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)

AFFIDAVIT OF MARCO MENDICINO

I, Marco Mendicino, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of the Association of Justice Counsel ("AJC"), the Applicant in this matter. To fulfill this position, I am currently on a leave of absence as a federal prosecutor with the Public Prosecution Service of Canada ("PPSC"). I was elected as President of the AJC on May 20, 2010, and previously served as acting President from April 25, 2009. I have been a representative on the AJC's Governing Council since November 2008. The Governing Council is the AJC's ultimate decision-making body. I am also a member of the Negotiations Committee in my capacity as President of the AJC, and have been involved in the AJC's negotiations since 2008. As such, I have knowledge of the matters to which I hereinafter depose. Where such matters are based

on information and belief, I have identified the source of the information and in each case I believe it to be true.

2. I have reviewed the Affidavit of Carl Trottier, sworn April 13, 2012. My comments on his affidavit appear below.

A. The History of Representation of Federal Crown Counsel

3. The AJC represents lawyers employed by the federal government. Overwhelmingly, they work for the Department of Justice ("DOJ") or the PPSC. Prior to 2006, the PPSC did not exist as a separate entity, and federal prosecutors worked for the DOJ. The vast majority of lawyers were excluded from collective bargaining under the pre-2005 legislative regime.

4. Mr. Trottier mentions that some lawyers were represented by the Professional Institute of Public Servants Canada ("PIPSC") prior to 2006, but he does not mention that there were only about 100 such lawyers, out of some 2900 in the Law Group. Thus, for the vast majority of lawyers represented by the AJC, the collective agreement that was subject to the *Expenditure Restraint Act* ("*ERA*") was their first opportunity to bargain collectively over rates of pay.

B. The AJC's First Collective Agreement

5. Mr. Trottier sets out, at paragraphs 16 to 19 of his affidavit, the dates on which the AJC served its first notice to bargain (May 10, 2006), the TBS asked for an arbitration board (September 24, 2008), the hearings of the arbitration board were held (June 24-25, 2009), the arbitration board made its award (October 23, 2009), and the signing of the collective agreement (June 27, 2010).

6. It is important to note that this was the process for establishing an entire first collective agreement, in which many terms and conditions of employment were in dispute. Further, from the AJC's perspective, Treasury Board slowed down the process significantly, by failing to make any proposals at all for rates of pay until March 29, 2008, some two years after the notice to bargain was given, by failing to give timely and adequate disclosure, and by refusing to confirm, even after the arbitration award was made, that health and medical benefits applied to articling students, thereby delaying the signing of the collective agreement.

7. By contrast, the result of Justice Grace's decision is that only a single issue needs to be determined - the rates of pay for fiscal year 2006-2007 ("FY 2006-07"), which would then flow through to subsequent years under the increases that have already been set. The AJC expects that negotiations (and, if necessary, arbitration) over this issue will be very much simpler and shorter than the process required to reach an entire first collective agreement.

8. Moreover, the parties already assembled their comparative data and formulated their respective positions for the arbitration hearings on the first collective agreement that were held on June 24-25, 2009. The AJC is in the process of updating its data for the mediation and arbitration for the current collective agreement which are scheduled for May 29-30, 2012 and June 26-28, 2012 respectively. Briefs for that process are scheduled to be exchanged in May, so no doubt Treasury Board is doing the same thing. Thus, most of the work required to determine an appropriate base line for rates of pay has already been done.

C. Treasury Board's Position with respect to the Current Negotiations with the AJC

9. The AJC is very concerned that a stay of the decision below will have repercussions for the current round of negotiations for the year 2011-12 going forward.

10. Prior to seeking the stay in this matter, and prior to Justice Grace's decision on remedies, Treasury Board wrote to the Public Service Labour Relations Board ("PSLRB") and requested that it "postpone the establishment of this arbitration board [in respect of the collective agreement for 2011/12 going forward] pending the remedies ordered by Justice Grace". The reason offered by Treasury Board was as follows:

> Given that we do not yet know what the remedies ordered by Justice Grace will be, this leaves us in a situation where all parties to this arbitration process do not know what the baseline for comparison is. Section 148 of the *Public Service Labour Relations Act* stipulates, among other considerations, that the board must consider both internal and external relativity when making an award. We are not in a position to make representations related to market positioning since we do not know what remedies will be ordered or the process through which the remedies will be made.

Attached as **Exhibit A** is a letter from Mr. Kevin Marchand of Treasury Board to the PSLRB, dated November 30, 2011.

11. The AJC's counsel responded on December 2, 2011, setting out the reasons why, in the AJC's view, Treasury Board's request should be denied. Attached as **Exhibit B** is a copy of counsel's letter dated December 2, 2011.

12. By letter dated December 7, 2011, the PSLRB advised that "the Chairperson intends to proceed with the establishment of the arbitration board at this time". However, the Board left it open to the parties to address this matter at the arbitration hearing:

> The views brought forward by both parties in relation to the uncertainties created by the yet to be ordered remedies for the 2006-07 rates of pay is a matter that the parties are at liberty to bring to the attention of the arbitration board should they wish to do so.

Attached as **Exhibit C** is a copy of the PSLRB's letter of December 7, 2011.

13. On the basis of Treasury Board's position as set out in this correspondence, the AJC is concerned that if a stay is granted, this could lead to a lengthy delay or other uncertainties in the process for setting terms and conditions for the current collective agreement, even if the appeal is ultimately dismissed. Treasury Board appears to take the position that it is logically necessary, or at least desirable, to know the "starting point" rates of pay after Justice Grace's remedies have been implemented, before considering the appropriate rates of pay for the current collective agreement for 2011-12 going forward.

14. For these reasons, it is the AJC's position that it would be more convenient to both parties to establish the appropriate rates of pay for FY 2006-07 now, rather than waiting for some future indefinite point.

D. The AJC's Position on Implementation of any Agreement/Award

15. At the hearing on remedies in the court below, at which I was present, the Attorney General presented arguments as to why any declarations of invalidity should be suspended, that were similar to the arguments in support of the current request for a stay. In particular, the Attorney General argued that it could create difficulties if a pay raise were bargained or arbitrated and then implemented, but the appeal was subsequently allowed. It was argued that this could result in a situation where employees had to make repayments to the employer.

16. The AJC's position in the court below, which is reflected in Justice Grace's reasons on remedies at paragraph 17, was that the AJC would agree to a condition that the implementation of any pay raise be stayed, so that no actual payments are made pending the outcome of the appeal and cross-appeal. That remains our position in this Court.

17. The advantage of this proposal is that it allows the parties to determine more precisely what the practical consequences of the decisions below may be. Obviously, the parties are currently far apart on what is an appropriate base line for rates of pay for the AJC's first collective agreement. However, there is a process for resolving that

difference under the *Public Service Staff Relations Act* ("*PSLRA*"). As noted by Justice Grace, the *PSLRA* requires parties to meet and negotiate in good faith, and to make every reasonable effort to make a collective agreement. If agreement cannot be reached, the PSLRB appoints an arbitration board to resolve the differences between the parties.

18. In the AJC's view, resolution of this issue in the form of either collectively bargained rates of pay, or rates of pay that are determined by a neutral adjudicator to be fair and appropriate in all of the circumstances (having due regard to the factors in s.148 of the *PSLRA*), would be of great assistance to the parties and to this Court (and potentially the Supreme Court of Canada if there is a subsequent appeal) going forward.

19. In short, it would help to crystallize what the impact of allowing or dismissing the appeal may be, just as the claim of the Ship Repair West Group was crystallized by the issuance of an arbitral award for that group shortly before the *ERA* came into effect.

20. The AJC also takes no position on whether a stay might be imposed in respect of the possible impact of the decisions below on other groups. In the court below, the AJC submitted that if the court was concerned with the potential impact on the Ship Repair West Group or the Research Group, the remedies could be confined to employees represented by the AJC. Again, that remains the AJC's position before this Court.

E. Treasury Board's Remaining Objections to Continuing the Process for Determining Appropriate Rates of Pay

21. Mr. Trottier claims that if a stay is not granted, there is a danger that the negotiation and/or arbitration process would "create expectations for the members of the AJC that they were deserving of a much greater increase than legislatively provided". He further asserts that this would create a negative impact on employee morale and labour relations if the appeal were subsequently allowed, leading in turn to poor productivity and absenteeism.

22. The AJC takes strong exception to these statements, for several reasons.

23. First, the AJC strongly disagrees with any suggestion that Mr. Trottier knows better than the certified bargaining agent for federal Crown counsel, as to whether these employees should find out what their fair rates of pay would be, if determined by agreement or neutral arbitration, without the restrictions of the *ERA.* The AJC, as certified bargaining agent with statutory responsibilities to all of its members, regularly consults with the membership through its representative structures. The AJC, and not Mr. Trottier, is responsible for determining what its members want and what is in their best interests.

24. While there might be some disappointment if members learn that they would have received higher rates of pay if the *ERA* was ultimately found to be unconstitutional

in part, but the appeal is subsequently allowed and the legislation is upheld so that the amount is not awarded after all, this should not be a major concern.

25. In the AJC's view, such potential disappointment pales in comparison with the ongoing frustration members experience at having their every attempt to bargain or otherwise determine fair rates of pay stymied by the delay and intransigence of Treasury Board, and the application of provisions of the *ERA* that have been found to be unconstitutional.

26. In short, the process that Treasury Board objects to would at least be perceived as transparent, even if federal Crown counsel did not ultimately receive any increase to their rates of pay because of a decision of this Court (or the Supreme Court of Canada). There is no transparency in Treasury Board's position that such rates of pay should not even be determined.

27. Second, the membership of the AJC is already fully convinced that they are deserving of a much greater increase than legislatively provided. As set out in my affidavits filed in the court below, salaries for federal Crown counsel have fallen far behind their provincial counterparts for the vast majority of lawyers represented by the AJC. This is particularly true of Ontario, where almost two thirds of the bargaining unit works. Below is a chart illustrating the differences between federal Crown counsel, and counsel employed by the Ministry of the Attorney General in the Province of Ontario, as of 2009 when the *ERA* came into effect:

Federal Crown Counsel – effective May 1, 2009			Ontario MAG Counsel – effective July 1, 2009		Disparity %
Class	**National Salary Range ($)**	**Toronto Salary Range ($)**	**Class**	**Salary Range ($)**	**National Rate (Toronto)**
Entry level (LA1)	58,961-84,119	58,967-84,119	Entry Level (CC1)	75,265 – 103,603	27% bottom 23% top (same)
Intermediate (LA2A)	82,917 – 118,995	82,917 – 134,969	Intermediate and Senior Counsel (CC2/3)	111,072 – 182,703	**34% bottom 54% top** **(34% bottom 34% top)**
Senior Counsel (LA2B)	101,649 – 129,604	106,774 – 149,518			9% bottom 41% top (4% bottom 22% top)
General Counsel (LA3A)	115,914 – 147,241	122,719 – 159,987	General Counsel (CC4)	151,545 - 196,965	30% bottom 34% top (23% bottom 23% top)
Senior General Counsel (LA3B)	134,386 – 164,417	134,386 – 164,417			13% bottom 20% top (same)
Senior General Counsel (LA3C)	153,075 – 186,671	153,075-186,671			0% bottom 5% top (same)

28. Third, low morale is already a major concern that I have amply documented in my previous affidavits. However, since the lawyers represented by the AJC are professionals, we see the result of these issues in terms of recruitment and retention challenges rather than poor productivity or absenteeism. This has been documented in

various reports of the DOJ and PPSC themselves. For example, in its Human Resources Management Plan 2007-2010, the DOJ states:

> Compounding the challenge of an agency workforce and future labour shortages is the fact 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.[1]

29. Likewise, the PPSC has stated:

> The salaries of prosecutors and lawyers in some regions of Canada continue to increase, which affects PPSC's ability to retain its highly skilled prosecutors, hence creating a personnel shortage. Due to the competition for scarce resources, not all vacant positions were filled.[2]

30. In many provinces, the salary for provincial crown counsel has continued to increase, outpacing compensation at the DOJ and PPSC. The PPSC has cautioned:

> During 2008-2009, the recruitment and retention of qualified prosecutors will continue to be a priority. The PPSC will be seeking to augment its prosecutorial cadre in order to ensure that it continues to have the capacity to fulfill its mandate in relation to a number of new government initiatives, including the National Anti-Drug Strategy. The PPSC will undertake a nationally coordinated recruitment effort to achieve this goal.[3]

31. Most recently, in March 2012, the Standing Committee on Justice and Human Rights issued a report on the state of organized crime, in which it called upon the government of Canada to review the salaries of prosecutors with the Public Prosecution Service of Canada to determine whether they are comparable with the salaries of prosecutors within provincial prosecution services. This was an all Party committee of

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[1] Department of Justice, *Human Resources Management Plan 2007-2010*, p. 10.

[2] See PPSC Annual Report: 2007-2008, http://www.ppsc-sppc.gc.ca/eng/pub/ar08ra08/06.html.

[3] See *Report on Plans and Priorities* 2008-09, Public Prosecution Service of Canada, pp. 11 and 16: see http://www.ppsc-sppc.gc.ca/eng/pub/rpp09/index.html.

the House of Commons, with majority representation by the governing party. Attached as **Exhibit D** is an excerpt from the Report of the Standing Committee on Justice and Human Rights, on the State of Organized Crime.

32. Mr. Trottier also deposes, on the advice of counsel, that the decision below only applies in Ontario. He therefore objects that any revised pay grid and wage increase for 2006-07 above the *ERA* limits would not "necessarily" apply outside of Ontario.

33. I have been involved in the AJC's *Charter* challenge since the beginning, and I have attended all of the hearings. As noted by Justice Grace in his decision on remedies, the Attorney General did not raise any question or the appropriateness of the Ontario courts to decide the issues in the case at any time prior to the remedies hearing in January 2012. Given the fact that a substantial majority of federal Crown counsel work in Ontario, and the presence of a number of other connecting factors, such as the location of the AJC and the main offices of the DOJ and PPSC, as well all witnesses in these proceedings, the AJC continues to believe that Ontario is the appropriate jurisdiction for the case to proceed.

34. Ultimately, it seems highly unlikely that this case will result in different rates of pay between Ontario and other jurisdictions. Either the constitutionality of the impugned provisions of the *ERA* will be determined by the Supreme Court of Canada, in which case the ruling will apply throughout Canada or, if necessary, the AJC will commence parallel proceedings in the other provinces.

35. None of this prevents the parties from moving forward to determine fair rates of pay for FY 2006/07 in the meantime. At most, this is an argument for waiting before they are actually implemented.

36. I am particularly surprised to see Mr. Trottier cite recruitment and retention pressures for the employer from the highly theoretical possibility that lawyers in Ontario could ultimately be awarded higher rates of pay than lawyers in other provinces. Again, this pales in comparison to the very real problems of recruitment and retention that have long applied because federal Crown counsel are paid much less than their provincial counterparts, and towards which Treasury Board has long turned a deaf ear.

37. I note also that such concerns did not deter the government from awarding pay increases to its own Executive ranks that were significantly ahead of those legislated in the *ERA*, retroactive to April 1, 2007, and to keep the benefit of these increases despite the enactment of the *ERA*. In many cases, these executives work alongside federal Crown counsel whom they supervise and, in fact, the compensation for excluded lawyers was historically linked to the Executive classifications in the years before 2006, when these lawyers could not bargain collectively.

38. Likewise, the complaint that if the members of the Law Group receive a higher increase for FY 2006-07 than the Ship Repair West Group, that will have a negative effect on labour relations with them, seems quixotic, given the various exemptions for

other groups set out in the *ERA* itself, as noted by Justice Grace. (The *ERA* created exceptions for various groups including the Border Services Group, the Occupational Services Group, and any group of employees whose rates of pay were established prior to December 8, 2008, with respect to increases with an effective date before that date.) In any event, the *Dockyards Council* case, like the case at bar, is under appeal and the courts will ultimately determine whether the retroactive nullification of their increase is consistent with the *Charter*.

39. Mr. Trottier also claims that the process of establishing fair rates of pay for FY 2006-07 by negotiation or arbitration would be potentially "fraught with difficulty". I disagree. First, no such difficulty was described in the remedies hearing before Justice Grace, in which the Attorney General sought to have the declarations of invalidity suspended. Second, any difficulties that he mentions are alluded to only in the vaguest terms – for example, calculating EI contributions and pension entitlements on a retroactive basis – and are difficult to understand given that they are already a commonplace feature of the *PSLRA*, which expressly provides for the award of retroactive wage increases. Third, to the extent that any such difficulties exist, they are arise because *ERA* reached back retroactively for a 3-year period to FY 2006-07, a length of time which was found to be unjustified under s.1 of the *Charter*. Fourth, neither Mr. Trottier nor anyone else from Treasury Board has actually sought to sit down with the AJC in bargaining to discuss any such alleged difficulties. In my experience, it can be surprising how many "difficulties" can evaporate if the will to reach a solution is there.

40. Mr. Trottier also argues that the process of determining fair rates of pay for FY 2006-07 now would be inefficient if the parties have to revisit rates of pay for the subsequent fiscal years between 2007 and 2011 if the AJC is successful in its cross-appeal. That concern, with respect, 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 its members established by collective bargaining, and that as a result these rates of pay have fallen far behind comparators. In practical terms, once appropriate base line rates of pay are established by agreement or arbitration, determining subsequent increases becomes much less complicated. We would not expect any process for these subsequent years to be difficult or complicated once rates of pay for FY 2006-07 have been determined, if the cross-appeal succeeds.

F. Conclusion

41. The AJC seeks only to have rates of pay for FY 2006-07 for its members determined by agreement or adjudication, in a fair and transparent manner that is free from the constraints of the *ERA*. Because this process will take some time, and because it may have implications for the current round of bargaining, it is the AJC's position that it would be better to start this process now and have it run parallel with the progress of the appeal. However, the implementation of any agreement or award should wait until the appeal is determined.

42. The public interest will be served better by allowing this process to continue than by delaying it until the final disposition of all appeals. As has often been noted in this area, labour relations delayed are labour relations denied and defeated. Further, this is consistent with the recent call by the House of Commons Standing Committee on Justice and Human Rights that the pay rates of federal prosecutors be studied in relation to their provincial counterparts.

43. For these reasons, it is the AJC's position that the stay should be denied. Alternatively, this appeal should be expedited so that any labour relations uncertainty is resolved as soon as reasonably possible.

44. I make this affidavit in response to the stay motion brought by the Appellant, Attorney General, and for no other or improper purpose.

Sworn before me at the City of Toronto, in the Province of Ontario, this 17th day of April, 2012.	
A Commissioner, etc. ANDREW LOKAN	Marco Mendicino

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This is **Exhibit "A"** referred to in the Affidavit of **Marco Mendicino** sworn April 17, 2012.

Treasury Board of Canada Secretariat
Secrétariat du Conseil du Trésor du Canada

Ottawa, Canada
K1A 0R5

TB File: 8947-017-008
PSLRB File: 585-02-36

November 30, 2011

BY FAX and BY MAIL

Ms. Roxanne St. Jean Poitras
Dispute Resolution Services
Public Service Labour Relations Board
C.D. Howe Building
6th Floor, West Tower
240 Sparks Street
P.O. Box 1525, Station "B"
Ottawa, Ontario
K1P 5V2

Dear Ms. St. Jean Poitras:

SUBJECT: Concerns related to the Establishment of an Arbitration Board
Treasury Board of Canada and
The Association of Justice Council
Law (LA) Group

I feel at this time I must inform you of a recent Ontario Superior Court decision, which may impact an Arbitration Board's ability to issue a decision to resolve this collective agreement at this time. Specifically, the decision by Justice Grace has found that the first year of application (2006-07) for the *Expenditure Restraint Act* was a Charter infringement.

Given that we do not yet know what the remedies ordered by Justice Grace will be, this leaves us in a situation where all parties to this arbitration process do not know what the baseline for comparison is. Section 148 of the *Public Service Labour Relations Act* stipulates, among other considerations, that the board must consider both internal and external relativity when making an award. We are not in a position to make representations related to market positioning since we do not know what remedies will be ordered or the process through which the remedies will be made.

Canada

Based on the above, it would be prudent to postpone the establishment of this arbitration board pending the remedies ordered by Justice Grace.

For further information, please contact John Park at 613-952-3177 or by email at John.Park@tbs-sct.gc.ca.

Thank you for your attention to this.

Yours sincerely,

Kevin Marchand
A/Director
Compensation Management
Core Public Administration
Compensation and Labour Relations
Office of the Chief of Human Resources Officer

c.c.: John Park
Jean-François Munn
Marco Mendicino

This is **Exhibit "B"** referred to in the Affidavit of **Marco Mendicino** sworn April 17, 2012.

nelligan|o'brien|payne

Lawyers/Patent and Trademark Agents
Avocats/Agents de brevets et de marques de commerce

Dougald E. Brown, Tel: (613) 231-8210, Fax: (613) 788-3661, dougald.brown@nelligan.ca

December 2, 2011

Via E-mail

Roxanne St. Jean Poitras
Dispute Resolution Services Coordinator
Dispute Resolution Services
Public Service Labour Relations Board
C.D. Howe Building, West Tower
P.O. Box 1525, Station B
6th Floor, 240 Sparks Street
Ottawa, ON K1P 5V2

Dear Ms. St. Jean Poitras:

Re: Arbitration
Association of Justice Counsel and
The Treasury Board of Canada Secretariat
Law Group (LA)
PSLRB File No. 585-02-36
Our File No.: 27918-6

I am writing in reply to Mr. Marchand's letter of November 30, 2011, requesting that the Chairperson postpone establishing the arbitration board in this matter.

The *PSLRA* provides parties with statutory dispute resolution processes for obtaining a determination of terms and conditions of employment. The AJC has complied with all the statutory requirements necessary for arbitration. Pursuant to s. 137(2) of the *Act*, the Chairperson's discretion to delay the establishment of an arbitration board is limited to situations in which the party making the request has not bargained sufficiently and seriously. The Chairperson has already refused the Employer's request to delay establishment of the arbitration board. Once the Chairperson was satisfied that AJC had bargained sufficiently and seriously, s. 137(1) makes clear that he "must establish an arbitration board for arbitration of the matters in dispute". By letters dated November 15, 2011 and November 23, 2011, the Chairperson properly notified the parties that he intended to proceed with establishment of an arbitration board. Further to that notification, members of the arbitration board nominated by the AJC and the Employer have been appointed. Simply put, the *PSLRA* does not confer on the Chairperson the

discretion to postpone the establishment of an arbitration board for any reason other than a party's failure to bargain sufficiently and seriously before requesting arbitration. There is no authority for the Chairperson to delay establishing an arbitration board on the ground that there is litigation over one element of a historical arbitral award between the parties.

The "postponement" proposed by the Employer could result in a delay of indefinite duration. The Attorney General has filed an appeal against the decision of the Ontario Superior Court and the ultimate resolution of that litigation could take several years. Until all appeals are exhausted, it is possible that any remedy awarded by the Court will be stayed.

Mr. Marchand's suggestion that the Employer is "not in a position to make representations related to market position" is groundless. The arbitration board will be required to determine pay rates for LAs for the three-year period following expiry of the old collective agreement. The actual pay received by LAs and by their comparator groups as of the end of the old collective agreement is not in doubt. Speculative arguments based on how an as-yet-to-be-determined remedy for 2006 might affect the situation, (a remedy which might be finalized only after all appeals have been exhausted), cannot deprive members of the LA bargaining unit of the right to have their current terms and conditions of employment determined now in accordance with the procedures expressly provided for that purpose by the *PSLRA*.

It would no doubt serve the Employer's interests to postpone the arbitration; however, delay would be highly prejudicial to the LA bargaining unit. Section 144(1) of the *PSLRA* is an expression of clear legislative policy that matters are to be referred to the arbitration board "without delay". Establishment of the arbitration board does not benefit or prejudice either party and we respectfully ask the Chairperson to take an even-handed approach and proceed with the establishment of the board in accordance with the requirements of the *PSLRA*.

Yours very truly,

Dougald E. Brown

DEB/rm

c.c. John Park/Kevin Marchand (by email)
c.c. Marco Mendicino (by email)

This is **Exhibit "C"** referred to in the Affidavit of

Marco Mendicino sworn April 17, 2012.

Public Service Labour Relations Board

Commission des relations de travail dans la fonction publique

BY FAX

Reference No N° de référence
585-02-36

December 7, 2011

Mr. Dougald E. Brown
Nelligan O'Brien Payne
50 O'Connor Street, Suite 1500
Ottawa ON K1P 6L2

Mr. Kevin Marchand
A/Director
Compensation Management
Compensation and Labour Relations
Treasury Board of Canada, Secretariat
400 Cooper Street, 7th Floor
Ottawa ON K1A 0R5

Re: Request for Arbitration
The Association of Justice Counsel and
The Treasury Board of Canada
Law Group (LA)

This is further to Mr. Marchand's letter of November 30, 2011 and to Mr. Brown's letter of December 2, 2011 concerning the request by the employer to postpone the establishment of the arbitration board in the above-cited matter.

The information put forward in the above-noted correspondence has been referred to the Chairperson and I have been instructed to inform the parties that the Chairperson intends to proceed with the establishment of the arbitration board at this time. The views brought forward by both parties in relation to the uncertainties created by the yet to be ordered remedies for the 2006-07 rates of pay is a matter that the parties are at liberty to bring to the attention of the arbitration board should they wish to do so.

On November 23, 2011 a letter was sent to the parties' nominees, requesting them to confer with each other and to nominate a third person to act as

.../2

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chairperson in this matter. In light of the Chairperson's decision above and in view of the fact that the Board has not received a jointly agreed upon name from the nominees, or any indication that one is forthcoming, the Chairperson will proceed with the appointment of a third person to act as chairperson of this arbitration board. Accordingly, the nominees and their parties will be informed as soon as possible of the name of the appointed chairperson for this arbitration board.

Yours truly,

Roxanne St. Jean Poitras
Dispute Resolution Services Coordinator
(613) 993-9157

c.c. M. Mendicino / J. Park
P. Cavalluzzo
J.-F. Munn
G. Grenier

This is **Exhibit "D"** referred to in the Affidavit of **Marco Mendicino** sworn April 17, 2012.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

THE STATE OF ORGANIZED CRIME

Report of the Standing Committee on Justice and Human Rights

Dave MacKenzie, M.P.
Chair

MARCH 2012

41st PARLIAMENT, 1st SESSION

41st Parliament – 1st Session

STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

CHAIR

Dave MacKenzie

VICE-CHAIRS

Jack Harris

Hon. Irwin Cotler

MEMBERS

Françoise Boivin

Kerry-Lynne D. Findlay

Pierre Jacob

Brent Rathgeber

Stephen Woodworth

Charmaine Borg

Robert Goguen

Brian Jean

Kyle Seeback

OTHER MEMBERS OF PARLIAMENT WHO PARTICIPATED

Joe Comartin

David Wilks

Kennedy Stewart

CLERK OF THE COMMITTEE

Jean-François Pagé

LIBRARY OF PARLIAMENT

Parliamentary Information and Research Service

Robin MacKay

Julia Nicol

Dominique Valiquet

RECOMMENDATION

The Committee recommends that section 515 of the *Criminal Code* be amended to specify that one of the conditions of an order granting interim judicial release can be an order to wear an electronic monitoring device.

LEGAL AID

The Lesage-Code report noted that Legal Aid Ontario (LAO) may have contributed to the phenomenon of overly-long criminal trials in Ontario by the steady diminution of the legal aid tariff while trials were becoming longer and more complex. This has led to many leading members of the bar not taking on such trials. These senior and experienced counsels could be relied upon to focus on the essential issues in a trial and to conduct it in a responsible and efficient manner. Today, however, such counsels tend to avoid lengthy, complex trials as not being feasible financially. The inexperienced counsels that do take on long trials at the legal aid tariff require advice and supervision as to how they should conduct a defence so that trials are not unduly protracted.

LAO administers a Big Case Management (BCM) program. The BCM program has been created to deal with particularly large cases that are likely to exceed the cost of an average legal aid certificate. The BCM program covers cases that cost LAO between $20,000 and $75,000. If the case exceeds this upper limit, there is a further degree of oversight from a panel of experts known as the Exceptions Committee. Approximately 25% of the LAO criminal budget is spent on BCM cases. These cases are increasingly being conducted by junior lawyers, while the Lesage-Code report notes that, between 1999 and 2007, there was a 15% decline in the number of senior lawyers who took on any Legal Aid cases.

The preferred means of dealing with this situation is to pay higher fees and restrict eligibility to ensure that highly qualified lawyers will take on long, complex cases. The enhanced fees will make it economical for senior counsels to take on the defence in such cases. The benefit is that the trials should end up being shorter and less costly, as senior counsels will generally focus on the real issues in the case and will have no reason to unduly prolong the case.

An issue related to that of the role of counsel in complex trials is the problem of recruiting and retaining talented lawyers in the Public Prosecution Service of Canada. The Committee was informed that the salaries of federal prosecutors have fallen behind those of a number of provinces. The result is that, after federal prosecutors have amassed a certain amount of experience, they transfer to the provinces at salaries that could be as much as 40% to 60% higher.[170]

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170 Testimony of Marco Mendicino, Acting President, Association of Justice Counsel, before the House of Commons Standing Committee on Justice and Human Rights, April 30, 2009, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3854946&Language=E&Mode=1&Parl=40&Ses=2.

RECOMMENDATION

The Committee recommends that the federal contribution to legal aid be reviewed for "mega-trials" with a federal law element (such as prosecutions under the *Controlled Drugs and Substances Act*) in order to attract senior counsel.

RECOMMENDATION

The Committee recommends that the Government of Canada review the salaries of prosecutors with the Public Prosecution Service of Canada to determine whether they are comparable with the salaries of prosecutors with provincial prosecution services.

PUBLIC EDUCATION

A key component in the fight against organized crime is public education. This takes many forms. One is educating the public about the dangers of counterfeit goods. One of these dangers is that a counterfeit of, for example, medicine may, in fact, be harmful. A second danger is that a member of the public might think that he or she is getting a "good deal" when purchasing a deeply-discounted counterfeit product. But the labour of many people was exploited in the making of that product and the profit from the sale goes straight into the pocket of organized crime.

To combat payment card fraud, users of these cards need to learn about the scams perpetrated by organized crime and ways to protect themselves. The purchase of contraband tobacco may seem advantageous from a financial standpoint but it is not a "victimless crime", as it funds large organized crime groups and leads to a significant tax revenue loss.

The Committee was told that organized crime relies for its success upon its ability to prey upon the naive and the vulnerable. The way to combat this is through public education. Such education has to start at a young age so that children get the right messages about drugs and cyber-predatory behaviour. It is these elements that lead to approaches for prostitution and gang involvement. There is no other way to explain the continuing success of Internet frauds other than public ignorance. There must be a national commitment to education to reduce levels of victimization.[171]

171 Testimony of Chief Rick Hanson, Chief of Police, Calgary Police Service, March 29, 2010, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4391311&Language=E&Mode=1&Parl=40&Ses=3.