Federal Court  Cour fédérale

Date: 20110621

Docket: T-50-09

Citation: 2011 FC 735

Ottawa, Ontario, June 21, 2011

PRESENT: The Honourable Madam Justice Heneghan

REPRESENTATIVE PROCEEDING

BETWEEN:

ROBERT MEREDITH AND BRIAN ROACH (REPRESENTING ALL MEMBERS OF THE ROYAL CANADIAN MOUNTED POLICE)

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] Mr. Robert Meredith and Mr. Brian Roach (the "Applicants") are Members of the Royal Canadian Mounted Police (the "RCMP"). They bring this application for judicial review as representatives of all Members of the RCMP. Although the Applicants did not bring a motion for an

Order pursuant to Rule 114 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), appointing them as representatives of the RCMP, the Respondent has not contested their status in that respect.

[2] The Applicants seek judicial review of a decision made on December 11, 2008, by the Treasury Board. They claim that the decision, together with certain provisions of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 (the "*ERA*"), amount to a breach of their rights to freedom of association pursuant to subsection 2(d) of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "*Charter*").

[3] In the alternative, the Plaintiffs argue that the decision constitutes a breach of contract, having regard to the provisions of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the "*RCMP Act*").

The Parties

[4] The Applicants are serving Members of the RCMP, representing all Members across the country. Mr. Meredith is an RCMP Officer in Sherwood Park, Alberta. He was elected to the National Executive of the Staff Relations Representative (the "SRR") Program in 2008. Mr. Roach is an RCMP Officer in Winnipeg, Manitoba. He was elected to the National Executive of the SRR Program in 2005.

[5] The Attorney General of Canada, representing Treasury Board, is the Respondent (the "Respondent") to this application.

The Evidence

[6] The evidence consists of affidavits filed on behalf of both the Applicants and the Respondents.

[7] The Applicants filed an affidavit of Mr. Meredith, and two affidavits of Mr. Roach. They also filed the affidavits of Mr. Mike McDermott, Chair of the Pay Council since 2007; Mr. Gord Dalziel, an RCMP Member and the Chair of the Staff Relations Pay and Benefits Committee and Member of the Pay Council; and Don Taylor, a retired RCMP Member and a former Chair of the Staff Relations Pay and Benefits Committee.

[8] Mr. Eugene Swimmer, Distinguished Research Professor, School of Public Policy and Administration, Carleton University, and the Compensation Specialist on the Pay Council also swore an affidavit in support of the Applicants' application. Finally, Ashley Deathe, a student-at-law at the law firm of the Applicants' Counsel swore an affidavit in support of this application, referencing proceedings begun in the Ontario Superior Court of Justice by the Mounted Police Association of Ontario.

[9] The Respondent filed three affidavits. The first affidavit was the affidavit of Ms. Claudia Zovatto, Senior Director, Excluded Groups and Administrative Policies with the Treasury Board Secretariat. Ms. Helene Laurendeau, Assistant Deputy Minister, Compensation and Labour Relations sector of the Treasury Board Secretariat, and Mr. Paul Rochon, Senior Assistant Deputy

Minister, Economic and Fiscal Policy Branch, Department of Finance, also swore to affidavits in support of the Respondent.

Facts

[10] Section 22 of the *RCMP Act* provides that "the Treasury Board shall establish the pay and allowances to be paid to members".

[11] Paragraph 2(1)(d) of the *Public Service Labour Relations Act*, which is Part 3 of the *Public Service Modernization Act*, S.C. 2003 c. 22, excludes RCMP Members from the federal public service collective bargaining regime. At paragraphs 16-18 of her affidavit, Mr. Laurendeau explains the difference between employees governed by the *Public Service Labour Relations Act* and employees who are not:

> 16. The federal public administration compromises three concentric circles of employment relationships. The inner circle is the core public administration for which the Treasury Board is the employer. Members of the Royal Canadian Mounted Police are part of the core public administration and the Treasury Board is their employer as well.
>
> 17. The next ring consists of the various separate agencies under the *Financial Administration Act* and the *Public Service Labour Relations Act*. The heads of these separate agencies are responsible for determining their own human resources requirements, including job classification, pay and other terms and conditions of employment. In most cases, the President of the Treasury Board approves collective bargaining mandates for these employers.
>
> 18. The outer ring consists of the appropriation-dependant Crown corporations listed in Schedule 2 to the *Public Service Labour Relations Act*. The heads of these Crown corporations are responsible for their own human resources requirements, including collective bargaining. Treasury Board does not therefore approve collective bargaining mandates for these corporations. Its fiscal control is limited to the transfer of funds.

[12] Before 1996, Members of the RCMP had no formal mechanism through which to advocate for increases in pay. Pursuant to section 96 of the *Royal Canadian Mounted Police Regulations*, 1988, SOR/88-361 (the "RCMP Regulations"), the SRR Program was established to represent the interests of Members of the RCMP. The National Executive of the SRR Program is composed of two full-time representatives and the Chair of the Staff Relations Pay and Benefits Committee. That Committee is established pursuant to section 96 of the RCMP Regulations.

[13] At the same time as the adoption of the SRR Program, the Commissioner of the RCMP (the "Commissioner") created an advisory board known as the Pay Council. The Pay Council consists of a neutral chairperson appointed by the Commissioner, two members of RCMP management and two SRRs.

[14] One of those representatives is the Chair of the Pay Committee and the other is an external labour expert appointed by the Commissioner upon the advice of the SRR National Executive.

[15] The Pay Council works upon the basis of consensus and collaboration. The Commissioner contributes throughout the process. When the Pay Council reaches a final recommendation, that recommendation is submitted to the Commissioner. The Commissioner will then discuss the proposal with the Treasury Board Secretariat. The Commissioner has the discretion to accept or reject the recommendation, in whole or in part. If the Commissioner supports the recommendation, he provides it to the Minister responsible for the RCMP, currently the Minster of Public Safety.

That Minister then makes a formal submission to the Treasury Board, which in turn decides whether and how to revise the pay and benefits for Members of the RCMP.

[16] At paragraph 26 of his affidavit, Mr. Taylor describes the nature of the Pay Council as follows:

> I have one final point about the Pay Council. Throughout my time on the Pay Council, I had to be very careful not to use the word "negotiate" when describing the mandate or function of the Pay Council. Members of the RCMP are prohibited by statute from joining a trade union or engaging in collective bargaining or negotiation with Treasury Board or the RCMP. Therefore, I had to be careful not to use the word "negotiate" or "negotiation" to describe the work of the Pay Council. Instead I used words such as "recommendation" or "collaboration" or "consultation" to describe our work. However, despite the use of these words, the Pay Council was the vehicle by which RCMP Members negotiated with management. Now that I am free from possible disciplinary action by the RCMP, I am free to say that my job on the Pay Council was to negotiate terms and conditions of employment.

[17] The constitutionality of section 96 of the RCMP Regulations and the SRR Program and Pay Council processes were challenged in litigation before the Ontario Superior Court of Justice. In the decision reported as *Mounted Police Association of Ontario v. Canada (Attorney General)* (2009), 96 O.R. (3d) 20 the Court found section 96 of the Regulations and the SRR Program and Pay Council processes to be unconstitutional. A declaration issued finding section 96 to be of no force and effect. That declaration was stayed for 18 months from the date of the Court's reasons.

[18] The initial stay was continued by the Ontario Court of Appeal until 30 days following the release by the Supreme Court of Canada of the decision in *Fraser v. Ontario (Attorney General),* 301 D.L.R. (4th) 335, upon appeal from the Ontario Court of Appeal.

[19] In determining appropriate compensation, the Pay Council uses a comparator group, described as the “police universe”, of eight Canadian police forces excluding the RCMP. Considering overall compensation, the Pay Council aims to provide compensation placing the RCMP in the average of the top three police forces.

[20] The Pay Council worked throughout 2007 and provided a recommendation to the Commissioner in respect of salary and benefits for 2008 through 2010.

[21] The Treasury Board accepted most of what the Pay Council had recommended to the Commissioner. On June 26, 2008, the Treasury Board announced the following increases:

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

[22] The Treasury Board also agreed to double service pay, that is a lump sum paid annually to Members of the RCMP based upon the number of years of service and determined as a percentage of salary. The Treasury Board also authorized a Field Trainer Allowance.

[23] As of December 31, 2008, this would place the total compensation, including all pay and benefits, for the RCMP at 0.43% below the average of the total compensation for the top three police forces in Canada. This differential was within the Pay Council’s acceptable range.

[24] In the meantime, the global economy was collapsing, reaching a critical state in the fall of 2008. There was a sharp downward revision of the Canadian economic outlook between November 2008 and January 2009. This economic crisis would lead to the deepest global recession since the great Depression. These circumstances, well-known to everyone, are detailed in the affidavit of Mr. Rochon.

[25] In view of these developments, the Department of Finance approached the Treasury Board Secretariat in October 2008 to discuss measures to reduce spending, including the restriction of wages paid to the Public Service. Ms. Laurendeau prepared a report setting out three possibilities:

1. The imposition of staffing freezes;

2. Control of wage growth by suspending promotions and movements within pay brackets; or

3. Freezing or limiting salary increases.

Ms. Laurendeau recommended the third option and in particular, she favoured limiting salary increases rather than freezing those increases.

[26] The Treasury Board Secretariat contacted the heads of all the bargaining agents in the core public administration in late October and early November of 2008. According to paragraph 20 of Ms. Laurendeau's affidavit, the Treasury Board's

> … strategy was to try to create momentum towards consensus throughout the core public administration and thereby encourage the separate agencies and the Crown corporations to do the same.

[27] On November 17, 2008, the Secretary of the Treasury Board met with the Chief of Defence Staff and the Commissioner of the RCMP to discuss limiting salary increases.

[28] On November 18, 2008, the Secretary of the Treasury Board met with the heads of Crown corporations regarding wage increases. The same day, the President of the Treasury Board made a final offer to the bargaining agents for the core public administration. That offer was for a 2.3% salary increase for 2007-2008, and a 1.5% salary increase for the three following years.

[29] On November 27, 2008, the Government of Canada issued an economic and financial statement which included wage limit increases for the public sector. On the same day, the Treasury Board Secretariat informed the Commissioner that the wage limiting increases would apply to the RCMP.

[30] By early December 2008, the Treasury Board signed agreements with 14 bargaining agents in the core public administration. By this time, over 30 separate agencies had also reached agreements with their respective bargaining agents; see the affidavit of Ms. Laurendeau at paragraphs 23-29.

[31] In the meantime, senior RCMP officials contacted Ms. Zovatto, to determine whether the RCMP would be able to implement the wage increases for 2009. According to her affidavit, Ms. Zovatto's staff advised those RCMP officials not to raise wages above 1.5%.

[32] According to the affidavit of Mr. Dalziel, rumours of this advice circulated among SRRs. Mr. Dalziel, the SRRs on the Pay Council, contacted Deputy Commissioner Peter Martin, the Chief Human Rights Officer, in this regard. In response, the Commissioner sent a bulletin on November 28, 2008, indicating that he did not know whether the RCMP would be affected by the wage increase limit.

[33] On December 11, 2008, the Treasury Board officially approved a modification to the RCMP package that had been approved in June 2008. This modification cancelled the market adjustment for 2009, reduced the economic increase from 2% to 1.5% for 2009 and 2010, and cancelled the increase to the service pay.

[34] On December 12, 2008, the Commissioner informed the members of the SRR National Executive, Mr. Dalziel and Mr. McDermott, of the Treasury Board's decision. The Commissioner notified the general membership of the RCMP of this decision on the same day, that is December 12, 2008.

[35] The Applicants and their colleagues began requesting meetings and consultations with various government officials regarding the Treasury Board's decision. According to the affidavit of Mr. Roach, such attempts included letters from the SRR National Executive or the Pay Council in December 2008 and January 2009 to Stockwell Day, the Minister of International Trade, and the former Minister responsible for the RCMP, Ms. Laurendeau, the Prime Minister, and 75 Members of Parliament. None of these letters were answered.

[36] In his letter to Ms. Laurendeau, Mr. McDermott expressed his disappointment that the Pay Council process had been disregarded.

[37] On January 27, 2009 and February 2, 2009, Mr. Roach, Mr. Dalziel, Mr. Meredith and others met with the Honoruable Peter Van Loan, the Minister of Public Safety, in attempt to initiate discussions on alternatives to the wage rollback.

[38] On February 5, 2009, the same RCMP Members met with the Honourable Vic Toews, then President of the Treasury Board. At that meeting, Mr. Toews was not willing to discuss the Treasury Board's decision or the *ERA*.

[39] On February 6, 2009, the *ERA* was tabled in Parliament. The relevant sections of that Act read as follows:

Increases to Rates of Pay	Augmentation des taux de salaire
16. Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:	16. Malgré toute convention collective, décision arbitrale ou condition d'emploi à l'effet contraire, mais sous réserve des autres dispositions de la présente loi, les taux de salaire des employés sont augmentés, ou sont réputés l'avoir été, selon le cas, selon les taux figurant ci-après à l'égard de toute période de douze mois commençant au cours d'un des exercices suivants :
	Augmentation des taux de salaire
(a) the 2006–2007 fiscal year,	a) l'exercice 2006-2007, un

2.5%;	taux de deux et demi pour cent;
(b) the 2007–2008 fiscal year, 2.3%;	b) l’exercice 2007-2008, un taux de deux et trois dixièmes pour cent;
(c) the 2008–2009 fiscal year, 1.5%;	c) l’exercice 2008-2009, un taux de un et demi pour cent;
(d) the 2009–2010 fiscal year, 1.5%; and	d) l’exercice 2009-2010, un taux de un et demi pour cent;
(e) the 2010–2011 fiscal year, 1.5%.	e) l’exercice 2010-2011, un taux de un et demi pour cent.
…	…
Non-represented and Excluded Employees	Employés non représentés ou exclus
Definitions	Définitions
35. (1) The following definitions apply in sections 36 to 54.	35. (1) Les définitions qui suivent s’appliquent aux articles 36 à 54.
“employee” means an employee who is not represented by a bargaining agent or who is excluded from a bargaining unit.	« employé » Tout employé non représenté par un agent négociateur ou exclu d’une unité de négociation.
“terms and conditions of employment” means terms and conditions of employment that apply to employees.	« condition d’emploi » Toute condition d’emploi s’appliquant aux employés.
(2) For the purposes of sections 36 to 54, terms and conditions of employment are considered to be established if they are established by an employer acting alone or agreed to by an employer and employees.	(2) Pour l’application des articles 36 à 54, sont des conditions d’emploi établies celles qui émanent unilatéralement de l’employeur ou celles convenues par celui-ci et les employés.
…	…
38. With respect to any terms	38. S’agissant de conditions

and conditions of employment established before December 8, 2008 that provide for increases to rates of pay	d'emploi établies avant le 8 décembre 2008, les règles suivantes s'appliquent :
…	…
(b) for any 12-month period that begins during any of the 2008–2009, 2009–2010 and 2010–2011 fiscal years, section 16 applies only in respect of periods that begin on or after December 8, 2008 and any provisions of those terms and conditions of employment that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.	b) en ce qui concerne toute période de douze mois commençant au cours de l'un ou l'autre des exercices 2008-2009, 2009-2010 et 2010-2011, l'article 16 s'applique uniquement à l'égard de toute période commençant le 8 décembre 2008 ou après cette date, et toute disposition des conditions d'emploi prévoyant, pour une période donnée, une augmentation des taux de salaire supérieure à celle qui est prévue à cet article pour cette période est inopérante ou réputée n'être jamais entrée en vigueur, et est réputée prévoir l'augmentation prévue au même article pour cette période.
…	…
43. Subject to sections 51 to 54,	43. Sous réserve des articles 51 à 54 :
(a) no provision of terms and conditions of employment established after the day on which this Act comes into force may provide for the restructuring of rates of pay during any period that begins during the restraint period;	a) aucune condition d'emploi établie après la date d'entrée en vigueur de la présente loi ne peut prévoir de restructuration des taux de salaire au cours de toute période commençant au cours de la période de contrôle;
(b) any provision of terms and conditions of employment established during the period that begins on December 8, 2008 and ends on the day on	b) toute condition d'emploi établie au cours de la période allant du 8 décembre 2008 à la date d'entrée en vigueur de la présente loi et prévoyant une

which this Act comes into force that provides for the restructuring of rates of pay during any period that begins during the restraint period is of no effect or is deemed never to have had effect, as the case may be; and

restructuration des taux de salaire au cours de toute période commençant au cours de la période de contrôle est inopérante ou réputée n'être jamais entrée en vigueur;

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

…

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

…

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

…

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

…

49. If any terms and conditions of employment established before December 8, 2008

49. Est inopérante ou réputée n'être jamais entrée en vigueur toute disposition de conditions

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

[40] According to paragraph 30 of Mr. Rochon's affidavit, the objectives of the *ERA* and of the decision to limit wage increases were the following:

1. To reduce undue upward pressure on private sector wages and salaries;

2. To provide leadership by showing restraint and respect for public money; and

> 3. To manage public sector wage costs in an appropriate and predictable manner that would help ensure the continuing soundness of the Government's fiscal position.

[41] While the measure was temporary, since the limit on wage increases was to expire on March 31, 2011, the underlying idea was to permanently reduce the amount of Government spending, in order to assist in the national economic recovery from a deficit position as soon as possible. This is stated in paragraph 31 of Mr. Rochon's affidavit.

[42] The SRRs continued their efforts. The Pay Council presented a Pay Roll Back package to Mr. Toews, on February 11, 2009. This proposal was formally rejected on February 27, 2009. According to Mr. Roach, the National Executive of the SRR advised the Pay Council that its package was rejected because it was inconsistent with the *ERA*.

[43] On March 3, 2009, Mr. Meredith, Mr. Dalziel, and Mr. Roach met with the Commissioner concerning compensation. At that meeting, the Commissioner advised that the Prime Minister and other Ministers would not answer their requests for meetings. Since the Ministers were refusing to meet with the public service unions, they could not appear to favour the RCMP.

[44] At a second meeting on March 4, 2009, the Commissioner presented the Pay Council with a mandate letter to consider how to increase existing allowances to advance transformation initiatives for the RCMP, in accordance with section 62 of the ERA.

[45] From paragraphs 14 to 16 of his affidavit, Mr. Roach summarizes the outcome of the various meetings between RCMP Members and government officials between December 2008 and March 2009, as follows:

> 14. The meetings on February 5, 2009 and March 3-4, 2009 were the only meetings at which compensation for RCMP Members was discussed.
>
> 15. At no time during any of these meetings was any Government official willing to discuss changing the decision announced on December 12, 2008 rolling back our schedule wage increases or changing any provision of the *Expenditure Restraint Act*, including the provisions permitting the rollback of scheduled wage increases.
>
> 16. I would not characterize these meetings with government officials as consultations or negotiations. Instead, these meetings were part of our lobbying effort: during these meetings we lobbied for changes, but were consistently rebuffed. The rollback of the schedule wage increases was an accomplished fact.

[46] The *ERA* received Royal Assent on March 12, 2009.

[47] On March 13, 2009, the Pay Council presented its report on transformation initiatives. On June 9, 2009 the Treasury Board increased service pay from 1% to 1.5% for each five years of service.

Issues

[48] The following issues arise in this application:

1. Did the decision of the Treasury Board on December 12, 2008 to reduce the scheduled wage increases for RCMP Members, together with the impugned provisions of the *ERA*, violate subsection 2(d) of the *Charter*?

2. If so, is this violation saved by section 1 of the *Charter*?
3. In the alternative, was the Treasury Board's decision of December 12, 2008 a breach of contract?

Discussion

1. Did the decision of the Treasury Board on December 12, 2008 to reduce the scheduled wage increases for RCMP Members, together with the impugned provisions of the *ERA*, violate subsection 2(d) of the *Charter*?

(i) Applicants' Submissions

[49] The Applicants, relying on the decision of the Supreme Court of Canada in *BC Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 argue that the combined effect of the Treasury Board's decision and the impugned provisions of the *ERA* deprive them of the right of freedom of association. In *BC Health Services*, where the Court was dealing with alleged legislative interference with the collective bargaining process, the following test was set out:

(a) Does the law interfere with the process of collective bargaining?

(b) Is the interference substantial?

[50] In *Confederation des syndicates nationaux c. Quebec (Procureur general)*, [2008] R.J.D.T. 1477, the Superior Court of Quebec identified examples of state action that constitutes substantial interference with subsection 2(d) rights. These include the failure to consult, the refusal to bargain in

good faith, the withdrawal of important topics for negotiation, and unilateral cancellation of negotiated terms.

[51] The Applicants argue that the Treasury Board's decision was made without any input from RCMP Members or the Pay Council, and that the Treasury Board refused to discuss wages once the decision was announced.

[52] The Applicants argue that the *ERA* is equivalent to the legislation found to be unconstitutional in *BC Health Services*. The *ERA* invalidates negotiated agreements on wages and prohibits further negotiation until a future set date. The wage package for RCMP Members in 2008 was not a collective agreement, but it was achieved as a result of the Pay Council's efforts. The Pay Council is the RCMP's substitute for collective bargaining, and wage packages implemented as a result of the work of the Pay Council must be treated as analogous to collective agreements.

[53] According to the Applicants, the abrogation of a wage package resulting from recommendations of the Pay Council and the prohibition of wage packages flowing from the recommendations of the Pay Council, amount to the cancellation of a collective agreement or a bar against collective bargaining.

[54] With respect to the matter of substantial interference, the Applicants point out that the subject matter of the Treasury Board's decision and the *ERA* is wages. They submit that remuneration constitutes the cornerstone of collective bargaining.

[55] The Treasury Board's decision cancelled the existing wage agreement, and the *ERA* prohibits collective bargaining on wages until 2011. The Applicants argue that the Treasury Board's decision and the *ERA*, accordingly, interfere with negotiating the most important collective bargaining issue. They submit that the *ERA* precludes negotiation on salary and abrogates an existing wage package that was developed through the Pay Council. As a result, it violates subsection 2(d) of the *Charter*.

[56] The SRRs and Pay Council attempted to engage in consultation about wages. Prior to the decision of December 11, there was no consultation or negotiation. The decision by the Treasury Board was unilateral. According to the affidavit of Mr. Dalziel, when a Pay Council representative asked the RCMP Commissioner whether the previously negotiated wage package would be decreased, the Commissioner stated that he was unaware as to whether the RCMP would be affected by the Government's wage limit program.

[57] The Applicants further argue that the Treasury Board refused to negotiate or consult after it reached its decision. According to the second affidavit of Mr. Roach, SRRs for RCMP Members had two meetings with the Minister of Public Safety, one meeting with the President of the Treasury Board, a meeting with the Commissioner and some other discussions with RCMP officials. Treasury Board officials refused to discuss salary at any of these meetings. The Pay Council developed a consultation package which was rejected, due to its inconsistency with the proposed *ERA*.

[58] After the initial hearing of this application for judicial review, the Supreme Court of Canada released its decision in *Fraser v. Ontario (Attorney General)*, 2011 SCC 20. The parties were invited to make written and oral submissions, and both did so.

[59] The Applicants argued that *Fraser* has little impact on this case. The majority of the Supreme Court confirmed its decision in *BC Health Services*, emphasizing that good faith negotiation and consultation is required to comply with subsection 2(d) of the *Charter*.

[60] The Applicants also submitted that the facts in this case are distinguishable from those in *Fraser*.

(ii) Respondent's Submissions

[61] The Respondent argues that the protection of subsection 2(d) of the *Charter* is limited to protection from substantial interference with associational activity, that is the process enabling employees to pursue objectives in meaningful negotiations with the employer. He argues that the inquiry is contextual and fact specific, focusing on the importance of the matter affected to the process of collective bargaining, and second, to the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[62] The SRR Program and the Pay Council, according to the Respondent, are mechanisms that permit associational freedoms of the RCMP Members on a collegial and consensual basis. Recommendations are considered by the Commissioner, who makes appropriate recommendations to the Minister of Public Safety. This model cannot be directly compared to traditional labour

relations models. He argues that the Applicants are trying to impose an obligation of good faith bargaining. Subsection 2(d) grants a right to maintain the process of collective engagement but is not the right to claim the procedural benefits of a traditional collective bargaining model.

[63] Further, the Respondent submits that the *ERA* does not interfere with the associational activity of the SRR Program or the Pay Council. The *ERA* applies to establishing wages for individuals across the public service and does not amend, or even refer to, existing process for representing the interests of the RCMP Members. The *ERA* does not nullify negotiated terms of a collective agreement or undermine future collective agreements; rather, it imposes a statutory constraint on the authority of Treasury Board to establish terms and conditions of employment.

[64] The Respondent further argues that although wages are important, the *ERA* merely limits increases for two years. This is not a freeze or wage reduction. The impact on remuneration is limited.

[65] The Respondent notes that the SRRs met with the President of the Treasury Board in February of 2009. The President of Treasury Board also received submissions from the Pay Council. The President listened to these submissions but did not change the *ERA*. According to the Respondent, the President used the ordinary consultative process, inviting the Pay Council to make recommendations regarding new allowances under section 62 of the *ERA*.

[66] Finally, the Respondent submits that the *ERA* does not affect the existing associational process. It only restricts the maximum pay increases that may be granted to RCMP Members. The

Applicants' claim amounts to a claim for a specific economic outcome, which is not protected by subsection 2(d) of the *Charter*.

[67] He argues that disappointment by the RCMP concerning limited wage increases does not constitute a loss of confidence in the existing associational process nor does it constitute substantial interference. The manner in which the terms of employment were altered is consistent with a good faith process of discussion and consultation. He submits that the Treasury Board met this standard by encouraging the Commissioner to address the issue with the RCMP before the Treasury Board decision was made.

[68] In addressing the Supreme Court of Canada's decision in *Fraser*, the Respondent submits that *Fraser* confirms the subsection 2(d) right to association, but that subsection 2(d) does not protect a particular model of collective bargaining nor guarantee particular outcomes.

[69] The Respondent further argues that *Fraser* creates an overall threshold of effective impossibility, that is in order to violate subsection 2(d), legislation or government action must render the meaningful pursuit of collective goals substantially impossible.

[70] Applying that standard in this case, the Respondent argues that the Treasury Board's decision and the *ERA* do not render the pursuit of collective goals effectively impossible. The Respondent points to the increase in service pay under the transformation initiatives as evidence that the Pay Council continued its work unimpeded by the Treasury Board's action and the *ERA*.

(iii) Analysis

[71] The statutory regime precludes the Members of the RCMP from collective bargaining; see paragraph 2(1)(d) of the *Public Service Labour Relations Act*, and sections 41 and 96 of the RCMP Regulations, as discussed in *Mounted Police Association of Ontario v. Canada*.

[72] The Pay Council's work cannot be considered wholly equivalent to collective bargaining. Nonetheless, it is the only formal means through which Members of the RCMP can collectively pursue goals relating to remuneration with their employer, that is the Treasury Board.

[73] In *Fraser*, the Supreme Court of Canada held that all employees, not just those under a Wagner style collective bargaining regime, have the right to make collective representations and have those representations considered in good faith; see paras. 42, 46-48. It follows that the Pay Council process is important and should be afforded the protection of subsection 2(d) of the *Charter*.

[74] The Supreme Court of Canada in *Fraser* adopted the approach to determining whether a subsection 2(d) breach has occurred, but did not apply the two-step test laid out in *BC Health Services*. Instead, the majority of the Supreme Court in *Fraser* reformulated the inquiry at para. 47, as follows:

> [47] If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.

[75] In the factual context of *Fraser*, the majority frames the test as follows, at paras. 98-99:

> [98] The essential question is whether the *AEPA* makes meaningful association to achieve workplace goals effectively impossible, as was the case in *Dunmore*. If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the right to meaningful association guaranteed by s. 2(d) of the Charter will have been limited, and the law found to be unconstitutional in the absence of justification under s. 1 of the Charter. The onus is on the farm workers to establish that the *AEPA* interferes with their s. 2(d) right to associate in this way.
>
> [99] As discussed above, the right of an employees association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(d) of the Charter, necessary to meaningful exercise of the right to free association. The question is whether the *AEPA* provides a process that satisfies this constitutional requirement.

[76] In his submissions on *Fraser*, the Respondent repeatedly emphasized the word "impossible", arguing that it creates an overall threshold. In my opinion, the Respondent's focus in this regard is too narrow.

[77] The word "impossible" must be taken in the context of other words such as "meaningfully" and "effectively", and the phrase "good faith". If legislation makes it possible for employees to make collective representations that are ineffective or not meaningful, or if representations are possible but government action demonstrates a lack of good faith, a breach of subsection 2(d) of the *Charter* will still have occurred.

[78] In my opinion, the Supreme Court's use of the word of impossibility does not constitute a paramount consideration or a threshold. Rather, it is part of the overall test set out and applied in *Fraser*.

[79] The test applied in *Fraser* can be easily restated to illustrate its applicability to this case: do the *ERA* and the decision of the Treasury Board make it effectively impossible for the Pay Council to make representations on behalf of the Members of the RCMP, and have those representations considered in good faith?

[80] Unlike in *Fraser*, the Applicants in this case do not argue that either the SRR Program or Pay Council associational scheme, *per se*, violates subsection 2(d) of the *Charter*. That issue was the subject of the litigation in *Mounted Police Association of Ontario v. Canada*. In the present case, as in *BC Health Services*, the Applicants submit that a particular decision of the Treasury Board, together with certain sections of the *ERA*, violate their subsection 2(d) rights by failing to abide by the Pay Council process.

[81] In June 2008, after consultation with the Pay Council, the Treasury Board approved a 2% wage increase and a 1.32% market adjustment for the RCMP for 2008, a 2% wage increase and a 1.5% market adjustment for 2009, and a 2% wage increase for 2010. On December 11, 2008, without consulting the Pay Council, the Treasury Board lowered the wage increases to 1.5% for all three years, and cancelled the market adjustments for 2009 and 2010.

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

[83] Although the actual provisions of the *ERA* are not closely similar to the legislation considered in *BC Health Services*, the impact of the legislation is largely the same. In the first place, it confirms the Treasury Board's decision to unwind a previous agreement and second, it restricts the manner of dealing with a particular issue in future agreements.

[84] The Respondent asserts that the process of the Pay Council is unaffected and only the results of the process have been limited. He points to the increase in service pay as evidence of the Pay Council's continued ability to represent the RCMP on wage issues.

[85] The evidence in the record is clear that transformation initiatives, such as the increase in service pay, were the only aspect of RCMP remuneration that Treasury Board officials were willing to discuss with Pay Council and SRRs after its decision of December 2008 and the enactment of the *ERA*.

[86] In my opinion, this limited engagement demonstrates that the Treasury Board withdrew the issue from consideration and refused to negotiate on a good faith basis. The unilateral cancellation of a previous agreement also constitutes interference with subsection 2(d) rights; see *Confederation des syndicates nationaux v. Quebec*.

[87] The Respondent argues that the effects of the *ERA* are limited since they will expire on March 31, 2011. It is clear from the evidence of Mr. Rochon however, that the measures themselves are temporary but the impact is meant to be permanent. The intention is to permanently reduce

government expenditures on the salaries of public employees. This is an inevitable consequence of the *ERA*.

[88] If the wage increases of the RCMP Members are limited, even for a three year period, this will have lasting effects on the amount the Treasury Board will be required to spend for pension, service pay and other benefits that depend on the amount of salary earned by a Member of the RCMP. In practical terms, it also sets the benchmark for future wage increase negotiations.

[89] The financial impact of the *ERA* is irrelevant. In both *BC Health Services* and *Fraser*, the Supreme Court focused not on the significance of the financial impact of the legislation but on the significance of the impact of the interference on the bargaining process.

[90] In this case, the process of the Pay Council has been seriously hampered. The Pay Council had worked for over a year to develop its recommendations to have the Treasury Board institute an acceptable wage increase regime. The Treasury Board's decision and the legislation unilaterally rescinded this, thereby completely disregarding the Pay Council process.

[91] Much of the Pay Council's work involves making recommendations for the salaries of the Members of the RCMP. The establishment of a low wage increase for a three year period is a clear indication that the matter has been removed from discussion and consultation. This virtually eliminates the Pay Council process, with respect to establishing wages, for three years.

[92] The Treasury Board's decision and the *ERA* made it effectively impossible for the Pay Council to make representations on behalf of the Members of the RCMP, and have those representations considered in good faith. In my opinion, this is a substantial interference, which constitutes a violation of subsection 2(d) of the *Charter*.

2. Is the violation of subsection 2(d) saved by section 1 of the *Charter*?

(i) Applicants' Submissions

[93] The Applicants argue that the Treasury Board's decision and the impugned provisions of the *ERA* are not saved by section 1. First, they argue that the Treasury Board's decision is not "prescribed by law". Second, the Applicants argue that the Treasury Board's decision and the *ERA* do not meet the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. That test is as follows:

1. The objective of the law must be pressing and substantial;

2. There must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve that objective;

3. The impugned law must be minimally impairing; and

4. There must be proportionality between the objective and the measure adopted by the law, more specifically between the salutary and deleterious effects of the law.

Prescribed by Law

[94] The Applicants argue that section 1 of the *Charter* is not available to justify the Treasury Board's decision, since that decision is not prescribed by law. While the Applicants concede that the Treasury Board decision is "a law" for the purpose of section 1, they argue that it is not "prescribed

by law". The Applicants submit that in order to be "prescribed", a law must meet the following criteria:

1. It must be adequately accessible to the public; and

2. It must be formulated with sufficient precision to enable people to regulate their conduct by it and to provide guidance to those who apply the law.

[95] The Applicants argue that a Treasury Board decision is subject to cabinet confidence, since Treasury Board is a committee of the Queen's Privy Council. As a result, Treasury Board's decisions are not accessible to the public and accordingly, not prescribed by law; see *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 S.C.R. 295.

Pressing and Substantial Objective

[96] The Applicants acknowledge that the first objective, that is reducing upward pressure on wages and reducing job losses, is a pressing and substantial objective.

Rational Connection

[97] The Applicants concede that there could be a rational connection between limiting public sector wages and decreasing job losses, but submit that the difficulty is in the rate chosen. There is no explanation as to how a legislated limit of 1.5% is rationally connected to the reduction of pressure on private sector wages, when those wages, that is private sector wages, increased by 2.5% in 2008 and 1.8% in 2009, according to the affidavit of Mr. Rochon filed on behalf of the

Respondent. The Applicants submit that the legislative limit need not be lower than the wage increase in the private sector.

Minimal Impairment

[98] As for minimal impairment, the Applicants submit that the Respondent has not shown that a complete prohibition on collective bargaining on wages is necessary.

[99] In *BC Health Services*, the Supreme Court of Canada found that an absolute prohibition was not minimally impairing. The Applicants note that the Treasury Board turned its mind to consulting the Pay Council, but then failed to do so. In this regard, I refer to the cross-examination of Ms. Laurendeau.

[100] They also say that other bargaining agents were informed of the process and given opportunities to make representations. In this regard, the Applicants rely on the decision of the Public Service Labour Relations Board in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102, aff'd 2010 FCA 109.

Proportionality

[101] The Applicants argue that the Respondent has given no evidence regarding the salutary effects of the *ERA* and there is no evidence that the *ERA* had any impact on job losses. Equally, there is no evidence regarding the costs saved by the Government pursuant to the *ERA*.

[102] The Applicants submit that the deleterious effects are financial and procedural. The procedural deficiencies are the most important. These effects outweigh the unproven salutary effects.

(ii) Respondent's Submissions

[103] The Respondent argues that the Treasury Board's decision was prescribed by law. He further argues that in light of the rapid economic decline in the fall of 2008, the objectives of that decision and the wage increase limits of the *ERA* are pressing and substantial. There is a rational connection between those objectives and the wage increase limits. These limits impair associational freedoms in a minimal way and the salutary effects of the limits outweigh the deleterious effects.

[104] Further, the Respondent submits that a deferential approach should be taken to the Government's response to the fiscal crisis. The effect of the *ERA* provisions is to prescribe an annual wage increase limit of 1.5% for two fiscal years, to nullify the terms established in June 2008 by the Treasury Board and to prohibit new terms until March 31, 2011. He submits that these consequences are justified by a sudden and significant economic crisis.

Prescribed by Law

[105] The Respondent argues that section 1 does apply to the Treasury Board's decision, since that decision was prescribed by law. Although the decision is protected by cabinet confidence, it was communicated to Members of the RCMP by the Commissioner and was applied, effective January 1, 2009. The Respondent argues that the decision meets the criteria of accessibility and precision.

Pressing and Substantial Objectives

[106] The Respondent submits that the *ERA* is not an isolated measure but is part of a broader response to an unprecedented economic crisis. The urgency of this crisis was communicated to core public administration bargaining agents in November 2008. The stated objectives of the *ERA* are not merely budgetary considerations, they are economic measures enacted as one element of a comprehensive fiscal policy.

Rational Connection

[107] The Respondent submits that it must show that it is reasonable to suppose that the limit adopted may further its objectives, not that it will do so, relying in this regard upon the decision in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567. The Respondent relies upon the affidavit of Mr. Rochon to demonstrate a rational connection.

[108] In his affidavit, Mr. Rochon refers to economic studies supporting his position that limiting increases in public sector wages reduces the upward pressure on private sector wages, ensuring that jobs are not lost. He also points to the Governments of Nova Scotia, New Brunswick, Ontario, Manitoba, Alberta and British Columbia, which have limited increases in public sector wages in order to reduce pressure on private sector wages. Mr. Rochon also expresses the opinion that moderation in the growth of public sector wages is particularly important to restore public confidence when so many private sector workers were losing their jobs.

Minimal Impairment

[109] According to the Respondent, the Treasury Board considered several options for controlling growth of public wage expenditures, including the control of the number of employees through staff freezes or lay-offs; suspending movement within pay ranges, promotions and reclassifications; and freezing, reducing or limiting pay increases.

[110] The Respondent submits that the wage increase limit is temporary. The RCMP may negotiate wage increases up to the limits prescribed in the *ERA*. In the fall of 2008, the Government needed to address the issue of limiting pay raises for 17 bargaining agents, as well as for separate employers, Crown corporations, the military and the RCMP. It did not have time to follow all of the separate associated processes to accomplish its goals.

Proportionality

[111] The Respondent uses the objectives of the *ERA* to describe its salutary effects. Again relying on the decision of the Supreme Court of Canada in *Hutterian Brethren*, the Respondent submits that the Supreme Court of Canada has held that section 1 of the *Charter* does not require proof that future benefits have been realized.

[112] The Respondent submits that the deleterious effects of the wage increase limits are entirely financial, and that the capacity of the RCMP to pursue their goals, in concert, is not undermined in any way. They are able to address wages but must do so within the scope of the *ERA*.

[113] In any event, economic outcomes are not protected by subsection 2(d) of the *Charter* and the focus must be on associational rights.

(iii) Analysis

Prescribed by Law

[114] At para. 53 of *Greater Vancouver*, the Supreme Court of Canada discussed the "prescribed by law" requirement of section 1 of the *Charter* as follows:

> …Such limits satisfy the "prescribed by law" requirement because, much like those resulting from regulations and other delegated legislation, their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply. In these regards, they satisfy the concerns that underlie the "prescribed by law" requirement insofar as they preclude arbitrary state action and provide individuals and government entities with sufficient information on how they should conduct themselves [emphasis added].

[115] As discussed, section 22 of the *RCMP Act* grants the Treasury Board the statutory authority to establish RCMP Members' pay. The Treasury Board enjoys the privilege of cabinet confidence over the materials consulted and the communications made in the course of deliberating a decision. However, the Applicants have not provided any authority holding that cabinet confidence applies to Treasury Board decisions, themselves, such as those mandated by section 22 of the *RCMP Act*.

[116] Even if the Treasury Board's decision of December 11, 2008 is privileged by virtue of cabinet confidence, it was clearly communicated to the Commissioner of the RCMP on December 12, 2008. In turn, the Commissioner communicated the decision to the SRR National Executive and the Members of the RCMP on December 12, 2008.

[117] In my opinion, the Treasury Board's communication of its decision to the Commissioner of the RCMP made its decision of December 11, 2008 sufficiently accessible to those to whom it applied, that is the Members of the RCMP.

[118] As a result, the Treasury Board's decision was prescribed by law.

Pressing and Substantial Objective

[119] The Treasury Board has not provided any specific figures with regard to how much will be saved from limiting RCMP wage increases *vis-à-vis* the budgetary deficits incurred during the economic crisis. Nonetheless, the Applicants concede that reducing upward pressure on private sector wages is a pressing and substantial objective. In my opinion, a response to the global financial crisis goes beyond a mere budgetary consideration, and is a pressing and substantial objective.

[120] The aim of providing leadership and showing restraint and respect for public money is quite abstract. It appears to be political in nature. In my opinion, this stated aim is not pressing and substantial.

Rational Connection

[121] I agree with the Respondent's submissions that pursuant to the decision in *Hutterian Brethren*, it is not necessary to conclusively demonstrate that the limits placed on subsection 2(d)

rights will further the stated objectives, only that it is reasonable to suppose that the limits may further the goal.

[122] As noted above, the Respondent relies heavily on the affidavit of Mr. Rochon to demonstrate a rational connection between the compensation of public sector employees and the pressure on the private sector to then increase wages, which can lead to job losses. Although Mr. Rochon refers to many studies, only one study discusses this effect in the context of a looming recession. In that regard, I refer to "Wage Watch: A Comparison of Public-sector and Private-sector Wages" (Ted Mallett and Queenie Wong, *Canadian Federation of Independent Business*, December 2008). That report emphasizes that wage increases should not go above the rate of inflation and that wage freezes should be contemplated during a recession to avoid raising taxes.

[123] Generally, the abstracts and conclusions of the studies provided do not tend to detail the types of employees considered when comparing the public and private sectors. However, there is one exception.

[124] The last study Mr. Rochon references, "The Spillover Effect of Public-Sector Wage Contracts in Canada" (Robert Lacroix and Francois Dussault, *The Review of Economics and Statitistics*, Vol. 66, No. 3, August 1984) breaks down its analysis of what it terms the "spillover effect" by category of employee and draws the following conclusion:

> The spillover effect is present only when the two following conditions are met: the public-sector workers are white- or blue-collar workers, and they are located in the same urban area as the private-sector workers.

[125] Police officers are considered neither white nor blue collar workers. In fact, the study expresses the following conclusion:

> …the effect is nil if the workers covered by the government-sector settlement are teachers, nurses, firemen, or policemen, or if they are located in a different urban area.

[126] The only study discussing upward pressure on private sector wages, that breaks down the public sector into groups, has concluded that wages of police officers do not put pressure on the private sector to increase employee remuneration. In my opinion, a wage increase limit that applies to the entirety of the federal civil service, covering employees who are neither blue nor white collar workers such as RCMP Members, is not rationally connected to the reduction of upward pressure on the private sector to increase wages which could lead to job losses.

[127] In my opinion, the Respondent has not provided persuasive and cogent evidence to show that the reduction of wage increases of the RCMP provides leadership or demonstrates restraint with public money.

Minimal Impairment

[128] The Respondent's arguments concerning minimal impairment focus on the financial impact to the Members of the RCMP. In my opinion, this focus is misplaced.

[129] What should be considered is not the financial consequences but the impairment of the subsection 2(d) *Charter* right, that is upon the process for associational activities. On the evidence before me, the affected process is the Pay Council process. The only submission made by the

Respondent in this regard is that Treasury Board simply did not have time to address limiting pay increases with 17 bargaining agents, separate employers, Crown corporations, the military and the RCMP.

[130] According to the affidavit of Ms. Laurendeau, the Treasury Board was able to create consensus with 17 bargaining agents in the core public administration and was able to meet with other agencies and Crown corporations before enacting the *ERA*; see the affidavit of Ms. Laurendeau at paragraphs 20 to 24.

[131] Overall, the Treasury Board and separate government agencies signed more than 44 agreements with bargaining agents inside and outside the core public administration. If other bargaining agents were informed and given the opportunity to consult, to the point of signing agreements, it is clear that unilateral action and complete disregard for the Pay Council process was not minimally impairing.

Proportionality

[132] The only substantiated benefit of the *ERA*, relative to the RCMP, is saving the Treasury Board an undisclosed amount of money. On the other hand, the *ERA* rescinds wage increases that were reached through consensus with the Pay Council and deprives the Members of the RCMP of their only means of negotiating wage increases, for three years. The provision of an associated benefit pursuant to section 62 of the *ERA* does not mitigate these deleterious effects. On the whole, the salutary effects of the *ERA* are outweighed by the deleterious effects.

[133] In conclusion, I find that the breach of the Applicants' rights pursuant to subsection 2(d) of the *Charter* are not saved by section 1 of the *Charter*.

3. Does the Treasury Board's decision constitute a breach of contract?

(i) Applicants' Submissions

[134] The Applicants, relying on the decision of the Supreme Court of Canada in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, submit that the relationship between a civil servant and the Crown is a contractual relationship. The same applies to virtually all non-unionized public servants; see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[135] The Applicants submit that an employer may not unilaterally amend a contract of employment; see *Wronko v. Western Inventory Service Ltd*. (2008), 292 D.L.R. (4th) 58 (O.N.C.A.). They argue that a contract with the Crown remains binding unless there is explicit statutory authority displacing the contract, relying on *Wells*. The Applicants submit that Treasury Board breached the terms of its contract with the Members of the RCMP and that they are entitled to remedy.

[136] The Applicants further submit that section 22 of the *RCMP Act* does not relieve the Crown from liability. Section 22 grants the Treasury Board power to establish rates but not to unilaterally reduce rates of pay.

[137] As well, the Applicants argue that the *RCMP Act* does not preclude a remedy for breach of contract. A decision that is statutorily lawful may still constitute a breach of contract and nothing excludes the Crown from liability when it breaches a contract; see *Arsenault v. Canada* (2008), 330 F.T.R. 8 (F.C.), aff'd (2009), 395 N.R. 377 (F.C.A.).

(ii) Respondent's Submissions

[138] The Respondent submits that Treasury Board has the statutory authority to determine wages for Members of the RCMP. Decisions of Treasury Board do not create contractual obligations between the Treasury Board and the RCMP Members. In this regard, the Respondent relies on the decisions in *Babcock v. Canada (Attorney General)*, 2005 BCSC 513 and *Appleby-Ostroff v. Canada (Attorney General)*, 2010 FC 479. The Respondent submits that the decision in *Wells* is distinguishable since it concerned an Order-in-Council that was not subject to statutory grants of authority.

(iii) Analysis

[139] The Applicants are correct in asserting that, pursuant to *Wells*, the Crown is not protected from liability when it breaches a contract, even where it is authorized by statute to engage in the conduct breaching the contract. However, I am not persuaded that the RCMP rates of pay constitute contractual terms.

[140] In *Babcock*, it was held that the contents of the Salary Administration Plan, which includes the rates of pay for Department of Justice lawyers and is set unilaterally by the Treasury Board, do not constitute binding obligations.

[141] In *Appleby*, the Court found that the Treasury Board had the authority to unilaterally alter the applicant's conditions of employment and that Treasury Board was not bound by previous versions of the employment conditions.

[142] In my opinion, the present case is distinguishable from *Wells* but not on the basis suggested by the Respondent.

[143] In *Wells*, the Government of Newfoundland and Labrador had appointed an individual to sit on an administrative tribunal. The Government, by legislation, reconstituted the tribunal and did not reappoint the individual. While the actions of the Government were in accordance with the statute, the terms of the individual's employment were still in place and the Government had no statutory authority to alter that individual's contract.

[144] In the present case, Treasury Board is expressly authorized to alter the rates of pay for the RCMP.

[145] Furthermore, section 22 of the *RCMP Act* may be considered as an alteration of the ordinary law of contracts. Section 22 provides as follows:

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

demotion	Cas de rétrogradation
(1.1) Where, pursuant to this Act, a member is demoted, the rate of pay of that member shall be reduced to the highest rate of pay for the rank or level to which the member is demoted that does not exceed the member's rate of pay at the time of the demotion.	(1.1) La rétrogradation d'un membre conformément à la présente loi entraîne la réduction du barème de sa solde au barème de la solde la plus élevée du grade ou échelon auquel il est reporté, qui ne dépasse pas le barème de sa solde au moment de sa rétrogradation.
During imprisonment	Cas d'emprisonnement
(2) No pay or allowances shall be paid to any member in respect of any period during which the member is serving a sentence of imprisonment.	(2) Il ne peut être versé ni solde ni indemnités à un membre pour toute période durant laquelle il purge une peine d'emprisonnement.
During suspension	Cas de suspension
(3) The Treasury Board may make regulations respecting the stoppage of pay and allowances of members who are suspended from duty.	(3) Le Conseil du Trésor peut prendre des règlements régissant la cessation de la solde et des indemnités des membres suspendus de leurs fonctions.

[146] Generally speaking, terms cannot be set unilaterally by one party to a contract, without the express agreement of the other party.

[147] Section 22 of the *RCMP Act*, as set out above, clearly gives the Treasury Board the power to set terms of rates of pay. In my opinion, the exercise of this power does not amount to a breach of contract. In the result, I am satisfied that the Applicants have not established a breach of contract and consequently, the Treasury Board is not liable for damages in breach of contract.

Conclusion

[148] In my opinion, the Treasury Board's decision of December 11, 2008, together with sections 16, 35, 38, 43, 46 and 49 of the *ERA*, violates subsection 2(d) of the *Charter*. That breach is not saved by section 1.

[149] In the result, this application for judicial review is allowed with costs to the Applicants. The Treasury Board's decision of December 11, 2008 is quashed.

[150] The Applicants do not seek a remedy with respect to any provisions of the *ERA*. Accordingly, I decline to order a remedy in that regard. Further, the Treasury Board's decision does not constitute a breach of contract and no claim for damages arises.

[151] If the parties are unable to agree on costs, they may advise the Court within five days of the issuance of the Order allowing this application and directions will issue with respect to costs.

ORDER

THIS COURT ORDERS that this application for judicial review is allowed with costs to the Applicants. The Treasury Board's decision of December 11, 2008 is declared contrary to subsection 2(d) of the *Charter* and is quashed. If the parties are unable to agree on costs, they may advise the Court within five days of the issuance of this Order and directions will issue with respect to costs.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-50-09
STYLE OF CAUSE:	ROBERT MEREDITH AND BRIAN ROACH (REPRESENTING ALL MEMBERS OF THE ROYAL CANADIAN MOUNTED POLICE) v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	November 3, 2010 and May 18, 2011
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	June 21, 2011

APPEARANCES:

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