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MEMORANDUM OF ARGUMENT OF THE APPLICANTS

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. At issue in this case is whether s.96(1) of the *RCMP Regulation*[1] (the "*Regulation*"), a government and employer imposed process of internal communication for RCMP employees which prevents them from engaging in collective bargaining through their own independent employee-formed association, infringes the freedom of association guarantee under s. 2(d) of the *Charter of Rights and Freedoms* (the "*Charter*"). The Ontario Court of Appeal examined whether freedom of association "guarantees workers the right to be represented in their relationship with their employer by an association of their own choosing", through a "vehicle . . . structurally independent of management"[2], and concluded that it does not. Reversing the lower court's ruling, the Court decided that workplace freedom of association does not provide employees with the right to engage in a process of collective bargaining, or the right to choose an independent association for the purpose of pursuing workplace goals.

2. The constitutionality of the *Regulation* is a matter of public importance not only because it prevents approximately 20,000 members of the RCMP from engaging in collective bargaining through an independent association of their choosing, but also because the Court of Appeal's reasons seriously restrict the scope of freedom of association in a manner contrary to *Charter* principles, and undermine democracy and choice in the workplace for all Canadians.

3. The scope of the *Charter* freedom of association is placed squarely at issue in the proposed appeal. According to the Court of Appeal, the right of workers to engage in a process of collective bargaining is a derivative right, meaning one which has to be demonstrated to be necessary on a case by case basis, and will not be needed if the workers have other means of communicating with the employer, even if that process of communication is imposed upon them and precludes them from being represented by an independent association. This determination is

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[1] *Royal Canadian Mounted Police Regulations*, 1988 (SOR/88-361), s.96(1)
[2] Reasons for Decision of Ontario the Court of Appeal, June 1, 2012, ("Appeal Reasons") para 2, Application Record ("AR"), Tab 19

contrary to fundamental principles of freedom of association articulated by this Court, and critically misreads what was meant by this Court in describing collective bargaining as a derivative right. By imposing a test which acts as a gate-keeper to the right to engage in a process of collective bargaining as part of the freedom of association, the decision has created ambiguity about the scope of this fundamental right.

4. The Court of Appeal's holding that employees do not have a right to choose an employee association independent of management to represent their interests runs contrary to the core values of freedom of association, the democratic principles underlying the *Charter*, and the premise that freedom of association in the labour context is intended to reduce inequalities between the employer and employees.

5. The Applicants seek leave to appeal this decision in order to argue that a process of collective bargaining is part of the fundamental freedom of association, and cannot be abrogated in favour of an employer's process of internal communication. Employees have the right to form and maintain their own employee association, independent of their employer, and to engage in a process of collective bargaining through that independent association. By imposing an internal process of communication through the *Regulation*, the government has prevented RCMP members from exercising their s. 2(d) *Charter* rights.

B. The Applicants

6. The Applicants are independent, member-formed, non-profit employee organizations which advocate for the right of members of the RCMP to engage in a process of collective bargaining through an independent, member-selected association.[3] The Applicants sought a declaration that the program of internal communication imposed by the *Regulation* infringes freedom of association, as it constitutes a legislative impediment that, in purpose and effect, prevents collective bargaining through an independent association. The Applicants succeeded in the Superior court, but that decision was overturned on appeal.

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[3] Reasons for Decision of Justice MacDonnell dated April 6, 2009, ("MacDonnell Reasons"), para 2, AR Tab 6

7. The Applicants are not recognized by RCMP management, and never have been. RCMP management has steadfastly maintained that employee relations will be conducted exclusively through the internal Staff Relations Representation Program[4] ("SRRP") imposed under the *Regulation*, which was created in response to labour unrest, and for the purpose of avoiding unionization and collective bargaining[5].

C. A History of Anti-Unionism in the RCMP and the Imposition of the SRRP

8. Canada has consistently sought to ensure the non-union status of the RCMP beginning from the 1918 Order-in-Council promising "instant dismissal" for any RCMP member associating with a union, to legislation adopted in 1945 which prohibited RCMP members from membership within a union, to the modern day approach of explicit exclusion from the federal employees' labour relations legislative regime and imposition of the SRRP.[6] Imposed in the early 1970's, one of the SRRP's primary functions has been to maintain the non-union status of the Force. RCMP employees working as Staff Relations Representatives ("SRRs") within the SRRP have been expressly prohibited from engaging in activities that "promote alternate programs in conflict with the non-union status" of the SRRP,[7] and the Applicants' leaders have been barred from acting as SRRs.[8]

9. The legal foundation for the SRRP is the *Regulation*, which states simply: "The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters." The SRRP is a department within the RCMP. It is an employer-funded, non-adversarial, program of communication for certain labour-related issues in which the SRRs provide advice and guidance to members.[9] The Regulatory Impact Statement accompanying the publication of the *Regulation* states:

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[4] Affidavit of Dan Petre, sworn August 29, 2005 ("Petre Affidavit"), Exhibit "H" email, AR Tab 23
[5] Affidavit of Michael Lynk, sworn April 24, 2008 ("Lynk Affidavit"), para 73, AR Tab 27; MacDonnell Reasons, paras 23-24, AR Tab 6
[6] MacDonnell Reasons, paras 20-22, AR Tab 6
[7] Lynk Affidavit, paras 76-77, AR Tab 27
[8] Affidavit of Royce Mills, sworn February 2, 2007, paras 3-11, AR Tab 26
[9] Lynk Affidavit, paras 120-121, AR Tab 27; MacDonnell Reasons, para 16, AR Tab 6

> *This program is co-ordinated and monitored at R.C.M.P. Headquarters. It is also subject to biannual reviews at R.C.M.P. Divisions with reports to the Commissioner from the Internal Communications Officer.*[10]

10. The SRRP is readily distinguishable from any known labour relations model of independent representation and collective bargaining. It is not institutionally independent, but rather part of the Force. The SRRs require the permission of the Commissioner to review the SRRP.[11] The SRRP cannot retain external counsel; as part of the RCMP it is represented by the Department of Justice.[12] The SRRP lacks financial independence, getting the funding the Force decides to provide.[13] The SRRs themselves are not independent of the Force but rather paid employees, who have their performance assessments done by the commanding officers of the divisions in which they serve as SRRs,[14] and who "have become part of the chain of command of the RCMP organization" and "cannot be expected to be credible with employees when they sit at the management table".[15] Moreover, SRRs may choose not to assist members, and cannot be compelled to act unless ordered by a commanding officer. In the words of the government's SRR witness, "[W]e all fall under management of the RCMP. We're employees. We are paid by the, by the RCMP to do a job and our job at this particular time in life is to be a Divisional Rep."[16]

11. The government's own evidence notes that the SRRP's process is limited: "The members of the RCMP have no right to bargain at all, much less collectively. They receive what the Board giveth and soldier on.[17]" Further, "Members of the RCMP are, therefore, vulnerable and completely dependent upon the fairness of the employer in setting terms and conditions of employment."[18]

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[10] MacDonnell Reasons, para 25, AR Tab 6
[11] Lynk Affidavit, para 78, AR Tab 27
[12] Cross examination transcript of Ken Legge taken May 15, 2008 on his affidavit sworn January 25, 2007 ("Legge Transcript"), pp. 45-46, qq. 126-127, AR Tab 28
[13] Lynk Affidavit, para 84, AR Tab 27
[14] Affidavit of Calvin Lawrence, sworn April 7, 2005, para 40, AR Tab 22 , Lynk Affidavit, paras 119-123, AR Tab 27
[15] MacDonnell Reasons, paras 62, 72, AR Tab 6
[16] Legge Transcript, pp. 31, q 72; pp 67, qq 193, AR Tab 28
[17] Affidavit of Fred Drummie sworn January 25, 2007 ("Drummie Affidavit"), Exhibit "H", *2005 Pay Council Report p.4*, AR Tab 25
[18] Drummie Affidavit, Exhibit "H", *2005 Pay Council Report p.25*, AR Tab 25

12. And yet, the SRRP is the only labour relations process recognized and permitted by management.[19] In refusing to permit the Applicants to disseminate their information in the workplace, the RCMP tells its members:

> *The issue here is not censorship of information. It is all about soliciting you as Members to join an Association that has no ability to represent you. The Force, for over 30 years, has recognized only one labor* (sic) *relations model, your SRR Program.*[20]

13. RCMP members are in a bind. As one member put it, "Using the SRR Program, RCMP management has been able to channel member concerns into a system which is largely ineffective", however, "you cannot fight the exclusivity of the SRR Program from within it, and yet there is no platform of recognition to fight from outside it".[21]

14. Collective bargaining is the norm for police services in Canada and abroad. There are now approximately 254 unionized police forces in Canada.[22] The RCMP is the exception. And yet, *the RCMP has never asked members whether they want an independent association or collective bargaining*[23]. It has simply been prohibited.

15. The SRRP is unique. The government's witness, Professor Chaykowski was *unable to provide any other example where an "association" represented employees but was not independent of management.*[24] Although Professor Chaykowski pointed to "work councils" as a labour relations tool used in European countries, he acknowledged that work councils exist alongside unions, not in place of them[25].

D. The Decision of the Ontario Superior Court on the Application

16. On the hearing of the application, Justice MacDonnell found that the *Regulation* violated s.2(d) of the *Charter* because it substantially interfered with the freedom of members of the

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[19] Lynk Affidavit, para 80, AR Tab 27; MacDonnell Reasons, para 29, AR Tab 6
[20] Petre Affidavit, para 21, AR Tab 24
[21] Petre Affidavit, para 25, AR Tab 24
[22] Lynk Affidavit, paras 44-45, AR Tab 27
[23] MacDonnell Reasons, para 64, AR Tab 6
[24] Cross examination transcript of Richard Chaykowski taken May 15, 2008 on his affidavit sworn February 1, 2007 ("Chaykowski Transcript"), pp 28-31, qq 93-101, AR Tab 29
[25] Chaykowski Transcript, p. 132, qq. 426-428, and p.130, q. 422, AR Tab 29

RCMP to engage in a process of collective bargaining and to do so through their own independent association. He rejected the argument that the SRRP was a constitutionally adequate form of collective bargaining on the grounds that the SRRP is not an independent association formed or chosen by the members, and because the interaction between the SRRP and management cannot reasonably be described as a process of collective bargaining.[26]

17. On the issue of the right of employees to choose an independent association, Justice MacDonnell stated:

> *If the submission of the respondent is that a collective bargaining process in which employees are not permitted to be represented by an association of their own choosing is constitutionally acceptable, I reject it. The Supreme Court of Canada was clear in* Health Services & Support-Facilities Subsector Bargaining Assn. *that what is protected under ss. 2(d) is "the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues." The majority stated that "[this] means that employees have the right to unite, to present demands to... employers collectively and to engage in discussions in an attempt to achieve workplace-related goals." The majority also referred to Justice Bastarache's observation, in* Dunmore, *that "the law must recognize that certain union activities [such as] making collective representations to an employer... may be central to freedom of association even though they are inconceivable on the individual level". In my view, those passages make it clear that the right to form a labour association and the right to a process of collective bargaining are not disconnected rights, and that the latter right is an emanation of the former.*[27]

18. Justice MacDonnell held that the SRRP was not an "independent association"[28], and went on to note that while changes have been made to the SRRP over time, they "cannot realistically be considered to have transformed the SRRP from a program created by management to avoid unionization into an independent association constituted for the purpose of collective bargaining". [29]

19. Observing that RCMP members had never been given the opportunity to choose whether to conduct labour relations through the SRRP, Justice MacDonnell noted:

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[26] MacDonnell Reasons, paras 7, 60, AR Tab 6
[27] MacDonnell Reasons, para 57, AR Tab 6
[28] MacDonnell Reasons, paras 61-62, AR Tab 6
[29] MacDonnell Reasons, para 63, AR Tab 6

> *Agreeing to populate a structure created by management for labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making.*[30]

20. Justice MacDonnell found that the SRRP did not provide a process of collective bargaining, and concluded that the SRRP not only substantially interfered with the process of collective bargaining, but that it completely precluded it.[31] The *Regulation* could not be saved under s.1 of the *Charter*, and was declared unconstitutional.

E. The Decision of the Court of Appeal

21. The Court of Appeal reversed Justice MacDonnell's decision on the basis that the Applicants and their members did not have a right to engage in a process of collective bargaining. That Court held that *"a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals"*[32].

22. The Court's decision to impose a necessity test is based upon its interpretation of a "derivative" right. The majority of this Honourable Court in *Fraser*[33] described the nature of the right to a process of collective bargaining as a derivative right, citing the *Criminal Lawyers' Association* ("*CLA*") case.[34] Since the *CLA* decision held that the derivative right to the disclosure of information by the government arises only in circumstances where it is a "necessary precondition" to the exercise of the fundamental freedom itself[35], the Court of Appeal interpreted a derivative right to be one which can only arise where it is necessary to the exercise of the fundamental freedom, and that this was an inquiry to be posed on a case by case basis.

23. The Court imposed a test to claim a right to engage in a process of collective bargaining:

> *A government employer is obligated to engage in "collective bargaining" under s. 2(d) only when the employees are able to claim the derivative right under s. 2(d).*

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[30] MacDonnell Reasons, para 63, AR Tab 6
[31] MacDonnell Reasons, para 74, AR Tab 6
[32] Appeal Reasons, para 111, AR Tab 19
[33] *Fraser v. Ontario (Attorney General)*, 2011 CarswellOnt 2695 (SCC) ("*Fraser*").
[34] Appeal Reasons, para 104, AR Tab 19, citing *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 CarswellOnt 3964 (S.C.C.)
[35] Appeal Reasons, para 108, AR Tab 19

> *They are able to claim that derivative right upon showing that the exercise of the fundamental freedom of association is "effectively impossible". Only where the "core protection of s. 2(d)… to act in association with others to pursue common objectives and goals" (*Fraser*, at para. 25) cannot be meaningfully exercised does the derivative right arise. As s. 2(d) does not constitutionalize minority unions, the test of "effective impossibility" is applied to the workers at large, and not to any particular combination of workers.*[36]

24. Based upon this test, the Court concluded that it was not effectively impossible for RCMP members to meaningfully exercise their freedom of association because (i) they are able to form voluntary associations; (ii) while RCMP members are prevented from acting collectively to achieve workplace goals through these associations, they are permitted to do so through the SRRP; and (iii) the Legal Fund is independent and acts in a role to support the SRRP[37]. On this basis, the Court of Appeal held that the Applicants were not entitled to claim the right to engage in a process of collective bargaining. According to the Court of Appeal, the SRRP constitutes a process of collaboration between employees and management which establishes that it is not impossible for RCMP members to associate to achieve workplace goals[38].

25. Finally, the Court of Appeal held that because the Applicants were not entitled to claim a right to bargain collectively, the issue of the SRRP's lack of independence from the employer was immaterial:

> *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.*[39]

PART II - STATEMENT OF QUESTIONS IN ISSUE

26. The proposed appeal raises the following legal issues which are of public importance and require consideration by this Honourable Court:

> **Issue 1** - Does freedom of association under s.2(d) of the *Charter* include the right to choose an association independent of management?

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[36] Appeal Reasons, para 120, AR Tab 19
[37] Appeal Reasons, paras 121, 122, 128 and 132, AR Tab 19
[38] Appeal Reasons, paras 128 and 131, AR Tab 19
[39] Appeal Reasons, para 136, AR Tab 19

Issue 2 - Is the right to engage in a process of collective bargaining as part of the freedom of association under s.2(d) of the *Charter* a right that can only be claimed if an applicant can demonstrate need?

PART III - STATEMENT OF ARGUMENT

A. Issue 1: Does Freedom of Association include the Right to Choose an Association Independent from the Employer?

27. The Court of Appeal held that freedom of association grants RCMP employees the right to act in association to pursue common goals, but that this right does not include the right to choose an independent association for that purpose. Associational independence and employee choice were not considered relevant by the Court because the Applicants were unable to establish a right to engage in a process of collective bargaining, as distinct from the right to associate to pursue common goals. In other words, associational independence and employee choice are aspects of the derivative right to bargain collectively that had to be demonstrated to be necessary in each case: they are not aspects of the fundamental freedom of association itself. In finding that RCMP employees were able to work together to achieve workplace goals, the Court effectively concluded that "associational" activity can be carried out by a program which is not an association, not independent of management nor chosen by employees, as if in full satisfaction of members' rights to freedom of association. The Applicants seek leave to argue that this conclusion is fundamentally flawed.

28. Although independence and choice of association are part of the traditional *Wagner Act* model of labour relations, they are also essential to the constitutionally protected scope of freedom of association under the *Charter*. Having noted that it is an important feature of the *Wagner Act* model that the employees' bargaining representative be structurally autonomous and independent of the employer[40], the Court of Appeal stated:

> *[The applications judge] brought to bear values from the Wagner model. His conception of the constitutionally required attributes of an employee association*

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[40] Appeal Reasons, para 28, AR Tab 19

> *would preclude models of employee relations that bring employees into the decision making structures in a non-adversarial, collaborative fashion"*[41].

29. The Court of Appeal's apparent concern with constitutionalizing the *Wagner Act* model led it to reject two essential elements of the freedom of association in the workplace context: independence and choice. As a result, the Court was prepared to accept the SRRP as a means by which RCMP members could "act collectively to achieve workplace goals", notwithstanding the Court's acknowledgement that the program is not independent of the employer (including structurally, such that it is not even an association), or a product of members' choice, but rather is legislatively imposed[42]. The Court of Appeal's reasons ignore the necessity of forming an independent association as a precondition to any attempt to engage in associational activities. They also ignore the benefits of employee empowerment arising from forming an employee association and defining a collective agenda, as an exercise in self-determination and democracy.

30. The Court's reasons are also flawed in that an independent association can choose to participate in any number of different means of communicating and decision-making with the employer, including collaborative forms of decision-making. As previously noted, work councils used in some European countries can operate *within* a unionized environment.

31. The Court of Appeal's rejection of independence as a requirement for an employee association is inconsistent with Justice Bastarache's views expressed in *Delisle*, in which he said:

> *Since this Court's decision in* P.I.P.S. v. Northwest Territories (Commissioner), *supra, it is clear that under the trade union certification system, the government may limit access to mechanisms that facilitate labour relations to one employee organization in particular, and impose certain technical rules on that organization. It goes without saying that it must, however, be a genuine employee association that management does not control. Otherwise, there would be a violation of s. 2(d).* [43]

32. In addition, Convention 87 on the *Freedom of Association and Protection of the Right to Organise* specifies that employees have the right to join organizations *of their own choosing*, draw up their own constitutions and rules, elect their representatives in full freedom, organize

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[41] Appeal Reasons, para 139, AR Tab 19
[42] Appeal Reasons, para 128, AR Tab 19
[43] *Delisle v. Canada*, 1999 CarswellQue 2840 (S.C.C.), para 37

their administration and activities, formulate their programs and establish or join with other federations or confederations of employees[44]. This Convention was endorsed in *Health Services*:

> *Convention No. 87 has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the Alberta Reference, at p. 355, relied on Convention No. 87 for the principle that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".*[45]

Given that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights covenants that Canada has ratified[46], independence and choice should be recognized as integral to the constitutional freedom of association in the labour context.

33. As a matter of principle, independence is not an optional characteristic for an association engaged to represent members in workplace matters. Whether the association is engaged in collective bargaining, as the Applicants submit is part of the freedom of association, or whether the task is to "achieve collective goals", as described in the Court of Appeal's test, independence is essential to ascertain the true employee voice and make representation meaningful.

34. In the labour context, independence requires both structural independence, and freedom from employer influence. Structural independence means an autonomous association capable of operating freely without reliance on the employer for financial or other support. Without structural independence, there is no separation between the employer and the employees, and thus no way that two separate parties can discuss or negotiate workplace matters. More

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[44] International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention*, C87, 9 July 1948, C87, available at: http://www.unhcr.org/refworld/docid/425bc1914.htmlC87, Articles 2, 3 and 5.
[45] *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 CarswellBC 1289, (SCC) ("*Health Services*"), para 75
[46] *Health Services*, para 70. See also the *International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, Article 22; *International Covenant on Economic, Social and Cultural Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, Article 8, which also compel Canada to protect as a core, self-standing element of freedom of association the right of workers to form an independent association of their own choosing for the purpose of pursuing collective workplace interests.

importantly, without structural independence there is no entity to capture and develop the collective interests of employees as distinct from their individual interests and the interests of the employer.

35. Structural independence alone is not sufficient. The association must be free to operate in the interests of the employees, without being subject to inappropriate influence from the employer. In the SRRP, conflicts of interest abound. SRRs must personally answer to management and rely upon management for their performance reviews and promotions while at the same time purporting to represent members within their division. This, together with the absence of structural and financial independence, including the prohibition against retaining outside counsel, means that any SRRP agenda is limited and controlled through the confines of the program and subject to the influence of the employer.

36. The importance of an employee association being independent from the RCMP is implicitly acknowledged by the government in its submission that the SRRP's purpose is to prevent the divided loyalties it fears from unionism[47]. There can be no fear of divided loyalty when the SRRP and the employer are one and the same, just as there can be no mobilization of employee will, or challenge to the inherent power imbalance in the employment relationship. The SRRP cannot act independently. Having it imposed upon them as the sole means of communication on labour matters, the employees are effectively confined, and the benefits identified with true, independent association are unattainable.

37. The state imposed SRRP robs RCMP employees of the opportunity to select a representative association.[48] Coming together to form or join an association is the product of an

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[47] MacDonnell Reasons, para 82, AR Tab 6

[48] As Professor David Doorey has pointed out in *Ontario Court of Appeal: State Mandated, Non-Independent Employee Association Not a Violation of Charter*, at http://www.yorku.ca/ddoorey/lawblog/?p=5328), the Court of Appeal's decision sanctions the Chinese model of labour relations, where "the state creates the only union allowed" as consistent with the *Charter*. As Professor Doorey puts it, the Court "*[E]ffectively breaks the freedom to associate up into its component parts and then treats them all as distinct pieces rather than as a coherent whole. It confirms that Section 2(d) includes a right of workers to form an independent employee association, and to make collective representations to the employer and to have those representations considered in good faith (as per Fraser). But the new twist introduced by the OCA is that it need not be the chosen independent association that makes the representations on behalf of the employees. Rather, the state can create a non-independent organization to do the representation part of freedom of association, while the employee-selected, independent union sits by and twiddles its thumbs. I didn't see that one coming, I confess. I actually thought that the SCC meant that the employees had a right to make collective representation through their chosen collective organization….*".

explicit decision to engage with others for a collective purpose. Choosing to associate is an act of self-determination, and in the labour relations context, an exercise in democracy. These important principles underpin freedom of association, and cannot be satisfied if choice is denied.

38. Even if the Court of Appeal was correct in its finding that the limited communication process permitted under the SRRP met constitutional requirements for acting collectively to achieve workplace goals, this would not provide an answer to the separate constitutional claim that employees have a s. 2(d) right to pursue collective workplace interests through an association of their own choosing. By characterizing the right to form an independent association for the purposes of collective bargaining as "a facet of the derivative right to collective bargaining", the Court effectively held that associational independence and employee choice are not fundamental aspects of the freedom to associate, and thus found that the right to form an independent association for the purpose of collective bargaining "does not arise in this case."[49] This determination ignores the critical importance to freedom of association of assuring to workers the right to engage their employer through their chosen associational vehicle.[50]

39. Resort to the SRRP as a means of "collective action" ignores the choice employees have made. The members of the Applicants have *chosen* to join together to form the Applicant associations for the purpose of, among other things, engaging in collective bargaining *through their associations*. Choice as central to the freedom to associate is obvious when viewed in the political context. As voters, we would not be satisfied if the government imposed a single political party, recognizing no others. It is the ability to choose between parties that ensures that those parties remain responsive to our wishes. The logic adopted by the Court of Appeal would permit a single, state imposed political party since it could be said to pursue the collective goals of the population.

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[49] Appeal Reasons, paras 136 & 140, AR Tab 19

[50] In *Saskatchewan v Saskatchewan Federation of Labour*, 2012 CarswellSask 64, para 263, Justice Ball (a former Chair of the Saskatchewan Labour Relations Board) identified "the assessment of the freely expressed wishes of the majority concerning a bargaining representative…." as a rudimentary aspect of freedom of association, and one not necessarily derived from the *Wagner Act* model, but rather found in "Any system that does not operate by Government decree (that is, any system with constitutional protections for freedom of association)".

40. The single party result is troubling because we know that choice and independence together are how we ensure that our interests, the interests that we formed the collective to protect or advance, are being properly represented. A non-arms length, state-imposed program of communication, even if it is populated by people chosen by employees, does not represent the exercise of employee choice of association, and it is simply not good enough to satisfy the *Charter* right.

41. The decision has obscured the understanding of the fundamental freedom of association by indicating that the "core" aspect of the freedom, described as collective action to achieve workplace goals, can be carried out by a process imposed on employees which is divorced from any established collective, neither independent of the employer nor chosen by its employees. This conclusion runs contrary to both international conventions and domestically established norms. The implications of this decision are far-reaching and startlingly problematic. The freedom of association is meaningless if it can be satisfied by a state-imposed, internal program of communication. If this principle is allowed to stand, a new and regressive era in labour relations will have commenced. The Court of Appeal's decision provides the formula for making genuine collective action impossible.

B. Issue 2: Is the Right to Collective Bargaining only available if an Applicant can Demonstrate Need?

42. This case was decided on the basis of the Court of Appeal's interpretation that collective bargaining is a derivative right, understood as a right that may only be claimed if an applicant in a given case can demonstrate necessity because of an inability to exercise the core freedom. If leave to appeal is granted, the Applicants will argue that the Court of Appeal fundamentally erred in its approach, severely restricting this Court's decisions in *Health Services* and *Fraser*, and causing confusion on the extent to which collective bargaining may be protected within freedom of association.

43. The Court of Appeal held that the *Fraser* majority used the word "derivative" to describe the associational right to a process of collective bargaining as a right that could only be claimed through a necessity test applied in each case. However neither of the decisions in *Fraser* or

Health Services applied a needs test to determine whether the applicants in those cases were entitled to claim a right to bargain collectively. It appears that the Court of Appeal infused this requirement into the analysis based upon the *Fraser* majority's reference to collective bargaining being a "derivative right", and citing the *CLA* case, which imposed a test of necessity to determine whether the government had a positive obligation to disclose documents as part of the freedom of expression. By contrast, both *Fraser* and *Health Services* recognized a right to a process of collective bargaining as forming a vital component of freedom of association for employees. The language used in the *Health Services* and *Fraser* decisions refers to the right to engage in a process of collective bargaining as part of the freedom of association in labour cases, *without caveat.* For example:

> *We conclude that s. 2(d) of the* Charter *protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.*[51]
>
> * * *
>
> *Section 2(d), interpreted purposively and in light of Canada's values and commitments, protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals.*[52]

44. As the below passage from *Fraser* shows, the right to collective bargaining is described as a derivative right that *is* necessary in the labour context:

> *As discussed above, the right of an employees' association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(d) of the Charter, necessary to meaningful exercise of the right to free association*[53] *[emphasis added]*

45. Thus, there is no basis for imposing a necessity test on a case by case base. The determination has been made and the right to a process of collective bargaining is a right that is necessarily part of freedom of association in the labour context. By imposing a necessity test of

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[51] *Health Services*, para 19. See also paras 2, 40, 79.
[52] *Fraser*, para 35. See also para 40.
[53] *Fraser*, para 99.

its own creation, the Court of Appeal has severely circumscribed the scope of freedom of association and the availability of the right to a process of collective bargaining.

46. The Court of Appeal examined the particular workplace before it, inquired into whether it was effectively impossible for RCMP members to act collectively to achieve workplace goals, concluded that the existence of the SRRP made possible such collective action, and on this basis, found that RCMP members could not claim a derivative right to collective bargaining. This ignores the fundamental premise of *Health Services* and *Fraser* that protection of collective bargaining is itself a *necessary precondition* to workers' ability to engage in meaningful association in the workplace:

> *The protection for collective bargaining in the sense affirmed in* Health Services *is quite simply a* necessary *condition of meaningful association in the workplace context.*[54] *[emphasis added]*

At the very least, clarification is needed from this Honourable Court on the meaning of a derivative right and the scope of freedom of association for labour organizations.

47. The test the Court of Appeal developed to determine whether there is a right to a process of collective bargaining asks whether the RCMP's employees "at large" are able to "*act in association with others to pursue common objectives and goals*[55]", which divorces the collective action from the employee association itself, and instead looks to the entirety of the workforce. Employees can form an association, but according to the Court of Appeal, the pursuit of common goals can be legitimately carried out by some other means wholly unrelated to the association formed by employees themselves. This approach suggests that the right to pursue collective goals can be severed from a true association and grafted onto a non-entity, namely the entire workforce, in satisfaction of members' *Charter* rights. However, this cannot fulfill the rights of the members of any independent, employee-formed association to engage in associational activity. Indeed, both *Health Services* and *Fraser* established that what is protected is the right to associate *for the purpose* of bargaining collectively.[56] The nexus between the association and

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[54] *Fraser*, para 43
[55] Appeal Reasons, para 120, AR Tab 19
[56] *Health Services*, para 87; *Fraser*, para 28

bargaining must be maintained. As the Superior Court judge observed, the right to bargain emanates from the right to form an association.

48. The connection between workers associating and the association taking action for that collective recognizes that the chosen collective develops its own agenda, as noted by the majority in *Fraser*:

> *The affirmation that s. 2(d) protection extends to collective activities that only a group can carry out, required rejection of Sopinka J.'s fourth proposition in* PIPSC, *which suggested that s. 2(d) only protected the right to further individual goals. Bastarache J. pointed out that certain activities are, when performed by a group, "qualitatively different" from those activities performed solely by an individual. He recognized that "trade unions develop needs and priorities that are distinct from those of their members individually". As a result "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning" (*Dunmore, *at para. 17).*[57]

49. Even if the process of collective bargaining is an aspect of freedom of association that has to be demonstrated to be necessary in each case, the test imposed is flawed. It ignores that the formed association is the foundation to the right to bargain collectively, as well as the relationship between that association and its goals. By imposing a test to evaluate the ability to engage in collective action without reference to the formed collective, the Court has created an incoherent and impractical criteria that is entirely disconnected from the underlying freedom to associate.

50. The Court of Appeal relied upon the existence of the Applicants, the SRRP and the Legal Fund to support its conclusion that workers can act collectively to achieve workplace goals. However such reliance is misplaced, and unresponsive to the claim that the SRRP precludes meaningful good faith collective bargaining, conducted through an independent association freely chosen by RCMP members. Reliance on the fact that RCMP members had formed their own associations ignores the reality that those associations are precluded, by the imposition of the SRRP, from attempting to bargain for their members. That the SRRP permits limited collaboration is no answer to the claim that as part of the RCMP, the SRRP cannot capture or

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[57] *Fraser*, paras 30, 63

represent the collective interests of the members. That RCMP members have voluntarily formed a legal services vehicle which does not even attempt to engage in collective bargaining, and which would not be allowed to do so, is no answer to the claim that the SRRP precludes both choice of bargaining representative and good faith collective bargaining.

51. In reaching its decision to impose a test for triggering the right to engage in a process of collective bargaining, the Court of Appeal characterized this case as a positive rights case, saying of the Applicants: "their members are seeking positive measures to enable them to exercise their freedom of association"[58]. The Applicants seek the removal of the SRRP, a legislatively imposed impediment to collective bargaining through a freely chosen, independent association. In asking the Court to endorse Justice MacDonnell's decision, the Applicants were not asking for the creation of legislative supports to enable collective bargaining, but rather the removal of legislative impediments. Put simply, the Applicants want the legislatively imposed SRRP to get out of the way. As the only employee relations mechanism that the RCMP management will permit, the SRRP is blocking the path to the meaningful exercise of freedom of association by RCMP members, and should be declared unconstitutional. This is not a "positive rights" case.

52. The Court of Appeal indicates that the positive obligation that the Applicants seek to impose is the obligation to engage in collective bargaining[59], however that obligation falls within the freedom of association and is no more a claim for a "positive" right here than it was in *Health Services*. That the right itself will require an employer to engage in negotiation, whether because the employer is government and subject to the *Charter* directly, or an employer is subject to a legislatively imposed scheme, is the intended outcome of including a process of collective bargaining within freedom of association. That fact has been clearly acknowledged by the majority in *Fraser*:

> *It may also be observed that* Health Services *does not impose constitutional duties on private employers, but on governments as employers and parliaments and legislatures as law makers, in accordance with s. 32 of the Charter. Rather, the majority held that individuals have a right against the state to a process of collective bargaining in good*

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[58] Appeal Reasons, para 112, AR Tab 19
[59] Appeal Reasons, para 111, AR Tab 19

> *faith, and that this right requires the state to impose statutory obligations on employers.*[60]

53. If the Court of Appeal's case is allowed to stand, each place of employment will potentially be subject to an individualized, fact-specific inquiry around whether the employees are entitled to a process of collective bargaining, and the outcome will be significantly dependent upon factors which can be controlled by the employer, allowing employers to constrain the availability of *Charter* rights.

C. Conclusion

54. This case breaks new ground by confining the scope of freedom of association in a manner which appears contrary to this Court's expressed intention in *Health Services* and *Fraser*. The inevitable result is doubt about whether collective bargaining, as a derivative right, is included within the scope of freedom of association, and if so, under what circumstances.

55. Further, the Court of Appeal's approach "constitutionalizes", as the s. 2(d) guarantee, a right to be represented through an employer or legislatively imposed non-independent company union, allowing the power of the employer and of the state to trump meaningful freedom of association.

56. Whether workers have a right to be represented by an association of their choosing and whether the vehicle for dealing with workers collective concerns has to be structurally independent of management are the two questions the Court of Appeal identified as new, and in need of this Court's attention. Indeed, as the Court of Appeal noted, this case raises questions which will "ultimately, in this case or another, have to be decided by the Supreme Court"[61]. The Applicants ask this Court to take this opportunity, grant leave to appeal, and ultimately decide these issues in a manner consistent with the fundamental principles underlying the *Charter*.

PART IV - COSTS

57. The Applicants, as public interest litigants, seek their costs in any event.

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[60] *Fraser*, para 73
[61] Appeal Reasons, para 2, AR Tab 19

PART V - ORDER SOUGHT

58. The Applicants ask that leave be granted to appeal from the judgment of the Court of Appeal for Ontario, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2012.

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Laura C. Young
Lawyer for the Applicants

PART VI - TABLE OF AUTHORITIES

1. *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 CarswellBC 1289, (S.C.C.)
2. *Fraser v. Ontario (Attorney General)*, 2011 CarswellOnt 2695 (S.C.C.)
3. *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 CarswellOnt 3964 (S.C.C.)
4. *Delisle v. Canada*, 1999 CarswellQue 2840 (S.C.C.)
5. *Saskatchewan v Saskatchewan Federation of Labour*, 2012 CarswellSask 64 (Q.B.)
6. International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention*, C87, 9 July 1948, C87, available at: http://www.unhcr.org/refworld/docid/425bc1914.html
7. *UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.unhcr.org/refworld/docid/3ae6b3aa0.html*
8. *UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: http://www.unhcr.org/refworld/docid/3ae6b36c0.html*
9. *Ontario Court of Appeal: State Mandated, Non-Independent Employee Association Not a Violation of Charter*, Professor Doorey, http://www.yorku.ca/ddoorey/lawblog/?p=5328

PART VII - RELEVANT STATUTES

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11

S.1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

S.2 Everyone has the following fundamental freedoms:

d) freedom of association.

s.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.

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

S.96 (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters.

(2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.

(3) [Repealed, SOR/98-262, s. 6]

96. (1) La Gendarmerie établit un programme de représentants divisionnaires des relations fonctionnelles qui a pour objet d'assurer la représentation des membres en matière de relations fonctionnelles.

(2) Le programme de représentants divisionnaires des relations fonctionnelles est mis en application par les représentants divisionnaires des relations fonctionnelles qu'élisent les membres des divisions et des secteurs.

(3) [Abrogé, DORS/98-262, art. 6]