

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDENT'S FACTUM

Dated: April 7, 2011

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The recent global economic crisis had a sudden and significant impact on the Canadian economy and on the fiscal position of the Government of Canada. The impact was felt most acutely in the autumn of 2008 when the crisis, which began in the United States, spread rapidly around the world, creating turbulence in the financial markets, destabilizing economies and ultimately resulting in the worst global recession in decades.

2. The Government of Canada responded by implementing policy and legislative measures that were designed to demonstrate leadership in the responsible management of public funds, to stabilize and stimulate the economy in the near term and to help restore budgetary balance and fiscal sustainability in the medium to long term. A key goal was to manage uncertainty by enhancing predictability of expenditure.

3. Included in the measures was a temporary limit on wage increases for all unionized and non-unionized employees in the federal public service and appropriation dependent Crown Corporations, members of the Senate and the House of Commons, the Royal Canadian Mounted Police and the Canadian Forces. The limit was implemented through negotiation of new collective agreements for 122,000 of approximately 178,000 unionized employees and through legislation, the *Expenditure Restraint Act* (“ERA”), associated with the federal budget of January 2009.

4. The applicant argues that these measures violated its freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*. The essence of its position is that the government's action denied its members a 35% increase in wages to achieve parity with the Ontario Crown. The unprecedented economic situation facing all Canadians, it argues, was not a pressing and substantial reason for implementing wage restraint and was an unjustified response.

5. The *ERA* did not prohibit or prevent association, did not prohibit or prevent collective bargaining, and did not freeze wages or cut jobs. The *ERA* implemented a limit on the percentage public sector wages could be increased for a targeted and specific period of time, to ensure predictability and certainty during a time when the economy and Canadians were experiencing little of either.

6. The rights of the Association of Justice Counsel ("AJC") under section 2(d) of the *Charter* are not infringed by the *ERA* or the manner of its enactment. There has been no interference with its right to a process of collective bargaining. If an infringement is found it is justified as reasonable under section 1 of the *Charter* given the severe economic and fiscal pressures the government was required to address in late 2008 and early 2009 and the minimally intrusive nature of the limit.

7. For these reasons, there are no grounds upon which this Court may grant the remedies sought by the AJC. The application must be dismissed.

B. COLLECTIVE BARGAINING FOR FEDERAL LAWYERS

1) History of Collective Bargaining for Federal Lawyers

8. From 1967 until 2006, there were represented and unrepresented lawyers in the federal public service.

9. The represented lawyers had a long history of collective bargaining with the Treasury Board Secretariat.¹ They were represented by the Professional Institute of the Public Service of Canada ("PIPSC") and had successfully negotiated 17 collective agreements that embodied the terms and conditions of their employment. The last agreement between the Law Group and the Treasury Board expired on February 28, 2006.²

10. The unrepresented lawyers mostly worked for the Department of Justice and the terms and conditions of their employment were set out in Treasury Board Policies. The former *Public Service Staff Relations Act* specifically prohibited Department of Justice lawyers from being part of a bargaining unit.³

¹ The Treasury Board is a committee of the Queen's Privy Council for Canada established by section 5 of the *Financial Administration Act*. The Treasury Board manages government funds within the fiscal framework established by the Department of Finance. It is also the employer for employees in departments and agencies in the core public administration, including the Law Group. The Secretariat is the administrative arm of Treasury Board and negotiates terms and conditions of employment with the bargaining agents on behalf of Treasury Board. Affidavit of H el ene Laurendeau sworn October 29, 2010 (1st Laurendeau Affidavit) paras. 10, 12, 15 and 17, Respondent's Record (RR), Vol. *, Tab *, p. 4-5.

² Affidavit of Marc Thibodeau, sworn October 29, 2010 (Thibodeau Affidavit), at para. 40, RR, Vol. *, Tab *, p. 303; Exhibit G, p. 570-650.

³ Thibodeau Affidavit, at para. 41, RR, Vol. *, Tab *, p. 304; Thibodeau Cross-examination, p. 17, Q. 68 to p. 18, Q. 70, Applicant's Record (AR), Vol. *, Tab *, p. *.

11. The prohibition was removed when the *Public Service Labour Relations Act* came into force on April 1, 2005. The AJC was certified as the bargaining agent for both groups of lawyers by order of the Public Service Labour Relations Board (“PSLRB”) on April 28, 2006.

12. The AJC served its notice to bargain for all the lawyers in the bargaining unit (“LA Group”) on May 10, 2006.⁴

2) The Bargaining Process

13. The bargaining process for the AJC and the Treasury Board Secretariat (“Secretariat”) started with the notice to bargain and ended with a signed collective agreement on July 27, 2010. The parties participated in negotiations, mediation and arbitration.

a) Negotiations

14. The first order of business for the AJC was to obtain a full mandate from its membership. The parties also jointly agreed to set up the process of collecting union dues, to deal with exclusions and other administrative matters such as use of the employer’s facilities for union business and leave for AJC business. These matters were mostly resolved by November of 2006, including the collection of union dues from employees so that the AJC could function properly.⁵

⁴ Thibodeau Affidavit, at para. 16, RR, Vol. *, Tab *, p. 288-289.

⁵ Thibodeau Affidavit, at para. 30, RR, Vol. *, Tab *, p. 295.

15. From November 2006 through to September 2007, the AJC and the Secretariat had face-to-face bargaining sessions on November 22 and 23, January 23 to 25, February 20 to 22, April 11 to 13, June 26 to 28 and September 25 and 26.⁶

16. The matters negotiated during these sessions included: leave for union representatives, use of video surveillance, vacation carry over, grievance procedures, advances of sick leave, education, training and career development, a no-discrimination clause, leave for union representatives to pursue union business, deduction of union dues for employees in acting positions, timekeeping, publication of scholarly works, professional responsibility, legal indemnification, vacancies, hours of work, alternate work arrangements, compensation and National Joint Council matters.⁷ It is the Secretariat's uncontradicted evidence that the parties agreed to negotiate non-monetary issues before discussing monetary issues.⁸

17. Throughout this time period, the AJC requested information that it believed was necessary for collective bargaining. The Secretariat made every effort to produce the requested disclosure in an acceptable format and in a timely manner. The parties took different positions on the sufficiency and timeliness of the disclosure.⁹

⁶ Affidavit of Marco Mendicino sworn June 8, 2010 (1st Mendicino Affidavit), at para. 45, AR, Vol. *, Tab *, p. 21.

⁷ Thibodeau Affidavit, at para. 30, RR, Vol. *, Tab *, p. 10-11.

⁸ Thibodeau Cross-examination, p. 71, Q. 275 to p. 74, Q. 285, AR, Vol. *, Tab *, p. *.

⁹ Thibodeau Affidavit, at paras. 24-32, RR, Vol. *, Tab *, p. 291-295.

18. On October 15, 2007, the AJC and the Secretariat made a mutual request to the PSLRB for mediation and the parties agreed to have Kevin Burkett act as mediator.¹⁰

b) Mediation

19. Mediation sessions took place November 14, December 19, 2007, January 18, 19 and 20 and March 29, 2008.¹¹ The mediator encouraged the parties to address non-monetary issues before monetary issues and that was the approach to mediation that was taken by the Secretariat.¹²

20. At the mediation sessions, the following matters were negotiated and discussed, some of which were successfully resolved: lawyers' statement of duties, sick leave assessments, publication and authorship of scholarly works, parking, various types of paid and unpaid leave, including sick leave, education and training leave, union dues, management rights, court clothing, meal reimbursement, legal indemnification and alternative working arrangements.¹³

21. In preparation for negotiations and mediation on compensation, the Secretariat provided its February 22, 2007 "Policy Framework for the Management of Compensation" to the AJC. The Policy Framework is a background document that explains the factors taken into consideration in making compensation decisions. It is a

¹⁰ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 296.

¹¹ 1st Mendicino Affidavit, at para. 49, AR, Vol. *, Tab *, p. 21-22.

¹² Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 296; Thibodeau Cross-examination, p. 79, Q. 309 to p. 81, Q. 316, AR, Vol. *, Tab *, p. *. None of the other parties who attended the negotiations and mediation has provided evidence in this application, therefore, Marc Thibodeau's evidence is uncontradicted.

¹³ Thibodeau Affidavit, at para.33, RR, Vol. *, Tab *, p. 297.

standard piece of information used to explain compensation decisions and compensation positions.¹⁴

22. There was a large gap in the parties' respective opening salary proposals.

23. The AJC had made its opening salary proposal in November of 2006 seeking increases in excess of 35% to achieve parity with the lawyers employed by the Ontario Ministry of the Attorney General.¹⁵

24. At the March 29, 2008 mediation session, the Secretariat presented its response to the AJC salary proposal with an offer of 1.5% annual economic increases retroactive to April 28, 2006.¹⁶

25. The AJC representatives quickly rejected the Secretariat's proposal and advised that they would refer the matter to arbitration. Both parties wanted to explore/discuss the possibility of agreeing to a Chair of the Arbitration Board. However, by September 24, 2008, the parties had not agreed on the identity of a Chair for the arbitration. Given the time that had passed without the parties agreeing on a Chair, the Secretariat referred the matter to the PSLRB to establish an Arbitration Board to settle all outstanding issues.¹⁷

¹⁴ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 297; Thibodeau Cross-examination, p. 173, Q. 685 to p. 175, Q. 686, AR, Vol. *, Tab *, p. *.

¹⁵ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 295.

¹⁶ Thibodeau Affidavit, at paras. 36-67, RR, Vol. *, Tab *, p. 302-209; 1st Mendicino Affidavit, AR, Vol., Tab *, p. 153-156.

¹⁷ Thibodeau Affidavit, at para. 18, RR, Vol. *, Tab *, p. 290.

c) Arbitration

26. One of the first matters to be dealt with in establishing the Arbitration Board was the terms of reference. That could not be resolved and went to a hearing on December 15 and 16, 2008.¹⁸

27. In light of the economic conditions facing Canada, the Secretariat invited the AJC to resume negotiations and attempt to reach a settlement. The Secretariat presented a final offer to the AJC on November 18, 2008 that included a 2.5% salary increase for 2006-2007, 2.3% for 2007-2008 and 1.5% for each subsequent year until the end of the 2010-2011 fiscal year. The negotiator for the Secretariat discussed the final offer with counsel for the AJC on November 25 and 26, 2008 but the AJC refused and did not resume negotiations.¹⁹

28. The arbitration on the merits proceeded in June of 2009. By that time, a number of terms and conditions of employment had been resolved including: rights of the bargaining unit members, representation, use of employer facilities, membership dues, hours of work (except for overtime), travel time, other leave with or without pay (medical appointment for pregnant employees, court leave, personnel selection, injury-on-duty leave and religious observance), acting pay and no discrimination clauses.²⁰

29. Prior to the conclusion of the arbitration, the parties had also agreed to language regarding the following issues: designated paid holidays, vacation leave with pay, sick

¹⁸ Thibodeau Affidavit, at para. 19, RR, Vol. *, Tab *, Exhibit B, p. 313-339.

¹⁹ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 298.

leave with pay, other leave with or without pay (bereavement leave, care of immediate family, relocation of spouse, family-related responsibilities, maternity-related reassignment), career development specifics, employee performance review and employee files, grievance procedure, joint consultation on employment related matters and job security.²¹

30. On October 23, 2009, the arbitration decision and award were issued. The decision settled the various issues that had not been resolved and established the salary increases up to the maximum allowed by the *ERA* (9.3% over 5 years) as follows: 2.5% on May 10, 2006, 2.3% on May 10, 2007, 1.5% on May 10, 2008, 1.5% on May 10, 2009 and 1.5% on May 10, 2010.²²

31. As noted in the award,²³ a major issue in dispute between the parties had to do with overtime compensation. The Chair of the panel awarded overtime and travelling time compensation to lawyers at the LA-01 and LA-02A level. The union nominee and the employer nominee registered dissent. Both the Secretariat and the AJC sought judicial review of the award and as of the date of this memorandum, the matter remains under reserve in the Federal Court.

²⁰ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 299-300.

²¹ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. 299-300.

²² Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. *, Exhibit D, p. 536-557

²³ Thibodeau Affidavit, at para. 33, RR, Vol. *, Tab *, p. *, Exhibit D, p. 547.

d) Collective agreement signed

32. The collective agreement between Treasury Board and the AJC was signed on July 27, 2010. It expires on May 9, 2011.²⁴

C. THE GLOBAL FINANCIAL CRISIS AND ITS IMPACT ON CANADA

33. Beginning in August 2007 and peaking in late 2008 to early 2009, the world experienced a massive financial crisis, unprecedented in scope and severity.²⁵

34. The AJC acknowledges that Canada experienced a serious economic downturn in 2008-2009.²⁶ Indeed this Court can take judicial notice of the global financial crisis and its impact in Canada which is detailed in the respondent's affidavit of Paul Rochon sworn November 5, 2010.²⁷

35. What is of key importance to the context of this *Charter* challenge is an appreciation of the speed at which the economic situation in the world and in Canada deteriorated and the uncertainty that was created by the rapid decline.

36. Although the global financial crisis had its origins in the United States as early as August 2007, it had, by September and October of 2008, escalated significantly, triggered by the failure and near-failure of major financial institutions in the U.S. and Europe. In a

²⁴ Thibodeau Affidavit, at para. 34, RR, Vol. *, Tab *, p. 302.

²⁵ Affidavit of Paul Rochon sworn November 5, 2010 (Rochon Affidavit), at para. 5, RR, Vol. *, Tab *, p. 656.

²⁶ Affidavit of Marco Mendicino sworn January 6, 2011 (2nd Mendicino Affidavit), at para. 20, AR, Vol. *, Tab *, p. *.

²⁷ *Aalto v. AGC*, 2010 FCA 195; *Aalto et al. v. Attorney General of Canada* (17 March 2011), Ottawa 33868 (SCC) leave denied, [2010] S.C.C.A. No. 352.

cascading series of extraordinary developments over a matter of weeks, international credit markets seized; stock markets plunged steeply; and the interest rates at which banks lend to each other soared to unprecedented levels, a key indicator of the anxiety and instability in the financial markets. The International Monetary Fund (“IMF”) repeatedly downgraded its economic growth forecasts, describing the financial crisis as “virulent” and the economic outlook as “exceptionally uncertain”.²⁸

37. By October 2008, the rapid deterioration in the economic situation in the U.S. and globally was beginning to have serious implications for the Canadian economy.²⁹

38. Continuing into November 2008, there was a palpable atmosphere of uncertainty and concern within the Government of Canada concerning the state of the Canadian economy and Canada’s fiscal position.³⁰ The situation was urgent and deteriorating weekly. As stated by the federal Finance Minister in his speech to a joint meeting of the Empire Club of Canada and the Canadian Club of Toronto on October 29, 2008, “[A]fter the extraordinary developments that have taken place in a matter of weeks, no one can reliably predict what will happen next.”³¹

²⁸ The financial crisis resulted in the failure and subsequent nationalization or acquisition of a number of major banks around the world: nationalization of Northern Rock, a mortgage lender in the United Kingdom (February 17, 2008); acquisition of Bear Stearns, the fifth-largest bank in the U.S., by JP Morgan Chase (March 16, 2008); bankruptcy of Lehman Brothers (September 15, 2008); acquisition of Merrill Lynch by Bank of America (September 15, 2008); partial acquisition of Washington Mutual by JP Morgan Chase (September 25, 2008); acquisition of Wachovia Corp by Wells Fargo (October 3, 2008); and partial acquisition of Fortis by BNP Paribas (October 5, 2008). A number of other major banks received significant funds from governments to reduce the risk of their failure. Rochon Affidavit, at paras. 5-20, RR, Vol. *, Tab *, p. 656-660.

²⁹ Rochon Affidavit, at para. 17, RR, Vol. *, Tab *, p. 659.

³⁰ 1st Laurendeau Affidavit, at para. 56, RR, Vol. *, Tab *, p. 16.

³¹ Rochon Affidavit, at para. 21, RR, Vol. *, Tab *, p. 661, Exhibit G, p. 712-717.

39. The deteriorating situation was reflected in the repeatedly declining outlook for real GDP growth in Canada in 2009. Already, revised down from 1.9% to 1.2% in October, it was further downgraded to 0.3% in November. Employment in Canada also declined abruptly in November 2008, registering a loss of approximately 71,000 jobs in that month as reported by Statistics Canada on December 5, 2008.³²

40. In the Economic and Fiscal Statement delivered on November 27, 2008, the government projected budgetary deficits for the years 2009-10 to 2011-12 if the responsive actions proposed in the Statement were not taken.³³

41. The proposed actions included measures to buttress the financial system, provide relief to seniors and constrain the sharp projected rise in the costs of the Equalization program. Measures were also proposed to reduce the cost of government operations and ensure spending sustainability including limits to public sector wage increases.³⁴

42. After the November Economic and Fiscal Statement, global economic conditions including Canada's, deteriorated further, a reflection of the acute financial strains on the global economy, a sharp loss of consumer confidence and the disruption of global trade.³⁵

43. The IMF further downgraded its outlook for the Canadian economy in January 2009, projecting a decline of 1.2% in real GDP, while private-sector forecasters in

³² Rochon Affidavit, at paras. 19-20, RR, Vol. *, Tab *, p. 660.

³³ Rochon Affidavit, at para. 22, RR, Vol. *, Tab *, p. 661-662.

³⁴ Rochon Affidavit, at paras. 24-27, RR, Vol. *, Tab *, p. 662-663.

³⁵ Rochon Affidavit, at para. 38, RR, Vol. *. Tab *, p. 667.

Canada downgraded their 2009 outlook to a decline of 0.8%. This represented the first year of negative growth since 1991.³⁶

44. Faced with growing economic challenges and uncertainties, the government maintained its commitment, first expressed in the fall of 2008, to chart its course through the crisis and support the economy in a fiscally responsible manner. Whereas in November of 2008, the government's initial aim, through its proposed responsive action, was to maintain budgetary balance, by January of 2009, it had become necessary to go into deficit to stimulate the economy and the government's aim shifted to restoring budgetary balance and fiscal sustainability as soon as possible.³⁷

45. The government's response to the crisis included a suite of policy and legislative actions intended to address the negative impacts of the recession and stimulate the economy. Responsive actions aimed at supporting the economy in the short term were combined with measures designed to ensure appropriate management of financial resources and help restore budgetary balance and fiscal sustainability in the medium to long term.³⁸

46. The responsive actions adopted by Canada included: tax measures, changes to employment insurance, measures to promote the stability or maintain the efficiency of the financial system and financial markets, stimulus spending, amending the method of calculating equalization payments to the provinces and the Canada Health Transfers and a

³⁶ Rochon Affidavit, at para. 39, RR, Vol. *, Tab *, p. 667, Exhibit I, p. 727-730, Exhibit J, p. 732-735.

³⁷ Legislative History, Vol. *, Tab *, p. * (Leg. His.).

³⁸ Rochon Affidavit, at para. 11, RR, Vol. *, Tab *. p. 657.

temporary limit on wage increases for employees and others in the federal public sector through the *ERA*.³⁹

D. CANADA'S RESPONSE TO THE CRISIS

1) October – December 2008: Negotiating Wage Increase Limits

a) Options

47. In October 2008, in the midst of the arbitration and negotiations with the AJC and other public sector bargaining agents, the Secretariat was informed by officials from the Economic and Fiscal Policy Branch of the Department of Finance (“Finance”)⁴⁰ of the emerging fiscal concerns related to the rapidly deteriorating global economic situation and its implications for the Canadian economy.⁴¹

48. Finance asked the Secretariat to develop measures to restrict spending. A few days later, Finance requested more specific advice from the Secretariat on options to limit compensation costs within the current round of collective bargaining so as to control the growth of the wage bill. Compensation costs are a significant component of government spending. For the 2008-09 fiscal year, compensation costs constituted more than one-third of direct program expenses.⁴²

49. The Secretariat considered several options:

(1) controlling the growth of the employee population;

³⁹ *Budget Implementation Act*, 2009, S.C. 2009, c.2.

⁴⁰ The Economic and Fiscal Policy Branch of the Department of Finance is responsible for monitoring, analyzing and forecasting Canada's economic and fiscal situation and advising the Minister of Finance on these matters. The Branch plays a lead role in the preparation of the federal budget and the fall Economic and Fiscal Update. Rochon Affidavit, at para 3, RR, Vol. *, Tab *, p. 655.

⁴¹ st Laurendeau Affidavit, at para. 47, RR, Vol. *, Tab *, p. 14.

⁴² st Laurendeau Affidavit, at paras. 47-48, RR, Vol. *, Tab *, p. 14.

- (2) controlling movement within pay ranges; and
- (3) wage reductions, eliminating wage increases or limiting wage increases.⁴³

50. The Secretariat advised Finance that controlling the growth of the employee population would not be sufficient and timely given the urgent circumstances. Hiring restrictions, layoffs and departure incentives would not produce immediate savings. Indeed, layoffs and incentives would likely have required additional expenditures. Laying-off public servants would require the government to eliminate or reduce government programs and services. In addition, lay-offs would also risk a serious loss of expertise and experience in the public administration.⁴⁴

51. The Secretariat also advised against controlling movement within pay ranges. The pay component of promotions and other movement within existing pay ranges is provided for in existing terms and conditions of employment and in collective agreements. The Secretariat's view was that the suspension of these provisions would substantially interfere with existing terms and conditions and was not necessary to achieve the government's objectives.⁴⁵

52. Within the third group of options, the Secretariat recommended limited wage increases instead of wage freezes or wage reductions. The Secretariat believed that

⁴³ 1st Laurendeau Affidavit, at para. 50, RR, Vol. *, Tab *, p. 14-15.

⁴⁴ 1st Laurendeau Affidavit, at para. 51, RR, Vol. *, Tab *, p. 15.

⁴⁵ 1st Laurendeau Affidavit, at para. 52, RR, Vol. *, Tab *, p. 15.

freezes or reductions could not be successfully negotiated but that limits to wage increases could be achieved through the collective bargaining process.⁴⁶

b) Implementing the third option

53. The government accepted the recommendation to limit wage increases and instructed its negotiators in the Secretariat to return to the collective bargaining tables with a mandate to negotiate within defined limits. It also instructed the preparation of legislation that would apply where wage increases within the defined limits could not be achieved by collective agreement and that would also apply to unrepresented employees and others.⁴⁷

54. In the fall of 2008, Secretariat officials contacted the AJC and most of the heads of the bargaining agents in the core public administration including; those that were in negotiations, those that had already signed collective agreements and those that had gone to arbitration. They were informed of the new direction and an attempt was made to secure the greatest possible number of agreements before November 27 when the Economic and Fiscal statement was to be delivered. Separate agencies and Crown corporations were encouraged to do the same.⁴⁸

55. On November 18, 2008, the Secretariat presented to the bargaining agents for the core public administration, a final offer consisting of a total salary increase of 6.8 per cent over four years beginning in 2007-8, as follows: 2.3 per cent in the first year and 1.5

⁴⁶ 1st Laurendeau Affidavit, at para. 53, RR, Vol. *, Tab *, p. 15, Exhibit M, p. 235-238.

⁴⁷ Rochon Affidavit, at para. 31, RR, Vol. *, Tab *, p. 665.

⁴⁸ 1st Laurendeau Affidavit, at para. 65, RR, Vol. *, Tab *, p. 19, Exhibit O, p. 247-264.

per cent in each of the subsequent years. The offer to the AJC is described at paragraph 27 above.⁴⁹

56. In the press release that accompanied the final offers, the President of the Treasury Board explained that given the economic uncertainty and tight fiscal circumstances there was an urgent need to ensure predictability in public sector wages meant presenting final offers to the bargaining agents.⁵⁰

57. It was the Secretariat's goal to conclude negotiations with the bargaining agents by November 27, 2008, before release of the Economic and Fiscal Statement and before the introduction of legislation that would limit wage increases. However, by November 26, there were still bargaining agents who wanted to continue negotiations; momentum had picked up with the bargaining agents in the core public administration and separate agencies and it was felt that progress with these groups could be made given more time.⁵¹

58. By early December 2008, after a period of intense negotiation and discussion, the Secretariat had signed agreements within the defined parameters with 14 bargaining agents in the core public administration. These agreements covered approximately 122,000 employees in the core public administration, out of a total bargaining population of approximately 177,649.⁵²

⁴⁹ 1st Laurendeau Affidavit, at para. 66, RR, Vol. *, Tab *, p. 19.

⁵⁰ 1st Laurendeau Affidavit, at para. 66, RR, Vol. *, Tab *, p. 19, Exhibit P, p. 266.

⁵¹ 1st Laurendeau Affidavit, at para. 69, RR, Vol. *, Tab *, p. 20.

⁵² 1st Laurendeau Affidavit, at para. 69, RR, Vol. *, Tab *, p. 20, Exhibit Q, p. 268-271.

2) *The Expenditure Restraint Act*

59. In the November 27, 2008 Economic and Fiscal Statement, the Minister of Finance announced that specific wage increase limits would be applied to federal employees, employees of separate agencies and Crown corporations and Members of Parliament, senators, cabinet ministers and senior public officials. By applying the restraint measures across the board to unionized, non-unionized, executives, Governor-in-Council appointees, MPs and senators he underlined the importance of demonstrating the government's respect for public money by exercising spending restraint in response to the financial crisis and by ensuring that, as the economy slowed, public sector pay did not exceed what taxpayers could afford.⁵³

60. Shortly after delivery of the Statement, Parliament was prorogued. Consequently the federal budget of January 27, 2009, reintroduced most of the spending restraint measures proposed in the November 2008 Statement, including the *ERA* and introduced the stimulus measures.⁵⁴

61. The *ERA* received Royal Assent on March 12, 2009. The *ERA* provides, in part that:

(1) The right to bargain collectively under the *Canada Labour Code*, the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act* is continued (section 6);

(2) Nothing in the *Act* affects the right to strike (section 7);

⁵³ 1st Laurendeau Affidavit, at paras. 60, 68, RR, Vol. *, Tab *, p. 17-18, 20; Rochon Affidavit, at para. 22, RR, Vol. *, Tab *, p. 662, Exhibit H, p. 719-725.

⁵⁴ Rochon Affidavit, at paras. 37, 43, RR, Vol. *, Tab *, p. 666, 668.

(3) Nothing in the *Act* precludes the amendment of a collective agreement or arbitral award, other than a provision relating to its term, as long as the amendment is not contrary to the *Act* (section 8);

(4) Nothing in the *Act* precludes the co-development of workplace improvements by bargaining agents and employers under the auspices of the National Joint Council or any other body that they may agree on (section 9);

(5) Nothing in the *Act* is to be construed as precluding the entitlement of any employee to incremental increases — including any based on the attainment of further qualifications or the acquisition of further skills — or to merit or performance increases, in-range increases, performance bonuses or similar forms of compensation (section 10);

(6) Wage increase limits were set out are as follows: 2.5% for the 2006-2007 fiscal year, 2.3% for 2007-2008, 1.5% for 3 years from 2008-2009 to 2010-2011 (section 16);

(7) For collective agreements that were entered into or arbitral awards that were made before December 8, 2008, the wage increase limits did not apply for the 2006-2007 and 2007-2008 fiscal year (section 19);

(8) The continuation of "additional remuneration" such as allowances, bonuses, differentials or premiums, with no increases to additional remuneration and no new additional remuneration (ss.2, 24-29, and 44-49);

(9) Limits on restructuring rates of pay (section 23) and

(10) The same limits for non-represented employees' terms and conditions of employment (sections 35 to 54).⁵⁵

a) Applicability of the ERA and policy objectives

62. The wage restraint measures applied to approximately 400,000 unionized and non-unionized employees in the federal public sector, including Crown Corporations that are dependent upon appropriation and the compensation reserve, excluding only the

⁵⁵ *Expenditure Restraint Act*, S.C. 2009, c.2, s. 393.

Governor General and Lieutenant Governors, Judges, Military Judges, Prothonotaries, Staff of the Non-Public Funds and the Financial Consumer Agency of Canada.⁵⁶

63. The *ERA*'s policy objectives were complementary elements of the government's larger economic and fiscal policy. These objectives were threefold:

- (1) to help reduce 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 ongoing soundness of the government's fiscal position.⁵⁷

b) 2.5% wage increases for 2006-2007

64. The restraint period in the legislation went back to the 2006-2007 fiscal year because there were three bargaining units in the core public administration that had not yet settled terms and conditions of employment for the 2006-2007 fiscal year. The groups were: LA (law), SR (W) (ship repair, west), and RE (research).⁵⁸

65. To ensure consistency and fairness to other bargaining agents who had already settled with the Treasury Board and separate agencies for 2006-2007, the Secretariat was of the view that the *ERA* should also determine the wage increases for the above-mentioned groups. As such, wage increases provided for by the *Act* for 2006-2007 were

⁵⁶ 1st Laurendeau Affidavit, at para. 80, RR, Vol. *, Tab *, p. 23-24.

⁵⁷ Rochon Affidavit, at para. 33, RR, Vol. *, Tab *, p. 665.

⁵⁸ 1st Laurendeau Affidavit, at para. 81, RR, Vol. *, Tab *, p. 24; Affidavit of H el ene Laurendeau sworn February 23, 2011, (2nd Laurendeau Affidavit), at paras. 5-6, 8-9, RR, Vol. *, Tab *, p. *.

consistent with the pattern amount, i.e. the amount of the increase agreed to with almost all other bargaining agents for that fiscal year of 2.5%.⁵⁹

66. The government was concerned that any arbitral awards for the restraint period that went beyond the *ERA* increases would have a direct and significant impact on the compensation costs for all future years.⁶⁰

c) Exceptions

67. There were five groups (Border Services, Operational Services, Ship's Officer, RCMP and Law) that were allowed to restructure rates of pay and were exempted from the prohibition in the *ERA* on restructuring of pay. The rationale for these exceptions included:

- (1) The Border Services Group was a new group with a new job evaluation plan, and had to have their rates of pay established;
- (2) The Operational Services Group had been negotiating a national rate of pay for a few years before 2008 and an exception was necessary to complete this work;
- (3) In the previous round of bargaining with the Ship's Officer group there had been an agreement to restructure the annual rates of pay and other items which resulted in a more efficient and cost effective means of managing fleet vessels;
- (4) The RCMP were allowed to change or create new allowances in support of their transformation initiatives following the 2007 report of the Task Force on Governance and Cultural Change in the RCMP. The allowances must be approved by the Treasury Board.
- (5) The Law Group required an exception to allow for the harmonization of the pay structure and other terms and conditions of employment for members of the

⁵⁹ 1st Laurendeau Affidavit, at para. 82, RR, Vol. *, Tab *, p. 24; 2nd Laurendeau Affidavit, at para. 7, RR, Vol. *, Tab *, p. *.

⁶⁰ 1st Laurendeau Affidavit, at para. 82, RR, Vol. *, Tab *, p. 24.

LA bargaining unit, part of which had previously been represented by the PIPSC and the other part which had previously been unrepresented.⁶¹

3) The Economic Action Plan

68. The Economic Action Plan that was implemented through the *Budget Implementation Act, 2009*, was based on three principles, namely, that stimulus spending should be: *timely*, to support private demand when it was at its weakest; *targeted*, to businesses and families most in need; and *temporary*, to avoid long-term deficits, with the vast majority of measures expiring on March 31, 2011.⁶²

69. The federal budget introduced 40 billion dollars in federal stimulus measures over two years aimed at supporting the economy and maintaining and creating jobs.⁶³

4) Stimulus and Restraint Combined – Sustainable Fiscal Position

70. In the government's view, the credibility and maximum effectiveness of the Economic Action Plan rested on the government's ability to demonstrate its commitment to sound ongoing fiscal management and long-term sustainable public finances. In order to restore confidence among Canadians, the government considered it necessary to act boldly with a stimulus package and also to ensure that the government's fiscal position was sustainable coming out of the crisis. The *ERA* and spending restraint measures were introduced to help achieve this latter goal.⁶⁴

⁶¹ 1st Laurendeau Affidavit, at para. 79, RR, Vol. *, Tab *, p. 23; 2nd Laurendeau Affidavit, at paras. 2-3, RR, Vol. *, Tab *, p. *.

⁶² Rochon Affidavit, at paras. 42, 45, RR, Vol. *, Tab *, p. 668-669, Exhibit J, p. 732-735.

⁶³ Rochon Affidavit, at para. 42, RR, Vol. *, Tab *, p. 668, Exhibit J, p. 732-735.

⁶⁴ Rochon Affidavit, at para. 45, RR, Vol. *, Tab *, p. 668-669.

5) Conclusion

71. As a result of the government's response to the crisis, Canada fared well experiencing only a short, sharp recession. As remarked by the Governor of the Bank of Canada at the International Center for Monetary and Banking Studies on November 9, 2010, Canada fared relatively well because of the government's response to the crisis.⁶⁵

PART II – POINTS IN ISSUE

72. Is there a contravention of section 2(d) of the *Canadian Charter of Rights and Freedoms*?

(1) Do the impugned provisions of the *ERA*, in purpose or effect, interfere with collective bargaining?

(2) If there is interference is it substantial?

(i) Are the five year statutory limits on wage increases of central importance to the process of collective bargaining, in that they impact the capacity of the union members to come together and pursue common goals?

(a) If the five year statutory limits on wage increases are of central importance to the process of collective bargaining, were they introduced in a manner that respects good faith negotiation or consultation such that these limits did not adversely affect the employees' right to collective bargaining?

73. If the impugned provisions contravene section 2(d) are they saved by section 1 of the *Charter*?

⁶⁵ 2nd Mendicino Affidavit, at para. 22, AR, Vol. *, Tab *, p. *, Exhibit D, AR, Vol. *, Tab *, p. *.