Mounted Police Association of Ontario/Association de la Police Monte de l'Ontario et al. v. The Attorney General of Canada

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

111 O.R. (3d) 268

2012 ONCA 363

Court of Appeal for Ontario,
Doherty, Rosenberg and Juriansz JJ.A.
June 1, 2012

Charter of Rights and Freedoms -- Freedom of association -- Labour relations -- Collective bargaining -- Exclusion of RCMP members from Public Service Staff Relations Act and establishment of Staff Relations Representative Program not making it effectively impossible for RCMP members to act collectively to achieve workplace goals -- Section 2(1)(d) of Act and s. 96 of Royal Canadian Mounted Police Regulations not violating s. 2(d) of Charter -- Canadian Charter of Rights and Freedoms, s. 2(d) -- Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2(1)(d) -- Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 96.

Charter of Rights and Freedoms -- Freedom of expression -- Section 41 of Royal Canadian Mounted Police Regulations prohibiting RCMP members from publicly criticizing force -- Applicants attacking constitutionality of s. 41 based on its impact on associational freedoms of RCMP members -- Application judge not erring in finding that there was inadequate factual foundation for that claim as RCMP had not used s. 41 to

discipline members in labour relations context -- Canadian Charter of Rights and Freedoms, s. 2(b), (d) -- Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 41. [page269]

The applicants were independent private associations of RCMP members and aspired to represent RCMP members in collective bargaining. They brought an application for a declaration that s. 2(1)(d) of the Public Service Labour Relations Act ("PSLRA") (which excludes RCMP members from the application of the PSLRA), s. 96 of the Royal Canadian Mounted Police Regulations, 1998 (which establishes a separate employee relations scheme for RCMP members) and s. 41 of the Regulations (which prohibits members of the RCMP from publicly criticizing the force) infringe ss. 2(b), (d) and 15 of the Canadian Charter of Rights and Freedoms. The application judge found that s. 2(1)(d) of the PSLRA does not infringe freedom of association contrary to s. 2(d) of the Charter. He found that s. 96 of the Regulations infringes s. 2(d) and that the infringement is not justified under s. 1 of the Charter. He dismissed the applicants' claims under ss. 2(b) and 15 of the Charter. The respondent appealed and the applicants cross-appealed.

Held, the appeal should be allowed; the cross-appeal should be dismissed.

"Collective bargaining" under s. 2(d) of the Charter protects only the right to make collective representations and to have those collective representations considered in good faith. It is a derivative right. A government employer is obligated to engage in "collective bargaining" under s. 2(d) only when the employees are able to show that their exercise of freedom of association is effectively impossible. As s. 2(d) does not constitutionalize minority unions, the test of "effective impossibility" is applied to the workers at large and not to any particular combination of workers. It is not effectively impossible for RCMP members meaningfully to exercise their fundamental freedom under s. 2(d). RCMP members were able to form the voluntary associations before the court. While the Staff Relations Representative Program ("SRRP") is not institutionally independent and lacks the attributes of a Wagner model bargaining representative, the extensive

collaboration between the elected staff relations representatives and management shows that it is not impossible for RCMP members to associate to achieve collective goals. Moreover, the legal fund, a voluntary not-for-profit corporation which helps its members with various employment-related issues, is entirely self-governed, independent and autonomous, with independent, democratically elected directors and officers, and plays a role that is complimentary to, and supportive of, the SRRP. As it is not effectively impossible for RCMP members to act collectively to achieve workplace goals, the applicant associations' members are unable to claim the derivative right to collective bargaining under s. 2(d). There is no necessary precondition for placing a positive obligation on the employer to recognize and negotiate with the applicant associations in order to make meaningful association possible for their members. Section 96 of the Regulation does not infringe s. 2(d). For the same reasons, s. 2(1)(d) of the PSLRA does not infringe s. 2(d).

Before the application judge, the applicants confined their attack on s. 41 of the Regulations under s. 2(b) of the Charter to the context of the impact of s. 41 on the efforts of RCMP members to exercise their associational freedoms. The application judge did not err in finding that there was an inadequate factual foundation to consider that claim because the RCMP had chosen not to use s. 41 to discipline its members in a labour relations context and because insufficient evidence was adduced to demonstrate the effect of s. 41 on freedom of expression. Having confined their attack on s. 41 to its impact on their members' associational freedoms, the applicants should not be permitted to mount a general challenge to s. 41 for the first time on appeal.

Cases referred to

Ontario (Attorney General) v. Fraser, [2011] 2 S.C.R. 3, [2011] S.C.J. No. 20, 2011 SCC 20, 233 C.R.R. (2d) 237, 415 N.R. 200, 2011EXP-1378, 275 O.A.C. 205, 2011EXPT-828, J.E. 2011-751, D.T.E. 2011T-294, 331 D.L.R. (4th) 64, [2011] CLLC 220-029, 91 C.C.E.L. (3d) 1, revg (2008), 92 O.R. (3d) 481, [2008] O.J. No. 4543, 2008 ONCA 760, 242 O.A.C. 252, [2009] CLLC 220-001, 182 C.R.R. (2d) 109, 171 A.C.W.S. (3d) 829, apld [page270]

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989, [1999] S.C.J. No. 43, 176 D.L.R. (4th) 513, 244 N.R. 33, 99 CLLC 220-066, 66 C.R.R. (2d) 14, 90 A.C.W.S. (3d) 697; Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, [2001] S.C.J. No. 87, 2001 SCC 94, 207 D.L.R. (4th) 193, 279 N.R. 201, J.E. 2002-141, 154 O.A.C. 201, 13 C.C.E.L. (3d) 1, [2002] CLLC 220-004, 89 C.R.R. (2d) 189, 110 A.C.W.S. (3d) 630, consd

Other cases referred to

Haig v. Canada, [1993] 2 S.C.R. 995, [1993] S.C.J. No. 84, 105 D.L.R. (4th) 577, 156 N.R. 81, J.E. 93-1526, 16 C.R.R. (2d) 193, 42 A.C.W.S. (3d) 442; Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391, [2007] S.C.J. No. 27, 2007 SCC 27, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 363 N.R. 226, [2007] 7 W.W.R. 191, J.E. 2007-1185, 242 B.C.A.C. 1, 65 B.C.L.R. (4th) 201, [2007] CLLC 220-035, 157 C.R.R. (2d) 21, 157 A.C.W.S. (3d) 298, EYB 2007-120552, 164 L.A.C. (4th) 1; Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23, 2010 SCC 23, 212 C.R.R. (2d) 300, 84 C.P.R. (4th) 81, 76 C.R. (6th) 283, 402 N.R. 350, 319 D.L.R. (4th) 385, EYB 2010-175469, 2010EXP-1990, 262 O.A.C. 258, J.E. 2010-1089, 1 Admin. L.R. (5th) 235; Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R. 424, [1987] S.C.J. No. 9, 38 D.L.R. (4th) 249, 75 N.R. 161, J.E. 87-506, 87 CLLC 14,022 at 12189, 32 C.R.R. 114; R. v. Court (1997), 36 O.R. (3d) 263, [1997] O.J. No. 3450, 47 C.R.R. (2d) 262 (Gen. Div.); Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10, 38 D.L.R. (4th) 161, 74 N.R. 99, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 78 A.R. 1, 87 CLLC 14,021 at 12149, 28 C.R.R. 305, 4 A.C.W.S. (3d) 138; Retail, Wholesale and Department Store Union v. Saskatchewan, [1987] 1 S.C.R. 460, [1987] S.C.J. No. 8, 38 D.L.R. (4th) 277, 74 N.R. 321, [1987] 3 W.W.R. 673, 56 Sask. R. 277, 87 CLLC 14,023 at 12201, 4 A.C.W.S. (3d) 138

Statutes referred to

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

Agricultural Labour Relations Act, 1994, S.O. 1994, c. 6 [rep. by S.O. 1995, c. 1, s. 80(1)]

Canada Corporations Act, R.S.C. 1970, c. C-32 [as am.]

Canada Labour Code, R.S.C. 1985, c. L-2 [as am.]
Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d), 15
Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 [as am.]
Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, ss. 3(b.1), 15
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1
National Labor Relations Act, 29 U.S.C. 151-169
Public Service Labour Relations Act, S.C. 2003, c. 22, ss. 2(1) (d), 186(1)(a)
Public Service Staff Relations Act (1967)
Rules and regulations referred to
Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, ss. 41, 96 [as am.], (1), (2)
Authorities referred to
Adams, Roy J., "Prospects for Labour's Rights to Bargain Collectively After B.C. Health Services" (2009), 59 U.N.B.L.J. 85 [page271]
Langille, Brian, "Why are Canadian Judges Drafting Labour Codes -- And Constitutionalizing the Wagner Act Model?" (2010), 15 C.L.E.L.J. 101
Tuohy, Carolyn J., Policy and Politics in Canada: Institutionalized Ambivalence (Philadelphia: Temple University Press, 1992)

APPEAL and CROSS-APPEAL from the judgment of MacDonnell J. (2009), 96 O.R. (3d) 20, [2009] O.J. No. 1352 (S.C.J.) in an application for declarations of invalidity.

Kathryn Hucal and Susan Keenan, for appellant/cross-respondent.

Laura Young, for respondents/cross-appellants.

Ian Roland and Michael Fenrick, for intervenor Canadian Police Association.

Kelly Henriques and John Craig, for intervenor Mounted Police

Members' Legal Fund.

James R.K. Duggan, for intervenor L'Association des Membres de la Police Monte du Qubec.

The judgment of the court was delivered by

JURIANSZ J.A.: --

A. Overview

[1] In four recent decisions, the Supreme Court of Canada has addressed the content and scope of s. 2(d) of the Canadian Charter of Rights and Freedoms, which protects freedom of association, as it applies to employees' associational activities in pursuit of workplace goals. In those decisions, the Supreme Court set out the principles that were necessary to resolve the particular issues posed by those cases.

[2] Yet many issues regarding the Charter's guarantee of freedom of association in the labour context remain. This appeal raises questions that were not directly contemplated in the previous cases. One new question is whether "the right to collective bargaining" under s. 2(d) guarantees workers the right to be represented in their relationship with their employer by an association of their own choosing. Another new question is whether "the right to collective bargaining" under s. 2(d) requires that the vehicle for dealing with workers' collective concerns with management be structurally independent of management. I answer these questions based on my understanding of the Supreme Court's jurisprudence. They will ultimately, in this case or another, have to be decided by the Supreme Court.

[3] The Mounted Police Association of Ontario ("MPAO") and the British Columbia Mounted Police Professional Association [page272] ("BCMPPA") commenced a Charter application, challenging the validity of three provisions governing the current labour relations regime for members of the Royal Canadian Mounted Police ("RCMP"). The two associations, representing the individuals who are their members, sought a

declaration that s. 2(1)(d) of the Public Service Labour Relations Act, S.C. 2003, c. 22 (the "PSLRA"), and ss. 41 and 96 of the Royal Canadian Mounted Police Regulations, 1988, SOR/88-361 (the "Regulations") infringe ss. 2(b), 2(d) and 15 of the Charter. Two other associations, the Canadian Police Association ("CPA") and l'Association des Membres de la Police Monte du Qubec Inc. ("AMPMQ"), intervene in support of the MPAO and BCMPPA. The Mounted Police Members' Legal Fund ("Legal Fund") intervenes in support of the Attorney General.

[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. Section 2(1)(d) of the PSLRA excludes members of the RCMP from that regime. The RCMP members have a separate employee relations scheme, the Staff Relations Representative Program ("SRRP"), established by s. 96 of the Regulations. Section 41 of the Regulations prohibits members of the RCMP from publicly criticizing the force.

[5] The application judge found that s. 96 of the Regulations infringes s. 2(d) of the Charter, which guarantees freedom of association, and that this infringement could not be justified under s. 1. The application judge dismissed the associations' other claims. The Attorney General of Canada appeals the holding that s. 96 of the Regulations violates s. 2(d) of the Charter. The MPAO and the BCMPPA cross-appeal from the application judge's dismissal of two of their claims relating to s. 41 of the Regulations and s. 2(1)(d) of the PSLRA. The relevant legislative provisions are set out in the Appendix to these reasons.

[6] Based on my reading of the Supreme Court's s. 2(d) jurisprudence, I would allow the Attorney General's appeal and dismiss the respondents' cross-appeal.

B. Background

(1) The parties and intervenors

[7] The MPAO, BCMPPA and AMPMQ are independent private associations of RCMP members. Their existence is not contemplated by any statute or regulation. They have been

organized at the initiative of individual RCMP members acting in concert. [page273]

[8] The MPAO was incorporated in 1998 and has approximately 500 members in Ontario. The BCMPPA, based in British Columbia, was incorporated in 1994 and has about 2,000 members. However, the total number of paid up members of both the MPAO and the BCMPPA was 890 in 2008 (the latest figures in the record). The AMPMQ was established in 1985 and claims to represent the majority of the members of the RCMP in Quebec, although there are no membership statistics in the record. In 2008, there were approximately 20,000 members of the RCMP in Canada.

[9] These associations aspire to represent RCMP members in collective bargaining. The associations are currently unable to do so under the PSLRA because s. 2(1)(d) of that Act excludes the RCMP from its application. More specifically, while RCMP members are free to form and participate in the lawful activities of employee organizations of their choice, voluntary employee organizations, such as the respondents, cannot apply to the Public Service Staff Relations Board to be certified as the bargaining agent for a proposed bargaining unit. Individual RCMP members and the employee organizations they form are therefore excluded from the entire regulatory regime for collective bargaining provided by the PSLRA that is available to most other federal public employees.

[10] The MPAO, BCMPPA and AMPMQ are also not recognized by RCMP management. While the associations purport to provide a collective means of raising and resolving employment issues, and while RCMP members are free to form and join such associations, s. 96 of the Regulations establishes the SRRP as the process by which RCMP members can address labour issues with RCMP management.

[11] The CPA, an umbrella group of 172 police associations across Canada, intervenes in support of the associations. It represents some 56,800 police personnel at the federal, provincial and municipal levels.

[12] Also participating as an intervenor, the Legal Fund is a

not-for-profit corporation under the Canada Corporations Act, R.S.C. 1970, c. C-32. It was established to help RCMP members with various employment-related issues arising under RCMP policies and directives.

(2) The SRRP

[13] Section 96(1) of the Regulations provides that the RCMP shall have a Staff Relations Representative Program "to provide for representation of the interests of all members with respect to staff relations matters". The SRRP is organized divisionally (by [page274] province or territory) and regionally to align with the management configuration of the RCMP. Section 96(2) provides that the program shall be carried out by the "representatives of the members of the divisions and zones who elect them".

[14] The representatives of the members are called Staff Relations Representatives ("SRRs"). The collective body of SRRs is the National Caucus, and there are also Regional and Divisional Caucuses. There are 34 SRRs elected by RCMP members and an additional five "national representatives" elected by the National Caucus. There are also 150 elected part-time sub-SRRs.

[15] The SRRP has a National Executive Committee ("NEC"). The NEC 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.

[16] As set out in the SRRP constitution, the duties of SRRs include providing information, guidance and support to RCMP members and representing RCMP members' interests in negotiations with the management of the RCMP: RCMP Staff Relations Representative Program Constitution, July 14, 2004. SRRs attend divisional management meetings at which issues affecting the employment conditions of their constituents are considered.

[17] A formal agreement between the commissioner and the SRRP provides that management will recognize the role of the SRRP, respond to proposals and requests from SRRs in a timely and

open fashion, and provide rationales for major decisions: Agreement Between the Commissioner of the Royal Canadian Mounted Police and the Staff Relations Representative Program, clause 11, October 28, 2002. The agreement also provides that management and the SRRP will consult on specific human resources initiatives in a meaningful and timely fashion and participate together in national policy centre committees. Although final decisions rest with management, consultation is meant to promote an active participatory regime.

[18] Clause 18 of the agreement between the SRRP and the commissioner provides that the two full-time SRRs on the NEC "will be the formal point of contact for the SRR Caucus, and its Committees, with the Commissioner, Senior Management, and the Solicitor General of Canada". The two SRRs attend all meetings of the RCMP's Senior Management Team, which meets three times a year, to identify and consider the key issues in policing and law enforcement confronting the RCMP, and all meetings of the Senior Executive Committee, which develops force-wide policies for the RCMP.

[19] The Treasury Board has the ultimate authority to establish pay and allowances for RCMP members. Before exercising [page275] that authority, Treasury Board receives the recommendations of the RCMP Pay Council. The Pay Council was established in May 1996 to provide an alternative to the traditional collective bargaining model set out in the PSLRA. It has five members, made up of two SRRs, two representatives of management and an impartial chair. Its mandate on issues concerning pay and benefits is broad. 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 Minister of Public Safety, and if the minister approves it, it is presented to Treasury Board on behalf of the commissioner.

[20] The existence of the SRRP was not always provided for by the Regulations. The SRRP was first established in 1974, after the creation of the Public Service Staff Relations Act (the

"PSSRA") in 1967. The PSSRA was enacted to provide a comprehensive labour relations regime for members of the federal public service, but it excluded RCMP members.

[21] There was significant dissatisfaction among RCMP members with their exclusion from the federal labour relations regime, and some began to organize an association. Representatives of that group met with the RCMP Commissioner, who proposed a 14-point plan for a more formal employee relations system, featuring full-time, elected member representatives. Those who were in attendance agreed to take the proposal back to their divisions, hold a referendum on it and report back to the commissioner.

[22] There was overwhelming acceptance of the commissioner's proposals by members in every division, except members of "C" Division in Quebec who voted against the proposal. This led to the establishment of the Division Staff Relations Representative ("DSRR") Program, which eventually evolved into the SRRP.

(3) The Wagner model

[23] As will be discussed below, the Attorney General takes the position that what the associations seek is access to a Wagner model of labour relations. To make sense of that claim, and to understand how the SRRP compares with that model, it is helpful to review what is meant by the Wagner model.

[24] The Wagner model is named after New York Senator Robert F. Wagner, who sponsored the National Labor Relations Act, 29 U.S.C. 151-169 (the "NLRA") enacted by the United States Congress in 1935. The NLRA, which is also known as the "Wagner Act", is the template for most legislated labour regimes in [page276] North America. Most Canadian provinces passed legislation incorporating the main objectives of the Wagner Act by the end of the 1930s.

[25] The Wagner model is a legislated labour regime of collective bargaining with several distinctive features. A single, exclusive bargaining agent is recognized for employees in a "bargaining unit" through a certification application to

an independent labour board. To protect employees engaged in collective activities from employer interference or reprisal, employers are prohibited from using "unfair labour practices". Employers are required to recognize and bargain in good faith with the employees' bargaining agent, who in turn must bargain in good faith with the employer. Finally, disputes that occur during the life of a collective agreement must be dealt with by arbitration rather than strike or lock-out.

[26] "Majoritarianism/exclusivity" is a fundamental principle of the Wagner model. Majoritarianism/exclusivity means that the association supported by the majority of employees in the bargaining unit has the exclusive right to bargain on behalf of all employees in the unit. In a Wagner labour regime, an association that represents a minority of the employees, as much as 49 per cent of them, has no right to collectively bargain with the employer. Once a bargaining agent is certified by the relevant labour board, no other association of employees has any officially recognized status. An uncertified association has no right to bargain on behalf of workers, or so much as meet with employers to discuss the views of the workers they claim to represent. Even individual employees cannot negotiate their own terms and conditions of employment but must deal with the employer through the certified union.

[27] In light of the exclusive status accorded to the certified bargaining agent, labour legislation usually imposes on the agent a duty of fair representation. The agent must represent all employees in the unit in a manner that is not arbitrary, discriminatory or in bad faith.

[28] It is an important feature of the Wagner model that the employees' bargaining representative be structurally autonomous and independent of the employer. For example, it is an unfair labour practice under s. 186(1)(a) of the PSLRA for a member of management to "participate in" the formation or administration of an employee organization or the representation of employees by an employee organization. Even more striking, s. 15 of Ontario's Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A prohibits the Labour Relations Board from certifying a [page277] union if an employer has participated in its

formation or administration, or has contributed financial or other support to it.

[29] As can be seen, a Wagner labour regime provides comprehensive affirmative support for employees' ability to organize and collectively engage the employer regarding workplace issues.

[30] While the Wagner model is widely acclaimed and credited with extending "freedom of association" and "collective bargaining" to approximately 30 per cent of the Canadian workforce, it is not without its detractors. Two criticisms are worth noting.

[31] First, the Wagner model is sometimes seen as institutionalizing an adversarial tone to the labour-management relationship. Carolyn J. Tuohy comments on the adversarial nature of the Wagner model in Policy and Politics in Canada: Institutionalized Ambivalence (Philadelphia: Temple University Press, 1992), at p. 164:

> The Wagner model is essentially one of regulated and delimited adversarialism. It thus contrasts with the codetermination models of Germany and Sweden, which imply the participation of workers in managerial decision making through structures of industrial democracy such as work councils and employee representation on corporate boards. Under the Wagner model, labour and management recognize each other as legitimate adversaries. Conflict between them is to be regulated through agreed-upon rules and structures, which they are to respect in "good faith."

[32] A second criticism of the Wagner model is of the majoritarianism/exclusivity principle. For example, as Professor Roy Adams has argued, a system that prohibits minority unions from representing their members violates the associational rights of those minority workers under international law:

> [T]he [International Labour Organization]'s position is that if workers decide to organize outside of the bounds of

> statutory majoritarian exclusivity, their organizations still ought to be recognized for bargaining purposes. In its 2006 Digest of Decisions, the Committee on Freedom of Association has this to say: "Where, under a system for nominating an exclusive bargaining agent, there is no union representing the required percentage to be so designated, collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members." On this reasoning, employees who want to be represented by minority unions have an international human right to bargain collectively, in Canada and elsewhere: Roy J. Adams, "Fraser v. Ontario and International Human Rights: A Comment" (2008) 14 Canadian Lab. & Emp. L.J. 379, at pp. 383-84.

[33] These criticisms remind us that there is more than one conception of collective bargaining. This is important since, as discussed below, the Supreme Court has made it abundantly clear that s. 2(d) does not guarantee any particular model of labour relations. [page278]

[34] In my view, it takes sustained discipline to apply this principle, since the Wagner model so completely pervades our thinking about the meaning of collective bargaining and other models are outside our experience. Professor Brian Langille put it this way in his article "Why are Canadian Judges Drafting Labour Codes -- And Constitutionalizing the Wagner Act Model?" (2010), 15 C.L.E.L.J. 101, at p. 108:

> Canadian labour lawyers have grown up in a world where, for as long as any of us can remember, we have instantiated freedom of association in the Wagner model, with some Canadian innovations such as a mandatory rights arbitration and the no-strike rule during the life of a collective agreement. We cannot, it seems, imagine any other way of "doing" freedom of association. We are stuck with our own local practices, and have no ability to bring to bear any wider or deeper perspective.

With this background in mind, I now turn to the decision under appeal.

C. Decision Below

[35] A comprehensive review of the application judge's s. 2(d) analysis is unnecessary because he was unable to consider and apply the Supreme Court's most recent decision on s. 2(d), which was released after his decision: Ontario (Attorney General) v. Fraser, [2011] 2 S.C.R. 3, [2011] S.C.J. No. 20, 2011 SCC 20. In fact, this appeal was delayed pending the release of the Supreme Court's decision in Fraser so that the parties and this court would have the benefit of the latest word from the Supreme Court on the difficult question of the proper scope and application of s. 2(d) of the Charter.

[36] In deciding the application, the application judge relied primarily on the Supreme Court's earlier decision in Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391, [2007] S.C.J. No. 27, 2007 SCC 27 ("B.C. Health"). He also referred to this court's decision in Fraser (Fraser v. Ontario (Attorney General) (2008), 92 O.R. (3d) 481, [2008] O.J. No. 4543, 2008 ONCA 760).

[37] The application judge arrived at the legal conclusion, at para. 55, that the members of the RCMP "have a constitutional right to form an independent association for labour relations purposes, free of management interference or influence" as guaranteed by s. 2(d) of the Charter. He held that s. 96 of the Regulations, which requires members of the RCMP to interact collectively with management regarding labour issues through the SRRP, violates s. 2(d) for two reasons. First, the SRRP is not an independent association formed or chosen by members of the RCMP. Second, the interaction between the SRRP and [page279] management is restricted to a process of consultation and cannot reasonably be described as a process of collective bargaining. In his view, the breach of s. 2(d) cannot be saved by s. 1 as it fails the minimal impairment test.

[38] In reaching this conclusion, the application judge relied on a robust conception of collective bargaining, rooted in traditional labour practice, which includes a process of negotiation based on a comparative equality of bargaining strength and in which management does not have the last word.

He defined collective bargaining, at paras. 47-49:

> In my opinion, while the majority in BC Health Services described the process [of collective bargaining] 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, and that "the duty to consult and negotiate in good faith" is "the fundamental precept of collective bargaining". 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.
>
> 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 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.
>
> 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.

(Citations omitted; italics in original; underlining added)

[39] The application judge also concluded that the exclusion of RCMP members from the PSLRA by virtue of s. 2(1)(d) of that Act does not violate s. 2(d) of the Charter. He relied on the Supreme Court's decision in Delisle v. Canada (Deputy Attorney

General), [1999] 2 S.C.R. 989, [1999] S.C.J. No. 43, in which the Supreme Court held that the exclusion of RCMP members from the application of the PSLRA's predecessor statute did not violate the s. 2(d) freedom of RCMP members. The application judge reasoned that the Supreme Court in Delisle had rejected the argument that the exclusion of members of the RCMP from the labour relations scheme of the PSLRA infringed s. 2(d) of the Charter, and there was no reason to reassess that determination. [page280]

[40] The application judge dismissed the remainder of the associations' claims. He held that there was no factual foundation for a consideration of whether s. 41 of the Regulations interferes with the RCMP members' freedom of expression (under s. 2(b) of the Charter) in the context of their freedom of association (under s. 2(d) of the Charter). He noted the main concern of the MPAO and BCMPPA was the impact of s. 41 on the efforts of RCMP members to exercise their associational freedoms. They had conceded before the application judge that s. 41 has never been used to interfere with the efforts of RCMP members to unionize or engage in collective bargaining. Therefore, he found that there was an insufficient factual grounding for this claim.

[41] Finally, the application judge dismissed the claim that the SRRP violates the RCMP members' equality rights under s. 15 of the Charter, as the MPAO and the BCMPPA did not show that any failings of the program fall disproportionately on s. 15 protected groups. The respondent associations do not pursue their s. 15 claim before this court.

[42] As a remedy, the application judge issued a declaration that s. 96 violates s. 2(d) and is of no force or effect. As s. 2(1)(d) of the PSLRA remained in place, he recognized that this declaration would "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": para. 117. He suggested that Parliament might act to provide such a framework but would need time to consider the issue. Consequently, he suspended the declaration for a period of 18 months.

D. Positions of the Parties

(1) The Attorney General of Canada

[43] The Attorney General challenges the application judge's conclusion that s. 96 of the Regulations violates s. 2(d) of the Charter. The Attorney General relies on the Supreme Court's decision in Fraser for the proposition that workers' s. 2(d)-protected freedom is only breached where there is substantial interference with that freedom, such that their meaningful pursuit of collective goals is rendered "effectively impossible". The appellant notes that the majority in Fraser equates substantial interference with a standard of "effective impossibility". For instance, at para. 47, McLachlin C.J.C. and LeBel J., writing for the majority, state that "[i]f it is shown that is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws . . .) or by government [page281] action, a limit on the exercise of s. 2(d) is established". See, also, paras. 32-34 and 46 of Fraser.

[44] The Attorney General points out that while the challenged legislation in Fraser required only that the employer listen to oral representations and read written representations with implied good faith, the Supreme Court nonetheless concluded that the legislation complied with s. 2(d).

[45] The Attorney General asserts that the SRRP more than meets what is required by Fraser. The SRRP constitution provides for actual employee participation in the decision-making process at the national, regional and divisional levels of the RCMP. The SRRs are elected by the members of the RCMP to provide fair and equitable representation with management and to facilitate participation in the development of policies and procedures that affect their employment. The Attorney General argues that this process is constitutionally sufficient, and the respondents are seeking to constitutionalize the Wagner model.

[46] Finally, the Attorney General challenges the respondents' submissions that s. 2(1)(d) of the PSLRA breaches

s. 2(d) and that s. 41 of the Regulations breaches s. 2(b).

(2) The Mounted Police Members' Legal Fund

[47] The Legal Fund submits that the appeal should be allowed because s. 96 does not violate s. 2(d) of the Charter. The SRRP is a legitimate employee association that allows RCMP members to voice their concerns and does not render freedom of association "effectively impossible".

(3) The MPAO and the BCMPPA

[48] The two respondent associations submit that the Fraser decision does not alter the law upon which the application judge found that s. 96 of the Regulations is unconstitutional. Rather, Fraser affirms B.C. Health and the principle that freedom of association includes protection for the process of collective bargaining. The associations emphasize that the Fraser majority specifically held, at para. 55, that B.C. Health continues to "represent good law".

[49] In particular, the associations contend that the two rationales for the application judge's decision -- that the SRRP is not an independent association and that the interaction between the SRRP and management cannot reasonably be described as a process of collective bargaining -- are not undermined by the Fraser decision.

[50] Counsel for the MPAO and the BCMPPA relies on the majority's statement in Fraser that the right to engage in a [page282] process of collective bargaining is derivative of the employees' freedom to form and maintain an association. This means that the process of collective bargaining does not come into play until after the employees have formed an association. First, the employees form an association, and then it is the association itself that asserts the collective right to engage in collective bargaining. The employees' freedom of association cannot be severed from the association they have chosen and grafted onto another entity.

[51] Counsel submits that the Attorney General's position that the SRRP is a constitutionally adequate form of collective bargaining must be rejected. The SRRP is not a genuine employee

association, freely chosen by the employees, but a branch of the RCMP imposed on them. Moreover, it is not independent from management. Though SRRP representatives are elected by RCMP members, the following facts demonstrate the program's lack of independence:

-- The SRRP is a program within the RCMP, not an employee association;

-- the SRRP lacks institutional and financial independence.

-- SRRP representatives are not required to represent members; they represent the program;

-- the SRRP is not limited to non-commissioned members; all ranks are allowed to vote for the representatives.

[52] The second leg of the respondents' argument is that the SRRP does not engage in collective bargaining. On their reading of the majority decision in Fraser, which affirms B.C. Health, collective bargaining involves more than an opportunity to consult. The respondents point to several passages from the majority's decision in Fraser to support this view, including paras. 37 and 38:

> Applying the principles of interpretation established in Dunmore, a majority of the Court [in B.C. Heath] held that s. 2(d) includes "a process of collective action to achieve workplace goals" (para. 19). This process requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace (para. 90).
>
> The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals. (Emphasis added)

[53] The associations point out that, at para. 40, the majority in Fraser reiterated that B.C. Health had affirmed that [page283]

> . . . bargaining activities protected by s. 2(d) in the

> labour relations context include good faith bargaining on important workplace issues (para. 94; see also paras. 93, 130 and 135). This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer. In this sense, collective bargaining is protected by s. 2(d).

[54] The respondents rely on the fact that the Fraser majority reiterates para. 90 of B.C. Health, at para. 40 of Fraser:

> 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.

[55] They emphasize that, at para. 50, the Fraser majority disagrees with the more narrow reading of B.C. Health proposed by Deschamps J.:

> If s. 2(d) merely protected the right to act collectively and to make collective representations, the legislation at issue in that case would have been constitutional. The legislation in that case violated s. 2(d) since it undermined the ability of workers to engage in meaningful collective bargaining, which the majority defined as good faith negotiations[.]

[56] The respondents also note that, in responding to the dissenting reasons of Rothstein J., the Fraser majority states, at para. 95: "'[T]he principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement'" was "precisely the general principle that [B.C. Health] endorses".

[57] Finally, the respondents note the Fraser majority's use of the words "negotiate", at paras. 49, 50 and 95.

[58] Thus, the associations claim that they have, on behalf of their members, more than the right to make collective

representations to the employer -- they claim the right "to meet and bargain in good faith", and to engage in "good faith negotiations" with the employer regarding workplace issues.

[59] The MPAO and the BCMPPA also bring a cross-appeal, challenging the application judge's conclusion that s. 2(1)(d) of the PSLRA -- the provision that excludes the RCMP from the general public employee labour relations scheme -- does not violate s. 2(d) of the Charter.

[60] Finally, the associations challenge the application judge's determination that there was an insufficient factual foundation to assess the constitutionality of s. 41 of the Regulations. They submit that s. 41 violates s. 2(b) of the Charter.

(4) The CPA

[61] The CPA supports the respondents' position that the Supreme Court's decision in Fraser does not undermine the [page284] application judge's decision. In Fraser, the Supreme Court decided that the Ontario Court of Appeal erred by ordering specific statutory supports for agricultural workers in Ontario. In this case, the application judge invalidated s. 96 of the Regulations but did not require the enactment of specific statutory supports. He left the appropriate legislative response to Parliament.

[62] The CPA also submits that the application judge's decision is supported by B.C. Health, which states that collective bargaining requires more than a process of consultation and cannot be reduced to a mere right to make representations.

(5) The AMPMQ

[63] The intervenor, the AMPMQ, offers a somewhat different perspective on why s. 96 of the Regulations is allegedly unconstitutional. The association submits that the case turns on the constitutionally protected freedom of the members of the RCMP to form independent voluntary associations without interference. It contends, relying on Delisle, that the application judge effectively found that the establishment of

the SRRP and its continued existence is an unfair labour practice.

[64] The AMPMQ reminds this court that Bastarache J. states, at para. 10 of Delisle, that since the RCMP is a government employer, s. 2(d) "protects RCMP members against any interference by management in the establishment of an employee association". Bastarache J. adds, at para. 32:

> If RCMP management has used unfair labour practices with the object of interfering with the creation of [a voluntary employee association], 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 s. 2(d), as the RCMP is part of the government within the meaning of s. 32(1) of the Charter.

[65] The AMPMQ submits that the purpose and effect of s. 96 of the Regulations is to completely prevent an independent association from representing its members. In oral argument, counsel referred to the long history of anti-union activity by RCMP management described by the minority judges in Delisle (beginning at para. 104). This "union busting" activity would constitute an unfair labour practice in any legislated labour regime, such as a Wagner-style regime. In a legislated labour regime, the SRRP could not be certified as the bargaining agent because it would be regarded as a "company union". In the AMPMQ's submission, s. 96 of the Regulations should be struck down as an unfair labour practice that prevents the independent associations from representing their members. [page285]

E. Issues

[66] In light of the submissions of the parties, the following issues must be addressed:

(1) Does s. 96 of the Regulations, which creates the SRRP, violate s. 2(d) of the Charter?
(2) Does s. 96 constitute an unfair labour practice that is prohibited by s. 2(d) of the Charter?
(3) Does the exclusion of the RCMP from the PSLRA violate s.

2(d) of the Charter?

(4) Does s. 41 of the Regulations violate s. 2(b) of the Charter?

[67] I will consider each of these issues in turn.

F. Section 2(d): The Charter's Guarantee of Freedom of Association

(1) Section 2(d) jurisprudence

[68] Before turning to a discussion of the issues in this appeal, it is important to review the jurisprudence setting out the framework for that discussion.

[69] The four key Supreme Court of Canada decisions interpreting s. 2(d) of the Charter are Delisle; Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, [2001] S.C.J. No. 87, 2001 SCC 94; B.C. Health; and Fraser. Fraser is the most important authority to consider when interpreting s. 2(d), not only because it is the most recent, but also because it restates the Supreme Court's conclusions in the earlier cases.

(a) Delisle

[70] As previously noted, Delisle also concerned the s. 2(d) freedom of RCMP members. Mr. Delisle was the president of the intervenor AMPMQ. He brought an application attacking the provision in the PSSRA (the predecessor to the current PSLRA) that expressly excluded RCMP members from the PSSRA labour relations regime. He also challenged the provision of the Canada Labour Code, R.S.C. 1985, c. L-2 that provided that it did not apply to public service employees. He argued that the purpose or effect of these provisions was to interfere with RCMP members' freedom to associate.

[71] The Supreme Court held that s. 2(d) does not give RCMP members the right to establish a particular type of [page286] association defined in a particular statute. Section 2(d) does not require that RCMP members be included in the PSSRA or any other legislative regime. What s. 2(d) does guarantee is "the establishment of an independent employee association and the exercise in association of the lawful rights of its members": Delisle, at para. 12.

[72] However, the Supreme Court also noted that s. 2(d) protects RCMP members from management interference in the establishment of an independent employee association. If RCMP management uses unfair labour practices to interfere with the creation of an employee association, it would be open to an RCMP member "to challenge these practices directly by relying on s. 2(d), as the RCMP is part of the government within the meaning of s. 32(1) of the Charter": Delisle, at para. 32.

[73] When the majority in Fraser summarizes Delisle, it emphasizes that Bastarache J. had concluded that "there is no general obligation for the government to provide a particular legislative framework for employees to exercise their collective rights, i.e., a different framework than already provided for RCMP members": Fraser, at para. 23.

(b) Dunmore

[74] The 2001 decision of the Supreme Court in Dunmore concerned the exclusion of agricultural workers from Ontario's statutory labour relations regime. Except for a brief period after the enactment of the Agricultural Labour Relations Act, 1994, S.O. 1994, c. 6, agricultural workers in Ontario have historically been excluded from the labour relations regime generally available to workers. The Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1 repealed the Agricultural Labour Relations Act, and s. 3(b.1) of Ontario's Labour Relations Act excluded agricultural workers from the protections of that Act.

[75] The appellants in Dunmore, who were farm workers and union organizers, argued that these statutes had the effect of preventing them from establishing, joining and participating in the lawful activities of a trade union. The Supreme Court concluded that the exclusion of agricultural workers from the Labour Relations Act infringed the appellants' freedom of association.

[76] A large portion of the majority's reasons, written by Bastarache J., address the agricultural workers' claim that s. 2(d) obligated the government to provide them with a protective

regime to enable them to effectively exercise their associational freedoms in their relationships with private employers. The court concludes that in the circumstances facing the agricultural [page287] workers in Dunmore, s. 2(d) gives the workers the right to be included within a protective regime.

[77] When the Fraser majority summarizes Dunmore, McLachlin C.J.C. and LeBel J. characterize Dunmore as a case in which workers sought affirmative government action to safeguard their associational activity. They remark, at para. 26, that Dunmore "raised the question of whether s. 2(d) requires the government to provide a legislative framework which enables employees to associate to obtain workplace goals in a meaningful process".

[78] The Fraser majority describes Bastarache J.'s conclusion as follows: "[T]he absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible": Fraser, at para. 31. Bastarache J. "found that the absence of legislative support discredited the organizing efforts of agricultural workers and had a chilling effect on their constitutional right to associate" and he "concluded that farm workers in Ontario were substantially incapable of exercising their fundamental freedom to associate without a protective regime": Fraser, at para. 31. The absence of legislative protection for associational activity made it "impossible" to achieve workplace goals and constituted "substantial interference" with the workers' freedom of association as guaranteed by s. 2(d): Fraser, at para. 47.

[79] McLachlin C.J.C. and LeBel J. summarize, at para. 33, the propositions supporting the majority decision in Dunmore:

-- Section 2(d), interpreted purposively, guarantees freedom of associational activity in the pursuit of individual and common goals.

-- The common goals protected extend to some collective bargaining activities, including the right to organize and

to present submissions to the employer.

-- What is required is a process that permits the meaningful pursuit of these goals. No particular outcome is guaranteed. However, the legislative framework must permit a process that makes it possible to pursue the goals in a meaningful way.

-- The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association, in that it negates the very purpose of the association and renders it effectively useless. This constitutes a limit under s. 2(d) which is unconstitutional unless justified by the state under s. 1 of the Charter[.]

-- The remedy for the resultant breach of s. 2(d) is to order the state to rectify the legislative scheme to make possible meaningful associational activity in pursuit of common workplace goals.

(Emphasis in original; citations omitted) [page288]

(c) B.C. Health

[80] The context in which B.C. Health was decided is significant. Factually, the case is quite different than Dunmore. Unlike the farm workers in Dunmore, the health care workers in B.C. Health had collective bargaining rights under traditional Wager model legislation. Rather than seeking to impose positive obligations on an employer, they sought protection from interference with the collective bargaining rights that they already possessed. The dispute arose when the government introduced legislation that invalidated a number of basic provisions in the collective agreement between the health care workers and the B.C. government, and "effectively precluded meaningful collective bargaining on a number of specific issues": para. 11.

[81] Overruling prior case law (the so-called labour "trilogy": Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10; Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R.

424, [1987] S.C.J. No. 9; and Retail, Wholesale and Department Store Union v. Saskatchewan, [1987] 1 S.C.R. 460, [1987] S.C.J. No. 8), a majority of the court concluded that s. 2(d) "protects the capacity of members of labour unions to engage in collective bargaining on workplace issues": B.C. Health, para. 2. The court determined that a number of provisions that interfered with the terms of existing collective agreements and that prohibited future bargaining on important issues violated s. 2(d) of the Charter and were not saved by s. 1.

[82] The court states that the constitutional right to collective bargaining "might be described as employees banding together to achieve particular work-related objectives": para. 89. The constitutional right to collective bargaining "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": para. 89. This right entails a corresponding duty on the part of government employers "to agree to meet and discuss with [the employees]": para. 89.

[83] The s. 2(d) constitutional right recognized in B.C. Health does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity. The interference must be "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": para. 91. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the [page289] employer has been, or is likely to be, significantly and adversely impacted: para. 92.

[84] The majority in Fraser describes B.C. Health as providing a general discussion of s. 2(d), even though the case "concerned the actions of a government employer nullifying collective bargaining arrangements with unions representing its own employees": Fraser, at para. 37. The Fraser majority states that B.C. Health affirms that, in the labour relations context,

s. 2(d) protects "good faith bargaining on important workplace issues": para. 40. Good faith bargaining is not limited to making representations to the employer, but "requires the employer to engage in a process of consideration and discussion to have [the representations] considered by the employer": para. 40.

[85] McLachlin C.J.C. and LeBel J. summarize, at para. 41 of Fraser, the elements of good faith bargaining established by B.C. Health:

-- Section 2(d) requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract;

-- Section 2(d) does not impose a particular process. Different situations may demand different processes and timelines;

-- Section 2(d) does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse;

-- Section 2(d) protects only "the right . . . to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method".

(Citations omitted)

(d) Fraser

[86] In response to Dunmore, the Ontario legislature enacted a separate labour relations scheme for farm workers under the Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16 (the "AEPA"). The AEPA grants farm workers the right to form and join an employee association, the right to have the association make representations to their members' employers on the terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the exercise of their associational rights. The Act requires employers to give an association the opportunity to make

representations respecting terms and conditions of employment, and requires the employers to listen to or read those representations. The AEPA also creates a tribunal to hear and decide disputes about the application of the Act. [page290]

[87] The Court of Appeal for Ontario, relying on B.C. Health and noting that the "primary difficulty has been that the union has been unsuccessful in engaging employers, who have no statutory duty to bargain in good faith" (para. 98), held that the AEPA does not provide the "minimum" statutory protections required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way. The Court of Appeal held that the Act does not meet the requirements of s. 2(d) of the Charter because it fails to provide three protections: (1) a statutory duty to bargain in good faith; (2) statutory protection for majoritarian/exclusivity, meaning that each bargaining unit would be represented by a single bargaining agent; and (3) a mechanism to resolve bargaining impasses and interpret collective agreements.

[88] A divided Supreme Court allowed the appeal, holding that the AEPA satisfies the requirements of s. 2(d) of the Charter.

[89] Early in its reasons, at para. 18, the majority articulates the issue in the case:

> The ultimate question is whether s. 2(d), properly understood and applied, requires the Ontario legislature to provide a particular form of collective bargaining rights to agricultural workers, in order to secure the effective exercise of their associational rights.

In contrast with B.C. Health, where the workers sought protection from legislative interference, the farm workers in Fraser sought affirmative government action to safeguard their associational activities.

[90] According to the majority, the AEPA does not substantially interfere with the ability of farm workers to achieve workplace goals through collective actions so as to have the effect of negating their freedom of association. Accordingly, the AEPA does not constitute a limit on s. 2(d)'s

guarantee of freedom of association. The Act provides for the required "process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith": para. 2.

[91] The Fraser majority concludes that the Court of Appeal overstated the ambit of the s. 2(d) right, by misreading B.C. Health's affirmation of the right to collective bargaining as constitutionalizing a full-blown Wagner Act system. The court in B.C. Health had "unequivocally stated that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome": Fraser, at para. 45 (emphasis added).

[92] The majority reiterates that what s. 2(d) protects is the freedom to associate to achieve collective goals. Section 2(d) protects collective bargaining in a derivative sense, as the majority describe, at para. 46: [page291]

> Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(d) protects a right to collective bargaining: see Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, [2010] 1 S.C.R. 815 ("CLA"), where the right to access government information was held to be "a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government" (para. 30). However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.

(Italics in original; underlining added)

[93] The majority explains, at para. 47, what B.C. Health did not decide:

> . . . [B.C. Health] does not support the view . . . that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in

good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements. (Citations omitted)

[94] Rather, what is protected "is associational activity, not a particular process or result": Fraser, at para. 47. In order to establish a breach of s. 2(d), it must be shown that it is impossible to meaningfully exercise the freedom to associate due to substantial interference by government action, as in B.C. Health, or absence of government action, as in Dunmore.

[95] Applying these principles, the question in Fraser was whether the legislative scheme rendered association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(d) associational freedom. The majority repeats this question in slightly different terms, at para. 98, asking whether the AEPA process, viewed in terms of its effect, "makes good faith resolution of workplace issues between employees and their employer effectively impossible" (emphasis added).

[96] The majority notes that the AEPA gives employee associations the right to make representations to their employers, and provides that employers shall listen to oral representations, read written representations and acknowledge having read them. Further, the AEPA implicitly requires employers to consider employee representations in good faith.

[97] Since the AEPA, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer, it follows that it does not violate s. 2(d) of the Charter. [page292]

(e) The derivative right to collective bargaining

[98] I would like to highlight one aspect of the Fraser decision that sheds light on the nature of the s. 2(d) right to bargain collectively. The majority in Fraser, at para. 46,

states that s. 2(d) protects the right to collective bargaining in a "derivative sense".

[99] To understand what the Supreme Court means by a derivative right, we must return first to Delisle. At para. 26, Bastarache J. points out that "s. 2 [of the Charter] generally imposes a negative obligation on the government and not a positive obligation of protection or assistance". He draws an analogy to freedom of expression, echoing the court's remark in Haig v. Canada, [1993] 2 S.C.R. 995, [1993] S.C.J. No. 84, at p. 1035 S.C.R., that "the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones". He notes, however, that in Haig, the court did leave open the possibility that "a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required": Haig, at p. 1039 S.C.R.

[100] Bastarache J. concludes that "except perhaps in exceptional circumstances, freedom of expression requires only that Parliament not interfere. In my view, the same is true for freedom of association": Delisle, at para. 27.

[101] The majority in Fraser carries the analogy to freedom of expression further, by referring to Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23, 2010 SCC 23 ("CLA") to explain the nature of a derivative right. In CLA, the court introduces the term "derivative right" to Charter jurisprudence, and I find it of immense assistance in understanding the concept.

[102] The CLA case [at para. 10] has an interesting context. Glithero J. [R. v. Court (1997), 36 O.R. (3d) 263, [1997] O.J. No. 3450 (Gen. Div.)] stayed a prosecution for the murder of Domenic Racco, finding, at p. 300 O.R.:

> . . . many instances of abusive conduct by state officials involving deliberate non-disclosure, deliberate editing of useful information, negligent breach of the duty to maintain original evidence, improper cross-examination and jury addresses during the first trial.

[103] These findings led to an investigation by the Ontario Provincial Police ("OPP") of potential police misconduct. The OPP's report exonerated the police of any wrongdoing, and its report was not made public. The CLA requested the report under the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 (the "FIPPA"), and the responsible minister, relying on [page293] exemptions in and discretion bestowed by the Act, refused to disclose it. The CLA, relying on s. 2(b) of the Charter, attacked provisions of FIPPA and the exercise of discretion by the minister who refused to disclose the report. The CLA argued that its freedom of expression was infringed because its ability to make public comment was hampered by not knowing the content of the report.

[104] The Supreme Court dismissed the bulk of the CLA's claim and concluded that s. 2(b) of the Charter guarantees freedom of expression, not access to information: CLA, at para. 30. However, McLachlin C.J.C. and Abella J., writing for the court, did not completely close the door on the Charter providing a right of access to government information. They comment, at para. 30, that "[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government" (emphasis added). At para. 31, they conclude "that the scope of the s. 2(b) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints".

[105] They go on, at para. 33, to discuss the scope of s. 2(b) protection where the issue is access to documents in government hands:

> To demonstrate that there is expressive content in accessing such documents, the claimant must establish that the denial of access effectively precludes meaningful commentary. If the claimant can show this, there is a prima facie case for the production of the documents in question.

(Emphasis added)

[106] The court concludes, at paras. 37 and 38:

> In sum, there is a prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in Harper's Weekly entitled "What Publicity Can Do": "Sunlight is said to be the best of disinfectants . . . ." Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.
>
> If this necessity is established, a prima facie case for production is made out. However, the claimant must go on to show that the protection is not removed by countervailing considerations inconsistent with production.

(Emphasis added)

[107] The court goes on to find that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco and the prosecution of those suspected of the murder could take place without disclosure of the OPP's report. The CLA [page294] had not established that disclosure was "necessary for meaningful public discussion of the problems in the administration of justice relating to the Racco murder": para. 59. The CLA, while unable to comment on the content of the report itself, could exercise its freedom of expression by commenting on the findings of the trial judge and the fact the report had not been made public.

[108] In the CLA case, it is clear that a derivative right to disclosure of information is not a "stand alone" right. Instead, the right arises only in circumstances where it is a "necessary precondition" to the exercise of the fundamental freedom itself. McLachlin C.J.C. and Abella J. describe the derivative right, in para. 30, as one that "may arise".

[109] The Supreme Court in Fraser draws on the analogy of a derivative right to access information, as described in CLA, to define the parameters of when positive government action is

required to support the freedom of association, at para. 70:

> A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities, just as a purposive interpretation of freedom of expression may require the state to disclose documents to permit meaningful discussion.

(Emphasis added)

[110] Since the Fraser majority cites the CLA case as the source of the concept of a derivative right, it may be taken that the majority intended for the derivative right to collective bargaining to function the same way as the derivative right to information.

[111] Therefore, as I understand the Fraser majority's discussion of collective bargaining as a derivative constitutional right, a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals.

G. Analysis of the s. 2(d) Issues in this Case

(1) Does s. 96 of the Regulations violate s. 2(d)?

[112] In the respondents' formulation, their members are seeking positive measures to enable them to exercise their freedom of association. As affirmed by Delisle, RCMP members have the freedom to establish, join and maintain an independent employee association of their choice and to exercise in association the lawful rights of its members. Members of those associations are able to collectively convey representations about workplace issues to their employer. The employer, however, refuses to recognize the associations they have formed and ignores any representations they make through their associations. The essence of [page295] the associations' position is that their freedom of association is effectively useless unless their employer is under a positive obligation to recognize and to engage in "collective bargaining" with the associations. They seek to have a positive obligation placed on the employer to recognize and "collectively bargain" with them.

[113] Since the members of the associations are employed by the state, the associations need not argue that the government is constitutionally bound to impose the positive obligation on the employer by statute. The positive obligation of their government employer to engage in "collective bargaining" with them, if it exists, stems directly from the constitution.

[114] I begin with two observations about the associations' claim that s. 2(d) imposes on their employer a positive obligation to engage in "collective bargaining".

[115] First, the associations embrace an expansive concept of the constitutionally guaranteed right to "collective bargaining". Their position is that once employees have formed an independent association to engage in collective bargaining, s. 2(d) gives them the right to negotiate with the employer on the basis of comparatively equal bargaining power. In their view, the Supreme Court's jurisprudence leaves it open for them to argue that s. 2(d) guarantees a mechanism to break deadlocks in negotiations between the independently formed association and the employer.

[116] Counsel for the associations acknowledges that the result of accepting their claim is that any combination of employees who choose to form an association will have the same collective right, and the employer will be obliged to "negotiate" with each and every association formed. Counsel recognizes this would lead to unwieldy labour relations but suggests that the government could step in and enact a legislative regime that provides for majoritarianism/ exclusivity.

[117] I do not regard the solution as that simple. If the associations' position is accepted, a legislative regime providing for majoritarianism/exclusivity would itself run counter to s. 2(d), since it would deny all minority associations the right to engage in "collective bargaining" as conceived by the associations. One commentator has interpreted the jurisprudence in this fashion. Professor Roy Adams argues that, following B.C. Health, "public sector workers who have

not yet organized now apparently have a constitutional right to form minority unions and have them recognized by their government employers for bargaining purposes": "Prospects for Labour's Rights to Bargain Collectively After B.C. Health Services" (2009), 59 U.N.B.L.J. 85, at p. 89.

[118] I do not accept that the principles enunciated by the Supreme Court lead to the result that Wagner model labour [page296] regimes are prima facie unconstitutional and would have to be justified under s. 1 [of the Charter]. In my view, had the Supreme Court intended to de-constitutionalize the predominant form of collective bargaining in Canada, it would have done so unambiguously.

[119] In any event, the Supreme Court's jurisprudence makes clear that the associations' conception of the content of "collective bargaining" is too expansive. In my view, the Supreme Court has established that the content of the constitutionally guaranteed right to "collective bargaining" is narrower than how that term is used in Wagner model regimes. "Collective bargaining" under s. 2(d) protects only the right to make collective representations and to have those collective representations considered in good faith.

[120] Second, "collective bargaining" under s. 2(d) is a derivative right. A government employer is obligated to engage in "collective bargaining" under s. 2(d) only when the employees are able to claim the derivative right under s. 2(d). They are able to claim that derivative right upon showing that the exercise of the fundamental freedom of association is "effectively impossible". Only where the "core protection of s. 2(d) . . . to act in association with others to pursue common objectives and goals" (Fraser, at para. 25) cannot be meaningfully exercised does the derivative right arise. As s. 2(d) does not constitutionalize minority unions, the test of "effective impossibility" is applied to the workers at large and not to any particular combination of workers.

[121] Applying the test in that way, I conclude that it is not effectively impossible for RCMP members to meaningfully exercise their fundamental freedom under s. 2(d). I reach that

conclusion for several reasons.

[122] First, RCMP members have been able to form the voluntary associations before the court in this case.

[123] The Supreme Court has already indicated that the ability of RCMP members to form voluntary associations is significant and sets RCMP members apart from, for example, relatively disempowered agricultural workers.

[124] In Delisle, Bastarache J. remarks, at para. 31, that the fact that RCMP members have formed voluntary independent associations shows that they are not prevented from doing so:

> [I]t is difficult to argue that the exclusion of RCMP members from the statutory regime of the PSSRA prevents the establishment of an independent employee association because RCMP members have in fact formed such an association in several provinces[.]

[125] In Dunmore, Bastarache J. refers back to Delisle and contrasts RCMP members with agricultural workers. Agricultural workers were unable to form employee associations in [page297] provinces that denied them protection. He lists the distinguishing features of agricultural workers: political impotence; lack of resources to associate without state protection; vulnerability to reprisal by employers; poor pay; difficult working conditions; low levels of skill and education; low status; and limited employment mobility: Dunmore, at para. 41.

[126] By contrast, Bastarache J. links RCMP officers' ability to associate to their "relative status", comparing them to "the armed forces, senior executives in the public service and judges": para. 45. The exclusion of RCMP members from the labour regime of the PSSRA could not discourage RCMP members from associating "in light of their relative status, their financial resources and their access to constitutional protection": para. 45.

[127] The majority in B.C. Health referred to Bastarache J.'s

analysis in Delisle. At para. 35, the majority observed that Bastarache J. had reconciled the imposition of a positive obligation on government in Dunmore with the result in Delisle, in which no positive obligation was imposed. He had done so "by distinguishing the effects of the legislation in the two cases. Unlike the RCMP members in Delisle, farm workers faced barriers that made them substantially incapable of exercising their right to form associations outside the statutory framework": B.C. Health, at para. 35 (emphasis in original). In my view, this is enough to dispose of this issue: the Supreme Court has already decided that it is not effectively impossible for RCMP members to exercise their fundamental freedom of association guaranteed by s. 2(d) of the Charter.

[128] The second reason for concluding that it is not effectively impossible for RCMP members to act collectively to achieve workplace goals is the existence of the SRRP. The SRRP was criticized by the associations, who devoted much of their argument to distinguishing the SRRP from "a labour relations model of independent representation and collective bargaining". No doubt the SRRP lacks the attributes of a Wagner model bargaining representative. The SRRP is not institutionally independent. The RCMP members have never had the opportunity to choose a bargaining agent in a Wagner labour regime, and the SRRP is created by regulation (though the formation of its predecessor, the DSRR, was endorsed in a referendum). The question at this stage, though, is not whether the SRRP should be regarded as an adequate alternative to a collective bargaining agent in the traditional "labour relations model". Rather, the question is whether the legislative framework makes it effectively impossible for the workers to act collectively to pursue workplace issues in a meaningful way. [page298]

[129] The SRRs elected by the RCMP membership are included in all important management processes. Two SRRs attend all meetings of the RCMP's Senior Management Team. SRRs attend divisional management meetings. Two SRRs, along with two representatives of management and an impartial chair, make up the Pay Council.

[130] The application judge's findings of fact make it

unnecessary to reprise the description of the SRRP in paras. 13-19, above. The application judge found that there was extensive collaboration between SRRs and management that was carried out in good faith by everyone involved. He accepted, at para. 68, that "RCMP management listens carefully and with an open mind to the views of SRRs in the consultative process established by the SRRP." There is no reason to interfere with that finding.

[131] The extensive collaboration between the elected SRRs and management shows that it is not impossible for the RCMP members to associate to achieve collective goals.

[132] The third reason I conclude that the exercise of the fundamental freedom of association by RCMP members is not "effectively impossible" is the existence of the Legal Fund. As noted above, the Legal Fund is a voluntary not-for-profit corporation. Some 14,000 RCMP members have joined the fund and some 100 additional members join each month. It was established to help its members with various employment-related issues. It assists RCMP members by acting to advance their dignity and welfare, in relation to matters arising under RCMP policies and directives. It is funded exclusively by the dues of its members, and is entirely self-governed, independent and autonomous, with independent, democratically elected directors and officers. The Legal Fund plays a role that is complementary to, and supportive of, the SRRP.

[133] The respondents submit the Legal Fund is a "smart and adaptive" way of trying to deal with the shortcomings of the SRRP. For example, the SRRP (as a program of the RCMP) must use the legal services of the Department of Justice. The Legal Fund is able to provide private legal representation to RCMP members.

[134] That the Legal Fund expends some funds in ways that the respondents consider inappropriate is neither here nor there. The point is that the formation and maintenance of such a robust association by RCMP members and the functions it performs support the conclusion it is not effectively impossible for RCMP members to exercise their fundamental

freedom of association in relation to workplace issues.

[135] For these reasons, I conclude that it is not effectively impossible for RCMP members to act collectively to achieve [page299] workplace goals. It follows that the respondent associations' members are unable to claim the derivative right to collective bargaining under s. 2(d). Accordingly, there is no constitutional obligation on the government to take positive action, in the sense discussed in Haig, Delisle, CLA and Dunmore, to facilitate the exercise of the RCMP members' s. 2(d)-protected freedom. There is no "necessary precondition" for placing a positive obligation on the employer to recognize and "negotiate" with the respondent associations in order to make meaningful association possible for their members.

[136] The conclusion that the members of the respondent associations cannot claim the derivative right to collective bargaining renders the principal concerns of the application judge immaterial. He considered the inability of RCMP members to form an independent association "for the purpose of collectively bargaining" to be the principal source of the infringement of s. 2(d). As Delisle establishes, RCMP members do have the freedom to form independent employee associations. The additional guidance provided by Fraser indicates their ability to associate is not so ineffective that they are able to claim the derivative right to collectively bargain. The constitutional right to form an independent association for the purpose of collective bargaining, if it exists, would be a facet of the derivative right to collective bargaining and does not arise in this case.

(2) Is s. 96 an unfair labour practice?

[137] In the formulation of the AMPMQ, this case involves the active interference of the government with the freedom of association of RCMP members. The AMPMQ argues that the application judge found, in effect, that s. 96 of the Regulations and the historical actions of RCMP management constitute unfair labour practices that prevent RCMP members from being able to organize an effective voluntary association. The application judge, in describing the evolution of the SRRP,

noted the government and the commissioner's history of opposing the unionization of RCMP members.

[138] The application judge did not use the term "unfair labour practice". However, accepting for the sake of argument that the application judge did, in effect, find that the government engaged in unfair labour practices, it is my view he erred in making that finding.

[139] Without the benefit of the Supreme Court's decision in Fraser, the application judge proceeded with an inflated view of the content of "collective bargaining" protected by s. 2(d). He did not appreciate the derivative nature of the right, and he brought [page300] to bear values from the Wagner model. His conception of the constitutionally required attributes of an employee association would preclude models of employee relations that bring employees into the decision-making structures in a non-adversarial, collaborative fashion. Such alternative models of employer-employee relations are widely used in other industrial democracies. [See Note 1 below]

[140] In any event, the AMPMQ's claim ultimately devolves into the same claim as that brought by the respondent associations. A constitutionally protected right must exist before practices can be found to unfairly interfere with it. If the associations have no constitutional right to demand that RCMP management recognize and negotiate with them, practices that hinder them from doing so cannot rise to the level of constitutional violations.

[141] The AMPMQ's formulation of s. 2(d) must be rejected for the same reasons as the MPAO and the BCMPPA's formulation.

(3) Does the exclusion of the RCMP from the PSLRA violate s. 2(d) of the Charter? (The cross-appeal)

[142] The cross-appeal of the application judge's conclusion that the exclusion of the RCMP from the PSLRA does not violate [page301] s. 2(d) of the Charter must be dismissed on the same analysis set out above. As it is not effectively impossible for RCMP members to associate collectively to achieve workplace goals, there is no positive obligation on the

government to include them in the labour regime set out in the PSLRA. Moreover, the Supreme Court has already addressed the constitutionality of the RCMP members' exclusion from the PSSRA, the predecessor to the PSLRA, in Delisle.

H. Section 2(b): The Charter's Guarantee of Freedom of Expression

[143] The associations appeal from the application judge's dismissal of their claim that s. 41 of the Regulations violates s. 2(b) of the Charter. Section 41 states:

> 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.

[144] As the application judge noted, at para. 104, the respondents "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."

[145] In this context, the application judge found that there was an inadequate factual foundation to consider this claim because the RCMP has chosen not to use s. 41 to discipline its members in the labour relations context, and because insufficient evidence was adduced by the associations to demonstrate the effect of s. 41 on the freedom of expression. He concluded that in the context in which it was challenged, the "constitutionality of s. 41 of the Regulations ought not to be considered in the abstract": para. 107.

[146] On appeal, the cross-appellants seek to advance a general attack on s. 41 as violating the s. 2(b) freedom of expression of RCMP members. They argue that "[t]he violation of 2(b) is self evident -- the purpose of the provision is to curtail speech which the government considers might be harmful or embarrassing to the force".

[147] In my view, having initially confined their attack on s. 41 to its impact on their members' associational freedoms,

the cross-appellants cannot mount a general challenge to s. 41 for the first time in this court. I see no error in the application judge's disposition of the issue that was placed before him. I would not interfere with his decision. [page302]

I. Conclusion

[148] For these reasons, I would allow the Attorney General's appeal and set aside the application judge's declaration that s. 96 of the Regulations violates the s. 2(d) Charter rights of RCMP members.

[149] I would dismiss the associations' cross-appeal.

[150] The parties, but not the intervenors, may make written submissions not exceeding five pages regarding the costs of the appeal and of the application.

[151] Finally, I note that the question whether an Ontario court was the most appropriate forum for this proceeding was not raised before the application judge and was not considered by him. All parties and intervenors agree it is not a matter that should be considered by this court at this stage.

Appeal allowed;

cross-appeal dismissed.

Appendix

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

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[.]

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

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.

. . . . .

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.

Notes

Note 1: Alternative labour relations regimes were described in detail in the affidavit of Professor Richard Chaykowski. As he notes:

Variations exist across jurisdictions and within jurisdictions in traditional labour relations legislation and policy . . . .

There exist a variety of alternative models of employee representation both within Canada and among industrialized democracies that constitute legitimate alternatives to the traditional Canadian model of unionism and collective bargaining . . . . One important example is works councils, which constitute a quite different model of employee representation from unions and collective bargaining:

> ". . . work councils . . . are workplace level committees of employee (and sometimes employer) representatives with information sharing, consultation, and/or joint decision making rights. In theory, these mechanisms not only extend democratic rights, they also make for more inclusive

> decision processes, so that workers and their representatives are in a proactive rather than reactive position. In theory, this should in turn help to facilitate a more consensual relationship, with potentially positive performance implications."

Work councils are extensively utilized, internationally, in a range of industrialized countries, including Germany, Belgium, Denmark, Spain, France, Great Britain, Greece, Ireland, Italy, Luxembourg, the Netherlands, and Portugal.

(Citations omitted)
