Federal Court of Appeal  Cour d'appel fédérale

Date: 20130426

Docket: A-268-11

Citation: 2013 FCA 112

CORAM: **NADON J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

ROBERT MEREDITH and BRIAN ROACH
(representing all members of the Royal Canadian Mounted Police)

Respondents

Heard at Ottawa, Ontario, on November 28, 2012.

Judgment delivered at Ottawa, Ontario, on April 26, 2013.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

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DAWSON J.A.

Overview

[1] On June 26, 2008, the Treasury Board announced pay increases for members of the Royal Canadian Mounted Police (RCMP) for the years 2008 to 2010 (inclusive). Included were increments in respect of economic increases and market adjustments as described in more detail later in these reasons.

[2] Commencing in August 2007, and reaching a peak in late 2008 and early 2009, the world experienced a massive financial crisis that led to the most serious global recession since the Great Depression.

[3] In response, in October 2008 the Treasury Board Secretariat recommended a number of options to the Government of Canada. One recommended option was that the Government impose limits on wage increases to be given to federal government employees. The Government accepted this recommendation. It instructed its negotiators to negotiate collective bargaining agreements with federal government employees within the proposed limits and further instructed that legislation be prepared that would apply when wage increases within the proposed limits were not achieved by collective agreement.

[4] On December 11, 2008, the Treasury Board approved a modification to the previously approved RCMP pay package. The modification reduced the previously approved economic increases from 2% to 1.5% for 2009 and 2010, and cancelled the 1.5% market adjustment for 2009. Any salary increase for 2011 would be limited to 1.5%.

[5] In response, the respondents commenced a representative proceeding in the Federal Court in which they, representing all members of the RCMP, sought relief quashing the December 11, 2008 decision of the Treasury Board (Decision) and declaring the Decision to violate section 2(*d*) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (Charter).

[6] The *Budget Implementation Act, 2009* received Royal Assent on March 12, 2009. Section 393 of that Act enacted the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 (ERA). Briefly stated, as relevant to the RCMP, the ERA legislated the limits on RCMP wage increases previously implemented by the Treasury Board in the Decision.

[7] After the enactment of the ERA, the respondents sought leave to amend their notice of application to put in issue the ERA. Leave was granted, and the application was amended to place in issue not only the Decision, but also the ERA "as it relates to Treasury Board's decision." The respondents did not amend their prayer for relief to seek any remedy in respect of the ERA.

[8] In reasons cited as 2011 FC 735, 392 F.T.R. 25, a Judge of the Federal Court allowed the application for judicial review, and declared the Decision to be contrary to section 2(*d*) of the Charter. In the Judge's view, the violation of section 2(*d*) was not saved by section 1 of the Charter. In her reasons, at paragraph 148, the Judge also stated that sections 16, 35, 38, 43, 46 and 49 of the ERA violate section 2(*d*) of the Charter, and that such violation was not saved by section 1. Notwithstanding this statement, in her original judgment the Judge declined to grant any remedy in respect of the ERA. She reiterated this position on a subsequent motion for reconsideration brought by the Attorney General pursuant to Rule 397 of the *Federal Courts Rules*, SOR/98-106.

[9] As will be explained below, this has led to a dispute between the parties about the proper scope of the appeal to this Court from the judgment of the Federal Court. It is the position of the appellant Attorney General that the ERA remains in full force and effect, and that its constitutionality is not at issue in this appeal. This is said to be because the judgment under appeal grants no relief in respect of the ERA. The respondents counter that the ERA does not remain in full force and effect because section 52 of the *Constitution Act, 1982* provides that laws that are inconsistent with the Constitution are "to the extent of the inconsistency, of no force or effect." In the respondents' submission, the Judge ruled at paragraph 148 of her reasons that sections 16, 35, 38, 43, 46 and 49 of the ERA violate section 2(*d*) of the Charter.

[10] For the reasons that follow, I have concluded that the constitutionality of the impugned provisions of the ERA, as they affect the respondents, was in issue in the Federal Court and on this appeal. I have further concluded that the Judge erred by conflating the Decision and the ERA. At law she was required to conduct separate contextual analyses of the validity of each. Finally, I have concluded that the ERA did not violate the respondents' right of association, and that the ERA rendered the Decision moot. It follows from these conclusions that I would allow the appeal and dismiss the application for judicial review with costs as stated more specifically at paragraph 103 below.

The Issues on Appeal

[11] On this appeal from the judgment of the Federal Court the issues to be determined are:

i. What is the proper scope of the appeal?

ii. What is the applicable standard of review to be applied to the decision under appeal?

iii. Did the Judge err by reviewing the constitutionality of the Decision and the ERA together, rather than conducting separate contextual analyses?

iv. What was the relationship between the Decision and the ERA?

v. Did the ERA violate the respondents' right of association guaranteed by section 2(*d*) of the Charter?

vi. If so, is any violation saved by section 1 of the Charter?

The Facts

[12] The facts are well set out in the decision of the Federal Court. The following review of the facts establishes the context in which the issues now before the Court arise.

[13] The *Public Service Labour Relations Act*, S.C. 2003, c. 22 excludes members of the RCMP from its application (subsection 2(1)). Instead, pay and allowances for members are established by the Treasury Board without any collective bargaining process.

[14] The Staff Relations Representatives Program (SRRP) is the formal mechanism by which members of the RCMP advance their collective goals. The SRRP was established in 1988, pursuant to section 96 of the *RCMP Regulations*, for the purpose of representing the interests of all members with respect to staff relations matters. Staff Relations Representatives make submissions to the Commissioner of the RCMP concerning pay and benefits of members through the Pay Council, as

discussed below. Both respondents, Robert Meredith and Brian Roach, are members of the National Executive of the SRRP.

[15] Prior to the establishment of the Pay Council, the Commissioner would from time to time ask the Treasury Board for a pay increase for members of the RCMP.

[16] In 1996, the then Commissioner of the RCMP created the RCMP Pay Council to deal with discontent with the process for determining pay and allowances for members of the RCMP. The Pay Council is comprised of five members: two Staff Representatives, two RCMP management representatives and an impartial chairperson. The two Staff Representatives are the Chair of the SRRP Pay and Benefits Committee and an external compensation expert appointed by the Commissioner on the advice of the SRRP. Aside from the Chair of the SRRP Pay and Benefits Committee, the Commissioner appoints all members of the Pay Council.

[17] The Pay Council makes recommendations to the Commissioner concerning the pay, compensation, and other working conditions of members of the RCMP and certain civilian members. It operates on the basis of consensus and collaboration. Its members work together to develop an appropriate compensation package and submit their recommendation to the Commissioner.

[18] The Commissioner has discretion to accept or reject the recommendation of the Pay Council. If the Commissioner accepts the recommendation, he forwards it to the Minister responsible for the RCMP, who in turn may submit it to the Treasury Board. The Treasury Board

does not have to accept the Commissioner's recommendation. Section 22 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 authorizes the Treasury Board to establish the pay and allowances paid to members of the RCMP.

[19] There are no direct negotiations between either the Pay Council or the SRRP and the Treasury Board. Neither is there any collective agreement, or any other agreement, between the Pay Council or the SRRP on the one hand and the Treasury Board on the other hand. Treasury Board decisions are communicated by the Treasury Board Secretariat to the deputy head of an institution for implementation. The communication is generally by way of a letter.

[20] As explained above, the Treasury Board initially announced RCMP pay increases on June 26, 2008, which provided for the following pay increases for the years 2008 – 2010 (inclusive):

Year	Economic Increase	Market Adjustment	Total Increase
2008	2%	1.32%	3.32%
2009	2%	1.5%	3.5%
2010	2%	0%	2%

[21] At the same time, the Treasury Board agreed to double service pay and provide a 1.5% increase in the Field Trainer Allowance. Service pay is a lump sum paid annually to members based upon their years of service. This pay package was in line with the recommendation of the Pay Council.

[22] After the June 2008 announcement, the Canadian economy was threatened by the rapidly deteriorating global economic situation. In October 2008, the Treasury Board Secretariat proposed to the Government three possibilities to reduce government spending:

1. Impose a staffing freeze on new hiring;
2. Suspend promotions and upward movement within pay brackets; or
3. Freeze or limit salary increases.

[23] The Government accepted the recommendation that employee salary increases be limited.

[24] On November 17, 2008, the Commissioner was informed by the Treasury Board that members would not receive the second 1.5% market adjustment that was due to be paid on January 1, 2009, and that thereafter increases for the 2009, 2010 and 2011 years would be limited to 1.5%. No change was made to the previously announced increases to service pay and the Field Trainer Allowance. The Secretary of the Treasury Board recommended that the Commissioner inform and work with the Pay Council to determine how this development could be conveyed to the members. The Commissioner did not accept this recommendation for reasons that are not explained in the record.

[25] In the result, there were no negotiations or discussions with the RCMP or its members about these changes.

[26] On November 27, 2008, the Minister of Finance issued an Economic and Fiscal Statement (Statement) that announced publicly the specific wage increase limits that had previously been communicated to the Commissioner.

[27] In the meantime, the Chair of the SRRP Pay and Benefits Committee had contacted the Deputy Commissioner to find out if the RCMP wage increase was to be limited. On November 28, 2008, notwithstanding the meeting of November 17, 2008, the Commissioner issued a bulletin indicating that he did not know if the RCMP would be affected by the wage increase limit. The SRRP, Pay Council and the members of the RCMP were informed of the Decision on December 12, 2008, the day after it was made.

[28] At no time prior to making the Decision did Treasury Board consult with the Pay Council or the SRRP.

[29] After learning of the Decision, members of the SRRP and Pay Council attempted to meet with various Ministers and Members of Parliament to discuss the wage increase limit. While representatives met separately with the Minister of Public Safety and the President of the Treasury Board, they were not successful in securing any variation of the Decision. The President of the Treasury Board was unwilling to discuss the Decision or the ERA.

[30] On February 6, 2009, the ERA was tabled in Parliament, and it received Royal Assent on March 12, 2009.

[31] On February 11, 2009, the Pay Council presented the President of the Treasury Board with a revised proposal for wages and allowances. This proposal was not accepted because portions of it were inconsistent with the ERA.

[32] On March 4, 2009, the Commissioner gave a mandate letter to the Pay Council requesting that it consider how to increase existing allowances to advance transformation initiatives at the RCMP as permitted by section 62 of the ERA. The Pay Council did so, and on June 9, 2009, the Treasury Board accepted the Pay Council's recommendation in part.

[33] Two changes were approved by Treasury Board. First, the Treasury Board increased the service pay paid to regular members up to and including the rank of Superintendent. Service pay was increased by .5% to 1.5% for every five years of service, to a maximum of 10.5% at 35 years service. Service pay was also extended for the first time to certain civilian members. Second, a new Operational Response Allowance Policy was approved to replace the former Stand-By Policy. The new policy provided compensation for off-duty members required to be available for work.

[34] Such allowances were permissible pursuant to section 62 of the ERA which is set out later in these reasons.

The Decision of the Federal Court

[35] After detailing the facts, setting out the relevant provisions of the ERA and stating the issues, the Judge considered the first issue which she framed to be: "Did the decision of the Treasury Board on December 12, 2008 [*sic*] to reduce the scheduled wage increases for RCMP Members, together with the impugned provisions of the *ERA*, violate subsection 2(*d*) of the *Charter*?" (reasons, paragraph 48).

[36] The Judge began by noting that the work of the Pay Council "cannot be considered wholly equivalent to collective bargaining. Nonetheless, it is the only formal means through which Members of the RCMP can collectively pursue goals relating to remuneration with their employer" (reasons, paragraph 72).

[37] Relying upon the decision of the Supreme Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, she found that the Pay Council process is important and should be afforded the protection of section 2(*d*) of the Charter. She dismissed the Attorney General's submission that *Fraser* requires meaningful association to achieve workplace goals to be impossible before section 2(*d*) is violated (reasons, paragraphs 76 and 77). The Judge posed the issue to be: "do the *ERA* and the decision of the Treasury Board make it effectively impossible for the Pay Council to make representations on behalf of the Members of the RCMP, and have those representations considered in good faith?" (reasons, paragraph 79).

[38] The Judge focused on the impact of the Decision on the bargaining process (reasons, paragraph 89). She went on to find that the impact of the Decision was similar in both this case and in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 (*B.C. Health Services*) (reasons, paragraph 83).

[39] The Judge then concluded her analysis as follows:

> 82. On the basis of the evidence submitted, it is apparent that the decision reached by Treasury Board in December 2008 was the forerunner to the enactment of the *ERA*. In other words, the *ERA* gave statutory effect to the content of the decision made on December 11, 2008.

> 83. Although the actual provisions of the *ERA* are not closely similar to the legislation considered in *BC Health Services*, the impact of the legislation is largely the same. In the first place, it confirms the Treasury Board's decision to unwind a previous agreement and second, it restricts the manner of dealing with a particular issue in future agreements.
>
> 84. The Respondent asserts that the process of the Pay Council is unaffected and only the results of the process have been limited. He points to the increase in service pay as evidence of the Pay Council's continued ability to represent the RCMP on wage issues.
>
> 85. The evidence in the record is clear that transformation initiatives, such as the increase in service pay, were the only aspect of RCMP remuneration that Treasury Board officials were willing to discuss with Pay Council and SRRs after its decision of December 2008 and the enactment of the *ERA*.
>
> 86. In my opinion, this limited engagement demonstrates that the Treasury Board withdrew the issue from consideration and refused to negotiate on a good faith basis. The unilateral cancellation of a previous agreement also constitutes interference with subsection 2(*d*) rights; see *Confederation des syndicates nationaux v. Quebec*.
>
> […]
>
> 90. In this case, the process of the Pay Council has been seriously hampered. The Pay Council had worked for over a year to develop its recommendations to have the Treasury Board institute an acceptable wage increase regime. The Treasury Board's decision and the legislation unilaterally rescinded this, thereby completely disregarding the Pay Council process.
>
> 91. Much of the Pay Council's work involves making recommendations for the salaries of the Members of the RCMP. The establishment of a low wage increase for a three year period is a clear indication that the matter has been removed from discussion and consultation. This virtually eliminates the Pay Council process, with respect to establishing wages, for three years.
>
> 92. The Treasury Board's decision and the *ERA* made it effectively impossible for the Pay Council to make representations on behalf of the Members of the RCMP, and have those representations considered in good faith. In my opinion, this is a substantial interference, which constitutes a violation of subsection 2(*d*) of the *Charter*.

[40] At no point in her analysis did the Judge consider the Decision and the ERA individually, and conduct separate constitutional analyses as to their validity.

[41] The Judge then went on to consider whether the section 2(*d*) violation was saved by section 1 of the Charter. After applying the factors articulated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, the Judge found the breach of the Charter was not saved by section 1. This was because the Attorney General failed to establish: (1) that the reduction of wage increases was rationally connected to a pressing and substantial objective (reasons, paragraphs 121-127), (2) that the unilateral action and disregard for the Pay Council process was not minimally impairing (reasons, paragraphs 128-131) and (3) that the salutary effects of the ERA were outweighed by the deleterious effects so that the measure was not proportional (reasons, paragraph 132).

[42] The Judge rejected the claim that the Decision constituted a breach of contract because the Treasury Board was specifically authorized to alter the contract under section 22 of the *RCMP Act* (reasons, paragraphs 144-147). The Judge's finding on this issue is not at issue on this appeal.

The Applicable Legislation

[43] Paragraph 2(1)(*d*) of the *Public Service Labour Relations Act* excludes members of the RCMP from its application:

2. (1) The following definitions apply in this Act. "employee", except in Part 2, means a person employed in the public service, other than:	2. (1) Les définitions qui suivent s'appliquent à la présente loi. Sauf à la partie 2, personne employée dans la fonction publique, à l'exclusion de toute personne :
[…]	. . .
(*d*) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions	*d*) qui est membre ou gendarme auxiliaire de la Gendarmerie royale du Canada, ou y est employée sensiblement aux mêmes conditions

substantially the same as those of one of its members;	que ses membres;

[44] Section 22 of the *Royal Canadian Mounted Police Act* gives the Treasury Board the authority to establish RCMP pay:

22. (1) The Treasury Board shall establish the pay and allowances to be paid to members.	22. (1) Le Conseil du Trésor établit la solde et les indemnités à verser aux membres de la Gendarmerie.

[45] The relevant portions of the *Expenditure Restraint Act* are:

16. Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:	16. Malgré toute convention collective, décision arbitrale ou condition d'emploi à l'effet contraire, mais sous réserve des autres dispositions de la présente loi, les taux de salaire des employés sont augmentés, ou sont réputés l'avoir été, selon le cas, selon les taux figurant ci-après à l'égard de toute période de douze mois commençant au cours d'un des exercices suivants :
(a) the 2006–2007 fiscal year, 2.5%;	a) l'exercice 2006-2007, un taux de deux et demi pour cent;
(b) the 2007–2008 fiscal year, 2.3%;	b) l'exercice 2007-2008, un taux de deux et trois dixièmes pour cent;
(c) the 2008–2009 fiscal year, 1.5%;	c) l'exercice 2008-2009, un taux de un et demi pour cent;
(d) the 2009–2010 fiscal year, 1.5%; and	d) l'exercice 2009-2010, un taux de un et demi pour cent;
(e) the 2010–2011 fiscal year, 1.5%.	e) l'exercice 2010-2011, un taux de un et demi pour cent.
[…]	. . .
35. (1) The following definitions apply in sections 36 to 54.	35. (1) Les définitions qui suivent s'appliquent aux articles 36 à 54.
"employee" means an employee who is not represented by a bargaining agent or who is excluded from a bargaining unit.	« condition d'emploi » Toute condition d'emploi s'appliquant aux employés.

"terms and conditions of employment" means terms and conditions of employment that apply to employees.

(2) For the purposes of sections 36 to 54, terms and conditions of employment are considered to be established if they are established by an employer acting alone or agreed to by an employer and employees.

[…]

38. With respect to any terms and conditions of employment established before December 8, 2008 that provide for increases to rates of pay

(*a*) section 16 does not apply in respect of any period that began during the 2006–2007 or 2007–2008 fiscal year; and

(*b*) for any 12-month period that begins during any of the 2008–2009, 2009–2010 and 2010–2011 fiscal years, section 16 applies only in respect of periods that begin on or after December 8, 2008 and any provisions of those terms and conditions of employment that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

[…]

43. Subject to sections 51 to 54,

(*a*) no provision of terms and conditions of employment established

« employé » Tout employé non représenté par un agent négociateur ou exclu d'une unité de négociation.

(2) Pour l'application des articles 36 à 54, sont des conditions d'emploi établies celles qui émanent unilatéralement de l'employeur ou celles convenues par celui-ci et les employés.

. . .

38. S'agissant de conditions d'emploi établies avant le 8 décembre 2008, les règles suivantes s'appliquent :

a) l'article 16 ne s'applique pas à l'égard de toute période commençant au cours des exercices 2006-2007 ou 2007-2008;

b) en ce qui concerne toute période de douze mois commençant au cours de l'un ou l'autre des exercices 2008-2009, 2009-2010 et 2010-2011, l'article 16 s'applique uniquement à l'égard de toute période commençant le 8 décembre 2008 ou après cette date, et toute disposition des conditions d'emploi prévoyant, pour une période donnée, une augmentation des taux de salaire supérieure à celle qui est prévue à cet article pour cette période est inopérante ou réputée n'être jamais entrée en vigueur, et est réputée prévoir l'augmentation prévue au même article pour cette période.

. . .

43. Sous réserve des articles 51 à 54 :

a) aucune condition d'emploi établie après la date d'entrée en vigueur de la

after the day on which this Act comes into force may provide for the restructuring of rates of pay during any period that begins during the restraint period;

présente loi ne peut prévoir de restructuration des taux de salaire au cours de toute période commençant au cours de la période de contrôle;

(*b*) any provision of terms and conditions of employment established during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force that provides for the restructuring of rates of pay during any period that begins during the restraint period is of no effect or is deemed never to have had effect, as the case may be; and

b) toute condition d'emploi établie au cours de la période allant du 8 décembre 2008 à la date d'entrée en vigueur de la présente loi et prévoyant une restructuration des taux de salaire au cours de toute période commençant au cours de la période de contrôle est inopérante ou réputée n'être jamais entrée en vigueur;

(*c*) any provision of terms and conditions of employment established before December 8, 2008 that provides for the restructuring of rates of pay during any period that begins during the period that begins on December 8, 2008 and ends on March 31, 2011 is of no effect or is deemed never to have had effect, as the case may be.

c) toute condition d'emploi établie avant le 8 décembre 2008 et prévoyant une restructuration des taux de salaire au cours de toute période commençant au cours de la période allant du 8 décembre 2008 au 31 mars 2011 est inopérante ou réputée n'être jamais entrée en vigueur.

[…]

. . .

46. If any terms and conditions of employment established before December 8, 2008 contain provisions that, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, provide for an increase to the amount or rate of any additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before the first period that began on or after December, 8, 2008, those provisions are of no effect or are deemed never to have had effect, as the case may be.

46. Est inopérante ou réputée n'être jamais entrée en vigueur toute disposition de conditions d'emploi établies avant le 8 décembre 2008 prévoyant, à l'égard de toute période commençant au cours de la période allant du 8 décembre 2008 au 31 mars 2011, une augmentation des montants ou des taux de toute rémunération additionnelle applicable, avant la première période qui commence le 8 décembre 2008 ou après cette date, aux employés régis par ces conditions d'emploi.

[…]

. . .

49. If any terms and conditions of employment established before December 8, 2008 contain, in relation to any employees, a provision that provides, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before the first period that began on or after December 8, 2008, that provision is of no effect or is deemed never to have had effect, as the case may be.	49. Est inopérante ou réputée n'être jamais entrée en vigueur toute disposition de conditions d'emploi établies avant le 8 décembre 2008 prévoyant, à l'égard de toute période commençant au cours de la période allant du 8 décembre 2008 au 31 mars 2011, une rémunération additionnelle qui est nouvelle par rapport à celle applicable, avant la première période qui commence le 8 décembre 2008 ou après cette date, aux employés régis par ces conditions d'emploi.
[…]	. . .
62. Despite sections 44 to 49, the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.	62. Malgré les articles 44 à 49, le Conseil du Trésor peut créer une nouvelle allocation applicable aux membres de la Gendarmerie royale du Canada ou modifier le montant ou le taux d'une allocation qu'ils reçoivent s'il estime qu'une telle mesure est indispensable à la mise en oeuvre de toute initiative de transformation relative à cet organisme.

[46] Section 2(*d*) of the Charter guarantees freedom of association:

2. Everyone has the following fundamental freedoms:	2. Chacun a les libertés fondamentales suivantes :
[…]	. . .
(*d*) freedom of association.	*d*) liberté d'association.

[47] Subsection 24(1) of the Charter provides a remedy to anyone whose rights are infringed:

24. (1) Anyone whose rights or	24. (1) Toute personne, victime de

freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[48] Subsection 52(1) of the *Constitution Act, 1982* provides:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Consideration of the Issues

i. What is the proper scope of this appeal?

[49] As explained above, the parties disagree as to whether the constitutionality of the ERA is in issue on this appeal.

[50] The Attorney General submits that the provisions of the ERA remain in full force and effect because the judgment of the Federal Court granted no relief in respect of its validity. The Attorney General argues that the respondents challenged the Decision and the provisions of the ERA together as if they were one limit and the Judge adopted this approach. The respondents did not seek a remedy under subsection 52(1) of the Charter. Instead, the respondents sought a judgment pursuant to subsection 24(1) of the Charter quashing the Decision. They asserted that as an unconstitutional statute, the ERA had no bearing on the availability of the subsection 24(1) remedy.

[51] The respondents argue in response that the Judge made a clear finding that sections 16, 35, 38, 43, 46 and 49 of the ERA violated section 2(*d*) of the Charter. Relying upon *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 at paragraph 28, the respondents assert that by operation of subsection 52(1) of the Charter the provisions were invalid from the time they were enacted and no formal declaration of invalidity was necessary. The respondents submit that, having quashed the Decision, the only constitutionally valid wage decision for the years 2008 to 2011 is the original decision of June 26, 2008. No further order or remedy was required to effect this result.

[52] The two paragraphs of the Judge's reasons that give rise to this dispute are paragraphs 148 and 150:

> 148. In my opinion, the Treasury Board's decision of December 11, 2008, together with sections 16, 35, 38, 43, 46 and 49 of the *ERA*, violates subsection 2(d) of the *Charter*. That breach is not saved by section 1.
>
> […]
>
> 150. The Applicants do not seek a remedy with respect to any provisions of the *ERA*. Accordingly, I decline to order a remedy in that regard. Further, the Treasury Board's decision does not constitute a breach of contract and no claim for damages arises.

[53] To resolve this dispute I begin by noting, as the Judge did at paragraph 82 of her reasons, that the Decision was the forerunner to the enactment of the ERA. The ERA gave statutory effect to the content of the Decision.

[54] More precisely, on November 27, 2008, the Minister of Finance delivered his Statement which proposed measures to reinforce the stability of the financial system and support the economy.

For example, included in the Statement were measures to buttress the financial system, to provide temporary relief to seniors with Registered Retirement Income Funds, to enhance credit availability for Canadian businesses and to constrain the sharp projected rise in the costs of the federal equalization program. With respect to public sector compensation, the Statement provided:

> Appropriate Public Sector Compensation
>
> Responsible fiscal management also means that public sector wage increases must be affordable. Since the beginning of the year, wage growth in the public sector has been leading that of the private sector. The Government believes that more moderate growth in public sector compensation is appropriate in the current circumstances. Recognizing these circumstances, some of the largest public sector bargaining agents have shown leadership by signing tentative settlements that provide reasonable wage increases for their members and are affordable for the Government.
>
> As indicated in the Speech from the Throne, the Government is introducing legislation to ensure predictability of federal public sector compensation during this difficult economic period.
>
> The legislation puts in place annual wage increases for the federal public administration, including senior members of the public service, as well as Members of Parliament, Cabinet Ministers, and Senators, of 2.3 per cent in 2007-08 and 1.5 per cent for the following three years, for groups in the process of bargaining for new agreements. For groups with collective agreements already covering 2008-09, the 1.5 per cent would apply for the remainder of the three-year period starting at the anniversary date of the collective agreement. In addition, the legislation would suspend the right to strike on wages through 2010-11.

[55] Shortly after the Statement was delivered, Parliament was prorogued so that legislation to implement the measures detailed in the Statement, including the limit on public sector compensation, was not tabled in the House of Commons until the January 2009 budget was tabled.

[56] The ERA, when enacted, prescribed the same limit on RCMP compensation as the Decision. In this circumstance, the Decision can be characterized to be an interim, facilitative measure that

prevented the payment of pay increases to RCMP members on January 1, 2009 which would be inconsistent with the anticipated expenditure restraint legislation.

[57] Because the Decision and the ERA effected the same result, in order for the respondents to reclaim the June 2008 increases, they must impugn the validity of the ERA (as well as quash the Decision). It follows from this that the constitutionality of the impugned provisions of the ERA as they effect the respondents was in issue in the Federal Court and in this appeal. Once the respondents amended their notice of application to put in issue the ERA, it was necessary for the Federal Court to consider whether the provisions of the ERA which reduced previously announced wage increases to be paid to members in 2009 and 2010, and capped any wage increase for 2011, violate the respondents' right of association guaranteed by section 2(*d*) of the Charter.

[58] This conclusion is consistent with the terms of the Attorney General's notice of appeal which describes the appeal to be from the judgment of the Federal Court which "determined that the Treasury Board decision of December 11, 2008 limiting pay increases for members of the RCMP, together with sections 16, 35, 38, 43, 46 and 49 of the *Expenditure Restraint Act*, violates section 2(d) of the *Canadian Charter of Rights and Freedoms*". Among the grounds of appeal set out by the Attorney General are that the Judge erred by:

> (b) incorrectly reviewing the constitutionality of the Treasury Board decision and the *Expenditure Restraint Act* together rather than conducting separate contextual analyses, and,
>
> (c) failing to conduct a thorough constitutional analysis of the *Expenditure Restraint Act* having proper regard for the scope, application and objectives of the *Act* as a whole.

[59] The Attorney General expressly put in issue on this appeal whether the ERA violated the respondents' right of association, and made submissions on the issue. It follows the effect of the ERA on the respondents is validly in issue on this appeal.

ii. What is the applicable standard of review to be applied to the decision under appeal?

[60] The standard of review to be applied to the Judge's conclusions of law is correctness. Her findings of fact and mixed fact and law are reviewable on the standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

iii. Did the Judge err by reviewing the constitutionality of the Decision and the ERA together, rather than conducting separate contextual analyses?

[61] Section 2(*d*) of the Charter protects the rights of employees to associate for the purpose of advancing workplace goals. A government can infringe that guaranteed right of association by enacting legislation which does not conform to section 2(*d*). As well, a government can also infringe section 2(*d*) through its actions as employer. In the present case, the respondents assert that the federal government violated section 2(*d*) both by enacting noncompliant legislation, the ERA, and by rendering the Decision *qua* employer.

[62] The Judge framed the first issue to be decided in the following terms "Did the decision of the Treasury Board […] to reduce the scheduled wage increases for RCMP Members, together with the impugned provisions of the *ERA*, violate subsection 2(d) of the *Charter*?" As noted above, at no point in her analysis did she consider separately and contextually the impugned action of the government *qua* employer and the impugned action of the government in the form of the enactment of the ERA.

[63] As will be developed in more detail below, when considering whether section 2(*d*) has been violated, "[t]he inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted." (*B.C. Health Services*, at paragraph 92).

[64] In light of the contextual analysis mandated by the Supreme Court in *B.C. Health Services* it was, in my respectful view, an error of law for the Judge to conflate the Decision and the ERA as if they were a single limit on the respondents' freedom of association. Each required a separate contextual analysis.

[65] This view is reinforced when one considers that different remedies are provided for unconstitutional government action and legislation. Section 52 of the *Constitution Act, 1982* requires that any law that is inconsistent with the Charter be struck down, but only to the extent of the inconsistency. Depending upon the circumstances, legislation may be struck down, or be read down, or material may be read in to the provision. Any such remedy must be carefully crafted. As well, section 24 of the Charter allows courts to grant appropriate and just remedies to anyone whose Charter rights have been infringed or denied (*Schacter v. Canada*, [1992] 2 S.C.R. 679, 139 N.R. 1, at paragraph 25). Therefore, the range of remedies available also points to the need for a separate analysis of the constitutionality of the Decision and the ERA.

[66] To illustrate the difficulty caused by conflating the Decision and the ERA, in the present case the Judge conducted no contextual analysis of the provisions of the ERA that she concluded

violated section 2(*d*) of the Charter. So, for example, it is not apparent why all of section 16 of the ERA was found to offend section 2(*d*) when only three of its five subsections were applicable to the facts of this case. Nor is it clear how the definitions set out in subsection 35(1) of the ERA offend section 2(*d*) of the Charter. As legislation is to be struck down only to the extent it is inconsistent with the Charter, a contextual analysis of impugned provisions was required.

[67] As a result, it is necessary to consider afresh whether the Decision or the ERA violated the rights guaranteed to the respondents by section 2(*d*) of the Charter. Before doing so it is relevant to again note the relationship between the Decision and the ERA.

iv. What was the relationship between the Decision and the ERA?

[68] The ERA gave statutory effect to the content of the Decision. In consequence, in oral argument counsel for the parties agreed that a finding that the impugned provisions of the ERA are valid would render the question of the validity of the Decision moot.

[69] I propose, therefore, to begin with consideration of the constitutional validity of the impugned provisions of the ERA as they affect the respondents.

v. Did the ERA violate the respondents' right of association guaranteed by section 2(*d*) of the Charter?

(a) Applicable legal principles

[70] The proper scope and application of section 2(*d*) of the Charter were considered by the Supreme Court in *B.C. Health Services*, and more recently in *Fraser*. I begin the analysis by reviewing the principles articulated by the Supreme Court in *B.C. Health Services* and *Fraser*.

B.C. Health Services

[71] At issue in *B.C. Health Services* was the validity of legislation which applied to relations between healthcare sector employers and unions accredited to those employers. The legislation invalidated important provisions of then existing collective agreements and precluded meaningful collective bargaining in future on a number of specific issues. The majority of the Supreme Court found certain provisions of the legislation to be invalid on the basis that they infringed section 2(*d*) of the Charter.

[72] Important principles articulated by the majority included the following:

i. Section 2(*d*) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. If a government substantially interferes with that right, section 2(*d*) of the Charter is violated (reasons, paragraph 19).

ii. Section 2(*d*) does not guarantee the particular objectives sought through associational activity. It guarantees the process. Government employers are under a duty to meet and discuss issues with unions. As well, section 2(*d*) constrains the exercise of legislative powers in respect of the right to bargain collectively (reasons, paragraph 89).

iii. Section 2(*d*) protects only against "substantial interference" with associational activities. It is sufficient if the effect of the state law or action discourages the collective pursuit of common goals. Government must not substantially interfere with the ability of a union to exert meaningful influence over working conditions

through a process of collective bargaining conducted in accordance with the duty to bargain in good faith (reasons, paragraph 90).

iv. The right to collective bargaining is, however, a limited right. Because the protected right is a right to process, there is no guarantee of any certain substantive or economic outcome. The right is to a general process of collective representation, not to a particular model of labour relations. Finally, the right is limited in that the interference must be so substantial that it interferes with the very process that allows union members to pursue their objectives through meaningful negotiations with the employer (reasons, paragraph 91).

v. Acts of bad faith or unilateral nullification of negotiated terms without any process of meaningful discussion and consultation may significantly undermine the process of collective bargaining. In every case the inquiry is contextual and fact-specific (reasons, paragraph 92).

vi. Generally, two inquiries are made to determine if the government measure at issue amounts to substantial interference. The first inquiry is into the importance of the matter affected to the process of collective bargaining, more specifically to the capacity of union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation (reasons, paragraph 93).

vii. If the matters affected do not substantially impact on the process of collective bargaining, a government measure will not violate section 2(*d*) (reasons, paragraph 94).

viii. With respect to the first inquiry, laws that unilaterally nullify significant negotiated terms in a collective agreement may substantially interfere with the activity of collective bargaining (reasons, paragraph 96).

ix. With respect to the second inquiry, the essential question is whether the legislative measure or government conduct respects the duty to consult and negotiate in good faith (reasons, paragraph 97).

x. When considering whether legislation impinges on the collective right to good faith negotiations and consultation, regard must be had to the circumstances surrounding its adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith (reasons, paragraph 107).

Fraser

[73] At issue in *Fraser* was whether legislation creating a separate labour relations regime for the farming sector respected the section 2(*d*) guarantee of freedom of association. The farm workers sought more robust legislation to protect their associational activity. The majority of the Supreme Court concluded that, properly interpreted, the impugned legislation did not infringe the workers freedom of association.

[74] The majority articulated the following principles:

i. The decision in *B.C. Health Services* reflected application of the principles articulated previously in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. *Dunmore* established that claimants must demonstrate "the substantial impossibility of exercising their freedom of association" (reasons, paragraph 34).

ii. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association by making it pointless. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals (reasons, paragraph 46).

iii. No particular process or result is protected. Associational activity is protected. What must be shown is that, as a result of substantial interference by a law or by government action, it is impossible to meaningfully exercise the right to associate (reasons, paragraph 47).

iv. Properly understood, *B.C. Health Services* did not decide that a breach of a collective agreement violates section 2(*d*). The majority in *B.C. Health Services* found that the section 2(*d*) right to associate had been undermined by "the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining" (reasons, paragraph 76).

v. The essential question to be answered was whether the impugned legislation made meaningful association to achieve workplace goals effectively impossible (reasons, paragraph 98).

(b) Important contextual factors

[75] As noted above in *B.C. Health Services*, the Supreme Court stressed the need for a contextual approach to any analysis of the content of the right of association. I therefore turn to what are, in my view, the most important contextual factors: the nature of the associational activity enjoyed by members of the RCMP, the purpose of the ERA and its effect upon members of the RCMP.

The nature of RCMP members' associational activity

[76] In *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, 244 N.R. 33, the Supreme Court considered whether the exclusion of members of the RCMP from what is now the *Public Service Labour Relations Act* violated section 2(*d*) of the Charter. The majority concluded that it did not, on the basis that section 2(*d*) did not confer a right to participate in any specific statutory scheme and members of the RCMP were entitled to establish, and had established, independent employee associations. Section 2(*d*) would operate to prevent RCMP management from interference with the establishment of such associations.

[77] More recently, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2012 ONCA 363, 111 O.R. (3d) 268 (leave to appeal allowed, [2012] S.C.C.A No. 350) the Ontario

Court of Appeal was asked to consider whether the right to collective bargaining guaranteed by section 2(*d*):

i) guaranteed members of the RCMP the right to be represented in their relationship with their employer by an association of their own choosing; and

ii) required the vehicle for dealing with members' collective concerns to be structurally independent of management.

[78] The Ontario Court of Appeal concluded that under the current scheme it was not effectively impossible for RCMP members to meaningfully exercise their right of association guaranteed under section 2(*d*) of the Charter because:

i) RCMP members are able to form voluntary associations;

ii) there is extensive collaboration between the Staff Relations Representatives and RCMP management with respect to collective goals; and

iii) an entity known as the Legal Fund assists members with employment related issues.

[79] The Ontario Court of Appeal concluded its analysis as follows:

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

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

[80] The respondents did not put in issue in their application for judicial review in the Federal Court the constitutionality of the SRRP. Nor is it in issue on this appeal.

[81] In order to appreciate the effect of the ERA upon the respondents and other members of the RCMP it is necessary to review the salient features of the current RCMP labour relations scheme:

i) The SRRP was established to represent the interests of members of the RCMP. Staff Relations Representatives make submissions to the Commissioner with respect to pay and benefits through the Pay Council.

ii) The Pay Council operates on the basis of consensus and collaboration. The members of the Pay Council work to develop an appropriate compensation package which is submitted as a recommendation to the Commissioner.

iii) The Commissioner possesses the discretion to accept or reject the recommendation of the Pay Council in whole or in part.

iv) If the Commissioner supports the recommendation he passes it on to the Minister responsible for the RCMP.

v) That Minister then makes a formal submission to the Treasury Board.

vi) The Treasury Board then decides whether and how to revise the pay and benefits of members of the RCMP.

[82] Flowing from these facts are the following conclusions:

i) Staff Relations Representatives play a consensual and collaborative role in the deliberations of the Pay Council.

ii) The Pay Council is only indirectly engaged in the determination of RCMP salaries and benefits. It makes non-binding recommendations to the Commissioner. It does not negotiate with the Commissioner.

iii) There is no direct consultation or negotiation between the Pay Council and the decision-maker, which is the Treasury Board. The Treasury Board is not obliged to consult with the Pay Council (or the Staff Relations Representatives) if it disagrees with the Pay Council's recommendation.

iv) There is no collective or other agreement between the employer and any entity representing the members. There is no agreement of any kind regarding the terms and conditions of employment of members, or the maintenance of any previously approved terms and conditions.

The purpose of the ERA and its effect upon RCMP members

[83] As to the purpose of the ERA, this legislation must be seen in the context of the economic situation which prevailed during the period of time leading to its enactment. The Attorney General put forward the affidavit of Paul Rochon, the Senior Assistant Deputy Minister, Economic and Fiscal Policy Branch, in the Department of Finance. He was not cross-examined on his affidavit.

[84] Mr. Rochon described the financial crisis, unprecedented in scope and severity, that began in August 2007 and peaked in late 2008 and early 2009. Prominent aspects of his evidence are as follows:

i) The global financial crisis originated in the collapse of the United States' housing market in the summer of 2007.

ii) In September and October 2008, the crisis escalated significantly, triggered by the failure and near-failure of major financial institutions in the United States and Europe.

iii) By October 2008, the rapid deterioration of the economic situation, both in the United States and globally, was beginning to have serious implications for the Canadian economy.

iv) In November 2008, the International Monetary Fund (IMF) issued a report which advised that the financial crisis remained virulent, and that the economic outlook was exceptionally uncertain.

v) On November 27, 2008, the Minister of Finance delivered the Statement which projected budget deficits in the 2009-2010, 2010-2011 and 2011-2012 financial years. These were the first projected budget deficits in 12 years. The Statement proposed measures to reinforce the stability of the financial system and support the economy in the face of the deterring economic situation and heightened risks.

vi) Statistics Canada reported that employment in Canada started to decline abruptly in November 2008, when a decline of 70,600 jobs was registered.

vii) The Treasury Board Secretariat recommended a limit on public service wage increases. In addition to moderating wage growth, such limits would ensure predictability by fixing the Government's compensation cost estimates. This predictability was considered by the Government to be crucial to the credibility of the overall economic and fiscal response plan under development.

viii) The Government accepted the recommendation made by the Treasury Board Secretariat. Therefore, it instructed that wage increases currently being bargained collectively be negotiated within the proposed wage increase limits. It also instructed that legislation be prepared which would apply when wage increases within the proposed limits were not achieved through collective agreement.

ix) The proposed legislation, the ERA, would prescribe maximum wage increases for the federal public administration as well as Members of Parliament, Cabinet Ministers and Senators.

x) The policy objectives of the ERA were threefold:

a. to help reduce undue upward pressure on private sector wages and salaries;
b. to provide leadership by showing restraint and respect for public money; and
c. to manage public sector wage costs in a manner that would help ensure the ongoing soundness of the Government's fiscal position.

xi) Shortly after delivery of the Statement, Parliament was prorogued. As a consequence, legislation to implement the measures proposed in the Statement was not tabled in the House of Commons.

xii) Global economic conditions continued to deteriorate. In January 2009, the IMF released another update to its global outlook which projected that the world economy would grow by only .5%. The IMF reported that "despite wide-ranging policy actions, financial strains remain acute, pulling down the real economy" as a "pernicious feedback loop between the real and financial sectors is taking its toll."

xiii) The repeated downgrading of growth forecasts for 2009 was unprecedented and reflected the scope and severity of the continuing global economic crisis.

xiv) The decline in employment in Canada that began in November 2008 continued through 2009. By January 2010, employment had declined by 264,000 jobs.

xv) The Budget of January 27, 2009, introduced $40 billion in federal stimulus measures to be delivered over two years, aimed at supporting the economy and maintaining and creating jobs.

xvi) The January 2009 Budget also reintroduced most of the restraint measures proposed in the November 2008 Statement, including the ERA.

xvii) All of these measures were enacted simultaneously through the *Budget Implementation Act, 2009*.

xviii) The Government viewed it to be significant that both the stimulus and spending measures were enacted together. In its view, "it was necessary to act boldly with the stimulus package and also to ensure that the Government's fiscal position was sustainable coming out of the crisis. It was to help achieve this latter goal that it was important to enact the ERA and the other spending measures".

xix) The public sector wage bill is a major federal expenditure, representing about one-third of the Government's direct program expenses.

[85] The respondents have not argued that the purpose of the ERA was to prevent or interfere with associational activity. In light of Mr. Rochon's evidence such a submission could not, in my view, be sustained. The ERA was part of a series of measures designed to stabilize the economy and maintain and create jobs. This was a valid purpose. As the purpose of the ERA was valid, the remaining question to be answered is whether its effect was to interfere substantially with the right of RCMP members to pursue their associational activities. This question is to be answered by application to the evidence of the legal principles articulated by the Supreme Court, summarized above.

(c) Application of legal principles

[86] I begin by observing that legislation that significantly interferes with, or nullifies, existing collectively bargained terms of employment will not necessarily violate section 2(*d*): *B.C. Health Services* at paragraphs 92 and 96. As explained by the majority in *Fraser* at paragraph 76, the majority of the Court in *B.C. Health Services* did not find that a breach of a term of a collective agreement *per se* violated section 2(*d*) of the Charter. Rather, it was the unilateral nullification of significant contractual terms, coupled with the effective denial of future collective bargaining, which violated the section 2(*d*) right to associate.

[87] It follows from this that, in order to demonstrate a breach of their section 2(*d*) right of association, it is insufficient for the respondents to simply establish the nullification of previously announced pay increases. The respondents are required to prove that the ERA rendered it substantially impossible for RCMP members to exercise their freedom of association.

[88] On the facts of this case, the following legal principles are, in my view, the controlling principles:

i. Section 2(*d*) does not guarantee any particular objective, result or process. It guarantees a process through which collective goals are pursued (*B.C. Health Services* at paragraph 89, *Fraser* at paragraph 47).

ii. The right to bargain collectively is a limited right because there is no guarantee of any particular economic outcome or any particular process. The right is further limited in the sense that the interference must be so substantial that it interferes with

the very process that allows employees to pursue their associational objectives (*B.C. Health Services* at paragraph 91).

iii. The first inquiry to be made is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of employees to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation. (*B.C. Health Services* at paragraph 93).

iv. With respect to the first inquiry, "[i]f the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation." (*B.C. Health Services* at paragraph 94).

[89] To turn, then, to the effect of the ERA on the process through which members of the RCMP pursue their associational activity, for ease of reference I repeat the conclusions concerning the current RCMP labour relations scheme set out above at paragraph 82:

i) Staff Relations Representatives play a consensual and collaborative role in the deliberations of the Pay Council.

ii) The Pay Council is only indirectly engaged in the determination of RCMP salaries and benefits. It makes non-binding recommendations to the Commissioner. It does not negotiate with the Commissioner.

iii) There is no direct consultation or negotiation between the Pay Council and the decision-maker, which is the Treasury Board. The Treasury Board is not obliged to consult with the Pay Council (or the Staff Relations Representatives) if it disagrees with the Pay Council's recommendation.

iv) There is no collective or other agreement between the employer and any entity representing the members. There is no agreement of any kind regarding the terms and conditions of employment of members, or the maintenance of any previously approved terms and conditions.

[90] In my view, these facts render this case distinguishable from the facts before the Supreme Court in *B.C. Health Services*. I conclude that the ERA did not substantially interfere with the process by which members of the RCMP pursue their associational activity because the ERA did not make it impossible for members of the RCMP to act collectively to achieve workplace goals. I reach this conclusion for the following reasons.

[91] First, assuming that the ERA impacts on a matter important to the process of associational activity, the ERA did not substantially interfere with the process followed by RCMP members to exercise their right to associational activity. Put another way, the ERA did not make it impossible for members to act collectively. The effect of the ERA was not so substantial that it undermined the very process by which associational activity was pursued. This is because members, through their Staff Relations Representatives, did not bargain directly with their employer. Staff Relations Representatives played a consensual and collaborative role in the deliberations of the Pay Council, a body that, in turn, made non-binding recommendations to the Commissioner of the RCMP. The

Treasury Board, the ultimate decision-maker, was not obliged to consult with either the Pay Council or the Staff Relations Representatives if it disagreed with the non-binding recommendation. The ERA did not undo the terms of a collective bargaining agreement nor did it reverse terms negotiated directly with, and agreed to by, the employer. Rather, the ERA modified terms and conditions which the Treasury Board was authorized to set.

[92] Second, conduct immediately prior to and following the enactment of ERA shows that the associational process continued to function. The ERA did not make the process pointless. This is so because the Pay Council was able to exert meaningful influence over working conditions in the following way.

[93] On March 4, 2009, the Commissioner of the RCMP issued a mandate letter to the Chair of the Pay Council. This letter referred to section 62 of what became the ERA, which was then before Parliament as part of the *Budget Implementation Act, 2009*. Section 62 permitted the Treasury Board to alter allowances to RCMP members, or add new allowances, if of the view that the change or new allowance was "critical to support transformation initiatives relating to the Royal Canadian Mounted Police". The mandate letter asked the Pay Council "to consider how increasing existing allowances or establishing new ones might help address priority issues and advance our Transformation Initiative."

[94] The Pay Council then presented recommendations to the Commissioner under cover of an undated letter addressed to the responsible Minister. The letter advised:

> Enclosed is our package of potential changes to the RCMP compensation and policies which we believe will mitigate the impact of the government's decision to limit the RCMP salary increases to 1.5% in 2009 and 2010.
>
> The list is divided into monetary and non-monetary proposals, with the value of all monetary items presented. The items are listed in terms of our members' priorities.
>
> In their entirety, these proposals represent a way of balancing the needs of government's economic restraint policy with the maintenance of fair RCMP remuneration to ensure sufficient attraction and retention of high quality public safety employees.

[95] On June 9, 2009, the Treasury Board approved the two changes to RCMP allowances described at paragraph 33 above.

[96] Third, a key distinguishing feature is that there was no prohibition on future associational activity on the scale considered in *B.C. Health Services*.

[97] The original, June 26, 2008, decision of the Treasury Board dealt with pay increases for the calendar years 2008 to 2010. The only post-2010 effect of the ERA was to limit wage increases to 1.5% for the 2010-2011 fiscal year (i.e. the period from January 1, 2011 to March 31, 2011). In my view, the three-month limit on one aspect of the terms and conditions of employment of RCMP members did not make it substantially impossible for members of the RCMP to exercise their freedom of association in the future.

[98] Fourth, and finally, Parliament was not required to consult with the Pay Council or others before enacting the ERA (*B.C. Health Services*, paragraph 157).

[99] In the result, I conclude the ERA did not violate the respondents' right of association protected by section 2(*d*) of the Charter.

[100] As conceded by the parties, this renders the question of the validity of the Decision moot, and I can see no reasons to exercise the discretion to consider an issue which is moot.

vi. Section 1 of the Charter

[101] As I have found that the ERA did not violate the respondents' right to freedom of association it is not necessary to consider this issue.

Conclusion

[102] For these reasons, I would allow the appeal and set aside the judgment of the Federal Court. Giving the judgment the Federal Court should have pronounced, I would dismiss the application for judicial review.

[103] In my view there is no reason to depart from the principle that costs follow the event. The appellant asks both in the notice of appeal and in the memorandum of fact and law that the appeal be "allowed with costs". I would therefore award the costs of the appeal in this Court to the appellant.

"Eleanor R. Dawson"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-268-11
STYLE OF CAUSE:	AGC v. Robert Meredith et al.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 28, 2012
REASONS FOR JUDGMENT BY:	Dawson J.A.
CONCURRED IN BY:	Nadon J.A. Trudel J.A.
DATED:	April 26, 2013

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