Court File No. C54656

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant
(Respondent in Appeal)

- and -

ATTORNEY GENERAL OF CANADA

Moving Party/Respondent
(Appellant)

FACTUM OF THE RESPONDING PARTY
(Motion for Stay)

PART I - OVERVIEW

1. The Attorney General seeks a stay pending appeal of a judgment arising from two decisions. In the first, dated November 1, 2011, Justice Grace found that provisions of the *Expenditure Restraint Act* ("*ERA*") had infringed the *Charter* rights of Federal Crown counsel, in a manner that could not be saved under s.1, by limiting collective bargaining over rates of pay retroactively to the 2006-2007 fiscal year ("FY 2006-07").

2. In the second decision, dated March 26, 2012, Justice Grace declared s.16(a) and s.34(1)(a)(ii) of the *ERA* to be invalid, and declined the Attorney General's request to suspend the declaration. He described where this left the parties:

> [17] If rates of pay were negotiated or established by arbitration for the 2006-2007 fiscal year based on those statutory provisions, the parties should be permitted to revisit them. If new rates are negotiated or set by arbitral award they will establish the new benchmark to which the increases set forth in s.16(b) through (e) of the *ERA* applied. Implementation of the results of further negotiations or an arbitral award should be suspended until determination of the appeal and cross-appeal if still pending.

3. Justice Grace made these decisions after considering voluminous evidence, and hearing three days of argument on the merits, and a further full day of argument on the remedy. Substantially all of the arguments now made by the Attorney General in support of a stay were also made in the court below, in support of a suspension of the declarations of invalidity. Justice Grace's holding that the parties should proceed to negotiate (or if necessary arbitrate) rates of pay for FY 2006-07, but should not implement them pending this appeal, balances the legitimate interests of both parties. This holding, made with the consent of the Association of Justice Counsel ("AJC"), reflects the balance of convenience. That balance should be preserved in the manner determined by Justice Grace to be appropriate.

4. The parties are currently heading into two days of mediation in late May, and if necessary arbitration on June 24-26, to settle their collective agreement for the period from April 1, 2011 going forward ("2011 Collective Agreement"). Treasury Board has previously taken the position that any increases to rates of pay prior to 2011 flowing from Justice Grace's decisions should logically be determined before the parties settle their 2011 Collective Agreement. While Treasury Board now resiles from this position, it is clear that these issues are related.

5. The AJC submits that the stay should be denied, and that the parties should proceed to determine the rates of pay for FY 2006-07 and the 2011 Collective Agreement together if they can. The parties have already done the necessary

background work. The Appellant has not demonstrated any functional reason why rates of pay for FY 2006-07 should not be determined under the same framework, and in the same timeframe, as the 2011 Collective Agreement. If this requires a brief adjournment of the June dates, or additional dates before the arbitration board, the AJC would consider this. Even if it is not feasible to determine the issues together, the AJC submits that the Appellant has shown no compelling reason why the balance struck by Justice Grace should be disturbed. This Court should grant a limited stay only, in the terms set out by Justice Grace.

PART II – FACTS

A. Background to the Application

6. The *ERA* was enacted on March 12, 2009, in the context of a serious economic downturn.[1] The *ERA* sets a five-year period of wage restraint, reaching back retroactively to FY 2006-07. Although it incorporates a number of exceptions, the basic pattern of the *ERA* is that wage increases are limited to 2.5% for FY 2006-07, 2.3% for 2007-08, and 1.5% per year for 2008-11.[2] However, for the period prior to December 8, 2008, these limits do not apply for any group whose increases were established prior to that date.[3]

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[1] Reasons for Decision of Grace J. dated November 1, 2011 ("Decision on the Merits"), *Motion Record*, Tab 4, paras. 1, 17-20.
[2] *Expenditure Restraint Act*, S.C. 2009, c.2, s.393 ("*ERA*"), s.16
[3] *ERA*, s.19, 38.

7. Section 16(a), which Justice Grace declared to be invalid, limits wage increases for FY 2006-07 to 2.5%.[4] Because most groups within the federal public service already had collective agreements applying to FY 2006-07 (or, in the case of non-unionized employees, had increases for that year that the government had already implemented or accepted), s.16(a) applied to only three groups: the Law Group, the Ship Repair West Group, and the Research Group.

8. Section 34(1)(a)(ii), also declared to be invalid, requires that any increase for the Law Group for FY 2006-07 be based on the rates of pay set out in a schedule to the *ERA*.[5] This provision applies only to the Law Group.

9. The AJC represents approximately 2,700 Federal Crown counsel who work in the Public Prosecution Service of Canada ("PPSC"), the Department of Justice ("DOJ"), and other federal agencies, tribunals and courts.[6] The AJC challenged the *ERA* because it impedes efforts by its members to address long-standing concerns about salary.[7]

10. Historically, all but a few Federal Crown counsel were excluded by statute from collective bargaining. That changed in 2005 with the passage of the *Public Service Labour Relations Act* ("*PSLRA*"). The AJC became certified as the bargaining agent for

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[4] *ERA*, s.16(a).
[5] *ERA*, s.34(1)(a)(ii).
[6] Decision on the Merits, *Motion Record*, Tab 4, paras. 2-3.
[7] Decision on the Merits, *Motion Record*, Tab 4, para. 1.

Federal Crown counsel in April 2006, and served a Notice to Bargain on Treasury Board on May 10, 2006.[8]

11. Lawyers employed by the Province of Ontario have had the right to bargain collectively since 1989. For many years, Federal Crown counsel earned salaries that were roughly equivalent those earned by Ontario's lawyers. However, an arbitration board awarded Ontario's lawyers a 30% increase effective January 1, 2001. Federal Crown counsel have remained far behind lawyers in Ontario since then, and have also fallen behind other provinces (and the private sector).[9] In Ontario (where almost two thirds of Federal Crown counsel work), the gap was typically between 20 and 50 per cent as of 2009, depending upon the classification.[10]

12. A series of government reports in recent years have noted the difficulties experienced by DOJ and PPSC in recruiting and retaining counsel. These include the DOJ's Human Resources Management Plan 2007-2010, the PPSC's Annual Report for 2007-2008, and the PPSC's Report on Plans and Priorities 2008-2009. In the first of these reports, the DOJ expressly acknowledges that "we are recruiting in a very competitive labour market, with private sector and other levels of government in some cases offering much more attractive compensation packages than we are".[11]

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[8] Decision on the Merits, *Motion Record*, Tab 4, paras. 4, 10.
[9] Decision on the Merits, *Motion Record*, Tab 4, para. 9.
[10] Affidavit of Marco Mendicino, sworn April 17, 2012 ["Mendicino Affidavit"], *Responding Party's Motion Record*, Tab 1, para. 27.
[11] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 28.

13. Most recently, in March 2012, the House of Commons Standing Committee on Justice and Human Rights has called upon the government to review the salaries of prosecutors with the PPSC, to determine whether they are comparable with the salaries of prosecutors within provincial prosecution services.[12]

B. Enactment of the *ERA*

14. The *ERA* was preceded by a number of public statements by the government in late 2008. These statements uniformly referred to wage restraints for a period commencing in the 2007-2008 fiscal year.[13] Likewise, in mid-November 2008, Treasury Board's senior negotiators contacted various bargaining agents, including the AJC, and referred to the Department of Finance "looking for cost containment and predictability of expenditures for the period 2007/8 to 2010/11".[14]

15. When the *ERA* was introduced in early 2009, it reached back to FY 2006-2007, to the surprise of the AJC.[15] This had been a year of significant budgetary surplus, and was well before the commencement of the global financial crisis. Justice Grace described the *ERA* as follows:

> [29] The legislation increases base rates of pay for affected federal employees by specified percentages for five fiscal years commencing in 2006 and ending in 2011. Section 16 granted an increase of 2.5% in the 2006-2007 fiscal year, 2.3% in the 2007-2008 fiscal year and 1.5% in each of the three following fiscal years ending with 2010-2011. As a general rule, the restrictions apply notwithstanding any collective agreement, arbitral award or contract of employment.[16]

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[12] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 31.
[13] Decision on the Merits, *Motion Record*, Tab 4, paras. 20, 23, 127(b).
[14] Decision on the Merits, *Motion Record*, Tab 4, para. 22.
[15] Decision on the Merits, *Motion Record*, Tab 4, para. 27.
[16] Decision on the Merits, *Motion Record*, Tab 4, para. 29

16. Despite these provisions, the *ERA* contained numerous significant exemptions:

(a) For any group that had established increases for fiscal years 2006-07, 2007-08, or 2008-09 up to December 8, 2008, it was permitted to keep these increases even if they were above the limits mandated by the *ERA*. This included the Executive classifications, and the Ship Repair East Group;

(b) The Border Services Group, consisting of about 9,500 employees received a new pay grid with increases above the limits of the *ERA*, and were permitted to keep these increases;

(c) The Occupational Services Group, consisting of about 11,000 employees, were restructured by the application of a national pay gird that increased pay rates for many members above the limits set out in the *ERA*; and

(d) The RCMP, with approximately 18,000 members, received a service adjustment that was above the limits set out in the *ERA*.[17]

C. Justice Grace's Decision on the Merits

17. Justice Grace found that the *ERA*'s restrictions on bargaining rates of pay infringed the right to freedom of association in s.2(d) of the *Charter*. He accepted that the government's stated objectives in the context of the economic crisis provided a justification for the Act as a whole, and for its retroactive reach back to the 2007-2008

[17] Cross-examination of C. Trottier, *Responding Party's Motion Record*, Tab 2, Q. 94-99, 104-120.

fiscal year. However, he found that the ERA went too far by including the 2006-2007 fiscal year, for the following reasons:

> a) The 2006-2007 fiscal year pre-dated the economic crisis. In fact, Canada's economy was then buoyant and the federal government enjoyed a significant budgetary surplus. None of the objectives that caused the *ERA* to be drafted and passed existed until later.
>
> b) The Attorney General bears the onus of satisfying every stage of the *Oakes* test. Demonstrating a clear and compelling rationale for the *ERA*'s retroactivity is particularly important, because there had been no reference to 2006-2007 until Bill C-10 received first reading in February, 2009. Prior public statements had consistently mentioned 2007-2008 as the starting point for budgetary restraint initiatives. E-mails sent by the Treasury Board's senior negotiators to the AJC and other bargaining agents in mid-November 2008 made no mention of the 2006-2007 fiscal year;
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> c) The inclusion of 2006-2007 is even more puzzling when the provisions of the *ERA* are reviewed. While as a general rule, the specified increases set forth in the *ERA* were to apply starting with that fiscal year, its inclusion had no effect on those who had concluded a collective agreement or were the subject of an arbitral award made before December 8, 2008. As a practical matter the pre-December 8, 2008 base salaries of only three groups of represented employees were affected by the *ERA*. Federal Crown counsel was one of them. Given the objectives and the extent of the crisis, why were so many exceptions made?
>
> d) A number of groups were allowed to continue efforts to restructure their base salaries even after December 8, 2008. If successful the annual increases mandated by the *ERA* were to apply to the new or "restructured" amount. Given the objectives and the extent of the crisis, why were further exceptions made? Why was the federal government able to rationalize allowing some federal employees to exercise their section 2 (d) rights during a period of "great economic uncertainty and contraction in the economy" and members of the AJC were not?[18]

18. He further noted that 2006-2007 "was not mentioned until late in the day and a satisfactory rationale for the change of position has not been articulated". He found as follows:

> [133] The reasonableness of the expansion of the legislation's grasp is not self evident to me. If the AJC's position prevailed, it would only be extinguishing or narrowing an existing gap. How could that step apply pressure to wages in the

[18] Decision on the Merits, *Motion Record*, Tab 4, para. 127.

> private sector when, at most, the salaries paid to AJC members were to rise to an equal level? The *ERA* limits would have applied to the new - or "restructured rates of pay". That would have prevented any upward pressure on salaries paid to lawyers in the private sector.
>
> [134] If a lower than market wage was being paid to the AJC, how is leadership or respect for public money being compromised by paying what is agreed or determined to be fair? How is predictability compromised when the Treasury Board knew AJC's monetary demands and the applicable criteria articulated in the *PSLRA*?[19]

19. In the result, he found that the inclusion of FY 2006-2007 in the *ERA* did not minimally impair the rights of the AJC's members, and was not proportional to the objectives of the *Act.*

D. Decision on Remedy

20. In his decision on remedy, Justice Grace declared s.16(a) and s.34(1)(a)(ii) to be invalid. Further, he described in detail the intended effect of these declarations:

> [6] During argument, I explained to counsel the intended effect of my decision. I envisioned the parties being restored to the same position they were in before the *ERA* was enacted insofar as the 2006-2007 fiscal year was concerned.
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> [7] Whether the process was one of negotiation or arbitration, the parties or arbitration panel, would not be constrained by this new legislative scheme. Simply and theoretically, the rates of pay earned by the AJC's members during the 2006-2007 fiscal year could be higher than those established by the *ERA*.
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> [8] The remaining task is to ensure that the *ERA* allows bargaining to restart and reach its pre-*ERA* conclusion.
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> * * *
>
> [17] If rates of pay were negotiated or established by arbitration for the 2006-2007 fiscal year based on those statutory provisions, the parties should be permitted to revisit them. If new rates are negotiated or set by arbitral award they will establish the new benchmark to which the increases set forth in s. 16 (b) though (e) of the *ERA* applied. ...
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> * * *

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[19] Decision on the Merits, *Motion Record*, Tab 4, paras. 133-134.

> [23] In this case, it was not the federal government's choice of one of a series of options which violated the *Charter*. It was the decision to implement *any* option in a year which was unaffected by an economic crisis. The *ERA* was held to be unconstitutional in a restricted, albeit important way. The declaration has limited practical effect. Only three of more than twenty bargaining units were affected by s. 16 (a) of the *ERA*. The statutory scheme which operated before enactment of the *ERA* still exists. My decision does nothing more than allow the process commended by the ACJ on May 10, 2006 when it served its Notice to Bargain to reach a resolution through negotiation or arbitration as the pre-existing statutory regime contemplated.
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> [24] I recognize the declaration does *not* guarantee a result. Section 106 of the *Public Service Labour Relations Act* obligates the parties to "bargain collectively in good faith" and to "make every reasonable effort to enter into a collective agreement". I am confident the parties will meet their obligation. However, an accord is not assured.
>
> [25] I am also acutely aware that the state of the Canadian economy and the federal government's fiscal circumstances are factors an arbitration board is directed to consider under s. 148 of the statute if the matter requires an adjudicative process. My decision is intended to resuscitate earlier methods of resolving an impasse. The uncertainty of the result returns.[20]

21. As noted above, Justice Grace declined to suspend his declarations, but specifically stated that "implementation of the results of further negotiation or arbitral award should be suspended until determination of the appeal".[21]

PART III - ISSUES AND ARGUMENT

22. The test for whether a stay should be granted is as follows:

(a) Is there a serious issue to be determined?

(b) Would the moving party suffer irreparable harm if the stay were not granted? and

(c) Does the balance of convenience favour a stay?

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[20] Reasons on Remedy dated March 26, 2012 ("Decision on Remedy"), *Motion Record*, Tab 5, paras. 6-8, 17, 23-25.

[21] Decision on Remedy, *Motion Record*, Tab 5, para. 17.

A. Serious Issue to be Determined

23. The AJC accepts that the appeal (and cross-appeal) raise serious issues. This branch of the test is not in dispute.

B. Irreparable Harm

24. The AJC submits that none of the harms claimed by the Appellant are irreparable in nature. At most, given the ACJ's consent to a stay of implementation of any negotiated agreement or arbitral award, the Appellant will suffer the inconvenience of having to devote some resources to this process.

25. This is not a case where the Appellant ought to enjoy the benefit of a presumption of irreparable harm, given the AJC's consent to a limited stay. Put another way, any irreparable harm that might arise from full implementation of a negotiated agreement or arbitral award is answered by a term providing that implementation will await the outcome of the appeal. Other than the need to devote some resources to bargaining or arbitrating over FY 2006-07, all of the harms claimed by the Appellant depend upon actual implementation, as set out below.

26. The limited stay approach gives appropriate respect to the objectives of Parliament in enacting the *ERA*. These objectives were: a) to reduce upward pressure on wages in the private sector; b) to provide leadership through restraint and respect for public money; and c) to assist the federal government in managing its medium term

fiscal position by making the cost of salaries predictable. In addition, Justice Grace found that cost containment was an underlying purpose of the statute.[22]

27. None of these objectives are threatened by a possible negotiated agreement or arbitral award that will not be implemented pending the outcome of the appeal. Since no amounts will be paid, cost containment is not undermined and respect for public money is not threatened. There will be no upward pressure on wages in the private sector. Nor will an agreement or arbitral award detract from the government's need for predictability of expenditure – an objective that was described by Treasury Board as being more a focus of the *ERA* than saving money.[23] To the contrary, a negotiated agreement or arbitral award will help further this purpose. With an agreement or arbitral award in hand, the government will be able to plan its finances on the basis that if the appeal is dismissed, its expenditures arising from the decisions below have been crystallized and quantified.

28. In short, allowing the parties to proceed to a negotiated agreement or arbitral award, which will remain unimplemented pending the outcome of the appeal, is no different in principle than a trial court fixing damages in a case where liability is appealed. This does not rise to the level of irreparable harm.

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[22] Decision on the Merits, *Motion Record*, Tab 4, paras. 92, 96.

[23] Testimony of H. Laurendeau, Proceedings of the Senate Standing Committee on Finance, March 12, 2009, Exhibit 2 to the cross-examination of H. Laurendeau, *Responding Party's Motion Record*, Tab 3, p. 81, 83.

C. Balance of Convenience

29. There is a significant public interest in allowing the negotiation and possible arbitration process to proceed. As is often noted in this field, labour relations delayed are labour relations denied and defeated.[24] This has been described as "a fundamental principle of labour law".[25]

30. If a stay is granted, Federal Crown counsel will experience delays even if the appeal is subsequently dismissed. By contrast, if the negotiation and possible arbitration process is allowed to proceed parallel with the appeal, implementation of any pay increases that are agreed or determined to be fair may proceed promptly upon dismissal of the appeal.

31. Further, Treasury Board itself has recognized that there are advantages to knowing what pay increases, if any, might result from the decisions below. Before the Respondent moved for the stay, Treasury Board took the position that the pending arbitration for the 2011 Collective Agreement should be adjourned because "all parties to this arbitration process do not know what the base line for comparison is".[26] Treasury Board has now apparently resiled from this position, but only did so in the context of the cross-examination of the Respondent's affiant Mr. Carl Trottier on the present motion.[27]

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[24] Mendicino Affidavit, para. 42; *The Journal Publishing Company of Ottawa Limited v. The Ottawa Newspaper Guild*, [1977] O.J. No. 8 (C.A.), at para. 4; *National Waste Services Inc. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada)*, 2009 CanLII 58584 (ON SCDC), at para. 26.

[25] *Consolidated Bathurst Packaging Ltd. v. I.W.A. Local 2-69*, at para. 15.

[26] Letter dated November 30, 2011, Treasury Board to PSLRB, Exhibit A to Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1A, p. 18.

[27] Cross-examination of C. Trottier, *Responding Party's Motion Record*, Tab 2, Q. 41-43, 52-57.

32. Despite Treasury Board's current position, it is clear that the questions of what rates of pay should apply to Federal Crown counsel for FY 2006-2007 fiscal year, and for the current contract from 2011 going forward, are interrelated. Further, if rates of pay for the 2006-2007 fiscal year are notionally fixed by agreement or arbitral award, this will not only assist the parties, but could be of great assistance to the Court (and subsequently the Supreme Court of Canada, if applicable) on the hearing of the appeal. The parties and Court will know the tangible impact of any prospective ruling.

33. Against these considerations, the Respondent claims a number of "harms" that are unconvincing and exaggerated at best.

1. The Alleged Danger of Disappointed Expectations

34. The Respondent claims that labour relations harms will arise if members of the AJC learn through agreement or arbitral award what the fair value of their rates of pay would be – i.e., what they would have received but for the *ERA* - only to have any potential increase taken away if the appeal is allowed. With respect, this is patronizing and usurps the role of the AJC.

35. The AJC, and not Treasury Board, is responsible for ascertaining the wishes of its members and determining what is in its members' best interests. In the AJC's judgment, its members would be better served by such process than by continued

delay. At least in the former case, the process is transparent.[28] Further, the alleged impacts on morale and productivity pale in comparison to the ongoing difficulties caused by the very significant pay gap between Federal Crown counsel and their comparators in Ontario and other provinces.[29]

36. Moreover, the Appellant can hardly argue that it is against public policy for this scenario to occur, when it is a feature of the *ERA* itself. Under s.18 of the *ERA*, any group that received an increase by agreement or arbitral award between December 8, 2008 and the coming into force of the *ERA* on March 12, 2009, would not enjoy the benefit of the increase to the extent that it exceeded the mandatory limits of s.16. This is precisely what occurred with the Ship Repair West Group, who saw a 5.6% increase awarded by an arbitration board on January 20, 2009 taken away by s.18 of the *ERA*.[30]

2. Alleged Resentment in the Ship Repair West Group

37. The Appellant also claims that if Federal Crown counsel receive an increase for the 2006-2007 fiscal year that is more than the 2.5% set out in s.16(a), this will create labour relations difficulties and resentment among the Ship Repair West Group. However, such resentment, if it exists, would only be a function of the different litigation results that they achieved. The Ship Repair West Group's claim, like that of the AJC, is presently under appeal. If the courts ultimately hold that the *ERA* is constitutional in its treatment of the Ship Repair West Group, but unconstitutional in its treatment of Federal

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[28] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, paras. 23-26.
[29] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, paras. 25, 27-31.
[30] Cross-examination of C. Trottier, *Responding Party's Motion Record*, Tab 2, Q. 88-91.

Crown counsel, then the results for both bargaining units will be different. Again, it must be remembered that the AJC's bargaining unit is the only group of employees in the core public service that was bargaining collectively for the first time when the *ERA* came into effect.[31]

3. Alleged Spillover Effect on the Research Group

38. The Appellant argues that if a stay is not granted, the Appellant might face claims from the Research Group, who were also affected by the *ERA*'s reach back to the 2006-2007 fiscal year. With respect, there is nothing in the record to indicate that this is anything more than a theoretical concern. In any event, the AJC would not oppose a term that stayed the affect of the judgment below for groups other than the Federal Crown counsel represented by the AJC.[32]

4. Alleged Differences in Interprovincial Application

39. The Appellant claims that if a stay is not granted, problems may arise because any wage increase for FY 2006-007 above the *ERA* limits would not "necessarily" apply outside of Ontario. However, under the partial stay proposed by the AJC, the implementation of different rates of pay between Ontario and other provinces is a scenario that is ultimately unlikely to occur.[33]

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[31] Cross-examination of C. Trottier, *Responding Party's Motion Record*, Tab 2, Q. 166-67. Mr. Trottier pointed out that the Border Services group was also negotiating a "brand new" collective agreement (having been recently established as a new group within the public service), but they had previously been covered by PSAC collective agreements, and they also obtained increases in rates of pay that were substantially above those set out in the *ERA*.

[32] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 20.

[33] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1. para. 34.

40. As noted by Justice Grace, this argument was raised very late in the day by the Appellant. Having litigated the matter fully on the merits, without any protest as to the jurisdiction of Ontario's courts, the Appellant raised this issue for the first time on the remedies hearing in January 2012. Justice Grace commented as follows on this submission:

> [26] ...First, [the Appellant] maintains that my decision can only have effect within the Province of Ontario. It suggests that the federal government is not bound to follow it elsewhere and therefore could treat members of the Law Group differently in other provinces. That submission left me unaffected. The reality is this: my decision is the subject of an appeal and cross-appeal. It remains to be seen whether it has effect anywhere. Further, no mention was made of any jurisdictional limitation until the argument on remedy. This dispute involves one bargaining agent, one bargaining unit, one employer and one piece of legislation. Ontario seemed to have been accepted as the logical location to litigate the issue since the vast majority of the members of the AJC and Treasury Board are based in Ontario due the population and the location of this national's capital. Suspending the declaration until proceedings in other Provinces are commenced and completed seems absurd to me given the road the parties are already taking.[34]

41. As long as the actual implementation of any agreement or arbitral award is stayed, it is difficult to imagine how unequal application between provinces on any long-term basis would result. Either this case will reach the Supreme Court, in which case that Court's decision will have national effect, or, if necessary, the AJC will commence proceedings in other jurisdictions once the matter is litigated to finality in the Ontario Courts.[35] In any event, in a case where the Ontario courts have been accepted by the parties as the logical place to litigate the issue, the Appellant clearly has the power

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[34] Decision on Remedy, *Motion Record*, Tab 5, para. 26.

[35] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 34.

(and, arguably, the duty) to apply the final decision of the Ontario courts to Federal Crown counsel across the country.[36]

42. In short, the alleged difficulties of interprovincial differences do not prevent the parties from moving forward to determine fair rates of pay for the 2006-2007 fiscal year. At most, this is an argument for waiting before they are actually implemented.[37]

5. Alleged Difficulties with Retroactive Application

43. The Appellant alleges that if a stay is not granted, it will be difficult to implement any increase to FY 2006-2007 rates of pay above the *ERA* limits, because this would involve retroactive calculations. These submissions, however, are left essentially unexplained. Parties routinely negotiate agreements with retroactive effect under the *PSLRA*, and an arbitration board under the *PSLRA* is specifically empowered to grant retroactive relief.[38] Moreover, as Mr. Trottier explained in re-examination, retroactivity can be addressed in a number of ways in bargaining, including lump sum payments, adjusted rates, and a restructured pay grid. As Mr. Trottier said, "imagination is our limit ... in terms of how we do it".[39]

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[36] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2002 CanLII 49401 (ON S.C.), at para. 16; *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 B.C.S.C. 1270 (CanLII), at paras. 18-19 (Attorney General, after unsuccessfully litigating issue of whether enforcement of money-laundering regulations should be enjoined in several provinces, consented to injunctions in the remaining provinces).

[37] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 35.

[38] Cross-Examination of Carl Trottier, *Responding Party's Motion Record*, Tab 2, Q. 70-74; *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("*PSLRA*"), s. 155.

[39] Re-examination of Carl Trottier, *Responding Party's Motion Record*, Tab 2, Q. 224.

44. Further, to the extent that there is any merit in the Appellant's concerns, this would argue just as strongly for denying the stay. If it will take time to sort out the practical implementation of retroactivity, the parties should begin this process sooner rather than later.

6. Alleged Difficulty with Process for Determining 2006-2007 Rates of Pay

45. The Appellant argues that difficulties may arise with the process for bargaining collectively or, if necessary, arbitrating, rates of pay for FY 2006-2007. These statements are also unparticularized and essentially unexplained. On closer examination, they appear to relate more to the Appellant's unwillingness to engage in the process than to any inability to follow Justice Grace's reasons on remedy.

46. The ACJ was very clear in its position before Justice Grace, and he was equally clear in mapping out the intended effects of the declarations of invalidity of s.16(a) and s.34(1)(a)(ii) of the *ERA*, as set out above. The *PSLRA* sets out a defined and carefully balanced process and framework under which the parties conduct collective bargaining, in furtherance of the Government's commitment to "fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment".[40] A "Notice to Bargain" is delivered, and the parties must bargain in good faith and make every reasonable effort to reach a collective agreement.[41] If they cannot, the parties may request the appointment of an arbitration board to resolve their differences.

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[40] *PSLRA*, preamble.
[41] *PSLRA*, s.106.

47. That arbitration board must have regard to the following factors under s.148 of the *PSLRA*:

> 148. In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:
>
> (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
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> (b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
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> (c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;
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> (d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
>
> (e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.[42]

48. This is the process that was interrupted by the passage of the *ERA*, which was found to be unjustified in its reach back to the 2006-2007 fiscal year. Rather than an agreement or arbitral award for FY 2006-07 based on the criteria in s.148, the *ERA* mandated a maximum 2.5% increase. As Justice Grace noted, his decision striking down s.16(a) and 34(1)(a)(ii) "does nothing more than allow the process commenced by the AJC on May 10, 2006 when it served its notice to bargain to reach a resolution through negotiation or arbitration as the pre-existing statutory regime contemplated".[43]

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[42] *PSLRA*, s.148.

[43] Decision on Remedy, *Motion Record*, Tab 5, para. 23.

49. Both before Justice Grace and in this Court, the AJC has maintained that the framework is very simple. The parties must meet and bargain in good faith, based on the Notice to Bargain dated May 10, 2006,[44] and make every reasonable effort to reach agreement. The negotiation will be on the single issue of rates of pay for FY 2006-07. If the parties do not reach agreement, this single issue may be referred to arbitration before an arbitration board appointed by the PSLRB. In effect, the parties will have the negotiation and arbitration over rates of pay for FY 2006-07 that they were precluded from having under the impugned provisions of the *ERA*.

50. The Appellant professes to find this difficult to understand. When pressed on whether Treasury Board had any objection to proceeding in this manner, Mr. Trottier would not answer, although he acknowledged that "in all likelihood that will be the process".[45] Nevertheless, Mr. Trottier did express his confidence that this would be something that the parties would be able to figure out.[46]

51. The AJC therefore respectfully submits that there are no difficulties with the process, other than those of the Appellant's own making. The Appellant has not given any functional or practical reason why they cannot simply proceed to determine rates of pay for FY 2006-07 under the existing and well-understood framework of the *PSLRA*.

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[44] The significance of the notice to bargain is that under s.155 of the *PSLRA*, the arbitration board may make an award with retroactive effect back to the date of the notice, but not earlier. Whether and to what extent such an award is made depends on the application of the factors set out in s.148.

[45] Cross-Examination of Carl Trottier, *Responding Party's Motion Record*, Tab 2, Q. 204.

[46] Cross-Examination of Carl Trottier, *Responding Party's Motion Record*, Tab 2, Q. 171. Mr. Trottier was also given an opportunity to respond to that question by way of undertaking but, as of the date of this factum, he has not provided a response.

7. The Alleged Strain on Resources

52. The Appellant argues that it will be a waste of resources to devote time and effort to negotiating or arbitrating rates fo pay for the 2006-2007 fiscal year, when the appeal might be allowed. Again, this assertion is unparticularized and unexplained.

53. The parties have already assembled data and developed positions for their previous arbitration in 2009. They are in the process of updating that information for the current round, in the context of a mediation, scheduled for late May, and possible arbitration, scheduled for late June 2012. Thus, the necessary work has already been done to a very large extent.[47]

54. Mr. Trottier speculated on cross-examination that it "could take up to a year" to reach a result on rates of pay for FY 2006-07, but he did not explain why, and he admitted that he had no experience with a scenario where a prior year must be revisited because wage restraint legislation has been found to be unconstitutional.[48] He did not give any estimate or breakdown of the number of hours or days' work that would be involved.

55. The Responent therefore respectfully submits that there is no tangible evidence on which this Court could conclude that the parties would have to devote undue resources to determining rates of pay for FY 2006-2007 by agreement or arbitral award.

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[47] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 8.
[48] Cross-Examination of Carl Trottier, *Responding Party's Motion Record*, Tab 1, Q. 59, 65.

8. Alleged Difficulties Arising from the Cross-Appeal

56. The Appellant argues that a stay should be granted because of the possibility that the parties would have to repeat some of the process, in the event that the AJC's cross-appeal is allowed. However, that concern is exaggerated. The thrust of the AJC's case has always been that the Law Group, uniquely among the federal public service, has never had the rates of pay for the vast majority of members determined by collective bargaining, and as a result these rates of pay have fallen far behind comparators. In practical terms, once appropriate base line rates of pay for FY 2006-07 are determined by agreement or arbitration, determining subsequent increases is much less complicated. The AJC does not expect the process for the subsequent years covered by the *ERA* to be difficult or complicated, if the cross-appeal succeeds.[49]

9. There is no Reason to Wait for a Legislative Response

57. The Appellant argues that the judgment should be stayed to allow Parliament the opportunity to provide a legislative response. However, no indication is given as to what that response might be, when it might be coming, or even that Parliament is considering the matter.

58. Morevoer, the nature of the constitutional defect found was that Parliament had reached back further than was justified in enacting the *ERA*, for reasons that were essentially unexplained. This is not a case where Parliament could obviously have

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[49] Mendicino Affidavit, *Responding Party's Motion Record*, Tab 1, para. 40.

achieved the same objective in a different manner through choosing different legislative means with respect to the 2006-2007 fiscal year.

59. If the government wishes to remedy the constitutional defect through its own initiative, it may do so through bargaining. Granting a full stay would likely hinder, rather than help, this process.

10. Conclusion on Balance of Convenience

60. The ACJ respectfully submits that the balance of convenience strongly favours denying the stay, except as to implementation of any agreement or arbitral award. Proceeding to determine fair rates of pay for FY 2006-07 by agreement or arbitral award will assist the parties and, potentially, this Court (as well as possibly the Supreme Court of Canada), and will ensure that the paties are in a position to move quickly if the appeal is dismissed. It will also be consistent with the position of the House of Commons Standing Committee on Justice and Human Rights that the competitiveness of federal prosecutors' salaries should be examined, and will help move towards alleviating the long-standing recruitment and retention concerns identified by the DOJ and PPSC themselves. As long as the actual implementation of any agreement or award is stayed, there is no real prejudice to the Appellant in denying a full stay.

PART IV - OTHER ISSUES RAISED BY THE RESPONDENT

61. The Respondent respectfully requests that this Court set an early date for the hearing of the appeal, if the stay requested by the Appellant is granted. The Appellant

is scheduled to perfect the appeal on May 4, 2012. The Respondent will move quickly thereafter to file its responding materials and its cross-appeal, and can do so by early June. It is therefore likely that the appeal can be ready for hearing by late June. It is in the interests of both parties that the labour relations uncertainty that arises from this appeal be resovled as soon as possible.

PART V - ORDER REQUESTED

62. The Respondent respectfully requests:

(a) That the motion be denied, except for a term staying of the implementation of any agreement or arbitral award and, if necessary, a term staying the judgment in relation to any employees that are not represented by the AJC;

(b) In addition or in the alternative, that this Court set an early date for the hearing of the appeal; and

(c) That the Respondent be awarded its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: April 23, 2012

Andrew K. Lokan

Paliare Roland Rosenberg Rothstein LLP
Barristers & Solicitors
Suite 501, 250 University Avenue
Toronto, Ontario, M5H 3E5

Lawyers for the Association of Justice Counsel