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Court File No.: 25926

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

GAÉTAN DELISLE

Appellant

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

-and-

PUBLIC SERVICE ALLIANCE OF CANADA,
CANADIAN LABOUR CONGRESS, ONTARIO TEACHERS' FEDERATION,
CANADIAN POLICE ASSOCIATION, and PROCUREUR GÉNÉRAL DU QUEBEC

Interveners

SUPREME COURT OF CANADA
FILED
JUN 8 1998
DÉPOSÉ
COUR SUPRÊME DU CANADA

**FACTUM OF THE INTERVENER,
PUBLIC SERVICE ALLIANCE OF CANADA**

SERVICE OF A TRUE COPY
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PART I - STATEMENT OF FACTS

Status of the Intervener Public Service Alliance of Canada

1. The Public Service Alliance of Canada ("PSAC" or "Alliance") is an employee organization certified as bargaining agent under the *Public Service Staff Relations Act* ("*PSSRA*") for a variety of bargaining units in all areas of the federal public service. As well, the Alliance is certified as a bargaining agent under the *Canada Labour Code* ("*Code*") and various provincial statutes on behalf of employees employed by a variety of employers. In these capacities, the Alliance represents more than 140,000 workers across the country.

PART II - POINTS IN ISSUE

2. In this factum, the Alliance will advance submissions relating to the following issues:

(a) Do the impugned provisions infringe or deny the Appellant's freedom of expression?

(b) Do the impugned provisions infringe or deny the Appellant's freedom of association?

(c) If the answer to questions (a) or (b) is in the affirmative, can the impugned provisions be justified under section 1 of the *Charter*?

PART III - ARGUMENT

A. The Workplace Context

3. It is the submission of the Alliance that the issues raised by this appeal must be considered in light of the workplace context. This context includes not only the particular workplace of Royal Canadian Mounted Police officers such as the Appellant, but the more general workplace which is both the subject and target of the labour relations legislation in issue. This is particularly

the case when considering and measuring the position of the Respondent against the standard required by section 1 of the *Charter*.

> *Ross* v. *School District No. 15,* [1996] 1 S.C.R. 825 at 871-872 per La Forest J.
>
> *Thomson Newspapers Co.* v. *Canada (Attorney General)* (May 29, 1998), S.C.C. File No.: 25593 at paras. 87 *et seq.* per Bastarache J.

10

4. This Court has affirmed repeatedly the central importance of employment in Canadian society and the fundamental relationship between employment or work and a person's life:

> 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.

20

> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368 per Dickson C. J.
>
> *Machtinger* v. *HOJ Industries Ltd.*, [1992]1 S.C.R. 986 at 1002 per Iacobucci J.
>
> *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at 740-742 per Iacobucci J.

30

5. Chief Justice Dickson, as he then was, recognized that, given the importance of employment to a person's well being,

> [t]he conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.
>
> *Reference Re Public Service Employee Relations Act (Alta.), supra,* at 368 per Dickson C.J.

6. Despite the vital importance of work and, therefore, the terms and conditions in which one works, contracts of employment between individuals and their employers rarely result from an exercise of free bargaining power and, in fact, are often the result of a power imbalance which is overwhelmingly in favour of the employer. This imbalance in power not only affects the terms and conditions of employment as contained in the employment contract itself, but extends to virtually all facets of the employment relationship. In these circumstances, this Court has described employees as a "vulnerable group."

> *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1051-1052 per Dickson C.J.
>
> *Wallace, supra,* at 740-742 per Iacobucci J.
>
> *Atkins* v. *City of Charlotte*, 296 F. Supp. 1068 (1969) at 1075-1076

10

7. As indicated by Davies and Freedland, in a statement this Court has adopted,

> [T]he relation between an employer and an isolated employee or worker is typically a relations 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. . . The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation — . . . , and indeed most labour legislation all together — must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.
>
> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd Ed. 1983), cited in *Davidson, supra,* at 1051-1052 and in *Wallace, supra,* at 741

20

30

8. The comments of former Chief Justice Dickson in one of the trilogy judgments are particularly relevant to the consideration of this context:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions. As Professor Paul Weiler explains in *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 31:
>
> > An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.
>
> *Reference Re Public Service Employee Relations Act (Alta.), supra,* at 368-369 per Dickson C.J.

9. Although Cory J. dissented in *PIPSC*, the Alliance submits that these comments on the importance of fair working conditions to an individual employee were not in dispute in that case:

> Whenever people labour to earn their daily bread, the right to associate will be of tremendous significance. Wages and working conditions will always be of vital importance to an employee. . .
>
> 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. . .

Professional Institute of the Public Service of Canada v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 380-381 per Cory J.

10. In view of these concerns, Canadian legislatures have adopted labour relations legislation as one of the central means by which the power imbalance between employees and employers can be alleviated through the negotiation of fair working conditions, including issues such as wages, hours of work, leave entitlement, health and safety, discrimination, accommodation, etc. As well, collective bargaining is a means by which employers are able to standardize and centralize the terms and conditions of employment governing their employees and to more efficiently deal with those employees through the representation provided by a bargaining agent. Virtually all labour relations legislation affords to the parties the opportunity to engage specialized dispute resolution mechanisms where labour relations issues can be dealt with by a tribunal which has expertise in that area. In short, labour relations legislation helps establish the rule of law in the workplace.

Weber v. *Ontario Hydro*, [1995] 2 S.C.R. 929 at 951 to 959 per McLachlin J.

Canada (Attorney General) v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 952-964 per Cory J.

Canada (Attorney General) v. *Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 at 628-630 per Sopinka J. and at 650-663 per Cory J.

Seeking a Balance, the Report of the Task Force established to review Part I of the Canada Labour Code (Hull, Quebec: Minister of Public Works and Government Services Canada, 1995) at 36

Canadian Industrial Relations, the Report of Task Force of Labour Relations ("the Woods Report") (Privy Council Office, 1968) at 109

Labour Law Case Book Group, *Labour Law: Cases, Materials and Commentary*, 5th Ed. (Kingston: Queen's University, 1991), chapter 3, pages 153-191

R. Brown, "Unions, Markets, and Other Regulatory Mechanisms: Theory and Evidence" (1994), 44 U.T.L.J. 1

11. Finally, the Preamble to the *Code* has been acknowledged as reflecting "two of the fundamental freedoms which are revered by Canadian society: association and expression":

> 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 bases 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;
>
> AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interest of Canada in ensuring a just share of the fruits of progress to all;

Canada Labour Code, R.S.C. 1985, c. L-2, as amended, Preamble

Seeking a Balance, *supra,* at 46

B. The Legislative Context

12. The *PSSRA* and the *Code* are the two principal legislative initiatives which provide an exhaustive framework for collective bargaining and labour relations in areas which fall broadly within the authority of Parliament. (Parliament has passed a third statute, the *Parliamentary Employment and Staff Relations Act*, which applies generally to Parliamentary employees and is modeled after the *PSSRA*.)

Canada Labour Code, supra, section 6

10

Public Service Staff Relations Act, R.S.C. 1985, c. P-35, as amended, section 2

Parliamentary Employment and Staff Relations Act, S.C. 1986, c. 41

13. By virtue of the definitions of "employee" and "employer" contained in section 2 of the *PSSRA*, workers who are employed by Her Majesty in Right of Canada as part of the public service are subject to the provisions of the *PSSRA*. Section 6 of the *Code* confirms that such

20 employees are not generally governed by the *Code*.

PSSRA, supra, sections 2 and 3

Canada Labour Code, supra, section 6

14. As appears from the definition of "employer" in the *PSSRA*, employees in those portions of the public service of Canada which are specified in Part I of Schedule I to the *PSSRA* are employed by Her Majesty in Right of Canada as represented by Treasury Board. Treasury Board,

30 therefore, exercises the primary managerial authority over most employees in the public service. By contrast, those parts of the public service which are specified in Part II of Schedule I to the *PSSRA* are considered to be "separate employers" and, as a result, those employers exercise their own managerial authority in respect of their employees in a fashion distinct from Treasury Board.

PSSRA, supra, section 2 and Schedule I

15. The Royal Canadian Mounted Police is named in Part I of Schedule I to the *PSSRA* and, as such, the employer of employees of the RCMP is Her Majesty in Right of Canada as represented by Treasury Board. *Prima facie*, therefore, the RCMP is subject to the collective bargaining regime established by the *PSSRA*. However, given the definitions of "bargaining agent", "bargaining unit", "collective agreement", and "employee organization", together with the exclusion of RCMP officers from the definition of "employee", no union may be certified to represent such officers. In the result, RCMP officers are among the few persons employed in the public service who do not have the right to form an employee organization under the *PSSRA*.

10

PSSRA, supra, section 2 and Schedule I

16. It is important to recognize that, unlike more general labour relations legislation, where the parties are free to negotiate most, if not all, terms and conditions of employment, there are significant distinguishing features to the labour relations regime established by the *PSSRA* which are relevant for the purpose of the issues raised by this appeal.

20

(a) Section 7 of the *PSSRA* provides explicitly for the general managerial rights of employers to determine the organization of the public service and to assign duties to and classify positions therein. In addition, sections 7 to 11 of the *Financial Administration Act* vest specific powers in the Treasury Board as employer, including authority over the organization and administration of the public service.

PSSRA, supra, section 7

Financial Administration Act, R.S.C. 1985, c. F-11, sections 7-11

30

Public Service Alliance of Canada v. *Canada (Treasury Board)* (1987), 76 N.R. 229 (Fed. C.A.) at 238

Public Service Alliance of Canada v. *Canada (Treasury Board)* (1986), [1987] 2 F.C. 471 (C.A.) at 477

(b) The scope of collective agreements under the *PSSRA* is limited by subsection 57(2) insofar as they cannot alter or amend terms or conditions of employment specified by legislation of Parliament or that have been established pursuant to Acts specified in Schedule II of the *PSSRA*. Schedule II of the *PSSRA* includes the *Government Employees Compensation Act* (dealing generally with workers' compensation), the *Public Service Employment Act* (dealing generally with matters of staffing and promotion), and the *Public Service Superannuation Act* (dealing generally with pension entitlement).

10

PSSRA, supra, subsection 57(2) and schedule II

(c) Under Part III of the *PSSRA*, parties to collective bargaining may refer matters in dispute at the bargaining table to arbitration in specified circumstances, a process which is described in the private sector as "interest arbitration." Following referral of matters in dispute to arbitration, an arbitration board renders an arbitral award which has the same effect as a collective agreement. Where parties elect to resolve labour disputes by way of arbitration, recourse to strike action is not available. As appears from section 69 of the *PSSRA,* the jurisdiction of an arbitration board does not extend to the matters identified specifically therein.

20

PSSRA, supra, section 60 *et seq.* (Note that the operation of sections 64 to 75.1 is suspended for specified period of time (section 62).)

Public Service Alliance of Canada v. *National Capital Commission* (1997), [1998] 2 F.C. 128 (T.D.)

(d) Finally, the *PSSRA* contains detailed provisions governing the designation of positions as involving safety or security duties. Once designated, the incumbents of such positions cannot engage in strike action under the *PSSRA*.

30

PSSRA, supra, sections 52.1 and 78 *et seq.*

C. Freedom of Expression

(1) General Principles

17. It is well established that expression has both a content and a form and that the two can be inextricably connected. Where an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee of freedom of expression. This content can include an infinite variety of forms of expression, such as the written or spoken word, the arts, and physical gestures or acts. As a general rule, in assessing whether an activity falls
10 within the scope of freedom of expression, a very broad approach must be adopted.

> *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 968-970 and 978-979 per Dickson C.J.
>
> *Ross, supra,* at 864-865
>
> *R.* v. *Lucas (J.D.)* (1998), 224 N.R. 161 (S.C.C.) at paras. 24-28 per Cory J.

20

18. In assessing the purpose of the legislation, the characterization must proceed from the standpoint of the guarantee in issue. If the government has aimed to control attempts to convey meaning either by directly restricting the content of the expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee.

> *Irwin Toy Ltd., supra,* at 974-975 and 978-979 per Dickson C.J.

19. In assessing whether the impugned government action has the effect of restricting the plaintiff's free expression, it is important to recognize the core values or principles which underline
30 the promotion of freedom of expression in our society. Among these is the proposition that,

> the diversity in forms of individual self-fulfillment and human

flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

Irwin Toy Ltd., supra, at 976 and 978-979 per Dickson C.J.

(2) The Present Case

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20. In the submission of the Alliance, the opportunity to join a union which can become a certified bargaining agent and which, therefore, has the right to compel an employer to bargain in good faith is, in and of itself, an expression of a view of the workers to be represented by that union. The meaning which is expressed by the workers in these circumstances relates to the nature of the employment relationship with their employer and the terms and conditions under which they will provide their labour. It asserts that, in these circumstances, the workers believe that it is necessary to join together as an association to deal with an employer. Indeed, as acknowledged by the Federal Task Force which was struck to review the *Canada Labour Code*, the freedom of expression of employees is one of the fundamental freedoms which is protected and promoted by the *Canada Labour Code*.

20

Seeking a Balance, *supra*, at 46

See also *Labour Law: Cases, Materials and Commentary, supra,* at 168-171, where Freeman and Medoff are quoted as describing unions as a "collective voice."

21. Moreover, the Alliance submits that the fact that RCMP members may still have the right to express themselves individually vis-à-vis their employer is irrelevant for the purposes of

30

assessing the claim to freedom of expression in the present circumstances. There can be no doubt that, given the present restrictions in the *PSSRA* and the *Code*, RCMP members can never express the message which is conveyed through their collective action. Furthermore, this message has an expressive content and impact regardless of whether, in fact, these employees are subsequently able to be represented by a bargaining agent and engage in collective bargaining.

22. The fact that signing a union card or otherwise expressing an interest in unionization conveys a message is confirmed when one considers the impact of unionization in one industry on employers who are not unionized. For example, it is recognized that employers often will design their wage structures in order to be competitive with unionized rates. In addition, employers often react strongly when faced with a unionization drive in one area of their establishment, and in some cases will strive to ensure that the terms and conditions of employment elsewhere are consistent with those which a union seeks. These facts clearly indicate that the expression of a desire to unionize does send a meaning to employers.

10

> *Seeking a Balance, supra*, at 34
>
> *National Bank of Canada and Retail Clerks' International Union* (1981), [1982] 3 Can LRBR 1 (CLRB) and [1984] 1 S.C.R. 269
>
> *Canada Trustco. Mortgage Company*, [1984] OLBR Rep. (Oct.) 1356 at 1361
>
> *Union of Bank Employees (Ontario), Local 2104* v. *Canadian Imperial Bank of Commerce*, 86 CLLC 16,023 (CLRB)

20

23. Indeed, it is possible to see similar effects in the circumstances of the present case: the establishment of the Divisional Representative Program is a direct result of the RCMP's fear of unionization as desired by certain of its officers.

> See Appellant's Factum at page 4, paragraphs 21 *et seq.*

24. The meaning expressed by the Appellant in seeking to associate with his colleagues is clearly related to the core principles underlying the freedom of expression including, in particular, the promotion of individual self fulfillment and human flourishing. As noted above, establishing an association is one of the primary means by which individuals seek to promote their well being in the workplace and, by extension, their own personal dignity. As well, it has been recognized that,

30

as an association of workers, a union may have an impact far beyond the workplace.

> *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211
>
> *Reference Re Public Service Employee Relations Act (Alta.), supra,* at 368-389 per Dickson C.J.
>
> P.J.J. Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively" in J.M. Weiler and R.M. Elliot, eds., *Litigating the Values of a Nation: the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 189 at 205-207

10

25. For these reasons, the Alliance submits that the limitations at issue in the present case restrict the freedom of expression of RCMP officers. By their very nature, they are intended to stifle the expression which is at the root of the desire of anyone to form an association of employees — that those employees view their working conditions to be such that they believe it is necessary to combine as a group in order to address their employer. In any event, the Alliance submits that the effect of these provisions is clearly to restrict the freedom of expression of RCMP officers as it undermines their ability to express views regarding their workplace in a manner which promotes their individual self fulfillment. As such, the impugned limitation amounts to a violation of subsection 2(b) of the *Charter*.

20

D. Freedom of Association

(1) General Principles

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26. The Alliance submits that the trilogy of judgments of this Court regarding the right to strike or engage in collective bargaining, together with the Court's subsequent judgment in *PIPSC*, do not rule out the proposition that certain aspects of collective bargaining may be protected by the freedom of association guaranteed by the *Charter*. For example, in *PSAC* v. *Canada*, Justice

McIntyre, while concluding that section 2(d) of the *Charter* does not include a constitutional guarantee of a right to strike, cautioned that his finding did not "preclude the possibility that other aspects of collective bargaining may receive *Charter* protection under the guarantee of freedom of association."

> *Public Service Alliance of Canada* v. *Canada,* [1987] 1 S.C.R. 424 at 453 per McIntyre J.

10 27. Moreover, in the *PIPSC* case, the late Justice Sopinka summarized the four propositions which flowed from the trilogy and stated as follows,

> The above propositions concerning s. 2(*d*) of the *Charter* lead to the conclusion, in my opinion, that collective bargaining is not an activity that is, **without more**, protected by the guarantee of freedom of association. Restrictions on the <u>activity</u> of collective bargaining do not **normally** affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this 20 **alone** is a sufficient condition to engage s. 2(*d*). Finally, bargaining for working conditions is not, **of itself**, a constitutional freedom of individuals, and it is not an individual legal right **in circumstances in which a collective bargaining regime has been implemented**: see McIntyre J. in the *Alberta Reference*, at pp. 411-12. [Underlining only in the original.]
>
> *PIPSC, supra,* at 404 per Sopinka J.

30 28. These views indicate that, simply because a particular activity relates to collective bargaining, it does not always follow that it is not protected by the freedom of association. As in all cases, the context must be examined thoroughly in order to determine whether in fact, and in law, the action which is precluded falls within the scope of the freedom of association.

(2) The Present Case

29. It is the submission of the Alliance that the circumstances of the present case fall outside of the dicta of this Court in both the trilogy and the *PIPSC* judgments. In particular, the Appellant is prohibited by definition from becoming a member of an employee organization and from seeking certification of that employee organization as a bargaining agent representing him. Accordingly, the impugned statutes abrogate the Appellant's "freedom to establish, belong to and maintain an association."

10 *PIPSC, supra,* at 402 per Sopinka J.

30. The Alliance submits that the Appellant's attempt to associate in the present case necessarily precedes the aspects of collective bargaining which have been identified by this Court as generally not being protected under the *Charter's* guarantee of freedom of association. As indicated by Dickson C.J. in the *PIPSC* case, the determination of a bargaining agent by a labour board is the first stage of the right to bargain collectively. As the Appellant is excluded from the definition of an employee organization under the *PSSRA*, the Appellant is not even able to join such an employee organization and seek its certification as bargaining agent.

20 *PIPSC, supra,* at 373 per Dickson C.J.

Atkins, supra

31. Unlike the *PIPSC* case, there is, by definition, no existing collective bargaining regime which has been implemented in respect of RCMP officers. As such, it is clear that the Appellant, and other RCMP officers, have an individual legal right in these circumstances to bargain for working conditions. The impugned statutes, however, prevent the Appellant from exercising that right in association with other RCMP officers. For this reason, alone, the Alliance submits that the 30 Appellant's freedom of association has been violated.

PIPSC, supra, at 404 per Sopinka J.

32. Finally, it has also been established that the freedom of association is fundamental for the purpose of protecting the collective exercise of other *Charter* rights. In the present case, the restrictions which the Appellant impugns result in the denial of the Appellant's freedom to express his views regarding his employer collectively with his colleagues. His freedom of association is also violated for this reason.

PIPSC, supra, at 402-403 per Sopinka J.

10

E. Section 1 of The *Charter*

(1) General Principles

33. The Alliance emphasizes that the test which must be met under section 1 of the *Charter* is severe. The party justifying a violation of a *Charter* right bears the onus of demonstrating that each component of the *Oakes* test is satisfied. The standard of proof is by a preponderance of probability, a test which "must be applied rigorously." Evidence tendered "should be cogent and

20 persuasive and make clear to the Court the consequences of imposing or not imposing the limit" on the right or freedom in question. This standard of proof is not diminished by concerns that it may be difficult to prove any of the elements of the section 1 analysis. Rather, a contextual analysis will reveal a number of factors which go more properly to the question of whether there has been a demonstrable justification of the otherwise *Charter*-offensive measure.

Thomson Newspapers, supra, at paras. 87-91 and 111 *et seq.* per Bastarache J.

R. v. *Oakes*, [1986] 1 S.C.R. 103 at 137-138 per Dickson C.J.

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Irwin Toy Ltd., supra, at 984 per Dickson C.J.

34. The express wording of section 1 of the *Charter* compels the "reasonableness" of a violation to be "demonstrably justified" by the government. Accordingly, a *Charter* violation must be justified by processes of reason and rationality, which import the notion of inference from evidence or established truths. The "bottom line" is that there must be:

> a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning.
>
> *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 320-329 per McLachlin J. and at 352 per Iacobucci J.

35. Finally, this Court has expressed concern regarding the trend in favour of an attenuated application of section 1 and the *Oakes* test. In light of these concerns, the Court has confirmed that deference to Parliament must not be taken to the point of relieving the Government of its burden under the *Charter* to demonstrate that limits on guaranteed rights are reasonable and justifiable. As stated by Madame Justice McLachlin, in a comment which has been confirmed by this Court in *Vriend*,

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.
>
> *RJR-MacDonald, supra,* at 331-333 and 346 per McLachlin J. and at 351 per Iacobucci J.

Vriend v. *Alberta*, [1998] 1 S.C.R. 493 at para. 126 per Iacobucci J.

Rodriguez v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 564-565 per Lamer C.J.

36. Finally, none of the factors which would normally call for a certain amount of latitude to be afforded to Parliament by the Court is present here. First, there is no vulnerable group which is being protected by the impugned legislation. Second, this is not a situation where Parliament is required to account for its legislative choice as between competing groups or policies where complex social issues are engaged. Third, this is not a situation where the very nature of the expression seeks to undermine the position of groups or individuals as equal participants in society. Indeed, as indicated below, since the Appellant's claim to freedom of expression and freedom of association is related to the core values underlying the *Charter* generally and the section 1 analysis specifically, this is precisely the type of case where an attenuated level of section 1 justification is not appropriate.

RJR-MacDonald, supra, at 330-333 per McLachlin J.

Ross, supra, at 879 per La Forest J.

Thomson Newspapers, supra, at paras. 111-117 per Bastarache J.

Rodriguez, supra, at 564-565 per Lamer C. J.

37. In any event, there already exists a well established internal mechanism for balancing the concerns of the Respondent regarding loyalty and strike action. As a result, it is inappropriate to exercise judicial deference in these circumstances.

Vriend, supra, at paras. 124-125 per Iacobucci J.

See paragraphs 12-16 above.

(2) The Present Case

38. The Alliance will limit its submissions to the proportionality test which is required by section 1 of the *Charter*. As the impingement on the freedoms of expression and association here are unrestricted, as the effects of these measures on the Appellant are severe and relate to fundamental values in Canadian society, and as there is little basis to support any real or salutary benefit of these measures, there is no basis to justify the restrictions under section 1 of the *Charter*.

(a) Rational Connection

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39. With respect to the Appellant's freedom of expression, this Court has confirmed that, where the expression which a party seeks to protect is central to the core values expressed by Parliament in the *Charter*, a higher standard is required in order to justify the violation. The expression which the Appellant seeks to protect relates to such core values as the importance of the dignity of an individual, together with the importance of democracy and the rule of law generally and in the workplace. In these circumstances, the evidence proffered by the Respondent is insufficient to establish a rational connection in order to justify the intrusion upon the Appellant's *Charter* rights.

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See, generally, paragraphs 3-11 above.

Ross, supra, at 876-878 per La Forest J.

RJR-MacDonald, supra, at 280-281 per La Forest J.

40. With respect to both freedoms at issue here, the Respondent relies upon a concern that a conflict of loyalties may arise between the Appellant's obligations as an RCMP officer and his loyalty to a police union. PSAC emphasizes that it is well established that such concerns have no

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place in Canadian labour relations. Indeed, the labour relations regime established by the *PSSRA* has operated successfully for 30 years without raising difficulties regarding the conflict of loyalties

of workers from all areas of the public service who are represented by unions.

41. In this regard, the following comments of the Canada Labour Relations Board are particularly important:

> Should the Board be concerned about potential conflict of interest, the Board may, where appropriate, fashion separate units for supervisors and those they supervise. Where the conflict was seen as more serious, in the case of private constables, Parliament directed separate units represented by separate unions (section 135).
>
> Our duty today is to apply the Code in diverse circumstances where traditional, modern and experimental styles operate. Foremost in our thoughts is this tradition to which Canada is committed and the freedoms Parliament views as intrinsic to "ensuring a just share of the fruits of progress to all" and as a deeply embedded root for "social justice" in our free and democratic society. We do not seek to have established that a person is entitled to enjoy this freedom, but rather why he should be denied it.
>
> As we said our test is one of conflicting interests, but it is no longer as it was perceived in the 60s or even early 70s. Views about the compatibility of collective bargaining and job responsibilities have changed. Collective bargaining and trade union membership are no longer viewed as incompatible with the performance of responsibilities as teacher, **police officer**, firefighter, professional or public servant. Society accepts that citizens may exercise duties of social trust and find no conflict with their exercise and membership in trade unions or participation in collective bargaining...
>
> . . .
>
> In this context it is no longer apposite to view the conflict of interest rationale for the managerial exclusion in terms of sworn oaths of membership in unions and unswerving loyalty to the brotherhood of membership. These terms are **clearly outdated**. The potential conflict of interest to be considered is one between employment responsibilities and the union as an instrument for collective bargaining in a climate where there is legal protection for the individual in his relationship to the union both as bargaining agent and organization. . .

. . .

. . . The loyalty and integrity of such a person is not altered by union membership or representation. We do not subscribe to a view that says an employee will become dishonest or abuse responsibility because he is represented by a union. We do not refer to membership because it is not necessary. A person may be a union member whether represented by a union or not. The Code does not restrict union membership to "employees" it only governs union representation." [emphasis added]

United Steelworkers of America and Cominco Ltd., [1980] 3 Can.L.R.B.R. 105 (CLRB) at 116-118

See also *Canada Post Corporation and Canada Union of Postal Workers* (1989), 90 CLLC 16,007 (CLRB) at 14,074-14,079 and 14,084-14,085

42. At the very least, if such a conflict of loyalty could be used to deny the freedoms claimed by the Appellant in the present case, the strongest possible evidence would be necessary in order to overturn such well established and well considered principles of labour relations and to demonstrate a rational connection here. As indicated by the Appellant at paragraphs 170 *et seq.* of his factum, the evidence in support of the concern raised here is scarcely the kind of evidence which can be used to justify a *Charter* violation. Indeed, it is the submission of the Alliance that the government has failed in the present case to establish that the harm that it seeks to prevent by these legislative provisions is widespread or even significant.

Thomson Newspapers, supra, at para. 118 per Bastarache J.

43. As to the concern regarding strike action, the evidence clearly established that this issue does not arise in connection with those police forces who are not subject to the same limitations on freedom of expression and association as the Appellant. Moreover, the reliance by the Respondent on the fact that RCMP officers could engage in illegal strikes is a red herring: that concern exists regardless of whether police officers are entitled to freely associate for the purpose

of negotiating the terms and conditions of employment or expressing their views to their employer. If, as suggested by the Respondent, the existing specific prohibition on illegal strikes has not been effective, it is difficult to understand how a general prohibition on unionization would be of any more assistance.

(b) Minimal Impairment

44. PSAC submits that the impugned statutes are so over broad — resulting in the complete abrogation of the Appellant's freedoms of expression and association — that only the clearest and most severe circumstances could justify these violations. The evidence does not support the existence of those circumstances. Rather, there are ample other measures which would allow for the entrenchment upon the Appellant's freedoms in a manner which is proportionate to the objective of the legislation and which does not unduly cause adverse effects on the Appellant. In other words, the impugned measures do not, by any standard, impair the Appellant's rights "no more than necessary."

> *RJR-MacDonald, supra,* at 342-344 per McLachlin J. and at 354 per Iacobucci
>
> *Osborne* v. *Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 99-101 per Sopinka J.
>
> *Thomson Newspapers, supra,* paras. 119-120 per Bastarache J.

45. In particular, the labour relations scheme which would govern RCMP officers includes a variety of mechanisms by which the Respondent`s concerns could be addressed without so severely entrenching upon the Appellant's freedoms and without substantial changes to legislation or Regulations. For example,

(a) RCMP officers could resolve collective bargaining disputes through interest arbitration and not through strike action;

(b) In any event, RCMP officers would be subject to the designation provisions of the *PSSRA* with the result that the incumbents of positions which involve safety or security duties would not be allowed to strike;

(c) Those matters which may not be appropriate subjects of collective bargaining or interest arbitration may be excluded from the process through the operation of sections 57 and 69 of the *PSSRA*; and

(d) Generally, the employer would maintain a certain level of managerial authority under
10 section 7 of the *PSSRA* which could not be limited except by the employer's express agreement.

See paragraph 16 above.

46. Finally, the Alliance submits respectfully that the international conventions referred to by the Respondent are of limited, if any, relevance to the section 1 issues raised by this appeal. These conventions generally allow for the "lawful restriction" of the rights of police officers or state that the guarantees provided are subject to the national laws or regulations of specific countries. By
20 no means can this international law be characterized as endorsing or adopting the view that the violations of constitutional rights in the present case are justifiable in view of the particular constitutional provisions governing Parliament. Clearly, it is the *Charter* which determines whether or not the restrictions in the present case are lawful or consistent with the national laws of Canada, and the burden of justification lies with the government under section 1.

47. The *International Covenant on Civil and Political Rights* expressly recognizes in Article 5(2) that any exceptions provided by international law cannot be relied upon to derogate from any of the fundamental human rights recognized within a "State Party" including, for example, the *Charter*. Therefore, the only exception which could justify the entrenchment of the freedoms at issue
30 here can be found under section 1 of the *Charter*.

International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, (1966), Article 5(2)

See also *Sotgieu* v. *Deutsche Bundesport*, Case 152/73, [1974] ECR 153 at 158-160, where it was confirmed that international provisions which could be construed as an exception to a fundamental principle must be interpreted narrowly.

(c) Prejudicial Impact

48. Finally, counsel for the Respondent has submitted in his factum that the prejudicial impact here is justifiable particularly since it affects only the economic interest of the Appellant and RCMP members whose freedoms have been violated. In the submission of the Alliance, the violation of the fundamental freedoms by the impugned provisions has an impact far greater than in the area of economics.

49. To the extent that the Appellant's freedom of expression is concerned, the provision directly prevents the Appellant from conveying fundamental views regarding the important issue of his workplace generally and the terms and conditions under which he must work. The inability to express this view has a direct bearing upon the Appellant's ability to influence the terms and conditions under which he works to reflect his dignity as a worker and to promote his "sense of identity, self-worth and emotional well-being."

See paragraphs 3-11 above.

50. Moreover, to the extent that the impugned provisions prevent the Appellant from exercising his freedom of expression through association and his freedom of association for the purpose of addressing the employer respecting terms and conditions of work, they have an equally severe impact. This impact is revealed most clearly when it is recognized that the fundamental reason for exercising these freedoms relates to concerns regarding the Appellant's livelihood and his life and the establishment of the rule of law in the workplace.

51. Finally, it is the submission of the Alliance that there is a lack of evidence here

regarding the harm which might occur in the absence of the limitations on association and expression and regarding the purported benefits of these provisions. This is therefore not a case where the legislation could be upheld under this aspect of the section 1 analysis, particularly in light of the severe entrenchment upon the freedoms in issue.

Thomson Newspapers, supra, at paras. 127-130 per Bastarache J.

PART IV - NATURE OF ORDER REQUESTED

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52. The Alliance submits respectfully that the Appellant's appeal should be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, this 8th day of June, 1998.

20

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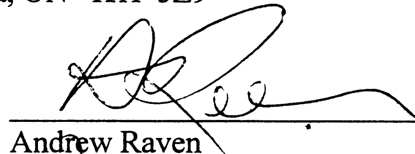

Per: ______________________
Andrew Raven

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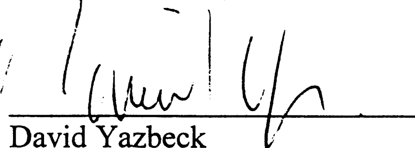

Per: ______________________
David Yazbeck

Solicitors for the Intervener
Public Service Alliance of Canada

PART V - AUTHORITIES

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HEREOF ADMITTED
This 8 day of June 1998.
Noël et Associés
Agents for
A G Québec

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Admitted this 8th day
Acceptée le jour

of June 19 98
de

Linda Gauthier

for
pour
George Thomson
Deputy Attorney General of Canada
Sous-procureur général du Canada

3:25 p.m.