PART I – STATEMENT OF FACTS

A. OVERVIEW

1. None of the legal issues raised by the applicant require consideration by this Court. Applying this Court's recent decision in *Fraser* regarding protection afforded under s.2(d) of the *Charter* in labour relations, a unanimous Court of Appeal for Ontario determined that the Association of Justice Counsel (AJC) failed to demonstrate that the *Expenditure Restraint Act* (*ERA*) infringed the rights of its members to engage in a meaningful process of collective bargaining and therefore that there was no 2(d) violation.[1] The Court's conclusions are grounded on well-established principles and are unassailable. The applicant has not raised any issues of public importance that warrant this Court's intervention.

2. Nor are there any conflicting decisions which create uncertainty in the law. The two cases upon which the applicant relies - the Federal Court decision in *Meredith v. Roach*, which is under appeal, and the Quebec Superior court decision in *Association des réalisateurs c. Canada*, which is also under appeal - were considered and distinguished by the Court of Appeal. The Court noted that, unlike the case before it, these cases did not consider the effect of the *ERA* in circumstances where no agreement or arbitral award had yet been made, but the employees had already made submissions with respect to

[1] Decision of the Court of Appeal for Ontario, dated August 7, 2012, (Appeal Decision), Application Record, (AR) Tab 9, p.65, para.42

compensation for the subject period of time and their submissions had already been considered in good faith.

B. SUMMARY OF THE FACTS

3. Until April 1, 2005, when the *Public Service Labour Relations Act* (*PSLRA*), came into force, Department of Justice lawyers were specifically prohibited from being part of a bargaining unit and the terms and conditions of their employment were set by Treasury Board.[2]

4. The AJC was certified as the bargaining agent under the *PSLRA* for lawyers working for the federal government in the Department of Justice, the Public Prosecution Service of Canada and other federal agencies, tribunals and courts. [3] The AJC served its notice to bargain for all the lawyers in the bargaining unit (LA Group) on May 10, 2006.[4]

5. The history of the entire process of negotiation, over a broad range of terms and conditions of employment, is in the Appendix to the Ontario Court of Appeal's reasons, from the notice to bargain issued in May 2006 to the final offer in November, 2008. A summary of the key events follows.

6. At the first negotiating session, the AJC presented its bargaining proposal seeking a salary increase of approximately 35%. [5] The Treasury Board Secretariat (TBS) also tabled a bargaining proposal which addressed non-monetary issues.

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[2] Appeal Decision, AR, Tab 9, pp.49-50, para.3.
[3] Appeal Decision, AR,Tab 9, p.50, para.3.
[4] Appeal Decision, AR, Tab 9, p.50, para.4.
[5] Appeal Decision, AR, Tab 9, p.50, para.4.

7. Between November 22, 2006 and September 26, 2007, there were sixteen face-to-face negotiating sessions between the AJC and TBS. The undisputed evidence is that the parties agreed to negotiate non-monetary issues first.[6]

8. In March 2008, TBS tabled an offer of 1.5% annual economic increases retroactive to April 28, 2006. The AJC rejected this proposal and indicated it would begin the process of arbitration pursuant to the *PSLRA*.[7]

9. Between April and September 2008, the parties discussed but were unable to agree upon an arbitrator. As a consequence TBS referred all outstanding issues, including the appointment of the arbitrator, to the Public Service Labour Relations Board (PSLRB), pursuant to s.136 of the *PSLRA*. There were no further negotiations regarding wages or any other outstanding term.[8] An arbitrator was eventually appointed in September 2008 to settle the unresolved issues.

10. As the global financial crisis unfolded in the fall of 2008 and the economic conditions in Canada deteriorated, TBS invited the AJC to resume negotiations and attempt to reach a settlement. TBS presented a final offer to the AJC on November 18, 2008 that included a 2.5% salary increase for 2006-2007, 2.3% for 2007-2008 and 1.5% for each subsequent year until the end of the 2010-2011 fiscal year.[9] The negotiator for

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[6] Appeal Decision, AR, Tab 9, p.51, paras.4, 6.
[7] Appeal Decision, AR, Tab 9, p.51, para.8.
[8] Appeal Decision, AR, Tab 9, pp.51-52, para. 9.
[9] Affidavit of Marc Thibodeau, (Thibodeau Affidavit) at para. 33, Respondent's Record, (RR), Tab 3, p.26, Thibodeau Affidavit, Exhibit C, *Submission of the Treasury Board to the Arbitration Board in Respect of the Law Group*, (June 2009), p.49, RR, Tab 4, p.31.

TBS discussed the final offer with AJC counsel on November 25 and 26, 2008, but the offer was rejected and the AJC refused to resume negotiations.[10]

11. The same offer was made to all other bargaining agents in the Core Public Administration (CPA) resulting in the conclusion of 14 collective agreements by December 2008. Those agreements covered approximately 122,000 employees in the core public administration, out of a total bargaining population of approximately 177,649.[11]

12. All of this occurred three months before the *ERA* was proclaimed into force in March 2009.[12] From November 2008 until March 12, 2009 when the *ERA* came into force, particulars were filed by the parties with the arbitrator, who had been appointed at the request of the parties in September 2008 to settle the remaining issues. During this period the terms of reference and the jurisdiction of the arbitrator were decided, but no other issues were addressed.[13]

13. The arbitration on the merits proceeded in June of 2009 and awarded salary increases up to the maximum allowed by the *ERA* as follows: 2.5% on May 10, 2006, 2.3% on May 10, 2007, 1.5% on May 10, 2008, 1.5% on May 10, 2009 and 1.5% on May 10, 2010.[14]

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[10] Thibodeau Affidavit, at para. 33, RR, Tab 3, p.26,Thibodeau Affidavit, Exhibit C, *Submission of the Treasury Board to the Arbitration Board in Respect of the Law Group*, (June 2009), p. 49, RR, Tab 4, p.31; Appeal Decision, AR, Tab 9, pp.51-52, para. 10.
[11] Affidavit of Hélène Laurendeau, at paras. 65-70, RR, Tab 6, pp. 55-56.
[12] Appeal Decision, AR, Tab 9, p.52, para. 11.
[13] Appeal Decision, AR, Tab 9, Appendix pp.67-72.
[14] Thibodeau Affidavit, at para. 33, RR, Tab 3, pp.28,29, Thibodeau Affidavit, Exhibit D, *Arbitral Award between Association of Justice and Treasury Board* (October 23, 2009), RR, Tab 5, pp.32-53.

14. The increases were implemented in a collective agreement signed July 27, 2010.[15]

i. Unanimous Decision of the Ontario Court of Appeal

15. The Ontario Court of Appeal canvassed and considered the evolution of the s.2(d) jurisprudence and concluded that this Court's most recent pronouncement in *Fraser* was determinative.

16. In determining that the *ERA* did not infringe the rights of the members of the AJC to engage in a meaningful process of collective bargaining, the Court of Appeal applied the following principles from *Fraser*: s.2(d) guarantees a collective bargaining process, not a result, and does not require the parties to conclude an agreement or accept any particular terms. [16] In accordance with those principles the Court found that, the parties had engaged in a process that permitted the AJC to present the collective demands of its members to TBS and that required TBS to consider those demands in good faith. The Court rejected the AJC's claim that its s.2(d) rights were violated because the process of collective bargaining failed to yield an agreement.[17]

17. In so concluding, the Ontario Court of Appeal considered the lengthy two year process of collective bargaining in which the parties had participated. After sixteen face-to-face bargaining sessions and five days of mediation this process had ended in an impasse that resulted in arbitration. Despite not concluding an agreement regarding a

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[15] Appeal Decision, AR, Tab 9, p.52, para. 12.
[16] Appeal Decision, AR, Tab 9, p.65, paras. 22-31,42.
[17] Appeal Decision, AR, Tab 9, p.63, para. 38.

wage increase, this process allowed the AJC to make "very full representations to TBS as to the terms it proposed for its first collective agreement".[18]

18. Governed by the provisions of the *PSLRA*, this was a process, which required the parties "to meet and … bargain collectively in good faith". Though the application materials filed by the AJC are replete with allegations of bad faith conduct on the part of the employer throughout the bargaining process, it is notable that the union never availed itself of the proper recourse to deal with this alleged conduct[19] – namely, a bargaining in bad faith complaint before the PSLRB.

19. The Court of Appeal recognized that once the *ERA* was enacted, the wage settlement flowing from the arbitration was dictated by statute and the AJC would not be able to eliminate the salary gap of which it complained. However, the Court concluded, that this in itself was not a s.2(d) violation, given that *Fraser* makes clear that s.2(d) only protects "the right to collective bargaining in the minimal sense of good faith exchanges"[20], "does not impose a particular process" and "does not guarantee a legislated dispute resolution mechanism in the case of an impasse."[21]

20. The Court considered and rejected the applicant's submissions that the possibility of further negotiations between the parties after having proceeded to arbitration, demanded s.2(d) protection. In the Court's view, the validity of the *ERA* had to be assessed at the time it was enacted, and, at that time the parties had had a meaningful

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[18] Appeal Decision, AR, Tab 9, p.62, para. 35.
[19] Appeal Decision, AR, Tab 9, p.62, para. 36.
[20] *Fraser* at para. 90 as cited in Appeal Decision, AR, Tab 9, pp.63, 64, para. 39.

process of collective bargaining. The Court concluded that "the faint hope of further negotiations in the shadow of a dispute resolution mechanism not protected by s.2(d) cannot expand or extend the reach of s.2(d) beyond its core guarantee".[22]

21. Accordingly, the Court concluded that the AJC had failed to demonstrate that the *ERA* infringed the rights of its members to engage in a meaningful process of collective bargaining and the claim under s.2(d) failed.[23]

PART II – STATEMENT OF QUESTION IN ISSUE

22. The only issue in this application is whether the decision of the Ontario Court of Appeal raises a question of public importance or an important issue of law that ought to be considered by this Court. This application fails to meet the high threshold for granting leave under s.40(1) of the *Supreme Court Act*.

PART III – STATEMENT OF ARGUMENT

23. Leave to appeal should not be granted where the court below has correctly applied established law to the particular facts before it. In this case, the Court of Appeal correctly applied the law, as articulated by this Court in *Health Services*[24] and reaffirmed in *Fraser*. On a fact-specific and contextual inquiry, the Ontario Court of Appeal determined that the *ERA* did not make it effectively impossible for AJC members to

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[21] *Fraser* at para. 41 as cited in Appeal Decision, AR, Tab 9, pp.63, 64, para. 39.
[22] Appeal Decision, AR, Tab 9, p.64, para. 41; *Fraser* at para. 41.
[23] Appeal Decision, AR, Tab 9, p.65, para. 42.

engage in a meaningful process of collective bargaining.[25] This case warrants no further review by this Court.

i. <u>This Court's ruling in *Fraser* is dispositive</u>

24. This Court in *Fraser* reaffirmed its findings in *Health Services* that s. 2(d) of the *Charter* protects:

> *"... the right to associate to achieve collective goals. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association....However no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals."*[26] *(emphasis in original)*

25. The Ontario Court of Appeal's approach to the s.2(d) analysis in this case is entirely consistent with this Court's reasoning in *Health Services* and *Fraser*. The issue in those cases, as in the present case, was whether government action or legislation at issue, constituted substantial interference with the process of associational activity for the purpose of pursuing collective goals.[27]

26. The Court of Appeal assessed the validity of the *ERA* on the basis of whether, at the time it was enacted, the parties had had the opportunity to engage in a meaningful process of collective bargaining. If they had, the Court reasoned, s.2(d) was satisfied.[28]

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[24] *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, (*Health Services*) [2007] 2 SCR 391, 2007 Carswell BC 1289, App. Auth., Tab 6.
[25] Appeal Decision, AR, Tab 9, p.61, paras. 32,42,44.
[26] *Fraser,* at para. 46, App. Auth., Tab 9.
[27] *Health Services*, at paras. 89 - 92, App. Auth., Tab 6; *Fraser* at para.117 App. Auth., Tab 9
[28] *Association of Justice Counsel v. Canada (Attorney General), (AJC)* 2012 ONCA 530 at para. 41, Respondent's Authorities, Tab 1

As the collective bargaining process at issue was completed prior to the introduction of the *ERA*, the Court correctly focussed on the sufficiency of that process.

27. Central to the Court's decision is the fact that, by the time the *ERA* came into force, the parties had engaged in a two year process of negotiation during which they had conducted sixteen face-to-face negotiating sessions and participated in five days of mediation before reaching an impasse that led to arbitration. While acknowledging that TBS had adopted a tough bargaining position, the Court determined that having made very full representations on behalf of its members, the AJC had not been denied a full opportunity to present the wage demands nor had TBS failed to consider those demands in good faith. [29] The applicant alleges error in this determination and seeks leave to appeal on the ground that in focussing on the two year process of negotiation, the Court failed to consider the purpose and effect of the *ERA*.

28. There can be no error in not considering the purpose and effect of a statute that was neither proposed nor enacted during the negotiation period- from May 2006 to April 2008 when the AJC decided in favour of arbitration. The prospect of wage restraint legislation was first signalled in November 2008 when the AJC, like other federal public service unions, was invited by TBS to resume bargaining within anticipated legislative wage parameters in light of the unfolding financial crisis. Unlike a number of other federal unions, the AJC refused to do so. On these facts, the Court rightly concluded that

[29] *AJC* at paras. 35-37, Respondent's Authorities, Tab 1

the AJC had had an opportunity for a meaning process of negotiations, on which the *ERA* had no effect.[30]

29. Consequently, the Court concluded that there was no 2(d) breach, given that *Fraser* makes clear s.2(d) does not guarantee any dispute resolution mechanism after the parties have reached a bargaining impasse.[31]

30. The applicant, dissatisfied, with this conclusion urges this Court to grant leave to appeal so that it can argue for extension of the constitutional protection to negotiations that occur once arbitration has been engaged, relying on the principle in the *PSLRA* that provides that negotiations between the parties can continue after arbitration has commenced.

31. First, this is not an issue that can properly be raised by the applicant on the facts of this case given the finding of both courts below that the possibility of intra-arbitral negotiations between the parties was "remote". Second, reference to the *PSLRA* obligations is misguided and irrelevant as the protected 2(d) process a) did not constitutionalize this or any provision of the *PSLRA* and b) protects only the good-faith consideration of employee representations, not the ongoing possibility, however remote, that an agreement might be achieved before an interest arbitration board issues its award.

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[30] *AJC* at paras. 10, 41, Respondent's Authorities, Tab 1
[31] *AJC* at para. 41, Respondent's Authorities, Tab 1

32. Notwithstanding the Court's clear and obvious application of the *Fraser* and *Health Services* test for determining a s.2(d) violation, the applicant also seeks to challenge the analysis, arguing that the Court imported an additional hurdle or requirement and expanded the scope of the s.2(d) test.

33. *Health Services* established that the question of whether there was a substantial interference with a process of collective bargaining requires answering two queries: 1) the importance of the matter affected to the process of collective bargaining and, more specifically, to the capacity of union members to come together and pursue collective goals in concert; and 2) the manner in which the measure impacts on the collective right to good faith negotiation and consultation.[32] The Court of Appeal in answering the first question concluded that there was no interference with the capacity of union members to come together and pursue collective goals. This in itself was determinative. However, the Court proceeded to address the second inquiry and found that there was good faith negotiation.

34. In so doing, contrary to the applicant's submissions, the Court of Appeal merely applied well established law and did not expand the scope of the 2(d) inquiry. It is, rather the applicant that seeks to subvert the *Health Services*' test for substantial interference, by *narrowing* the scope of the test from two conjunctive inquiries to a singular inquiry.

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[32] *Health Services* at paras. 93-97

35. The applicant asserts that because the *ERA* impacted wages, which are important, the fact of whether members were able to come together and pursue collective goals in concert is irrelevant, as is the second inquiry, whether the measure impacts good faith negotiation. The issue, through the applicant's 2(d) lens, is simply one of legislative intent not of legislative impact or effect. The applicant's suggested 2(d) analysis divorces consideration of legislative intent from the factual context of the negotiation process, rendering meaningless the *actual* legislative impact or effect on the process of negotiations.

36. The applicant seeks to recast and narrow the test for finding a 2(d) breach as solely a question of whether the matter impacted by the legislation is important. If so, there is a 2(d) violation. This is not the contextual and fact-specific inquiry that *Health Services* demands. Nor does it heed the *Health Services* guidance that section 2(d) violations should not be lightly found.

37. In the applicant's decontextualized refashioning of the 2(d) test the only question in this case would be whether the *ERA*, despite not being enacted until March 2009, four months after negotiations had ended, impacted an important term, i.e. wage increases. On an affirmative answer to that question the applicant would argue that there is a 2(d) breach. This ignores the following facts: the AJC and TBS had negotiated for two years; the parties had reached an impasse; the applicant wanted the matter of wages to be determined by arbitration; the applicant refused to negotiate any further as of November

2008; and the likelihood of a return to negotiations during the arbitration phase was remote.

38. The applicant is trying to use s.2(d) to protect the ability to obtain a specific negotiated wage increase, i.e. a particular result – without legislative interference. Such an attempt flies in the face of this Court's findings in *Fraser* and *Health Services* that "what is protected is associational activity, not a particular process or result".[33] It is not the Court of Appeal that has got the s.2(d) test wrong, it is the applicant.

Conclusion

39. The proposed application for leave does not raise a question of public importance. The constitutionality of the *ERA* was decided in accordance with the recent decisions of this Court concerning s. 2(d) and need not be revisited.

PART IV – SUBMISSIONS AS TO COSTS

40. As this application does not raise an issue of public importance, there is no reason why costs should not follow the cause.

[33] *Fraser*, at para.47 (applying *Health Services*) App. Auth., Tab 9

PART V – ORDER SOUGHT

41. The Attorney General asks that the application for leave be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 6th day of November, 2012.

Kathryn Hucal

Kathryn Hucal
Of Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

Jurisprudence		Cited at para. #
1.	*Association of Justice Counsel v. Canada (Attorney General),* 2012 ONCA 530	26, 27, 28 and 29
2.	*Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia,* (*Health Services*) [2007] 2 SCR 391	23, 25, and 33
3.	*Ontario (Attorney General) v. Fraser,* 2011 SCC 20	24, 25 and 38

PART VII – STATUTES RELIED ON

Statutes	
1.	*Expenditure Restraint Act*, SC 2009, c 2, s 393
2.	*Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2
3.	*Supreme Court Act*, R.S.C., 1985, c. S-26