Court File No. C54656

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant
(Respondent in Appeal)
(Appellant in Cross-Appeal)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Appellant in Appeal)
(Respondent in Cross-Appeal)

FACTUM OF THE ASSOCIATION OF JUSTICE COUNSEL (Cross-Appeal)

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I N D E X

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FACTUM OF THE ASSOCIATION OF JUSTICE COUNSEL (Cross-Appeal)

PART I – DECISION APPEALED FROM

1. The Association of Justice Counsel ("AJC") cross-appeals the decision of Justice Grace of the Superior Court of Justice, upholding the balance of the *Expenditure Restraint Act* ("*ERA*") after striking down two provisions of the Act on the grounds that they unjustifiably infringed the *Charter* rights of Federal Crown counsel.

PART II - OVERVIEW

2. The AJC has always acknowledged that the economic events of late 2008 were extremely serious, and posed significant challenges to the federal government. The global financial crisis required the government to take steps to restore liquidity to credit markets, to stimulate spending, and to maintain and restore confidence in the economic system generally. The severity of the global financial crisis is not in issue. Indeed,

many of the government's measures in response to the crisis were crafted with the assistance of lawyers represented by the AJC.

3. However, the government did not face insurmountable problems with its own finances. There was no major concern with accumulated debt. When wage restraints were first put forward, the government did not even expect to have a deficit. There was no crisis of unpredictability in public sector wages, nor were there any significant documented inflationary pressures on private sector wages. Furthermore, the government had at its disposal a flexible tool for addressing public sector wages – arbitration under the *Public Service Labour Relations Act* ("*PSLRA*"), which must take into account the state of the economy and the government's fiscal circumstances. The existing system of collective bargaining, including arbitration under the *PSLRA*, was sufficiently flexible to take into account all of the objectives now put forward for the *ERA*.

4. Justice Grace erred in accepting the argument that the global financial crisis, however serious, justified the imposition of wage restraints from 2007 to 2011. Put simply, there was no obvious connection between the issues created by the global financial crisis and the claimed need to suspend the right to bargain collectively over wages. While public sector wage restraints may be politically popular – as is perhaps evident from the frequency with which they have been imposed by the federal government – this does not make them demonstrably justified in a free and democratic society. There has been no showing that the government's legitimate interests could

not have been recognized and protected through ordinary course bargaining and arbitration.

PART III - FACTS

5. The AJC relies on the facts as set out in its factum responding to the main appeal. The AJC further relies on the facts set out below.

6. Collective bargaining in the federal public service is governed by the terms of the *PSLRA*. Under that statute, the bargaining agent (union) for a bargaining unit of employees negotiates with Treasury Board towards the conclusion of a collective agreement. Both parties must bargain in good faith, and must make every reasonable effort to enter into a collective agreement.[1]

7. If the parties are unable to reach agreement, there are two methods of resolving their differences: conciliation (leading ultimately to the right to strike or lockout), or binding arbitration before an arbitration board appointed by the Public Service Labour Relations Board ("PSLRB"). The bargaining agent may elect between these two methods, but must do so before bargaining commences.[2] The AJC elected arbitration as the dispute resolution mechanism for their first collective agreement.

8. If settling the terms of a collective agreement does proceed to arbitration (commonly referred to as "interest arbitration"), the Arbitration Board must have regard to a number of factors:

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[1] *Public Service Labour Relations Act*, S.C. 2003, c. 22, s.2 ("*PSLRA*"), s. 106.
[2] *PSLRA*, s.103.

> 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;
>
> (*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;
>
> (*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;
>
> (*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. [emphasis added][3]

PART IV – ISSUES AND ARGUMENT

9. Justice Grace found the *ERA* infringes s.2(d) of the *Charter*. The remaining question is therefore whether he erred in concluding that the provisions of the *ERA*, other than those he struck down, could be justified under s.1. This involves the following issues:

(a) Were the objectives of the *ERA* pressing and substantial?

(b) Were the means chosen rationally connected to the objectives?

(c) Did the *ERA* minimally impair the *Charter* rights at issue?

(d) Did the deleterious effects of the *ERA* outweigh any benefits it entailed?

[3] *PSLRA*, s.148; Cross-Examination of H. Laurendeau, q. 608, *Exhibit Book*, Vol. 8, Tab 10, p. 2317.

A. The Objectives of the *ERA* as a Whole are not Pressing and Substantial

(i) Cost Containment

10. Justice Grace found that one objective of the *ERA* was cost containment, though this was not an objective asserted by the Attorney General.

11. Mr. Rochon, Associate Deputy Minister of Finance, stated that the *ERA* has the "overriding objective" of restraining expenditure to ensure that the government's fiscal position is sustainable coming out of the global economic crisis.[4] However, he also identified three separate "policy objectives" of the Act:

(a) To reduce undue upward pressure on private sector wages;

(b) To provide leadership by showing restraint and respect for public money; and

(c) To manage public sector wage costs in an appropriate and predictable manner.[5]

12. Despite Mr. Rochon's evidence, the contemporaneous evidence suggests that the major emphasis at the time the *ERA* was being developed was upon cost containment, not these "policy objectives", to the extent that they go beyond cost containment.

13. Both Mr. Rochon and Ms. Laurendeau, Assistant Deputy Minister at Treasury Board Secretariat, testified that in October 2008, Treasury Board Secretariat was asked

[4] Rochon Affidavit, para. 45, *Exhibit Book*, Vol. 3, Tab 3, pp. 670-671.
[5] Rochon Affidavit, para. 33, *Exhibit Book*, Vol. 3, Tab 3, p. 667.

by Finance "to develop measures to restrict spending", subsequently refined to provision of specific advice "on options to limit compensation costs within the current round of collective bargaining so as to control the growth of the wage bill".[6]

14. Ms. Laurendeau, working with her colleagues at Treasury Board Secretariat, then proceeded to prepare an options paper on "cost containment measures", which looked at three different "drivers" of compensation expenditure, and ways in which each of these could be curtailed.[7] These requests to limit spending, and the subsequent development of options that have little in common except that they would all limit spending, are consistent with the objective of the *ERA* being to contain costs.

15. However, they do not demonstrate any concern with the supposed undue upward pressure on private sector wages. Indeed, Treasury Board Secretariat actively considered a hiring freeze,[8] which would not have required that wage increases be limited at all.

16. To the extent that cost containment is the major or overriding objective of the *ERA*, it should not be accepted as sufficiently pressing and substantial to warrant overriding the *Charter* rights of employees. Having found this to be an objective, Justice Grace should have ruled that it did not meet the s.1 test, in light of the abundant

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[6] First Laurendeau Affidavit, para. 47, *Exhibit Book*, Vol. 1, Tab 1, p. 14; and Rochon Affidavit, para. 28, *Exhibit Book*, Vol. 3, Tab 3, p. 666.
[7] "Compensation Expenditure Cost Containment Measures", Exhibit "M" to First Laurendeau Affidavit, *Exhibit Book*, Vol. 1, Tab 1M, pp. 233-237.
[8] "Compensation Expenditure Cost Containment Measures", Exhibit "M" to First Laurendeau Affidavit, *Exhibit Book*, Vol. 1, Tab 1M, p. 233-237.

authority holding that budgetary constraints are rarely a sufficient reason to justify the infringement of *Charter* rights.[9]

17. On the Attorney General's evidence, the savings created by the *ERA* are relatively modest in comparison to the overall budget. After three years, they reach $1 billion per year, on a total federal budget of approximately $268 billion per year.[10] These savings are dwarfed by the impact of tax cuts, estimated at $21 billion by Minister Flaherty in his October 29, 2008 speech,[11] or the stimulus spending package of approximately $20 billion per year for each of 2009-10 and 2010-11.[12] Moreover, the government's fiscal position is relatively strong, despite the global economic downturn. Even with the impact of stimulus spending, the government's accumulated deficit is projected to peak at 35.4% of GDP before declining, which compares very favourably to the peak of 68.4% reached in 1995-96.[13] This is not, with respect, a crisis in the government's fiscal situation of the kind that was held to be sufficiently exceptional to justify infringing *Charter* rights in *Newfoundland (Treasury Board) v. N.A.P.E*.[14]

(ii) Reducing Upward Pressure on Private Sector Wages

18. Data specific to Canada do not support the existence of any "undue upward pressure" by public sector wages on private sector wages. Unlike the case in many

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[9] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391*, para. 147; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 109; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, para. 72.
[10] Cross-examination of P. Rochon, q. 91, 70-71, *Exhibit Book*, Vol. 6, Tab 7, p. 1579, 1573.
[11] Speech by the Honourable Jim Flaherty, October 29, 2008, Exhibit O to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, Tab 5O, p. 1283-1287.
[12] Cross-examination of P. Rochon, q. 126-128, *Exhibit Book*, Vol. 6, Tab 7, p. 1588-1589.
[13] Cross-examination of P. Rochon, q. 145-151, *Exhibit Book*, Vol. 6, Tab 7, p. 1591-1593.
[14] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381.

countries, in Canada public sector wages are lower than private sector wages, and have been since the mid to late 1990s.[15] Moreover, public sector wage settlements have been lower than private sector wage settlements over the last 20 years, albeit with some catching up in recent years.[16] Finally, the economic literature is very sparse and inconclusive on whether restraining public sector wages has any affect on private sector wages, at least in Canada.[17] That was particularly true at the time that the *ERA* was announced.

(iii) Providing Leadership/ Showing Restraint and Respect for Public Money

19. As set out in *Meredith & Roach v. Canada (Attorney General)*, this objective is "quite abstract", and "appears to be political in nature".[18] Moreover, it is an objective that applies all of the time, not just in times of economic stress. For the same reasons that budgetary considerations are not generally sufficient to warrant overriding a *Charter* right, this objective should not be regarded as pressing and substantial.

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[15] Alfonso & Gomes, "Interactions between Private and Public Sector Wages", European Central Bank Working Paper Series, No. 971, November 2008, Exhibit M4 to Rochon Affidavit, *Exhibit Book*, Vol. 3, Tab 3-M4, p. 909.

[16] Human Resources and Skills Development Canada, "Average Annual Percentage Wage Adjustments by Public and Private Sectors, A Chronological Perspective Since 1990", Exhibit 5 to Rochon cross-examination, *Exhibit Book*, Vol. 6, Tab 7E, p. 1989-1790.

[17] Lameaux, Perez and Schuknecht, "Public and Private Sector Wages Co-movement and Causality", Exhibit 4 to Rochon Cross-Examination, p. 5, 19, discussed below, *Exhibit Book*, Vol. 6, Tab 7D, p. p. 1729-1730, 1738-1739. Mr. Rochon conceded on his cross-examination that generally the literature on public sector wages affecting private sector was "not a deep literature", even outside of the Canadian context: cross-examination of P. Rochon, q. 297, *Exhibit Book*, Vol. 6, Tab 7, p. 1630.

[18] *Meredith & Roach v. Canada (Attorney General)*, 2011 FC 735, at para. 120 (appeal pending).

(iv) Ensuring Predictability of Wage Settlements

20. There is no evidence that unpredictability of wage settlements was a problem for the government in the years leading up to 2008. To the contrary, Ms. Laurendeau testified that Treasury Board Secretariat had an "Expenditure Management Unit" that was able to estimate both the general economic increase for future agreements, and the impact of "group specific pressures" that went into collectively bargained settlements. She further testified that these estimates were provided to Finance and, in turn, formed the basis for Finance's announcement to Canadians that wage restraint legislation would save $600 million for each of 2008-09 and 2009-10, $900 million for 2010-11, and $1 billion for the following two years.[19]

21. To put this into context, Mr. Rochon admitted that other components of the budget on both the revenue and expenditure side were subject to significant variation, and that Finance operated in a very uncertain world.[20] It is mysterious that ensuring predictability should be imperative only for the government's compensation costs, while other items affecting the budget can vary so widely.

22. Finally, asserting the need to ensure predictability in compensation is tantamount to saying that the government cannot accept any uncertainty that may arise when the government does not unilaterally control wage increases. In other words, the government cannot accept free collective bargaining, because it doesn't control the

[19] Laurendeau Cross-Examination, q. 182-187, *Exhibit Book*, Vol. 8, Tab 10, p. 2185-2187.
[20] Rochon Cross-Examination, q. 116-125, *Exhibit Book*, Vol. 6, Tab 7, p. 1586-1588.

outcome. This objective is absolutely inimical to a protected *Charter* right. Negating a *Charter* right is not a valid objective for the purposes of s.1.[21]

B. The *ERA* is not Rationally Connected to its Objectives

23. In assessing if there is a rational connection between the infringement of the Law Group members' rights on the one hand, and the *ERA*'s objective(s) on the other, this Court must ask whether the government has demonstrated that the *ERA* scheme "may promote" its stated objective(s). In doing so, however, the Court must also be satisfied that the *ERA* scheme is not arbitrary, unfair, or based on irrational considerations. As Chief Justice McLachlin stated in *Adler v. Ontario*:

> What is required is that the measure not be arbitrary, unfair or based on irrational considerations. … As a matter of common sense, can it be said that the measure or legislative scheme in question may promote (as opposed to inevitably accomplish) the objective sought?[22]

24. In assessing whether there is a rational connection under the s.1 analysis, this Court must also be cognizant of the specificity with which the impugned legislation seeks to achieve its objective. To satisfy the rational connection test, the impugned legislation must not only promote its objectives, it must also be "carefully tailored" to meet those objectives.[23]

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[21] *A.G. (Quebec) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, p. 88.
[22] *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 218 (per McLachlin C.J.C., dissenting in part). [Citation omitted]
[23] *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 54.

(i) Cost Containment

25. The AJC accepts that the *ERA* promotes the objective of containing costs, but it does so in such an irrational manner, with so many arbitrary distinctions, that it cannot be said to meet the "rational connection" test as described above.

(ii) Avoiding Undue Upward Pressure on Private Sector Wages

26. There is no reliable evidence that the *ERA* has the effect of avoiding undue upward pressure on private sector wages. The only evidence on this subject is found in the affidavit of Mr. Rochon, where he states the following, in highly qualified terms:

> Economic studies support the existence of a relationship between public sector wage settlements and private sector wage settlements, given that private sector firms compete directly and indirectly with the public sector for labour in many markets. Most of these studies also suggest that an increase in public sector wages tends to put upward pressure on private sector costs as it increases the attractiveness of public sector jobs relative to private sector jobs, inducing some private sector employees to look for jobs in the public sector. As a result, firms in the private sector need to increase their wages to retain or attract employees. Higher wages, not justified by economic conditions, have been shown to dampen private sector job creation.[24]

27. In support, Mr. Rochon appends eight economic studies and articles, of which three post-date the announcement of the *ERA*. However, these studies do not demonstrate that the *ERA* will have any effect on private sector incomes in Canada.

28. Mr. Rochon admitted that he is not a labour economist, and that conditions that are specific to individual countries can affect labour market outcomes. For example, degree of unionization, size of the public sector, model of collective bargaining

[24] Rochon Affidavit, para. 49, *Exhibit Book*, Vol. 3, Tab 3, p. 672.

(centralized or decentralized), and the extent of the social welfare system can all affect labour market outcomes and can differ markedly from country to country.[25]

29. Only one of Mr. Rochon's eight studies was specific to Canada.[26] That study found the following:

- There was no empirical evidence that income and price controls in Canada in 1975 had a significant effect on private sector wages;
- A spillover effect between public and private sector wages could only be found in certain specific conditions, i.e., for certain occupations and for employees located in the same urban area;
- The magnitude of the spillover effect is higher in a tight labour market (i.e., low unemployment), and lower in the case of a large urban area; and
- Where it was measured, the effect was small - in the range of 3%. That is to say, a 1% raise in public sector wages would lead to only a .03% raise in the private sector.

30. Because of the limited conclusions in this study, Justice Heneghan found no rational connection to upward pressure on private sector wages for the RCMP in *Meredith and Roach v. Canada (Attorney General)*.[27]

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[25] Cross-examination of Rochon, q. 12-25, 30-35, *Exhibit Book*, Vol. 6, Tab 7, p. 1558-1561, p. 1563-1564.
[26] Lacroix and Dussault, "The Spillover Effect of Public Sector Wage Contracts in Canada", Exhibit M8 to Rochon Affidavit, *Exhibit Book*, Vol. 3, Tab 3-M8, p. 1030-1034.
[27] 2011 FC 735, at paras. 124-26.

31. Mr. Rochon omitted from his affidavit a 2008 study that directly measured co-movement and causality between public and private sector wages in a number of OECD countries, including Canada. That study was a companion to the study Mr. Rochon appended at Tab M4, and shared a co-author with the study at Tab M2. The study omitted by Mr. Rochon concludes that "private sector wages seem to exert mostly a stronger influence on public wages than the other way around", and specifically finds that "in the Anglo Saxon group the US, the UK and Canada show causality from the private to the public sector", while some other countries show causality from public sector to private sector.[28]

32. In explaining these results, the authors examine various factors, including whether bargaining is centralized or decentralized to the company or occupational level, whether product markets are highly regulated, whether there is a high ratio of union membership in employment, and whether the county's economy is highly globalized. These factors indicate that in the case of Canada, increases in public sector wages would not be expected to cause increases in the private sector. Mr. Rochon was clearly aware of this study and admitted that he had been briefed on it, but omitted it because, in his view, it was "not relevant".[29]

33. In re-examination, Mr. Rochon was directed to the study at Tab M2. He confirmed that this study did not present separate results for Canada, but relied upon

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[28] Lameaux, Perez and Schuknecht, "Public and Private Sector Wages Co-movement and Causality", Exhibit 4 to Rochon Cross-Examination, p. 19, *Exhibit Book*, Vol. 6, Tab 7D, p. 1738.

[29] Lameaux, Perez and Schuknecht, "Public and Private Sector Wages Co-movement and Causality", Exhibit 4 to Rochon Cross-Examination, p. 22-23, *Exhibit Book*, Vol. 6, Tab 7D, p. 1742-1743. Cross-examination of P. Rochon, q. 193, 290, *Exhibit Book*, Vol. 6, Tab 7, p. 1605, 1628.

the fact that Canada was included in the aggregate results since it was an OECD country included in aggregate data for one particular measure. This paper, together with others cited by Mr. Rochon, is predicated on a public sector "wage premium" relative to private sector employees.[30] The existence of a "positive public-private sector wage gap" induces private sector employees to search for public sector jobs. However, if government sets public sector wages too low, far from creating "undue upward pressure" on private sector wages, few employees want a public sector job, "and the government faces recruitment problems".[31]

34. Moreover, the general studies Mr. Rochon relies upon to support his "undue upward pressure on private sector wages" theory (not specific to Canada) base their calculations on the effect of public sector wage increases on an assumption that the public sector accounts for approximately 15 - 20% of total employment.[32] While Canada's overall public sector employment is in this range, the *ERA* applies only to a small segment of Canadian employees - approximately 2.2% of all employees.[33] That small a tail is not likely to wag the dog to any material extent.

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[30] Cordoba, Perez and Torres, "Public and Private Sector Wages, Interactions and a General Equilibrium Model", Exhibit M2 to Rochon Affidavit, *Exhibit Book*, Vol. 3, Tab 3-M2, p. 783 (abstract), 784-785 (non-technical summary); Cross-examination of Rochon, q. 413, *Exhibit Book*, Vol. 6, Tab 7, p. 1663; Alfonso and Gomez, "Interactions Between Private and Public Sector Wages", Exhibit M4 to Rochon Affidavit, p. 47, *Exhibit Book*, Vol. 3, Tab 3-M4, p. 874-875.

[31] Gomes, "Labour Market Effects of Public Sector Employment and Wages", Exhibit M3 to Rochon Affidavit, p. 3, *Exhibit Book*, Vol. 3, Tab 3-M3, p. 817.

[32] Gomes, "Labour Market Effects of Public Sector Employment and Wages", Exhibit M3 to Rochon Affidavit, p.4, *Exhibit Book*, Vol. 3, Tab 3-M3, p. 818; Alfonso and Gomes, "Interactions between Private and Public Sector Wages", Exhibit M4 to Rochon Affidavit, p. 12, *Exhibit Book*, Vol. 3, Tab 3-M4, p. 874-875.

[33] 380,000 employees covered by the *ERA* represent 2.2% of Canada's total employment of 17.2 million: Statistics Canada, "Latest Release from the Labour Force Survey", March 11, 2011. The AJC's 2700 lawyers represent 2.7% of Canada's 98,500 lawyers and notaries: see Federation of Law Societies of Canada, "About Us", http://www.flsc.ca/en/about/about.asp.

(iii) Showing Leadership/Respect for Public Money

35. To the extent that this objective simply restates the objective of saving money, it is dealt with above. Moreover, the "leadership" shown by the *ERA* allowed the government's executive cadre (including all three of the Attorney General's affiants) to keep increases that were denied to most others.

(iv) Ensuring Predictability of Compensation

36. There is no demonstrated rational connection between the *ERA* and the objective of "ensuring predictability of compensation". Although the Attorney General's witnesses refused to divulge the amounts that the *ERA* was projected to save, Ms. Laurendeau confirmed that Treasury Board has an Expenditure Management Unit that calculates savings based on modeling, that such calculations are "usually fairly accurate", and that in that in the ordinary course Treasury Board can project both the general global or economic increase, and the groups-specific pressures that apply to federal public servants.[34] Moreover, this process is reliable enough that the government was able to announce to Canadians what the impact of the *ERA* will be.[35] There is simply no evidence before the Court that the *ERA* produces more certainty, to any material degree, than collective bargaining in the ordinary course. To the contrary, if the government can predict savings from the *ERA*, they must already have had the required predictability in their costing models.

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[34] Laurendeau Cross-Examination, q. 124-126 and q. 197-206, *Exhibit Book*, Vol. 8, Tab 10, p. 2166-2167, 2190-2193.

[35] Economic and Fiscal Statement, p. 50, Exhibit 1 to Laurendeau Cross-Examination; *Exhibit Book*, Vol. 8, Tab 10A, p. 2332-2333.

37. Moreover, the *ERA* introduces a very significant element of uncertainty. By interfering with collective bargaining rights, the government has provoked a number of *Charter* challenges. Mr. Thibodeau confirmed that in addition to the present case, *Charter* challenges have been filed by the Ship Repair (West) group, Professional Institute of Public Servants Canada, the CBC Producers, the Public Service Alliance of Canada, the Union of Correctional Officers, the Foreign Service Officers, and possibly the Canadian Association of Professional Employees,[36] as well as *Meredith & Roach*.[37] To the extent that these challenges succeed, they may change the government's predictions based on the *ERA*. At the very least, the process of resolving these challenges may lead to years of uncertainty, both for costing purposes and at the bargaining table.

38. While Justice Grace found a rational connection between the *ERA* and predictability because the *ERA* achieved more exact results than even a sophisticated modeling approach,[38] he did not explain why such exactitude should be considered a pressing and substantial objective.

C. The *ERA* does not Minimally Impair Charter Rights

(i) Cost Containment

39. For the overriding objective of cost containment, the record is clear that the government had less intrusive means of achieving this objective. Ms. Laurendeau

[36] Thibodeau Cross-Examination, q. 637-651, *Exhibit Book*, Vol. 7, Tab 9, p. 2068-2071.
[37] Laurendeau Cross-Examination, q. 614-615, *Exhibit Book*, Vol. 8, Tab 10, p. 2320.
[38] Decision on the Merits, para. 115, *Appeal Book and Compendium*, Tab 4, p. 31.

admitted on cross-examination that a hiring freeze did not require legislation and would not violate collective agreements. According to a "Cost containment measures" paper drafted by Ms. Laurendeau, such a freeze would generate savings comparable to those claimed for the *ERA*, particularly in light of the "snowball effect" whereby such savings increase from year to year.[39]

40. The AJC also submits that there is no evidence on the record that ordinary course bargaining, with the possibility of arbitration by the PSLRB, would result in any profligacy in public spending. For negotiated agreements, Treasury Board is free to take positions in light of the government's fiscal situation, and to agree only to those proposals that it sees as consistent with the government's fiscal situation. In arbitration under the *PSLRA*, the arbitration board is legislatively directed to take the government's fiscal situation into account.[40] There is no evidence that the board is unable to do so; to the contrary, Ms. Laurendeau confirmed that the board is able to make appropriate decisions on compensation.[41]

41. Alternatively, to the extent that legislated wage restraint may have been regarded as necessary, it would have been much less arbitrary to start its effective date at the same time for all employees – i.e., on a go-forward basis from December 8, 2008 without the retroactive features of the *ERA*. As drafted, the *ERA* imposes five years of

[39] Cross-examination of H. Laurendeau, q. 128, *Exhibit Book*, Vol. 8, Tab 10, p. 2168. The projected savings from a hiring freeze of $120 million, $525 million, and $975 million for the first three years, and greater amounts thereafter, are similar in magnitude to the $600 million for the first two years, $900 million for the third year, and $1 billion thereafter claimed by the government from its wage restraint legislation: compare Exhibit M to First Laurendeau Affidavit, *Exhibit Book*, Vol. 1, Tab 1M, p. 234-237, Exhibit 1 to Laurendeau Cross-Examination, *Exhibit Book*, Vol. 8, Tab 8A, p. 2332-2333.
[40] *PSLRA*, s.148.
[41] Cross-examination of H. Laurendeau, q. 607, *Exhibit Book*, Vol. 8, Tab 10, p. 2316.

wage restraint on three small groups (including the Law Group), but only a little more than two years on others (those individuals and groups whose increases were accepted prior to December 8, 2008), with still others in between. Eliminating the retroactive features of the *ERA*, so that all groups could have their wages established by collective bargaining up to that date, but restraint measures would apply thereafter with the same duration for everyone, would have been another intermediate solution that would have ensured a level playing field.

42. Effectively, by taking this route of selective retroactivity, the government selected particular groups for different treatment. It appears, for example, that the government put significant effort into reaching agreements with its largest union, the Public Service Alliance of Canada, prior to December 8, 2008. By contrast, there was no meaningful attempt by Treasury Board to negotiate with the AJC in late 2008. Ms. Laurendeau admitted that the AJC was "not at the top of the list" of bargaining agents Treasury Board expected to be able to reach agreement with,[42] nor were any offers made by Treasury Board that could have led to real bargaining.[43] Other groups, such as the executive cadre or Ship Repair East Group, were simply fortunate enough to have had their wage increases established prior to the December 8 date. Restraint legislation without the partial and selective retroactivity of the *ERA* would have been fairer and less intrusive.

[42] Cross-examination of H. Laurendeau, q. 374-376, *Exhibit Book*, Vol. 8, Tab 10, p. 2242.
[43] Cross-examination of H. Laurendeau, q. 558-559, *Exhibit Book*, Vol. 8, Tab 10, p. 2304.

(ii) Undue Upward Pressure on Private Sector Wages

43. The Attorney General did not demonstrate that ordinary course bargaining would be insufficient to address any possible pressures on private sector incomes. Either through negotiation or arbitration, Treasury Board could well have achieved results that were satisfactory to the parties, but did not put any undue upward pressure on private sector incomes, recalling that public sector incomes are on average lower than those in the private sector in Canada. The "state of the economy" is also one of the mandatory criteria that an arbitration board must take into account under the *PSLRA*.[44]

44. In the context of the pressing and substantial objective branch of the s.1 test, Justice Grace found that this objective qualified, despite the weakness of the evidence of any inflationary pressures on private sector incomes arising from the federal public sector (particularly in relation to lawyers), because such pressures could materialize in time "if potential increases remained unchecked".[45] However, for the purposes of the minimal impairment analysis, this does not justify the draconian step of suspending collective bargaining over wages for a five year period. Negotiation and arbitration under the *PSLRA*, on a case-by-case basis for each group with due regard to the state of the economy, is a much more tailored way of containing any such pressures.

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[44] *PSLRA*, s.148.

[45] Decision on the Merits, para. 104, *Appeal Book and Compendium*, Tab 4, p. 29.

(iii) Leadership/Respect for Public Money

45. To the extent that this restates the objective of restraining expenditure, it is dealt with above. Moreover, there are many other options to achieve savings goals, besides interfering with the *Charter* rights of public servants. The government elected to proceed with $21 billion in personal tax cuts, as well as its corporate tax cut reduction strategy. Whatever the merits of these decisions may be as policy choices, there is no right to tax cuts under the *Charter*.

(iv) Ensuring Predictability of Compensation

46. One obvious and much less intrusive means of ensuring predictability of public sector compensation is to negotiate longer term collective agreements. Indeed, in Budget 2011, the government announced that it had opened negotiations early with many bargaining agents in an attempt to achieve exactly the same objective.[46] This announced initiative contrasts sharply with the approach the Treasury Board took to the negotiations with the AJC between 2006 and 2008.

D. Proportionality Between Salutary and Deleterious Effects

47. The AJC respectfully submits that the deleterious effects of the *ERA* substantially outweigh any benefits that it may achieve. For federal public servants, collective bargaining on the most central issue is effectively eliminated for up to a five year period (depending upon the group). Further, this can exacerbate recruitment and retention

[46] Budget 2011, p. 169.

issues, and concomitant low morale, that plague many occupations within the public service, including the Law Group.

48. Moreover, the *ERA* is intended to have permanent effect – no subsequent agreement or award may compensate for the period of restraint.[47] The beneficial effects of ensuring workplace democracy and addressing inequality of bargaining power that were noted by the Supreme Court in *Health Services* are at a minimum weakened and postponed.[48] This has particular significance for the AJC and its members, who are new to collective bargaining. As is often said in this context, labour relations delayed are labour relations defeated and denied.[49] These deleterious effects far outweigh any benefits of the legislation.

[47] *Meredith & Roach v. Canada (Attorney General)*, 2011 FC 735, at paras. 87-88; *ERA*, s.57.
[48] *Health Services*, *supra* at paras. 82-85.
[49] See e.g. *The Journal Publishing Company of Ottawa Limited v. The Ottawa Newspaper Guild*, [1977] O.J. No. 8 (C.A.), at para. 4.

PART V - ORDER REQUESTED

49. The AJC respectfully requests that the cross-appeal be allowed, with costs, and that the *ERA* be struck down in its entirety. In the alternative, the retroactive provisions of the *ERA* should be struck down.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: May 31, 2012

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Court File No. C54656

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant
(Respondent in Appeal)
(Appellant in Cross-Appeal)

- and -

ATTORNEY GENERAL OF CANADA

Respondent
(Appellant)
(Appellant in Cross-Appeal)

CERTIFICATE

I, Andrew K. Lokan, solicitor for the Defendants (Appellants), certify that:

(i) an order under subrule 61.09(2) is not required; and

(ii) 2 hours and 15 minutes will be required for my oral argument on the appeal and cross-appeal, not including reply.

May 31, 2012

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SCHEDULE "A"
TABLE OF AUTHORITIES

1. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391

2. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504

3. *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381

4. *Meredith & Roach v. Canada (Attorney General)*, 2011 FC 735, at para. 120 (appeal pending)

5. *A.G. (Quebec) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66

6. *Adler v. Ontario*, [1996] 3 S.C.R. 609 at para. 218 (per McLachlin C.J.C., dissenting in part). [Citation omitted]

7. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 2011 FC 735

8. Budget 2011, p. 169

9. *The Journal Publishing Company of Ottawa Limited v. The Ottawa Newspaper Guild*, [1977] O.J. No. 8 (C.A.)

SCHEDULE "B"
TABLE OF STATUTORY AUTHORITIES

Please see Schedule "B"
of the Responding Factum of the Association of Justice Counsel

Court File No.: C54656

ASSOCIATION OF JUSTICE COUNSEL
Applicant
(Respondent in Appeal)
(Appellant in Cross-Appeal)

- and -

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COURT OF APPEAL FOR ONTARIO

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