PART III – SUBMISSIONS

A. THERE IS NO CONTRAVENTION OF SECTION 2(D) OF THE *CHARTER*

1) What Section 2(d) Protects

74. As a consequence of the Supreme Court of Canada's decision in *Health Services*, section 2(d) is "...understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining".[66] It is the process which is protected.

75. What is *not* protected or guaranteed is "...the particular objectives sought through this associational activity".[67] "The right to collective bargaining thus conceived is a limited right. ...As the right is to a process, it *does not guarantee a certain substantive or economic outcome*."[68] A specific wage increase – a particular outcome – *in this case an increase of 35%,* is not subject to constitutional protection.(emphasis added)

2) In Purpose or Effect, Section 38 of the *ERA* Did Not Interfere With the Collective Bargaining Process Between the Secretariat and the AJC

76. A purposive approach to freedom of association requires that a distinction be made between "the associational aspect" of a particular activity and the activity itself. A claimant needs to show either (1) that an activity prohibited for a group is permitted for individuals in order to establish that its regulation targets the association *per se* or (2) that

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[66] *Health Services and Support – Facilities Subsector Bargaining Assn.*, [2007] 2 S.C.R. 391 at para.87, Respondent's Authorities, (RA) Vol. 1, Tab 1 (*Health Services).*
[67] *Health Services* at para.89, RA, Vol. 1, Tab 1.
[68] *Health Services* at para.91, RA, Vol.1, Tab 1.

the legislature has targeted associational conduct because of its concerted or associational nature.[69]

77. One may infer from a legislative proscription that applies equally to individuals and groups that the purpose of the legislation is a *bona fide* prohibition of the activity itself rather than the fact that the activity may sometimes be done in association.[70]

78. In *Health Services* the legislation at issue was directed solely at unionized employees in the health sector and their collective agreements and was thus found to be targeted at associational activity. Here, the impugned percentage limits on wages apply to almost all employees in the federal public sector: unionized employees, non-unionized employees, GiC appointees and elected officials. What is targeted, therefore, is not the associational aspect of the activity – the *collective* negotiation of wages and the *process* that accompanies it - but rather the activity itself – the increase to wages themselves or the *outcome* of the process.

79. In *Health Services*, the challenged legislation both unilaterally nullified significant terms in existing collective agreements and precluded future collective bargaining on certain issues. The *ERA* does neither. It specifically preserves collective bargaining and the challenged provisions only prevent increases in wages above the specified limits, for a specific period of time.

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[69] *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016 at para. 18, RA, Vol. 1, Tab 2; *Health Services* at para.32, RA, Vol.1, Tab 1.
[70] *Reference re: Public Service Employee Relations Act*, (Alta.) [1987] 1 SCR 313 at para.89, RA, Vol.1, Tab *.

3) No Substantial Interference With Collective Bargaining

a) Wage increase limits not a matter of central importance and did not affect the ability of union members to come together and pursue common goals

80. Section 2(d) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. "It protects only against "substantial interference" with associational activity...."[71] To determine whether a government measure which relates to the process of collective bargaining amounts to substantial interference involves two inquiries.

81. The first inquiry is how important is the matter affected to the process of collective bargaining and more specifically, to the capacity of the union members to come together and pursue collective goals. The second inquiry is the manner in which the measure impacts the collective right to good faith negotiation and consultation.[72]

82. In addressing the first inquiry the applicant's argument is, in essence, that the *ERA* legislation addresses wages and *ipso facto* substantially interferes with collective bargaining. However, the applicant fails to answer the more specific aspect of the first inquiry: namely, does the legislation affect the ability of union members to come together and pursue collective goals?

83. The evidence demonstrates that union members as represented by their bargaining agent were engaged in a robust bargaining process with the Secretariat. Negotiations

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[71] *Health Services* at para.90, RA, Vol.1, Tab 1.
[72] *Health Services* at para.93, RA, Vol. 1,Tab 1.

began in July 2006 and continued until March 29, 2008 (during which time the AJC had 2 different union presidents). Over this period, from July 2006 to September 2007, the parties participated in 7 formal bargaining sessions, and from November 14, 2007 until March 29, 2008, 4 formal mediation sessions.[73] Although there were limits as to the maximum percentage by which wages could increase annually, this limit did not affect or impede any other aspect of the collective bargaining process as the other terms and conditions of employment were subject to lengthy consultation, negotiation and mediation. As this lengthy process indicates the *ERA* did not impact the capacity of union members to come together and pursue collective goals.

84. On November 18, 2008, the Secretariat presented the AJC with its final offer. Thereafter informal negotiations regarding all other issues continued with unresolved terms proceeding to arbitration, with a decision being released on October 23, 2009.[74] During this year it was open to the AJC as a matter of strategy, given the limit on increase to wages, to use the final wage offer as leverage to revisit terms that had been negotiated or use it in negotiation of the terms that remained outstanding.

85. The arbitral award dated October 23, 2009, addressed the following terms and conditions of employment under the collective agreement: leave, with or without pay for various purposes; information sharing between the Secretariat and the AJC; designated paid holidays; benefits including health insurance, dental insurance, life insurance and long-term disability insurance; reimbursement for parking; hours of work; overtime

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[73] Thibodeau Affidavit, at para.33, RR, Vol. *, Tab *, p.295-298.
[74] Thibodeau Affidavit, at para.33, RR, Vol. *, Tab *, p.298-300.

allowances and rates; travelling time compensation; vacation leave; sick leave; meal expenses; office space; court clothing; annual economic increases; and salary ranges.[75]

86. A collective agreement was ultimately signed by both parties on July 27, 2010, effective November 1, 2009 to May 9, 2011.[76]

87. All the processes that are central to collective bargaining were engaged and utilized by the AJC in their negotiations with the Secretariat. Establishing a monetary limit on wage increases did not affect the capacity of the AJC to pursue collective goals, the process protected by section 2(d). The limits on wage increases impacted only the particular objective sought parity with the Ontario Crowns, which is **not** guaranteed or protected by section 2(d).[77] The *ERA* did not prevent or deny meaningful discussion and consultation about working conditions between employer and employee, and therefore did not substantially interfere with the activity of collective bargaining.[78]

88. Because the statutory limits provided in the *ERA* did not impede or prevent the union's ability to participate in associational activity, namely collective bargaining, there is no requirement to proceed to the second step of the test and determine whether the legislation or its manner of introduction precluded or prevented good faith negotiation and consultation. However, if the *ERA* is found to have impeded the union's ability to negotiate it is the respondent's position that the legislation and its manner of introduction did not prevent good faith negotiation and consultation.

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[75] Thibodeau Affidavit, at para.33, RR, Vol. *, Tab *. p.301, Exhibit D p.539-555.
[76] Thibodeau Affidavit, at para.34; RR, Vol. *, Tab *, p.302.
[77] *Health Services* at para.89, RA, Vol.1, Tab 1.

b) TBS negotiated and consulted in good faith

89. When considering whether legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found.[79]

90. The applicant ignores the context within which the *ERA* was introduced.[80] In this case the Court must take into account:

(1) the exigency and urgency associated with the significant and rapid downturn in the economy;

(2) the advance notice and subsequent good faith attempt by the Secretariat to bargain with the AJC prior to the introduction of the *ERA*;

(3) the time-limited nature of the limits;

(4) the fact that the Secretariat was itself negotiating with many of the 17 bargaining agents, and also engaging with heads of separate agencies and Crown Corporations, all of whom had to be consulted with in a very short time frame;

and finally,

(5) the traditionally confidential nature of the budget process.

91. It is in light of these factors that the duty to bargain in good faith must be assessed. The Supreme Court of Canada's determination in *Health Services* as to what constituted substantial interference with collective bargaining was informed by the

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[78] *Health Services* at para.96, RA, Vol.1, Tab 1.
[79] *Health Services* at para.107, RA, Vol.1, Tab 1.
[80] *Health Services* at para.107, RA, Vol.1, Tab 1.

content of the duty to bargain in good faith. Specifically, the Court commented that "[c]onsideration of the duty to negotiate in good faith which lies at the heart of collective bargaining *may shed light* on what constitutes improper interference with collective bargaining"[81] *(emphasis added).*

92. As a consequence, the Supreme Court looked to decisions in labour matters for guidance. In the labour arena, the duty to bargain in good faith is understood as an essentially procedural obligation and does not dictate the content of any particular agreement achieved through collective bargaining.[82] It has been interpreted as requiring each side to "...honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions".[83]

93. There is no obligation to reach an agreement, nor does it include a duty to accept any particular contractual provisions.[84] A basic element of this duty is the obligation to actually meet and to commit time to the process of negotiation.[85] It imposes an obligation on each party to intend to reach a collective agreement and to make every reasonable effort to achieve that goal.[86]

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[81] *Health Services* at para.98, RA, Vol.1, Tab 1.
[82] *Health Services* at paras.99,100, RA, Vol.1, Tab 1.
[83] *Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 SCR 369 at para.41, RA, Vol. *, Tab *, in *Health Services* at para.101, RA, Vol.1, Tab 1.
[84] *Health Services* at para.103, RA, Vol. 1, Tab 1.
[85] *Health Services* at paras. 99,100, RA, Vol. 1, Tab 1.
[86] Canadian Union of Public Employees v. Nova Scotia (Labour Relations Board), [1983] 2 SCR 311 at 340, *(CUPE v. LRB),* RA, Vol.*, Tab *.

94. In this case, on March 29, 2008, the Secretariat proposed annual increases of 1.5 % for the entire five year period being negotiated, explaining this amount was reasonable given the public sector comparator and the economic outlook.[87]

95. In response the AJC advised they were not sure it was constructive to continue the discussion and indicated they would begin the process of arbitration. By September 2008, the parties had reached an impasse regarding the selection of an Arbitration Chair. On September 24, 2008, the Secretariat asked the PSLRB to establish an Arbitration Board to settle the remaining issues. On October 6, 2008, the AJC responded with additional matters they wanted referred and on October 27, 2008, the Secretariat responded.[88]

96. By email dated November 15, 2008, the Secretariat negotiator, Marc Thibodeau, contacted, then president of the AJC, Patrick Jetté, and then AJC counsel, Steven Barrett. He informed them of the new economic direction being taken by the government and asked them if they would be interested in resuming negotiations in light of these new economic conditions, noting in particular, the Minister of Finance's speech on the state of the economy and its possible impact on negotiating mandates.[89]

97. The signalling of this potential change in negotiating mandate is good faith consultation that prevents the change in mandate from adversely affecting the employees' right to collective bargaining.[90] This consultation was drastically different in content and

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[87] Thibodeau Affidavit, at para.33, RR, Vol. *, Tab *, p.298; 1st Mendicino Affidavit, AR, Vol.*, Exhibit N at p. 153,*.
[88] Thibodeau Affidavit, at para.33, RR, Vol. *, Tab *, p.298.
[89] 2nd Laurendeau Affidavit, RR, Vol.*, Exhibit O, p.264.
[90] *Health Services* at para.129, RA, Vol.1. Tab 1.

timing from the notice the unions received in *Health Services.* In that case a union representative was advised 20 minutes before Bill 29 was introduced in the legislative assembly that the "government would be introducing legislation dealing with employment security and other provisions of existing collective agreements." This was the only consultation with the unions on the legislation before the Act was passed.[91]

98. On November 18, 2008, the Secretariat presented a final offer of increases of 2.5 % for 2006; 2.3% for 2007 and 1.5% for each of 2008, 2009, 2010; improving on the previous offer of 1.5 % for every year.[92]

99. Contextually this offer was made at a time when it was expected that the unemployment rate across Canada would progressively increase from 6.2% in 2008, to 8.5% in 2009 and finally to 9.1% in 2010.[93]

100. It was in this economic climate that the AJC sought to have the salary for all LA lawyers across Canada raised by more than one third to achieve parity with that paid Ontario Crown Attorneys, most of whom work in the Greater Toronto Area. The Secretariat's position was that the percentage increases it proposed were appropriate, for two fundamental reasons. First, the LA group did not have recruitment or retention issues (despite their attempt to demonstrate otherwise) and the overwhelming majority of lawyers in the LA group practise outside of Toronto.[94] It was the Secretariat's undisputed documentary evidence that LAs had consistently been recruited at a higher rate than the

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[91] *Health Services* at para.7, RA, Vol.I, Tab 1.
[92] Thibodeau Affidavit, RR, Vol. *, Exhibit C, p.395.
[93] Thibodeau Affidavit, RR, Vol. *, Exhibit C, p. 344.

number of separations.[95] From March 2000 to March 2009, the number of employees in the LA group actually grew 61.8%.[96]

101. Approximately three quarters of the lawyers employed by the Government of Ontario work in the Greater Toronto Area. As a consequence, the province of Ontario must constantly compete to retain lawyers for whom private practice in Toronto is a lucrative alternative. The median salary for lawyers in Toronto is consistently and significantly higher than in any other major city across Canada.[97]

102. Had the Ontario Crown Attorneys been used as the *sole* baseline for LA Group compensation, this would have resulted in a significant increase in federal government lawyers salaries across the country as only 10.9% of employees in the LA group practice in Toronto with the balance of 89.1%, working elsewhere in Canada. As a result, in many places the salary paid LAs would far exceed the salary levels of provincial government and private practice counterparts alike.[98]

103. The Secretariat conducts regular wage comparison between lawyers in the LA group and equivalent provincial/territorial government lawyers. In most cases, even though the LA group rates had expired in 2006, they were still quite competitive with the average of the provincial/government rates for lawyers across the country, most of which

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[94] Thibodeau Affidavit, at para. 58, RR, Vol. *, Tab *, p.307.
[95] Thibodeau Affidavit, at paras. 44-54, RR, Vol.*, Tab *, p. 305-306.
[96] Thibodeau Affidavit, at para. 53, RR, Vol.*, Tab *, p. 306.
[97] Thibodeau Affidavit, at paras. 58, 59, RR, Vol.*, Tab *, p.307, Exhibit H, p.653.
[98] Thibodeau Affidavit, at paras.55-60, RR, Vol.*, Tab *, p. 306-307.

have more recent effective dates. The LA salary levels were comparable to those paid to lawyers employed by the provincial/territorial governments.[99]

104. The applicant asserts that the *ERA* has a "uniquely detrimental" impact on the AJC because there was no baseline for negotiating wages because this was the AJC's first collective agreement. To accept this assertion ignores the baseline established by the current wages paid to LAs as well the wages paid to the lawyers represented by the PIPSC. The PIPSC lawyers had historically been subject to a collective agreement, an agreement as the Secretariat negotiator Mr. Thibodeau explained in cross examination, that the AJC inherited in the same way the Union of Canadian Correctional Officers inherited an agreement.[100] While the number of lawyers represented by PIPSC was admittedly a small group, as Mr. Thibodeau explained, the framework for management of compensation is the same regardless of the size of the group to which it is applied.[101]

105. Even if the court was inclined to accept that a baseline had not been established nothing prevents establishment of this baseline in future negotiations. The applicant also complains that as a consequence of *ERA* their salary level will forever be negatively impacted. This is simply not true. Nothing prevents this bargaining agent or any other from seeking an increase in wages based on whatever factors they believe persuasive i.e. market conditions or otherwise. Nor is there anything that prevents a future arbitration board from establishing increases that it considers warranted.

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[99] Thibodeau Affidavit, at paras. 61-64, RR, Vol. * , Tab *, p. 308-309, Exhibit C, p.383-387.
[100] Thibodeau Cross-examination, p.13, Q.49 to p.14, Q.52, AR, Vol.*, Tab *, p. *.
[101] Thibodeau Cross-examination, p.178-9, Q. 699, 700, AR, Vol.*, Tab *, p. *.

106. However what is abundantly clear from these submissions is that the heart of the AJC's complaint is not a deprivation of a process or breach of the duty to bargain in good faith but rather frustration at not receiving the sought after financial outcome.

107. In this case, the employer did not engage in bad faith bargaining. The negotiations between the parties were no longer fruitful as of March 29, 2008 when the AJC indicated they wanted to proceed to arbitration. In fact, from this date, to the date of the final offer, there was no further negotiation.

108. In a factually similar case, *PIPSC v Treasury Board*, the PIPSC complaint alleging bad faith bargaining was dismissed because:

> (1) the wage increase proposal in the final offer was higher than the employer's original wage increase offer;
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> (2) the employer was not demanding significant rollbacks or concessions from the bargaining unit;
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> (3) the same wage offer was made by the employer to all bargaining agents;
>
> (4) the employer's position was not "inflexible and intransigent to the point of endangering the very existence of collective bargaining", noting that the employer had provided some rationale or justification for its position in bargaining, namely to ensure predictability in expenditures.[102]

109. As in the *PIPSC* case above, the final offer to the AJC was higher than the Secretariat's original proposal, the Secretariat was not demanding any rollbacks or significant concessions from the bargaining agent and made this same wage offer, to the majority of the public service, with consistent rationale; this action did not endanger the

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[102] 2009 PSLRB 102, [2009] C.P.S.L.R.B. No. 102 at paras. 91- 93, 97, RA, Vol. *, Tab *.

existence of collective bargaining and the position was justified.[103] However unlike the *PIPSC* case, the AJC did not make a complaint of bad faith bargaining.

110. *Health Services* cautions that the right to collective bargaining is "...the right to a process, it does not guarantee a certain substantive or economic outcome.[104]" Yet it is the desire for a specific economic outcome that forms the basis for the applicant's assertion that the *ERA* substantially interferes with collective bargaining.

111. The implication of the applicant's argument is that if the legislation provided for an increase of 35%, i.e. a particular economic outcome, the limit would not substantially interfere with the AJC members' section 2(d) rights.[105] Determination of what constitutes substantial interference cannot be results based. Such an approach effectively constitutionalizes the outcome of collective bargaining.

112. As a consequence, the actions of the Secretariat in light of the new economic landscape and anticipated legislative changes, satisfies its obligation to consult and negotiate in good faith.[106]

4) International Labour Organization- Committee on Freedom of Association Reports

113. The applicant places heavy reliance on reports from the ILO Committee on Freedom of Association and urges this Court to do the same, citing the Supreme Court of

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[103] *Iberia Airlines of Spain*, (1990) 80 di 165, CLRB no.796, upheld FCA [1991] FCJ No.146, RA, Vol. *, Tab *; *CUPE v. LRB*, [1983] 2 SCR 311 at 340, RA, Vol. *, Tab *.
[104] *Health Services* at para.91, RA, Vol.1, Tab 1.
[105] Applicant's factum at para.90, AR,*.

Canada's use of international law in *Health Services* and its comment that the *Charter* should provide the same level of protection found in human rights documents Canada has *ratified.*[107] Canada has ratified the International Labour Organization Convention 87 – Freedom of Association and Protection of the Right to Organize, 1948 which focuses on the right to associate. It does not address collective bargaining.

114. The conventions dealing with collective bargaining, C98 - Right to Organize and Collective Bargaining Convention, 1949, C151- Labour Relations Public Service Convention, 1978 and C154 –Collective Bargaining Convention, 1981 have not been ratified by Canada. Under the ILO constitution, member states cannot be bound by the provisions of conventions which they have not ratified.[108] Regardless, the Committee on Freedom of Association (CFA) will receive a complaint and issue a report *whether or not the country concerned has ratified the relevant conventions.*

115. This Committee is non adjudicative and has been described as a "representative" or "political" body with equal representation of workers, employers, and governments. Its members are not legally trained and it does not issue legal opinions. It has also been noted that it can in no way be compared to a procedure of inquiry in the context of legal proceedings as its focus is fact finding and conciliation.[109]

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[106] 1st Laurendeau Affidavit, RR, Vol.*, Exhibit O, p. 264; Thibodeau Affidavit, at para. 33, RR, Vol.*, Tab *, p. 298.
[107] *Health Services* at para. 71, RA, Vol.1, Tab 1.
[108] Brian A. Langille, "Can we Rely on the ILO?" Cdn Labour and Employment Law Journal, 13 C.L.E.L.J. 273 at 279, RA, Vol.*, Tab *.
[109] Brian A. Langille, "Can we Rely on the ILO?" Cdn Labour and Employment Law Journal, 13 C.L.E.L.J. 273 at 286-287, RA, Vol.*, Tab *.

116. It issues reports through the Governing Body and makes recommendations on how a situation can be remedied and while these interpretations may shed light on the interpretation of section 2(d), these interpretations, as the SCC recognized in *Health Services*, are not binding on states at international law.[110]

117. The applicant relies upon the ILO Committee on Freedom of Association case reports 1616, 1758 and 1800, all of which deal with complaints made fifteen to twenty years ago by federal government unions regarding wage restraint legislation in the early nineties. Unlike the ILO recommendations cited by the applicant, the *ERA* was imposed in response to a rapidly developing international financial crisis; was part of an international effort about which there was significant consensus to address the crisis; was not part of a pattern of recent or ongoing limitations on bargaining; contemplated wage increases that were in accordance with maintaining an appropriate standard of living; maintained the mechanisms available in the collective bargaining process and were imposed in a manner that was not only respectful of the bargaining process but indeed engaged the bargaining process.

B. IF THE *ERA* INFRINGES THE *CHARTER*, IT IS JUSTIFIED UNDER SECTION 1

1) Infringement Justified

118. If the *ERA* infringes the applicant's right to freedom of association, a contextual analysis under section 1 of the *Charter* demonstrates that this infringement is justified. The objectives were pressing and substantial: there was a rational connection between the

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[110] *Health Services* at para. 76, RA, Vol. 1, Tab 1.

objectives and the means chosen to attain them: the impugned provisions were minimally impairing and there was proportionality between the objective and the measures adopted.

119. The analysis under section 1 of the *Charter* must take into account the need for Courts to show deference to Parliament in relation to the choices it must make, the economic aspects of this particular challenge and the context in which the impugned legislation was enacted.

2) Relevant Considerations in the Section 1 Analysis

a) Deference to Parliament

120. The *ERA* was not an isolated measure but a significant element of the government's integrated and phased response to a set of extremely challenging economic and fiscal conditions. That response was carefully designed in all of its elements to address the short-term negative impacts of the recession in Canada and also ensure an early return to budgetary balance and long-run fiscal sustainability. Doing so is, in turn, the means of ensuring Canada's long-term growth and prosperity, stabilizing its economy, preserving its standard of living and maintaining programs, services and social benefits.[111]

121. The question of the appropriate response to the global economic crisis is one that is within the specific institutional competence of Parliament and the executive. As the Supreme Court has recognized, these types of questions call upon the institutional

[111] Rochon Affidavit, at paras.69-70, RR, Vol. *, Tab *, p. 680.

competence of the government to mediate among competing interests and competing social science evidence. Chief Justice Dickson opined that:

> ...courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems. The question how best to combat inflation has perplexed economists for several generations. It would be highly undesirable for the courts to attempt to pronounce on the relative importance of various suggested causes of inflation, such as the expansion of the money supply, fiscal deficits, foreign inflation, or the built-in inflationary expectations of individual economic actors. A high degree of deference ought properly to be accorded to the government's choice of strategy in combating this complex problem. Due deference must be paid as well to the symbolic role of government. Many government initiatives, especially in the economic sphere, necessarily involve a large inspirational or psychological component which must not be undervalued. The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the Charter. Thus, in the present case, I am prepared to accept the respondent's submission that compensation controls, even if limited to a select class of employees, could reasonably have expected to have a positive, albeit partial and indirect, impact on combating inflation in the economy in general. I am also prepared to accept that the temporary suspension of collective bargaining on compensation issues was a justifiable infringement of freedom of association having regard to the third limb of the proportionality test.[112]

122. The Supreme Court has stated that legislatures are best placed to sort out these types of difficult policy choices, particularly choices related to industrial relations policy, terms and conditions of employment and especially those which affect working conditions in the public service. Decisions regarding these matters have impact beyond

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[112] *Public Service Alliance of Canada v. Canada (Attorney General)*, [1987] 1 S.CR 424 at para. 36, RA, Vol. *, Tab * (*PSAC*); See also *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at paras. 54-55, (a complex regulatory response to a social problem dictates a more deferential posture), RA, Vol. *, Tab *.

the parties to the collective agreement and often relate to the allocation of scarce public resources,[113]

123. As a consequence, a reviewing court should afford flexibility to the legislature and the executive in making these decisions.[114] In *McKinney v. University of Guelph*, the majority of the Supreme Court noted that these sorts of decisions are "of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch."[115]

124. For these reasons, substantial deference should be given to Parliament and the executive when determining whether any infringement of the applicant's *Charter* rights is justified under section 1.

b) Economic justification

125. Although budgetary considerations in and of themselves cannot normally justify a breach of *Charter* rights, the Supreme Court of Canada noted that financial considerations intertwined with other public policy considerations can qualify as sufficiently important objectives under section 1. The objectives identified in this case, although fiscal or financial in nature, are intertwined with other public policy considerations that qualify as pressing and substantive objectives.

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[113] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board)*; *Bodner v. Alberta*; *Conférence des juges du Québec v. Quebec (Attorney General)*; *Minc v. Quebec (Attorney General)*, [2005] 2 S.C.R. 286, RA, Vol. *, Tab *.

[114] *M. v. H.*, [1998] 1 S.C.R. 877 at para. 78, RA, Vol. *, Tab *; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at 342 (*RJR*), RA, Vol. *, Tab *.

[115] [1990] 3 S.C.R. 229 at p. 305, paras. 104-105, RA, Vol. *, Tab *.

126. The AJC has cast its members' economic rights, that is, the right to a certain level of wages, as a cornerstone of its argument in this application. If the Court is inclined to protect aspects of the collective bargaining process which ensure the attainment of economic outcomes, it would follow that a government should be able to justify limits to collective bargaining based on economic rationale.

> It is the question of whether the right to collective bargaining – a right to a process designed to improve predominately *economic outcomes* for workers – is subject to limits under section 1 of an economic or budgetary nature. In principle, rights of an economic nature should be subject to limits of an economic nature.[116]

127. To the extent that the section 2(d) *Charter* right to a process of collective bargaining protects the amalgam of a civil and economic right, the courts should be receptive to economic justifications under section 1. While the Supreme Court of Canada has been hesitant to accept budgetary considerations for the purposes of a section 1 justification, except in unusual situations, the Court has not foreclosed the possibility.[117]

c) Context

128. Context is important to and informs all stages of the section 1 analysis. Four contextual factors have been identified as relevant to the section 1 analysis: (i) nature of the harm; (ii) the vulnerability of the group protected; (iii) subjective fears and

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[116] Robin K. Basu, "Revolution and Aftermath: B.C. Health Services and Its Implication" (2008) 42 S.C.L.R. (2d) 165, at 209, RA, Vol. *, Tab *.
[117] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para.64, RA, Vol. *, Tab *.

apprehension of harm, and (iv) the nature of the infringed activity. The consideration of these elements, as relevant, is addressed throughout the section 1 argument.[118]

3) *Oakes* Test

129. The *Oakes* test articulates the criteria which must be met to justify an infringement of a *Charter* right as follows:

(i) the objective must be pressing and substantial;

(ii) there must be a rational connection between the pressing and substantial objective and the means chosen by the law to attain the objective;

(iii) the impugned provision must minimally impair the *Charter* guarantee; and

(iv) there must be proportionality between the objective and the measures adopted and specifically between the positive and negative effects of the law.[119]

4) Pressing and Substantial Objectives

130. The pressing and substantial objectives of the *ERA* were threefold: (i) to help reduce upward pressure on private sector wages, (ii) to provide leadership to Canadians by showing restraint and respect for public money and (iii) to ensure predictability in management of public sector wage bill and ensure soundness of government's medium term fiscal position.[120]

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[118] *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at paras. 87-94, RA, Vol. *, Tab *; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at paras, 77-88, RA, Vol. *, Tab *; *R v. Bryan*, [2007] 1 S.C.R. 527 at para.10 (*Bryan*), RA, Vol. *, Tab *.

[119] *R v. Oakes*, [1986] 1 S.C.R. 103 at paras.62-79, RA, Vol. *, Tab *; *Health Services* at para. 139, RA, Vol. 1, Tab 1.

[120] Rochon Affidavit, at para. 33, RR, Vol. *, Tab *, p. 665.

131. The *ERA* addressed intersecting macro-economic and social policy objectives that were part of the government's response to the extraordinary crisis and rapid decline in Canada's economy and the resulting impact on Canadians. During this time of economic crisis, the government had to respond quickly and take measures it believed would ensure predictability in its expenditures and thereby assist in stabilizing the economy.

132. Given the great economic uncertainty and contraction in the economy at the end of 2008 and early 2009, limits on public sector wage increases were one of the measures that had to be introduced urgently to achieve the government's objectives. The limits had both economic and social policy objectives. They were intended to show leadership and signal to Canadians the need for restraint and caution in their financial affairs during this time of uncertainty.

133. The importance of the leadership role of government in difficult economic times was recognized by the Supreme Court of Canada as justification for legislation that imposed public sector wage controls in the 1980s. Chief Justice Dickson in the *PSAC v. Canada* decision noted above found, in dissent, that section 2(d) protected collective bargaining and that the wage controls were a breach of those rights. However, he found that the breach was justified and noted "...it was permissible for Parliament to exercise governmental leadership in compensation restraint by legislative means, rather than by merely adopting a firm posture in labour negotiations".[121]

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[121] *PSAC*, at para.40, RA, Vol. *, Tab *.

a) Reduce upward pressure on private sector wages

134. Minister Flaherty, in his October 2008 speech stated:

> We are entering an extremely difficult period for Canadian families, who are counting on their governments to get down to work and follow a sensible realistic plan to protect their earnings, their savings and their jobs.
>
> .....
>
> We all recognize that public sector employees work hard for Canadians, and that they must be adequately compensated. It is in the public interest that public sector compensation be determined responsibly in a manner that does not add pressure on businesses that are already feeling the pinch of an economic slowdown.[122]

135. Public sector employment accounts for approximately 20% of total employment in Canada. Public sector wage settlements influence private sector wage settlements, given that private sector firms compete directly and indirectly with the public sector for labour in many markets.[123]

136. Economic studies support the theory that an increase in public-sector wages tends to put upward pressure on private sector costs as it increases the attractiveness of public-sector jobs relative to private-sector jobs, inducing some private-sector employees to look for jobs in the public sector. As a result, firms in the private sector need to increase their wages to retain or attract employees. Higher wages, not justified by economic conditions, have been shown to dampen private sector job creation.[124]

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[122] Rochon Affidavit, at para. 27, RR, Vol. *, Tab *, p. 664, Exhibit G, p. 712-717.
[123] Rochon Affidavit, at para. 49, RR, Vol. *, Tab *, p. 670.
[124] Rochon Affidavit, at para. 49, RR, Vol. *, Tab *, p. 670, Exhibits M-1 to M-8, p. 745-1032.

137. The growth in public sector wages had been accelerating and had surpassed that of private sector wages in both 2006 and 2007. While the increase in private sector wages had begun to moderate in 2008, the upward trend in public sector settlements continued. By 2008, the differential between growth in public sector and private sector wages was sizeable and had the potential to create pressure on the private sector.[125]

138. The government was concerned that a large and growing public-private wage differential in light of falling growth in private sector wages would have put upward pressure on the private sector wage costs during a difficult financial time. This would have exacerbated the impacts of the recession and led to a greater number of job losses.[126] Consequently, one of the aims of the *ERA* was to appropriately manage public sector compensation so as to reduce pressure on private sector wages in order to allow private sector employers to adjust wages to the extent needed to deal with the economic downturn.[127]

139. This factor was of particular concern in the Province of Ontario. The federal government is the largest single employer in Canada, with more than 400,000 employees. More than 40% of these employees work in Ontario. The federal government therefore competes most directly in, and has the greatest influence on, Ontario's labour market.[128]

140. The Ontario labour market has been among the most severely hit nationally during the recession, reflecting an export sector that has been under extreme pressure

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[125] Rochon Affidavit, at para. 50, RR, Vol. *, Tab *, p. 671.
[126] Rochon Affidavit, at para. 52, RR, Vol. *, Tab *, p. 672, Exhibit G, p. 711-717.
[127] Rochon Affidavit, at para. 53, RR, Vol. *, Tab *, p. *, Exhibit H, p. 54.

from a rising Canadian dollar, strong productivity gains in the U.S. manufacturing sector, ongoing restructuring in the manufacturing sector and, most importantly, the sharp decline in U.S. demand for Canadian exports (more than 80% of Ontario's exports of goods go to the U.S.). The government therefore considered it important to avoid putting any undue upward pressure on private sector wages in Ontario and also elsewhere in the country. [129]

141. Similarly, the federal government aimed to indirectly reduce pressure on private sector wages by setting an example for other orders of government in Canada through the introduction of the *ERA*. All other governments in Canada have been affected by the recession and also compete, to varying degrees, in labour markets with the federal government and the private sector.[130]

142. Since the introduction of the *ERA*, most provincial governments (Nova Scotia, New Brunswick, Ontario, Manitoba, Alberta, British Columbia and Quebec) have also acted to moderate the growth of their public service compensation.[131]

b) Leadership through restraint and respect for public money

143. In reply to the November 19, 2008 Speech from the Throne, the government expressed its intentions regarding restraint and respect for public money:

> It is becoming apparent that financial and monetary actions may not be sufficient to deal with the present crisis. Already

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[128] Rochon Affidavit, at para. 54, RR, Vol. *, Tab *, p. 672.
[129] Rochon Affidavit, at para. 54, RR, Vol. *, Tab *, p. 673.
[130] Rochon Affidavit, at para. 55, RR, Vol. *, Tab *, p. 673.
[131] Rochon Affidavit, at para. 56, RR, Vol. *, Tab *, p. 673, Exhibit N, p. 1033-1035, Exhibit O, p. 1036-1038, Exhibit P, p. 1039-1041, Exhibit Q, p. 1042-1044.