Date: 20190711

Files: 542-02-12 and 13

Citation: 2019 FPSLREB 70

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ASSOCIATION DES MEMBRES DE LA POLICE MONTÉE DU QUÉBEC
Applicant

and
NATIONAL POLICE FEDERATION
Applicant

and
TREASURY BOARD
Respondent

and
ATTORNEY GENERAL OF CANADA
Intervenor

Indexed as
Association des membres de la Police Montée du Québec v. Treasury Board

In the matter of applications for certification under section 54 of the *Federal Public Sector Labour Relations Act*

Before: Catherine Ebbs, Steven B. Katkin, and Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Association des Membres de la Police Montée du Québec: Vincent Jacob and Alexandre Plakhov, counsel

For the National Police Federation: Christopher Rootham and Alison McEwen, counsel

For the Treasury Board and the Attorney General of Canada: Sean Kelly and Kevin Dulude, counsel

Heard at Montreal, Quebec,
November 19 to 21, 2018, and March 26 and 27, 2019;
and at Ottawa, Ontario,
November 22 and 23, 2018.

I. Applications before the Board

[1] Following certification applications filed by the applicants, who are the Association des membres de la Police Montée du Québec (AMPMQ) and the National Police Federation (NPF), the Board issued a decision on October 11, 2017 (*National Police Federation v. Treasury Board of Canada*, 2017 FPSLREB 34), declaring that the bargaining unit appropriate for collective bargaining is that legislated by the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), as amended by *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9, s. 33; "the *Act to amend the PSLRA*"), which states the following in s. 238.14:

> ***238.14*** *If an application for certification is made under subsection 238.13(1), the Board must determine that the group that consists exclusively of all the employees who are RCMP members and all the employees who are reservists constitutes the single, national bargaining unit that is appropriate for collective bargaining.*

[2] The certification applications were filed on April 5 and 18, 2017, respectively. The *Act to amend the PSLRA* was enacted on June 19, 2017. Consequently, the applications are governed by the transitional provisions of the *Act to amend the PSLRA*, which states the following at s. 63(1)(a):

> ***63 (1)*** *If, before the day on which section 238.13 of the Federal Public Sector Labour Relations Act, as enacted by section 33, comes into force, an employee organization makes an application under section 54 of the former Act to be certified as bargaining agent for a group of employees that includes employees who are members appointed to a rank, or employees who are reservists, the employee organization must not be certified as bargaining agent for the group, unless*
>
> > ***(a)*** *the group consists exclusively of all the employees who are members appointed to a rank, other than officers as defined in subsection 2(1) of the Royal Canadian Mounted Police Act, and all the employees who are reservists ….*

[3] The effect of the provisions under the two statutes is the same. The legislator mandated a single, national bargaining unit for employees who are Royal Canadian Mounted Police (RCMP) members appointed to a rank ("regular members") or who are reservists. In a letter dated November 9, 2017, the AMPMQ asked the Board to rule on

the issue of the constitutional validity of the provision of the *Act* that legislated a single bargaining unit for RCMP regular members and reservists.

[4] As we set out in *National Police Federation v. Treasury Board*, 2018 FPSLREB 31 at para. 36 (“the 2018 Order”), the Board does not have the authority to make a declaration of constitutional invalidity. However, it may consider whether it finds the provision inconsistent with the Constitution and may judge it of no force and effect by reason of the inconsistency (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 143). For the reasons that follow, the Board finds that s. 238.14 of the *Act* and the transitional provision set out in s. 63(1)(a) of the *Act to amend the PSLRA* are not inconsistent with the Constitution. Accordingly, the AMPMQ’s request is denied, and its certification application is dismissed. This decision lifts the stay imposed by the 2018 Order. The NPF’s certification application will proceed, and the ballots will be tallied.

II. Summary of the evidence

[5] The AMPMQ called the following people to testify: Gaétan Delisle, Paul Dupuis, and Serge Bilodeau. The employer called the following witnesses: Stephen White, Claude Castonguay, and Dennis Duggan. The NPF did not submit any evidence at the hearing.

[6] The AMPMQ sought to submit in evidence an expert report prepared by Professor Michel Coutu and to call him to testify. The employer objected to the report being submitted and to Professor Coutu’s testimony, essentially because the evidence did not meet the criteria applicable to expert testimony. At the hearing, we allowed the employer’s objection and did not allow either the report’s submission or Professor Coutu’s testimony. The reasons for that decision are set out in the analysis section of this decision.

A. For the AMPMQ

1. Gaétan Delisle

[7] Mr. Delisle was a member of the RCMP from 1969 to 2010. He reached the rank of staff sergeant. Early in his career, he was posted to Nova Scotia as a patrol officer and to the Halifax airport. In 1974, he was posted to “C” Division in Montreal, where he remained until the end of his career.

[8] In 1969, unilingual francophone recruits training in Regina had to take English classes three to four evenings per week, as training was in English. Francophone recruits wrote the same exams as anglophone recruits in the same troop, but their results were lower than those of the anglophones.

[9] In the early 1970s, meetings were held across the country with members who wanted changes made to their working conditions, which they found inadequate. Other police forces were unionized and had better working conditions.

[10] In 1972, a Division Staff Relations Representative Program (DSRRP) was created. For each of the 17 divisions, the division commander appointed a representative. Only representatives from “C” Division were elected by the members.

[11] In 1974, the members were asked if they wanted to maintain the DSSRP. Only “C” Division voted to replace it with a certified association that could negotiate for its members. The other divisions accepted the system, which was implemented across the country. The only place to discuss working conditions was before the RCMP’s commissioner (“the Commissioner”) and Executive Committee, and representatives could only make recommendations.

[12] In 1975, an association was created to form a national union for the 17 divisions. At the time, the association, of which Mr. Delisle was president in 1978, had 3000 members out of the 16 000 RCMP regular members. He testified that when he crossed the country to promote the association, he found that each division was distinct and that they were not all administered the same way.

[13] In 1980, the Treasury Board compared RCMP salaries to those of the eight largest police forces in the country. In 1981, the government decided to compare RCMP salaries to military salaries instead of those of police forces, resulting in an influx of members to the association. The members held meetings to denounce the situation. Faced with the protests, the government granted the requested raises. The number of members then fell in all divisions except Quebec.

[14] According to Mr. Delisle, the association of the 17 divisions did not work for several reasons, including the great regional diversity and demands, the language and the bilingualism bonus refused by other division representatives, and the members’ freedom of expression, which was more important in Quebec.

[15] In 1977, Mr. Delisle was a division representative, and the representative meetings were held in English. In Quebec, the vast majority of members held bilingual positions and wanted to receive the bilingualism bonus. In 1988, the DSRRP was enshrined in regulations (s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361).

[16] Mr. Delisle explained that the national caucus was made up of division representatives and that it met four times per year, consisting of two meetings of the representatives and two meetings with the Commissioner and Executive Committee. The national caucus established the items to be discussed with the Commissioner and Executive Committee. The RCMP Pay Council was created to liaise with division representatives to determine the working conditions of other police forces.

[17] The inability of "C" Division's members to raise specific points with the association of division representatives and the loss of members of the association of 17 divisions are factors that led to the AMPMQ's creation.

[18] "C" Division formed its own Association des membres de la Division "C" to obtain certification from the Canada Labour Relations Board, the predecessor to the Canada Industrial Relations Board (CIRB). The certification application was rejected in 1986.

[19] In 1986, Mr. Delisle was both president of the Association des membres de la Division "C" and a division representative. He said that division representatives represented the employer, even though they claimed to be independent. Division representatives adopted a resolution prohibiting Mr. Delisle from acting as a representative because he was the president of that association. According to him, one of the reasons for that sidelining was that he required that meetings include simultaneous interpretation services, which irritated people. He had to file a request for an injunction with the Federal Court to prevent the members of the national caucus from prohibiting him from taking part in the conference of representatives with the Commissioner and Executive Committee.

[20] Justice Reed found in his favour (see *Delisle v. Royal Canadian Mounted Police Commissioner* (1990), 39 F.T.R. 217). She was shocked by the t-shirt included with Mr. Delisle's affidavit, showing a bison defecating on the letters "GRC".

[21] As for the AMPMQ's particularities, Mr. Delisle stated that its actions resulted in changes to the RCMP in the following areas: language of work, greater Executive Committee respect for members, the RCMP travel policy, and the relocation policy.

[22] Mr. Delisle testified that when major events took place in "C" Division territory, the AMPMQ ensured that the travel policy was applied. According to him, members of other divisions could not believe that they were housed in comfortable premises and that overtime was paid (for work in excess of 40 hours per week).

[23] Mr. Delisle stated that AMPMQ members have a strong solidarity and that there is still a core of members working to defend members' rights. The level of trust is very high in the AMPMQ's elected members.

[24] He testified that the RCMP had a negative attitude towards unionization. He referred to his affidavit in support of the Mounted Police Association of Ontario (MPAO)'s request before the Ontario Superior Court of Justice and his exclusion from the caucus of representatives' deliberations in 2003.

[25] Mr. Delisle also alluded to the Mounted Police Members' Legal Fund ("the Legal Fund") created by the division representatives. He asserted that there was a policy by which employees could be represented by Department of Justice lawyers when dealing with a situation as part of their duties. According to him, since time could pass before meeting with a lawyer, the AMPMQ offered lawyer representation services. The Legal Fund was established at the caucus's request and with the Commissioner's approval. Members wanting to take part in it had to complete a form for source deductions. Mr. Delisle and another member completed the form to take part, but they were advised after five deductions that they could not take part, while no one else was excluded.

[26] Continuing with "C" Division's particularities, Mr. Delisle explained the RCMP's national structure. Each division represents a region or province. There is also Headquarters in Ottawa, along with protective services. Each division includes a commanding officer, post, sub-posts, and administrative services. All business lines report to a division headquarters.

[27] Mr. Delisle stated that resources vary by division. French is the language of work in "C" Division. In other divisions, some bilingual positions are in place to

provide services.

[28] According to Mr. Delisle, only one RCMP position is designated as unilingual, the inspector position. According to him, a unilingual anglophone member can become the commissioner, while a unilingual francophone member can reach only the rank of sergeant.

[29] He stated that he received three or four calls per week from francophone members in other divisions asking for help dealing with the employer in French for different files, such as grievances, disciplinary measures, medical and family services, schools, and transfers.

[30] As for the distinction between working conditions in the different divisions, Mr. Delisle stated that members of “C” Division enforce only federal laws.

[31] While he was a division representative, Mr. Delisle demanded several things, including the establishment of relocation and travel policies. He stated that after several years, the RCMP placed more importance on the consequences on families of transfers and promotions.

[32] With respect to mentality and the differences between divisions, Mr. Delisle stated that the national caucus discussed vehicles, uniforms, and firearms. According to him, the discussion was more about the differences between divisions than the benefits members should receive. He stated that “C” Division was the most demanding, at least about the respect the members received.

[33] In terms of the cultural differences with respect to conformity, Mr. Delisle noted that most anglophone members were more militarized and were used to receiving orders without any discussion, while “C” Division had more discussion.

[34] When he was asked whether the other divisions recognized the particularities of “C” Division, Mr. Delisle replied that the division representatives did not. However, the members who took part in events in “C” Division territory talked about them and referred to them, as he received calls from those members following the events.

[35] Mr. Delisle stated that the AMPMQ’s most important particularity is the ability to speak French. It is the only organization defending the rights of francophone members in other divisions, and he has given presentations to House of Commons and

Senate committees on that topic. According to him, the other divisions never encouraged his efforts to protect language rights.

[36] As for the functional characteristic of “C” Division, Mr. Delisle stated that there was a difference in the exchange of points of view. For example, he mentioned problems with the travel policy, which led to 600 grievances being filed. A new commanding officer at “C” Division discussed it with the AMPMQ executive and the problem was resolved, while the other divisions applied the policy as mandated by Headquarters in Ottawa.

[37] On the expertise specific or unique to “C” Division, Mr. Delisle mentioned events or activities such as the Summit of the Americas in Quebec in 2001and the G7 in Charlevoix in 2018. RCMP members must prepare the locations for such conferences. Moreover, “C” Division’s members are often called on to support other divisions, such as during the Vancouver Olympic Games in 2010.

[38] When he was asked whether more major events were held in Quebec than in other provinces, Mr. Delisle stated that eight of the major events in which he took part were held in Quebec, in addition to the Francophone Summit in Moncton in 1999, the Calgary Olympic Games in 1988, the Pope’s visit in 1984, a Royal Family visit, and the G8 in Kananaskis.

[39] When he was asked whether the entirety of the particularities led to specific demands, Mr. Delisle replied that the AMPMQ continues to support ad-hoc demands.

[40] “C” Division enforces only federal laws, while in the other divisions, the RCMP has contracts with the province or municipalities that govern the number of members in place at all times and their activities. During the period relevant to Mr. Delisle, the commanding officers of divisions in other provinces were appointed with the provinces’ approvals.

[41] Mr. Delisle stated that during his career, he was personally aware of a lack of personnel in “C” Division and in “O” Division (Ontario). For instance, although the Treasury Board authorized 1000 members, at least 150 to 200 positions were not filled. When he retired, there were 1100 members in “C” Division, including civilian members.

[42] As for the languages program, the RCMP set up a program in which hired

francophones had to take English classes before being assigned to training in Regina. Some anglophone members who volunteered to learn French were moved with their families to Quebec to be in an entirely francophone environment.

[43] Under cross-examination by the employer, Mr. Delisle stated that while he was assigned to Nova Scotia, he carried out contract and federal police work in the narcotics field.

[44] He was a division representative from 1977 to 2010. When he met with the Commissioner, he acted as a division representative and as the AMPMQ's president.

[45] Mr. Delisle acknowledged that meal, relocation, and travel policies were national and not unique to Quebec.

[46] Mr. Delisle stated that francophone members worked outside Quebec and that in 2008, all unilingual French positions were in Quebec, i.e., about 60% of identified positions.

[47] With respect to planned and unplanned events, Mr. Delisle acknowledged that the RCMP assigned members from several divisions to the event areas.

[48] For situations in which different divisions worked together to thwart criminal activities, Mr. Delisle stated that he was very familiar with that cooperation between divisions and with the work with police forces across the country and internationally.

[49] Mr. Delisle was referred to his testimony to the effect that the commanding officers of divisions carrying out contract work were appointed with the provinces' approval. When it was suggested to him that a provincial representative could sit on the selection committee but that the commanding officer was appointed by the Governor in Council, Mr. Delisle replied that in the 1980s, the contracts had a clause requiring provincial approval.

[50] In response to the NPF's question, Mr. Delisle stated that he did not testify before House of Commons and Senate committees about Bill C-7.

2. <u>Paul Dupuis</u>

[51] Mr. Dupuis joined the RCMP in 1980 and worked in "C" Division until August 2016, reaching the rank of staff sergeant. During his career, he worked in the following

fields, among others: border patrol, federal investigations, the commercial crime and counterfeit currency section in Montreal, and the bankruptcy section. He also took part in planning several major events.

[52] In 1993, Mr. Dupuis was elected as a sub-representative for the DSRRP and as a director of the AMPMQ. He became interested in the travel policy and the Legal Fund, which was created in March 1997 and used source deductions. In 2004, he was the president of the division executive for the Legal Fund. Although the Legal Fund's constitution did not include any provisions for excluding members, two SRRs, including Mr. Delisle, were excluded, without explanation. As a result, they could not take part in the national meeting and could not be represented by a lawyer.

[53] Following the Supreme Court of Canada's decision in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (*MPAO*), the Commissioner cut the source deductions. According to Mr. Dupuis, the Commissioner stated that he did so to keep the RCMP independent from the Legal Fund. As for the RCMP Pay Council, Mr. Dupuis stated that no members of "C" Division were appointed to it.

[54] During the Challenge 2000 national consultation, the two division representatives from "C" Division were not accepted on the committee that met with the RCMP policy centre. After Challenge 2000, it was resolved that the regions would identify and appoint the representatives they wanted on the committees, except the national committee and the pay committee. The national caucus elected the pay committee. The national committee established the priorities proposed during meetings with the Commissioner. Each committee had a chair and a deputy chair, but the members of "C" Division were never invited to hold those positions. The national caucus was made up of approximately 40 full-time division representatives and included 8 committees. For the Ontario, Quebec, and corporate regions, Mr. Dupuis acted as a representative for "C" Division on the human resources, internal affairs, health, and travel policy committees. However, no "C" Division member chaired those committees.

[55] Beginning in 2000, Mr. Dupuis was the AMPMQ's secretary; he was its president from 2015 until his retirement in August 2016. At the time, between 300 and 400 members of "C" Division, a majority, were AMPMQ members.

[56] As for "C" Division's functional or administrative characteristics, Mr. Dupuis

stated that being a federal police division results in human resources constraints. In divisions carrying out contract work, the RCMP underestimates its staffing needs to gain contracts, as they are profitable for it. According to Mr. Dupuis, the RCMP uses the police services of neighbouring cities or members assigned to federal work to add to the workforce. In 2016, “C” Division was supposed to have 1144 members but had only 900, a 20% vacancy rate. On staff shortages in other divisions, Mr. Dupuis stated that according to the figures, contract policing had trouble meeting a vacancy rate of 5%.

[57] Mr. Dupuis stated that because foreign dignitaries often visited Montreal and Quebec or those cities hosted international meetings, the members of “C” Division had developed expertise in protecting dignitaries. Moreover, given their demands under the RCMP’s travel policy, during certain planned events, members of “C” Division benefitted from more favourable working conditions than those of members from other divisions deployed to the same events. When he was asked whether other divisions had a similar level of expertise, Mr. Dupuis replied that “O” Division did but that it occasionally consulted with “C” Division.

[58] “C” Division is the only one with a section dedicated to the proceeds of crime. In other divisions, such a section is part of federal police operations.

[59] According to Mr. Dupuis, protecting francophone rights is very important to “C” Division. It is the only division with the language of work in French and in which a unilingual francophone member can work. When unilingual francophones join the RCMP, they join a francophone troop at the Regina depot. Those who do not receive a “B” in English return to Regina for three months to improve their English. They are then posted to a detachment and are often put to the test due to harassment and decide to leave. If they request a transfer to Quebec, they are informed that there are no openings. Thus, there is no place for a francophone member who is not bilingual.

[60] Mr. Dupuis stated that the highest rank a unilingual francophone member in Quebec can reach is corporal. Although unilingual francophone members can be experts in a field, they cannot be in charge because usually a higher rank is in charge, i.e., a sergeant or an inspector.

[61] Mr. Dupuis stated that “C” Division had to fight for simultaneous interpretation services at national meetings.

[62] A specific problem arose for “C” Division members when the RCMP developed a national promotion program using a knowledge exam. The questions were developed in English and then were translated outside the RCMP. Several translations created ambiguity between the best and the correct answer. According to Mr. Dupuis, 6 industrial psychologists crossed the country looking into the problem. They found that francophone members who wrote the test in French had marks 10% lower than members who wrote it in English. They recommended that the questions be written in English, translated to French, and then translated again into English to ensure validity, which the RCMP refused to do. After the first exam, 3000 grievances were filed. The marks were adjusted following the grievances due to the faulty translation.

[63] Mr. Dupuis stated that unilingual francophone members suffer psychological effects that can result in couples separating and in broken families. Unilingual francophone families who cannot adapt return to Quebec. The discrimination has a concrete impact on member recruitment. Moreover, the attrition rate is very high among unilingual francophones who cannot learn English. Even a bilingual francophone can face harassment because of the jealousy of anglophone members who think that bilingual members steal promotions.

[64] As for the survey of members, Mr. Dupuis noted that the employer hired an expert in non-unionized systems to design it.

[65] Mr. Dupuis corroborated Mr. Delisle’s testimony that the vast majority of “C” Division members have a very high level of trust in their representation by the AMPMQ.

[66] Under cross-examination by the employer, Mr. Dupuis stated that in principle, “C” Division was francophone and that there were bilingual anglophone members, as it offers services in English and because the City of Montreal is designated a bilingual zone.

[67] Mr. Dupuis did not know what percentage of unilingual francophone members worked at “C” Division in 2016. However, he noted that there were 3400 regular bilingual members across Canada at that time. He did not know how many members who identified as francophone worked outside “C” Division. He acknowledged that there are detachments across Canada that offer services to the public in French.

[68] As for the member survey, Mr. Dupuis attended the public meeting at “C”

Division. Question 4 was not open-ended. The members did not have time to consult, and no one consulted the AMPMQ. The questions were asked before the consultation. Mr. Dupuis did not agree with the result indicating that most members of "C" Division wanted a single, national grouping appropriate for collective bargaining, as the survey process was not legitimate.

[69] As for his appearances before House of Commons and Senate committees about Bill C-7, Mr. Dupuis acknowledged that s. 238.14 was already included in the first draft of Bill C-7 and that he knew as much as of his appearances, which he considered important and for which he had prepared. He also acknowledged that at his appearances, he made no comments about s. 238.14 and that he did not submit any documents to the committees about it.

[70] When he was asked whether the AMPMQ's priority is to be a regional bargaining unit for Quebec, Mr. Dupuis replied that it wants to represent regular members in Quebec but not necessarily that the AMPMQ does not want to represent francophone members outside Quebec.

[71] Mr. Dupuis stated that the AMPMQ wanted to join other RCMP member associations, including the MPAO and the association in British Columbia. At that time, one unit was emerging between the associations, but something needed to be negotiated.

[72] In cross-examination by the NPF, when it was put to Mr. Dupuis that he had suggested that members needed to be better informed to provide meaningful answers to the survey, he replied that within the RCMP, anti-union sentiment came from management. When the members were surveyed, they were uncertain as to what unionization consisted of.

[73] Mr. Dupuis emphasized that AMPMQ members were told that it was an employer survey and that the employer was anti-union. The AMPMQ did not suggest boycotting the survey but told members that it was suspect and that it was up to each of them to decide whether to participate. The AMPMQ did not take steps to inform its members of its preferred answers to the survey; it did not attempt to influence their answers. Mr. Dupuis said that the AMPMQ took no steps to tell the members how to respond but that it would challenge the survey.

[74] When he was asked how the AMPMQ would challenge the survey, Mr. Dupuis said that it did not endorse the survey. The AMPMQ did not challenge its validity or write to the RCMP that it was inappropriate. Since the RCMP knew that the AMPMQ did not endorse it, there was no use in writing. Mr. Dupuis stated that the RCMP knew that the AMPMQ did not endorse the survey because for over 40 years, the AMPMQ had contested several issues. When he was asked whether the AMPMQ had ever provided a survey to its members, Mr. Dupuis replied that they know the AMPMQ and that they respect its philosophy. He added that people either respect that philosophy or do not respect it.

3. <u>Serge Bilodeau</u>

[75] Mr. Bilodeau, who holds a bachelor of science in human resources administration, joined the RCMP in 2004. He was posted to "C" Division, in the economic crimes section, i.e., fraud and counterfeiting, until 2015. From 2015 to 2017, he was assigned to intelligence. He was promoted to the rank of corporal in 2017. Beginning in July 2017, he was assigned to planning the G7 conference held in Quebec City in 2018 and, since September 2018, he had been with the major fraud section. Throughout his career, Mr. Bilodeau has worked at "C" Division. Before joining the RCMP, he was a high-school teacher and a union representative at the school.

[76] During his RCMP training, Mr. Bilodeau was part of the only francophone troop of 39 troops. The material provided to the francophones was not appropriate. During tests, he requested the English version to better understand it, despite his poor English skills. For example, in applied police sciences, anglophones were provided with *Martin's Criminal Code*, while the bilingual *Criminal Code* provided to francophones did not contain the same jurisprudence as *Martin's Criminal Code*. As the tests focused on that code, the francophones needed more time.

[77] Mr. Bilodeau became an AMPMQ member while Mr. Dupuis was president. He was elected as a director and became secretary to the executive. When Mr. Dupuis retired, he was elected president.

[78] As for the context of the AMPMQ filing its certification application on April 5, 2017, Mr. Bilodeau stated that following the Supreme Court of Canada's decision in *MPAO* and the parliamentary committees reviewing Bill C-7, the AMPMQ contacted the other two associations with the view of working together to submit a

joint application. The AMPMQ met with the NPF in August 2017 and unsuccessfully tried to include the Mounted Police Professional Association of Canada (MPPAC). The AMPMQ sought representation for francophone members because no other one could represent them as well as it did.

[79] Given that the bill had not been passed, the AMPMQ decided to proceed with the existing law, the *PSLRA*. The AMPMQ filed a certification application only for Quebec members, as that made it easier to meet the criteria of that Act. On April 18, 2017, the NPF filed a certification application for all RCMP members in Canada.

[80] Mr. Bilodeau stated that in its certification application, the AMPMQ noted the geographic area and the French language as the first language of work. As for the community of interest, the application indicated that because they enforce only federal laws, "C" Division's members have a different community of interest than do members in other provinces, who enforce provincial and local laws.

[81] Mr. Bilodeau affirmed that AMPMQ members continue to trust their representatives. As for the AMPMQ's intention to have regional representation, Mr. Bilodeau stated that it was evolving. He believed that with the other associations, the 40% threshold could have been reached. The AMPMQ wanted representation on the Executive Committee, to have a right to speak without a veto right, and a place on the Bargaining Committee.

[82] When he was asked why the AMPMQ did not claim a bargaining unit for Quebec before Bill C-7 was passed, Mr. Bilodeau replied that it had focused on what would be excluded from an eventual collective agreement, as it wanted real bargaining power. As the passing of the bill was retroactive, it rendered the AMPMQ's certification application void.

[83] Mr. Bilodeau emphasized the registration of a consultant lobbyist from the Legal Fund on May 10, 2017, with respect to Bills C-4 and C-7.

[84] Mr. Bilodeau stated that the 800 RCMP members in "C" Division have a different culture, language, and structure. According to him, since he joined the RCMP in 2004, more major events were held in Quebec than in the other divisions. Moreover, the members perform border surveillance. In terms of the structure of investigations in Quebec as compared to the other provinces, Mr. Bilodeau stated that members of "C"

Division and “O” Division enforce federal laws and use different techniques than are used in other provinces, where members enforce municipal and provincial laws.

[85] Under cross-examination by the employer, Mr. Bilodeau confirmed that all the documents in Exhibit A-14 were published on the AMPMQ’s website. They included the following: a press release dated April 4, 2017, and entitled, “Quebec’s RCMP officers file a request to unionize its 800 members”; a letter to AMPMQ members on April 4, 2017, which he signed as president; a message to RCMP officers across Canada that he signed; and a letter to AMPMQ members on May 1, 2018, that he and the AMPMQ’s acting vice-president and treasurer both signed.

[86] The April 4, 2017, press release announced that the AMPMQ had filed a certification application for the members it represented in Quebec. It quoted Mr. Bilodeau as saying that it would have been preferable had the other two associations (the MPPAC and NPF) filed a single certification application with the AMPMQ, as its efforts to unify had been in vain. Mr. Bilodeau testified that he mentioned that because the other associations did not want to recognize the particularities of “C” Division members.

[87] In his letter to AMPMQ members of April 4, 2017, Mr. Bilodeau mentioned the certification application and the efforts to unite the associations, including the AMPMQ’s requests to the other associations. The letter mentioned the discussions that had taken place with the other associations in the form of mediation for reconciliation.

[88] In his letter to AMPMQ members dated May 1, 2018, Mr. Bilodeau advised them among other things of the progress of events, of the AMPMQ’s requests to the NPF, and of the difficulties encountered with the NPF to ensure respect for the particularities of “C” Division members. The letter indicated that the NPF had not responded to the AMPMQ’s offer of October 31, 2017, during mediation and included the following sentence: “[translation] Our application to challenge the constitutional validity is simply the result of the NPF’s lack of will to discuss and to get along.”

[89] The employer then questioned the AMPMQ’s claim that one of the particularities of “C” Division is a specialization in planning major events. Mr. Bilodeau stated that it is impossible to know what constitutes a major event without regularly participating in planning them. He was referred to an exhibit indicating the deployment of regular members to the following planned events: the 2010 Vancouver Olympics, the G8/G20

Summit in Toronto in 2010, the North American Leaders Summit in Ottawa in 2016, and the G7 Summit in Quebec in 2018. Mr. Bilodeau acknowledged that major events were held in locations other than on “C” Division territory and that members from all divisions were assigned to those events. According to him, the members of the federal police are assigned first to those deployments.

[90] Mr. Bilodeau confirmed that regular members of “C” Division are not automatically members of the AMPMQ, as they must contribute to become members. When he was asked whether in “C” Division, some regular members are members of other associations, he stated that he knew of two.

[91] In cross-examination by the NPF, Mr. Bilodeau was referred to the document indicating the registration on May 10, 2017, of a consultant lobbyist on behalf of the Legal Fund for among other things, monitoring Bills C-7 and C-4. When he was questioned as to whether he was asking the Board to draw a conclusion from the document that the Government of Canada was lobbied to present Bill C-7 to prevent the AMPMQ’s certification application, Mr. Bilodeau replied that he had said that the lobbying registration was to promote Bills C-7 and C-4. The date of registration was 14 or 15 months after the bills were tabled but less than one month after the AMPMQ filed its certification application. He also said that the registration corresponded to when the AMPMQ was in discussions with the NPF. He was unaware as to whether lobbying took place, as his only reference was the registration form and its date.

B. <u>For the employer</u>

1. <u>Stephen White</u>

[92] Mr. White has been the RCMP’s deputy commissioner and associate chief human resources officer since 2016. He joined the RCMP in 1986 and has had a varied career in both national and international policing services. In May 2008, he was appointed the RCMP’s director general of financial crime. From 2011 to 2016, he was the commanding officer of “O” Division for all RCMP activities in the province of Ontario. The mandate excludes the National Capital Region, which is covered by the National Division.

[93] As associate chief human resources officer, he is responsible for the national oversight of all human resources (HR) activities in Canada. The RCMP as an organization has 30 000 employees, of which approximately 19 000 are regular

members and 11 000 are civilian employees.

[94] The RCMP offers contractual policing services in 150 municipalities as well as in 8 provinces, the 3 territories, and in many indigenous communities. It offers federal policing services in all of Canada. In Ontario and Quebec, it offers only federal policing.

[95] Mr. White's entire career with the RCMP has been in federal policing, including in "C" Division. The federal policing mandate includes, according to the RCMP's *Departmental Results Report 2016-2017*, the following:

- *investigate drugs and organized crime, economic crime, and terrorist criminal activity*
- *enforce federal statutes*
- *secure Canada's border*
- *conduct international capacity building, liaison and peacekeeping*
- *ensure the safety of major events, state officials, dignitaries and foreign missions*

[96] Federal policing is supported by specialized services focused on surveillance, technological crime, and aerial policing.

[97] Mr. White introduced a table that shows the number of regular members and reservists in federal policing as of October 2, 2018. Out of a total of 3775 regular members and reservists, the 3 first divisions by size are "O" Division (975), "C" Division (755), and the National Division (Ottawa) (658).

[98] Major operations and broad investigations require approval from Headquarters in Ottawa. Oversight is provided by the director general, whose rank is chief superintendent, to ensure consistency in operations throughout the country. Decisions can be made at the division level, but some operations require approval from Ottawa. Mr. White gave as an example an operation to trace the movement of narcotics entering Canada. Approval must be obtained from Ottawa to allow the importation of the narcotics; further coordination may be necessary if the narcotics travel through several provinces. Mr. White explained that major criminal activity is generally not confined to one province. The investigation may be led by one division, but other federal policing resources outside that division will be mobilized.

[99] According to Mr. White, federal policing is the same in all divisions, but the scope of investigations may differ. Large centres, such as Montreal, Toronto, or Vancouver, lead similar investigations.

[100] Mr. White was questioned about his responsibilities when he was the commanding officer of “O” Division. He answered that during that time, he was responsible for all RCMP activities in Ontario, i.e., the oversight of all investigations and operations. He was in charge of the budget and training, resourcing, and operations. His role also involved engaging with other police and government organizations.

[101] In his current role of acting chief HR officer, Mr. White oversees all HR programs in the RCMP, including staffing, classification, recruitment, hiring, training, compensation (pay and benefits), and health and safety. One of the major responsibilities of the position is ensuring that HR activities are consistent throughout the country. As of April 1, 2018, the vacancy rate for contract policing was 4%, and for federal policing, 7%. Mr. White was asked if the 20% vacancy rate for “C” Division was accurate. He stated that the rate was not that high. It might be higher than 7%, but he pointed out that it was important to distinguish between what he called “permanent” and “temporary” vacancies, the first being positions that are funded but not staffed, the second being positions being held for incumbents away on extended leave, for example, due to medical reasons.

[102] Mr. White stated that terms and conditions of employment, as well as pay and benefits, are established by the Treasury Board and apply everywhere in Canada.

[103] Mr. White introduced a number of documents into evidence that all new recruits sign. One is a letter confirming enrollment in training at the Regina Depot; another is a cadet training agreement. The third document is entitled “Transfer Policy” and reads as follows:

> *I hereby acknowledge that the RCMP Transfer Policy has been explained to me. I fully understand that upon successful completion of the Cadet Training Program and subsequent engagement into the RCMP as a regular member that I will be posted to a detachment or unit to suit the needs of the RCMP. This posting can be anywhere in Canada. I further understand that any personal situations known to me prior to engagement as a regular member may not be considered*

> *for Human Resources management purposes during my subsequent employment with the RCMP.*
>
> *I agree to accept this policy as a condition of employment.*

[104] Mr. White discussed the third chapter of the RCMP's career management manual, which deals with transfers and deployments. He affirmed that when new recruits who have finished their depot training are posted, their preferences are considered. This is confirmed by sections 3.2 and 3.3 of the chapter on transfers and deployments, which read as follows:

> *3.2 In the lateral planning process, although the member's personal circumstances and aspirations will be considered, the organizational needs of the RCMP take precedence.*
>
> *3.3 Before a transfer is ordered, the members affected will be consulted and their views will be recorded ….*

[105] In addition, the acquisition of the second official language will be considered in the case of newly hired regular members. Section 11.1 in the same chapter reads as follows:

> *11.1 A newly engaged RM will not be ordered transferred to a locale where his/her first official language is not in general use, unless the member has been deemed functional in his/her second official language.*

[106] Mr. White explained a chart of promotions and transfers for fiscal years 2016-2017 and 2017-2018 that shows the mobility of regular members transferring into or out of "C" Division (whether via promotion or lateral transfer). The table is current to October 3, 2018. There were 51 transfers in 2016-2017 and 59 in 2017-2018 into "C" Division; there were 33 transfers in 2016-2017 and 30 in 2017-2018 out of it. Mr. White added that mobility is encouraged for regular members' career progression.

[107] Another important component of regular members' work is policing major events, whether planned (G7, G8, or G20 summits, the Olympics, etc.) or unplanned (natural disasters, a sudden influx of people entering Canada, the shootings in Moncton, etc.). All divisions contribute the services of their regular members to such endeavours. Members may volunteer, and if necessary, may be deployed. Mr. White agreed that "C" Division has considerable experience in major-event planning but added that this was also true of "O" Division (Ontario) and "E" Division (British Columbia) as they also regularly organize major events.

[108] On the topic of bilingualism in the RCMP, Mr. White acknowledged that the Treasury Board's *Directive on Official Languages for People Management* applies to the RCMP. It deals with the linguistic identification of positions in the federal public service, which can fall into one of the following four categories: English Essential (duties require the use of English, and the position is considered unilingual English), French Essential, Bilingual (duties require the use of both official languages; a bilingual position), and Either/Or (the incumbent may choose to work in the official language of his or her choice).

[109] Mr. White introduced a table into evidence showing the number of bilingual offices or detachments in Canada. The numbers show a distribution throughout Canada as follows:

Workplaces designated bilingual - All divisions (as of October 17, 2018)

Division	**Bilingual offices or detachments**
B - Newfoundland and Labrador	8
C - Quebec	16
D - Manitoba	19
E - British Columbia	36
F - Saskatchewan	13
G - Northwest Territories	4
H - Nova Scotia	26
J - New Brunswick	35
K - Alberta	28
L - Prince Edward Island	3
M - Yukon	3
National - Ottawa	7
NHQ - Ottawa	2
O - Ontario	20
T - Depot	1

V - Nunavut	1

[110] In October 2018, the Government of Canada announced amendments to the *Official Languages Regulations*. Among other changes, according to Mr. White, are some that will modify the way the RCMP delivers services to the Canadian population. While the former regulations provided that service in the second official language in a given community depended on the size and the percentage of people in a minority situation in terms of official languages, other factors will now be considered. For example, travellers on the Trans-Canada Highway will be entitled to service from the RCMP in the official language of their choice, irrespective of the language of the surrounding communities. This will mean an increase in the number of bilingual detachments and regular members.

[111] According to the RCMP's data, as of July 4, 2018, 2831 regular members identified French as their first language. Of those, 823 were in "C" Division, which means that, as Mr. White pointed out, 70% of regular members who identify French as their first language work outside Quebec.

[112] In cross-examination, Mr. White testified that to his knowledge, there were no unilingual French positions in Quebec for regular members. In the past, there might have been some in some detachments in Quebec, but no longer.

[113] When he was asked if French is a language of work in detachments outside Quebec, Mr. White replied that it is highly probable in New Brunswick. He is aware of detachments in Ontario such as Cornwall that are designated bilingual and where it is common to hear French spoken at work.

[114] Mr. White testified that communication through the RCMP's intranet was done in both official languages in all divisions.

2. <u>Claude Castonguay</u>

[115] Since October 2016, Mr. Castonguay has been the criminal operations officer (CROPS) for Quebec at the rank of chief superintendent. In his 30-year career, he has worked in both contract policing in British Columbia (1990 to 1997 and 2005 to 2010) and in federal policing in "C" Division (1997 to 2005 and 2010 to 2016).

[116] As the CROPS, he is responsible for criminal investigations in Quebec, which

includes six main programs: organized crime, national security, financial integrity, the border area, criminal intelligence, and technological support for investigations. Superintendents manage those programs and report to Mr. Castonguay. The superintendents oversee teams led by inspectors. Most members of “C” Division report to Mr. Castonguay through superintendents, with the exception of the dignitary protection sector and HR administration, who report to the commanding officer of the Division, to whom Mr. Castonguay reports directly.

[117] The priorities for the CROPS in Quebec are established based on a document entitled “2017-2020 Strategic Plan for Federal Policing”. According to Mr. Castonguay, the work is organized in the same way as in “O” Division. The sectors are the same, with the only difference being the number of members. In the other provinces, there are not necessarily the same federal policing sectors, depending on the size of the division. The Prince Edward Island division does not have the six sectors but does more overall work. “E” Division (British Columbia) and “K” Division (Alberta), which are larger, have federal policing structures similar to “O” and “C” divisions. In terms of criminal investigations, federal policing is primarily present in large cities where there is more organized crime, such as Montreal, Toronto, and Vancouver.

[118] The strategic plan focuses on priority issues, identified as follows:

- *Money laundering/terrorist financing*
- *Illegal migration/human smuggling*
- *Terrorist suspects*
- *Cybercrime*
- *Market enforcement teams*
- *Opioids*
- *Outlaw motorcycle gangs*
- *G7 security*

[119] The Strategic Plan is established at Headquarters (HQ) in Ottawa, under the direction of Gilles Michaud, Deputy Commissioner, Federal Policing. HQ establishes priorities and the ranking of investigations. Investigations are assessed based on a number of factors and are assigned a rating. Once the assessment is complete, those deemed less important are not undertaken due to a lack of resources.

[120] In terms of national security, Mr. Castonguay explained how an investigation could be conducted. Intelligence comes from the field, Montreal for example, but because national security falls under HQ’s governance, approval to begin an

investigation must come from Ottawa. The operational plan is developed in Montreal and then approved by HQ, i.e., by the chief superintendent and the director general of national security in terms of federal policing.

[121] According to Mr. Castonguay, "C" Division has only limited autonomy in investigation projects. There is some flexibility as to targets or as to how to investigate, but everything is reported to HQ, which must approve the conduct of the investigation.

[122] Criminal investigation work involves frequent collaboration with other divisions, whether it be the entry of illegal products into the ports of Halifax or St. John's or criminal networks located in Montreal and Toronto.

[123] Mr. Castonguay gave the example of a recent investigation in which electronic surveillance allowed targeting a criminal plan to import fentanyl. HQ approved the investigation, which was deemed a priority. Electronic surveillance was set up of targets in Halifax, where the fentanyl was to arrive, and in Montreal, which was the final destination. Ottawa coordinated the investigation, along with two lead investigators, one in Montreal and the other in Halifax, who oversaw 30 investigators in "C" Division and 20 investigators in "H" Division (Nova Scotia).

[124] Given the national security role of federal policing, it must maintain relations with several other partners in Canada (the Canadian Security Intelligence Service, the Canada Revenue Agency, the Canada Border Services Agency, etc.) and abroad (the Drug Enforcement Agency, the Homeland Security Agency, and the US Border Patrol in the United States, as well as police services in other countries) with whom the language of communication is generally in English (apart from francophone countries). In addition to state partners, the federal police also maintains relationships with private partners, such as Facebook, telecommunications companies, and banks.

[125] Mr. Castonguay stated that the language of work in "C" Division is primarily French. English is spoken as well, more or less, depending on the detachment. There are no unilingual French positions for regular members. In Quebec, all positions are bilingual. Given the duties of federal policing, a regular member cannot function solely in French. It does not offer local policing services as in other provinces (except Ontario). The RCMP's mandate in Quebec is federal policing, with everything that it involves in terms of coordinating with neighbouring Canadian and

American jurisdictions.

[126] International events that require an RCMP presence are planned at HQ in Ottawa, which determines staffing needs. In a case such as the G7 Summit in Charlevoix in 2018, a team from Ottawa coordinated with a team on-site from "C" Division. Planning and logistics were shared.

[127] Mr. Castonguay was questioned about "C" Division's expertise in counterfeiting and bankruptcy. He replied that it no longer handles those areas. However, it is the only division that has a team fully dedicated to the proceeds of crime. In other divisions, this work is part of the organized crime sector.

3. <u>Dennis Duggan</u>

[128] Mr. Duggan works for the Treasury Board Secretariat as a senior labour relations consultant. He has been with the Treasury Board since 1980, working as a negotiator, a policy coordinator for separate employers, and a senior policy analyst. He has negotiated with several different bargaining agents.

[129] At the hearing, Mr. Duggan was shown several collective agreements that he negotiated on behalf of the Treasury Board. The first one was between the Treasury Board and the Public Service Alliance of Canada (PSAC) with an expiry date of August 4, 2000, for the Operational Services group. Annex A shows the hourly rates of pay for the Hospital Services group; they varied from one region to another, as indicated by a grid. The regions are Atlantic, Quebec, Ontario, Manitoba, Saskatchewan, Alberta with Nunavut and the Northwest Territories, and British Columbia with the Yukon.

[130] The second collective agreement, with an expiry date of August 4, 2018, covered the same group. In this one, the regional rates of pay were eliminated. Mr. Duggan explained that they had been included in the past to compete with the private sector and that they were remnants of a time predating collective bargaining. The parties to that particular agreement felt that they were no longer needed.

[131] However, different work conditions may be negotiated for subgroups, and an example is given at Annex D, "… applicable to Pasture Managers, Pasture Riders and Range Riders", at Annex E, "… applicable to Lockmasters, Bridgemasters and Canalmen", and at Annex I, "… applicable to employees of the Department of Fisheries and Oceans Sea Lamprey Control Unit". Mr. Duggan explained that given the diversity

of functions in the operational group, it is necessary to provide some flexibility to take that diversity into account.

[132] Those same comments were made about to the collective agreement covering Technical Services, in which the appendices are generally memorandums of agreement to cover the different groups' particularities. Another example presented was a collective agreement with the Professional Institute of the Public Service of Canada covering Health Services (expiry date: September 30, 2018), in which regional rates of pay appear again, this time in response to retention issues, according to Mr. Duggan. The same holds true for the collective agreement between the Treasury Board and the Association of Justice Counsel for the Law group, in which a different rate of pay was negotiated for lawyers in Toronto, again for retention purposes.

[133] As a senior labour relations consultant, Mr. Duggan was involved in developing Bill C-43, the legislative response to the Ontario Superior Court of Justice's decision that found the labour relations regime in the RCMP unconstitutional (see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2009 CanLII 15149, 96 OR (3d) 20 (ON SC)). The bill was introduced sometime in 2010 and died on the order paper. It already contained the clause being challenged before the Board, mandating a single bargaining unit for regular members.

[134] Mr. Duggan was also involved in the development of Bill C-7, which became the Act enacted on June 19, 2017, creating the new RCMP labour relations regime. This time, the bill was designed to respond to the final court decision on the matter, the Supreme Court of Canada's 2015 *MPAO* decision. It followed a report written by Alain Jolicoeur, the then-chair of the Pay Council, who conducted research to gather the views of the RCMP's regular members about the regime that should replace the one that the Supreme Court had declared unconstitutional. The research was carried out by means of a survey and by holding town-hall meetings across the country. The meetings were held after the survey was conducted, to better inform the members and to gather their specific comments.

[135] Daphne Taras, Dean of the School of Business at the University of Saskatchewan, developed the survey in collaboration with Mr. Jolicoeur. As was pointed out in cross-examination, she has written extensively on non-unionized labour systems.

[136] The survey was administered in July and August 2015. All regular members

were invited to participate. The survey centre sent invitations to 17 366 active regular members as well as 1140 letters to members on leave. The participation rate was approximately 50%. Two questions were designed to determine to what extent the regular members favoured a single bargaining unit.

[137] Question 4 was worded as follows (number of responses and percentage follow; the percentage is based on the number of people who answered the question):

> *Which of the following answers best reflects your preference for a grouping of members that is appropriate for collective bargaining?*
>
> - *A single, national grouping that is consistent with the RCMP's (Royal Canadian Mounted Police) unique situation as a national police organization* (5277, 62%)
> - *A number of different RCMP (Royal Canadian Mounted Police) groupings, perhaps divided by province or region* (2862, 34%)
> - *Don't know* (403, 5%)
>
> *Total* (8542, 100%)

[138] Question 7 was used to validate question 4, a normal device in a survey, according to Mr. Duggan. It read as follows:

> *How important is it to you that the grouping of RCMP (Royal Canadian Mounted Police) members that is appropriate for collective bargaining is a single, national unit?*
>
> - *Not important* (617, 7%)
> - *A bit* (408, 5%)
> - *Somewhat* (1553, 19%)
> - *A lot* (2010, 24%)
> - Very important (3518, 42%)
> - *Don't know* (289, 3%)
> - *Total* (8395, 100%)

[139] A breakdown of the responses to question 4 by region shows that support for a single bargaining unit was lower in Quebec and British Columbia than in the rest of the country, although it was still the majority view. While in other regions support for the single bargaining unit varied from 61 to 81%, in Quebec it was 54%, and in British

Columbia, 53%.

[140] As was pointed out in cross-examination, Question 7 is somewhat ambiguous and could be interpreted as not necessarily meaning support for a single bargaining unit but rather a concern. The percentage in Quebec who considered it “a lot” or “very important” is 66%, and in British Columbia, 57%. The validity of that question is unclear.

[141] Bill C-7 was first introduced on March 9, 2016. The Senate passed it, with amendments, on June 21, 2016. Mr. Duggan was asked why the Senate’s amendments were considered only on May 12, 2017, and whether it was related to the AMPMQ’s certification application before the Board. He replied that to his knowledge, it was unrelated to the certification application. Rather, it was the process of Parliamentary bills; Parliament rose for the summer of 2016, and it took until May 2017 for the House of Commons to incorporate the great majority of the Senate’s proposed amendments.

[142] Mr. Duggan was questioned as to why s. 238.05 was added to Bill C-7. It gives specific direction to the Board in applying the *Act* to regular RCMP members and reservists. It reads as follows:

> ***238.05*** *In administering this Act and in exercising the powers and performing the duties and functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, with regulations made under it or with decisions made in respect of a matter coming before the Board, the Board must, in matters concerning RCMP members and reservists, take into account the unique role of the Royal Canadian Mounted Police as a police organization in protecting public safety and national security and its need to deploy its members and reservists as it sees fit.*

[143] Mr. Duggan answered that the RCMP is the only police operation within the core public administration and that it was important to give direction to the Board to take into account the force’s operational nature. Deployment, for example, cannot require the employee’s consent, as it does for all other public servants.

[144] Mr. Duggan was also questioned as to why the legislator chose to include s. 238.14, at issue in this case, instead of leaving it to the Board’s discretion, as

provided in s. 57 of the *Act*, to decide the appropriate bargaining unit or units for the RCMP's regular members and reservists.

[145] Mr. Duggan answered that that option was chosen both to respect the Supreme Court's decision and to maintain effectiveness in administering the RCMP labour relations regime. He added that the collective bargaining of several bargaining units representing groups performing the same work could create internal morale issues that could jeopardize the RCMP's effectiveness.

[146] Mr. Duggan mentioned as an example of a single bargaining unit the Canadian Coast Guard, which has offices in Quebec where the workplace language is French. It does not have a specific bargaining unit for Quebec.

[147] Mr. Duggan was asked whether the government had taken into account the results of the survey to draft s. 238.14. He answered that the government was interested in the RCMP members' perceptions but that it had drafted the section with a view to addressing a unique organization's situation.

[148] Mr. Duggan testified that he has negotiated with both large and small bargaining agents as a Treasury Board representative. The largest bargaining agent is the PSAC, which represents from 60% to 70% of core public administration employees. When he was asked whether the PSAC set the agreements for the smaller bargaining units, Mr. Duggan replied that the smaller units made their own assessments of terms and conditions, but he conceded that it would be difficult for smaller units to obtain more than what the larger units obtained, as the Treasury Board, which negotiated with all of them, would not want to undermine its position. For different terms to be negotiated, the bargaining agents have to clearly differentiate the circumstances, which would be rare.

[149] Mr. Duggan also testified to the trend to an increase in the size of bargaining units and a corresponding decrease in their number between the 1970s and the 2000s, which made for a more efficient bargaining process.

III. Summary of the arguments

A. For the AMPMQ

[150] According to the AMPMQ, the following two questions must be answered:

(a) Does s. 238.14 infringe the AMPMQ's constitutional right to associate?

(b) If so, is the infringement justifiable under s. 1 of the *Canadian Charter of Human Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("the *Charter*")?

1. <u>Does s. 238.14 of the *Act* infringe the AMPMQ's constitutional right to associate?</u>

[151] The AMPMQ argues that the Board should declare s. 238.14 inoperative because it infringes the freedom of association of "C" Division members.

[152] According to the AMPMQ, the main objective of the constitutional freedom of association is to give the right to demand working conditions to a group whose members would not have that power individually.

[153] The AMPMQ cites the decision in *MPAO* to identify what constitutes the constitutional right to associate and its components (see paragraph 29 of the AMPMQ'S written submissions):

> [Translation]
>
> *According to the Supreme Court of Canada, the cumulative elements of the constitutional right to associate are thus as follows:*
>
> > *(i) the right to choose and form a group with common goals or demands;*
> >
> > *(ii) The right to make collective demands or defend rights, including the right to bargain collectively;*
> >
> > *(iii) The right, in forming an association, to be on equal ground with the employer;*
> >
> > *(iv) The possibility of association chosen for real accountability with respect to demands made to the employer.*

[154] The Supreme Court of Canada, particularly in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*B.C. Health Services*"), and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, has developed the concept of "substantial interference" with the right to bargain collectively as the standard for determining whether s. 2(d) of the *Charter* has been infringed. In

particular, the AMPMQ cites paragraph 19 of *B.C. Health Services*, as follows:

> *19. At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the Charter protects collective bargaining rights. 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. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the Charter ….*

[155] The AMPMQ asserts that one of the fundamental aspects of the freedom of association is freedom of choice. In particular, it relies on a decision by the Court of Appeal of Quebec in *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ c. Association syndicale des employé(es) de production et de services (ASEPS)*, 2017 QCCA 737 ("*Renaud-Bray*"; application for leave to appeal dismissed in [2017] S.C.C.A. No. 280 (QL)).

[156] *Renaud-Bray* involved a certification application by ASEPS before the Commission des relations du travail (CRT; now named the Tribunal administratif du travail (TAT)) for a bargaining unit made up of nine employees at a Renaud-Bray bookstore in Victoriaville. The SEPB had the certification for all Renaud-Bray stores in Quebec, including in Victoriaville, but the employees were not satisfied with the representation it offered, as they were included in a single bargaining unit and had the impression that the SEPB did not consider their concerns, due to the small number of employees compared to all the other stores concentrated in the metropolitan Montreal area.

[157] The CRT viewed the ASEPS' certification application as a request to split a bargaining unit and dismissed the application, finding that there were insufficient grounds to justify reversing the presumption in favour of maintaining an existing bargaining unit. At trial, the Superior Court of Quebec allowed the application for judicial review and certified ASEPS as the bargaining agent for the unit of employees in Victoriaville. The Court of Appeal of Quebec, in a majority ruling, allowed the appeal in

part, finding unreasonable the CRT's decision to consider the certification application as a request to split (the burden of proof being much higher in the latter case) but returned the case to the TAT to reassess the certification application.

[158] The Court of Appeal of Quebec reached a split decision. Justice Gagnon, in dissent, would have restored the CRT's decision and refused the certification of ASEPS. According to the judge, the choice of representation upheld by the SCC in *MPAO* does not necessarily mean the choice of a specific bargaining agent.

[159] Justice Mainville, writing for the majority, found that the concept of choice requires that employees be consulted about who will represent them. It was clear to him that the unit made up of the nine employees had the right to determine its representation.

[160] In his reasoning, Justice Mainville relied on the decision in *MPAO*, as had the trial judge. He cited the Supreme Court's conclusion at paragraph 104 of his decision, in that "[translation] … the *Charter* guarantee of freedom of association protects the existence of a meaningful collective bargaining process that provides employees with a freedom of choice and an independence sufficient to enable them to determine and defend their collective interests."

[161] Justice Mainville conceded that freedom of choice does not mean that every association can be recognized; he recognized that the labour relations model "… imposes restrictions on individual rights to pursue collective goals" (*MPAO*, at para. 98).

[162] The argument in *Renaud-Bray* is that an analysis based on the criteria for division constitutes substantial interference in the freedom of employees to join the association of their choice. Justice Mainville brings up that the will of the employees is fundamental to the certification process, which the AMPMQ insists on in its arguments.

[163] The AMPMQ emphasizes that in *MPAO*, the Supreme Court stated that employees' freedom of choice is inherent in the nature and purpose of collective bargaining (at paragraph 39 of the AMPMQ's arguments). It cites paragraph 86 of *MPAO* to list the following components of freedom of choice:

> *[86] Hallmarks of employee choice in this context include the ability to form and join new associations, to change*

> *representatives, to set and change collective workplace goals, and to dissolve existing associations.*

[164] The AMPMQ asserts that freedom of association is such that the government cannot substantially interfere with employees' freedom to choose their exclusive bargaining agent, citing paragraph 98 of the decision, the first part of which reads as follows:

> *[98] The respondent argues that this view of s. 2(d) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association….*

[165] The AMPMQ recognizes that there can be limitations on the freedom to choose in a certification system; however, there are restrictions on those limitations, as indicated in the Court of Appeal of Quebec's decision in *Syndicat des juristes du secteur municipal (CSQ) c. Alliance des professionnels et professionnelles de la Ville de Québec*, 2017 QCCA 736, issued on the same day as *Renaud-Bray*, from which the AMPMQ cites the following passage:

> [Translation]
>
> *[81] In Renaud-Bray, I stated that limitations on employees' freedom of choice of the bargaining units to which they belong are inevitable in a Wagner Act labour relations regime. That being the case, if limitations on the right to freedom of association are inevitable under such a regime, the nature and the scope of those limitations must limit the employees' freedom of association only to a justified and proportionate level that allows the labour relations regime to function adequately. A limitation on the right to freedom of association that does not meet that criterion is immediately suspect from a constitutional perspective.*

[166] In support of its arguments, the AMPMQ cites the fact that other administrative tribunals, in the spirt of *MPAO*, follow suit in highlighting the importance of employees' choice of a bargaining agent. In particular, it cites *Unifor v. Enbridge Pipelines Inc.*, 2018 CIRB 871.

[167] In that decision, the CIRB certified Unifor for a bargaining unit consisting of 17

people assigned to pipeline maintenance for the St. Lawrence region. The employer asserted that the unit appropriate for bargaining was made up of 62 people, including employees responsible for the maintenance of two other pipelines in the Eastern region. The CIRB found that the unit of 17 people was appropriate for bargaining, despite the employer's operational preferences. (Comment from the Board: curiously, this decision refers to freedom of association within the meaning of *MPAO*, but at the same time, the CIRB dismisses the objections of Belleville employees, who were in the minority and who disagreed with the definition of the bargaining unit, on the grounds that the employees were not part of a certification application.)

[168] The AMPMQ also cites the decision in *Syndicat des inspecteurs du RTM - CSN et Unifor*, 2018 QCTAT 3310, in which the issue was the certification of employees in the context of transforming the Réseau de transport métropolitain, noting the following passage:

> [Translation]
>
> *[87] That said, with due respect, the Supreme Court's statement* [the model using a designated bargaining agent (see, for example, the *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5) offers another example of a scheme that could be acceptable] *must not be seen as authorization to infinitely mix things up without the right to associate being brought into question. It is very possible that a contextual analysis of a bargaining regime in which the bargaining agent is designated could lead to a conclusion that freedom of choice and independence with respect to the employer are enough to respect the requirements of the right to associate. This does not mean that freedom to choose the bargaining agent is not protected by the right to associate. The exercise of choosing a bargaining agent will be measured by a contextual analysis of the existing process.*

[169] The AMPMQ submits that "C" Division members constitute a distinct and homogenous group that has expressed its wish to associate with the AMPMQ. It also claims that "C" Division is a distinct group that has administrative and functional particularities. Notably, "C" Division is distinct because it does not include a contract policing component, unlike the rest of the country (other than Ontario). "C" Division is also distinct due to its linguistic reality.

[170] "C" Division is also distinct, again according to the AMPMQ, due to its more demanding nature in terms of labour law, as Mr. Delisle and Mr. Dupuis testified. "C"

Division was the only one to vote against the SRRP in 1974. Mr. Delisle led the fight in the 1990s to recognize the right of RCMP members to unionize, a right that was finally recognized in *MPAO*.

[171] Finally, The AMPMQ submits that “C” Division has distinct demands, particularly about the number of vacant positions in Quebec, the recognition of specific expertise at “C” Division, and the defence of French within the RCMP.

2. <u>If there is an infringement, is it justifiable under s. 1 of the *Charter*?</u>

[172] The AMPMQ submits that there is an infringement that cannot be justified under s. 1 of the *Charter*. It reiterates the analysis set out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[173] Under the first section of the *Charter*, a right or freedom guaranteed under it can be limited only by a rule of law that can be demonstrably justified in a free and democratic society. *Oakes* sets out two criteria to apply: the purpose of the restriction must be related to a substantial and pressing concern, and the restriction must be reasonable. Reasonableness is measured using three criteria: the restriction must have a rational connection to the intended purpose, it must interfere with the freedom or right in question as little as possible, and there must be proportionality between the effects of the limiting measure and the desired objective, such that the benefits outweigh the deleterious effect. According to the AMPMQ, s. 238.14 of the *Act* fails that analysis.

[174] First, there is no substantial and pressing objective. The Attorney General of Canada referred to the benefit of efficiency in having a single bargaining unit. It could have made the same arguments had the Board retained the discretion to determine the appropriate bargaining unit. The importance of the objective can be doubted, as the legislator took more than two years to enact it (from *MPAO* in January 2015 to the enactment of the bill on June 19, 2017). Instead, it seems that the objective of the legislator, which is confused with the employer, was to avoid having a separate unit represented by the AMPMQ, with which the employer has long had a conflictual relationship.

[175] If as it claims, the government’s objective is to foster better labour relations, then there is no logical relationship between that objective and the action taken, as it

only increases the tensions between the francophone and anglophone groups by imposing a single unit and a single bargaining agent. Denying a right of association is not consistent with labour peace; it is much to the contrary. The AMPMQ referred to the words of Justice Cory, who dissented in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, and wrote that although it can be assumed that precluding RCMP members from unionizing will prevent labour strife, the opposite conclusion is just as reasonable.

[176] Imposing a single bargaining unit is not a minimal interference with freedom of association. The employer could have raised its point of view before the Board if it was convinced that its solution was preferable. By legislating, the legislator deprived "C" Division members of the possibility of creating the association of their choice to bargain collectively, which is the very essence of the right protected by s. 2(d).

[177] In *B.C. Health Services*, the Supreme Court referred to the lack of consultation as a factor that can be considered in studying minimal interference (at paragraph 157). In the case at hand, the affected parties were not consulted, i.e., the three associations that were successful in *MPAO*. The government simply relied on a survey by experts in non-unionized workplaces and a bogus consultation conducted by an employer representative.

[178] The interference is not minimal as it deprives "C" Division members of the possibility of truly determining their collective objectives; they are flooded by a strong majority outside Quebec. A national association that is majority anglophone cannot consider the linguistic, cultural, and functional particularities of "C" Division.

[179] Finally, the prejudicial effects of s. 238.14 greatly outweigh its benefits. It tramples "C" Division's labour relations interests. No consideration is given to its linguistic reality, the fact that it has no contract policing component, unlike the rest of the country, or its members' desire to be represented by the AMPMQ, as is clearly seen in the certification application.

[180] The factors reiterated in *Delisle* that would lead the Board to uphold the legislator's choice do not apply in this case. The AMPMQ cites the following passage from *Delisle*:

> *127. … four contextual factors which would favour a more*

> *deferential approach at one or more stages of the s. 1 inquiry, namely: (1) the role of the legislature in striking a balance between the interests of competing groups, as distinct from the situation where the legislature is the "singular antagonist" of the individual whose Charter freedoms have been infringed; (2) the vulnerability of the group that the legislature seeks to protect, and that group's subjective fears and apprehension of harm; (3) the inability to measure scientifically a particular harm in question or the efficaciousness of a remedy; and (4) the low social value of the activity suppressed by the legislation.*

[181] The AMPMQ concludes that s. 238.14 constitutes a total, and therefore substantial, interference with "C" Division members' constitutional right to collective bargaining and, as such, interference with freedom of association guaranteed under s. 2(d) of the *Charter*.

B. <u>For the Treasury Board and the Attorney General of Canada</u>

[182] The employer, the Treasury Board, and the intervenor, the Attorney General of Canada, made joint submissions through the same counsel. Their interests do not diverge.

[183] According to the employer, the issues are as follows: (1) Does s. 238.14 of the *Act* substantially interfere with the right of RCMP regular and reserve members to a meaningful collective bargaining process within the meaning of s. 2(d) of the *Charter*? (2) If so, is it a reasonable limitation established by a rule of law and demonstrably justified in a free and democratic society, within the meaning of s. 1 of the *Charter*?

[184] The employer argues that the answer to the first question must be "no". Section 2(d) of the *Charter* protects the right to freedom of association. In the labour relations context, this provision protects the right to a meaningful collective bargaining process. The *Charter* does not protect a particular labour relations model or a specific outcome (see *MPAO*, at paras. 67, 93, 98, 137, and 193; *Fraser*, at paras. 42 and 45 to 47; and *Meredith v. Canada (Attorney General)*, 2015 SCC 2 at paras. 24 and 25). Employees have the right to a meaningful collective bargaining process, not associations. Section 2(d) does not impose a process in which every association will obtain the recognition that it seeks (see *MPAO*, at paras. 67 and 68; and *Meredith*, at paras. 24 and 25).

[185] To determine if there was interference in the employees' right to a meaningful collective bargaining process, one must examine whether the mechanism substantially

disrupts the balance of power between employees and employer necessary for the meaningful pursuit of workplace goals. Employees need only enough of a degree of freedom of choice and independence to allow them to identify their collective goals and how to achieve them. The analysis is contextual and varies with the industry culture and workplace in question (see *MPAO*, at paras. 67, 71, 72, 93, 137, and 140; and *Meredith*, at paras. 24 and 25).

[186] The employer cited examples of the features of the degree of choice and independence mentioned in *MPAO*, including the ability to form and join a new bargaining agent, to dissolve an existing bargaining agent, to set and change the bargaining agent's internal governance structure, and to set and change collective goals related to work (see *MPAO*, at paras. 81 to 89, 92, 95, and 97 to 99).

[187] According to the Supreme Court in *MPAO*, s. 2(d) of the *Charter* gives the legislator ample leeway to devise a collective bargaining regime that satisfies the RCMP's special requirements (see *MPAO*, at paras. 137 and 140).

[188] The employer referred to the following examples in which the courts have determined that collective bargaining regimes other than the Wagner model can satisfy s. 2(d) of the *Charter* by guaranteeing employees an acceptable degree of freedom of choice and independence to allow for meaningful collective bargaining: a separate regime for agricultural workers that provides the right to form and join an association, to participate in its activities, to assemble, to make representations to their employers on their terms and conditions of employment, which it must consider in good faith, and the right to exercise those rights without fear of interference or retaliation (see *Fraser*); a model identifying the bargaining unit (see *Québec (Procureur général) c. Confédération des syndicats nationaux*, 2011 QCCA 1247 at para. 94; application for leave to appeal dismissed in [2011] S.C.C.A. No. 424 (QL)); a model designating the bargaining agent (see *School Boards Collective Bargaining Act*, 2014, S.O. 2014, c. 5; and *MPAO*, at para. 95); a model based on majority and exclusivity (such as the Wagner model) that imposes restrictions on the rights of individuals to achieve common goals (see *MPAO*, at paras. 92, 94, and 98); a law prohibiting or limiting pay raises for a set period (see *Meredith*, at paras. 48 and 49; *Canada (Attorney General) v. Canadian Union of Public Employees, Local 675*, 2016 QCCA 163 at para. 100 (application for leave to appeal dismissed in [2016] S.C.C.A. 117 (QL); and *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2016 BCCA 156 at

paras. 92 and 93).

[189] The employer also cited examples in which the courts found substantial interference with the right to a meaningful collective bargaining process, including a model identifying a bargaining agent influenced by management (see *MPAO*), a model limiting the right to strike without providing a meaningful mechanism for resolving disputes (see *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4), and a law invalidating collective agreement provisions and precluding any meaningful collective bargaining on certain important issues (see *B.C. Health Services*).

[190] The employer submits that the *Act* gives regular members and reservists a meaningful collective bargaining process. We will come back to this in our analysis.

[191] In that the employees' wishes would be a determining factor in resolving a dispute about the bargaining unit under a Wagner model, the employer argued that in this case, the desire of the majority of members is to have a single, national bargaining unit, as expressed in the survey of them. According to the employer, this would improve the members' bargaining power and would allow it to bargain with a bargaining agent that best represents the employees who are its members.

[192] Alternatively, in response to the second question, the employer submits that even if s. 238.14 of the *Act* imposes a limitation under s. 2(d) of the *Charter*, the requirement of a single, national bargaining unit is a reasonable limitation demonstrably justified in a free and democratic society, in accordance with s. 1 of the *Charter*.

[193] The employer cites the steps of the analysis in *Oakes*. It argues that the main objective of the requirement of a single, national bargaining unit is to ensure stability and coherence in the RCMP's unique and national operations. This includes the following objectives: instituting uniform labour conditions on a national scale, ensuring the transfer of members to meet operational needs, and minimizing the risk of labour strife. These pressing and substantial needs are related to the public's protection and the safety, as the RCMP is the only force that provides security, protection, and law enforcement services at the municipal, provincial, federal, and international levels.

[194] As for the assessment of the proportionality of the means chosen to achieve the

objective, the employer first suggests that there is a rational link between the requirement of a single, national unit and the main objective of ensuring stability and coherence in the RCMP on a national scale. This link is also present in the objectives of uniform labour conditions, the transfer of members, and the minimization of the risk of labour strife.

[195] To establish the rational link, there simply needs to be a reasonable inference based on logic and common sense that the means adopted by the government will help achieve the objective in question (see *MPAO*, at para. 143).

[196] The employer argues that the requirement of a single, national bargaining unit eliminates the risk of splitting bargaining units, which would result in differences in working conditions. Given that the RCMP's operations require that its members be mobile, uniform working conditions favour a smooth transition for members from region to region.

[197] The employer submits that the interference is minimal and that requiring a single, national bargaining unit falls within the range of reasonable alternatives. This requirement corresponds to the community of interest of all members, as they receive the same training, perform the same duties, have the same pay and benefits, and can be transferred anywhere in the country.

[198] The employer notes that at this stage of the analysis, the courts must defer to a certain extent to the legislator and not intervene simply because they can imagine a more appropriate and less-detrimental remedy to the problem.

[199] As for the final element of the analysis, the employer argues that the measure has beneficial effects. It reiterates that a single, national unit improves the members' bargaining power and minimizes the risk of labour strife caused by different working conditions that according to it, would jeopardize the stability and coherence of its operations.

[200] The employer asserts that the measure is tempered, as members can still form and join an association or group of associations and exercise all the rights set out in the *Act*. It argues that since the specific demands of Quebec members, as applicable, can be addressed through collective bargaining, the requirement of a single, national unit does not leave them without a collective voice to determine their collective goals

and how to meet them. According to the employer, there is no empirical evidence to the contrary.

[201] The employer submits that the requirement of a single, national unit has a limited impact on the choice of a small group of employees who prefer a provincial unit.

C. For the NPF

[202] The NPF states that in *B.C. Health Services*, the Supreme Court described the right to collective bargaining under s. 2(d) of the *Charter* as a right to a process, not to a particular model and not to an outcome. The Court stated at paragraph 91 that to be constitutionally impermissible, an interference must be so substantial "… that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer."

[203] The NPF submits that in *MPAO*, the Supreme Court established that the test to determine a breach of s. 2(d) of the *Charter* is substantial interference with "… the possibility of having meaningful collective negotiations on workplace matters" (*MPAO*, at para. 68). Using this test, the NPF finds that s. 238.14 does not violate s. 2(d) of the *Charter*. Alternatively, if the Board finds that s. 238.14 violates s. 2(d) of the *Charter*, it is saved by s. 1 of the *Charter*.

[204] In *MPAO*, the Supreme Court declared that the purpose of s. 2(d) of the *Charter* is to improve the power imbalance between employees and employers. It stated that the two essential elements of a meaningful collective bargaining process are choice and independence. It added that choice and independence are limited in the context of collective bargaining. On choice, the Court stated, "In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association" (*MPAO*, at para. 83).

[205] The NPF stated that the notion of "choice" as an element of meaningful collective bargaining does not extend to the choice of bargaining unit or even the choice of bargaining agent. In its view, choice means that the employees' representatives must be accountable to the employees, to ensure that the association

works to realize the goals for which the employees joined. The NPF submits that a single, national bargaining unit has a myriad of protections for discrete groups within the larger unit.

[206] The NPF submits that freedom of association is about correcting power imbalances. Requiring a single, national bargaining unit does not violate s. 2(d) of the *Charter* because it actually enhances bargaining power for RCMP members and reservists. A legislated single, national bargaining unit promotes freedom of association and facilitates the exercise of members' and reservists' constitutionally protected right to collective bargaining.

[207] The NPF states that the case law recognizes that sector-based and legislated bargaining units conform with s. 2(d) of the *Charter*. Labour boards and courts, both before and after the *MPAO* decision, have determined that legislation or policies setting bargaining unit size and composition do not violate s. 2(d).

[208] In addition, in *MPAO*, the Supreme Court found that the "designated bargaining model", in which the bargaining agent is determined by legislation and not by employee choice, can be constitutionally permissible as long as the freedom of choice of workplace goals is retained, along with sufficient independence from the employer (*MPAO*, at para. 95). Likewise, a majoritarian model of labour relations can be constitutionally permissible (*MPAO*, at para. 94).

[209] Furthermore, s. 238.14 does not violate s. 2(d) of the *Charter* because it establishes the normal practice for police and public-sector workplaces such as the RCMP.

[210] The NPF also submits that labour boards, including the FPSLREB and its predecessors, have consistently preferred larger bargaining units for both federal and provincial public-sector employees.

[211] A legislated single, national bargaining unit is consistent with international legal norms. The International Labour Organization (ILO)'s 2018 report on freedom of association states that legislative determination of the appropriate bargaining unit is acceptable. The ILO has also stated that minority unions in a majoritarian system retain certain rights other than collective bargaining. The NPF submits that s. 238.14 of the *Act* does not limit RCMP members from forming and joining organizations of their

choice, in addition to a certified bargaining agent, and these union organizations have the right to represent the members in workplace issues not covered by the collective agreement.

[212] The NPF addresses the Quebec Court of Appeal's decision in *Renaud-Bray*, which the AMPMQ cited. The NPF submits that the FPSLREB, as a federal tribunal, is not bound by the Quebec Court of Appeal's decision. It states that the Court's focus was not on the *Charter* but instead on the finding that the decision maker relied solely on a presumption without adequately examining the facts of the case. The NPF further states that the Board declined to follow the Quebec Court of Appeal in a recent decision about determining the bargaining unit of certain RCMP civilian members (see *CUPE v. Treasury Board*, 2017 FPSLREB 36).

[213] The NPF acknowledges the evidence on the negative treatment of the AMPMQ's leadership by RCMP management and finds it inexcusable. However, the NPF does not believe that this evidence proves that Quebec members and reservists need their own bargaining unit.

[214] The NPF notes that AMPMQ representatives appeared before both Senate and House of Commons committees on the bills that included s. 238.14 and that it did not raise concerns about s. 238.14. The NPF adds that the AMPMQ errs when it contends that membership in it is proof of a preference for a bargaining unit only for Quebec.

[215] The NPF rejects the AMPMQ's contention that a Quebec bargaining unit is required because Quebec is a clearly distinct workplace on the basis of language, federal policing, and travel reimbursement claims. The NPF declares that the alleged differences are irrelevant to the application.

[216] As an alternative argument, the NPF submits that if the Board finds that s. 238.14 violates s. 2(d) of the *Charter*, then the provision is justified by s. 1 of the *Charter* under the *Oakes* test: there is a pressing and substantial objective, and the means by which it is attained are proportionate; that is, rationally connected to the objective, causing minimal impairment, and remaining balanced.

[217] The NPF agrees with the employer that s. 238.14 has a pressing objective (to protect the public interest in stable labour relations for RCMP members) and that the single, national bargaining unit is rationally connected to the objective.

[218] The NPF states that the salutary effects of the single, national bargaining unit are significant. For example, a single, national unit protects members when they transfer, and it ensures that the bargaining agent will have to reflect on a diversity of views and backgrounds. A single, national bargaining unit will protect the linguistic rights of all francophone members, not only those stationed in Quebec.

[219] In contrast, the deleterious effects are modest because members can choose to be represented by other employee organizations in matters not related to the collective agreement. In addition, members are protected because the single, national unit has a duty to fairly represent all its members, and they have the right to decertify and replace a bargaining agent.

IV. Analysis

[220] This section reviews the merits of the motion for a declaration that the impugned provision is inoperative on constitutional grounds, but we will first set out our reasons for dismissing the report and expert testimony presented by the AMPMQ.

A. Dismissal of the expert's report and testimony

1. Content of the report

[221] The AMPMQ sent an expert report to the parties and to the Board before the hearing; its intent was to have the expert testify at the hearing. The employer indicated before the hearing that it planned to object to the filing of the report. We heard the employer's objection and the AMPMQ's response at the hearing. The NPF supported the employer's position.

[222] The report is entitled "[translation] Appropriate Bargaining Units in the Federal Public Sector". The author is Professor Michel Coutu, a professor of labour law and sociology of law at the Université de Montréal's School of Industrial Relations. He claims to be a specialist in the sociology of law, which he distinguishes from normative law and defines as follows: "[translation] the objective of the sociology of law is to compare legal phenomena to other social, economic, political, religious and cultural facts, etc." Further in his introduction, he writes that an expert in the sociology of law refers to the law, regulations, and jurisprudence, not "[translation]… to argue in favour of a given interpretation, but simply to provide an accurate image of the state of law (in the broad sense of the term) to illustrate its sociological characteristics".

[223] Professor Coutu explains his mandate as follows:

> [Translation]
>
> *1. From a sociological and historical standpoint, study the emergence of certification units in the federal and provincial public sectors (as applicable), highlighting the policy and administrative choices that led to their breakdown, the conflict factors in that area (e.g. attempts to certify the Syndicat des contrôleurs aériens du Québec), and the functional dynamic guiding the orientation of the Federal Public Sector Labour Relations Board [sic].*
>
> *2. From the same standpoint, with respect to RCMP members in "C" Division: trace the history of the Association des membres de la police montée du Québec (AMPMQ), examine its attempts to unionize officers in Quebec and, more broadly, its activities to represent and defend its members, notably with respect to the RCMP's Representative Program; identify the specific topics of claims/bargaining that differentiate the AMPMQ from other voluntary RCMP member organizations, such as the National Police Federation (NPF); examine the difficulties of accepting the particularities of RCMP members in Quebec (as applicable); show how the amendment requiring a single cross-Canada bargaining structure penalizes AMPMQ members and substantially interferes with a meaningful bargaining process based on the wishes of the members in question.*
>
> *3. Based on international labour law (ILO, Council of Europe) and comparative law, essentially in a perspective of the sociology of labour law, examine the degree to which international law and national rights prevail in certain federal states (such as Belgium, Switzerland, and Germany) or multinational states (such as the United Kingdom), allowing for a segmented representation of members of the federal police or its equivalent. Specify the possible consequences on the desirable bargaining structure in the RCMP's case.*

[224] Following an introduction (section 1) on Professor Coutu's expertise in the sociology of law and his mandate, the report has four main sections and closes with a general summary.

[225] Section 2 is entitled "[translation] The emergence of bargaining units in the federal public sector: a socio-historic point of view". Essentially, the author presents a brief history of s. 57 of the *Act* and then illustrates the possible interpretation of the definition of appropriate units using two opposite decisions. The first is one in which

the Board as it then was, the Public Service Staff Relations Board (PSSRB), refused to split the bargaining unit made up of air traffic controllers to create a bargaining unit specific to Quebec (see *Quebec Air Traffic Controllers Union and Canada (Treasury Board) (Air Traffic Control Group - Technical Category)*, PSSRB File No. 143-02-164 (19780926), [1978] C.P.S.S.R.B. No. 9 (QL)). The second is a decision of the Canada Labour Relations Board (now the CIRB) that allowed spliting the bargaining unit for production employees to create a separate unit in Quebec for the French Services Division (*Syndicat des employés de production du Québec v. Canadian Broadcasting Corporation, Ottawa (Ont.)*, CLRB File No. 555-445 (19770617), [1977] 2 Can. LRBR 481 (QL)). In the analysis of these two decisions, the author highlights the different factors that can play a role in deciding if a national unit should be maintained or, on the other hand, if it is best to create regional units, particularly given linguistic and cultural considerations. He distinguishes between the functional approach (which the PSSRB seems to favour, according to Professor Coutu), which considers how the bargaining unit functions in terms of work units and classification, and the voluntary approach, which considers the employees' wishes to join one group over another (which the PSSRB does not seem to consider, again according to Professor Coutu).

[226] Section 3 contains a description of the RCMP as an argument in favour of a separate bargaining unit for Quebec. One of the important arguments is language. Professor Coutu emphasizes the fact that the policing services offered by the RCMP in Quebec are entirely federal and not partly contractual, as they are in other provinces, except Ontario. He notes the nature of federal policing work (border protection, national security, and large investigations into narcotics trafficking and organized crime). He also gives a history of the representation of RCMP members, noting that members of "C" Division have long advocated for the union model instead of internal representation controlled by the employer and declared unconstitutional by the Supreme Court of Canada in *MPAO*.

[227] Section 4 deals with the status of police unionization in certain European countries. Section 5 discusses instruments in international labour law "[translation] … that, directly or by an interpretation of competent control organizations, guarantee freedom of association, including the right to form unions appropriate for collective bargaining".

[228] The summary consists of a series of conclusions that advocate not only for the

creation of a separate unit for "C" Division but also for the AMPMQ's certification. Conclusion 17 summarizes the analysis as follows:

> [Translation]
>
> *From an industrial relations perspective, both the functional and voluntary approaches thus converge, in our view, on favouring the creation of a distinct bargaining unit for the members of "C" Division, with the AMPMQ being recognized as the bargaining agent.*

2. <u>The employer's objection</u>

[229] The employer objected to the filing of the report and to the expert's testimony on the following grounds: the content of the report is not relevant to the constitutional issue to be decided, the report is essentially a legal opinion, the expertise is not necessary, and the report lacks objectivity and impartiality.

[230] As a starting point for expert evidence, the employer cites *R. v. Mohan*, [1994] 2 S.C.R. 9, in which the Supreme Court of Canada expands on the necessary, relevant, and reliable nature of expert evidence. The Court lists the criteria for admission as follows (at paragraph 17):

> …
>
> *(a) relevance;*
> *(b) necessity in assisting the trier of fact;*
> *(c) the absence of any exclusionary rule;*
> *(d) a properly qualified expert.*
>
> …

[231] According to the employer, the report is not relevant because it deals primarily with an issue that is not before the Board, which is the appropriate bargaining unit. This exceeds the analysis that the Board can conduct if it finds unconstitutional the legislative amendment that strips it of the power to determine the appropriate bargaining unit. The constitutional issue is not to determine the appropriate unit but to determine whether imposing a pan-Canadian unit is a substantial interference with collective bargaining, in light of decisions by the Supreme Court on the protection afforded by s. 2(d) of the *Charter*.

[232] The employer asserts that the report is essentially a legal opinion, with a very specific conclusion on what constitutes the best bargaining unit for "C" Division. It

lacks objectivity and impartiality in that the conclusion that the AMPMQ is best able to represent members of "C" Division is clearly partisan and is based on an interpretation of the facts that is not objective but biased.

[233] Finally, the employer's view is that the expertise is not needed because it does not contribute anything to Board's knowledge. The Board has extensive experience in determining bargaining units and does not need an expert in its area of expertise. The employer cites the following passage from *Mohan*:

> ***21*** *In* R. v. Abbey*, supra, Dickson J., as he then was, stated, at p. 42:*
>
> > With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.).
>
> ***22*** *This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in R. v. Abbey, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature….*
>
> ***23*** *As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in R. v. Turner, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in Director of Public Prosecutions v. Jordan, [1977] A.C. 699, at p. 718:*
>
> > "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form

> their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

[234] The employer does not question Professor Coutu's expertise in labour law but rather objects to the expert evidence based on the first two criteria: the evidence is not relevant, and it is not necessary. Moreover, it could distort the fact-finding process by imposing a partial view of labour relations within the RCMP and a conclusion in favour of his client.

3. The NPF's position

[235] The NPF acknowledges that before an administrative tribunal, the rules governing admissibility of evidence are more flexible and that a constitutional issue is different from a civil or criminal law issue. That said, the NPF largely supports the employer's observations and adds the following comments.

[236] In *Boily v. Canada*, 2017 FC 102, the Federal Court was asked to rule on the decision by a prothonotary to strike an entire expert report. The Court upheld the decision because the expert provided legal findings on issues that were before the Court itself, which is inadmissible. Legal analysis cannot be part of expert evidence. Legal expert evidence on the issue to be decided is inadmissible.

[237] The NPF offers some examples from the expert that gave an opinion on the substantive issue, thereby exceeding his role. At page 58 of the report, Professor Coutu wrote: "[translation] Simply put, the obligation to form a union for a given industry or profession solely at the national level (rather than regional, if that is the free choice of employees) *is not consistent with the principles of freedom of association*" [emphasis in the original]. At page 61, in the conclusions, he writes: "[translation] *The fundamental change of paradigm in constitutional labour law,* particularly following the Supreme Court of Canada's rulings in 2007 and 2015, would in all logic favour the voluntary approach (criteria of employees' free choice) even more than before" [emphasis in the original]. This position can be adopted, but the opposite is also possible. That is the

issue that the Board must decide.

4. The AMPMQ's reply

[238] The AMPMQ responds to these arguments by asserting that in interpreting the charters (the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of human rights and freedoms*), the rules of admissibility of evidence must be applied with considerable flexibility. It is important that the courts have a factual basis for establishing a social, economic, and cultural context.

[239] In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, the Supreme Court emphasized the importance of a factual context in making a decision based on the *Charter* (Canadian). It must be shown that rights have been infringed by means of actual and not hypothetical examples. In particular, the AMPMQ cites the following sentence (at page 361): "Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts."

[240] The AMPMQ adds that administrative tribunals are masters of their proceedings and, as such, have more flexibility than courts of law. The AMPMQ submits that procedural fairness argues in favour of allowing the expert report. On this point, it refers to *Canada Post Corporation*, 2012 CIRB 638, in which the CIRB ruled that when in doubt about the relevance of an expert report, it is better to accept it, even if it is set aside at the analysis stage, than to deprive the tribunal of evidence that could be relevant.

[241] That case involved the union's objection to the employer filing an expert report. As in this case, the objection was essentially related to the relevance and necessity of the expert evidence. The issue was the notion of a true employer in opening Canada Post counters in certain pharmacies. The expert report dealt with the notion of franchises and concessions under business law. According to the union, this notion was not relevant to the issue, and the report was not necessary, given the CIRB's expertise. It concluded that it would admit part of the expert report. It justified its decision based on relevance, as follows:

> *41 With respect to the relevance of the expert report, the Board acknowledges that it does not have ex officio knowledge of the business rules applicable to franchises and*

> *concessions. In the instant matter, the Board must determine the true employer of the employees covered by the application for certification filed by the union. The different employers in this case have indicated that they adopted a business model specific to the franchise. The Board's concern is to proceed as efficiently as possible in seeking out the truth and it therefore considers it useful to obtain expert evidence on a specific element that will help it gain a better understanding of the contractual relationship between the different parties to the matter.*

[242] The AMPMQ claims that Professor Coutu's expertise is necessary and relevant "[translation] to provide a socio-historic portrait" of the determination of certification units and of the international situation. The AMPMQ notes in particular that the report establishes "the future impact of the impugned legislation" within the meaning of *MacKay* by indicating the prejudicial impact of a national bargaining unit on the AMPMQ and its members. Finally, the AMPMQ submits that the report is not a legal opinion and that it does not dictate a specific outcome to the Board.

5. The Board's decision

[243] We have considered the decisions that the parties cited, in our decision. We retain the following principles:

- The expertise must be useful in reaching a decision. As expressed in *Mohan*, the expertise must not only be useful but also necessary. In *Abbey*, the Supreme Court of Canada stated that the evidence must be necessary to allow the trier of facts to understand the issues, given their technical nature.

- "… [T]he criteria of relevance and necessity are applied strictly, on occasion, to exclude the expert evidence as to an ultimate issue" (see *Mohan*).

- The constitutional context must be considered (see *MacKay v. Manitoba*).

- The expert opinion must be impartial, independent, and unbiased (see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182, 2015 SCC 23, at para. 32).

a) <u>Relevance and necessity</u>

[244] In fact, the analysis that the professor claims is sociological far more closely resembles a legal argument than a sociological text, despite the introduction referring to the sociology of law. Professor Coutu's distinction between the functional approach and the voluntary approach for determining appropriate bargaining units is very interesting, but it is a legal argument that the parties can present and that the Board can decide. Professor Coutu states that it would be best to consider a separate bargaining unit in Quebec for historical, cultural, and linguistic reasons and because, in his view, the voluntary approach reflects the basis of the Supreme Court of Canada's analysis more in its development of collective bargaining law under s. 2(d) of the *Charter*.

[245] These conclusions are problematic in two ways. First, they do not stem from expertise specific to the expert. The Board has the tools needed, in terms of knowledge and experience, to determine appropriate bargaining units. More importantly, the report goes beyond the stage at which the Board would decide on the appropriate bargaining units. This decision deals with the constitutionality of a provision that strips the Board of any leeway in determining a bargaining unit. The issue is to determine whether that is a substantial interference with the right of RCMP members to bargain with respect to their working conditions. However, although the report goes beyond the stage of determination, it presents a conclusion that settles the constitutionality issue, claiming that the freedom of association of members of "C" Division can be guaranteed only by granting them a separate bargaining unit.

[246] Moreover, in its mandate, the report claims to answer the question that is before the Board, as shown in the following passage from the mandate: "[translation] … show how the amendment requiring a single cross-Canada bargaining structure penalizes AMPMQ members and interferes with a meaningful bargaining process based on the wishes of the members in question." It is clear from jurisprudence that the expert report must not attempt to answer the legal question that is before the tribunal.

b) <u>The constitutional context</u>

[247] In *MacKay*, the Supreme Court of Canada states that "[t]he presentation of facts is … essential to a proper consideration of *Charter* issues". In that respect, the AMPMQ cited the CIRB's decision in *Canada Post Corporation*, in which it agreed that in a

constitutional context, it had greater leeway.

[248] In that decision, the CIRB chose to retain part of an expert report. It set aside the elements that fell under its jurisdiction and retained the elements of expertise that were outside its expertise — namely, in that case, business law, and specifically how franchises and concessions operate, to better understand their impact on the organization of work at Canada Post. It is appropriate to cite as follows the reason that the CIRB retained only the part of the report that explained the business operations of franchises and concessions (see *Canada Post Corporation*, at para. 46):

> *46 Furthermore, the last three sections of the expert report are in fact a legal analysis of the issue to be decided by the Board, that is, the identity of the true employer of the employees covered by the certification application filed by the union.*

[249] Thus, it is possible to take parts of the report without accepting it entirely. Similarly, in *La Presse Ltée c. Poulin*, 2012 QCCA 2030, the Court of Appeal of Quebec found inadmissible parts of an expert report that expressed a legal opinion and allowed the parts to be filed that dealt more with facts, even legal facts.

[250] We carefully reviewed the report to determine if, like the CIRB or the Court of Appeal of Quebec in the decisions cited earlier, we could retain at least a part of the report. We reached the following conclusions. The report offers no expertise that we do not already have on the issue of bargaining units based on Canadian jurisprudence. The history of the AMPMQ and the unionization of the RCMP focus entirely on Quebec, to conclude that only a Quebec bargaining unit would be acceptable. However, in reviewing substantial interference with the right of RCMP members to collective bargaining, the Board must consider not only the context of "C" Division but also the RCMP's overall context. That is particularly true since one of the Professor Coutu's main arguments in favour of the specific unit for Quebec is language. However, this aspect is not limited solely to Quebec, as most francophone members work outside Quebec.

c) <u>An impartial, independent, and unbiased opinion</u>

[251] In *White Burgess*, the Supreme Court of Canada emphasized that the expert must offer the trier of facts an impartial, independent, and unbiased opinion. It wrote as follows:

> *[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 Alta. L. Rev. 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.*

[252] We have serious reservations about the impartiality of the expert report presented by the AMPMQ. At the outset, Professor Coutu states that his mandate is in part "[translation] … how the amendment requiring a single cross-Canada bargaining structure penalizes AMPMQ members and substantially interferes with a meaningful bargaining process based on the wishes of the members in question."

[253] Professor Coutu devotes most of the report to a legal analysis of administrative tribunal decisions, which he uses to illustrate two approaches to determining the appropriate bargaining unit. He then applies his analysis to what he has described as the RCMP context and concludes as follows: "[translation] From an industrial relations perspective, both the functional and the voluntary approaches thus converge, in our view, on favouring the creation of a distinct bargaining unit for the members of 'C' Division in the RCMP, with the AMPMQ being recognized as the bargaining agent."

[254] The evidence reveals that on several key issues, the report does not set out a balanced analysis. For example:

- The report concludes that Division "C" has its own linguistic concerns. Yet Professor Coutu omits the percentage of francophone members who work outside Quebec (70%, according to the employer's figures, which were not challenged).

- He notes the nature of federal policing (border protection, national security, and major investigations of drug trafficking and organized

crime) without stating that this type of work necessarily involves communicating in English, given Quebec's neighbouring jurisdictions.

[255] Although Professor Coutu recognizes that police are excluded from the international convention he relies on, he concludes that in international law, a legislated national bargaining agent "[translation] … is not consistent with the principles of freedom of association", if employees wish regional representation.

[256] The international law aspect is of very limited use. How a union operates in Europe differs too much from the Wagner model to be applicable in the context of RCMP bargaining units. The principles of unionization recognized by international treaties are now upheld by the Supreme Court of Canada, and we note the exception for police unions. That said, the specific issue of a single bargaining unit is not clarified by the international debate, again due to the exception for police unions. Finally, the summary is a plea in favour of a separate unit for Quebec. An eventual decision is anticipated, and a legal conclusion is drawn, which has no place in an expert report.

[257] We agree with the AMPMQ that the Board must have as complete a factual portrait as possible to reach a constitutional decision that is supported. That said, the facts presented in the expert report cannot be accepted for their truth, as Professor Coutu is not a direct witness of the situation at the RCMP. On this point, we received testimony from three AMPMQ witnesses who were on the front lines of efforts and steps to allow the unionization of RCMP members. Their testimony was certainly an important contribution to this decision. The report cannot contribute anything more to the factual portrait. We note that the report does not present any factual data about the RCMP as a whole.

[258] In summary, the Board concludes as follows:

- The report is not relevant. Its focus is on the determination of the appropriate bargaining unit for the RCMP and the certification of the AMPMQ as bargaining agent for Division "C", questions that are not before the Board.

- It is not necessary. It is primarily a legal argument leading to conclusions in favour of the AMPMQ's position. The facts mentioned in

it either are already within the Board's knowledge or were well canvassed in the testimonies at the hearing.

- The Board has recognized the constitutional context and has determined that no part of the report is admissible.
- The report is neither impartial nor objective.

[259] For all these reasons, the Board did not accept the report or Professor Coutu's testimony.

B. Motion for a declaration that s. 238.14 is inoperative on constitutional grounds

1. Issues

[260] Technically, the NPF's and AMPMQ's certification applications are subject to the transitional provisions of the *Act to amend the PSLRA*, specifically s. 63(1)(a), but that section is in effect the same as the impugned provision, which orders the Board to recognize only a single bargaining unit. Therefore, for the purposes of this analysis, we will deal with s. 238.14, which was not in effect when the AMPMQ and the NPF filed their certification applications but is today, as indicated in the Board's decision declaring the appropriate single, national bargaining unit (see *National Police Federation v. Treasury Board of Canada*, 2017 FPSLREB 34). Therefore, we will answer the following two questions:

- Does s. 238.14 of the *Act* infringe the freedom of association guaranteed under s. 2(d) of the *Charter*?
- If there is an infringement, is it justifiable under s. 1 of the *Charter*?

a. Does s. 238.14 of the Act infringe the freedom of association guaranteed under s. 2(d) of the *Charter*?

[261] The leading case for the purposes of our analysis is *MPAO* from the Supreme Court of Canada, which found that the labour relations scheme of RCMP members was not consistent with the freedom of association protected under s. 2(d) of the *Charter*. The importance of that decision is that it defines the boundaries of freedom of association in a labour relations context. The Court found that s. 2(d) guarantees employees' right to associate to collectively pursue workplace goals and that the right to a true collective bargaining process is a necessary element of that right (*MPAO*, at

para. 71).

[262] In *B.C Health Services*, the Supreme Court stated that legislative interference with freedom of association must be substantial to be found to violate s. 2(d) of the *Charter*. It stated as follows:

> *92 To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. … The 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.*

[263] It must now be determined whether one of the provisions of the regime created by the legislator in response to *MPAO* is itself contrary to the freedom of association. That is, does s. 238.14, which imposes a single, national bargaining unit, infringe s. 2(d) of the *Charter* in that it constitutes a substantial interference with a meaningful collective bargaining process?

i. <u>A meaningful collective bargaining process</u>

[264] It is important in this analysis to not lose sight of the context of the RCMP's collective bargaining regime. In s. 238.05 of the *Act*, the legislator set out as follows the reality that the Board must consider when dealing with issues related to the RCMP:

> ***238.05*** *In administering this Act and in exercising the powers and performing the duties and functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, with regulations made under it or with decisions made in respect of a matter coming before the Board, the Board must, in matters concerning RCMP members and reservists, take into account the unique role of the Royal Canadian Mounted Police as a police organization in protecting public safety and national security and its need to deploy its members and reservists as it sees fit.*

[265] In *MPAO*, the Supreme Court stated at paragraph 81 that "… a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective

interests and meaningfully pursue them.” The AMPMQ is not challenging the independent aspect of the new scheme. Therefore, our analysis will focus on the degree of choice.

[266] We must define what the Supreme Court means by “degree of choice” in *MPAO*. After stating that degree of choice is important, the Court nonetheless limited its scope, as follows:

> *[83] But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the Charter for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the Charter for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.*

[267] Therefore, the issue is whether the impugned provision interferes with the degree of choice.

ii. <u>Degree of choice</u>

[268] The Board notes that the collective bargaining process under the *Act* protects freedom of choice for employees who are RCMP regular members and reservists by several provisions that are not impacted by the impugned provision. In *MPAO*, the Supreme Court sets out that “[h]allmarks of employee choice … include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations” (at paragraph 86). The Board finds that these hallmarks are met by the *Act*.

[269] Section 5 protects the right of every employee to join the employee organization of his or her choice. However, it does not give a right to every employee organization to obtain certification as a bargaining agent.

[270] Employees may choose to replace their bargaining agent under s. 83.

[271] Furthermore, nothing in the *Act*, including the impugned provision, would prevent employees from setting or changing their collective workplace goals.

[272] Freedom of choice also includes accountability, as stated as follows by the Supreme Court in *MPAO*, at para. 87:

> *[87] Accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. Employees choose representatives on the assumption that their voice will be conveyed to the employer by the people they choose (A. Bogg and K. Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012), 33 Comp. Lab. L. & Pol'y J. 379, at p. 405). A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together. Accountability allows employees to gain control over the selection of the issues that are put forward to the employer, and the agreements concluded on their behalf as a result of the process of collective bargaining.*

[273] The *Act* provides for accountability of the bargaining agent to the employees of the bargaining unit. Employees dissatisfied by the representation of the bargaining agent can file a complaint with the Board under s. 187 of the *Act*. They may also file a complaint against the bargaining agent under s. 188 for unfair labour practices. And finally, they have the ability to seek the revocation of the certification of their bargaining agent under s. 238.17 of the *Act*.

[274] The Board finds that as long as employees are able to "have effective input into the selection of the collective goals", the mechanism that allows such input respects the degree of choice. The AMPMQ's main argument is in fact that as a minority group within an entity that cannot truly represent their interests, the members in "C" Division will have no voice in the selection of collective goals.

[275] The AMPMQ cites *Renaud-Bray* in support of its claim. The AMPMQ retains the following idea from that decision, in the words of Justice Mainville: "[translation] the will of the employees is fundamental to the certification process". That is certain, but that principle does not resolve the issue before us, i.e., whether imposing a single bargaining unit interferes with freedom of association. Specifically, the issue is whether legislation that imposes a single, national bargaining unit deprives members and reservists of the right to meaningfully associate in the pursuit of collective workplace goals (see paragraph 67 of *MPAO*). That is, does it remove from employees the degree of choice sufficient to enable them to determine and realize their collective interests?

[276] The impugned provision mandating a single, national bargaining unit would

prevent employees from being able to have AMPMQ as the bargaining agent, as the AMPMQ has applied to represent only those members in "C" Division. However, Justice Mainville recognizes that the Supreme Court did not impose an obligation to recognize every association. He cites paragraph 98 of *MPAO*, as follows:

> *[98] The respondent argues that this view of s. 2(d) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. It also requires that the employer consider employees' representations in good faith, and engage in meaningful discussion with them. But s. 2(d) does not require a process whereby every association will ultimately gain the recognition it seeks (see M. Coutu et al., Droit des rapports collectifs du travail au Québec (2nd ed. 2013), vol. 1, Le Régime général, at para. 98). As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the Wagner Act model) that imposes restrictions on individual rights to pursue collective goals.*

[277] Moreover, the facts in *Renaud-Bray* are very different. The issue in that case was to decide how a given unit would be represented and whether the analysis of the administrative tribunal was to split the unit or certify a bargaining agent. We must decide whether the single unit allows members in "C" Division to exercise their freedom of association as defined by the Supreme Court. It is also appropriate to cite the following passage from *Renaud-Bray*:

> [Translation]
>
> *127. As noted by the Court in Québec (Procureur général) v. Confédération des syndicats nationaux (CSN), the Wagner Act model includes arbitration or a compromise that can be binding on a minority of employees: this is the case for those who would have wanted to join another unit appropriate for bargaining, and those who did not join the majority association or did not vote for it. In a sense, the individual freedom of association of those employees is infringed by the compromise on which the Wagner Act model is based. However, it would be wrong to conclude from all this that there is therefore an unjustified infringement of the right to freedom of association set out in the Canadian Charter.*

iii. Legislative limits on choice

[278] The post-*MPAO* administrative decisions cited by the AMPMQ reiterate the ambiguity of the decision with respect to the scope of choice that employees have about their bargaining agent. The TAT's decision in the certification of employees working for the Réseau de transport métropolitain aptly states it when referring to "[translation] a contextual analysis of the existing process" that could allow for the conclusion that designating the bargaining agent nonetheless respects the freedom of choice that flows from freedom of association (see *Syndicat des inspecteurs du RTM — CSN et Unifor*, 2018 QCTAT 3310 at para. 87).

[279] There may be constitutional legislative limits on choice. In *MPAO*, the Supreme Court gave examples of legislative limits to the freedom of association that were constitutionally permissible. For example, it found that the Wagner model of labour relations had sufficient choice for employees. It stated as follows:

> *[94] The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to choose to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification — all under the supervision of an independent labour relations board — ensure that an employer deals with the association most representative of its employees: G. W. Adams, Canadian Labour Law (2nd ed. (loose-leaf)), at paras. 2.3800 to 2.4030; D. D. Carter et al., Labour Law in Canada (5th ed. 2002), at pp. 286-87; P. Verge, G. Trudeau and G. Vallée, Le droit du travail par ses sources (2006), at pp. 41-42.*

[280] The Court also found that certain designated bargaining models do not necessarily violate s. 2(d) of the *Charter*, citing as an example the Ontario legislation providing for the designation of the bargaining agent for a legislated bargaining unit:

> *[95] The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., School Boards Collective Bargaining Act, 2014, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a*

> *model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.*

[281] The same idea is restated as follows at paragraph 97 of *MPAO*:

> *… Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.*

[282] Legislative limits in policing and other public sectors are common. For example, in Ontario and Alberta, police bargaining units are established by legislation (see *Ontario Provincial Police Collective Bargaining Act*, 2006, SO 2006, c 35, Sch B, s 2(1); *Police Services Act*, RSO 1990, c P-15, s 118; and *Police Officers Collective Bargaining Act*, RSA 2000, c P-18, s 1(c)). Alberta legislation designates a single bargaining unit for Crown employees (see *Public Service Employee Relations Act*, RSA 2000, c P-43, s. 10). In Quebec, legislation requires a single all-employee bargaining group for the Sûreté du Québec (see *Act respecting the Syndical Plan of the Sûreté du Québec*, CQLR c R-14. s. 2). Likewise, broad-based bargaining units are also common and have not been found unconstitutional (see *Québec (Procureur général) c. Confédération des syndicats nationaux*, 2011 QCCA 1247).

[283] What, then, is meant by "… Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining …"?

[284] A meaningful process of collective bargaining is the ability to pursue collective interests without employer interference. One of the characteristics of such a meaningful collective bargaining process is the presence of adequate protections to prevent substantial interference, as stated by the Supreme Court of Canada in *MPAO* as follows at paragraph 80:

> *… the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with*

> *management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.*

[285] This right is protected under the *Act* by the following provisions.

[286] The bargaining unit composed of RCMP members and reservists is entitled to arbitration as a dispute resolution process (s. 238.18). The employer must bargain in good faith (s. 106). The employer cannot interfere in the formation or administration of the employee organization, and employees are protected in their associative rights against all reprisals by the employer (s. 186).

iv. Substantial interference

[287] The AMPMQ submits that there is substantial interference with a meaningful process because creating a single bargaining unit fails to consider “C” Division’s distinct interests. However, based on the evidence, the Board is not at all convinced that “C” Division’s interests differ from the collective interests of all RCMP members and reservists. On the contrary, the Board believes that the AMPMQ has failed to show distinct interests for members and reservists of “C” Division.

[288] The AMPMQ relies on several characteristics of “C” Division to support this argument: language, structural organization, and a different union culture. We will address each one in turn.

v. Language

[289] The language difference is a significant argument. The province of Quebec is the only province in Canada in which the official language is French and the language of work is majority French. However, several factors come into play against this.

[290] The AMPMQ cited the Supreme Court in *MPAO*, at para. 6, which noted the fact that the AMPMQ “… represents the majority of members of ‘C’ Division …”. The AMPMQ did not add in its arguments the rest of the sentence, “… as well as French-speaking members across Canada.” In its arguments before us, the AMPMQ does not claim to represent French-speaking members, only members in “C” Division. However, according to the undisputed figures from the employer, 70% of members who report being francophone work outside Quebec. If the French fact must be defended in the labour relations context, it must be defended throughout the organization; having a single bargaining unit does not interfere with that representation; it is quite

the contrary.

[291] French is unquestionably the language of work at most detachments in Quebec. However, according to the evidence, it is also the language of work in certain detachments in Ontario and New Brunswick. Moreover, given the federal policing duties performed in "C" Division, it is essential that members working in that division be bilingual. The Board accepts the employer's logical explanation: given its mandate, federal policing must necessarily maintain close ties with neighbouring English-speaking jurisdictions in the fight against organized crime, terrorism, narcotics trafficking, and in border control. Therefore, knowledge of English is essential to carrying out the duties of members and reservists working in "C" Division, whose mandate is exclusively federal policing. Accordingly, we find that language is not a characteristic that distinguishes "C" Division from other RCMP regular members and reservists.

vi. Structural organization

[292] The AMPMQ submits that given its mandate of federal policing, the interests of "C" Division will not be adequately defended as part of a bargaining unit in which the large majority of members perform their duties under contracts with the provinces, territories, and municipalities to offer local front-line policing services.

[293] The AMPMQ did not explain how the situation in "C" Division differs from that of "O" Division in Ontario, which is also dedicated entirely to federal policing. The AMPMQ tried to highlight "C" Division's specific expertise, but that evidence was convincingly contradicted by the employer's witnesses. There is no specific expertise in Quebec concerning bankruptcy, counterfeiting, or the organization of major events; those realities are also present in Ontario and in other Canadian provinces. The Board finds that its work and organization do not set "C" Division apart from the rest of the RCMP.

vii. Different union culture

[294] The AMPMQ presented evidence of the traditional militancy of "C" Division, incarnated by the AMPMQ, which differs from the attitude of members in the rest of the country. The Board accepts that evidence but finds that it is not a determining factor in the issue of the constitutionality of s. 238.14. The AMPMQ has fought for its members; that is undeniable. However, it must also be recognized that the victory

before the Supreme Court was the work of three associations.

[295] It must be noted that the makeup of "C" Division is not static. The evidence shows an annual change (arrivals and departures) of between 7% and 10%. The mobility of members is a condition that applies everywhere, is part of the terms and conditions of employment, and shows the commitment that recruits must have to accept transfers based on the RCMP's operational needs. This mobility of members makes it difficult to assess the wishes of the members of "C" Division. The AMPMQ has not established that at present, "C" Division has a different culture from the regular members and reservists in the rest of Canada.

[296] Moreover, the Board is struck by the remarkable number of similarities among all RCMP Divisions, including "C" Division. For example, regular members are part of one occupational group, have the same pay and benefits regime, receive the same training on recruitment in the same location, wear the same uniforms, and have the same deployment obligations.

[297] Given the similarities and the absence of distinctions, the Board finds that the AMPMQ has not established that "C" Division has characteristics that distinguish it from the other RCMP Divisions.

[298] Finally, the workplace goals of "C" Division members are the same as the goals of the other members. This was confirmed in the Parliamentary committee proceedings, at which the AMPMQ made representations on the legislation with respect to working conditions. Significantly, at that time, it did not raise the single bargaining unit as an issue.

[299] We believe that access to meaningful collective bargaining for regular members and reservists, including those from "C" Division, is not substantially impaired by s. 238.14. We have seen that freedom of choice is not absolute; employees do not necessarily have a say on the constitution of the bargaining unit they will belong to. They do have a say in who will represent them, here, by means of a vote. We do not find this situation contrary to freedom of association in the context of labour relations, according to the Supreme Court's decisions.

[300] We note from *MPAO* that the degree of choice can be exercised within a unit defined by the law. The evidence presented at the hearing does not satisfy us that

members of "C" Division could not exercise their degree of choice with respect to freedom of association guaranteed by the *Charter*; they can vote, and they can have their demands heard by their representatives.

[301] The AMPMQ argues on behalf of the members of "C" Division that their minority situation within a national bargaining unit will prevent them from having meaningful representation. This minority situation does not in itself interfere with collective bargaining; in fact, it is a characteristic of the Wagner model, applicable to all bargaining agents certified under the *Act*, which gives exclusive representation to the organization that represents the majority of members. Majority rule is not deemed to constitute substantial interference with the exercise of the right protected under s. 2(d) of the *Charter*.

[302] We conclude that s. 238.14 does not constitute substantial interference with collective bargaining and thus does not infringe the freedom of association guaranteed under s. 2(d) of the *Charter*.

b. If there is interference with the freedom of association guaranteed under s. 2(d) of the *Charter*, is it justifiable under s. 1 of the *Charter*?

[303] We have found that s. 238.14 does not interfere with the protection guaranteed by s. 2(d) of the *Charter*. However, if we are wrong, and if imposing a national bargaining unit does not respect the parameters of freedom of association, we are of the view that that infringement can be justified under s. 1 of the *Charter*.

[304] In *MPAO*, the Supreme Court set out the main points of an analysis of s. 1 of the *Charter*, particularly in the context of the RCMP, as follows:

> *[139] Section 1 of the Charter permits Parliament to enact laws that limit Charter rights if it establishes that the limits are reasonable and demonstrably justified in a free and democratic society. This requires that the objective of the measure be pressing and substantial, and that the means by which the objective is furthered be proportionate, i.e. that the means are rationally connected to the law's objective, minimally impair the s. 2(d) right, and are proportionate in effect (R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; Health Services, at paras. 137-139). The onus rests on the party seeking to uphold the limitation of the Charter right, and the burden of proof is a preponderance of probabilities (RJR-MacDonald Inc. v. Canada (Attorney General), 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at paras. 137-38 ("RJR-*

> *MacDonald (1995)”)….*
>
> *[140] We have already seen that s. 2(d) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified.*

[305] The Board is of the view that cohesion within the RCMP is a substantial and pressing objective. The members of the organization are part of a whole; they are often deployed outside their assigned areas, and mobility is encouraged and necessary for RCMP operations, as highlighted by s. 238.05, as set out earlier. The fact that members can be posted anywhere in Canada as a condition of their employment is an important argument to justify a single unit.

[306] Once it is determined that it is important to standardize working conditions across the country, the logical result is that there is a rational link between the government’s objectives and the designation of a national bargaining unit for the RCMP. The employer took care to demonstrate in its evidence that this does not mean that bargaining cannot provide for occasional targeted arrangements to consider regional realities, if needed. However, it seems preferable to ensure cohesion, to have a single bargaining framework.

[307] The Board finds that the interference with freedom of association is minimal. In *MPAO*, the Supreme Court states that when determining whether interference is minimal, “The government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives” (at paragraph 149). The Supreme Court quotes from paragraph 160 of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, as follows:

> *The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement:* [references omitted]. *On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the*

> *law may fail.*

[308] In *B.C. Health Services*, at para. 157, the Supreme Court developed the analysis further, as follows:

> *Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.*

[309] The Board received in evidence a document titled “A new labour relations regime for the Royal Canadian Mounted Police”. It came from consultations carried out by the government “to obtain the views of the members on some of the options available to them”. The consultations included a survey, town-hall meetings, videoconferences, and teleconferences.

[310] On the issue of the appropriate collective bargaining unit, the government sought the members’ opinions on two possible options: a single, national unit appropriate for bargaining collectively, or several units that could be created along regional or provincial lines. The majority of members who answered the survey preferred a single, national unit. This was also true for the members of “C” Division who answered the survey.

[311] The Board finds that the legislator considered the two possible options. It took into account the results of the consultations with RCMP members. The determination of a single, national bargaining unit is a reasonable measure to achieve the goal of consistency within the RCMP. Moreover, the regime created by the *Act* allows members to choose their bargaining agent and to advise their representatives of their interests in bargaining. It must be noted that even if the Board had kept its discretion, the determination of the appropriate bargaining unit would not be up to the members or the bargaining agents.

[312] Finally, we are of the view that the benefits outweigh the drawbacks. Members of “C” Division are deprived of the possibility of arguing before the Board in favour of their own bargaining unit, but they are members of a bargaining unit with common

interests in which the bargaining agent can better face the employer, having the strength of numbers and the prerogative of representing all members. The single unit avoids conflicts between regions.

[313] Thus, the Board considers the measure reasonable and acceptable and proportional to the stated objective of cohesion to ensure a truly national labour regime in the context of a police force characterized by, among other things, the mobility of its members.

V. <u>Conclusion</u>

[314] In light of the evidence at the hearing, the Board is not satisfied that “C” Division constitutes a group that is so distinct that its interests cannot be represented by a national bargaining unit. The work of members in “C” Division is exactly the same as that of members in “O” Division. Federal policing services are offered in every division. Moreover, the mobility of members is such that it is not unreasonable to ensure uniform working conditions as part of collective bargaining. Finally, the language argument does not stand up in light of the reality of the RCMP: over 70% of francophones work outside Quebec.

[315] It is hard not to see the struggle by the AMPMQ to be recognized as the representative of “C” Division as historic, which must be given due respect. Were it not for the AMPMQ’s efforts, along with those of the MPAO and the British Columbia Mounted Police Professional Association, the RCMP’s regular members and reservists would not now enjoy the right to collective bargaining that the Supreme Court of Canada has recognized. However, this historic struggle does not lead to s. 238.14 being declared unconstitutional.

[316] The current *Act* gives regular members and reservists the possibility of coming together, without employer interference, to argue their demands through collective bargaining. They will have the opportunity to be actively involved in the choice of collective goals, as part of a “… scheme that holds representatives accountable to the employees who chose them …” (*MPAO*, at para. 87). That is what s. 2(d) of the *Charter* protects, according to the Supreme Court’s interpretation in *MPAO*.

[317] Consequently, the request to declare s. 238.14 inoperative on constitutional grounds is denied. The AMPMQ’s certification application is dismissed. The Board will

proceed with the NPF's certification application that was suspended by the 2018 Order.

[318] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[319] The motion for a declaration that s. 238.14 of the *Federal Public Sector Labour Relations Act* is inoperative as being inconsistent with the Constitution is dismissed.

[320] The AMPMQ's certification application is dismissed.

[321] The stay that the Board ordered on April 17, 2018, in *National Police Federation v. Treasury Board of Canada*, 2018 FPSLREB 31, is lifted. The vote held from November 21 to December 20, 2018, in the NPF's certification application will now be tallied.

July 11, 2019.

Catherine Ebbs, Steven B. Katkin, and Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board