

governments around the world have been responding with large budgetary actions, and we will see many more. China has announced a half-trillion dollar package to bolster domestic spending; the United Kingdom and the United States, although already deeply in deficit, are moving ahead with additional fiscal stimulus.

In short, world governments have resolved that they will undertake whatever financial, monetary and budgetary measures are necessary to cope with the crisis, and, let me be clear, this is also the position of the Government of Canada.

We will undertake whatever short-term fiscal measures are necessary to be part of a global economic solution to a global economic problem. We will do so while ensuring our country's fundamental strengths and competitive advantages are still in place when turmoil subsides.<sup>132</sup>

144. In the November 27, 2008 Economic and Fiscal Statement, the government's plans for restraint and respect for public money were outlined in detail. With respect to public sector compensation, it was noted:

Responsible fiscal management also means that public sector wage increases must be affordable. Since the beginning of the year, wage growth in the public sector has been leading that of the private sector. The Government believes that a more moderate growth in public sector compensation is appropriate in the circumstances. Recognizing these circumstances, some of the largest public sector bargaining agents have shown leadership by signing tentative settlements that provide reasonable wage increases for their members and are affordable for the Government.<sup>133</sup>

145. Constraining the public sector wage bill was considered to be particularly important in the context of a recession that resulted in widespread job losses in the

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<sup>132</sup> Official House of Commons Debates (Hansard). 1st Sess., 40th Parl., vol. 143, No. 003, November 20, 2008, (Peter Milliken), Leg. His., Vol. \*, Tab \*, p. \*.

<sup>133</sup> Economic and Fiscal Statement 2008, <http://www.fin.gc.ca/ec2008/Ec/ectoc-eng.html>, RR. Vol. \*, Tab \*, p. \*.

private sector and significant concern over the health and viability of private sector pension plans. In contrast, employment levels in the federal public service were generally stable and pensions were secure.<sup>134</sup>

146. Therefore the government judged it appropriate to moderate the growth of all whose wages are paid by the public purse.<sup>135</sup>

147. These broad aims of the *ERA* were acknowledged by the Public Service Alliance of Canada (PSAC) when it signed a collective agreement with the federal government. In a news release by PSAC dated November 24, 2008, its President stated:

Talks began in an expanding economy with reasonable expectations of economic increases. Times change, the economic landscape has been altered and now, after 18 months of bargaining, a deal has finally been reached that does not contain any concessions.

148. The press release went on to announce:

In view of the current economic circumstances, the government has mandated wage increases across the federal public service. While these increases are less than what our members expected when bargaining began, circumstances have changed and many Canadians are now facing the prospect of layoffs and the loss of pension benefits.

In response to these difficult economic times, PSAC and its Bargaining Teams adjusted wage expectations and returned to negotiations with resolve to negotiate significant improvements in a number of areas of long-standing concern to our membership.

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<sup>134</sup> Rochon Affidavit, at paras. 57 and 58, RR, Vol. \*, Tab \*, p. 675.

<sup>135</sup> Rochon Affidavit, at para. 58, RR, Vol. \*, Tab \*, p. 675; Exhibit R, p. 1045-1048.

These agreements serve to protect and enhance the employment and economic security of PSAC members and provide the government with a predictable wage bill until 2011.<sup>136</sup>

149. These broad aims of the *ERA* were also articulated by Minister Flaherty in response to questions at the House of Commons Standing Committee on Finance:

.....[W]e are in the midst of a very serious recession. Thousands of Canadians are going to lose their jobs. I hope you don't think it is reasonable as I don't think it is reasonable, for public sector workers not be cognizant of the fact that fellow Canadians in the private sector, thousands of them, are losing their jobs. What we're asking people in the public sector to do, including you and me, is to limit our pay increases to 1.5% over the course of the next few years.<sup>137</sup>

**c) *Manage the public sector wage bill to ensure ongoing soundness of the government's medium-term fiscal position***

150. The public sector wage bill is a major federal expenditure and growth in the wage bill has a strong and direct influence on federal spending and Canada's fiscal position.

151. It was understood that limiting wage increases across-the-board would moderate the growth of the wage bill and avoid the uncertainty inherent in the collective bargaining and arbitration processes. In a time of declining revenues and looming deficits public sector wages had to be affordable but without exacting a heavy sacrifice from public servants.

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<sup>136</sup> Rochon Affidavit, at para. 59, RR, Vol. \*, Tab \*, p. 675-676, Exhibit S, p 1049-1050.

<sup>137</sup> Standing Committee on Finance, "Evidence" in the House of Commons, FINA, 2nd Sess., 40th Parl., No. 007, February 23, 2009 (James Rajotte), Leg. His., Vol. \*, Tab \*, p. 5.

152. The government believed that limiting wage increases would ensure predictability by crystallizing the compensation cost estimates. This predictability was crucial to the credibility of the government's response to the economic crisis. This was noted in the clause by clause review of the *ERA*, in answers to questions in the Standing Senate Committee on National Finance and in the House of Commons Debates.<sup>138</sup>

153. In restraining wage increases the government acted consistently with a December 2008 IMF recommendation that public sector wage increases should not form part of any stimulus package.<sup>139</sup>

154. The government's overall approach was also consistent with the consensus reached by G-20 Leaders at the November 14-15, 2008, Summit on Financial Markets and the World Economy:

Against this background of deteriorating economic conditions worldwide ...we will... [u]se fiscal measures to stimulate domestic demand to rapid effect, as appropriate, while maintaining a policy framework conducive to fiscal sustainability.<sup>140</sup>

*d) Conclusion*

155. When considering the pressing and substantial objective, the Court has recognized the importance of the entire legislative context as a legitimate aspect of this part of the analysis:

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<sup>138</sup> House of Commons Debates, 40th Parl, 1st Sess, Vol 143, No 2 (19 November 2008) at 1530, Leg. His., Vol. \*, Tab \*, p. \*; House of Commons Debates, 40th Parl, 1st Sess, Vol 143, No 6 (25 November 2008) at 1420 (Hon Jim Flaherty), Leg. His., Vol. \*, Tab \*, p. \*; House of Commons Debates, 40th Parl, 1st Sess, Vol 143, No 8 (27 November 2008) at 1625 (Hon Jim Flaherty), Leg. His., Vol. \*, Tab \*, p. \*; House of Commons Debates, 40th Parl, 1st Sess, Vol 143, No 9 (28 November 2008) at 1315 (Hon Vic Toews), Leg. His., Vol. \*, Tab \*, p. \*.

<sup>139</sup> Rochon Affidavit, at para. 47, RR, Vol. \*, Tab \*, p. 669, Exhibit K, p. 736-738.

<sup>140</sup> Rochon Affidavit, Exhibit L, RR, Vol. \*, p. 739-743.

The place and function of the challenged provisions in the legislative scheme must be carefully identified. The nature of the system and its broader objectives have to be kept in mind. The analysis should not consider the infringing provision apart from its legislative context.<sup>141</sup>

156. In this case the impugned legislation was part of a suite of policy and legislative actions that were intended to address the negative impacts of the recession and stimulate the economy. “The law is clear that the first stage of the section 1 analysis is not an evidentiary contest... the proper question at this stage of the analysis is whether the Attorney General *has asserted* a pressing and substantial objective.” As noted by Chief Justice McLachlin and Justice Major in *AGC v. Harper*, a “theoretical objective asserted as pressing and substantial is sufficient for purposes of the section 1 justification analysis”.<sup>142</sup>

### 5) Rational Connection

157. In *R v. Bryan*, the Court accepted that “the rational connection stage of the test requires the Attorney General to show a causal connection between the infringement and the benefit sought on the basis of reason or logic”.<sup>143</sup>

158. This has been interpreted to mean that the government must demonstrate that it is at least “possible to argue that the means may help to bring about the objective”, or that “the measure or legislative scheme in question may promote (as opposed to inevitably

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<sup>141</sup> *Vriend v. Alberta* [1998] 1 S.C.R. 493, S.C.J. No. 29, at paras.101-3, RA, Vol. \*, Tab \*; *R. v. Advance Cutting and Coring Ltd.* [2001] 3 S.C.R. 209, S.C.J. No. 68, at para. 255 (*Advance Cutting*), RA, Vol. \*, Tab \*.

<sup>142</sup> *Harper v. Canada (AG)*, [2004] 1 S.C.R. 827, S.C.J. No. 28, at paras.25, 26, RA, Vol. \*, Tab \*; *Bryan*, at para. 32, RA, Vol. \*, Tab \*, see also *PSAC*, at p.439-40, RA, Vol. \*, Tab \*.

<sup>143</sup> *RJR*, at para 153, RA, Vol. \*, Tab \*; *Bryan*, at para 39, RA, Vol. \*, Tab \*.

accomplish) the objective sought. This stage of the analysis has been described by the courts as "not particularly onerous".<sup>144</sup>

159. The question at this stage of the s. 1 inquiry is whether there is a reasonable basis for believing that the chosen means will achieve the desired objective. Proof of a relationship between an infringing measure and the objective is not essential. The Supreme Court has made it clear that a common sense analysis based on logic and reason is all that is needed to establish a rational connection.<sup>145</sup> The question is whether the means employed are a logical way of attempting to achieve the objective, not whether they will in fact be successful in doing so.

160. The evidence in this case establishes the reasonableness of the belief that the limits on wage increases imposed by the *ERA* would achieve the desired objectives. In seeking to avoid putting upward wage pressure on the private sector, the Government relied on economic theory, supported by the literature, which holds that public sector wage increases tend to put upward pressure on private sector wage costs, with detrimental effect where not justified by economic conditions. Further, the Government's overall approach in restraining spending, including public sector compensation costs, and ensuring fiscal sustainability was consistent with the consensus of G-20 Leaders and the expert advice of the IMF. This is sufficient to establish a rational connection between the *ERA* and its intended benefits.

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<sup>144</sup> *Health Services*, at para 148, RA, Vol. 1, Tab 1; *Canada (Attorney General) v. JTI Macdonald Corp.*, [2007] 2 S.C.R. 610, S.C.J. No. 30, at para. 40, RA, Vol. \*, Tab \*.

161. The choice of means was well within Parliament's discretion in such matters. This is pre-eminently an area requiring the exercise of legislative judgment, and in the "dialogue of mutual respect" created by the *Charter* it is important to keep in mind that, as the Supreme Court noted in *Vriend v. Alberta*:

In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.<sup>146</sup>

#### 6) Minimal Impairment

162. The inquiry under the "minimal impairment" test asks whether the law or government action at issue is within a range of reasonable alternatives:

The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement...<sup>147</sup>

163. Other options considered to restrict spending on the wage bill included a hiring freeze, not replacing departing employees, laying off employees and offering departure

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<sup>145</sup> *Canadian Broadcasting Corporation v. New Brunswick (A. G.)*, [1996] 3 S.C.R. 480, at para. 48, RA, Vol. \*, Tab \*; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 502-03, RA, Vol. \*, Tab \*.

<sup>146</sup> This Court has repeatedly recognized that it is not the function of the judiciary to second-guess policy choices made by the legislative branch: *Harvey v. New Brunswick (A.G.)*, [1996] 2 S.C.R. 876, at para. 47, RA, Vol. \*, Tab \*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 136, RA, Vol. \*, Tab \*; quoted with approval in *M. v. H.*, at para. 78, RA, Vol. \*, Tab \*.

incentives, freezing wage growth by suspending movement within pay ranges, suspending promotions and suspending upward reclassification of positions.<sup>148</sup> These options were rejected as they were viewed as more intrusive and detrimental to public sector employees and their impact would not be seen quickly enough.

164. Moreover the Supreme Court of Canada in *M v. H.* recognized that “the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make”.<sup>149</sup> In *Eldridge v. British Columbia*,<sup>150</sup> the Court similarly commented that, “It is also clear that while financial considerations alone may not justify *Charter* infringements... governments must be afforded wide latitude to determine the proper distribution of resources in society...”

165. In this case it was decided that containing future pay increases throughout the public sector would accomplish the government’s objective in the least intrusive manner, given the options available and the timeframe for achieving savings, for employees would still see increases, albeit lesser than in previous years. Ancillary compensation features such as movement within pay ranges, leave, performance, overtime and leave would not be affected.<sup>151</sup> The measures were time-limited, preserved collective bargaining and were preceded by consultation and negotiation.

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<sup>147</sup> *RJR*, at para. 160, RA, Vol. \*, Tab \*.

<sup>148</sup> 1<sup>st</sup> Laurendeau Affidavit, at para. 50, RR, Vol. \*, Tab \*, p. 14-15.

<sup>149</sup> *M v. H.*, at para. 78, RA, Vol. \*, Tab \*.

<sup>150</sup> [1997] 3 S.C.R. 624, at para. 85, RA, Vol. \*, Tab \*.

<sup>151</sup> 1<sup>st</sup> Laurendeau Affidavit, at para. 54, RR, Vol. \*, Tab \*, p. 16.



166. Other countries took more drastic measures to deal with the crisis. The United States, the United Kingdom and Ireland, froze or cut wages.<sup>152</sup>

167. 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.<sup>153</sup>

168. As repeatedly demonstrated by the evidence on the record, the government was faced with an unprecedented crisis that required prompt action. In light of the overall level of economic uncertainty at the time determination of the precise response required weighing of numerous options and potential impacts. To the extent possible the government's choice minimized any negative impacts on *Charter* rights and while at the same time achieving the goals of the *ERA* legislation. The Supreme Court has determined when Parliament is tackling complex problems of this type deference is appropriate:

There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing.<sup>154</sup>

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<sup>152</sup> Rochon Affidavit, Exhibit V, RR, Vol. \*, p. 1061-1064.

<sup>153</sup> Rochon Affidavit, at para. 56, RR, Vol. \*, p. 673-674.

<sup>154</sup> *JTI- Macdonald*, at para 43, RA, Vol.\* Tab \*

169. In these circumstances there is no question that the *ERA*, as one element of the entire legislative response to the global economic crisis is within a “range of reasonable alternatives”. As contemplated in *RJR Macdonald*, any impairment of the plaintiffs’ subsection 2(d) rights arising from use of that alternative is minimal.<sup>155</sup> Finally, as stated by the Supreme Court in *Bryan*, supra:

Parliament considered the alternative options proposed ... and determined the s. 329 scheme to be the most effective and least intrusive; there is sufficient evidence in the particular context of this case showing that the policy choice of Parliament is a rational and justifiable solution to the problem of informational imbalance.<sup>156</sup>

170. The minimal impairment test is therefore met in the case at bar.

### **7) Proportionality**

171. The final part of the *Oakes* analysis requires that there be a proportionality between the effect of the means and its objective so that the infringement of the guaranteed right does not overshadow the legislative objective. In other words, do the deleterious effects outweigh the salutary effects?

172. The seriousness of the global economic crisis and its potential long lasting effect in Canada was such that the benefit of the responsive measures instituted, including the *ERA*, far outweighed any detrimental impact suffered as a consequence of the inability to negotiate an increase in salary beyond that provided by the statutory ceiling.

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<sup>155</sup> *RJR MacDonald*, at para. 160, RA, Vol.\* Tab \*

<sup>156</sup> *Bryan*, , at para 47 RA, Vol.\* Tab \*

173. This Court's consideration of proportionality should consider the overall legislative context and recognize that, unlike the legislation at issue in *Health Services*, this legislation does not alter previously negotiated terms for the AJC and does not permanently preclude matters that historically were subject to collective bargaining. The *ERA* does not inhibit or prohibit collective bargaining but merely puts a ceiling on the amount wages can be increased, a matter of outcome not process.

174. The AJC entered into a collective agreement on July 27, 2010 and it is set to expire May 10, 2011. It will be free to pursue wages as it sees fit in this next round of collective bargaining.

#### **8) Conclusion**

175. In completing its section 1 analysis the Court is urged to recognize the broad public policy issues naturally intertwined in labour relations in the public sector. Such issues should transcend the interests or working conditions of the affected employees. Workplace democracy must be carefully balanced with Parliamentary democracy within our constitutional framework. "... [G]overnment must retain its authority as it does in every other context to regulate contracts to ensure that they are consistent with the broader public good, and not just the private interest of one or both parties to the contract."<sup>157</sup>

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<sup>157</sup> Robert E. Charney, *The Contract Clause Comes to Canada: The British Columbia Health Services Case and the Sanctity of Collective Agreements* (2008) 23 N.J.C.L. 65, at p. 82, RA, Vol. \*, Tab \*.

**C. WHAT REMEDY IS APPROPRIATE IF THERE IS FOUND TO BE AN UNJUSTIFIED *CHARTER* VIOLATION?**

176. Given that the nature and extent of the remedy depends upon the characterization of the *Charter* breach by this Court, the AGC asks that the parties be allowed to make submissions on remedy after the decision on the merits has been rendered.

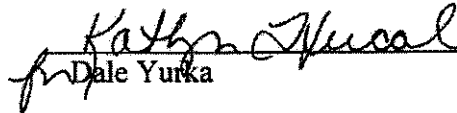
**PART IV – ORDER SOUGHT**

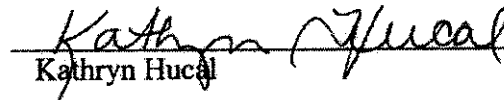
177. Order sought:

- (1) There is no section 2(d) infringement and the application be dismissed;
- (2) In the alternative if there was a section 2(d), it was justifiable under section 1 of the *Charter* and the application is dismissed;
- (3) In the further alternative if there was a section 2(d) infringement and it was not justifiable under section 1 of the *Charter*, issuance of a section 24 declaration of the claimant's section 2(d) rights or strike down the current collective agreement and send it back to be re-negotiated in accordance with the *ERA*;
- (4) In the final alternative if there was a section 2(d) infringement and it was not justifiable under section 1 of the *Charter*, issuance of a section 52 declaration is suspended for 24 months.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 7<sup>th</sup> day of April, 2011

  
Dale Yurka

  
Kathryn Hucal

Solicitors for the Respondent

**SCHEDULE "A"**

**TABLE OF AUTHORITIES**

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5. *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369
6. *Canadian Union of Public Employees v. Nova Scotia (Labour Relations Board)*, [1983] 2 S.C.R. 311
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11. *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. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, [2005] 2 S.C.R. 286
12. *M. v. H.*, [1999] 2 S.C.R. 3
13. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199
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16. *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)*, [1998] 1 S.C.R. 877
17. *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827
18. *R. v. Bryan*, [2007] 1 S.C.R. 527
19. *R v. Oakes*, [1986] 1 S.C.R. 103
20. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
21. *R. v. Advance Cutting and Coring Ltd.*, [2001] 3 S.C.R. 209
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23. *Canadian Broadcasting Corporation v. New Brunswick (A.G.)*, 1996] 3 S.C.R. 480
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26. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624
27. *Independent Electricity System Operator v. Canadian Union of Skilled Workers*, [2011] O.J. No. 941
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29. *R. v. Ferguson*, [2008] S.C.J. No. 6
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31. *R. v. Nasogaluak*, [2010] 1 S.C.R. 206
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34. Robin K. Basu, "Revelation and Aftermath: B.C. Health Services and Its Implication" (2008) 42 S.C.L.R. (2d) 165

35. Robert E. Charney, *The Contract Clause Comes to Canada: The British Columbia Health Services Case and the Sanctity of Collective Agreements* (2008) 23 N.J.C.L. 65

**SCHEDULE "B"**

**TABLE OF STATUTES**

1. *Expenditure Restraint Act*, S.C. 2009, c.2, s. 393, ss. 2, 8-10, 16, 19, 23, 24-29, 35-54



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AND

Applicants

ATTORNEY GENERAL OF CANADA

Respondent

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

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