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Citation: 2023 FPSLREB 110

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

TREASURY BOARD

Applicant

and

NATIONAL POLICE FEDERATION

Respondent

Indexed as
Treasury Board v. National Police Federation

In the matter of an application, under s. 59(1) of the *Federal Public Sector Labour Relations Act*, for a declaration that a position is a managerial or confidential position

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Richard Fader and Marie-France Boyer, counsel

For the Respondent: Christopher Rootham and Adrienne Fanjoy, counsel

Heard at Ottawa, Ontario,
October 4 to 7 and December 16, 2021,
and by written submissions,
filed September 23, November 26, and December 7, 2021, and
March 18 and 24 and April 1, 2022.

REASONS FOR DECISION

I. Application before the Board

[1] The National Police Federation ("the NPF" or "the bargaining agent") was certified as the bargaining agent for the Regular Members and Reservists (RM) bargaining unit at the Royal Canadian Mounted Police ("the RCMP") on July 24, 2019. The bargaining unit is composed of employees in 20 221 positions below the rank of inspector. While the NPF'S application for certification was still pending before the Federal Public Sector Labour Relations and Employments Board ("the Board"), the Treasury Board of Canada ("the employer") proposed in May 2017, that the Board declare 1, 139 positions to be "managerial or confidential" , in accordance with ss. 59(1)(a), (c), (e), and (g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). In 2021, the employer revised the number of positions to be declared managerial or confidential to 478; therefore, those 478 positions proposed by the employer remain in dispute between the parties. The NPF opposes the remaining proposals and raised a constitutional question.

[2] Employees determined by the Board to be in "managerial or confidential" positions are not employees under the *Act*. Therefore, persons occupying a "managerial or confidential" position are not employees in the bargaining unit. These positions are commonly referred to by the parties as "excluded positions". Accordingly, the parties refer to these provisions of the *Act* as "exclusion provisions".

[3] The NPF alleged that the exclusion provisions violate s. 2(d) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*").

[4] The bargaining agent submitted a "Notice of Constitutional Question" on February 14, 2020, which was served on all attorneys general in Canada. No submissions were received from any attorneys general, other than the employer. In a statement of particulars, the bargaining agent later clarified that it was challenging paragraphs 59(a), (c), (e), and (g) of the *Act*.

[5] The parties requested that the Board first determine the constitutional question before making any rulings on which proposed positions are managerial or confidential positions. I agreed with this approach. Although I heard some evidence about the

duties of some persons occupying the positions being proposed by the employer, I have made no determination as to whether they will be declared to be managerial or confidential positions. That determination can be made only with a full evidentiary record and submissions. At this point in the proceeding, it cannot be determined if all remaining 478 positions proposed by the employer for exclusion will be declared by the Board to be managerial or confidential positions.

[6] Under the *Act*, positions and not employees are excluded from the bargaining unit. It is when an employee is an incumbent of a managerial or confidential position that they cannot form part of the bargaining unit and can no longer be represented by a bargaining agent. In this decision, therefore, references to 'excluded employees' must be taken to refer to employees who are the incumbents of positions that the Board has declared to be managerial or confidential positions. The incumbents of the positions proposed for such a declaration are therefore not yet excluded from the bargaining unit.

[7] The parties prepared detailed written submissions and made oral submissions. After the conclusion of the hearing, the Quebec Court of Appeal issued a decision (*Association des cadres de la Société des casinos du Québec v. Société des casinos du Québec*, 2022 QCCA 180; appeal pending before the Supreme Court of Canada "*Société des casinos du Québec*") on an appeal of a decision relied upon by the bargaining agent in its submissions. I requested written submissions from the parties on *Société des casinos du Québec* and have addressed those submissions in the reasons section of this decision.

[8] On February 3, 2023, Christopher Rootham, one of the counsel for the NPF, was appointed as a full-time member of the Board, effective April 3, 2023. He and this panel of the Board have had no discussion about this application beyond case management meetings and his hearing advocacy as counsel, both done in the presence of the applicant's representatives, and all of which took place before his appointment to the Board.

II. The legislative and constitutional framework

[9] The *Act* sets out the following requirements for exclusion from a bargaining unit (the bolded texts are the parts of the section that the NPF argued are contrary to the *Charter*):

…	[…]
59 (1) *After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that*	***59 (1)*** *Après notification d'une demande d'accréditation faite en conformité avec la présente partie ou la section 1 de la partie 2.1, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :*
(a) the position is confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, or a deputy head;	***a) poste de confiance occupé auprès du gouverneur général, d'un ministre fédéral, d'un juge de la Cour suprême du Canada, de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt, ou d'un administrateur général;***
(b) *the position is classified by the employer as being in the executive group, by whatever name called;*	***b)*** *poste classé par l'employeur dans le groupe de la direction, quelle qu'en soit la dénomination;*
(c) the occupant of the position provides advice on labour relations, staffing or classification;	***c) poste dont le titulaire dispense des avis sur les relations de travail, la dotation en personnel ou la classification;***
(d) *the occupant of the position has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;*	***d)*** *poste dont le titulaire a des attributions l'amenant à participer, dans une proportion notable, à l'élaboration d'orientations ou de programmes du gouvernement du Canada;*
e) the occupant of the position has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Part 2 or Division 2 of Part 2.1;	***e) poste dont le titulaire exerce, dans une proportion notable, des attributions de gestion à l'égard de fonctionnaires ou des attributions l'amenant à s'occuper officiellement, pour le compte de l'employeur, de griefs présentés selon la procédure établie en application de la partie 2 ou de la section 2 de la partie 2.1;***

(f) *the occupant of the position is directly involved in the process of collective bargaining on behalf of the employer;*	***f)*** *poste dont le titulaire participe directement aux négociations collectives pour le compte de l'employeur;*
(g) the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer; *or*	***g) poste dont le titulaire, bien que ses attributions ne soient pas mentionnées au présent paragraphe, ne doit pas faire partie d'une unité de négociation pour des raisons de conflits d'intérêts ou en raison de ses fonctions auprès de l'employeur;***
(h) *the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).*	***h)*** *poste de confiance occupé, en matière de relations de travail, auprès des titulaires des postes visés aux alinéas b), c), d) et f).*
…	[…]

[Emphasis added]

[10] Section 186 of the *Act* sets out the following restrictions related to those employees who are excluded under s. 59:

186 (1) *No employer, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*	***186 (1)*** *Il est interdit à l'employeur ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier*, au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada*, ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :*
(a) *participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*	***a)*** *de participer à la formation ou à l'administration d'une organisation syndicale ou d'intervenir dans l'une ou l'autre ou dans la représentation des fonctionnaires par celle-ci;*
(b) *discriminate against an employee organization.*	***b)*** *de faire des distinctions illicites à l'égard de toute organisation syndicale.*

[11] The NPF did not challenge the constitutionality of s. 186(1) of the *Act*; however, it argued that the exclusion provisions make the application of s. 186 "overbroad".

[12] The *Act* also includes this interpretive provision, applicable to the Board's interpretation of provisions relating to RCMP officers and reservists:

…	[…]
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 … 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.*	***238.05*** *Lorsqu'elle met en oeuvre la présente loi et exerce les attributions que celle-ci lui confère ou qu'implique la réalisation de ses objets … la Commission doit, en ce qui touche les questions concernant les membres de la GRC et les réservistes, tenir compte, d'une part, du rôle unique de la Gendarmerie royale du Canada en tant qu'organisation policière à l'égard de la protection de la sécurité publique et de la sécurité nationale et, d'autre part, du besoin de celle-ci de procéder à des mutations de ses membres et de ses réservistes lorsqu'elle l'estime indiqué.*
…	[…]

[13] The bargaining agent relied on s. 2(d) of the *Charter*, which sets out the freedom of association. Section 1 provides that freedom of association is limited only as follows:

1. The Canadian Charter of Rights and Freedoms *guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*	*1. La* Charte canadienne des droits et libertés *garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.*

III. Summary of the evidence

[14] Six witnesses testified for the NPF, and two witnesses testified for the employer. Some of the witnesses are in positions that have been proposed to be declared

managerial or confidential. I have considered their testimony only for the purposes of the constitutional question and not the ultimate decision on whether the positions they occupy should be declared managerial or confidential.

A. The origins of the exclusion provisions in the *Act*

[15] In the development of the collective bargaining regime for the federal public service, the July 1965 *Report of the Preparatory Committee on Collective Bargaining in the Public Service* ("the Heeney Report") addressed exclusions as follows (at page 32):

> *The Committee quickly concluded, however, that the basic principle of "conflict of interest", which is recognized in all jurisdictions, should apply in the Public Service. In the view of the Committee, it is important to all concerned that individuals in positions characterized by a significant amount of responsibility for the management of employees, or by work that may be regarded as confidential to management, should be excluded from bargaining units. Apart from other considerations, it seems clear that, in a bargaining relationship, particularly in the administration of agreements and the processing of grievances, employee representatives must be able to deal at all levels of the organization concerned with individuals prepared to act in a responsible way on behalf of the employer.*

B. The organizational structure of the RCMP

[16] Kent Lowe is a labour relations officer with the NPF. He started his employment with the RCMP in 1997 and retired in February of 2021 at the rank of inspector. At the time of his retirement, he was in an acting superintendent position. He testified about the general structure of the RCMP and the different ranks and their roles within the RCMP.

[17] The RCMP has 16 divisions. Each province and territory has its own division. There are also divisions for the National Capital Region, the RCMP's National Headquarters, and training. Each division is broken into districts, which are geographical units.

[18] The RCMP does contract policing for eight provinces and the territories. This role represents the vast majority of the RCMP's work, according to Mr. Lowe. The other major role for the RCMP is federal policing, which involves policing related to national and transnational issues.

[19] The RCMP has commissioned officers (COs) and non-commissioned officers (NCOs). COs start at the rank of inspector and include the ranks of superintendent, chief superintendent, assistant commissioner, deputy commissioner, and commissioner. According to a population chart provided by the employer, as of April 1, 2019, there were 600 COs in the RCMP. They are not included in the bargaining unit. They have organized and formed a group called the Officer Consultative Committee (OCC) to advance their collective interests respecting their terms and conditions of employment. This group has met with the RCMP's Senior Executive Committee as well as the employer concerning their terms and conditions of employment.

[20] NCOs include the following ranks: special constable (112), constable (11 913), corporal (3599), sergeant (2049), and staff sergeant (838). There are no proposals by the employer to have those positions declared managerial or confidential in the special constable or constable ranks.

[21] Mr. Lowe testified that the distinction between a sergeant and a staff sergeant is based on the overall responsibilities of the position, including how many staff are supervised, financial authorities, specialized skills, decision making, and the level of risk. A sergeant supervises between 5 and 12 constables, Mr. Lowe stated. He also testified that there are very few units that are supervised by corporals.

[22] Mr. Lowe also testified that the RCMP is a paramilitary organization. He explained that this means that officers are expected to follow orders if the orders are given by someone in the same reporting line. The one exception, he stated, is in a command-and-control-type situation, in which the designated superior officer gives orders. Mr. Lowe stated that the consequences of disobeying an order would include being provided "guidance" or could lead to discipline under the RCMP's *Code of Conduct*.

[23] The positions of conduct advisor are being proposed to be declared managerial or confidential by the employer. The RCMP's *Administration Manual* sets out the responsibilities of a conduct advisor, including providing recommendations and direction on problem resolution and options and advice related to conduct measures to ensure consistency to the conduct authority.

[24] Mr. Lowe testified that the conduct advisor position is the subject-matter expert that provides expertise to the conduct authority. In cross-examination, Mr. Lowe

agreed that it is a fair statement to say that the relationship between the conduct authority and the conduct advisor is "an open relationship".

[25] A term of employment of an RCMP member includes the requirement to be willing to be posted anywhere in Canada. Mr. Lowe testified that there are limited-duration posts of two to three years and regular postings of three to five years. Near the end of a posting, the member engages in a discussion with a career development and resourcing advisor ("CDRA") on their next posting, based on personal circumstances and preferences. He testified that it is possible for a member to be ordered to transfer to a post without their consent but that it is rare. In cross-examination, he testified that he has never seen a forced transfer and that it involves more of a negotiation between an officer and the responsible staff sergeant.

[26] Mr. Lowe testified that COs make the decisions about the promotions of officers as well as the staffing of positions.

C. The declaration process, and the rights of excluded employees

[27] Positions are declared managerial or confidential, not employees. Under the *Act*, the definition of "employee" (other than in Part 2, which relates to grievances) "means a person employed in the public service, other than […] (i) a person who occupies a managerial or confidential position" (s. 2(1)).

[28] All positions proposed by the employer to be declared managerial or confidential must come to the Board for an order. If no objection is filed by a bargaining agent, the Board must make an order declaring the positions managerial or confidential positions (s. 75 of the *Act*). If the bargaining agent objects to the proposal, the Board will issue a decision after hearing submissions from the parties. Until such time as the Board issues a decision, the incumbent of the proposed position remains in the bargaining unit and subject to the terms and conditions of employment that apply to all members of the bargaining unit. In the period between the filing of the exclusion proposal and a decision of the Board, an amount equivalent to the dues for the bargaining agent is withheld through a payroll deduction. Depending on the outcome of the proposal, this amount is ether returned to the incumbent of the position declared managerial or confidential or provided to the bargaining agent.

[29] Mélanie Bilodeau is a superintendent with the RCMP. She is currently a director at the Canadian Police College. Before taking that position, she was the director of member labour relations. Initially, the employer proposed that 1139 positions be declared managerial or confidential. Later, it provided a revised list of 478 positions. Superintendent Bilodeau testified that the number of positions was reduced after receiving further guidance from Treasury Board advisors. She testified that this was not a change of mind but simply a better understanding by the RCMP of the criteria for positions to be declared managerial or confidential.

[30] Patrick Verner is a senior director at the Treasury Board Secretariat with responsibilities for compensation and collective bargaining for the RCMP and other organizations. He testified that the terms and conditions of employment for employees in excluded positions are generally those terms and conditions negotiated in the relevant collective agreement. He testified that very few negotiated terms and conditions of employment are not extended to those in excluded positions. He referred to the Treasury Board's *Directive on Terms and Conditions of Employment* (effective date April 1, 2014), *Directive on Terms and Conditions of Employment for Certain Excluded and Unrepresented Groups and Levels* (effective date April 1, 2020; "the excluded-groups directive"), and *Policy on Terms and Conditions of Employment* (effective date April 1, 2009; "the policy").

[31] The excluded-groups directive contains appendices that set out the specific terms and conditions of employment for several groups. The RM group is not listed in an appendix, although the employer stated that employees in excluded positions would be treated the same way. The excluded-groups directive provides that terms and conditions of employment are as set out in the relevant collective agreements and other legislation and as supplemented by other related policy instruments. "Relevant collective agreements" is defined as the collective agreement for the bargaining unit to which the person is assigned or would be assigned, were the person's position not declared to be managerial or confidential.

[32] All the appendices provide that excluded employees are not entitled to payment for overtime, call-back, standby duty, travel time, or to reporting pay, shift premiums, or "… any other form of compensation that is dependent on a person completing a specified number of hours in a normal workweek." Employees who work excessive

hours or who are required to work or travel on a day of rest or on a holiday may be granted management leave by the responsible manager "as considered appropriate."

[33] The employer provided a printout from September 22, 2021, of an internal web page of questions and answers about the RCMP and labour relations. The following information was provided by the RCMP about what it means to be in a managerial or confidential position:

> …
>
> *As the incumbent of an excluded position, all of the provisions of the relevant collective agreement, once negotiated, regarding hours of work, working conditions, leave, rates of pay, etc. continue to apply. However, because your position is not part of a bargaining unit, you:*
>
> - *are not subject to monthly union dues deductions*
> - *cannot participate in strike votes and contract ratification votes*
> - *cannot participate in a strike*
> - *cannot run for or hold a local and/or executive position with the bargaining unit*
> - *can submit a grievance, but have no right to bargaining agent representation during the grievance process*
>
> …

[34] Mr. Verner testified that some unrepresented groups meet with the employer on a regular basis. He referred to the association for employees in the executive (EX) category, the Association of Professional Executives of the Public Service of Canada (APEX). He testified that this association advocates and lobbies for its members and that it meets with the Treasury Board on a regular basis. He testified that the consultation mechanism with APEX results in the co-development of new policies that apply to EX employees. He also referred to the OCC for those holding the ranks of inspector and higher at the RCMP. He testified that the Treasury Board meets with this group on a regular basis and discusses conditions of employment, including pay. He testified that the employer remains open to meeting with other excluded employees.

[35] In cross-examination, Mr. Verner stated that the meetings with the OCC are ad hoc and that the OCC is not funded, to his knowledge.

[36] Superintendent Bilodeau testified that the average amount of time that an employee would spend in a managerial or confidential position is 3.07 years. She

testified that those in the advisor positions mostly perform duties that in the public service would be performed by those in the Personnel Administration Group (PE), who are all unrepresented. She testified that the RCMP attempted to keep the number of exclusions to a minimum, with a focus on the highest level of responsibility. She testified that it is important that this work be done by RCMP members and not civilians because members have the operational background to provide the best advice to management.

D. The role of NPF representatives, and addressing conflict of interest

[37] Section 14 of the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10) requires that each officer swear an oath of office and an oath of secrecy, as follows:

Oath of Office	***Serment professionnel***
I,_____, solemnly swear that I will faithfully, diligently and impartially execute and perform the duties required of me as a member of the Royal Canadian Mounted Police, and will well and truly obey and perform all lawful orders and instructions that I receive as such, without fear, favour or affection of or toward any person. So help me God.	*Je, _____, jure de bien et fidèlement m'acquitter des devoirs qui m'incombent en ma qualité de membre de la Gendarmerie royale du Canada et d'exécuter, sans craindre ni favoriser qui que ce soit, tous les ordres légitimes reçus à ce titre. Ainsi Dieu me soit en aide.*
Oath of Secrecy	***Serment du secret***
I,_____, solemnly swear that I will not disclose or make known to any person not legally entitled thereto any knowledge or information obtained by me in the course of my employment with the Royal Canadian Mounted Police. So help me God.	*Je,_____, jure de ne révéler ni communiquer à quiconque n'y a pas légitimement droit ce qui est parvenu à ma connaissance ou les renseignements que j'ai obtenus en raison de mon emploi dans la Gendarmerie royale du Canada. Ainsi Dieu me soit en aide.*

[Emphasis in the original]

[38] Superintendent Bilodeau testified that all public service employees are subject to a duty of loyalty.

[39] Four of the witnesses for the bargaining agent were its local area representatives (LAR) and RCMP members. One witness stated that a LAR's role is the same as that of a

shop steward. A LAR is often the first point of contact for members of the bargaining unit for issues or concerns that might or might not lead to grievances or complaints.

[40] Staff Sergeant Chris Voller is a detachment commander on an acting basis at Quadra Island, British Columbia. He is also a LAR. He testified that he had not been advised that the position of detachment commander was proposed to be declared managerial or confidential although he did know about the proposal. He testified that he did not have any discussions with management about the proposed proposal of his position. He stated that there had been no changes to his duties as a detachment commander because of being a LAR. He testified that in the event of any conflict of interest between his duties as a detachment commander and being a LAR, he would step aside from his LAR role, and another LAR would be brought in to deal with it.

[41] In cross-examination, Staff Sgt. Voller agreed that his role as a LAR is to support other bargaining unit members with issues related to their terms and conditions of employment. He testified that in an investigation of conduct, his role is to advise the officer as well as attend meetings related to the conduct investigation. He testified that he would sometimes assist members, to guide them in providing their "best evidence".

[42] Superintendent Bilodeau testified that Staff Sgt. Voller would not have received notification of the proposed proposal to have his position declared managerial or confidential because he is in an acting position, and only those whose substantive positions were proposed for such declaration were advised. She testified that this is a gap in the RCMP's system for advising incumbents that is being fixed.

[43] Staff Sergeant Trevor Ellis is a senior investigator with the RCMP's Professional Responsibility Unit. His role includes directing and conducting investigations into allegations of misconduct or criminality resulting from public complaints involving RCMP members and employees up to and including the staff sergeant rank. He is also a LAR in Saskatchewan.

[44] Staff Sergeant Ellis testified that he does not provide any assistance to bargaining unit members who contact him about conduct examinations, harassment complaints, or public complaints. He testified that in his view, doing so would conflict with his senior investigator role. He also testified that he signed an undertaking prepared by the NPF that limits his ability to represent members, as follows:

…

AND WHEREAS the representation provided by the National Police Federation includes, but is not limited to, assisting members accused of violations of the Code of Conduct and who are involved in public complaints under Part VI of the Royal Canadian Mounted Police Act*;*

S/SGT TREVOR ELLIS AGREES AS FOLLOWS:

1. I will not provide advice, support, or representation to an individual within the bargaining unit represented by the National Police Federation ("NPF") in respect of the following subject-matters:

a. The RCMP Code of Conduct;

b. Any statutory investigation;

c. Any harassment investigation or harassment complaint; and

d. Any public complaint.

2. I will recuse myself from any discussions with members of the Regional or National Boards about the NPF strategies for representing members in the subject-matters set out in paragraph 1 of this undertaking.

3. I will not access documents or other information provided by members to the NPF concerning the subject-matters set out in paragraph 1 of this undertaking. In the event that I inadvertently obtain information or documents from an NPF member relating to the subject-matters set out in paragraph 1 of this undertaking, I will immediately advise the President of the NPF of this disclosure and cooperate with the steps necessary to ensure members of the NPF are not prejudiced by this inadvertent disclosure.

4. This undertaking does not detract from or limit my duties and obligations towards the NPF in my capacity as a local representative.

…

[45] Staff Sergeant Ellis testified that nothing changed in his duties and responsibilities after his position was proposed to be declared managerial or confidential.

[46] I also heard testimony from two incumbents of positions proposed to be declared managerial or confidential who are constables and who occupy CDRA positions: Patrick Flannery and Shelly Jacobsen. They are also both LARs for the NPF. The CDRA role includes the following responsibilities:

…

1. providing career planning advice to employees,

> *2. identifying and developing employees to meet current and future human resource needs,*
>
> *3. promoting and advising employees to become continuous learners,*
>
> *4. implementing and coordinating the regional transfer and promotion processes,*
>
> *5. implementing and coordinating the Human Resource Management Program within the competency based model, and*
>
> *6. working with learning specialists and managers to address competency requirements to meet the needs of different programs and services.*
>
> …

[47] Constable Flannery has been a CDRA since 2018. He testified that a CDRA's role is to review the competencies for a position and screen the available RCMP members for those competencies. He would then come up with a short list and provide that to the inspector for a decision. If there is a promotion involved in the staffing of the position, a request would go to the promotion unit for determination. He testified that he might make a recommendation on whom to appoint but that he would not make any decisions on staffing a position. In cross-examination, he agreed that in some cases he would have a "full and frank" discussion with a member about a lateral transfer. He testified that an officer could grieve a lateral transfer or being screened out of a possible transfer.

[48] Constable Flannery testified that he was aware that his position is proposed for exclusion, and he discussed it with his supervisor. He was not made aware of the consequences of being in an excluded position, he testified. He testified that his role as an RCMP officer takes precedence over his role as a LAR. He stated that if he receives a request from an RCMP member about staffing in his LAR role, he provides information about the staffing policy but does not provide advice about their specific circumstances.

[49] Constable Jacobsen started as a CDRA in 2020. She also testified that she has no decision-making role in staffing and that her role is to ensure that the process was fair and that the rules were followed. She testified that she learned from co-workers that her position was being proposed to be declared managerial or confidential only after she started in it. She testified that when she told her manager that she was a LAR, he asked her not to assist RCMP members in staffing issues in that role. She testified that

she addresses any potential conflicts by immediately directing members to another representative for staffing assistance. She testified that management has expressed no concerns about this approach. She also testified that there had been no change in her duties as a result of her LAR role.

[50] Constable Jacobsen testified that she would not have taken the advisor position had she known about the possibility of it being excluded. In cross-examination, it was suggested to her that it would be easy to obtain another position within the RCMP. She agreed that that is theoretically possible, but she has limitations and restrictions because of her need to work a day shift.

[51] Superintendent Bilodeau testified that the RCMP would be open to discussions with those officers in positions declared managerial or confidential about transfers to non-managerial or confidential positions on a case-by-case basis. She testified that being in an excluded position is not a requirement for career advancement.

[52] Superintendent Bilodeau testified that the RCMP has been risk-managing the conflict of interest of those in proposed excluded positions until a final decision is reached on those positions. She testified that that method is not viable on a long-term basis.

E. Other policing organizations in Canada

[53] Tom Stamatakis is the president of the Canadian Police Association (CPA) and has been since 2011. He worked for 31 years as a police officer in Vancouver, B.C. The CPA is a national organization of police associations (bargaining agents for police officers) and is an advocacy group for them.

[54] Mr. Stamatakis testified about the general organization of police departments across the country. He stated that he is familiar with the RCMP but that he does not have intimate knowledge of its organization.

[55] He testified that he was not aware of any police organization in Canada, other than the RCMP, which has excluded NCOs from collective bargaining. He was not aware of any police organization that excluded individuals below the rank of inspector. He stated that inspectors are excluded from police associations but are often in a separate bargaining unit.

[56] Mr. Stamatakis testified that the rank structure of the RCMP is similar to other police organizations but that there are some differences. Some police organizations do not have corporal or staff-sergeant positions. Other jurisdictions have all the same ranks, and some may have additional ranks. The duties of an inspector are generally the same in all jurisdictions. He testified that an inspector is the first senior-management level and that an inspector would have a number of people under his or her control or command.

[57] Mr. Stamatakis testified that police organizations deal with conflict of interest by their members swearing an oath of office that includes a commitment to protecting the public as well as to not disclosing confidential information. In addition, statutes have been established that deal with codes of conduct and the disclosure of information. He also testified that as a union representative, if he were to assist another officer, he would have to sign an agreement not to disclose information. He testified that such non-disclosure agreements are typically individual agreements and are not collectively bargained.

[58] Mr. Stamatakis testified that generally, the investigation of disciplinary matters is conducted by members of the bargaining unit. He said that conflicts or power imbalances are managed by making sure that anyone conducting an investigation is not in a personal relationship with the person being investigated, which is addressed through internal policies.

[59] He testified that no employers of police have ever attempted to exclude NCOs from a bargaining unit. He also testified that elected union officials are often full-time police officers. He testified that he routinely investigated other officers while he was an elected union official. In cross-examination, he agreed that a union official would not be assigned to a role involving the investigation of an officer relating to professional standards.

[60] Harold Coffin is a labour relations officer with the NPF and has been in that role since 2021. He was formerly a police officer with the Ontario Provincial Police (OPP). He also was on the board of the OPP Association, the bargaining agent for OPP officers, for three years. He testified about the structure of the OPP, which has these ranks: constable, sergeant, sergeant-major, staff sergeant, inspector, superintendent, chief superintendent, deputy commissioner, and commissioner. He testified that those in

inspector positions and higher are excluded from collective bargaining and that no NCOs are excluded from the bargaining unit.

[61] Mr. Coffin testified that officers involved in disciplinary matters "knew what they were allowed to say and what not to say". He also testified that officers conducting investigations were not permitted to represent a member of the bargaining unit.

[62] Superintendent Bilodeau testified that the ranking system of the RCMP is different from that of other police services. She stated that there are some similarities among the different police services across the country but that the full rank array of the RCMP is unique. She also noted that other police services may not have the same responsibilities as does the RCMP. She testified that the RCMP did look at other police services before proposing exclusions, including the Sûreté du Québec (the Quebec provincial police), the Ontario Provincial Police, and the police services of Ottawa and Toronto in Ontario. She testified that other police services might have been examined. She testified that the RCMP did learn that these police services do not have exclusions but that many of them have something similar to a labour relations unit that was excluded from the bargaining unit.

IV. Submissions

[63] The parties provided written as well as oral submissions. I have summarized them in this section.

A. For the NPF

[64] The NPF submitted that the exclusion provisions violate s. 2(d) of the *Charter* in two ways: they prohibit employees in excluded positions from joining an employee organization, and they prevent these employees from exercising the right to engage in collective bargaining.

[65] The NPF relied on the approach to freedom of association in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, when it made this submission:

> …
>
> *(a) Do the activities for which the claimants seek protection fall within the scope of freedom of association?*

> *(b) If so, does the impugned law interfere with those protected freedoms in purpose or effect?*
>
> *(c) Is the state responsible for the interference?*
>
> …

[66] The NPF also referred me to the Supreme Court of Canada's early jurisprudence on freedom of association (see *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313; *PSAC v. Canada*, [1987] 1 SCR 424; *RWDSU v. Saskatchewan*, [1987] 1 SCR 460; and *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367). It also referred me to the decision of the Court in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*BC Health Services*").

[67] The NPF referred me to the trilogy of *Meredith v. Canada (Attorney General)*, 2015 SCC 2; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4; and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*"). It submitted that the decision in *MPAO* is the most important one for the issues in this case.

[68] In *MPAO*, the majority of the Supreme Court of Canada concluded that the then-existing structure of labour relations in the RCMP violated s. 2(d) of the *Charter*, thus invalidating the prohibition on collective bargaining for RCMP members. The Court then summarized the three classes of activities protected by s. 2(d), as follows:

> …
>
> *… (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.*
>
> …

[69] The NPF noted that the Supreme Court of Canada also clarified that the threshold for a violation of s. 2(d) is "substantial interference" in the process of collective bargaining. The Court also made it clear that the purpose behind this right is to ameliorate the power imbalance between employees and employers.

[70] The NPF noted that the employer had suggested that the *MPAO* decision declared that the *Wagner Act* model, named after the United States' legislation titled the *National Labor Relations Act of 1935* (ch. 372, 49 Stat. 449 (1935)), is constitutional.

The NPF submitted that the Supreme Court of Canada did not suggest that basing a labour law on the *Wagner Act* model automatically makes that law constitutional. It submitted that each variation on the *Wagner Act* model must be assessed on its own terms.

[71] The NPF submitted that in *Treasury Board v. Public Service Alliance of Canada*, 2021 FPSLREB 24 ("*TB v. PSAC 2021*"), the Board determined that the exclusion provisions infringe s. 2(d) of the *Charter*. In that decision, the Board applied the approach set out by the Supreme Court of Canada in *Doré v. Barreau du Québec*, 2012 SCC 12, for administrative or discretionary decisions that infringe *Charter* rights. The NPF submitted that by applying that approach, the Board acknowledged that the exclusion provisions violate s. 2(d) of the *Charter* when it stated that each case must be decided on its own facts, "… in such a manner as to impinge on the *Charter* rights of each employee in the identified group in the least intrusive manner" (at paragraph 82). The NPF stated that although the Board did not address s. 1 of the *Charter*, the decision should entirely dispose of the constitutional question in this case. (After the hearing of this matter, the Federal Court of Appeal allowed the employer's application for judicial review (2022 FCA 204) but did not address the Board's reliance on the *Charter*.)

[72] The NPF referred me to the decision in *Hutton v. Ontario (Attorney General)* (1987), 62 O.R. (2d) 676, in which the Ontario Hight Court of Justice struck down legislation that prohibited officers of the Ontario Provincial Police holding ranks higher than staff sergeant from engaging in collective bargaining on the basis that the prohibition was contrary to the *Charter* and was not saved by its s. 1.

[73] The NPF also referred me to two decisions of the Quebec Tribunal administratif du travail ("the Tribunal") relating to managerial exclusions under the Quebec labour relations regime (see *Association professionnelle des cadres de premier niveau d'Hydro-Québec (APCPNHQ) v. Hydro-Québec*, 2016 QCTAT 6871, and *Association des cadres de la Société des casinos du Québec v. Société des casinos du Québec inc.*, 2016 QCTAT 6870). The Quebec Court of Appeal subsequently issued the decision in *Société des casinos du Québec*.

[74] The NPF noted that the Quebec Court of Appeal agreed that the *Wagner Act* model does not require managers to be excluded. The NPF submitted that the Court

also affirmed that s. 2(d) of the *Charter* should be interpreted considering international human rights instruments, including International Labour Organization (ILO) conventions. It noted that the Court also recognized that voluntary associations, similar to the COs' association, are insufficient to meet the requirements of freedom of association. The NPF stated that the Court also held that the inability of managers to access independent labour tribunals to meaningfully assert their right to collectively bargain in good faith also violates their freedom of association.

[75] The NPF also noted that the Court affirmed that the violation of the freedom of association was not justified by s. 9.1 of the Quebec *Charter of human rights and freedoms* (C-12; "the Quebec *Charter*"), which involves the same analysis as s. 1 of the *Charter*. It observed that the Court concluded that managerial exclusions do not minimally impair freedom of association because other labour relations statutes do not exclude managers, thus demonstrating that there are other ways to address conflicts of interest. The NPF submitted that the Board should likewise conclude that the existence of these other labour relations statutes is sufficient to demonstrate that the exclusion provisions in the *Act* are not minimally impairing.

[76] The NPF also referred me to *Board of Education of School District No. 5 (Southeast Kootenay) v. Southeast Kootenay Principals' and Vice-Principals' Association*, 2021 BCLRB 82 ("*Southeast Kootenay*"), in which the British Columbia Labour Relations Board (BCLRB) addressed a constitutional challenge by a group of principals and vice-principals against a statutory provision excluding them from collective bargaining. The NPF noted that since the BCLRB decided not to address the constitutional question, this decision is of limited assistance. The NPF submitted that it is noteworthy that the statutory regime in B.C. does not contain any definitions or categories of managerial employees, unlike under the *Act*.

[77] The NPF noted that the *Act* prohibits managerial-excluded employees from joining the NPF (or any other employee organization). The NPF submitted that the combined effect of the definition of "employee", the exclusion provisions, and s. 186(1)(a) of the *Act* is that managerial and confidential employees may not "participate in" an employee organization, including becoming a member of the NPF. The NPF submitted that this is, from the words in *MPAO*, a case of a "complete denial" of freedom of association.

[78] The NPF submitted that in *MPAO*, the Court decided that the complete exclusion of a category of workers from a collective bargaining regime constitutes a substantial interference with those workers' constitutional right to engage in collective bargaining. The NPF noted that Mr. Verner agreed that the purpose of a meeting with excluded employees would be to hear stakeholder concerns and would not be collective bargaining.

[79] The NPF submitted that the exclusion provisions were enacted for the purpose of depriving those excluded employees of their right to collective bargaining. As explained in the Heeney Report, this was also a deliberate choice from among the possible less-restrictive competing models.

[80] The NPF argued that the exclusion provisions substantially interfere with the right of the affected RCMP members to exercise their right to collectively bargain, in both purpose and effect.

[81] The NPF submitted that the exclusion provisions are not saved by s. 1 of the *Charter*. It noted that the employer has stated that the purpose behind exclusions is to maintain the separation between management and employees in an adversarial model of collective bargaining. The NPF submitted that neither this separation nor an adversarial model of collective bargaining is a pressing and substantial objective justifying a *Charter* breach. The NPF argued that the exclusion provisions are not rationally connected to that purpose, as they exclude employees for reasons unrelated to the adversarial model of collective bargaining, unlike other paragraphs in the *Act* that are not at issue in this application.

[82] The NPF submitted that the exclusion provisions are also not minimally impairing. It stated that there is no evidence that the federal government considered less-intrusive means when drafting the exclusion provisions; there have been no exclusions for over two years since the NPF's certification. There has been no evidence of harm to the employer, and the exclusion provisions are inconsistent with the treatment of police officers throughout Canada and in other countries, where police officers below the rank of inspector are never excluded.

[83] The NPF also submitted that the employer provided no evidence about the benefits of the exclusion provisions, let alone evidence that would outweigh the harm

caused by depriving some RCMP members of their freedom of association and the right to collectively bargain.

[84] The NPF submitted that there is no rational connection between the pressing and substantial objective and the exclusion provisions (with the exception of one element of s. 59(1)(c) — the provision of advice on labour relations). It noted that s. 59(1)(a) has nothing to do with collective bargaining as collective bargaining remains within the sole jurisdiction of the Treasury Board: none of the officials listed in s. 59(1)(a) has any role to play in collective bargaining. The NPF alleged that deputy heads play no role in collective bargaining unless there is two-tiered bargaining, which has never occurred — their role is limited to consultation. The NPF submitted that the only rational connection in s. 59(1)(c) is labour relations, as staffing and classification are not related to collective bargaining. It also submitted that ss. 59(1)(e) and (g) have nothing to do with collective bargaining.

[85] The NPF submitted that the employer relied on the pressing and substantial objective behind the exclusion provisions as ensuring an adversarial system of collective bargaining and that it did not rely upon the broader concept of "conflict of interest." The NPF submitted that had the employer done so, the *Société des casinos du Québec* decision would guide the Board's decision. The NPF noted that in that case, it was determined that all employees owe a duty of loyalty to their employer, regardless of their level of responsibility within the organization; therefore, the restriction on collective bargaining was not rationally connected to a conflict of interest.

[86] The NPF submitted that the exclusion provisions do not minimally impair the freedom of association, as underscored by the fact that those proposed for exclusion have remained in the bargaining unit for years, without any evidence that it has impaired the employer's interests. The NPF noted that the parties successfully negotiated a collective agreement despite the incumbents of positions proposed for exclusion remaining in the bargaining unit. The NPF stated that this is explained in part by the common-sense approach taken in managing conflicts of interest and in part by the hierarchical nature of policing.

[87] The NPF submitted that the exclusions for members of the RCMP are more extensive than elsewhere in the federal public sector and that there is no explanation for it. In addition, it noted that the exclusion of NCOs is inconsistent with the

approach in every other jurisdiction in Canada as well as in other countries and under international law and therefore is not minimally impairing.

[88] The NPF submitted that when determining the degree of deference owed to the legislature in an analysis under s. 1 of the *Charter*, courts have traditionally considered four factors (see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877): the nature of the harm, the vulnerability of the protected group, any apprehension of harm and ameliorative measures considered, and the nature of the affected activity. The NPF submitted that these factors do not demonstrate a need for a deferential approach in this case. It submitted that the pressing and substantial objective is designed to benefit the interests of the government as the employer. There exists an obvious power imbalance in favour of employers that is amplified when that employer is also the government, the NPF stated.

[89] The NPF further noted that the employer introduced no evidence that ameliorative measures to the exclusion provisions were considered, in stark contrast to other freedom-of-association cases, which had extensive evidence that the government considered alternatives and even consulted affected parties about the alternatives.

[90] The NPF submitted that the activity being curtailed (membership in an association and, ultimately, collective bargaining) is an extraordinarily beneficial activity and that curtailing that right should be a last resort.

[91] The NPF noted that the employer led no evidence about any harm flowing from the current situation of those proposed for exclusion remaining in the bargaining unit. Based on this, the NPF submitted, it is clear that exclusions are unnecessary in this workplace.

[92] The NPF submitted that in *MPAO*, the Court decided that there was no material difference between the RCMP and other police forces in Canada. It submitted that even if this was not a binding precedent on this point, the employer provided no evidence to show any material difference that is relevant to the issue before the Board.

[93] The NPF noted that exclusion provisions are not an inherent part of the *Wagner Act* model. The original *Wagner Act* of 1935 permitted all employees to unionize; it was not until the United States federal legislature passed the *Labor Management*

Relations Act (ch. 120, 61 Stat. 136 (1947)) in 1947 (commonly called the "*Taft-Hartley Act*") that "supervisors" were excluded from collective bargaining.

[94] The NPF also submitted that the exclusion provisions are not a standard feature in other Canadian jurisdictions and that they in fact exclude a larger number of employees than would be the case in other jurisdictions.

[95] The NPF noted that the ILO has found that it is not necessarily incompatible with its "Convention No. 87" (which guarantees freedom of association) to deny managerial or supervisory employees the right to belong to the same trade union as other workers, on two conditions: such workers must have the right to establish their own associations to defend their interests, and the categories of staff must not be defined so broadly as to weaken the organization of other workers (ILO, *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, 6th ed., at paragraph 369; see also paragraphs 370 and 371).

[96] The NPF also noted that the ILO has concluded that collective bargaining must be permitted for all public servants and that only those with "senior managerial or policy-making responsibilities" can be barred from joining trade unions with other workers (although they must be allowed to form their own trade unions). The NPF submitted that the non-compliance of the exclusion provisions with the ILO convention demonstrates that the provisions violate s. 2(d) of the *Charter* and that this violation is not minimally impairing.

[97] The NPF submitted that one of the deleterious effects of the exclusion provisions is the impact on RCMP members who transfer to and from excluded positions. The NPF stated that the evidence showed that RCMP members transfer much more frequently than do other federal public sector employees, resulting in a disruption to NCOs' careers.

[98] The NPF submitted that the most significant deleterious effect of the exclusion provisions is to deprive RCMP members of the benefits of collective bargaining and associating with a union. The NPF submitted that the deleterious effect of the exclusion provisions is most obvious from the evidence of Ms. Jacobsen; had she known that she would be prohibited from joining the NPF, she would never have accepted her current job. The NPF argued that she would rather harm her career

prospects than be without a union to protect her from (as she described it) "every negative thing the RCMP has to offer."

[99] The NPF asked the Board to issue an order dismissing the employer's application to exclude positions from the bargaining unit on the basis of the exclusion provisions. The NPF also stated that this constitutional challenge relates only to members of the RM bargaining unit affected by the exclusion provisions. It submitted that a decision of the Board finding the exclusion provisions invalid would apply only to its members and would not invalidate existing exclusions; nor would it have any impact on the application of s. 59(1) of the *Act* to other bargaining units.

B. For the employer

[100] The employer noted that at this stage, the Board is not adjudicating the proposals for exclusion on their merits; each ground in s. 59 of the *Act* has a well-established legal test that must be met for an exclusion to be granted by the Board. The employer disagreed with the NPF that exclusions are not necessary because sergeants and staff sergeants do not have the authority to do what would traditionally be characterized as being part of the management team or be involved in human resources issues. However, the employer submitted that should the NPF be correct, the positions would not meet the legislative criteria for exclusion as adjudicated by the Board and would remain in the bargaining unit.

[101] The employer maintained that in *MPAO*, the Supreme Court of Canada ruled on the ultimate issue in this case. It argued that the Court made the following relevant findings:

- Section 2(d) of the *Charter* does not require a particular scheme of collective bargaining, and its finding: "… does not mean that Parliament must include the RCMP in the *PSLRA* scheme" (at paragraph 137).
- The *Act* is a *Wagner Act* model of collective bargaining that meets the requirements of s. 2(d) (at paragraphs 90, 94, 123, and 134).
- The *Wagner Act* model of collective bargaining places certain limitations on individual rights, to allow the pursuit of collective goals, such as majoritarianism and exclusivity, which are consistent with s. 2(d) (at paragraph 98).
- The *Wagner Act* model requires, and s. 2(d) allows for, a separation between management and employees (at paragraphs 5, 25, 72, 80, 82, 88, 89, 92, 99, 106, 111 to 113, 115, and 119).
- The *Wagner Act* model "… permits a sufficiently large sector of employees to *choose* to associate themselves …" under the supervision of an independent labour board (at paragraph 94).

- The exclusion process under the *Act* is a legitimate part of the system, and the Court added the following (at paragraph 152):

> *… concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the* PSLRA*, without requiring total exclusion from bargaining in the present regime.…*

[102] The employer submitted that in *MPAO*, the Court upheld the *Wagner Act* model as the constitutional standard against which other labour relations schemes are measured. The employer submitted that the *Act* is based on a *Wagner Act* model of labour relations, which has been adopted across Canada and the United States and that *MPAO* constitutionalizes a central feature of the *Wagner Act* model — its reliance on managerial and confidential exclusions. The Court cast its mind to the ultimate issue before this Board and found that the exclusion provisions are consistent with s. 2(d) of the *Charter*.

[103] The employer refuted the NPF's statement that the Board has already found that s. 59 of the *Act* infringes s. 2(d) of the *Charter* (see *TB v. PSAC 2021*). It submitted that the Board simply stated that each exclusion must be determined based on its facts to impinge on *Charter* rights in the least-intrusive manner. The Board's subsequent comments show that exclusions are routine matters considered by it, and there is no mention of *Charter* breaches.

[104] The employer submitted that the development of labour law in Canada has largely been a move toward *Wagner Act* collective bargaining. It submitted that this is an adversarial model of collective bargaining, which has at its foundation the separation of management and employees. The employer submitted that the protection guaranteed by s. 2(d) of the *Charter* is shaped by "the context of collective bargaining" and reflects certain features that are "… inherent to the nature and purpose of collective bargaining" (see *MPAO*, at paras. 83 and 84).

[105] Among these features is the separation between workers and management. The employer submitted that maintaining some degree of this separation is a precondition for meaningful collective bargaining and quoted that "… independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly" (see *MPAO*, at para. 89).

[106] The employer submitted that in typical workplaces, there is a distinction between management and workers for the purpose of engaging in workplace matters. It argued that workers' associations are independent and accountable to the workers and that they engage with management, who are the employer's representatives. It further noted that management is excluded from workers' associations to avoid conflict of interest and due to its interests being more closely aligned with the employer than with the workers.

[107] The employer submitted that the jurisprudence suggests that there is some level of the workplace hierarchy beyond which employees are too closely related to the employer or have too much power over the workplace to have a purposive interest in engaging collectively on workplace matters. The employer submitted that if the exclusion of managerial and confidential employees is understood as an unproblematic necessity in any collective bargaining regime, then such exclusions are fully consistent with the purposive aspect of freedom of association under the *Charter*.

[108] The employer submitted that in *Southeast Kootenay*, the BCLRB applied a *Charter*-values analysis to exclusions from a bargaining unit and concluded that the division between trade unions and employers is "… rooted in the *Wagner Act* model of labour relations and is recognized as a constitutionally valid principle of labour relations" (at paragraph 139). It noted that the Ontario Labour Relations Board made a similar finding in *Hydro Ottawa Ltd.*, [2019] O.L.R.D. No. 1648 (QL) at para. 66, where it stated that "[g]iven the harmony between the Act's purposes and the *Charter* …", *Charter* values did not add anything to the analysis of the exclusion proposals.

[109] The employer stated that if the exclusion provisions are unconstitutional, then the *Wagner Act* model itself is unconstitutional. It submitted that the trade-off for entering a *Wagner Act* model of labour relations is that the employer needs managerial and confidential employees on its side of the ledger to function. There is nothing untoward about this result as it is precisely what is described in *MPAO* as being one of the defining features of the *Wagner Act* model and is reflected in s. 59 of the *Act*.

[110] The employer agreed that the wording of the *Act* is different from the legislation of other jurisdictions but argued that the exclusion provisions are aligned with traditional *Wagner Act* model exclusions. It submitted that the same rationale

relied on by different labour boards in finding that the exclusion process is consistent with the *Charter* should be applied to the Board's analysis of s. 59 of the *Act*.

[111] The employer submitted that the absurdity that would flow from a finding that the exclusion provisions are unconstitutional should not be ignored. It provided the example of a member representing another bargaining unit member in the grievance process and dealing with a decision made by that member.

[112] The employer also noted that the NPF applied a double standard, given that it has argued for the maintenance of another key aspect of the *Wagner Act* model — majoritarianism and exclusivity. The employer noted that these two concepts limit an individual's right to choose (a) who they associate with, and (b) who represents them. It submitted that in *Association des membres de la Police Montée du Québec v. Treasury Board*, 2019 FPSLREB 70, the Board correctly concluded that this is not a substantial interference with bargaining — it is a central part of the *Wagner Act* model. The employer also noted that the Supreme Court of Canada has recognized that there must be some limit to individual rights, to enable the pursuit of collective goals.

[113] The employer submitted that the NPF's position on exclusions would require an increase in the number of inspectors to do the work that is currently being done by those employees proposed for exclusion. The employer submitted that this would wreak havoc on the rank structure and relativity required to maintain a coherent classification system. It also submitted that the unique nature of the RCMP is such that this work, in some cases, is done at the ranks of sergeant and staff sergeant, and those positions are proposed for exclusion.

[114] The employer submitted that in the alternative, the right to collective bargaining does not require access to any specific collective bargaining regime. As a result, provisions that exclude managerial or confidential positions from a particular statutory regime do not necessarily limit freedom of association.

[115] The employer submitted that the question of whether the exclusion provisions cause "… substantial interference with the right to a meaningful process of collective bargaining" (see *MPAO*, at para. 80) is partly an empirical question. It submitted that in this context, the following questions are relevant:

- Have any of the excluded employees tried to associate and to bargain with the employer?
- If so, did the employer demonstrate a willingness to engage?
- Is there an alternative process that is more than a legal hypothetical?
- How would inclusions or exclusions affect the bargaining power of the possible associations?
- Does the current balance of power, because of the exclusions, tip too far in favour of the employer?

[116] The employer submitted that there is no evidentiary foundation to address these questions and that mere speculation is not sufficient. It submitted that the employees in the proposed positions have yet to express any interest in organizing and have not approached the employer to discuss the terms and conditions of their employment.

[117] The employer argued that the NPF has not explained how the exclusion of approximately 2.3% of the bargaining unit is a substantial interference with the right to a meaningful process of collective bargaining. The employer submitted that the disappointment of some employees from being proposed for exclusion is not a substantial interference with collective bargaining. The employer also noted that Superintendent Bilodeau testified that the RCMP is open to discuss deploying individuals from excluded positions if requested, subject to operational requirements.

[118] The employer submitted that the purpose of collective bargaining is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties (see *MPAO*, at para. 82). The employer submitted that one cannot maintain any autonomy or equilibrium if one has "a foot in both camps". The employer submitted that the ultimate question to be determined is whether the exclusion provisions disrupt the balance between employees and employer that s. 2(d) seeks to achieve so as to substantially interfere with meaningful collective bargaining; see *BC Health Services*, at para. 90. It submitted that there is no evidence that excluding 2.32% of the bargaining unit would disrupt this balance and interfere with meaningful collective bargaining.

[119] The employer submitted that the *Société des casinos du Québec* decision is not binding on the Board. It also submitted that the decision is not persuasive. It noted that the Court identified the essential flaw in the Quebec legislation — which is that the management exclusion is blunt, simplistic, and antiquated and resting on a

traditional view of labour-management relations. The employer argued that the Quebec exclusion should be contrasted with the more targeted provisions in the *Act*.

[120] In the alternative, the employer argued that if the exclusion provisions breach s. 2(d) of the *Charter*, they are justified under its s. 1.

[121] The employer submitted that the legislative goal of the exclusion provisions is pressing and substantial. It submitted that the goal is to maintain a foundational component of *Wagner Act* collective bargaining; that is, the separation of labour and management for the benefit of both sides. The employer submitted that this is consistent with labour legislation across Canada.

[122] The employer referred me to *Canadian Union of Public employees, Local 23 v. Burnaby (District)*, [1974] 1 Can. L.R.B.R. 1 (BCLRB) (QL) (*Burnaby (District)*) at paras. 126 to 130, in which the BCLRB concluded that the explanation for the management exemption is "not hard to find" as true bargaining requires an arm's-length relationship between the two sides, each of which is organized in a manner to best achieve its interests.

[123] The employer submitted that the BCLRB also noted that the interest of the employer is in the undivided loyalty of its senior employees, "… who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to." In *Southeast Kootenay*, the BCLRB stated that "… implicit in this undivided commitment or undivided loyalty, is the premise that each must have absolute confidence that its policies and strategies remain confidential, are implemented fully, and in good faith."

[124] The employer submitted that the NPF's suggestion that except for labour relations, the exclusions in s. 59(1)(c) of the *Act* have nothing to do with collective bargaining, casts the rationale far too narrowly. The employer submitted that conflict of interest is the thread that runs through s. 59(1) and that while the NPF is correct to represent its members on all matters affecting their terms and conditions of employment, the employer is also entitled to have individuals on its side of the ledger, to ensure that its policies are implemented fully and in good faith, which is a foundational component of the *Wagner Act* model.

[125] The employer submitted that this maintenance of a foundational component of the *Wagner Act* model is a pressing and substantial objective that is sufficiently important to justify limiting a *Charter* right.

[126] The employer submitted that there is proportionality between the objective and the means used to achieve it. It submitted that the exclusion provisions are rationally connected to the objective and that there is a causal link between these provisions and the pressing and substantial objective identified.

[127] The employer submitted that the exclusion provisions impair s. 2(d) of the *Charter* no more than is reasonably necessary to accomplish the objective. It submitted that the Board's long-standing application of s. 59 is already designed to capture only those individuals who are reserved to the employer's side of the ledger; the provisions are carefully tailored and impair freedom of association no more than is reasonably necessary to accomplish their objective.

[128] The employer submitted that excluded employees can organize and present concerns about their terms and conditions of employment to it; exclusion from the bargaining unit does not limit all associational activities.

[129] The employer submitted that there is a proportionality between the deleterious and salutary effects of the exclusion provisions. The employer stated that it is telling that since the release of the *BC Health Services* decision in 2007, no other bargaining agent in the country has made an application to deem legislative exclusion provisions unconstitutional.

C. Oral reply submissions of the NPF and the employer

[130] The NPF submitted that the prohibition of membership in a union as set out in s. 186(1) of the *Act* is a broader prohibition on membership than has any other legislation. The section prohibits membership in a union for excluded employees "… whether or not … acting on the employer's behalf …". The NPF submitted that under the Ontario *Labour Relations Act* (1995, S.O. 1995, c. 1, Sched. A), the limits apply only to acting on behalf of the employer. The NPF submitted that membership in a union is important outside representation for collective bargaining purposes, in light of the broad scope of employment-related issues outside collective bargaining.

[131] In response to the employer's argument that excluded employees can negotiate their terms and conditions of employment, the NPF submitted that in such cases, there is no obligation on the employer to bargain in good faith, and there is no access to any recourse. The NPF submitted that it is more akin to lobbying than negotiating.

[132] The NPF submitted that the employer's characterization of the purpose of the exclusion provisions has shifted. In its submissions, the employer referred to the purpose of the separation between management and employees. However, the Heeney Report referred to the purpose of "conflict of interest". It submitted that the purpose of a provision under the test in *R. v. Oakes*, [1986] 1 SCR 103, is a function of the intent of those who drafted the legislation and not of any shifting variables (see *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para. 91).

[133] The NPF submitted that the adversarial model of labour relations is not a "pressing and substantial" objective. It noted that the *MPAO* decision (at paragraph 97) held that an adversarial model of labour relations is not required under the *Charter*.

[134] The NPF stated that conflict of interest is also not a pressing and substantial objective. It noted that all employees have a conflict of interest with their employer. In the alternative, it submitted that if it is pressing and substantial, efforts can be made to minimally impair the *Charter* right.

[135] The NPF submitted that the employer's argument that excluded employees can engage in alternate forms of bargaining raises the same conflict of interest as does participating in the bargaining unit. The NPF also noted that since the terms and conditions of employment of those in excluded positions are tied to those of represented employees, a conflict of interest still exists, even after exclusion. It submitted that the only way to address it is to have separate terms and conditions of employment for those in excluded positions.

[136] The NPF submitted that the percentage of the bargaining unit that is proposed to be excluded is not relevant. It noted that initially, the employer proposed 5.63% of the bargaining unit and then revised it to 2.32%, and it could change its mind again.

[137] The employer submitted that it is naïve to think that collective bargaining does not involve the deputy head (see s. 59(1)(a)). The employer submitted that the deputy head would likely be included in discussions about collective bargaining and the

purpose of exclusions cannot be defined so narrowly as to require that the deputy head be at the bargaining table; see *Southeast Kootenay*, at para. 126.

[138] The employer submitted that contrary to the bargaining agent's submissions, if a position is a low-level supervisor position, it will not meet the test of "substantial management duties". The employer stated that s. 59(1)(e) requires "substantial" management duties, which is stronger than some provisions in other regimes. The employer submitted that s. 59(1)(g) gives the role to the Board to exercise its discretion, to avoid conflicts of interest.

[139] The employer submitted that if it had done more to restrict conflict of interest during the period in which the Board dealt with the exclusion proposals, it would have invited an unfair-labour-practice complaint. It submitted that it should not be prejudiced by the time it takes the Board to address the exclusion proposals.

[140] The NPF noted that the duty of loyalty of RCMP officers is higher than that of the rest of the federal public sector and referred me to *Read v. Canada (Attorney General)*, 2006 FCA 283 at paras. 114 to 116; *Queen v. White*, [1956] SCR 154; and *McGillivray v. Canada (Attorney General)*, 2021 FC 443 at para. 29.

V. Reasons

[141] For the reasons set out in this section, I find that the exclusion provisions (specifically, ss. 59(1)(a), (c), (e), and (g)) do not comply with s. 2(d) of the *Charter* but are saved by s. 1 of the *Charter*.

A. Introduction

[142] The NPF presented evidence and made submissions on whether there was a confidential relationship related to collective bargaining or labour relations for some positions. This is an issue more relevant to the determination of whether the employer has met its burden of showing that the proposed positions are suitable for exclusion.

[143] The NPF referred me to the composition of bargaining units represented by police associations in the United States. I find that this information is not relevant to my determination of the constitutional question in the Canadian context. Police unionization in the United States is based on different statutory regimes and it would be inappropriate to consider that evidence without evidence on the full context of the organization of police services in the United States.

[144] Both the employer and the NPF referred to the percentage of employees in the bargaining unit who occupy positions proposed for exclusion by the employer. A proposal for exclusion does not mean that the position will be excluded (if the bargaining agent disagrees) – the ultimate decision is made by the Board, not the employer. All that can be said with certainty is that the number of positions excluded will not be greater than the number proposed by the employer.

[145] The NPF argues that the exclusion provisions contained in paragraphs 59(1)(a), (c), (e), and (g) of the *Act* violate s. 2(d) of the *Charter* and are not saved by s. 1 of the *Charter*. I have set out these provisions in the earlier section of this decision (in "The legislative and constitutional framework"). For ease of reference, the categories of excluded positions included in these paragraphs are:

- confidential to a deputy head (in this case, the RCMP commissioner);
- providing advice on labour relations, staffing or classification;
- exercising substantial management duties, responsibilities and authority over employees or exercising duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Division 2 of Part 2.1;
- exercising duties and responsibilities not otherwise described and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer.

[146] The NPF did not make an argument that the exclusion provisions in the *Act* interfered with the freedom of association of those employees not excluded. In other words, it did not submit that the number of excluded positions would substantially interfere with meaningful collective bargaining of those remaining in the RM bargaining unit after exclusions. Therefore, the issue is whether there is a breach of the freedom of association of those employees in excluded positions and, if so, whether that breach is justified under s. 1 of the *Charter*. The remedy requested by NPF would result in employees in excluded positions being included in the RM bargaining unit.

[147] The exclusion provisions in the federal public sector have been in place in several formulations since the beginning of collective bargaining in the federal public sector. These provisions have been applied and interpreted by the Board and its predecessor boards. Therefore, when assessing the exclusion provisions, it is necessary to review how they have been interpreted and applied by the Board. In addition, to

better understand the purpose and context of exclusions generally, it is also helpful to review decisions from other jurisdictions.

[148] I will commence with a brief overview of the history of exclusion provisions both in the federal public sector and other Canadian jurisdictions. I will then turn to the Board's interpretations of the exclusion provisions in the *Charter* era. Finally, I will address the issue of whether the exclusion provisions breach freedom of association and whether they are saved by s. 1 of the *Charter*.

B. The history of exclusion provisions

[149] The parties referred me to the Heeney Report, which formed the basis of the first statute governing collective bargaining in the federal public sector. It relied on "conflict of interest" as the supporting principle for exclusions from collective bargaining (see page 32).

[150] In an early decision *Burnaby (District)*, cited in George W. Adams, *Canadian Labour Law*, 2nd edition, at paragraph 6.3), the BCLRB explained the basis for management exclusions as follows:

> *The explanation for this management exemption is not hard to find. The point of the statute* [the Labour Code] *is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management — on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.*
>
> *The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or*

> *passed over for promotion on the grounds of their "ability". The employer does not want management's identification with its interests diluted by participation in the activities of the employees' union.*
>
> *More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of the employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it.*

[151] The Ontario Labour Relations Board has also noted the importance of an arm's-length relationship between employees represented by a bargaining agent and the employer acting through management, in *Canada Independent Automotive Union v. Chrysler Canada Ltd.*, [1976] O.L.R.B. Rep. August 396 at para. 12, cited in *Canadian Labour Law*, at paragraph 6.3, as follows:

> *…* [The Ontario L*abour Relations Act*] *attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.*

[152] In *Cowichan Home Support Society v. U.F.C.W., Local 1518*, [1997] B.C.L.R.B.D. No. 28 (QL), (*Cowichan Home Support Society)* the BCLRB stated that the broad purpose of the managerial exclusion is to ensure the undivided loyalty of managers to the enterprise, "… consistent with the arm's length model of collective bargaining that

safeguards the adversarial relationship (in both labour and management's interest) …" (at paragraph 104). The importance of loyalty or an "undivided commitment" in the labour relations context was explained by that board as follows (at paragraphs 105, 106, and 115):

> ***105*** *… Loyalty in the labour relations context means putting the company's interests first. From the union perspective, it means putting the members' interests first. By keeping managers out of any bargaining unit, their loyalty will not be divided between the functions of their jobs (the company's interests) and the interests of members of the bargaining unit… Perhaps a better reflection of today's governing values is the concept of commitment - an undivided commitment. This involves a strong adherence to both management policy and philosophy, but also conveys a relationship of continued reciprocity.*
>
> ***106*** *Finally, implicit in this undivided commitment or undivided loyalty, is the premise that each party must have absolute confidence that its policies and strategies remain confidential, are implemented fully, and in good faith. Access by one side to the confidential labour relations information of the other would result in an unfair advantage and ultimately bring the collective bargaining relationship into disrepute. This is immediately self-evident in regard to both the negotiation and administration of a collective agreement.…*
>
> *…*
>
> ***115*** *Underlying these factors is the rationale for exclusion — conflict of interest. As was originally stated in* Burnaby […] *the conflict of interest that is at the heart of the collective bargaining scheme is "a potential conflict of interest". No actual conflict need be shown. This conflict of interest arises directly from an objective examination of the actual responsibilities and authority of the individual at issue. Further, that potential conflict of interest is simply not an internal conflict of interest that may arise by the establishment of a blended unit — a unit containing supervisors and the employees they supervise. The concept of conflict of interest within the managerial exclusion issue, is a reference to the existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit. There are two important points that flow from this which are not resolved by simply placing a particular supervisor in a different bargaining unit from those that they supervise.*

[153] A predecessor board, the Public Service Staff Relations Board (PSSRB), adopted the so-called "three-fold test" for determining confidentiality in matters relating to labour relations (see *Canada (Treasury Board) v. Public Service Alliance of Canada*, PSSRB File No. 176-02-287 (19791009) [1979] C.P.S.S.R.B. No. 9 (QL) ("*Canada v. PSAC*

1979"), cited in *Canadian Energy Regulator v. Professional Institute of the Public Service of Canada*, 2020 FPSLREB 120 at para. 104). The PSSRB relied on this statement of the "three-fold test" for determining confidential positions provided in *Canadian Union of Bank Employees v. Bank of Nova Scotia,* (1977) 21 di 439 (CLRB) at 453, [1977] 2 Can L.R.B.R. 126:

> …
>
> *… The confidential matters must be in relation to industrial relations, not general industrial secrets such as formulae … This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial … It does not include personal history or family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it ….*
>
> …

[154] The PSSRB continued as follows at paragraph 45 of *Canada v. PSAC 1979* :

> *45. … The person must be "employed" in a certain "capacity"; we are concerned with functions which are a substantial and regular part of a person's job, not just a matter of occasional and accidental involvement. Moreover, the person must be employed in a "confidential" capacity and this requires a judgment about the seriousness of the need for secrecy for the information which the employee is privy to.*
>
> *…*
>
> *… The employer has an onus to organize its affairs so that its employees are not occasionally placed in this position of a potential conflict of interest if that result can readily be avoided.*
>
> *…*

[155] The PSSRB concluded in *Canada v. PSAC 1979* that merely being a supervisor is not sufficient to justify an exclusion of that position and stated (at paragraphs 54 and 56) that a supervisor's role may include transmitting grievances and making reports or recommendations relating to those grievances. Some of those communications may be confidential; however, the exchange of such confidences is an integral part of the role of any supervisor. This role, the PSSRB found, was not "a relationship that stands out from the generality of relations and bears a special quality of confidence." The PSSRB

also noted that an employer was expected to distribute the responsibility for investigating grievances to the smallest practical number of positions.

[156] In conclusion, before the *Charter*, the predecessor Boards (and other Canadian labour boards) determined that the purpose of exclusion provisions was to avoid conflict of interest and to maintain the undivided commitment or loyalty of managers. As well, exclusion provisions were narrowly interpreted to limit the number of employees excluded from collective bargaining.

C. Interpretations of exclusions in the *Charter* era

[157] The Supreme Court of Canada has held that administrative decision makers must exercise their statutory discretion in a manner consistent with the values underlying the granting of discretion, including *Charter* values (see *Doré*, at para. 24). The Board has considered *Charter* values when reviewing exclusion proposals, most recently in *TB v. PSAC 2021*. The Board stated that each exclusion proposal must be determined on its facts, impinging on the *Charter* rights of each employee in the identified group "in the least intrusive manner" (at paragraph 82). The question to be asked, the Board stated, was "… how the *Charter* values at issue will be best protected in view of the statutory objectives and balance the severity of the interference of the *Charter* protection with the statutory objectives …" (at paragraph 85).

[158] As noted earlier, the Federal Court of Appeal allowed a judicial review application of *TB v. PSAC 2021*. The Attorney General had alleged that the Board incorrectly applied *Charter* values to dismiss relevant precedents. The Court declined to deal with the question of the application of *Charter* values and allowed the judicial review on other grounds (at paragraph 13).

[159] I do not agree with the bargaining agent's position that that decision of the Board found that the exclusion provisions were not constitutional. That issue was not before the Board, and the decision refers only to *Charter* values.

[160] In *Hydro Ottawa Ltd.*, the Ontario Labour Relations Board noted that the Ontario *Labour Relations Act* already embodied the *Charter* value of the protection and facilitation of collective bargaining, and that that board's consistent approach to interpreting exclusion provisions was to do so narrowly. That board then stated that given the harmony between the Ontario L*abour Relations Act*'s purposes and the

Charter, considering "*Charter* values" did not add to the analysis, adding, "Interpreting [the exclusions provision of the Ontario *Labour Relations Act*] in accordance with the [the Ontario *Labour Relations Act*]'s legislative purpose *is* to interpret it in light of the constitutionally-enshrined right to organize."

[161] I agree that, in the federal public sector, the *Act*'s purpose, as set out in its preamble, also shows a harmony with the *Charter* value of freedom of association. The preamble states in part that "… collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment …". It also refers to the "fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment" and "mutual respect and harmonious labour-management relations".

[162] The Supreme Court of Canada has indirectly recognized that overall, the *Act* is *Charter* compliant, in *MPAO*. Although I agree that the Court did not address the exclusion provisions (which were not before it), it did state as follows at paragraphs 97 to 99:

> *[97] … 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.*
>
> *[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.*
>
> *[99] In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(*d*).*

D. Freedom of association and exclusions

[163] The parties provided detailed submissions on freedom of association, including a review of the Supreme Court of Canada's jurisprudence on freedom of association in

the labour relations context. I have reviewed and considered that jurisprudence. However, in this section I will primarily rely on the most recent discussion of freedom of association in the *MPAO* decision. Although that decision related to a complete restriction of collective bargaining of all uniformed members of the RCMP, the general principles of freedom of association remain relevant. In addition, the Court situated its discussion of freedom of association within the federal public sector labour relations regime.

[164] The parties disagreed on the impact of the *MPAO* decision. The employer stated that the Court endorsed the *Wagner Act* model of labour relations, including exclusions. The bargaining agent stated that the Court did not endorse the *Wagner Act* model and that in any event that model does not include exclusions. I will address this disagreement after setting out the Court's determinations on freedom of association generally.

[165] The Court started out with the foundation for freedom of association in labour relations, as set out in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("*Fraser")* at paragraph 42), which is the right of employees to join, to make collective representations to the employer, and to have those representations considered in good faith. In *MPAO*, the Court went on to say that the fundamental purpose of s. 2(d) is to protect the individual from "… state-enforced isolation in the pursuit of his or her ends" (at paragraph 58). Freedom of association empowers individuals to achieve collectively what they could not achieve individually. In this way, the Court said, freedom of association is not merely a bundle of individual rights but "collective rights that inhere in associations" (at paragraph 62). At paragraph 66, the Court held that s. 2(d), viewed purposively, protects the following classes of activities:

> *… (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.*

[166] The Court, relying on its earlier decisions in *Fraser* and *BC Health Services*, concluded that s. 2(d) guarantees the right of employees to "… meaningfully associate in the pursuit of collective workplace goals …", including a right to collective bargaining. The Court noted that this right "… guarantees a process rather than an outcome or access to a particular model of labour relations" (at paragraph 67).

[167] Freedom of association in the labour relations context is not absolute. The Supreme Court of Canada accepted that it is only substantial interference with the possibility of having meaningful collective negotiations that is inconsistent with the *Charter* (at paragraph 72).

[168] In *MPAO*, the Court dealt with a restriction on collective bargaining for all RCMP members. In the case before me, the restriction applies to incumbents of excluded positions and prevents them from participating in the activities of the NPF. Therefore, the question is whether the provisions for excluded positions "… disrupt the balance between employees and employer … so as to substantially interfere with meaningful collective bargaining …" (at paragraph 72).

[169] In *MPAO*, the Court determined that 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 …", thus interfering with their ability to meaningfully engage in collective negotiations (at paragraph 80).

[170] The Court stated that the purpose of collective bargaining is to "… preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties" (at paragraph 82). The equilibrium is contained in the degree of choice and independence given to employees in the labour relations process. The Court stated as follows that choice and independence are not absolute (at paragraph 83):

> *[83] … 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.*

[171] The Supreme Court of Canada has determined that the requirements of choice and independence can be respected by a "variety of labour relations models" if the model allows collective bargaining to be pursued in a meaningful way (at paragraph 92). The Court noted that the function of collective bargaining is not served by a process that is either dominated by or under the influence of management. This

independence of association is not absolute — the degree of independence required by the *Charter* is "… one that permits the activities of the association to be aligned with the interests of its members" (at paragraph 88).

[172] The Court held as follows that the *Charter* compliance of a labour relations scheme is based on the degrees of independence and choice guaranteed by the scheme "… considered with careful attention to the entire context of the scheme" (at paragraph 90):

> *[90] … The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals.*

[173] Although the Court re-emphasized that freedom of association does not mandate a particular model of labour relations, it did refer to the *Wagner Act* model at paragraph 98, as follows: "… 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."

[174] The NPF did not assert that exclusions will substantially interfere with its ability to meaningfully engage in collective bargaining or pursue collective workplace goals for employees in the bargaining unit who are not in excluded positions. Given the relatively small number of proposed exclusions (and remembering that not all employer proposals may be accepted by the Board), it would be hard to argue that excluded employees would create "substantial interference" in collective bargaining for the RM bargaining unit. The NPF's argument is rather that the incumbents of excluded positions would be barred from bargaining collectively with the employer. In essence, the NPF argued that excluding anyone (except those in the management classification) from the RM bargaining unit and, therefore, from the collective bargaining regime is contrary to s. 2(d) of the *Charter*.

[175] In *MPAO*, the Supreme Court of Canada has protected freedom of association within the confines of collective bargaining schemes — in other words, not as an absolute freedom of association. The purpose of collective bargaining, according to the Court, is to preserve "collective employee autonomy" against the "superior power of management" and to maintain "equilibrium" between the parties.

[176] Although the *Wagner Act* model is not the only model of labour relations that could satisfy the freedom of association, the Supreme Court of Canada did recognize it as a common model in Canada. Of course, it did not weigh in on the exclusions of positions contained in all labour relations regimes because that issue was not before it. It did conclude that the *Wagner Act* model "permits a sufficiently large sector of employees" to choose to associate with a particular bargaining agent. However, its focus was on the principles of majoritarianism and exclusivity, which are not engaged in the constitutional question before the Board.

[177] In *Southeast Kootenay*, the BCLRB held that the exclusion of managers was rooted in the core concepts of the duty of loyalty and the avoidance of potential conflicts of interest. The BCLRB asserted that this division between trade unions and employers is rooted in the *Wagner Act* model of labour relations and "… is recognized as a constitutionally valid principle of labour relations" (at paragraph 139). The employer relied on *Southeast Kootenay* to support its position that exclusions are not in breach of the *Charter*. However, the BCLRB expressly declined to address the constitutional question raised by the bargaining agent in that case.

[178] I do not need to determine whether exclusion provisions are part of the *Wagner Act* model. The fact that the Supreme Court of Canada endorsed the *Wagner Act* model is not relevant to the constitutional question before me. The Court did not address exclusion provisions in *MPAO* at all. It was looking at the issue of freedom of association from the perspective of the majority of employees, while the constitutional question before me looks at the issue from the other end of the telescope: a minority of employees who are in excluded positions. However, the principles set out in *MPAO* are directly relevant to my assessment of the constitutional question.

[179] There is limited jurisprudence on freedom of association and managerial or confidential exclusions that addresses the issue head on. As noted in *Canadian Labour Law*, at paragraph 6.9, "It remains to be seen what effect these rulings [the Supreme Court of Canada's decisions on the right to collective bargaining] will have on the validity of the exclusions from collective bargaining of groups such as … managerial employees and confidential employees."

[180] In *Hutton*, the Ontario High Court of Justice found that the complete prohibition against collective bargaining by COs was contrary to the *Charter* and was not saved by

s. 1. It found that the limited restrictions on collective bargaining for junior officers was not a breach of the *Charter*. That decision is not binding on the Board, as it relates to a different labour relations regime. Its limited persuasive value is also overshadowed by the more-recent Supreme Court of Canada decisions on freedom of association.

[181] The one recent case that has looked at exclusions in the context of *Charter* rights is the *Société des casinos du Québec* decision of the Quebec Court of Appeal. That decision was decided under the Quebec *Charter*. The statutory language of the Quebec *Labour Code*, c-27 at issue in that matter was referred to at paragraph 9 of the decision as follows:

[…]	[…]
1. In this Code, unless the context requires otherwise, the following expressions mean:	*1. Dans le présent code, à moins que le contexte ne s'y oppose, les termes suivants signifient :*
[…]	[…]
l*) "employee": a person who works for an employer and for remuneration,* ***but the word does not include:***	l*) «salarié» : une personne qui travaille pour un employeur moyennant rémunération,* ***cependant ce mot ne comprend pas:***
(1) a person who, in the opinion of the Tribunal, is employed as a manager, superintendent, foreman ***or representative of the employer in his relations with his employees***	*1. une personne qui, au jugement du Tribunal, est employée à titre de gérant, surintendant, contremaître* ***ou représentant de l'employeur dans ses relations avec ses salariés;***
[…]	[…]

[Emphasis in the original]

[182] In the *Société des casinos du Québec* case, at paragraph 18, the Court of Appeal referred to the Tribunal's description of the group that was seeking to be unionized as follows:

> [CanLII unofficial English translation
> of the judgment of the Court]

…	[…]
[18]…	[18]…
[315] … first-level managers in an organization with five or more levels of management. ***They often come from the very group they supervise. While they are "the employer's eyes and ears on the floor", they do not have the special relationship with the company that higher-level managers may have. They do not participate in setting the company's orientations. Nor do they play a strategic role in labour relations: they do not negotiate collective agreements; they see to their application in day-to-day activities. In short, first-level managers are truly "between a rock and a hard place".***	*[315] … des cadres de premier niveau, dans une organisation qui comprend cinq paliers ou plus de gestion****. Ils sont souvent issus eux-mêmes du groupe qu'ils supervisent. Tout en étant « les yeux et les oreilles de l'employeur sur le plancher », ils ne bénéficient pas de la relation privilégiée que peuvent entretenir les cadres de niveaux supérieurs avec l'entreprise. Ils ne participent pas aux orientations de l'entreprise. Ils ne jouent pas non plus de rôle stratégique dans les relations du travail : ils ne négocient pas les conventions collectives; ils en assurent l'application dans le quotidien des activités. En résumé, les cadres de premier niveau sont véritablement entre « l'arbre et l'écorce ».***

[Emphasis in the original]

[183] The Tribunal noted at para. 259 of 2016 QCTAT 6870 that the Quebec *Labour Code* covered managers in a broad sense, without being limited to those who perform managerial duties, as contemplated under the *Canada Labour Code*.

[184] The Tribunal went on to reject the notion that excluding first-level managers is a necessary component of the *Wagner Act* model, noting that other labour relations statutes in Canada do not adopt such a broad exclusion and allow for the unionization of first-level managers (at paragraphs 406 through 408).

[185] I agree that a blanket exclusion of all first-level managers is not part of the *Wagner Act* model. In cases such as the one before me, the exclusion provisions and the jurisprudence of the Board do not provide for all first-level managers to be excluded.

[186] I find that the *Société des casinos du Québec* decision is not directly relevant to the determination of whether there is a breach of freedom of association for a narrower exclusion of employees in the bargaining unit under the *Act*. However, I accept its analysis of *MPAO* and the scope of freedom of association under the *Charter*.

[187] Those employees who will be in excluded positions will be prevented from engaging in the collective bargaining regime set out in the *Act*. I agree with the employer that those employees will not be prevented from associating. However, such a level of association is not sufficient to respect the *Charter*-protected freedom of association of those employees in excluded positions. The *Charter*-protected right of those employees to associate to meet on "more equal terms" the power and strength of the employer (see *MPAO*, at para. 66) is limited by the lack of access to an effective collective bargaining regime. Although freedom of association does not guarantee access to a particular model of labour relations, it does guarantee access to a meaningful process of collective bargaining.

[188] As the Supreme Court of Canada noted in *MPAO*, the purpose of collective bargaining is to preserve "collective employee autonomy" against the "superior power of management" and to maintain "equilibrium" between the parties (at paragraph 82). A merely consultative associative model does not preserve the collective autonomy of employees in excluded positions, and it does not maintain an equilibrium between the parties.

[189] Therefore, I conclude that the exclusion provisions limit the freedom-of-association guaranteed under the *Charter* for those employees in excluded positions and does not accord with the values underlying the *Charter*. I now turn to whether the exclusion provisions are saved by s. 1 of the *Charter*.

E. Section 1 of the Charter

[190] The Supreme Court of Canada stated that "[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance." (see *Oakes*, at para. 65 and *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, at para. 137). Section 1 of the *Charter* allows laws to be enacted that limit *Charter* rights if it is established that the limits are reasonable and demonstrably justified in a free and democratic society. The test for a justification under s. 1 was established in *Oakes* and has these two components:

> 1) is the objective pressing and substantial; and
> 2) is there proportionality between that objective and the means used to achieve it?

[191] The second component of the *Oakes* test has these three parts:

> (a) Is there a "rational connection" between the impugned measure and the pressing and substantial objective?
> (b) Does the limit impair the right or freedom as little as possible to accomplish the objective?
> (c) Is there proportionality between the "deleterious" (harmful) and "salutary" (beneficial) effects of the law?

[192] In this matter, the employer bears the onus of satisfying all the parts of the *Oakes* test on a balance of probabilities.

F. Pressing and substantial objective

[193] The threshold for what constitutes a pressing and substantial objective is high. The objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"; see *Oakes*, at para. 69. The objective cannot be "trivial" and must not be "discordant with the principles integral to a free and democratic society"; see *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 20. The Supreme Court of Canada in *Sauvé* also noted that at this stage of the *Oakes* test (at para. 137):

> *…there is an important distinction to be made between the objective and the means chosen to implement that objective, since this phase is related to the Court's checking that the objectives are consistent with the principles, integral in a free and democratic society, pressing and substantial and directed to the realization of collective goals of fundamental importance*

[194] A measure of deference to legislators is appropriate when determining whether an infringing provision is directed toward a pressing and substantial objective (see, for example, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143).

[195] When determining whether a theoretical objective is pressing and substantial, evidence is not required at that stage of the analysis. It is sufficient for the employer to assert that a theoretical objective is pressing and substantial, which can be determined on the basis of common sense; see *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paras. 25 and 26. Any failure to demonstrate the existence or scale of a pressing and substantial objective is generally addressed at the proportionality stage of the *Oakes* test.

[196] A review of the statutory provisions is the first step in determining the objective of exclusions and whether that objective is pressing and substantial. The positions subject to exclusion from the bargaining unit are managerial or confidential positions. The managerial positions that are excluded are described in the *Act* as positions with "substantial management duties" or as dealing formally with grievances under the *Act*. Those positions that are confidential include those positions confidential to the deputy head; those positions providing advice on labour relations, staffing, or classification; and those positions that should not be included because of conflict of interest "… or by reason of the person's duties and responsibilities to the employer …".

[197] The relevant statutory provision (the exclusion provisions) provides that certain positions in the proposed bargaining unit be identified as managerial or confidential positions. The objective of these provisions is to prevent those employees in managerial or confidential positions from being included in a bargaining unit of employees represented by a bargaining agent, in this case the NPF. The basis for this objective is the conflict of interest that can arise from "… the existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" (see *Cowichan Home Support Society*, at para. 115).

[198] The conflict-of-interest purpose of exclusions must be situated within the context of the overall purpose of collective bargaining. That overall purpose, according to the Supreme Court of Canada in *MPAO*, is to preserve "collective employee autonomy" against the "superior power of management" and to maintain "equilibrium"

between the parties (at paragraph 82). In that context, preventing conflict of interest that can arise from "… the existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" is, theoretically, a pressing and substantial goal. The NPF proposed that these excluded employees be included in the RM bargaining unit, but including all employees in managerial or confidential positions in that bargaining unit could lead to a disequilibrium between the parties.

[199] The NPF characterized the pressing and substantial objective relied upon by the employer as ensuring an adversarial system of collective bargaining and as not protecting against conflict of interest that can arise from "… the existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit". The employer disagreed that it had limited its characterization of the pressing and substantial objective. I find that based on the Heeney Report as well as the early jurisprudence of labour boards on the purpose of exclusions, the pressing and substantial objective of the exclusion provisions is to prevent a conflict of interest in the broad sense of combatting "… dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship. The focus is on the setting of fundamental terms and conditions of employment, not the day-to-day management of employees in the bargaining unit.

[200] The NPF argued that the objective of ensuring an adversarial system of collective bargaining could not be pressing and substantial, since the proposed positions have not yet been excluded, and the employer has taken no steps to address concerns about conflict of interest. In other words, the NPF suggested that since the parties have managed so far without the exclusions in place, the status quo demonstrates that the objective is not pressing and substantial.

[201] I would first note that the *Act* prevents the employer from doing anything related to positions proposed for exclusion until the Board issues an order declaring positions to be managerial or confidential. Union dues continue to be deducted from employees in the proposed positions, and that money will either be returned to them (if the proposed exclusion is granted) or remitted to the NPF (if the proposed exclusion is denied). The employer is "risk-managing" the status quo, and the NPF has required those in LAR roles to sign a declaration. I will address the declaration in the next

section of these reasons. The status quo is not, in my view, sustainable since it does not provide the necessary safeguards to prevent conflicts of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of employment relationship.

[202] In conclusion, I find that preventing conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship is, theoretically, a pressing and substantial objective.

G. Are the means used to achieve the objective proportionate?

1. Are the exclusion provisions rationally connected to the pressing and substantial objective?

[203] The Supreme Court of Canada has noted that to answer this question, it need be only "… reasonable to suppose that the limit may further the goal, not that it will do so"; see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 ("*Hutterian Brethren*") at para. 48. The Court has characterized the test as "not particularly onerous"; see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 228; and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 40.

[204] The NPF argued that some paragraphs of the exclusion provisions are not related to ensuring an adversarial system of collective bargaining and therefore are not rationally connected to a pressing and substantial objective. I will review each paragraph at issue.

[205] Section 59(1)(a) excludes positions that are confidential to the deputy head (in this case, the RCMP's commissioner). For examples of the Board's interpretation of "confidential" see *Canada v. PSAC 1979* and *Treasury Board v. Public Service Alliance of Canada,* 2017 PSLREB 11. The NPF stated that a deputy head has no role to play in collective bargaining, as the Treasury Board is the employer. Section 110 of the *Act* allows the RCMP Commissioner and the NPF to engage in two-tier collective bargaining, although no such bargaining has yet occurred. I heard no evidence on the role of the RCMP's commissioner in collective bargaining generally. However, the NPF admitted

that the commissioner was at least consulted on collective bargaining matters. I also accept that the commissioner would be involved in labour relations matters generally. Therefore, I find that this paragraph is rationally connected to the pressing and substantial objective of preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship.

[206] The NPF agreed that s.59(1)(c) is rationally connected to the objective of the exclusion provisions, as the occupant of the position at issue provides advice on labour relations. It did not agree that the limitation relating to positions that provide advice on staffing and classification are rationally connected to the objective.

[207] If one limits the objective of the exclusion provisions solely to ensuring an adversarial system of collective bargaining, the NPF is correct. However, the objective of exclusion provisions is broader than just ensuring an adversarial system of collective bargaining — it includes all aspects of preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship. Staffing and classification are central aspects of the employment relationship. The staffing of positions can affect pay and allowances, a central aspect of an employment relationship. Similarly, the classification of positions can have a direct impact on pay. Accordingly, I find that there is a rational connection between s. 59(1)(c) and the pressing and substantial objective.

[208] The NPF submitted that the limitation relating to positions in s. 59(1)(e) is also not related to ensuring an adversarial system of collective bargaining. There are two categories of positions in this paragraph: positions in which the occupant has 1) "… substantial management duties, responsibilities and authority over employees …", or 2) "…duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process …" set out in Part 2.1 of the *Act*.

[209] The phrase "… substantial management duties, responsibilities and authority over employees …" has been interpreted by the Board in a narrow fashion. The mere

supervision of employees is not sufficient to justify an exclusion from the bargaining unit (see, for example, *Canadian Energy Regulator*, at paras. 119 to 130).

[210] In *Canada v. PSAC 1979* (at paras. 54 and 56), the PSSRB stated, with respect to supervisory functions, as follows:

> *54. A very important function of a supervisor is to be a link in the chain of communication between management and employees. The supervisor is expected to relay and interpret the policy and administrative decisions of his superiors. In addition to responding to the needs of management he must advise his superiors of difficulties with the implementation of policy and the concerns and complaints of his staff. This may require him to receive and transmit grievances and make reports or recommendations concerning them. Obviously, some of these communications may be of a confidential nature to one or more persons, but the exchange of such confidences is an integral part of the role of any supervisor. The relationship of Mr. Sisson and Mr. MacKeen in the grievance process is the normal and usual relationship of a supervisor to his superior. It is not "a relationship that stands out from the generality of relations and bears a special quality of confidence."*
>
> . . .
>
> *56. . . . If the employer distributes the responsibility for investigating grievances in such a manner as to expose a number of employees to an occasional conflict of interest rather than assigning the responsibility to the smallest practical number it cannot expect to find this Board sympathetic to such an action. If the Board were to designate Mr. Sisson under paragraph (f) of the definition, because on occasion he engaged in the exchange of confidential information relating to grievances with his superior it would establish a precedent that would lead to proposals that other supervisors, similarly involved on occasion with the exchange of confidential information relating to grievances, should be designated as persons "employed in a managerial or confidential capacity". In doing so we would fail to ensure that the maximum number of persons enjoy the freedom and rights to [sic] collective bargaining.*

[211] The substantial managerial duties that would justify an exclusion must affect the "fundamental terms and conditions of employment" (see *Humber River Regional Hospital v. ONA*, 2014 CarswellOnt 16646 at paras. 151 and 152, cited in *Canadian Energy Regulator*, at para. 106).

[212] In *Public Service Alliance of Canada v. Canada (Treasury Board)*, PSSRB File No. 174-02-250 (19770214), [1977] C.P.S.S.R.B. No. 3 (QL) ("*PSAC v. TB 1977*"), the PSSRB noted that the Board had set out guidelines on the "management team" concept that have been applied consistently (at para. 17):

> *…We need not elaborate them here except to point out that they imply a real likelihood of conflict of interest because the persons involved participate in, or are privy to, the processes of formulating policies, or decision-making, or administrative management at the higher levels of the particular sector of the public service in which they are employed. …*

[213] As interpreted by the Board, the exclusion for substantial management duties is rationally connected to the pressing and substantial objective of preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship. This is because the Board's interpretation means that only those with a real likelihood of conflict of interest are found to be in this category of managerial or confidential positions.

[214] The other part of s. 59(1)(c) relates to employees "dealing formally on behalf of the employer with grievances presented in accordance with the grievance process …" set out in Part 2.1 of the *Act*. Part 2.1 of the *Act* allows a member of the RCMP to present an individual grievance "only if they feel aggrieved by the interpretation or application, in respect of the employee, of a provision of a collective agreement or arbitral award" (s. 238.24). Such grievances clearly relate to the interpretation of provisions that arise from collective bargaining, placing that employee in a potential conflict of interest. Accordingly, this provision is also rationally connected to the pressing and substantial objective of preventing conflict of interest that can rise from the duties performed for the employer and membership in a bargaining unit that relate to the fundamental terms and conditions of the employment relationship.

[215] The NPF also argued that s. 59(1)(g) is not rationally connected to ensuring an adversarial system of collective bargaining. It is the catch-all provision for those positions not included in the other paragraphs that should be excluded for "… reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer …". In *Treasury Board (Correctional Service of Canada) v. Public Service*

Alliance of Canada, 2012 PSLRB 46, the Board discussed the purpose of that paragraph, as follows (at paragraphs 69 to 72):

> *69 Paragraph 59(1)*(g) *of the* PSLRA *is an umbrella provision that seems meant to catch situations in which excluding an employee can be justified on one of a broad range of grounds not captured by the more specific descriptions in the other paragraphs. The term "conflict of interest" could mean either that the conflict must be identified by examining the duties and responsibilities performed by the employee as a whole (rather than by referring to any specific exercise of managerial authority, decision-making power or labour relations function) or that the specific feature of the position that gives rise to the conflict of interest is not caught by the other paragraphs because not every instance in which a conflict could occur can be anticipated when a statute is drafted.*
>
> *70 The second ground for exclusion under paragraph 59(1)*(g) *of the* PSLRA *— "… the person's duties and responsibilities to the employer …" — is even more open-ended. That phrase confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities and to call on adjudicators* [sic] *to carefully consider, under that paragraph, the overall relationship between the position and the applicant's interests. In that context, it is perhaps not surprising that the case law has failed to articulate a set of clear criteria for applying that provision… Although the decisions put before me often treat the concepts of the "management team" and "conflict of interest" as being closely related and as part of a holistic approach to assessing a position, they do not provide much in the way of definition or concrete criteria for making such an assessment. To be fair, since this provision seems designed as a catch-all that gives the PSLRB wide scope to consider positions for exclusion that are not ordinary and that cannot be anticipated, the PSLRB should not be expected to fetter its discretion by attempting to provide a more restrictive definition of its task.*
>
> *71 Adjudicators* [sic] *have on many occasions counselled caution when deciding whether a position should be excluded from a bargaining unit. The loss of the bargaining agent's protection and of the benefit of a collective agreement could have significant implications for an employee. Those advantages should not lightly be cast aside.*
>
> *72 On the other hand, in some circumstances, including an employee in a bargaining unit could impair the effectiveness of that employee's performance of duties essential to the applicant. Paragraph 59(1)*(g) *of the* PSLRA *suggests that the reasons for making a finding of that risk could include factors not ordinarily considered. When a finding is made of a fundamental incompatibility between an employee's duties and inclusion in a bargaining unit, the employee's position may legitimately be excluded.*

[216] The Board went on to conclude that "[o]ne would expect that paragraph to be used sparingly and that any situation in which it is held to apply would be unusual" (at paragraph 76). In *PSAC v. TB 1977* the Board noted (at para. 17) that a position might fall under paragraph (g) "provided that the proven conflict of interest is latent in duties and responsibilities to the employer which are not otherwise described in paragraphs (c) to (f)".

[217] This paragraph is used only in rare circumstances. The focus of the paragraph, as interpreted by the Board, is a proven conflict of interest not captured by the other relevant paragraphs of s. 59(1). In light of the focus on a proven conflict of interest and its sparing use, the paragraph is rationally connected to the pressing and substantial objective of preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship.

[218] I find that the exclusion provisions are rationally connected to the pressing and substantial objective of preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship.

2. Do the exclusion provisions minimally impair the freedom of association?

[219] Under this part of the *Oakes* test, the employer must show that the limit impairs the freedom of association as little as reasonably possible to achieve the legislative objective, as follows (from *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para. 160):

> *160 … 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 ….*

[220] In *Hutterian Brethren*, the Supreme Court of Canada clarified the standard and held that alternatives do not need to satisfy the pressing and substantial objective to

exactly the same degree as the government's chosen means. Rather, this standard includes measures that give sufficient protection, in all the circumstances, to the government's goal. The Court rephrased the minimal impairment test as "… whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner"; see *Hutterian Brethren*, at para. 55.

[221] In *Oakes*, the Court stated that some deference to the legislators will be warranted when assessing minimal impairment and that evidence will "generally" be required to justify an infringement under s. 1 (at paragraph 68). Common sense and logical inferences can supplement the evidence, but as the Court has cautioned, deference must not be substituted for the "reasoned demonstration" required by s. 1; see *Sauvé*, at para. 18.

[222] In that context, in *MPAO*, the Supreme Court of Canada stated (at paragraph 152), "Unless it is established that the RCMP is materially different from the provincial police forces, it is clear that total exclusion from meaningful collective bargaining cannot be minimally impairing." In that case, it found that no such material difference had been shown.

[223] I do not take the Supreme Court of Canada's finding of absence of no material difference between the RCMP and provincial police forces with respect to exclusion of collective bargaining as applying to the exclusion of specific classes of members of the RCMP from the freedom of association. The Court made its finding in the context of a total ban on collective bargaining. This is confirmed as follows in that same paragraph of that decision (see *MPAO*, at para. 152):

> *… Moreover, concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the* PSLRA*, without requiring total exclusion from bargaining in the present regime.…*

[224] Courts typically look to evidence that the government explored options other than the impugned measure and evidence supporting its reasons for rejecting those alternatives. The applicant in the case before me did not examine options other than exclusions, as evidenced by the Heeney Report. It is perhaps understandable that it did not, as exclusions from a bargaining unit based on preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental

terms of employment relationship are routine in labour relations regimes across Canada and were in place long before the advent of the *Charter*.

[225] The NPF suggested that RCMP members have a higher duty of loyalty to the employer than do other federal public sector employees, relying on the decisions in *Read*, *Queen*, and *McGillivray*. Those decisions were not made in the context of a discussion of exclusion provisions, and I find them of limited relevance.

[226] In *Queen*, the Supreme Court of Canada held that members of the RCMP are held to a higher standard of conduct than is the ordinary citizen (at page 158) and did not compare the standard to the expected standard for other federal public sector employees. The Court did not deal in that case with a duty of loyalty resulting from the duties RCMP members perform for their employer in the context of fundamental terms and conditions of the employment relationship. In *McGillivray*, the Court noted that RCMP members are held to a higher standard of conduct (at paragraph 33) but did not identify the comparator group — is it higher than the ordinary citizen, or is it higher than federal public sector employees? Once again, the Court did not deal in that case with a duty of loyalty resulting from the duties RCMP members perform for their employer in the context of fundamental terms and conditions of the employment relationship.

[227] In *Read*, the assistant commissioner of the RCMP concluded that RCMP officers should be subject to a higher duty of loyalty than are other federal public sector employees. However, the Court did not accept that view, stating as follows:

> …
>
> *[116] I am not prepared to say, as the Assistant Commissioner and the Board do, that RCMP members must be held to a standard higher than other public servants. However, I agree entirely with the Assistant Commissioner and for the reasons that he gives, that RCMP officers must necessarily be held to a very high standard of the duty of loyalty. Whether or not that standard is higher than that imposed on other public servants will, in my view, depend on the circumstances of the case in addition to, as Dickson C.J. held in* Fraser, supra, *"the position and visibility of the civil servant."*
>
> …

[228] I find that it is not clear from the jurisprudence cited by the NPF that the duty of loyalty resulting from the duties RCMP members perform for their employer in the

context of fundamental terms and conditions of the employment relationship is higher than that of a federal public sector employee. In any event, the discussions of the 'duty of loyalty' in the cases mentioned above relate to standards of conduct regarding either public disclosure of wrongdoing or disobeying an order — issues that are quite different from the conflict of interest that can arise in the labour relations context. In addition, the purpose of exclusion provisions is to address more than individual conflict-of-interest situations — it extends to the broader issue of preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship.

[229] The NPF also suggested that RCMP members in positions that are proposed for exclusion have signed a written declaration that provides protection against any conflict of interest. That written undertaking was prepared by the NPF, and I heard no testimony or submissions on how it could be enforced by the employer. Although the arrangements made by the parties during this interim period, before the positions are excluded, are commendable, they are stop-gap measures not meant to be a permanent solution to the type of conflict of interest that the exclusion provisions are designed to prevent.

[230] The NPF also proposed that work done by RCMP members that could lead to a conflict of interest could be performed by other employees, outside of the RM bargaining unit. Although the employer has an obligation to organize its affairs so that members "are not occasionally placed" in a position of a potential conflict of interest if that result can be "readily avoided" (see, *Canada v. PSAC 1979*), the NPF proposal goes far beyond this obligation. The NPF proposal is not for those "occasionally placed" in a conflict of interest, but for those whose duties put them in a regular conflict of interest. I heard no submissions on how such a change would be in keeping with the *Act*'s provisions or the Board's jurisprudence. I also note that such a step would likely require those members in positions declared managerial or confidential to be reassigned and an overall reduction in available positions for members. That reassignment of members would be a result of their functions and duties being reassigned to other federal public sector employees at the RCMP. In addition, the number of positions available to members would be reduced because of the reassignment of functions and duties to other federal public sector employees.

[231] Furthermore, when assessing whether the exclusion provisions are minimally impairing the freedom of association it is important to consider the jurisprudence of the Board that I have set out earlier in this decision, which has narrowly interpreted the provisions to limit the number of excluded positions and, in recent years, has applied *Charter* values when determining whether a proposed exclusion is appropriate.

[232] The Quebec Court of Appeal concluded in *Société des casinos du Québec* that the exclusion of all managers was not justified under section 1 of the *Charter*. I have already noted that the statutory provision at issue in that case was much broader than the provisions in the Act at issue in this case.

[233] The Quebec Court of Appeal noted (at para. 182) that the "… unqualified exclusion of all levels of managerial personnel from the definition of employees is clearly at odds" with Supreme Court of Canada jurisprudence (CanLII unofficial English translation of the judgment of the Court). It also noted that the Quebec provisions had not kept pace with statutory developments in other jurisdictions (it referred to the *Canada Labour Code*, and legislation in Ontario and Manitoba, with similar provisions to those in the *Act*).

[234] The Quebec Court of Appeal accepted the reasoning of the Tribunal on the minimal impairment of freedom of association (at paras. 180 and 181):

> [CanLII unofficial English translation of the judgment of the Court]
> [180]… *the Court sees no fault in the ALT's finding that the determinative flaw is at the minimal impairment stage, which justified the ALT's conclusion that the AGQ failed to satisfy the justificatory test:*
>
> > *[423] The exclusion of managerial personnel from the general certification scheme does not in any way distinguish on the basis of their rank within the company, the nature of their functions, whether or not*
>
> *[180]… la Cour est d'avis qu'il n'y a rien à redire au constat du TAT, selon lequel le bât blesse de façon déterminante à l'étape du critère de l'atteinte minimale, ce qui le justifiait de conclure que le PGQ a échoué à satisfaire le test de justification :*
>
> > *[423] L'exclusion des cadres du régime d'accréditation général est faite sans aucune distinction quant à leur rang dans l'entreprise, la nature de leurs fonctions, le fait qu'ils aient ou non accès à de l'information confidentielle, leur participation aux négociations avec les groupes syndiqués et ainsi de suite.*

> *they have access to confidential information, their involvement in negotiations with the unionized groups, and so on.*
> *[424] Nor is the exclusion limited to prohibiting managerial personnel from being in the same unit as the rest of the employees, despite this being a possible model for preventing conflicts of interest—a model chosen for municipal police officers and, recently, for CCQ investigators in connection with the fight against corruption in the construction industry.*
> *[425] Several other models, which have been adopted by the legislature with respect to particular groups, as shown above in the review of specific schemes, allow for less impairment of freedom of association.*
> *[426] Moreover, examples in Quebec, Canada and internationally demonstrate that it is possible for managerial personnel to be unionized without this adversely affecting their role within the company.* [242]

[181] In fact, the AGQ has not established "that the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective"…

> *[424] Cette exclusion ne se limite pas non plus à interdire que les cadres fassent partie de la même unité que le reste des employés. C'est pourtant un modèle possible afin de prévenir les conflits d'intérêts, modèle choisi pour les policiers municipaux et récemment pour les enquêteurs de la CCQ dans le cadre de la lutte contre la corruption dans l'industrie de la construction.*
> *[425] Plusieurs autres modèles, adoptés par le législateur en regard de groupes particuliers, tel qu'il ressort de la revue des régimes spécifiques faite précédemment, permettent une atteinte moins grande à la liberté d'association.*
> *[426] Qui plus est, des exemples au Québec, au Canada et au niveau international démontrent la possibilité pour des cadres d'être syndiqués sans pour autant que cela ne nuise à leur rôle au sein de l'entreprise.* [242]

[181] En fait, le PGQ n'a pas établi « que la mesure en cause restreint le droit aussi peu que cela est raisonnablement possible aux fins de la réalisation de l'objectif législatif »…

[235] I agree that an exclusion of all managers from the bargaining unit would not be justified under section 1 of the *Charter*. However, the *Act* does distinguish employees based on the "nature of their functions", their access to confidential information and their involvement with labour relations. On this basis, I do not find the Court of Appeal's decision to be persuasive in the case before me.

[236] The minimalist approach of the Board to exclusions has not been as broad as the application of the Quebec *Labour Code*, for example, where all front-line managers were excluded from collective bargaining. The *Act* and the Board's application of the *Act,* have focused on conflict of interest and the risk of dual loyalties which are very real concerns in labour relations. In this way, the provisions of the *Act* minimally impair the freedom of association under the *Charter*.

3. Do the benefits of the exclusion provisions outweigh its harmful effects?

[237] The final stage of the *Oakes* tests requires that the "salutary effects" (benefits) of the impugned provisions outweigh its "deleterious" (harmful) effects. In *JTI-Macdonald*, the Supreme Court of Canada stated as follows at paragraph 45:

> *45 … This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?*

[238] Excluding confidential and managerial positions from a bargaining unit provides significant benefits to collective bargaining and labour relations. I have already reviewed the jurisprudence that sets out the underlying purposes of excluding employees. In *MPAO*, the Supreme Court of Canada emphasized the importance of the independence of bargaining unit members from management to ensure a meaningful process of collective bargaining (at paragraph 98).

[239] The exclusion of employees occupying positions of which the duties include confidential and management-related functions (as narrowly defined by the Board) is necessary for meaningful collective bargaining for those employees in the bargaining unit as well as for effective labour relations. They are necessary for preventing a conflict of interest that can arise from the "… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit" that relate to the fundamental terms and conditions of the employment relationship. The

benefits to collective bargaining and labour relations resulting from the limitation of the associative rights of RCMP officers in positions that will be identified as managerial or confidential by the Board outweighs the disadvantage of limiting those rights for those RCMP members in those positions.

H. Conclusion

[240] I find that the limitation to the freedom of association created by the exclusion provisions in the *Act* (ss. 59(1)(a), (c), (e), and (g)) are saved under s. 1 of the *Charter*. Accordingly, the constitutional question raised by the NPF, as to whether the exclusion provisions violate the *Charter*, is answered in the negative.

[241] The employer provided a list of proposed exclusions, and the parties should discuss those proposals that are still pending. After those discussions, any remaining objections to the employer's proposals can be determined by the Board.

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

(The Order appears on the next page)

VI. Order

[243] The Board declares that the exclusion provisions contained in ss. 59(1)(a), (c), (e) and (g) of the *Federal Public Sector Labour Relations Act* are in compliance with the *Canadian Charter of Rights and Freedoms*.

November 23, 2023

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board