PART I – IDENTIFYING STATEMENT

1. The Attorney General of Canada ("the Attorney General") seeks an Order:

   (a) staying the Judgment of the Honourable Mr. Justice A. Duncan Grace, dated March 26, 2012 ("Judgment"), pending disposition of this motion;

   (b) staying the Judgment of the Honourable Mr. Justice A. Duncan Grace, dated March 26, 2012 ("Judgment"), pending disposition of the appeal and cross-appeal in this Court;

   (c) granting the Attorney General his costs of the motion; and

   (d) granting such further and other relief as counsel may advise and this Court permit.

2. By Reasons for Decision dated November 1, 2011, Justice Grace found that paragraphs 16(a) and 34(1)(a)(ii) ("the impugned provisions") of the *Expenditure Restraint Act,* S.C. 2009, c. 2 *("ERA")* constituted an unjustifiable infringement of the Applicant's right to freedom of association under s. 2(d) of the *Charter.* He held down the issue of the appropriate remedy pending further submissions from counsel.

3. By Reasons on Remedy dated March 26, 2012, Justice Grace declared the impugned provisions to be invalid. He further ruled that this declaration should take immediate effect. However, he granted a 30-day suspension of his decision to allow the Attorney General to seek a further stay of his decision pending appeal in this Court.

PART II – OVERVIEW

4. Justice Grace's decision strikes down two provisions of the *ERA,* a statute enacted as part of the federal government's comprehensive response to the financial crisis which peaked in late 2008 and early 2009. From the *ERA,* that applies to approximately 400,000 federal public servants, the following two provisions were struck:

(a) paragraph 16(a): which provides for a maximum wage increase of 2.5% for 2006-2007; and

(b) subparagraph 34(1)(a)(ii): which sets out the pay grid for the LA Group (federal public sector lawyers).

5. The Attorney General has appealed, and the Applicant has cross-appealed from this decision.

6. With respect to the three factors for granting a stay:

(a) The constitutionality of legislation constitutes a serious issue to be tried;

(b) The removal of these two provisions from the *ERA* and the harms resulting from this removal, constitute irreparable harm; and

(c) The balance of convenience, specifically the public interest, favours the granting of a stay.

7. Allowing Justice Grace's decision to stand until these appeals are determined would invalidate legislative provisions that were enacted in the public interest – namely, the interest of responsible financial and economic management. Under these circumstances, this Court can presume that there would be irreparable harm to the public interest.

8. However, refusing to grant a stay also raises the very real possibility that the parties may have to re-open an expired collective agreement and re-negotiate portions of the pay grid for one particular employee group – the LA Group. The parties would enter into this process with the equally real possibility that the outcome of the process could be set aside or further impacted by the decision of this Court in the appeal and cross-appeal.

9. Attempting to reach a collective agreement in these circumstances would be unprecedented and would cause a number of harms to the public interest. Specifically, it would cause harms both with respect to labour-management relations between the employer and the LA Group but also with respect to other employee groups within the federal public service. With respect to the LA Group, allowing Justice Grace's decision to stand pending the appeal and cross-appeal would create harm by fomenting great uncertainty in the labour-management relationship between the Applicant and the employer. It would also result in a number of additional harms arising from the potential inconsistent treatment of employees, and the raising of expectations within the LA Group. With respect to other groups within the federal public service, allowing the decision to stand pending the appeal and cross-appeal would create harms such as the perceived inequities of having exceptions to the *ERA* created for one particular group.

10. A stay pending the disposition of this appeal is necessary to maintain the status quo until the appeal and cross-appeal from Justice Grace's decision can be resolved by this Court. The balance of convenience favours a stay in order to ensure the continuation of a stable, efficient and procedurally understood relationship between the applicant bargaining agent and the employer, help maintain certainty in the legal and labour relations process, and enhance public confidence in the administration of justice.

PART III – FACTS

A. BACKGROUND

1) Labour Management Relations between the Applicant and Treasury Board

11. The Applicant union, the AJC, has been the bargaining agent for all members of the LA Group (except for excluded employees) since 2006. This Group consists of federal public sector lawyers employed primarily at the Department of Justice Canada, and also employed in various government departments and agencies. There are over 2,300 employees in the LA bargaining unit. These individuals are employed across the country, with more than half working in Ontario.[1]

12. The AJC served its first notice to bargain on the employer on May 10, 2006. The parties proceeded to bargain but were ultimately unable to conclude a collective agreement. For this reason, in 2009, the employer requested arbitration before an Arbitration Board, in accordance with the *Public Service Labour Relations Act* ("*PSLRA*").[2]

13. The Arbitration Board issued its decision on October 23, 2009. The Board held that it was bound by provisions of the *ERA* with respect to all fiscal years at issue (2006/07 to 2010/11) and for that reason, all wage increases were limited to those prescribed by s. 16 of the *ERA*.[3]

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[1] **Affidavit of Carl Trottier**, sworn April 13, 2012, Motion Record of the Moving Party ("MR"), Tab 2, paras. 9-10.
[2] **Affidavit of Carl Trottier**, MR, Tab 2, para. 11.
[3] S.C. 2003, c. 22. **Affidavit of Carl Trottier**, Exhibit "A": **Arbitral Award between AJC and Treasury Board,** dated October 23, 2009, MR, Tab 2A.

14. On June 27, 2010, the first collective agreement for the LA Group was signed by the parties. This collective agreement expired on May 9, 2011.

2) Current Status of Negotiations

15. Prior to the expiry of its first collective agreement, the AJC filed a notice to bargain on March 18, 2011. Again, the parties reached an impasse in the negotiations. On October 7, 2011, the AJC requested that the Public Service Labour Relations Board ("PSLRB") establish an Arbitration Board. Mediation before the Arbitration Board is currently scheduled for May 29-30, 2012 and should mediation fail to reach a resolution, the Arbitration Board has scheduled an oral hearing for June 26-28, 2012. Wage increases for the year 2011/12 going forward are among the issues to be put to the Arbitration Board.[4]

3) The *Expenditure Restraint Act*

16. On June 10, 2010, the AJC issued its Notice of Application in this proceeding, challenging the entirety of the *ERA* as inconsistent with s. 2(d) of the *Charter of Rights and Freedoms* in a manner that could not be saved by s. 1.[5]

17. The *Expenditure Restraint Act* was one element of the Government's comprehensive response to the financial crisis which peaked in late 2008 and early 2009 and resulted in the most serious global economic recession since the 1930s. In

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[4] **Affidavit of Carl Trottier**, para. 20, MR, Tab 2.
[5] Notice of Application, dated June 9, 2010, MR, Tab 3.

keeping with the paramount aim of responsible economic and fiscal management, the objectives of the *ERA* were to:[6]

> (a) help to reduce upward pressure on private sector wages and salaries;
>
> (b) provide leadership by showing restraint and respect for public money; and
>
> (c) manage public sector wage costs in an appropriate and predictable manner that would help ensure the ongoing soundness of the Government's fiscal position.

18. The *ERA* applies broadly to approximately 400,000 unionized and non-unionized employees in the federal public sector.[7] This includes employees for which Treasury Board is the employer, but also employees in separate agencies, appropriation-dependent Crown Corporations, the Senate, the House of Commons, the Library of Parliament, the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner. Further, the *ERA* applies to directors of the Crown corporations and public bodies named in Schedule 1 of the *ERA*, officers and non-commissioned members of the Canadian Forces and the Chief Electoral Officer. It also applies to persons appointed by the Governor in Council.

19. From a fiscal management perspective, the *ERA* was not enacted as either an isolated or interim measure. As recognized by Justice Grace, and by the trial judge in the *Dockyard Council* case, the *ERA* was part of the government's overall 2009 Economic Action Plan, which consisted of a

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[6] **Affidavit of Carl Trottier**, MR, Tab 2, para. 15; *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2011 BCSC 1210, Book of Authorities of the Moving Party ("BOA"), Tab 2, paras. 117-136, 151-153.

[7] **Affidavit of Carl Trottier**, MR, Tab 2, para.12.

> complex, interlocking and multifaceted set of legislative and policy initiatives intended to address the negative effects of the recession and stimulate the economy.[8]

The *ERA* was part of the government's strategy to "assist in restoring budgetary balance and fiscal sustainability in the medium to long term."[9]

20. Section 16 of the *ERA* sets the maximum increases to rates of pay for federal employees for any 12-month period that begins during the fiscal years 2006-2011. In particular, paragraph 16(a) limits the maximum wage increase for the 2006-2007 fiscal year to 2.5%.

21. Paragraph 34(1)(a) of the *ERA* applies specifically to the LA Group. It generally provides for the following:

- The collective agreement or arbitral award for the Group cannot have retroactive effect prior to May 10, 2006.
- Wage increases have to be based on the pay grid found at Schedule 2. The pay grid at Schedule 2 harmonizes the rates of pay for the lawyers who had previously been represented by the Professional Institute of the Public Service of Canada (PIPSC) and the lawyers who had previously been unrepresented.
- The performance pay plans and additional remuneration that had previously applied to the two groups of lawyers are to be harmonized.

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[8] *Dockyard Council,* BOA, Tab 2, para. 112. See also Reasons for Decision of Grace J., dated November 1, 2011, MR, Tab 4, paras. 15-21, 83-90, 105.
[9] *Dockyard Council,* BOA, Tab 2, para. 112. See also Reasons for Decision of Grace J., dated November 1, 2011, MR, Tab 4, paras. 15-21, 83-90, 105.

B. THE JUDGMENT OF GRACE J.

22. Justice Grace's decisions, released on November 1, 2011 and March 26, 2012, declared paragraph 16(a) and subparagraph 34(1)(a)(ii) of the *ERA* invalid as an unjustifiable infringement of the Applicant's s. 2(d) right to associate under the *Charter.*

23. Justice Grace granted a suspension of his decision for 30 days. The current suspension expires on April 25, 2012, but the parties have agreed to take no actions with respect to the decision until the hearing of this motion.

24. The Attorney General of Canada filed his Notice of Appeal of Justice Grace's decision on November 29, 2011. In the Notice, the Attorney General asks that Justice Grace's decision be set aside on the basis that he erred in finding the impugned provisions unconstitutional.[10] The Applicant filed its Notice of Cross-Appeal on December 9, 2011. In its Notice, the Applicant asks the Court to overturn Justice Grace's decision and to strike down the *ERA*, in its entirety, on the basis that the *Act* as a whole unjustifiably violates its s. 2(d) right.[11]

C. JUSTICE GRACE'S DECISION IS ONE OF SEVERAL CURRENT CHALLENGES TO THE ERA

25. Justice Grace's decision is the third decision from superior courts across the country addressing the constitutionality of the *ERA*. Two other decisions, one from the Federal Court (*Meredith and Roach)*, and one from the Supreme Court of British Columbia (*Dockyard Council)*, have also considered the constitutionality of the *ERA*.

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[10] Notice of Appeal, filed November 29, 2011, MR, Tab 6.
[11] Notice of Cross-Appeal, dated December 9, 2011, MR, Tab 7.

1) Meredith and Roach v. Attorney General of Canada (Federal Court)

26. In *Meredith and Roach* v. *Attorney General of Canada,*[12] two members of the Royal Canadian Mounted Police sought judicial review of a December 11, 2008 Treasury Board decision eliminating an allowance and reducing future wage increases, and challenged the constitutionality of certain provisions of the *ERA*.

27. The Federal Court found that the Treasury Board decision setting the RCMP wages together with sections 16, 35, 18, 43, 46 and 49 of the *ERA* unjustifiably violated s. 2(d) of the *Charter*. The Federal Court quashed the Treasury Board decision but declined to order a remedy in respect of the *ERA*.

28. The Attorney General appealed the decision to the Federal Court of Appeal. The appeal was heard in January 2012, and a decision is pending.

2) Federal Government Dockyard Trades and Labour Council v. Attorney General (British Columbia Supreme Court)

29. In *Federal Government Dockyard Trades and Labour Council* v. *Attorney General*, the Supreme Court of British Columbia upheld the constitutional validity of the *ERA*. In that case, the Dockyard Council (representing the Ship Repair (West) bargaining unit), sought to have the *ERA* declared unconstitutional on the basis that it deprived its members of a 2006 wage increase of 5.2% that had been awarded through arbitration.

30. The Supreme Court of British Columbia dismissed the action, finding that the nullification of the 2006 wage increase did not violate the *Charter*, and in any

[12] *Meredith v. Canada (Attorney General),* 2011 FC 735, BOA, Tab 1.

event, that a breach would have been justified under s. 1 as part of the Government's response to the 2008 economic crisis. The court's findings in the *Dockyard Council* case stand in contradistinction to the findings of Justice Grace in his decision in the court below. The Dockyard Council has appealed the decision to the Court of Appeal for British Columbia. Facta have been filed in the appeal, but currently, a hearing date has not been set.

3) Other challenges

31. In addition to these three proceedings, there are six other constitutional challenges to the *ERA* at different stages of proceeding before the superior courts in Quebec and Ontario.

32. Three proceedings have been commenced in the Ontario Superior Court of Justice:

> (a) ***Public Service Alliance of Canada et al v. Attorney General of Canada*** **and** ***Professional Institute of the Public Service of Canada et al v. Attorney General of Canada***: In these two applications, bargaining agents have challenged the constitutionality of the *ERA* and the *Public Service Equitable Compensation Act*.[13] Affidavits are currently being exchanged and a hearing on these applications is not expected until 2013.
>
> (b) ***Pamela Isfeld and the Professional Association of Foreign Service Officers*** **v.** ***Attorney General of Canada***: In this application, filed in March of 2011, the bargaining agent representing Foreign Service officers employed in the federal public service has challenged ss. 16 to 34 and 56 to 65 of the *ERA*. At this time, only the initial Notice of Application has been filed.

33. In addition, three proceedings have been commenced in the Quebec Superior Court:

> (a) ***Association des Réalisateurs c. PGC et Société Radio-Canada*** **and** ***Syndicat Canadien de la Fonction Publique et al. c. PGC et Société Radio-***

[13] S.C. 2009, c. 2, s. 394.

Canada: These two actions (now joined) were filed by unions representing different groups of employees at Radio-Canada (CBC). The unions assert that s. 16, 19, 21, 23, 24, 26, 27, 29, 56 and 57 of the *ERA* substantially interferes with the process of collective bargaining by invalidating provisions of their collective agreements concerning remuneration and preventing future negotiation on the subject, without any discussions or consultation with the unions. A hearing before the Superior Court of Québec took place on May 18-20, 2011. Written submissions were filed over the summer and a decision is pending; and

(b) ***UCCO-SACC-CSN and Pierre Mallette* v. *Attorney General of Canada***: In this application, the bargaining agent representing federal correctional officers has challenged ss. 16 to 34 and ss. 56 to 65 of the *ERA*, along with certain limitations of collective bargaining found in the *PSLRA*. The application was filed in October of 2010 and the parties are currently at the expert report stage of the process. A hearing is not expected until sometime in 2013.

PART IV – THE ISSUES AND LAW

34. The only issue is whether this Court should grant a stay, pending the disposition of the appeal and cross-appeal in this Court.

A. The Three-Part Test for Granting a Stay

35. In order to grant a stay, this Court must be satisfied that:

(a) There is a serious issue to be tried;

(b) The party seeking the stay would suffer irreparable harm should the stay not be granted; and

(c) The balance of convenience favours a stay.[14]

36. The test for granting a stay is to be applied flexibly. The Manitoba Court of Appeal has ruled that the points "are to be considered, not as separate hurdles but as interrelated considerations,"[15] and this Court has ruled:

> These three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must

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[14] *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR MacDonald*"), BOA, Tab 3.

[15] *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1994] 7 W.W.R. 420, 95 Man. R. (2d) 241 (C.A.), BOA, Tab 4, para. 14.

> decide whether the interests of justice call for a stay: *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.). Nonetheless in many cases whether to grant a stay will depend on the third criterion, called the balance of convenience or the balance of inconvenience.[16]

B. The Constitutionality of the Impugned Provisions Constitutes a Serious Issue to be Determined

37. The constitutionality of the impugned provisions of the *Expenditure Restraint Act* constitutes a serious issue to be determined on appeal.

38. This first part of the test for granting a stay is easily satisfied. This Court has long held that the constitutional validity of legislation clearly constitutes a serious issue for the purposes of the first part of the test for granting a stay. In *Horsefield v Ontario (Registrar of Motor Vehicles)*, in relation to a constitutional challenge to the provisions of the *Highway Traffic Act*, Finlayson J.A. held:

> **... there is no issue that the constitutional validity of the impugned legislation is a serious question to be determined.** Additionally, recognizing that the threshold of satisfying this test is a low one, I am content to say that the judgment under appeal makes a limited analysis of existing case-law and is not directly supported by any authority.[17]

C. Failure to Grant a Stay would result in Irreparable Harm to the Public Interest

a) Legal Principles

39. Irreparable harm is generally categorized as harm that cannot be remedied by an award of damages, and refers to the "nature of the harm suffered rather than the

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[16] *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.) at pp. 676-7, BOA, Tab 5, para. 8. See also *Longley v. Canada (Attorney General)*, 2007 ONCA 149, 153 C.R.R. (2d) 224, BOA, Tab 6, para. 15. (*Longley*)

[17] *Horsefield v Ontario (Registrar of Motor Vehicles)* (1997), 35 O.R. (3d) 304 (C.A.) at p. 311, BOA, Tab 7, para. 17. (emphasis added). See also *Falkiner v. Ontario (Ministry of Community and Social Services)* (2000), 49 O.R. (3d) 564 (C.A.), BOA, Tab 8 and *Harper v. Canada*, [2000] 2 S.C.R. 764, 2000 SCC 57, BOA, Tab 9, para. 4 (*Harper*).

magnitude".[18] When considering the granting of stays in *Charter* cases, the Supreme Court has held that the public interest should be considered at this stage and at the final stage of the stay test.[19] Indeed, this Court has noted that because public interest is part of the consideration in both of these stages, "cases involving the constitutionality of legislation, irreparable harm and balance of convenience tend to blend together and they are often considered together."[20]

40. The public interest is a "*special factor*"[21] in assessing the second and third parts of the test, irreparable harm and the balance of convenience. While both parties can rely on the public interest, the Supreme Court held in *RJR-MacDonald* that a public authority is subject to a less onerous standard when seeking to demonstrate irreparable harm to the public interest:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined.[22]

b) The legislative void created by Justice Grace's decision constitutes irreparable harm

41. Justice Grace's decision strikes out provisions of the *Expenditure Restraint Act*, legislation enacted by Parliament in the public interest. On its own, this is sufficient to constitute irreparable harm should a stay be denied.

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[18] *Canadian Council for Refugees v. Canada*, 2008 FCA 40, 373 N.R. 387, BOA, Tab 10, para. 23 (*Canadian Council for Refugees*).
[19] *RJR-MacDonald*, BOA, Tab 3, para. 81.
[20] *Bedford v. Canada (Attorney General)*, 2010 ONCA 814, BOA, Tab 11, para. 24.
[21] *RJR-MacDonald*, para. 64.
[22] *Ibid* at para. 71. See also *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 338 (C.A.), p. 343, BOA, Tab 12, para. 21 (*Henco*).

42. The Supreme Court has held that where impugned legislation has been enacted pursuant to a public authority's responsibility to promote the public interest, irreparable harm can be presumed to occur should the court not grant a stay:

> The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. **Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.**
>
> **A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought.**[23]

This principle helps to ensure that the results of Parliamentary deliberations on point are not readily cast aside, pending appeal, by the opinion of one single judge of one single superior court.

43. Where the "nature and declared purpose of legislation is to promote the public interest", a court hearing a stay motion should assume that the law's effect promotes the public good.[24] This principle applies directly to the impugned provisions here, which were enacted in response to an unprecedented economic crisis and in keeping with the paramount aim of responsible economic and fiscal management.

44. The practical effect of Justice Grace's decision is to carve out an exception, from legislation that applies broadly to approximately 400,000 public servants, to one particular group of employees. As outlined below, the ripple effects of allowing this decision to stand include a number of harms, not only with respect to the labour

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[23] *RJR-MacDonald*, BOA, Tab 3, paras. 71-72 (emphasis added). See also *Henco,* p. 343, BOA, Tab 12, para. 21.
[24] *RJR-MacDonald*, BOA, Tab 3, para. 80; *Harper,* BOA, Tab 9, para. 9.

relations for the employee group in question, but also for other employee groups that are affected by the *ERA*. Failure to grant a stay in these circumstances would cause irreparable harm to the public interest.

c) The failure to grant a stay would cause irreparable harm to the public interest

i) Failure to grant a stay would harm labour relations and collective bargaining with the LA group

45. The failure to grant a stay pending the resolution of the appeal and cross-appeal in this case would cause harm to labour relations and collective bargaining with the LA Group. First and foremost, allowing the decision to stand would create great uncertainty in the relationship between the Applicant and the employer. Attempting to reopen and renegotiate or re-arbitrate a previously signed and now expired collective agreement, while the parties are already set to present their positions to an Arbitration Board on the next collective agreement, would be unprecedented.[25]

46. Collective bargaining in the Core Public Administration operates under the framework provided in the *Public Service Labour Relations Act*. The *PSLRA* provides clear rules and a predictable bargaining cycle for the parties at the bargaining table.

47. It does not however provide for a process to revisit wage increases set out in a concluded collective agreement. It would be necessary to develop a mutually acceptable process to reopen the collective agreement for the 2006/07 fiscal year, within the framework of the *PSLRA*. The *PSLRA* does not provide for any process to re-open a concluded and expired collective agreement. With the parties already at the

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[25] **Affidavit of Carl Trottier**, para. 32, MR, Tab 2.

arbitration stage of a subsequent round of collective bargaining, the process by which wage increases could be determined is unclear, would have to be negotiated between the parties and as such is fraught with difficulty.

48. Assuming that a mutually agreeable process could be developed between the parties for reopening these issues, reaching a collective agreement in these circumstances poses significant challenges. Attempting to reach a collective agreement always requires a significant investment of time and energy from both the union and the employer. This is especially the case here, where on both occasions that the parties have attempted to reach a collective agreement, they have failed to do so through collective bargaining, and have had to resort to arbitration.

49. For the employer, developing positions in bargaining is complicated, and is based on a matrix of considerations, such as group specific pressures, labour market conditions, the state of the Canadian economy, the current government agenda, and operational issues.[26] Here, it would be even more difficult for the employer to develop positions, either at arbitration or in negotiations, in light of the uncertainty created by the appeal and cross-appeal and potentially having to proceed with 2 negotiations simultaneously, one for the 2006-2007 year and one for the next collective agreement for the period beginning 2011-2012.

50. Even if the parties were to agree that the results of such a process would not be implemented pending the appeal and cross-appeal, as suggested by Justice Grace, this would not negate the harms set out above. The parties would still face the

[26] **Affidavit of Carl Trottier**, para. 35, MR, Tab 2.

challenges of attempting to reach a collective agreement described above. Moreover, delaying implementation of any collective agreement would itself be accompanied by other potential harms.

51. Specifically, should the parties reach an agreement concerning the 2006/2007 pay grid, *inter alia,* the results would create expectations for the members of the AJC that they were deserving of a much greater increase than legislatively provided. If the Attorney General is successful on appeal, the AJC membership's expectation that it is deserving of a higher wage would continue, negatively impacting employee morale and labour relations generally between the Treasury Board and the LA Group. Low employee morale could also lead to poor productivity and absenteeism.[27]

52. If the AJC is successful in its cross-appeal, this would still result in a high degree of uncertainty, as increases for the four additional fiscal years (2007/08, 2008/09, 2009/10 and 2010/11) would have to be re-determined.

53. It should also be noted that delaying implementation of a collective agreement or an arbitral award runs contrary to the presumption of implementation contained in the applicable sections of the *PSLRA.* With respect to collective agreements, s. 117 of the *PSLRA* provides that the "parties must implement the provisions of a collective agreement" as set out in the collective agreement, or within 90 days of signature, or any longer period that may be agreed to by the parties, or that the Board may set on application by either party. Similarly, with respect to arbitral

[27] **Affidavit of Carl Trottier**, para. 37, MR, Tab 2.

awards, s. 157 of the *PSLRA* provides that the parties must implement the provisions of the award within 90 days or within such time as may be agreed by the parties, or that the Board may set on application by either party.

54. Should the Applicant and the employer reach a "conditional" agreement on these matters before the disposition of the appeal and cross-appeal, and should the parties seek to implement the agreement, a host of further difficulties would arise.

55. A revisited pay grid and 2006/07 wage increase would be extremely complicated to implement, and even more complicated to reverse once implemented.[28] This would create a huge burden on the compensation system, both in terms of time and resources. Adjustments would have to consider the consequential impacts on wages, but also on matters such as CPP and EI deductions, and pension and supplementary death benefits. Any adjustment would need to be recovered from the employees, if the Ontario Court of Appeal affirms that the *ERA* is constitutional, or further amended if the AJC's cross-appeal is successful and wage increases for four additional fiscal years (2007/08, 2008/09, 2009/10 and 2010/11) are revisited.[29] This would require a third re-opening of the collective bargaining process and potentially a third arbitral decision on the same matter, should the AJC be successful in its cross-appeal.

d) Failure to grant a stay has the potential to create inequities between LA's in Ontario and other provinces/territories

[28] **Affidavit of Carl Trottier**, para. 39, MR, Tab 2.
[29] **Affidavit of Carl Trottier**, para. 39, MR, Tab 2.

56. As a decision of the Ontario Superior Court of Justice, Justice Grace's decision applies only in Ontario. As such, paragraphs 16(a) and 34(1)(a)(ii) of the *ERA* continue to be in force elsewhere in Canada. Moreover, in the *Dockyard Council* case, the Supreme Court of British Columbia has explicitly upheld provisions of the *ERA* limiting wage increases for the same fiscal period as is at issue in this proceeding.

57. For these reasons, any revised salaries reached pursuant to negotiations or arbitration arising from Justice Grace's decision would not necessarily apply to members of the LA Group located outside of Ontario. Reaching a collective agreement that would apply only to employees in Ontario would create a perception of unfairness for members of the LA Group employed outside of Ontario. This would create a recruitment and retention pressure for the employer, particularly in the National Capital Region (NCR), where lawyers who work closely together and perform similar work are employed on either side of the provincial boundary, i.e. in Ottawa, Ontario and Gatineau, Québec. Approximately 51% of the total LA Group population is located in the NCR.

e) Failure to grant a stay would cause harm to other employee groups

58. The limits on wage increases contained in s. 16 of the *ERA* apply fairly and consistently to all employees subject to the *Act* – the *Act* applies to approximately 400,000 public servants.[30] Revisiting the LA Group pay grid and the 2006/07 wage

[30] The *ERA* contains certain exceptions to the prohibition on restructuring for certain groups: the Border Services Group (ss. 31 and 51); the Operational Services Group (ss. 32 and 52); the Ships' Officers Group (ss. 33 and 53); and the Law Group (ss. 34 and 54). Once the restructuring was completed, the wage increases provided at s. 16 also applied to those groups.

increases would create a perception of unfairness in other individuals covered by the *ERA*.

59. In particular, Justice Grace's decision has a direct effect not only on members of the LA Group, but also on other groups to which paragraph 16(a) of the *ERA* applies. Practically speaking, paragraph 16(a) of the *ERA* impacts three groups of employees in the CPA: the LA Group, the Research Group (RE) (represented by PIPSC), and the Ship Repair (West) Group (SR(W)) (represented by the Dockyard Trades and Labour Council).

60. All of these groups are currently involved in constitutional challenges to the *ERA* that are before the courts. As described above, in the case of the Dockyard Council and in the case of the RCMP, appeals from the lower court decisions are currently outstanding.

61. With respect to the Research Group (a group with employees located in Ontario and in other provinces), their union, the Professional Institute for the Public Service of Canada ("PIPSC"), received an arbitral award for this group on March 23, 2009. This award provided for wage increases consistent with the *ERA* back to fiscal year 2006/07. PIPSC has challenged the *ERA* in a separate proceeding filed at the Ontario Superior Court of Justice on behalf of the six bargaining units it represents in the CPA, including the Research Group.[31] The application has not yet been heard.

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[31] The application was filed by PIPSC on April 6, 2009 and the Attorney General of Canada is currently filing evidence to defend the case.

62. As a result of Justice Grace's order, PIPSC may, in addition to its ongoing litigation, seek to revisit the 2006/07 wage increase once Justice Grace's decision is effective. However, as with the LA Group, Justice Grace's decision would not necessarily apply to employees from the RE Group employed outside of Ontario. For this reason, it would be unfair to employees in the Research Group employed outside of Ontario, and also create expectations, morale issues and recruitment and retention pressures for the Treasury Board as employer, similar to those described above for the LA Group.[32]

63. Furthermore, any increase in compensation for members of the LA group would have a ripple effect on other groups paid on a similar scale as the LA Group in the CPA, such as the military lawyers serving with the Office of the Judge Advocate General, Canadian Forces and the excluded lawyers employed in the CPA. Occupational groups considered equivalent may also request to revisit their wage increases in the context of Justice Grace's decision in a manner that is not consistent with the intent of the *ERA*.[33]

64. Accordingly, the employer would be faced with the same regional challenges described above in terms of Ontario and the rest of the country, along with the same morale, fairness and expectation challenges should either party be successful on appeal or cross-appeal.

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[32] **Affidavit of Carl Trottier**, para. 48, MR, Tab 2.
[33] **Affidavit of Carl Trottier**, para. 50, MR, Tab 2.

D. The Balance of Convenience Favours the Granting of a Stay

a) The Public Interest is the Primary Consideration in Assessing the Balance of Convenience

65. In weighing the balance of convenience, the case law establishes that the public interest should be taken into account *not* on the basis of whether granting a stay furthers the public interest, but rather that it does not hurt it.[34] The Supreme Court has also held that the notion of inconvenience should be "widely construed" in *Charter* cases.[35]

66. In *Sfetkopoulos v. Canada (Attorney General)*, Chief Justice Richard of the Federal Court of Appeal observed that:

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter.[36]

67. This is one of the reasons why it has become "almost routine"[37] for courts to delay any declarations of constitutional invalidity. The rationale behind delayed declarations pending appeal is twofold: they afford Parliament an opportunity to participate in the remedial dialogue[38] and allow the appeal process to take its course.[39] Both of these rationales apply here.

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[34] *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339, BOA, Tab 13, para. 105.
[35] *RJR-MacDonald,* Tab 3, para .71. See also *Ontario Public Service Employees Union v. Ontario (Attorney General)*, [2002] O.J. No. 1375, 158 O.A.C. 113 (C.A.), BOA, Tab 14, para. 37.
[36] *Sfetkopoulos v. Canada (Attorney General)* (2008), 377 N.R. 224, 2008 FCA 106, BOA, Tab 15, para. 12.
[37] Kent Roach, "*Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity*", (2002) 35 UBCL Rev. 211, BOA, Tab 16, p. 218.
[38] *Ibid,* pp. 218 -221.
[39] *Longley,* BOA, Tab 6, paras. 28-29.

68. Where legislation is struck for reasons of unconstitutionality, the balance of convenience on an application for a stay of the judgment pending appeal is measured not simply by "harms" calculated in the conventional manner of litigation between private parties. The public interest in maintaining the certainty of legislation during the whole appeal period is a unique and important factor in cases concerning the constitutional validity of legislation.[40]

b) The Public Interest Favours the Granting of a Stay

69. In considering the balance of convenience, this Court's focus must be on the public interest and the broader context of Justice Grace's decision.[41] When considered in this light, there are a number of factors - the need to maintain certainty in the law and in the labour relationship between the parties, the need to be efficient in the use of government resources, and the interest in preserving Parliament's ability to respond, that all militate in favour of granting a stay pending the disposition of this appeal and cross-appeal.

70. Here, the primary consideration under the balance of convenience is the public interest in maintaining certainty, both in the law and in the relationship between the Applicant bargaining agent and the employer. The balance of convenience favours a stay because of the uncertainty that would arise, in both of these contexts, should this Court refuse to grant such relief.

71. Failure to grant a stay would create distinctions in the operation of the *ERA* between Ontario and the rest of Canada. This would be contrary to the public interest

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[40] See *Canadian Council for Refugees,* BOA, Tab 10, paras. 34, 50.
[41] See *RJR-MacDonald,* BOA, Tab 3, para. 81.

in legal certainty, given that there is disagreement among the lower courts concerning the constitutionality of these provisions, and given that there are a number of challenges that are still outstanding.

72. Failure to grant a stay would also create great uncertainty in the labour-management relationship between the Applicant and its employer. As noted above, in these circumstances, there is no defined or mutually understood process for giving effect to Justice Grace's decision. Returning to the bargaining table on an expired collective agreement, when the parties are currently engaged in a process to reach a subsequent collective agreement, would be unprecedented.

73. Moreover, if either party is successful in its appeal, the entire process could be overturned. This would mean that both parties, and potentially the PSLRB if an arbitration process is engaged, would have unnecessarily devoted valuable time and resources to this process, at a time when labour relations are already at a heightened pace of activity due to the work force adjustments resulting from the expenditure reductions announced by the federal government. The balance of convenience favours a stay, given the public interest in ensuring the efficient and non-wasteful use of governmental resources.

74. In considering this motion, the court should be mindful of the ongoing need for responsible stewardship of public funds. These concerns have very recently been underscored by the recent federal budget. Investing public resources in a process that could be nullified by a subsequent appeal decision, rendering the expenditure a waste, is antithetical to such responsible stewardship.

75. Finally, the balance of convenience favours a stay because otherwise, the impugned provisions would be invalidated before this Court has an opportunity to consider the complex constitutional issues raised by this appeal and cross-appeal. A stay would preserve Parliament's ability to respond having the full benefit of this Court's view on these issues. Moreover, the ultimate decision that Parliament will be obliged to respond to may be entirely different, depending on the outcome of the appeal or cross-appeal, or there may be no need to respond at all.

PART V – ORDER REQUESTED

76. The Attorney General of Canada seeks an Order:

(a) staying the Judgment of the Honourable Mr. Justice A. Duncan Grace, dated March 26, 2012 ("Judgment"), pending disposition of this motion;

(b) staying the Judgment of the Honourable Mr. Justice A. Duncan Grace, dated March 26, 2012 ("Judgment"), pending disposition of the appeal and cross-appeal in this Court;

(c) granting the Attorney General his costs of the motion; and

(d) granting such further and other relief as counsel may advise and this Court permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 16th day of April, 2012.

Kathryn Hucal

Joseph Cheng

Of Counsel for the Moving Party, The Attorney General of Canada