ORIGINAL

No 25926

IN THE

Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF QUEBEC

BETWEEN: GAÉTAN DELISLE
(Petitioner before the Superior Court)
APPELLANT

AND: THE ATTORNEY GENERAL OF CANADA
(Respondent before the Superior Court)
RESPONDENT

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IN THE

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IN THE

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ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF QUEBEC

BETWEEN:

GAÉTAN DELISLE

Appellant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE APPELLANT GAÉTAN DELISLE

PART I: THE FACTS

1. This is an appeal from a judgment of the Quebec Court of Appeal dated January 29, 1997 and rectified February 12, 1997, dismissing an appeal from Quebec Superior Court dated November 28, 1989. Appellant's application for a declaration that the legislation denying members of the RCMP the right to form their own union violated his freedom of expression and association as well as his right to equality under the law was refused. Mr. Justice Baudouin dissented from the Quebec Court of Appeal judgment on the issue of freedom of association. Leave to appeal was granted by this Court on October 16, 1997.

2. Fish and Forget J.J.A. agreed with Michaud J. (as he then was) that the right of an association to obtain union certification was not guaranteed under the *Charter*.

3. Because of the impugned provisions, Appellant as well as over 15,000 members of the RCMP are prevented from freely forming a union of their own choosing or even

*** Appellant's Record will be referred to in the present Factum as: "A.R."**

from expressing themselves through a vote on this issue, contrary to most other persons employed in the public service and almost all other police officers in Canada.

4. The originating Motion challenged the validity of Subsection 109 (4) (now section 6) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (hereinafter the "*Code*"), and paragraph (e) of the definition of *employee* in section 2 of the *Public Service Staff Relations Act* R.S.C. 1985, c. P-35 (hereinafter the "*Act*"), as contrary to Sections 2(b), 2(d) and 15(1) of the *Canadian Charter of Rights and Freedoms* (hereinafter, the *"Charter"*).

5. This motion was dismissed in Quebec Superior Court ([1990] R.J.Q. 234), and the appeal from that judgment was dismissed by the Quebec Court of Appeal ([1997] R.J.Q. 386), Baudouin J. dissenting.

6. Gaétan Delisle, the Appellant, has achieved the rank of Staff-Sergeant in the Royal Canadian Mounted Police (hereinafter the "RCMP") with in excess of twenty-eight (28) years of service in 1998 and is also the leader of the union movement within the RCMP.

7. Appellant recently received a long-service medal and bar from Her Majesty the Queen for "long and meritorious service" in the RCMP awarded to a "regular member who completes twenty (20) years of qualifying service and who is of irreproachable character"[1].

8. Appellant has made the RCMP his lifelong career and as a result has been denied the rights this case concerns.

9. The impugned provisions deny him, as well as over 15,000 members of the RCMP posted across Canada, the right to form their own union, or even the right to vote on this issue, which rights are generally enjoyed by employees be they members of the public service or police officers.

10. This denial of rights is achieved by the general exclusion of employees of Her Majesty under section 6 of the *Code* and the specific exclusion of members of the RCMP from the definition of *employee* under subsection 2(e) of the *Act.*

[1] Royal Canadian Mounted Police Regulations [67] (Long Service Medal) **(Appellant's Book of Authorities, Tab 17)**

The Facts

11. Section 6 of the *Code* provides: [Employees of Her Majesty] "Except as provided by section 5 , this Part does not apply in respect of employment by Her Majesty in right of Canada".

12. Subsection 2(e) of the *Act* defines *employee* as: "a person employed in the Public Service, other ... than a person who is a member or special constable of the R.C.M.P."

13. The only form of representation permitted to members of the RCMP, which is also imposed by law, has no effective power, is entirely financed by the employer and is ultimately controlled by the Commissioner of the RCMP.[2]

14. Members of the RCMP are not allowed to negotiate their own working conditions either collectively or individually.

15. As a result, the Commissioner of the RCMP has absolute power over the rights of the members of the RCMP.[3]

16. It has never been established that this absolute denial of the right to unionize is of any benefit whatsoever to Canadian society.

17. No acceptable alternative to the complete denial of the right to form a union is available to Gaétan Delisle and the other members of the RCMP.

18. In stark contrast, almost all other police officers in Canada have the right to form their own union.[4]

19. The prohibition against forming a union in the RCMP stems from an erroneous and outdated perception that for policemen this would create a "divided loyalty".[5]

20. This perception is reflected in the Order in Council of 1918 prohibiting members of the RCMP from forming or becoming a member of a union under pain of "instant dismissal".[6]

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[2] Royal Canadian Mounted Police Regulations [96] (Division Staff Relations Representative Program) (Appellant's Book of Authorities, Tab 18)

[3] Submission to the Task Force to review Part I of the Canadian Labour Code (A.R., vol. IV, p. 597 to 645)

[4] Exhibit R-6, Table (A.R., vol. III, p. 410)

[5] Exhibit R-24, Order in Council P.C. 2213 (A.R., vol. IV, p. 589)

[6] Exhibit R-24 (A.R., vol. IV, p. 587-588)

21. In 1974, following various demonstrations of protest by members of the RCMP, the 1918 Order in Council was revoked, ostensibly to allow for unionization.[7]

22. This change was ineffective however, as the statutory prohibition against forming a union was and continues to be effected by the impugned provisions and reflected in RCMP policies.

23. One of these policies was to create a form of "forced association", the Divisional Staff Relations Representative Program (hereinafter the "DSRRP").

24. The DSRRP structure was correctly characterized by Baudouin J. in the Quebec Court of Appeal as "one imposed by law, without effective power and ultimately controlled by management".[8]

25. Not only is this system controlled by management but it has been used to prevent the formation of a union and in retaliation against members including Appellant attempting to form a union or to express themselves in favour of a union.

26. This issue was also addressed in submissions made on behalf of members before the "*Task Force to inquire into Part I of the Canada Labour Code*" (hereinafter the "*Simms Commission*").[9]

27. The potential for abuse including blatant reprisals for union activities under such a system is detailed at pages 7 through 10 of those submissions as follows:

> "The "C" Division members had elected Gaétan Delisle as their DSRR and the R.C.M.P. attempted to expel him from the caucus of DSRRs because of his efforts to unionize the "C" Division members. His expulsion was prevented by an injunction issued by Madam Justice Reed of the Federal Court (see *Delisle* v. *A.G. Canada,* (1990) 39 F.T.R. 217 (T.D.). The R.C.M.P. Commissioner responded to that court decision by adopting a Standing Order that punishes any DSRR who "engages in activities that promote alternate programs in conflict with the non-union status of the DSRRP." The

[7] Exhibit R-24, P.C. 1974-1339 (A.R., vol. IV, p. 590)
[8] Court of Appeal judgment p. 6 (A.R., vol. I, p. 125)
[9] Submission to the Task Force to review Part I of the Canada Labour Code (A.R., vol. IV, p. 597 to 645)

> Commissioner's Standing Order is being used to persecute the leaders and organizers of the members' associations. Three DSRRs (including Gaétan Delisle and Len Squires) are currently on trial by (sic) the R.C.M.P. for having exercised their freedom of expression and association by participating in the formation of a members' association in "E" Division of British Columbia (see Appendix "D")."[10]

28. In 1980, the then Commissioner of the RCMP addressed the following question at the request of the Solicitor General of Canada:

> "Can members of the RCMP join a union?".[11]

29. His conclusion reads in part:

> "In summary, the position is that members cannot belong to a collective bargaining group. They cannot belong to an association, organization or union (or euphemism for a union) which conflicts in any way with their role as a peace officer or member of the Force. To date we have not taken exception to members belonging to the Association of the 17 Divisions, an organization we do not recognize in terms of the labour-management regime of the Force" (our emphasis).[12]

30. In 1987, this position was reiterated under oath by Commissioner Simmond's successor-to-be, Commissioner Norman Inkster, in the following terms:

> "For example, like Mr. Simmonds, I am against the idea of RCMP members getting unionized for several reasons" (our emphasis)[13]

31. Moreover, in 1989, the Respondent expressly admitted before the Quebec Superior Court in the present case that:

> "What we are prepared to admit, is that the members of the RCMP do not have the right to unionize. This is admitted, the legislation says so." (our translation and our emphasis)[14]

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[10] Simms Commission Report (Seeking a balance) (A.R., vol. IV, p. 628 to 632)
[11] Exhibit R-30, Correspondence Commissioner Simmonds (A.R., vol. IV, p. 594)
[12] Exhibit R-30 (A.R., vol. IV, p. 594)
[13] Exhibit R-29 and extracts of transcripts of Norman Inkster's testimony before Michaud J. (A.R., vol. IV, p. 593 and vol. II, p. 320)
[14] Respondent's admission before Michaud J. (A.R., vol. II, p. 245)

While this admission was subsequently nuanced by the Respondent, it does accurately reflect the actual situation of the members of the RCMP regarding the right to unionize.

32. In 1993, the anti-union policy of the RCMP was again starkly exposed in the Commissioner's standing orders regarding the DSRRP which, as modified, dictate to Gaétan Delisle that he "shall not engage in activities that: (a) are prejudicial to the goals and objectives of the DSRRP; (b) promote alternative programs in conflict with the non-union status of the DSRRP; ..." (our emphasis).[15]

33. As Appellant contends in his arguments, attempts in the present case to create an ambiguity over the denial of the right of members to unionize approach sophistry and fly in the face of the history of the union movement in the RCMP.

34. The impugned provisions and the DSRRP have allowed the RCMP to enforce its opposition to unionization and persecute the Appellant for his attempts to form a union in the RCMP.

35. As a result, the Appellant and all other members of the RCMP are legally excluded from forming their own union by the impugned provisions and subject to sanctions when they attempt to do so.

36. As well, the effect of the impugned provisions is to deny Appellant any of the legal protections against such reprisals or unfair labour practices, which protections are provided under the *Code* and the *Act*, thereby giving the impugned provisions a chilling effect and shielding the RCMP's anti-union tactics.

37. Ultimately, the impugned provisions have been effective in enabling the RCMP to prevent its members from forming a union and thereby expressing their solidarity against the absolute power of the Commissioner.[16]

38. It is noteworthy as well that the DSRRP contains no statutory duty of fair representation thereby unfettering management's use of the DSRRP as a tool to stifle unionization, in contrast to the fundamental values recognized under the *Code* and the *Act*.

[15] Royal Canadian Mounted Police Regulations [96], Commissioner's Standing Orders (DSRPP) **(Appellant's Book of Authorities, Tab 18)**

[16] Extracts of Norman Inkster's testimony before Michaud J. (Appellant's Factum, Vol. III, p. 58 & 582) **(A.R., vol. II, p. 330-331)**

39. In fact, use of such an employer dominated association to stifle unionization is considered illegal as a blatant unfair labour practice. (see Labour Law and Industrial relations in Canada (*infra*))

40. Furthermore, the denial of the fundamental right of members of the RCMP to unionize has contributed to making them a disadvantaged and vulnerable group to whom other basic or fundamental rights have been readily denied. (see paragraph 151)

41. Throughout the attempts by the members of the RCMP to unionize, they have never compromised the delivery of police services nor evidenced any conflict of loyalty, and nothing indicates that the right to form a union would change this.[17]

42. Members of the RCMP wishing to unionize have consistently opposed the right to strike for members of the RCMP and supported alternate dispute resolution mechanisms such as arbitration that would ensure uninterrupted police service.[18]

43. By way of contrast a member of the RCMP opposed to the formation of a union and who has acted with the employer in persecuting Appellant for his union activities is now himself threatening "work to rule" or "job action" (referred to by Respondents as euphemisms for strikes) if demands for a pay raise are not met. Notably this antiunion member (who also testified against Appellant in present case, at the RCMP's expense) is active within the DSRRP and is able to threaten strikes without a union.[19]

44. Apparently, strikes or work stoppages are possible in the absence of the right to form a union.

45. Strikes or work stoppages may occur over the right to form a police union as was the case in England in 1919.[20]

46. Respondent has admitted that there is really no relation between the fact that a union exists, no absolute relation between the fact a union exists and any work stoppage.[21]

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[17] Extracts of transcripts of Gaétan Delisle's testimony before Michaud J. (Appellant's Factum, Vol. III, p. 626) **(A.R., vol. II, p. 375)**

[18] **Submission to the Task Force to review Part I of the Canada Labour Code (A.R., vol. IV, p. 597 to 645)**

[19] Various newspaper articles and extracts of Reginald K. Trowell's testimony before Michaud J. **(A.R., vol. IV, p. 633 to 645)**

[20] **Historical synopsis of the Police Federation of England and Wales (A.R., vol. IV, p. 646 to 651)**

[21] Extracts of David John Beiersdorfer's testimony before Michaud J. (Respondent's Factum p. 252) **(A.R., vol. IV, p. 651-652)**

47. In Ontario where the right to unionize in the Ontario Provincial Police is coupled with compulsory arbitration and a specific prohibition on police strikes exists, there has never been a work stoppage.[22]

48. Appellant has consistently advocated such a balanced approach that would allow him to exercise his fundamental rights while ensuring the protection and security of our society.[23]

49. It is against this historical and factual background that the impugned provisions' inconsistency with the guaranteed freedoms of association and expression, as well as with Appellant's equality rights fall to be determined.

PART II: POINTS IN ISSUE

50. The following constitutional questions were stated by the Chief Justice on December 17, 1997:

(1) Do s. 6 (formerly 109(4)) of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* infringe or deny the Appellant's freedom of expression guaranteed in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

(2) Do s. 6 (formerly 109(4)) of the of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* infringe or deny the appellant's freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

(3) Do s. 6 (formerly 109(4)) of the of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations*

[22] Extracts of James Kingston's testimony before Michaud J. (Appellant's Factum, Vol. III, p. 598) **(A.R., vol. II, p. 347)**

[23] Submission to the Task Force to review Part I of the Canada Labour Code **(A.R., vol. IV, p. 597 to 645)**

Act infringe upon the appellant's equality rights guaranteed in s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

(4) If the answer to questions 1,2, or 3 is in the affirmative, can s. 6 (formerly 109(4)) of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* be justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

51. With respect to Question No. 1, Appellant submits that the impugned legislation denies him the fundamental right to express himself either by voting on whether or not he wants a union, or through the actual formation of a union of his own choosing or ultimately in expressing his solidarity with other members of the RCMP through a union of his choosing and thus violates his freedom of expression.

52. With respect to Question No. 2, Appellant submits that the impugned legislation denies him the fundamental right to form a union of his choosing and thus violates his very basic freedom of association.

53. With respect to Question No. 3, Appellant submits that the impugned legislation denies him equality under the law and thus violates his equality rights.

54. With respect to Question No. 4, Appellant submits that the infringement is not justifiable under s.1 of the *Charter* because:

(i) The objective of preventing a union in the RCMP does not respond to any pressing or substantial concern in a democratic society but rather perpetuates a power imbalance whereby the Commissioner of the RCMP has absolute power over RCMP members' rights.

(ii) Should the objective of preventing a union in the RCMP respond to pressing concerns that the RCMP could then become subject to illegal work stoppages, (an argument Appellant does not concede) no rational connection is demonstrated between the absolute denial of the right to form a union, or even to express oneself on this point, and the requirement for uninterrupted law enforcement services.

(iii) No proper balance is struck between, on the one hand Appellant's freedom of association, freedom of expression and right to equality under the law and on the other hand the absolute prohibition to unionize and the absolute power of the Commissioner of the RCMP.

(iv) There is no minimal impairment of Appellant's rights as he is subject to an absolute denial of the right to form a union of his choosing.

(v) There is no proportionality between the deleterious effects of the prohibition (absolute denial of the right to form his own union) and the objective of uninterrupted police services, in that:

- a total ban on forming a union could only be sustained when such a ban is necessary to preserve public order because reasonably available alternatives (such as banning strikes in favour of arbitration) will not prevent work stoppages;

- any salutary effects of an absolute denial of the right to unionize (Appellant does not concede this point and perceives no salutary effects but only raises the issue for the purpose of his submissions) do not outweigh the deleterious effects on freedom of association, freedom of expression and equality rights to the employees as well as the denigration of these values and the use of absolute power and abuse thereof that result from that denial.

PART III: ARGUMENT

Introduction

55. In this Part, Appellant contends that his rights and fundamental freedoms guaranteed under the *Charter* are violated and that this cannot be justified under section 1. He also contends that the impugned provisions are unconstitutional because there exists a balanced approach that recognizes his rights and freedoms while making them subject to reasonable limits, that leads to a declaration that the impugned provisions are unconstitutional.

Section I. Violation of freedom of association.

56. Baudouin J. of the Quebec Court of Appeal found that there was a violation of freedom of association and that the impugned provisions were not justified under section 1 of the *Charter*.

57. Fish J. having found that none of the rights and fundamental freedoms invoked were violated, made no substantial analysis in respect of section 1. In the Quebec Superior Court, Michaud J. summarized part of the evidence in respect of section 1 but drew no substantial conclusions regarding justification in respect of section 1.

58. Baudouin J. characterized Appellant's situation as follows:

> "the total and absolute denial of the right to associate freely within a union, combined with the members of the RCMP being forced into a substitute unilaterally dictated and controlled by the employer violates freedom of association" (our translation)[24]

59. Appellant submits that this reasoning correctly applies and distinguishes this court's prior rulings regarding the guarantee of freedom of association in this context.

60. In *Professional Institute of Public Service of Canada* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, where there was a question as to the constitutionality of legislation requiring that an employee's association be incorporated by an Act empowering it to bargain collectively, the late Sopinka J. wrote at page 408:

> "Upon considering the words of the impugned section, I find myself in agreement with the respondent. I observe that s. 42(1)(b) does not prohibit the establishment of or membership in other unions, and it does not prevent any such union from seeking incorporation under the Act.
>
> (...)
>
> I do not wish, however, to be taken as sanctioning the view that where a government confers a benefit it is entitled to attach whatever conditions it pleases to the receipt of the benefit.

[24] Court of Appeal judgment page 10 **(A.R., vol. I, p. 129)**

> Any such conditions must themselves pass constitutional muster. It seems obvious, for example, that a government could not grant collective bargaining rights on a basis that would contravene the equality rights guarantee contained in s. 15(1) of the *Charter*. Similarly, a grant of collective bargaining rights must account for the associational rights of affected individuals; but, in view of the trilogy, this means nothing more than permitting rival associations to exist and vie for recognition. The legislation impugned in the present case does not, as I have said, affect the Institute or any other union in a manner that could infringe s. 2(d) of the *Charter*, and the Institute's arguments in this regard must fail."

61. Cory J., dissenting, wrote, at page 381:

> "The right of the individual employee to join the association of his or her choice seems to me to be of fundamental importance. It not only enables the individual to better participate in the democratic process by acting through a group, but it permits the individuals to act in concert to seek fairness in wage settlements and working conditions. At the very least, the forming or changing of an entity to undertake collective bargaining is entitled to the protection of the *Charter* right of freedom of association."

62. Appellant submits that the present case allows the reconciliation and application of these views in that it concerns the right of an individual employee to freely associate in the union of his or her choice.

63. While Appellant does not concede that access to collective bargaining is not constitutionally protected, the main thrust of his argument under freedom of association goes to the "associational rights of affected individuals" (per Sopinka J. (*supra*)), in this case his own right to freely form a union of his own choosing in the RCMP.

64. The opinions of Michaud J. of the Quebec Superior Court and Fish J. of the Quebec Court of Appeal both characterize the issue by referring to the right of an association of members of the RCMP to obtain certification.[25]

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[25] Court of Appeal judgment page 2 **(A.R., vol. I, p. 131)**

65. Appellant submits that Baudouin J.'s opinion in the Quebec Court of Appeal more correctly addressed the issue in terms of the absolute denial of the right (of an individual) to form a union combined with the forced association dominated by the employer (an arrangement generally prohibited by labour legislation as an unfair labour practice and considered a violation of freedom of association) (see "Labour Law and Industrial Relations in Canada" (*infra*) (see as well *Delisle* v. *Canada*, [1989] R.J.Q. 1595 at p. 1597).

66. The approach of Michaud J. and Fish J. unduly narrows the issue to certification of an association thereby reducing the denial of Appellant's freedom of association to an issue of a union's right to certification, an entirely different matter.

67. Appellant submits that freedom of association in the present context is meaningless without the right to freely form a union of one's own choosing.

68. Forcing Appellant and all other members of the RCMP into an employer-dominated structure stifles their right to associate freely and has the effect of institutionalizing the employer's absolute dominance.

69. Furthermore, the impugned provisions have the effect of denying Appellant and all other members of the RCMP any protection against retaliation by the employer for attempting to form a union or against other unfair labour practices aimed at compromising freedom of association.

70. The preamble to the *Code* specifically recognizes the value of freedom of association in the following terms:

> "[Preamble] Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the basis of effective industrial relations for the determination of good working conditions and sound labour-management relations;

> And whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard." (our emphasis)

71. Further, subsection 8(1) ("Employee freedoms") of the *Code* provides:

> "Every employee is free to join the trade union of his choice and to participate in its lawful activities."

72. These basic freedoms are enforced through the prohibitions against unfair practices found at sections 94 and following of the *Code* that prohibit employer interference with them.

73. In the *Act,* under *Basic Rights and Prohibitions,* the right to join a union and participate in its lawful activities is contained in section 6 which provides:

> "Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which the employee is a member."

74. The prohibitions against interference with these rights is contained at sections 8 and following of the *Act.*

75. Both the *Code* and the *Act* prohibit employer participation in a union in order to prevent employer interference with freedom of association.

76. Notably, the *Code* and the *Act* also impose a duty of fair representation on the union, which protection is also denied to members of the RCMP under the forced association that is the DSRRP.

77. Because the Appellant is excluded from the *Code* and the *Act,* he is denied these basic freedoms and deprived of the protections against interference with the exercise of rights that other workers enjoy as Canadian citizens.

78. A favored tactic of employers seeking to prevent the exercise of these basic freedoms and rights is to prevent the formation of a union by forming an employer dominated association. (see *Schnaiberg* v. *Métallurgistes Unis D'Amérique, section locale 8990,* [1993] R.J.Q. 55 (C.A.)

79. In "*Labour Law and Industrial Relations in Canada*", H.W. Arthurs, D.D. Carter, J. Fudge and H.J. Glasbeek, (1988) 3rd ed. Butterworths, at page 181, paragraph 387, the rationale for protection against such tactics is explained:

> "If a trade union is to represent workers effectively and authentically, it must be completely free of employer control, and deal with the employer at arms' length. The labour relations acts ensure this effective and authentic representation by forbidding, as unfair labour practices, the participation of management in the formation or administration of a union, its selection by employees, or its representation of them, as a bargaining agent. Even the contribution of financial or other support by the employer to the union is forbidden, except in circumstances where the autonomy of the union is unlikely to be impaired."

80. In the present case, virtually every facet of the foregoing principles are violated by the impugned legislation and RCMP policy that constitute a form of legislated "unfair labour practice" in the sense that the government apparently allows for itself what it proscribes generally for all other employers.

81. This tactic of interfering in or dominating unions is particularly offensive as it perverts the very exercise of the right to join with others in a union of one's own choosing and places the Appellant in a forced association without any viable alternative.

82. Forced association of a much less repugnant type has been subject to severe criticism by this Court.

83. In *Lavigne* v. *SEFPO*, [1991] 2 S.C.R. 211, McLachlin J. said at p. 324-325:

> "The next question is whether s. 2(d) includes a right <u>not</u> to associate. While it is not necessary for my purposes to resolve that issue, I am inclined to the view that the interest protected by s. 2(d) goes beyond being free from state-enforced isolation, as contended by the interveners OFL and CLC. In some circumstances, forced association is arguably as dissonant with self-actualization through associational activity as is forced expression. For example, the compulsion to join the ruling party in order to have any real opportunity of advancement is a hallmark of a totalitarian state. Such compulsion might well amount to enforced ideological conformity, effectively

> depriving the individual of the freedom to associate with other groups whose values he or she might prefer. As La Forest, J., suggests, at p. 19, "Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it.""

84. It is noteworthy that in *Lavigne* (*supra*) what was challenged was the application of the "Rand Formula" by a *bona fides* union not an employer-dominated association.

85. The combination of the denial of the right to form a union with the imposed employer-dominated structure in the RCMP is evidence and a demonstration of an absolute denial of freedom of association.

86. As Baudouin J. indicates at page 10 of his judgment in the Quebec Court of Appeal herein, such legislation appears to be in flagrant and complete contradiction with principles contained in the preamble of the *Code* and section 22 of the *International Covenant on Civil and Political Rights*, to which Canada is a signatory.

87. Freedom of association stripped to its essence was initially interpreted as follows:

> "Of the remaining approaches, it must surely be accepted that the concept of freedom of association includes at least the right to join with others in lawful common pursuits and to establish and maintain organizations and associations as set out in the first approach. This is essentially the freedom of association enjoyed prior to the Charter" (*Re Public Service Employees Relations Act* (Alta) at page 407 *(infra)*.

88. The effect of the impugned provisions is to prevent the establishment of a union on behalf of employees in the RCMP, therefore the provisions violate the very basic concept referred to above.

89. Appellant submits that it should be obvious that the pursuit of fair and equitable working conditions by Appellant is lawful.

90. It is against the mischief caused by the exclusion of the members from the protection conferred by the *Code* and the *Act* and their forced association that this basic concept of freedom of association is invoked, and the failure of the majority in the

Quebec Court of Appeal to distinguish between this fundamental right and subsequent activities of the association is fundamental to the outcome of this case.

91. The Appellant respectfully submits that, ultimately, Michaud and Fish, JJ. addressed themselves to the wrong issues, certification of a union and the right to collective bargaining, which are activities that may follow the formation of the union, while failing to recognize the need to protect the very basic right to form a union.

92. This approach apparently caused them to fail to distinguish the prior rulings of the courts in this regard (See *Re Public Service Employees Relations Act* (Alta), [1987] 1 S.C.R. 313, *AFPC* c. *Canada*, [1987] 1 S.C.R. 424, and *SDGMR* c. *Saskatchewan*, [1987] 1 S.C.R. 460), the "Trilogy", where it was decided that certain aspects of collective bargaining were not constitutionally protected.

93. Appellant's case is more fundamental and does not concern the right to strike or the right to certain aspects of collective bargaining but goes to essence of freedom of association.

94. On the one hand, these issues (the right to strike and collective bargaining) tend to be dealt with by specialized tribunals applying labour legislation.

95. On the other hand, in prior cases this Court did not have to decide whether or not the right to associate in a union of one's own choosing was protected under the *Charter* and ultimately did not deny *Charter* protection to the right to unionize.

96. This distinction can be described as the difference between the basic or minimal right to associate (form a union) and the subsequent activities of the association (collective bargaining and the right to strike).

97. While the former (right to form a union) is fundamental, it appears that the latter may be subject to limitation (i.e. removal of the right to strike and substitution of binding arbitration in the case of essential services, a matter of striking a balance between valid competing interests) and ultimately may be subject to the caveat that rights exercised by the association do not exceed the ambit of those otherwise exercised by the individual (see as well Section II - Freedom of Expression). Here again, Appellant does not concede this point but rather takes the position that the arguments summarized at page 10

of the *Application for leave to intervene* herein made by the Canadian Police Association dated April 23, 1997, are well founded.[26]

98. In the United States, this distinction was examined by the United States District Court in *Atkins* v. *City of Charlotte*, 26 F. Supp. 1068 (1969).

99. In *Atkins*, a group of firemen contested the constitutionality of legislation prohibiting the formation of a union and nullifying collective agreements between the union and the government. The Court found that the right to unionize was constitutionally protected under freedom of association subject to the following distinction:

> "*The Court made a careful distinction between the proper exercise of legislative power to protect against abuse of the right of assembly and legislative infringement per se of that right, holding that the latter is not permissible.* Especially pertinent to the problem confronting us is the following:
>
> Consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose, De-Jonge v. Oregon, 299 U.S. 353, 365; 57 S.Ct. 255, 260 ;81 L.Ed., 278, 284 (1937).
>
> We would make the same distinction here. It matters not, we think, whether the firemen of the City of Charlotte meet under the auspices of the intervenor, a national labour union, but whether their proposed concerted action, if any, endangers valid states' interests in denying firemen the right to organize a labour union - whether local or national in scope. It is beyond argument that a single individual cannot negotiate on an equal basis with an employer who hires hundreds of people. Recognition of this fact of life is the basis of labour-management relations in this country. ...

[26] Canadian Police Association Notice of Motion herein dated 23rd of April 1997 **(A.R., vol. IV, p. 653 to 722)**

> *What we have said thus far supports our ultimate conclusion: that the firemen of the City of Charlotte are granted the right of free association by the First and Fourteenth Amendments of the United States Constitution; that right of association includes the right to form and join a labour union, whether local or national: that membership in such a labour organization will confer upon the firemen no immunity from proper state regulation to protect valid state interests which are, in this case, the protection of property and life from destruction by fire.* We think such a conclusion flows inevitably from the enunciations of the United States Supreme Court set out above. Our decision is consistent with that of the Seventh Circuit according the same right to teachers. McLauglhin v. Tilendis, 398 F.2d 287 (7th Cir., 1968). We do not think the McLaughlin decision is distinguishable on the asserted ground that the State in that case had not undertaken to prohibit membership in a teacher's labour union. The court's recitation that there was no such state legislation went to the question of whether there was a valid state interest. *It held that there was no state interest, and that the right of a teacher to join a labour union rested upon the First Amendment to the United States Constitution. ...*" (our emphasis)

100. In this context, it is more readily apparent that the purpose of the impugned provisions is to prevent formation of a union and not to regulate its activities once formed, and therein lies their basic inconsistency with the *Charter* guarantee of freedom of association.

101. Appellant submits that such an absolute and directed denial of the right to form a union, which right is recognized in our labour legislation, international obligations, culture and traditions (see paragraph 70 (*supra*)), is untenable and constitutes a form of legislative interference with rights recognized by this Court in *Reference Re: Public Employee Relations Act* (Alta.) (*supra*).

102. As well, Appellant submits that the lower Courts failed to appreciate the essential connection between freedom of association and freedom of expression in this case.

103. Freedom of association in the labour context ensures that the employees have a voice and thereby allows them to collectively exercise their freedom of expression. By

denying the right to unionize, the impugned provisions prevent the collective exercise of freedom of expression and stifle this expression of employee solidarity.

104. The essential connection between freedom of expression and freedom of association is referred to in *Libman* v. *Quebec (Attorney General)*, S.C.C. 24960, October 9, 1997, at page 31, citing *Professional Institute of Public Service of Canada* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 and *Reference Re Public Employee Relations Act* (Alta.) (*supra*).

105. Le Dain J. made the following connections between freedom of association and freedom of expression in *Reference Re Public Employee Relations Act* (*supra*), at p. 391:

> "Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion."

106. McIntyre J. stated the following in *Reference Re Public Employee Relations Act* (*supra*) at p. 407:

> "It is, I believe, equally clear that ... freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others."

107. In this context freedom of association is particularly important to the protection of collective expression and is therefore closely linked to that freedom

Section II. Violation of freedom of expression.

108. In *Libman* v. *Quebec (A.G.)* S.C.C. 24960, October 9, 1997, the Court stated at page 28 that:

> "The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the *Canadian Charter* to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(*b*) of the *Canadian Charter*."

109. In *Libman* (*supra*) the Appellant was challenging, *inter alia*, the provisions of the Quebec *Referendum Act* that obliged him to express his opinions through national committees and controlled expenses.

110. Here, Appellant is denied the right to express his solidarity with other members of the RCMP and obliged to participate in an employer-dominated system that stifles his freedom of expression.

111. No provision is allowed for dissent and no possibility of voting on whether or not the members want a union is permitted.

112. In contrast, both the *Code* and the *Act* allow employees to freely express their opinion on this issue in a manner whereby their rights are protected and reprisals are prohibited.

113. To pretend that their opinion on this issue can be expressed freely outside this legislative framework is tantamount to denying the reality of the history of labour relations, the struggle for the recognition of labour unions and the remedial labour legislation protecting freedom of association.

114. In Professor Jeremy Webber's and Jean-Denis Gagnon's report filed herein this is recognized at pages 254 and 255:

> "The ability to associate is therefore fundamental to employees' effective participation in the employment relationship. Early in the history of Canadian labour law, governments recognized this, rejecting attempts to repress unions through criminal sanctions and attempting instead to encourage employers to discuss employment-related concerns with their employees' representatives (while nevertheless permitting strikes if negotiations failed). When Canadian governments have, in the public interest, removed the principal lever available to employees' associations (the freedom to strike – the ability to withdraw labour in association) they have routinely provided an alternative mechanism for resolving disputes, one retaining independence from the will of the employer. The close link between the ability to associate and an effective employee voice has been reflected in the language governments have used to support bargaining legislation: the

> right of employees to bargain collectively have often been justified expressly in terms of "freedom of association"."[27]

115. Having recognized that the right to associate is essential to securing an effective employee voice, the denial of that right has the effect of denying freedom of expression since access to that effective employee voice is refused.

116. The lower Courts have nevertheless made short shrift of the Appellant's claim that the impugned provisions limit his freedom of expression.

117. Michaud J. of the Quebec Superior Court held that formation of a union was not expressive activity, that Appellant could not oblige the state to furnish him with a particular mode of expression and concluded that:

> "the activity of seeking union certification in order to gain a platform for the collective expression of members of the RCMP is not protected by the *Charter.*" [28]

118. Appellant submits that this contention is erroneous, first in that it fails again to distinguish between formation of a union and the subsequent activities of the union once formed (seeking certification and collective bargaining) and moreover fails to recognize that forming a union in order to give employees a voice is expressive. The whole purpose of forming a union is to send the following message to the employer:

> "We have joined together in our own union. We are expressing our collective solidarity. We will be heard."

119. Michaud J.'s analysis is further flawed because it fails to recognize that when the state has chosen to provide this means of expression to its employees it cannot deny it to some of them without limiting their freedom of expression and must moreover justify the denial (see *Professional Institute of Public Service of Canada (supra)* and *Libman (supra).*

120. Such a denial is suspect where its purpose is to prevent the expression of solidarity. Indeed Appellant contends that the government does not want to hear the

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[27] Exhibit R-9, Webber – Gagnon report (Report on the Development of Canadian Collective Bargaining Law and Administration, from 207 to 261) (A.R., vol. III, p. 483 to 537)

[28] Quebec Superior Court judgment, p. 61 (A.R., vol. I, p. 73)

message, otherwise why deny members the right to express themselves on this issue through a vote.

121. As well, no distinction was made between the individual's right to express his or her support for the formation of a union and the ultimate stifling of the collective voice (of the union) that results. Appellant submits that the reasoning of the Quebec Superior Court is partially driven by the Court's unwarranted focus on "the activity of seeking a union certification".

122. Appellant submits that the focus on certification is incorrect. Rather, Appellant asserts that the medium is the message: the forming of the union is itself expressive. The denial of the right to form a union is a denial of freedom of expression because the message conveyed by the very existence of that medium is purposefully and effectively stifled.

123. In *Irwin Toy Ltd.* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927, at pages 978 and 979, the Court drew the following distinctions:

> "When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the

> activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing."

10 124. In this case, the Respondent is restricting a form of expression tied to content. The "mischief" presumably consists in the meaning of the activity or the purported influence that activity has on others since the objective of the impugned legislation is to deny the conveyance of a meaning and influence by stifling Appellant's expression of support for a union and the influence that meaning will have in the creation of employee solidarity.

125. In summary then, Appellant contends that Michaud J. was wrong in denying *Charter* protection to this expressive activity and in failing to discern between individual 20 and collective rights and ultimately in denying the State's obligation to permit the use of a means of expression provided under the *Act* and *Code.*

126. In the Quebec Court of Appeal, Fish J. held that:

> "Neither the object nor effect of the impugned provisions prevent the transmission of the message that Appellant wishes to express to his employer; they merely prevent the association to which Appellant belongs from obtaining a certification 30 which would give his message herein juridical consequences for his employer. Ultimately, Appellant may transmit his message just as easily without the certification of his union. His incapacity to oblige his employer to listen to his message, to discuss with him and to agree on working conditions, the object of his message, doesn't constitute of itself a violation of freedom of expression contained in the *Charter.*" (our translation) [29]

127. This argument ignores the fact that Appellant cannot form a union and that this is 40 what the impugned provisions prevent, particularly where the formation of a union is itself part of the message sought to be conveyed, and that no message can be conveyed where the use of that form of expression is repressed. There is no other legitimate way

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[29] Court of Appeal Judgment, (Fish) p. 28 (A.R., vol. I, p. 158)

the members may vote in favour of unionizing and communicate the results of that vote to the RCMP.

128. How can the employees transmit the message "We have unionized" if they cannot form a union? How can the individual members even vote on this question if they are disenfranchised? Appellant submits that the obvious answer to both questions, that they cannot, underscores the basic nature of the violation.

129. Moreover, the message is more fundamental than negotiation of working conditions, as Fish J. assumes, and the expression is threefold:

- Appellant's ability to express himself in favour of or against the formation of a union through a legitimate vote; (his voice)
- Appellant's ability to express himself by joining in the formation of a union (the employees have spoken and the medium is the message);
- the collective expression of solidarity that the union in its formation and subsistence conveys (the employees now have a effective voice).

130. Collective bargaining is an activity distinct from and subsequent to the members being given a voice through formation of the union. Indeed that voice of solidarity may be heard on a myriad of issues prior to bargaining. Forming the union provides the effective employee voice referred to in the Webber -Gagnon report.[30]

131. Moreover, where bargaining fails, there are remedies including arbitration under the *Code* or the imposition of a first collective agreement which are not the result of collective bargaining *per se* but rather the result of forming a union.

132. Appellant submits that the argument that denying the right to unionize does not violate freedom of expression is tantamount to denying the whole rationale behind the *Act* and the *Code* that provide for the expression of the employees' voice in a manner that protects that form of expression.

[30] Supra (A.R., vol. III, p. 483 to 537)

133. Appellant submits that the formation of a union is the most basic form of expression for workers via-à-vis an employer with absolute power.

134. It is trite to state that unions give employees a real voice (see Webber and Gagnon (*supra*).[31]

135. The union incarnates the concept that the medium is the message; moreover, this is a form of expression that the employer cannot stifle, except by resorting to legislation of the type impugned.

136. Only with the formation of a union of their own choosing can the members of the RCMP express their solidarity in opposition to the employer's absolute power over them.

137. Appellant submits that he should not be required to justify his right of access to a recognized form of expression by invoking his purpose (to form a union) as our society has already recognized the legitimacy and fundamental value of such right. Rather Appellant submits that the onus rests on Respondent to justify denying Appellant access to this form of expression.

138. Appellant contests any suggestion that the denial of a fundamental right can be justified by virtue of an inferior substitute. By way of analogy Appellant would argue that the right to hold up a sign during an election is a inferior substitute that could never justify denying the right to vote.

139. It follows, then, that Gaétan Delisle and the members of the RCMP are denied this form of expression by the impugned provisions and Respondents must justify this denial (see *RJR McDonald* (*infra*)).

140. In *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139, L'Heureux-Dubé J. approved, at p. 181, a passage from *R.* v. *Kopyto*, [1987] 47 D.L.R. 4th 213, 24 O.A.C. 81 (at p. 90-91), per Cory J.A., as he then was:

> "It is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to

[31] Supra (A.R., vol. III, p. 483 to 537)

> express new ideas and to put forward opinions about the functioning of public institutions."

141. As long as the impugned provisions continue to have effect the members will not be able to express their solidarity in opposition to the employer's absolute power over their rights. Absent intervention by this Court, the impugned provisions will continue to have their desired effect of imposing a complete ban on a legitimate form of expression.

142. At pp. 343-344 of *RJR McDonald* v. *AG Canada*, [1995] 3 S.C.R. 199, McLachlin J. said:

> "As this court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban: Ramsden v. Peterborough (City), *supra*, at p. 1105-1106 (S.C.R.); Ford v. Quebec (Attorney General), *supra.* At pp. 772-773 S.C.R. the distinction between a total ban on expression, as in Ford where the legislation at issue required commercial signs to be exclusively in French, and a partial ban such as that at issue in Irwin Toys, *supra*, is relevant to the margin of appreciation which may be allowed the government under the minimal-impairment step of the analysis. In Rocket, supra, the law imposed a complete advertising ban on professionals seeking to advertise their services. I concluded that while the government had a pressing and substantial objective, and while that objective was rationally connected to the means chosen, the minimal- impairment requirement was not met since the government had exceeded a reasonable margin of appreciation given the need for consumers to obtain useful information about the services provided. A full prohibition will only be constitutionally acceptable under the minimal-impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established."

See as well *Haig* v. *Canada,* [1993] 2 S.C.R. 885, at page 1041.

Section III. Violation of equality rights.

143. Applicant submits that there is a cumulative effect in the denial of the right to associate in a union of his own choosing and the denial of the right to express himself with others in opposition to the employer's absolute power over his rights that underscores the discriminatory nature of the impugned legislation.

144. This is what the Applicant contests as being in violation of his fundamental rights and discriminatory as based on personal characteristics in the sense referred to, *inter alia*, by Martineau:

> "Pour réussir dans sa plainte à l'effet que le droit à l'égalité est violé, un requérant devrait être en mesure de démontrer que l'emploi de celui-ci est tellement identifiable à l'individu qui l'occupe, qu'il s'agit bien d'une «caractéristique personnelle». Nous pensons à cet égard à certains groupes particuliers, militaires, *policiers*, etc., où le statut d'emploi est identifiable à la personne qui l'occupe. Dans un tel cas, à cause du caractère particulier de son statut, l'individu en question porte avec lui, même à l'extérieur de son lieu de travail ou en dehors des heures normales de travail, l'étiquette de «militaire», de «*policier*», etc." L. MARTINEAU, «Le statut d'emploi peut-il constituer un motif de distinction illicite en vertu du paragraphe 15(1) de la Charte canadienne et de l'article 10 de la Charte Québécoise», dans *Développements récents en droit administratifs (1994)*, Formation permanente du Barreau du Québec, Éd. Y Blais, 1994, pp. 127 à 180. (our emphasis)

145. In *Egan* v. *Canada,* [1995] 2 S.C.R. 513, Cory J. addressed the following question at page 583:

> "How Should Section 15(1) Be Applied?
>
> Section 15(1) of the *Charter* is of fundamental importance to Canadian society. The praiseworthy object of the section is the prevention of discrimination and the promotion of a "society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component": *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R., 143 at p. 171. It has been recognized that the purpose of s.

15(1) is "to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.": *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, at p. 1329. It is this section of the *Charter*, more than any other, which recognizes and cherishes the innate human dignity of every individual. It is this section which recognizes that no legislation should treat individuals unfairly simply on the basis of personal characteristics which bear no relationship to their merit, capacity or need.

With this background in mind, it is appropriate to consider the principles which should guide a court in an interpretation of s. 15(1) and then to apply those principles to the situation presented in this case.

In *Andrews,* supra, and *Turpin*, supra, a two-step analysis was formulated to determine whether a s. 15(1) right to equality had been violated. The first step is to determine whether, due to a distinction created by the questioned law, a claimant's right to equality before the law, equality under the law, equal protection of the law or equal benefit of the law has been denied. During this first step, the inquiry should focus upon whether the challenged law has drawn a distinction between the claimant and others, based on personal characteristics.

Not every distinction created by legislation gives rise to discrimination. Therefore, the second step must be to determine whether the distinction created by the law results in discrimination. In order to make this determination, it is necessary to consider first, whether the equality right was denied on the basis of a personal characteristic which is either enumerated in s. 15(1) or which is analogous to those enumerated, and second, whether that distinction has the effect on the claimant of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to benefits or advantages which are available to others."

See as well *Miron* v. *Trudel*, [1996] 2 R..C.S., at p. 418.

146. Appellant, as is the case with the vast majority of members of the RCMP, has made his career in the RCMP and has been obliged to relinquish his right to equality under the law in order to safeguard that career.

147. Furthermore, the particular status of members of the RCMP extends beyond any workplace and is pervasive at all times. Members carry with them their status as police officers in the same way that they carry their badges. This status has become a personal characteristic.

148. In this sense members of the RCMP are isolated and insular, they stand apart, this can only be palliated by association, here by the exercise of the right to unionize, thus rather than being a reason to deny the right to associate, their isolation is a clear argument for permitting it.

149. Their distinctiveness is related for the most part to their status as police officers, a status that has not prevented almost all other police officers in Canada from forming their own unions without compromising legitimate state interests.

150. This isolation and the prohibition against forming a union has made members of the RCMP the victims of numerous denials of basic rights. Thus their vulnerability is at least in part attributable to the impugned legislation.

151. The following is a partial listing of fundamental rights denied within the RCMP as well as certain consequences of the denial of those rights:

- the civil rights of citizens (*Regina & Archer* v. *White,* (1955) 1 D.L.R. (2d) 305 (S.C.C.);

- the right to legal counsel (*Husted* v. *Commissioner of the RCMP*, [1981] 2 F.C. 791 (F.C.T.D.);

- linguistic rights guaranteed in the public service (*Gingras* v. *Canada*, [1994] 2 F.C. 318 (F.C.A.) (see as well racial and linguistic discrimination under the Haig-Brown report);

- the right to political expression and activities (*Delisle* v. *Canada*, Federal Court Trial Division, T-2285-95, Mr. Justice Pierre Denault, 27 October

1995), and regulation 57 of the Royal Canadian Mounted Police Regulations, 1988;

- the right to a hearing on disciplinary charges (*Cramm* v. *Canada*, [1988] 2 F.C. 20 (F.C.A.);

- the right to a public hearing before an independent and impartial tribunal in disciplinatory matters (*Armstrong* v. *RCMP*, Fed. T.D., January 27, 1994) and *Southam Inc.* et al. v. *Canada, Ont. G.D.*, 97-CV-002296, November 1997;

- discrimination based on status as RCMP member (*Baillargeon* v. *R.*, C.S.P., Iberville, 755-27-001732-835, January 28, 1985);

- subject to abuse of the absolute discretionary power wielded by the RCMP Commissioner (*Desjardins* v. *RCMP*, [1986] 3 F.T.R. 52 (Fed. T.D.);

- subject to management decisions made in a capricious manner (*Brooke and Browning* v. *RCMP*, March 17, 1993, Fed. C.A. (unreported);

- subject to reprisals for union activities within the RCMP (*Delisle* v. *Canada* [1990] 39 F.T.R. 27 (T.D.);

- union activities or any association with unions were grounds for instant dismissal under a 1918 Order in Council abolished only in 1974;

- discrimination based on civil status;

152. Indeed as an example of the type of power wielded by the Commissioner over the rights of members and as Appellant testified in this case, RCMP internal rules would have required him to chose between continuing in a common law relationship and his career.[32]

153. Given the foregoing, members of the RCMP have been made to feel that they are less deserving of the rights guaranteed to all Canadian citizens and which they have sworn to protect. Appellant submits that this situation should be repugnant in a free and democratic society and is particularly offensive as it serves no useful purpose while

[32] Extracts of Gaétan Delisle's testimony (Appellant's Factum, Vol. III, p. 460, 461 and 462) **(A.R., vol. II, p. 209 to 211)**

demeaning those who protect the rights of all citizens. To paraphrase this Court in *Andrews* (*supra*) members of the RMCP are "equally deserving of concern, respect and consideration."

154. Fish J. of the Quebec Court of Appeal held that because members of the RCMP were unique and because the distinction herein was based on the "type of employment" there was no discrimination. He went on to state that members of the RCMP were not disadvantaged even in terms of labour relations and that no disadvantage existed outside the contested distinction.[33]

155. Fish J. found that to conclude otherwise could cause any distinction to be found discriminatory, apparently relying on an argument that Appellant's claim trivializes *Charter* values.

156. Appellant submits, with respect, that this reasoning is flawed in that all other police officers in Canada are allowed to form their own unions, and that the present case is unique and does not present a serious risk of opening the floodgates for frivolous claims.

157. The government must be presumed to have determined that RCMP members could not be trusted to uphold the law if they were allowed to unionize. While such views might have been more generally acceptable (even though unfounded) in 1918, because of the perception that unions presented a threat to social order, they are no longer given the evolution of our society, the recognition of the rights of employees, the value of right to form unions, and the contributions of unions to social order and general well being. (see *Professional Institute of Public Service of Canada* (*supra*))

158. Such views also fall short when it comes to striking a balance between Appellant's fundamental rights and the interests of our society. Appellant submits that a free and democratic society is not well served by a system that has the rights of the members of its federal police subject to the absolute power of its Commissioner. Several Commissions of inquiry underline the inherent dangers and potential for abuse under such a system.[34]

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[33] Court of Appeal judgment p. 41 **(A.R., vol. I, p. 170)**

[34] Commission of inquiry relating to public complaints, internal discipline and grievance procedure within the Royal Canadian Mounted Police, P.C. 1974-1338 and amended by P.C. 1074-2415; Commission of inquiry into certain activities of the Royal Canadian Mounted Police P.C. 1977-1911; and see *Keable v. A.G. Canada*, [1979] 1 R.C.S. 219

159. This reasoning also fails to recognize the fact that employees are a vulnerable group in society and deserving of the protections provided under remedial labour legislation such as the *Code* and the *Act*.

160. In *Wallace* v. *United Grain Gowers Limited*, S.C.C. 24986, October 30, 1997, Iacobucci J. said at p. 49:

> "This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, Dickson C.J., writing for the majority of the Court, had occasion to comment on the nature of this relationship. At pp.1051-52 he quoted with approval from P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:
>
> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination...
>
> This unequal balance of power led the majority of the Court in *Slaight Communications, supra*, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368:
>
> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
>
> Thus, for most people, work is one of the defining features of their lives."

161. These statements were made partly in the context of an unjust dismissal case but have relevance when cumulated with the previously described isolation and vulnerability

of members of the RCMP confronted with a choice between "*a defining feature of their lives* (their careers)" and the exercise of fundamental rights.

162. On the one hand, the evidence does not support any allegation of divided loyalty in the event of unionization; on the other hand, this allegation of divided loyalty is a form of specious stereotyping not related to real merit or the actual circumstances of the members that contributes to discrimination.

163. Furthermore, Appellant submits that under certain circumstances, discrimination for purposes of section 15 (1) analysis may become more readily apparent, as is the case here, were the right to form a union is denied is based on specious stereotyping. (see as well *R.* v. *Généreux*, [1992] 1 S.C.R. 259).

164. Finally, Appellant submits that the lower courts failed to recognize the extent to which this type of discrimination has isolated and disadvantaged members of the RCMP.

165. Indeed, Appellant submits that allowing members to form a union of their own choosing is the only way to right this second-class status.

Section IV. No justification under section 1

166. Appellant submits that essentially, his arguments under s. 1 of the *Charter* can be applied to all three violations described above, in that ultimately what must be justified is the absolute denial of the right to freely form a union of one's own choosing, whether the denial results from the violation of his freedom of association, the violation of his freedom of expression, or the violation of his right to be treated equally under the law, or as Appellant submits, all three.

167. In *Libman* (supra) at page 33, the Court succinctly stated the following test:

> "The analytical approach developed by the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, serves as a guide for determining whether an infringement can be justified in a free and democratic society. Certain clarifications were made regarding the third step of the proportionality test in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Thus, the Court must first ask whether the objective the statutory restrictions seek to promote responds to pressing and

> substantial concerns in a democratic society, and then determine whether the means chosen by the government are proportional to that objective. The proportionality test involves three steps: the restrictive measures chosen must be rationally connected to the objective, they must constitute a minimal impairment of the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those restrictions."

168. What pressing and substantial concerns warrant the absolute denial of the right to form a union in the RCMP? Put otherwise, does the objective of preventing the formation of a union in the RCMP (or of even allowing the members to express themselves on this issue) respond to pressing and substantial concerns in our society?

169. Appellant submits that this objective does not respond to any such concerns.

170. The alleged basis for the denial of the right to form a union is the apprehension of the potential for a possible interruption in police services in the event of potential unresolved labour disputes, the whole based on a perception of a potential conflict of loyalty.

171. It has not been established that any such occurrences are likely; rather the record indicates that throughout the struggle to form a union, that has lasted over 20 years, neither Gaétan Delisle nor members of the RCMP have done anything to compromise the police services that they provide.[35]

172. Appellant submits that the evidence herein indicates that members of the RCMP are loyal and law abiding and that nothing would justify presuming that the mere right to form a union or express themselves on this issue would change this.[36]

173. Appellant further submits that implicit in the divided loyalty argument is the claim the members of the RCMP are some how unable to appreciate the difference between their rights as employees and their professional responsibilities. At the very least this is patronizing and insulting to the men and the women of the RCMP and ultimately unsupported by the evidence. Numerous other activities ranging from emergency care to

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[35] Extracts of Gilles Favreau's testimony before Michaud J. (Respondent's Factum, page 204) **(A.R., vol. IV, p. 723-724)**

[36] Extracts of Norman Inkster's testimony before Michaud J. **(A.R., vol. II, p. 317-318)**

essential services permit enjoyment of legitimate employee rights (including the right to form one's own union) without compromising professional responsibility. No evidence has been led to justify the presumption that members of the RCMP are so inferior or unworthy.

174. Indeed Appellant contends that the enjoyment of fundamental freedoms and rights is more conducive to civil order and respect for the rule of law than the denial of those rights.

175. Appellant therefore strongly contests that the objective of the impugned provisions responds to any pressing and substantial concerns in our society; but rather submits that it is an anachronism in that it merely perpetuates the wielding of absolute power over the rights of members of the RCMP (which stems from a long-since-repealed Order in Council) through means that have been obsolete and proscribed, both legislatively and judicially, for many years if not decades in labour relations generally as well as in respect of almost all other police officers in Canada.

176. *R.* v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, established the principle that under the analysis required pursuant to section 1, the party supporting the impugned legislation assumes the burden of justification.

177. Should the provision of uninterrupted police services by the RCMP become a pressing and substantial concern herein, a myriad of other means not requiring the absolute denial of the right to form a union are available and currently used, as Baudouin J. points out in his dissenting opinion.[37]

178. These alternatives are common and readily accepted in a free and democratic society.[38]

179. Furthermore, as indicated in the "*Submissions to the Simms Commission*" at page 3:[39]

> "Only one argument has been articulated by the R.C.M.P. Commissioner to defend the position that R.C.M.P. members

[37] Court of Appeal judgment pages 4, 5 and 6 **(A.R., vol. I, p. 123 to 125)**
[38] Exhibit R-9, Webber – Gagnon report **(A.R., vol. III, p. 483 to 537)**
[39] Submission to the Task Force to review Part I of the Canada Labour Code **(A.R., vol. IV, p. 597 to 645)**

> should not be permitted to unionize. The argument is simply that the R.C.M.P. must remain operational in the event that other police forces in the country go on strike. This argument does not, however, justify the denial of the collective bargaining rights to R.C.M.P. members, but rather relates to appropriate dispute resolution mechanisms. The simple answer in this regard is that, since R.C.M.P. members do not seek the right to strike, they would continue to provide uninterrupted law enforcement services in the event of the disruption of other police services."

180. No balance has been struck between Appellant's fundamental freedoms and rights and the public interest. Indeed, what Appellant seeks is a declaration that recognizes the need for such a balance and that it be re-established.

181. By way of analogy, Appellant invokes the reasoning of the Chief Justice in *Dagenais* v. *CBC*, [1994] 3 S.C.R., 835 at page 877, where Lamer C. J. writing for the majority, discusses balancing the right to a fair trial with freedom of expression in the context of publication bans:

> "The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to ss. 2(*b*) and 11(*d*). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(*d*) over those protected by s. 2(*b*). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.
>
> It is open to this Court to "develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution": *Dolphin Delivery*, supra, at p. 603 (*per* McIntyre J.). I am, therefore, of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the

> principles of the *Charter*. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected *Charter* rights. The modified rule may be stated as follows:
>
> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.
>
> If the ban fails to meet this standard (which clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful."

182. In this case, *Charter* rights are not in competition. Only Appellant asserts *Charter* rights whereas Respondent attempts to curtail those rights in favour of the RCMP Commissioner's absolute power over members rights.

183. The Report of the *Simms Commission* (*supra*) concluded under their study regarding "*Collective Bargaining Rights for the R.C.M.P.*" that:

> "(...) members of a police force could be granted access to collective bargaining without denying the need for operational control and without jeopardizing the public interest."[40]

184. If this is the case insofar as access to collective bargaining is concerned, Appellant submits that the right to unionize, which is a prior and more fundamental right, can no longer be denied based on those needs.

[40] Simms Commission Report (Seeking a balance) **(A.R., vol. IV, p. 628 to 632)**

185. Appellant and the members of the RCMP are faced with an absolute denial of the right to form a union in the RCMP that has no correct or proportional rationale to the supposed goal of the legislation, bearing in mind as well that the denial stems from a 1918 Order in Council prohibiting unionization that was abolished in 1974, in recognition of the inappropriateness of the denial.

186. As a result no rational connection has been established between the impugned provisions and concerns regarding potential interruption of police services.

187. Furthermore, Commissioner Norman Inkster has testified in this case that:

> "A. My point of view has changed only in the sense that I'm addressing it as a practical reality. And the practical reality is that if we have a union, the force will continue to function. And whether or not we need the union, that's another issue. The members ... the Law will decide whether or not it becomes an option, and the members will decide whether or not they want a union.
>
> Q. Are you still against R.C.M.P. members getting unionized?
>
> A. I think the R.C.MP. can function, as it has in the last hundred and some odd years, as I mentioned, without a union, and that, to repeat my answer, I think we can manage with one. And, again, it won't be me that decides, and I'll live with either option."

188. Furthermore, Appellant submits that the impugned provisions have no laudable purpose as they have as their sole purpose the denial of the right to form a union.

189. Appellant concludes that:

(i) the restrictive measures chosen (the total prohibition of the right to form a union) are not rationally connected to the alleged objective sought (maintenance of operational control and prevention of interruption in law enforcement services);

(ii) there is no minimal impairment, as the right to unionize is totally denied;

(iii) there is no proportionality between the government's objectives and the deterious effects of the restrictions (since prohibition of the right to strike, binding arbitration, and maintenance of essential services may all be provided for without banning unionization) and between the deterious and

salutary effects of the restrictions (the restrictions have created second class citizens within an organization that is a symbol for Canada without any salutary effect for our society and moreover, deny an essential safeguard against abuse of absolute power).

190. Appellant submits that denying him the rights he has sworn to uphold for all Canadians does nothing for the public interest and in effect denigrates both those rights and a legitimate public interest in maintaining the rule of law and equality under the law.

191. Appellant submits that ultimately no balance is struck by the impugned provisions between the public interest in maintaining police services and Appellant's fundamental rights and freedoms

PART IV: ORDER REQUESTED

Appellant prays that this Court allow the appeal, declare the impugned provisions inconsistent with the *Charter* and of no force or effect, with costs to the Appellant throughout.

The whole respectfully submitted.

MONTREAL, this March 12th, 1998

JAMES R.K. DUGGAN
Attorney for Appellant

PART V: LIST OF AUTHORITIES

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APPENDIX A

CONSTITUTIONAL QUESTIONS

Court File No.: 25926

IN THE SUPREME COURT OF CANADA

(Appeal from the Court of Appeal for the Province of Quebec)

BETWEEN:

GAÉTAN DELISLE

Appellant
(Applicant)

AND:

THE ATTORNEY GENERAL OF CANADA

Respondent
(Respondent)

NOTICE OF CONSTITUTIONAL QUESTIONS

TAKE NOTICE that pursuant to the Order of the Court on the 17th day of December, 1997, the constitutional questions in this appeal from the judgment of the Quebec Court of Appeal pronounced the 29th day of January 1997 and rectified February 12th, 1997, are as follows :

(1) Do s. 6 (formerly 109(4)) of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* infringe or deny the appellant's freedom of expression guaranteed in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

(2) Do s. 6 (formerly 109(4)) of the of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* infringe or deny the appellant's freedom of association guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

(3) Do s. 6 (formerly 109(4)) of the of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* infringe upon the appellant's equality rights guaranteed in s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

(4) If the answer to questions 1,2, or 3 is in the affirmative, can s. 6 (formerly 109(4)) of the *Canada Labour Code* and para. (*e*) of the definition of «employee» at s. 2 of the *Public Service Staff Relations Act* be justified under s. 1 of the *Canadian Charter of Rights and Freedom*?

(1) L'article 6 (auparavant le par. 109(4)) du *Code canadien du travail* et l'al. *e*) de la définition de «fonctionnaire» figurant à l'art. 2 de la *Loi sur les relations de travail dans la fonction publique* portent-ils atteinte à la liberté d'expression garantie à l'appelant par l'al. *2b*) de la *Charte canadienne des droits et libertés*?

(2) L'article 6 (auparavant le par. 109(4)) du *Code canadien du travail* et l'al. *e*) de la définition de «fonctionnaire» figurant à l'art. 2 de la *Loi sur les relations de travail dans la fonction publique* portent-ils atteinte à la liberté d'association garantie à l'appelant par l'al. *2d*) de la *Charte canadienne des droits et libertés*?

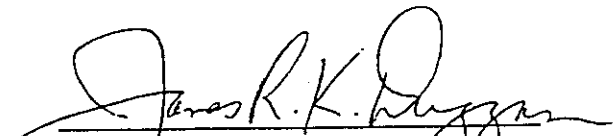
(3) L'article 6 (auparavant le par. 109(4)) du *Code canadien du travail* et l'al. *e*) de la définition de «fonctionnaire» figurant à l'art. 2 de la *Loi sur les relations de travail dans la fonction publique* portent-ils atteinte aux droits à l'égalité garantis à l'appelant par. 15(1) de la *Charte canadienne des droits et libertés*?

(4) En cas de réponse affirmative aux première, deuxième ou troisième quesitons, l'art. 6 (auparavant le par. 109(4)) du *Code canadien du travail* et l'al. *e*) de la définition de «fonctionnaire» figurant à l'art. 2 de la *Loi sur les relations de*

travail dans la fonction publique peuvent-ils être justifiés au sens de l'article premier de la *Charte canadienne des droits et libertés*?

AND FURTHER TAKE NOTICE that all notices of intervention must be filed with the Registrar of the Supreme Court of Canada on or before the 2nd day of February, 1998.

DATED this 30th day of December 1997.



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TO: Bearment, Green

Ottawa Agents for the Attorney General of Nova Scotia

TO: Noël, Berthiaume

Agent for the Attorney General of Quebec

TO: Lang, Michener

Ottawa Agents for the Minister of Justice of the Government of the Northwest Territories

AND TO: The Attorney General of Canada

APPENDIX B

ORDER SIGNED BY SIR JOHN A. MACDONALD SEPTEMBER 10TH, 1873

[illegible] 1873. [illegible]

The Committee of Council have had before them the annexed Report, dated August 27, 1873, from the Honorable the Minister of Justice, recommending that a Police Force in and for the North West Territories be constituted in accordance with the provisions of the Act 36th Vic. Cap 35, and submitting certain suggestions with respect to the organization of the Force - and they respectfully advise that a Police Force be constituted accordingly and organized as recommended in the said annexed Report.

John A. Macdonald

approved
30/8/73
Dufferin [illegible] Lieutenant [illegible]