Court File No. 32968

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant
(Respondent in the Court of Appeal)

– and –

MICHAEL J. FRASER on his own behalf and on behalf of the UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, XIN YUAN LIU, JULIA McGORMAN and BILLIE-JO CHURCH

Respondents
(Appellants in the Court of Appeal)

– and –

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MEMORANDUM OF ARGUMENT OF THE INTERVENER, THE LEGAL FUND

PART I – OVERVIEW AND FACTS

A. Introduction

1. The intervener, The Mounted Police Members' Legal Fund / Fonds de Recours Juridique des Membres de la Gendarmerie (the "Legal Fund") submits that s. 2(d) of the *Charter* and this Court's decision in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 do not dictate a specific model of collective bargaining. Section 2(d) must be interpreted to set constitutional minimums, not a union's vision of the ideal. Different models of association suit different contexts. Examining the RCMP's system of labour relations, a different labour relations model in a different context, may assist this Court in the task of defining the constitutional minimums guaranteed by s. 2(d).

B. This intervener and these submissions

2. The Legal Fund is an incorporated body that assists its members (who are also RCMP members) by acting to advance their dignity and welfare, including matters arising under RCMP policies and directives. In its intervention motion, the Legal Fund explained its great familiarity with the RCMP's system of labour relations; in these submissions, the Legal Fund reviews judicial descriptions of that system, and legislative statements about the nature and responsibilities of the RCMP. If the Respondents' submissions concerning the scope of s. 2(d) are accepted, s. 2(d) may end the RCMP's existing system of labour relations. It may also invalidate Parliament's decision to exempt RCMP members from the "normal" public sector labour relations system (s. 2 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2(1)), and force RCMP members into a particular form of association, a public service union, whether they want it or not.

PART II – ISSUES

3. The issues are as stated in paragraph 78 of the Appellant's factum.

PART III – STATEMENT OF ARGUMENT

A. The *Health Services* case

4. The *Health Services* case deals with the content of the right of "collective bargaining" in two places.

- *The bottom-line conclusion (para. 19 of Health Services).* "Labour unions" may "engage, in association, in collective bargaining on fundamental workplace issues." In this context, "collective bargaining" does "not cover all aspects of 'collective bargaining', as that term is understood in the statutory labour relations regimes that are in place across the country" nor "does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime." Instead, "[w]hat is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals."

- *A description of a particular statutory context (paras. 87-109 of Health Services).* The discussion descends into a specific context: the meaning of "collective bargaining" where "Parliament and provincial legislatures" have "adopt[ed] labour laws" (see the topic paragraph for this section, para. 87). Here we see a discussion about what collective bargaining means in the "Wagner Act" model. As a result, certain words permeate the analysis: "union" (paras. 90, 91, 92, 93, 95, 96, 97, 99, 109) and "negotiation" (91, 92, 93, 94, 96, 97, 98, 102, 106, 107, 109). This Court surely did not use s. 2(d) to constitutionalize unions and full-blown negotiations on all subject-matters in all contexts.

5. Basing most of their analysis on paras. 87-109 – and not the bottom-line conclusion in para. 19 of *Health Services* – the Respondents proffer, in para. 85 of their memorandum, a vision of "collective bargaining" that resembles the "Wagner Act" model: two conflicting parties forced to engage each other in an adversarial manner, with a requirement to "make a reasonable effort to arrive at an acceptable contract."

6. If this Court accepts the Respondents' submission found at para. 85 of their factum, there will be implications. Are labour relations regimes invalid if they are not based on the "Wagner Act" model? Must every workplace pit a union against an employer, with protracted, adversarial negotiations and efforts to reach a collective agreement on all aspects of the employment relationship? If this is the case, many labour relations regimes are suddenly constitutionally suspect.

B. The Court of Appeal's decision in the case at bar: far-reaching effects

7. The Appellant and the Intervener, the Ontario Federation of Agriculture, submit that the Court of Appeal's decision in the case at bar extended s. 2(d) of the *Charter* far beyond what was said in *Health Services*, effectively entrenching the "Wagner Act" model into our Constitution. Soon afterward, a lower court applied that extension of s. 2(d) to invalidate the RCMP's system of labour relations: *MPAO et al. v. Canada* (2009), 96 O.R. (3d) 20 (S.C.J.). In the course of doing so, it cast aside *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, a decision in which this Court *dismissed* a s. 2(d) challenge against the RCMP's system of labour relations.

C. The proper approach

8. The Legal Fund submits that s. 2(d) does not entrench "a particular model of labour relations, nor...a particular bargaining method" but only a "limited right" (*Health Services,* para. 91) – a "right of employees to associate in a process of collective action to achieve workplace goals" (*Health Services*, para. 19). This analysis must be "contextual" and "fact specific" (*Health Services*, para. 92). An examination of the RCMP's system of labour relations and the nature of the RCMP itself reveals some factors that ought to inform the contextual analysis required under s. 2(d).

D. The system of labour relations in the RCMP

9. Under s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 ("*Regulations*"), labour relations in the RCMP are governed by a Staff Relations Representative Program ("SRRP"). The *Regulations* do not define the content of the SRRP. The SRRP has

been established, has been in place for decades and has been modified from time to time, in part prompted by the views of RCMP members: *MPAO*, para. 29 and *Delisle*, paras. 103-106. In *MPAO*, s. 96 of the *Regulations* was held to violate s. 2(d) of the Charter, and will be of no force or effect in October 2010; at that time, the SRRP, enacted under s. 96, will end.

10. The SRRP allows for "association in a process of collective action" by RCMP members in the following way. Staff Relations Representatives, who are democratically elected by RCMP members, carry out the work of the SRRP: *MPAO*, para. 15 and *Regulations*, s. 96(2). The Staff Relations Representatives collectively form the National Caucus: *MPAO*, para. 15. There are also Regional and Divisional Caucuses. Caucuses meet and discuss workplace issues: *MPAO*, para. 15. The Representatives provide information, guidance and support to RCMP members and the representation of members' interests in the management of the RCMP: *MPAO*, para. 16.

11. An agreement with the RCMP Commissioner exists: *MPAO*, paras. 16-18. Under the agreement, management is to "recognize the role of the SRRP", "respond to proposals and requests from Staff Relations Representatives in a timely and meaningful fashion" and "provide rationale[s] for major decisions": *MPAO*, para. 16.

12. There are special rules for RCMP members' pay. The Pay Council is a five person panel comprised of two management representatives, two Staff Relations Representatives and an impartial chair. The Pay Council solicits the views and input of the RCMP members, formulates recommendations, and presents them to the Commissioner. If the Commissioner accepts them, they form the basis of a submission to Treasury Board. Under s. 22 of the *Royal Canadian Mounted Police Act*, R.S. 1985, c. R-10 (the "*Act*"), Treasury Board has the exclusive authority to establish pay and allowances for RCMP members. More information about the nature, history and operation of the SRRP can be found in both the *MPAO* and *Delisle* decisions.

E. The RCMP: A special context

13. Under s. 2(d), a Court should assess a particular labour relations system, such as the SRRP, in a practical way, in light of the nature and responsibilities of the particular organization or industry. Section 2(d) enforces minimum practical standards – not inapt, academic standards

– and not the highest standards that can possibly be imagined. The approach is to be "contextual" and "fact specific" (*Health Services*, para. 92), and so close attention must be paid to relevant details about the particular organization or industry. That is where both the Courts below and in *MPAO* erred.

14. A practical look at the RCMP, a look not taken by the Court in *MPAO*, shows that it is a security and paramilitary force that, by its nature and responsibilities, is quite different from a private sector, profit-maximizing, manufacturing or industrial workplace. Parliament is entitled, with due deference, to decide that the adversarial "Wagner Act" model is simply not appropriate.

15. That practical look at the RCMP involves examining the entire context, including the statutes and regulations that bear on the issue and the history of the particular workplace (as described in *Delisle*, in the case of the RCMP):

(a) *The RCMP is a paramilitary organization, not a simple labour-management adversarial paradigm.* Structurally, the Force is a paramilitary organization arranged by several levels of formal rank (*Act*, s. 6(1)), with each RCMP member bound to follow superiors' orders as they discharge exacting and sensitive duties (*Act*, s. 37; *Regulations*, s. 40), subject to a *Code of Conduct* (*Act*, s. 38), and subject to an obligation to report those who infringe the the *Code of Conduct* (*Regulations*, s. 46). Members are forbidden from certain forms of political activity and political expression (*Regulations*, ss. 56-58.7), and, importantly, they are forbidden from "criticizing, ridiculing, petitioning or complaining about the administration, operation, objectives or policies of the Force" unless authorized by law (*Regulations*, s. 41).

(b) *Important, special, and sensitive responsibilities.* Members of the RCMP do not provide ordinary commercial products or services. Rather, they discharge duties relating to public order, the prevention of crime, the execution of warrants and whatever other duties are imposed by the Commissioner or, a third-party, the Governor in Council (*Act*, s. 18), or under arrangements made with provinces, territories or municipalities (*Act*, s. 20). Some of these duties are very important and sensitive:

- *Anti-Terrorism, Security, Intelligence and Secrecy.* The Technical Operations Program of the RCMP, the RCMP Security Service, the Protective Operations Program of the RCMP and the Criminal Intelligence Program of the RCMP have a mandate that is primarily related to security and intelligence matters and those in it are permanently bound to secrecy obligations: *Security of Information Act*, R.S.C. 1985, c. O-5, ss. 8(1), 9 and the Schedule thereto. RCMP members have security and policing activities concerning "conduct constituting a threat to the security of Canada": *Security Offences Act*, R.S.C. 1985, c. S-7, s. 6. That conduct, described in the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23, s. 2, includes: (a) "espionage" and "sabotage"; (b) "foreign influenced activities" within or relating to Canada that are detrimental to the interests of Canada and that are "clandestine or deceptive" or "involve a threat to any person"; (c) activities within or relating to Canada that concern "acts of serious violence against persons or property for the purposes of achieving a political, religious or ideological objective within Canada or a foreign state"; and (d) activities aimed at "the destruction or overthrow by violence" of "the constitutionally established system of government in Canada."

- *Emergency roles.* RCMP members are obligated to act under the direction of government when it declares "a public welfare emergency," a "public order emergency," or an "international emergency." They may also be subject to orders made during a "war emergency": *Emergencies Act*, R.S. 1985, c. 22 (4th Supp.), ss. 5-9, 16-20, 27-31 and 40. The RCMP coordinates with the Canadian Security Intelligence Service, the Canada Border Services Agency, and the Canadian Firearms Centre to establish strategic priorities concerning public safety and emergency preparedness: *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10, s. 5.

- *International measures and peacekeeping functions.* Various measures require reporting information to the RCMP in order to enforce international and United Nations sanctions: see, *e.g.*, *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360, s. 8; *United Nations Al-Qaida and Taliban Regulations*, SOR/99-444, s. 5.2; *Regulations*

Implementing the United Nations Resolution on the Democratic People's Republic of Korea, SOR/2006-287, s. 12; *Regulations Implementing the United Nations Resolutions on Iran*, SOR/2007-44, s. 12.

- *Security at sensitive facilities.* RCMP members have security duties at sensitive federal facilities, such as airports: *Canadian Aviation Security Regulations*, SOR/2000-111.

- *Protecting border security.* RCMP members are responsible for protecting against intrusion by foreign fishers into Canadian waters: *Coastal Fisheries Protection Act*, R.S.C. 1985, c. C-33, ss. 2, 7-10. They can also act as customs and excise officers: *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), s. 2; *Excise Act*, R.S.C. 1985, c. E-14, s. 2. They can obtain information about persons entering Canada by aircraft: *Aeronautics Act*, R.S.C. 1985, c. A-2, s. 4.82.

- *Intergovernmental conferences and summits and foreign dignitaries.* The RCMP has the "primary responsibility" for providing security for any conference in which two or more states participate and can take any measures that are appropriate in the circumstances": *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, s. 10.1. RCMP members have security and policing responsibilities concerning offences in relation to "internationally protected persons": *Security Offences Act*, R.S.C. 1985, c. S-7, s. 6 and *Criminal Code*, R.S.C. 1985, c. C-46, s. 2.

(c) *RCMP members in some contexts are regarded as being different from ordinary Crown employees.* Parliament has made it clear that in some contexts RCMP members (and, for that matter, members of the Canadian Forces, as well) are not to be treated like other ordinary Crown employees: *e.g.*, *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 64; *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.), s. 2; *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2.

(d) *Terms and conditions of employment are mainly set by law, not agreement.* Many matters, normally the subject of collective agreements in "Wagner Act" models, are dealt

with by legislation, much of which is passed by persons other than the employer. For example:

- The Governor in Council, through regulations or, unilaterally, by the Commissioner, through rules, can set standards for "for the organization, training, conduct, performance of duties, discipline, efficiency, administration or good government of the Force" (*Act,* s. 21). Standing Orders have been made concerning disciplinary action (SOR/88-362), classification redress process for members (SOR/2001-248), dispute resolution process for promotions and job requirements (SOR/2000-141), grievances and representation in grievances (SOR/2003-181 and SOR/97-399), qualifications (SOR/88-366), stoppages of pay and allowances (SOR/84-886), grounds and procedures for discharge (*Regulations*, ss. 19-28 and 61), reinstatement (*Regulations*, s. 60), travelling expenses, relocation expenses, accommodation, and provision for health and safety (*Regulations*, ss. 71-86.1).

- Grievances are governed, not by a union-management collective agreement with arbitration, but instead by a mandatory legislative regime involving the Commissioner and an external review committee (*Act*, ss. 25-36), with rules of practice and procedure, security and confidentiality measures (SOR/88-313; SOR/88-397) and other similar regulations (*Regulations,* ss. 35-36).

- Promotion or demotion of RCMP members and the number of members in each rank potentially involve three potential parties, not just the "employer": the Governor in Council (*Act*, ss. 6(2) and 12), the Commissioner (*Act,* s. 7(1)) and the Treasury Board (*Act,* s. 7(2)).

(e) *Public accountability.* The Commissioner, or a third party (the Minister) may exercise a broad power of inquiry concerning "any matter connected with the organization, training, conduct, performance of duties, discipline, efficiency, administration or government of the Force or affecting any member or other person appointed or employed under the authority of this Act" (*Act*, s. 24.1). The Commissioner has exercised his unilateral

power to make rules concerning practice and procedure (SOR/88-367). The public may also complain concerning RCMP members' conduct, and there are special rules and procedures governing that process (SOR/88-522 and SOR/93-17 and the *Act*, Parts IV and VII)).

(f) *Broad geographic reach, diverse circumstances and diverse conditions.* The Force discharges its multifaceted responsibilities from coast to coast to coast, in giant metropolises and in remote hamlets, in aboriginal Canada and multicultural Canada, indeed in all of Canada, and even outside of Canada (*Act* and *Regulations,* s. 17).

F. Concluding comments

16. In this appeal, this Court will further define what minimum associational requirements are constitutionally mandated by s. 2(d) of the *Charter*. Its reasons for judgment will be applied to many, diverse contexts, including sensitive contexts such as this one, and others like the military. Several questions come into sharp focus. Do particular contexts, such as the unusual and sensitive context of the RCMP, require that s. 2(d)'s minimum standards be defined in a manner that permits Parliament to establish labour relations systems that are different from the adversarial ones in the traditional, industrial private sector? In unusual and sensitive contexts, like the RCMP, must there be a process of full, adversarial negotiation of all labour relations issues, akin to the process in "Wagner Act" regimes? Is the particular labour relations framework here – one that allows for associational activity such as meetings, the formulation of employee positions, and the direct communication of these collective positions to superiors – acceptable in this sensitive paramilitary context? Is the SRRP, a program that can be defined and modified from time to time as circumstances and employee sentiment dictate, sufficiently respectful of s. 2(d) associational freedoms? Are the various legislative provisions, above, that pertain to the RCMP all invalid under s. 2(d) because they unilaterally impose terms of employment that are not a product of full, adversarial negotiation and agreement on the subjects that they cover?

17. If the *MPAO* decision were ultimately reversed and s. 96 of the *Regulations* were upheld, the RCMP will not have a "blank cheque" under s. 2(d) of the *Charter*. Like any government program, the SRRP will always be subject to the *Charter* and, in particular, s. 2(d). This means

that if portions of the SRRP significantly obstruct "the right of employees to associate in a process of collective action to achieve workplace goals," they will be invalid. For example, if the RCMP were to engage in anti-associational conduct, such as budget cuts that prevent SRRP Caucuses, s. 2(d) will be infringed. The RCMP can be regulated under s. 2(d), and the SRRP can reflect and implement the minimum requirements of s. 2(d) as defined by this Court, while allowing the RCMP to perform the uniquely important and sensitive duties entrusted to it.

18. The *MPAO* decision has been appealed to the Court of Appeal for Ontario. But the Court of Appeal has rejected a request that it wait until this Court decides this appeal (*Fraser*): see no. M37704, October 23, 2009. The Court of Appeal might uphold the lower court decision in *MPAO*, relying on its decision in *Fraser*, and uphold the complete invalidation of the SRRP. Therefore, the Legal Fund respectfully requests that this Court render its judgment concerning the Court of Appeal's decision in this appeal as soon as possible.

PART IV – COSTS

19. The Legal Fund does not seek costs, nor should it be subject to a costs award.

PART V – ORDER SOUGHT

20. The Legal Fund requests that it be permitted to make oral submissions, not exceeding 10 minutes in length, at the hearing of this matter. The Legal Fund respectfully requests that the appeal be allowed.

DATED at Toronto, Ontario, this 23rd day of November, 2009.

David Stratas

David Stratas

Kelly Henriques

Kelly Henriques

PART VI – TABLE OF AUTHORITIES

Authority	Para. no
Delisle v. Canada, [1999] 2 S.C.R. 989 (Appellant's Book of Authorities Tab 10)	7, 9, 15
Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, [2007] 2 S.C.R. 391 (Appellant's Book of Authorities Tab 21)	1, 4, 5, 7, 8, 13
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PART VII – STATUTES

See book of authorities, filed with this memorandum.

Court File No.: 32968

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO
Appellant
(Respondent in the Court of Appeal)

- and -

MICHAEL J. FRASER, *ET AL.*
Respondents
(Appellants in the Court of Appeal)

- and -

ONTARIO FEDERATION OF AGRICULTURE
Intervener
(Intervening Party in the Court of Appeal)

- and -

ATTORNEY GENERAL OF CANADA, *ET AL.*
Interveners

MEMORANDUM OF ARGUMENT SUBMITTED BY THE INTERVENER, THE MOUNTED POLICE MEMBERS' LEGAL FUND / FONDS DE RECOURS JURIDIQUE DES MEMBRES DE LA GENDARMERIE

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