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)

FACTUM OF THE ASSOCIATION OF JUSTICE COUNSEL

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PART I - OVERVIEW

1. The Attorney General appeals the decision of Justice Grace striking down two provisions of the *Expenditure Restraint Act* ("*ERA*") on the grounds that they unjustifiably infringed the *Charter* rights of Federal Crown counsel, by limiting collective bargaining over rates of pay retroactively to the 2006-2007 fiscal year ("FY 2006-07"). The Attorney General claims that Justice Grace misunderstood the jurisprudence under s.2(d) of the *Charter*, misunderstood the effect of the impugned provisions, and failed to show appropriate deference to Parliament.

2. Contrary to these claims, Justice Grace conducted a careful review of the relevant cases and the voluminous evidence. His finding that the *ERA* breaches s.2(d) of the *Charter* is fully consistent with the authorities. The Attorney General's claim that Justice Grace failed to appreciate that payment of any retroactive increases arising from FY 2006-07 would affect current finances is simply wrong. Moreover, deference does not require that the court uphold a law where the government chooses not to explain

why a significantly less intrusive and equally effective measure was not chosen.[1] With respect, it is not appropriate to defer when the government led no evidence as to why FY 2006-07 was included in the *ERA* at the last minute. That inclusion had a unique affect on the Law Group, the only bargaining unit in the federal public service that had never established its baseline compensation through collective bargaining. For these reasons, the appeal should be dismissed.

PART II – FACTS

A. Background to the Application

3. The AJC represents approximately 2,700 Federal Crown counsel who work in the Public Prosecution Service of Canada ("PPSC"), the Department of Justice ("DOJ"), and other federal agencies, tribunals and courts.[2] The AJC challenged the *ERA* because it impedes efforts by its members to address long-standing concerns about salary.[3]

4. Historically, all but a few Federal Crown counsel were excluded by statute from collective bargaining.[4] That changed in 2005 with the passage of the *Public Service Labour Relations Act* ("*PSLRA*"). The AJC became certified as the bargaining agent for Federal Crown counsel in April 2006, and served a Notice to Bargain on May 10, 2006.[5]

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[1] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 160.

[2] Reasons for Judgment of Justice Grace, dated November 1, 2011 ["Decision on the Merits"], paras. 2-3, *Appeal Book and Compendium*, Tab 4, p. 11-12.

[3] Decision on the Merits, para. 1, *Appeal Book and Compendium*, Tab 4, p. 11.

[4] Approximately 100 of the 2700 lawyers had previously been represented by the Professional Institute of Public Servants Canada ("PIPSC"). These were lawyers working elsewhere than the Department of Justice: Submission of Treasury Board to the Arbitration Board in Respect of the Law Group: Exhibit C to Thibodeau Affidavit, *Exhibit Book*, Vol. 2, Tab 2C, p. 351; Cross-Examination of M. Thibodeau, q. 74-75, *Exhibit Book*, Vol. 7, Tab 9, p. 1926-1927.

[5] Decision on the Merits, paras. 4, 10, *Appeal Book and Compendium*, Tab 4, p. 12.

5. The Law Group is the only bargaining unit among 27 groups in the core federal public service that has never had rates of pay determined by collective bargaining. Ontario, where almost two thirds of Federal Crown counsel work, has allowed Provincial Crown counsel to bargain collectively since 1989. For many years, Federal Crown counsel earned salaries that were roughly equivalent those earned by Ontario's Crown lawyers. However, an arbitration board awarded Ontario's Crown lawyers a 30% increase effective January 1, 2001. Federal Crown counsel have remained far behind lawyers in Ontario since then, and have also fallen behind other provinces (and the private sector).[6] For example, as of 2009 the gap between Federal and Ontario Crown counsel was between 34 and 54 per cent for the LA 2A "intermediate" classification, which accounts for more than half the AJC bargaining unit.[7] The gap with private sector lawyers is even greater – the average income for lawyers in private practice is almost twice as much as the average salary of Federal Crown counsel.[8]

6. In part, the gap between Federal Crown counsel and other public and private sector lawyers is a legacy of previous wage controls. By 2009, when the *ERA* came into effect, the Law Group had been subject to wage controls from 1991 to 1997, followed by a period in which Treasury Board unilaterally set annual increases that essentially tracked the rate of inflation for the vast majority of the bargaining unit (1997

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[6] Decision on the Merits, para. 9, *Appeal Book and Compendium*, Tab 4, p. 12.

[7] Affidavit of Marco Mendicino, sworn June 8, 2010 ["First Mendicino Affidavit"], para. 27, *Exhibit Book*, Vol. 5, Tab 5, p. 1140.

[8] As of December 31, 2006, the average salary of AJC bargaining unit members was $101,332 per year. This compares to an average income of $192,500 for lawyers across Canada in tax year 2000, with an average of $214,900 in Ontario: Table 17, Report of the Second Judicial Compensation and Benefits Commission, Exhibit H to Thibodeau Affidavit, *Exhibit Book*, Vol. 2, Tab 2H, p. 653. (Incomes below $60,000 are excluded, on the basis that many lawyers in this category are not working full time.)

to 2005), followed in turn by a period in which no increases were made because the parties were in collective bargaining (2006 to 2009). During this time, Federal Crown lawyers' salaries were limited to zero growth in real terms, while the salaries of public sector lawyers in other Canadian jurisdictions, and private sector lawyers, increased substantially.[9]

7. The government's own reports in recent years have noted the difficulties experienced by DOJ and PPSC in recruiting and retaining counsel. These include the DOJ's Human Resources Management Plan 2007-2010, the PPSC's Annual Report for 2007-2008, and the PPSC's Report on Plans and Priorities 2008-2009. In the first of these reports, the DOJ expressly acknowledges that "we are recruiting in a very competitive labour market, with private sector and other levels of government in some cases offering much more attractive compensation packages than we are".[10]

B. Bargaining Prior to the *ERA*

8. The AJC delivered its notice to bargain on May 10, 2006.[11] Under the *PSLRA*, the parties were obliged to meet within 20 days, or on a date agreed between the parties, and bargain in good faith towards the conclusion of a collective agreement.[12]

9. In November 2006, the parties met for their first face-to-face negotiation session. The ACJ tabled its bargaining proposal, including a salary proposal. The ACJ sought

[9] First Mendicino Affidavit, paras. 20-24, *Exhibit Book*, Vol. 5, Tab 5, p. 1137-1138.
[10] First Mendicino Affidavit, paras. 26-28, *Exhibit Book*, Vol. 5, Tab 5, p. 1139-1140.
[11] First Mendicino Affidavit, para. 40, *Exhibit Book*, Vol. 5, Tab 5, p. 1144.
[12] *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ["*PSLRA*"], s.106.

salary increases of approximately 35% over the term of the agreement.[13] Treasury Board tabled a bargaining proposal in which the rates of pay were left blank, to be filled in later.[14]

10. Between November 2006 and September 2007, the parties met for a total of 16 days. At no time during those sessions did Treasury Board make a monetary proposal, despite being repeatedly asked for one by the AJC.[15] Moreover, the AJC's attempts to obtain meaningful data disclosure were met with continued stonewalling from Treasury Board.[16]

11. Following these negotiation sessions, the parties requested the assistance of a mediator through the PSLRB. Mediator Kevin Burkett met with the parties for a further five days between November 2007 and March 2008.[17] Treasury Board did not make a monetary proposal until the final session on March 29, 2008; nor did it provide an advance copy of its proposal to the AJC, despite repeated requests from the AJC negotiator that it do so.[18]

12. When Treasury Board finally did present its monetary proposal, it provided for annual increases of only 1.5% in a three year collective agreement going back to 2006 – well below the rate of inflation for those years, and despite the fact that the federal

[13] Thibodeau Affidavit, sworn October 29, 2010 ["Thibodeau Affidavit"], para. 33, *Exhibit Book*, Vol. 2, Tab 2, p. 297-303.
[14] Cross-Examination of M. Thibodeau, q. 299, *Exhibit Book*, Vol. 7, Tab 9, p. 1985.
[15] Cross-Examination of M. Thibodeau, q. 277-282, *Exhibit Book*, Vol. 7, Tab 9, p. 1980-1982.
[16] First Mendicino Affidavit, paras. 45, 46, *Exhibit Book*, Vol. 5, Tab 5, p. 1145.
[17] First Mendicino Affidavit, paras. 49-52, *Exhibit Book*, Vol. 5, Tab 5, p. 1145-1146.
[18] Thibodeau Affidavit, para. 33, *Exhibit Book*, Vol. 2, Tab 2, p. 297-303.

government ran a record surplus of $13.2 billion in 2006.[19] The proposal also noted that the employer was "not interested in amending the current pay structure".[20] Far from addressing the disparities with other comparable lawyers described above, this offer would have resulted in salary reductions in real terms. The AJC therefore rejected the proposal, and immediately advised that they would begin the process to move to arbitration before the PSLRB. Treasury Board's lead negotiator Marc Thibodeau admitted on cross-examination that he was not surprised at this reaction.[21]

13. With respect to data disclosure issues, between the fall of 2006 and April 2008, the AJC had repeatedly requested that payroll and demographic data, and other relevant information, be disclosed to them to assist them in the bargaining process.[22] Treasury Board provided limited data in late January, 2007, and some more detailed data in October, 2007.[23] However, this data was partial and often impenetrable, and missing items such as salary levels, classification, age, gender, and year of call for the members of the bargaining unit.[24] Treasury Board took the position that providing such data would infringe privacy legislation, and it was not until December 21, 2007 that much of this data was provided. Information on year of call was not provided until March 26, 2008 (and revised on April 7, 2008).[25]

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[19] First Mendicino Affidavit, para. 60, *Exhibit Book*, Vol. 5, Tab 5, p. 1148.
[20] Law (LA) Group Negotiations - Employer's Response to the AJC Salary Proposal, Exhibit N to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, Tab 5N, p. 1278-1281.
[21] Cross-Examination of M. Thibodeau, q. 251-255, *Exhibit Book*, Vol. 7, Tab 9, p. 1972-1973.
[22] First Mendicino Affidavit, paras. 43, 44, 47, 48, 52, and Exhibits H, I, J, L, M, *Exhibit Book*, Vol. 5, Tab 5, p. 1144-1146, Tab 5H, p. 1241, Tab 5I, p. 1247, Tab 5J, p. 1254,Tab 5L, p. 1273; Tab 5M, p. 1275.
[23] Thibodeau Affidavit, paras. 27, 30, *Exhibit Book*, Vol. 2, Tab 2, p. 294-296.
[24] First Mendicino Affidavit, para. 48, *Exhibit Book*, Vol. 5, Tab 5, p. 1145.
[25] Thibodeau Affidavit, para. 30, *Exhibit Book*, Vol. 2, Tab 2, p. 295-296. When asked in cross-examination about the lengthy gaps in providing any data (e.g. 7 months from February to October 2007, and 4 months from December 2007 until March, 2008), Mr. Thibodeau confirmed that he had only one

14. From April to September 2008, the parties sought to agree on an arbitrator to head the arbitration panel. Among the suggestions turned down by the employer were the Honourable Frank Iacobucci, a former justice of the Supreme Court of Canada and former Deputy Minister of Justice, and the Honourable George Adams, a former Superior Court Justice and former Chair of the Ontario Labour Relations Board.[26] In September 2008, in the absence of an agreement on the chair of the arbitration board, Treasury Board referred all outstanding issues to the PSLRB for arbitration. The effect of this referral was that the PSLRB appointed the panel.

C. Enactment of the *ERA*

15. The *ERA* was enacted on March 12, 2009, in the context of a serious global economic downturn.[27] The *ERA* sets a five-year period of wage restraint, reaching back retroactively almost three years to FY 2006-07. Although it incorporates a number of exceptions, the basic pattern of the *ERA* is that wage increases are limited to 2.5% for

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person on his team working on it, plus somebody else that was partly dedicated to this function as being a central point of contact to get customized data: Cross-examination of Thibodeau, q. 433, *Exhibit Book*, Vol. 7, Tab 9, p. 2018. The AJC is not alone in experiencing frustration with obtaining data sourced from the DOJ. The Auditor General, in his 2007 Report to the House of Commons, noted as follows in his analysis of DOJ's delivery of services to government:

> For example, we found that the Department had difficulty providing us with department-wide reports. It could not provide a summary report on historical salary expenses and the number of positions by staffing level with information from both its financial and human resources information systems, since these systems have not been reconciled. Also, some employee information available prior to the 2002–03 fiscal year is inconsistent with data collected after that year, making it difficult to analyze trends over time.

2007 Report of the Auditor General to the House of Commons: Chapter 5, Managing the Delivery of Legal Services to Government – Department of Justice Canada, Exhibit 1 to cross-examination of M. Mendicino, para. 5.69, *Exhibit Book*, Vol. 7, Tab 8A, p. 1894.

[26] Affidavit of Marco Mendicino, sworn January 6, 2011 ["Second Mendicino Affidavit"], para. 13, *Exhibit Book*, Vol. 6, Tab 6, p. 1465.

[27] Decision on the Merits, paras. 1, 17-20, *Appeal Book and Compendium*, Tab 4, p. 11, 13.

FY 2006-07, 2.3% for 2007-08, and 1.5% per year for 2008-11.[28] However, for the period prior to December 8, 2008, these limits do not apply for any group whose increases were established prior to that date.[29]

16. Because most groups within the federal public service already had collective agreements applying to FY 2006-07,[30] wage restraints for that year applied to only three groups: the Law Group, the Ship Repair West Group, and the Research Group.[31]

17. The *ERA* was preceded by a number of public statements by the government in late 2008 and early 2009. These statements uniformly referred to wage restraints for a period commencing in the 2007-2008 fiscal year.[32] Likewise, in mid-November 2008, Treasury Board's senior negotiators contacted various bargaining agents, including the AJC, and referred to the Department of Finance "looking for cost containment and predictability of expenditures for the period 2007/8 to 2010/11".[33]

18. When the *ERA* was introduced on February 6, 2009, it reached back to FY 2006-2007, to the surprise of the AJC.[34] This had been a year of significant budgetary surplus, and was well before the commencement of the global financial crisis. As a

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[28] *Expenditure Restraint Act*, S.C. 2009, c.2, s.393 ("*ERA*"), s.16.
[29] *ERA*, s.19, 38.
[30] Or, in the case of non-unionized employees, had increases for that year that the government had already implemented or accepted.
[31] Decision on the Merits, para. 127, *Appeal Book and Compendium*, Tab 4, p. 34. Section 34(1)(a)(ii) requires that any increase for the Law Group for FY 2006-07 be based on the rates of pay set out in a schedule to the *ERA*. This provision applies only to the Law Group.
[32] Decision on the Merits, paras. 20, 23, 127(b), *Appeal Book and Compendium*, Tab 4, p. 13-14, 33.
[33] Decision on the Merits, para. 22, *Appeal Book and Compendium*, Tab 4, p. 14.
[34] Decision on the Merits, para. 27, *Appeal Book and Compendium*, Tab 4, p. 15.

general rule, the restraints apply notwithstanding any collective agreement, arbitral award or contract of employment.[35] However, the *ERA* contained several significant exclusions and exemptions:

(a) Employees that had established increases for fiscal years 2006-07, 2007-08, or 2008-09 up to December 8, 2008, were permitted to keep these increases even if they were above the *ERA* limits.[36] This included substantial increases for executive classifications that were historically linked to Federal Crown counsel;[37]

(b) The Border Services Group, consisting of about 8,900 employees, received a new pay grid including a minimum 19.5% wage increase over the life of the agreement,[38] well above the limits of the *ERA*;

(c) The Occupational Services Group, consisting of about 11,000 employees, were restructured by the application of a national pay grid that provided average increases to affected employees of 6.8%, in addition to the maximum increases otherwise permitted by the *ERA*;[39] and

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[35] Decision on the Merits, para. 29, *Appeal Book and Compendium*, Tab 4, p. 15.

[36] For example, the Ship Repair East group was permitted to retain a 5.2% increase: PSLRB Arbitral Award Re Employees in the Ship Repair – East Group, May 9, 2008; see also PSLRB Arbitral Award Re Federal Government Dockyard Chargehands Association, February 7, 2007.

[37] Between January and May 2008, the "executive cadre" of the federal public service received significant increases – an average increase of 3.9% for the EX group, with the "maximum performance award" increasing from 16.1% of salary to 22.4% of salary for the EX4 and EX5 classifications for the 2007-08 fiscal year; and an across-the-board 4.1% increase with maximum increases ranging from 4.5% (EX1 to EX3) to 5.7% (EX4 and EX5) for the 2008-09 fiscal year: Second Mendicino Affidavit, para. 33, *Exhibit Book*, Vol. 6, Tab 6, p. 1471.

[38] First Mendicino Affidavit, para. 68, and Exhibit S, *Exhibit Book*, Vol. 5, Tab 5, p. 1150-1151, and Tab 5S, p. 1378; Cross-Examination of M. Thibodeau, q. 515-519, *Exhibit Book*, Vol. 7, Tab 9, p. 2038. Ms. Laurendeau disputed the amount of the increases, but did not dispute that they were beyond the limits set by the *ERA*: Affidavit of Hélène Laurendeau, sworn February 23, 2011 ["Second Laurendeau Affidavit"], para. 3, *Exhibit Book*, Vol. 4, Tab 4, p. 1127.

[39] First Mendicino Affidavit, para. 68, and Exhibit T, *Exhibit Book*, Vol. 5, Tab 5, p. 1150-1151, and Tab 5T, p. 1387. These increases were specifically preserved by s.32 and s.52 of the *ERA*.

(d) The RCMP, with approximately 18,000 members, received a service adjustment that was above the limits set out in the *ERA*.[40]

D. Justice Grace's Decision on the Merits

19. Justice Grace found that the *ERA*'s restrictions on bargaining rates of pay infringed the right to freedom of association in s.2(d) of the *Charter*. He accepted that the government's stated objectives in the context of the economic crisis provided a justification for the Act as a whole, and for its retroactive reach back to the 2007-2008 fiscal year. However, he found that the ERA went too far by including the 2006-2007 fiscal year, for the following reasons:

(a) The 2006-2007 fiscal year pre-dated the economic crisis. In fact, Canada's economy was then buoyant and the federal government enjoyed a significant budgetary surplus. None of the objectives that caused the *ERA* to be drafted and passed existed until later.

(b) The Attorney General bears the onus of satisfying every stage of the *Oakes* test. Demonstrating a clear and compelling rationale for the *ERA*'s retroactivity is particularly important, because there had been no reference to 2006-2007 until Bill C-10 received first reading in February, 2009. Prior public statements had consistently mentioned 2007-2008 as the starting point for budgetary restraint initiatives. E-mails sent by the Treasury Board's senior negotiators to the AJC and other bargaining agents in mid-November 2008 made no mention of the 2006-2007 fiscal year;

(c) The inclusion of 2006-2007 is even more puzzling when the provisions of the *ERA* are reviewed. While as a general rule, the specified increases set forth in the *ERA* were to apply starting with that fiscal year, its inclusion had no effect on those who had concluded a collective agreement or were the subject of an arbitral award made before December 8, 2008. As a practical matter the pre-December 8, 2008 base salaries of only three groups of represented employees were affected by the *ERA*. Federal Crown counsel was one of them. Given the objectives and the extent of the crisis, why were so many exceptions made?

(d) A number of groups were allowed to continue efforts to restructure their base salaries even after December 8, 2008. If successful the annual increases mandated by the *ERA* were to apply to the new or "restructured" amount.

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[40] First Mendicino Affidavit, para. 68, and Exhibit V, *Exhibit Book*, Vol. 5, Tab 5, p. 1151, and Tab 5V, p. 1425-1427.

> Given the objectives and the extent of the crisis, why were further exceptions made? Why was the federal government able to rationalize allowing some federal employees to exercise their section 2 (d) rights during a period of "great economic uncertainty and contraction in the economy" and members of the AJC were not?[41]

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

> [133] The reasonableness of the expansion of the legislation's grasp is not self evident to me. If the AJC's position prevailed, it would only be extinguishing or narrowing an existing gap. How could that step apply pressure to wages in the private sector when, at most, the salaries paid to AJC members were to rise to an equal level? The *ERA* limits would have applied to the new - or "restructured rates of pay". That would have prevented any upward pressure on salaries paid to lawyers in the private sector.
>
> [134] If a lower than market wage was being paid to the AJC, how is leadership or respect for public money being compromised by paying what is agreed or determined to be fair? How is predictability compromised when the Treasury Board knew AJC's monetary demands and the applicable criteria articulated in the *PSLRA*?[42]

E. The Government's Evidence on the Inclusion of FY 2006-07

21. The Appellant did not adduce any evidence on the Government's reasons for including FY 2006-07 in the scope of the restraint period established by the *ERA*. All questions that were asked of the Appellant's witnesses concerning what options were considered by Cabinet, and what advice was given to Cabinet, were refused on the basis that the answers were cabinet confidences protected by s.39 of the *Canada Evidence Act*. This included questions specifically relating to the decision to include FY 2006-07 in the *ERA*.[43] Moreover, none of the public statements that preceded the *ERA* (and which are relied upon by the Appellant) mentioned FY 2006-07.

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[41] Decision on the Merits, para. 127, *Appeal Book and Compendium*, Tab 4, p. 33-34.
[42] Decision on the Merits, paras. 133-134, *Appeal Book and Compendium*, Tab 4, p. 35.
[43] Undertakings Chart, *Exhibit Book*, Vol. 9, p. 2506-2507.

22. The most that Ms. Laurendeau would say, while maintaining that either she did not know or could not reveal what Cabinet considered, was that most bargaining units in the federal public service received a 2.5% wage increase for the 2006-2007 fiscal year.[44] That does not address the fact that Federal Crown counsel, unlike all other groups, had never bargained collectively for their salaries, and faced recruitment and retention pressures that would point towards a much more substantial increase.

23. The government appears to have recognized internally that Federal Crown counsel would likely receive more than the typical increase for that year, if collective bargaining proceeded unfettered by the *ERA*. This is evident from the examination for discovery of Ms. Laurendeau in the *Dockyard Council* case, produced by way of an undertaking in the case at bar:

> Q: He says in here,[45] "to the figures you had for a" [redacted] "from yesterday's meeting… (which included only the economic increases), I would include an additional" [redacted] "in savings from not having to face the pressures. I did not include all of the pressures money we had set aside, because the lawyers have not had an increase," [redacted] "and I expect most of their pressures would be addressed" [redacted]…
>
> Q: What does that refer to, "pressures money"?
>
> A: The way we do the forecast has basically two lines. The first line is about the global increase, or what others call economic increase, which is not 100 per cent accurate because of the appellation. I'd rather call it the global increase, which is the percentage increase. And each year we review what are known as group-specific pressures. They would be our best estimate of places where we have recruitment retention issues and where we feel that either market allowances would be required or, in the case of military, if we feel that there some acute vacancies that needs to be addressed.[46]

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[44] Second Laurendeau Affidavit, para. 7, *Exhibit Book*, Vol. 4, Tab 4, p. 1128.

[45] Quoting from an internal Treasury Board email from a Mr. Richard Hartrick, dated October 21, 2008 at 8:18 a.m.

[46] Examination of H. Laurendeau, q. 162-164, *Exhibit Book*, Vol. 9, Tab 12C, p. 2562-2563.

24. Ms. Laurendeau similarly testified in the present case that for the purposes of compensation planning, Treasury Board identifies both an expected global increase and group-specific pressures.[47]

PART III - ISSUES AND ARGUMENT

A. The Court Below Correctly Determined that the *ERA* Infringes s.2(d)

25. The Appellant argues that Justice Grace erred in finding a violation of s.2(d), because he "misunderstood the scope" of freedom of association, which the Appellant describes as "minimal". With respect, the Appellant misreads *Fraser v. Ontario*.[48] A careful review of *Fraser*, as well as *Health Services and Support – Facilities Subsector Bargaining Ass'n v. British Columbia*,[49] which *Fraser* specifically affirmed,[50] demonstrates that the *ERA* falls squarely within the test for infringement of s.2(d).

1. The Scope of s.2(d)

26. The majority of the Supreme Court in *Fraser* reviews the recent jurisprudence under s.2(d), including *Health Services* and *Dunmore v. Ontario (Attorney General)*.[51] The majority does not describe s.2(d)'s protections in "minimal" terms. Rather, the majority repeatedly stresses that s.2(d) protects the right of employees to associate to obtain workplace goals in a "meaningful" process. The majority explains as follows:

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[47] Cross-Examination of H. Laurendeau, q. 206, 220-231, *Exhibit Book*, Vol. 8, Tab 10, p. 2192-2193, 2197-2199.
[48] 2011 SCC 20 ("*Fraser*").
[49] [2007] 2 S.C.R. 391 ("*Health Services*").
[50] *Fraser*, at para. 55.
[51] [2001] 3 S.C.R. 1016 ("*Dunmore*").

- "[C]ertain collective activities [of trade unions] must be recognized if the freedom to form and maintain an association is to have any meaning";[52]
- "The right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association", and "legislation… that makes achievement of this collective goal substantially impossible, constitutes a limit on the exercise of freedom of association";[53]
- The guarantee of freedom of association "must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments";[54]
- The common goals protected by s.2(d) extend to some collective bargaining activities;[55]
- "What is required as a process that permits the meaningful pursuit of these goals. No particular outcome is guaranteed. However, the legislative framework must permit a process that makes it possible to pursue the goals in a meaningful way";[56]
- "The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of [s.2(d)], in that it negates the very purpose of the association and renders it effectively useless";[57]

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[52] *Fraser*, at para. 30 (citing *Dunmore*).
[53] *Fraser*, at para. 32 (citing *Dunmore*).
[54] *Fraser*, para. 32.
[55] *Fraser*, para. 33 (citing *Dunmore*).
[56] *Fraser*, para. 33 (citing *Dunmore*).
[57] *Fraser*, para. 33.

- Legislation at issue in *Health Services* that "repealed existing collective agreements and substantially interfered with the possibility of meaningful collective bargaining in the future" infringed s.2(d);[58]
- Where the government used its legislative powers "to effectively nulify the collective agreements to its benefit, and to the deteriment of its employees" … and also "precluded collective bargaining in the future on a number of issues and conditions of employement", it infringed s.2(d);[59]
- Section 2(d) protects "a process of collective action to achieve workplace goals", which "requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace";[60]
- The activities protected by s.2(d) in the labour relations context include "good faith bargaining on important workplace issues";[61] and
- Section 2(d) "requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract".[62]

27. The Court concluded that while s.2(d) does not require a particular model of bargaining, nor a particular outcome;

> [w]hat s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process. To use the language of *Dunmore*, it is among those "collective activities [that] must be recognized if the freedom to form and maintain an association is to have any meaning" (para. 17). Without

[58] *Fraser*, para. 35 (citing *Health Services*).
[59] *Fraser*, para. 35.
[60] *Fraser*, para. 38 (citing *Health Services*).
[61] *Fraser*, para. 40.
[62] *Fraser*, para. 41.

> such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(*d*) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.[63] [emphasis added]

28. The AJC submits that this conclusion describes precisely the impact of the *ERA* on Federal Crown counsel. With respect to rates of pay, the *ERA* permits Treasury Board "not even to consider employee representations" and is therefore "not a meaningful process". As applied to Federal Crown counsel, the *ERA* simply substituted "a system that makes it impossible to have meaningful negotiations" on rates of pay for the previous exclusion from collective bargaining. As noted by the Supreme Court, the latter form of interference with free association is "just as effective".

2. Justice Grace Properly Understood and Applied the s.2(d) Right to a "Meaningful Process"

29. The Appellant alleges that Justice Grace "determined that because the *ERA* had a substantive impact on a term of the collective agreement, it invalidated the procedural right of collective bargaining".[64] With respect, this mischaracterizes his reasoning. Justice Grace held that the *ERA* is objectionable not because it has a substantive impact, but rather because it makes bargaining over rates of pay "pointless".[65] No

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[63] *Fraser*, para. 42.

[64] *Appellant's Factum*, para. 50.

[65] *Fraser*, para. 46. See Decision on the Merits, para. 70: "[T]he *ERA* created a fixed, unalterable salary grid. There could be no other result and therefore salaries were no longer a topic of negotiation for the five year period covered by the *ERA*… The opportunity to seek a salary increase for the five year period covered by the *ERA* is irretrievably lost."; para. 131: "The result was ordained." Accord: see *Meredith and Roach v. Canada (Attorney General)*, 2011 FC 735, at para. 92.

amount of discussion, consultation or representations by the AJC can alter the fact that wage restraints are imposed by statute.

30. The Appellant also erroneously claims that "Justice Grace determined that [Treasury Board's] final wage increase offer violated the AJC members' 2(d) right".[66] With respect, Justice Grace made no such finding. Rather, he simply found that Treasury Board's final "take- it-or-leave-it" offer, made shortly before the intended introduction of the *ERA* and reflecting its ultimate terms, did not negate the conclusion that the *ERA* substantially interferred with s.2(d).[67]

31. Nor is there any merit to the Appellant's argument that in order to infringe s.2(d), legislation must "both repeal terms of an existing collecive agreement and hamper future collective bargaining on important workplace issues".[68] While this may have been a feature of the legislation at issue in *Health Services*, there is no reason in logic or principle why both forms of interference must be simultaneously present. As the Court held in *Health Services*, "[f]uture restrictions on the content of collective agreements constitute an interference with collective bargaining because there can be no real dialogue over terms and conditions that can never be enacted as part of the collective agreement".[69]

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[66] *Appellant's Factum*, para. 51.
[67] Decision on the Merits, para. 65, *Appeal Book and Compendium*, Tab 4, p. 22.
[68] *Appellant's Factum*, para. 53.
[69] *Health Services*, at para. 113.

32. If the Appellant's view prevailed, this would amount to a holding that governments are free to limit, suspend, or even abolish collective bargaining in any circumstances whatsoever, as long as they wait for any previous collective agreement to expire. It would also mean that no group of employees bargaining collectively for the first time could ever claim the protection of s.2(d). This makes no sense, as first round collective bargaining is often a situation in which employee associations are at their most vulnerable, as compared to mature collective bargaining relationships.[70]

33. As to the Appellant's reliance on the pre-*ERA* "process of negotiations", this appears to be an argument to the effect that the AJC cannot complain of a breach of s.2(d) because it had an opportunity, however limited, to bargain over rates of pay. With respect, it difficult to understand the rationale behind this argument. The sum total of Treasury Board's bargaining over rates of pay was its offer dated March 29, 2008 (featuring economic increases below the rate of inflation)[71] and the take-it-or-leave-it offer of November, 2008, made in the shadow of impending legislated wage restraints.[72]

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[70] The particular vulnerability of unions in negotiations for their first collective agreement is reflected in the "first contract arbitration" provisions of the *Canada Labour Code* and other labour statutes: see *Communications, Energy and Paperworkers Union of Canada, Local 87-M v. Ming Pao Newspapers (Canada) Ltd.*, 2011 CanLII 77758 (ON LRB) at paras. 18 – 21.

[71] Employer's Response to the AJC Salary Proposal, Exhibit N to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, Tab 5N, p. 1277.

[72] On October 29, 2008 the Minister of Finance gave a speech stating that the Government's "commitment to responsible fiscal management will also extend to public sector compensation": Exhibit N to Affidavit of Hélène Laurendeau, sworn October 29, 2010 ["First Laurendeau Affidavit"], *Exhibit Book*, Vol. 1, Tab 1N, p. 242. On November 15, 2008, Treasury Board emailed bargaining agents including the AJC, referring them to the Minister's speech, and advised that they would be in contact Monday November 18, 2008: Exhibit O to First Laurendeau Affidavit, *Exhibit Book*, Vol. 1, Tab 1O, p. 263. On November 18, Treasury Board issued a press release, advising that "final offers" had been made to the bargaining agents for the core public administration: Exhibit P to First Laurendeau Affidavit, *Exhibit Book*, Vol. 1, Tab 1P, p. 265. On November 19, 2008, the Government announced its intention to introduce legislation "to ensure sustainable compensation growth in the federal public service": Speech from the Throne, Exhibit P to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, Tab 5P, p.1291. On November 27, 2008 the Government released an Economic Statement, referring to the Government's plan to introduce

The latter was followed closely by the introduction of the *ERA*, which made it completely unnecessary for Treasury Board to consider the AJC's salary claims for a period of five years. This, with respect, does not fall within the Supreme Court of Canada's description of a "meaningful process" of collective bargaining.

3. Justice Grace Applied the Right Test

34. The Appellant alleges that Justice Grace did not apply the right test for breach of s.2(d). However, the Appellant himself appears to restate the test from *Health Services*, by adding a step which is not set out as part of the test; i.e. whether the legislation "targets" an associational activity by permitting the activity for individuals while prohibiting it for groups, or otherwise "targets" associational conduct because of its concerted or associational nature.[73] The Appellant treats this as a separate step from the "substantial interference" analysis.

35. Contrary to the Appellant's argument, the Supreme Court sets out a single test for breach in this context – whether the state action constitutes "substantial interference" with associational activity. The test is described as follows:

> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.
>
> Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and,

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legislation with the same wage restraints as in the final offers: Exhibit R to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, Tab 5R, p.1376. The *ERA* was to have been introduced in early December, 2008, but was delayed when Parliament was prorogued.

[73] *Appellant's Factum*, para. 58.

> indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.[74]

36. There is no need for an additional step under which the AJC must show as a precondition to a finding of substantial interference, that the *ERA* treats unions more harshly than individuals,[75] or that the Government intended to target associational activity. State action which substantially interferes with collective bargaining affects an associational activity by its very nature: "It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals".[76] In any event, even if differential treatment of collectives were necessary, it could be found in the contrast between the treatment of the unrepresented executive cadre (previously linked to Federal Crown counsel) and the AJC.[77]

37. Justice Grace's shorthand reference to the substantial interference test in paragraph 39, as subsequently applied in his reasons, is fully consistent with the approach in *Health Services*. On the question of importance of the matter affected to the process of collective bargaining, he correctly finds that salaries are of the utmost

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[74] *Health Services*, paras. 93, 94.

[75] *Health Services*, para. 32: "[E]qual legislative treatment of individuals and groups does not mean that the "associational aspect" of an activity has not been interfered with."

[76] *Health Services*, para. 90.

[77] In the case of the executive cadre, the Government provided a much speedier process and accepted the recommendation of an external advisory committee that increases were needed to address recruitment and retention issues: Ninth Report of the Advisory Committee on Senior Level Retention and Compensation (Stephenson Committee), Exhibit W to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, Tab 5W, p. 1437-1439.

importance to workers.[78] If employees cannot bargain collectively over rates of pay, many will question whether it is worth having a union at all.[79]

38. As to the second inquiry, whether the *ERA* respects the fundamental precept of collective bargaining - the duty to consult and negotiate in good faith - there is no doubt that this fundamental precept is not respected by the legislation. There is simply no room for consultation or negotiation over rates of pay, whether in good faith or otherwise, during the five year period that rates of pay are effectively established by legislation.[80] In short, the *ERA* "puts the nail in the coffin of consultation".[81]

39. Under *Health Services*, the Court must pay regard to the circumstances surrounding the adoption of legislation in considering whether it impinges on the collective right to good faith negotiations and consultation. In other words, the Court should consider context, including such matters as exigency and urgency. Nevertheless, "there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line".[82] Justice Grace found that the *ERA* did not preserve the process of good

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[78] "Wages and related forms of remuneration are among the most important provisions in all collective agreements": Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 4th ed., Vol. 1, looseleaf (Toronto: Canada Law Book, 2006) at 8.1 [Brown & Beatty]; "An employee's compensation is a central term to any contract of employment. Indeed, apart from an employee's obligation faithfully to discharge those duties he or she has obliged himself/herself to discharge, no other term of a contract of employment can be more central than that governing compensation.": *Evangelista v. Number 7 Sales Ltd.*, [2006] O.J. No. 2742 (S.C.J.) at para. 14, aff'd [2008] O.J. No. 3224 (C.A.).

[79] *Health Services*, paras. 95-96.

[80] *Health Services*, para. 97.

[81] *Health Services*, para. 135.

[82] *Health Services*, para. 107.

faith consultation fundamental to collective bargaining, because the parties could not negotiate over rates of pay for a five year period.

40. The approach in the decision below also finds support in international law. In *Health Services*, the Supreme Court cited international law as a key reason for recognizing protection of collective bargaining under s.2(d), on the basis that the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.[83]

41. The federal government has a lengthy history of implementing public service wage restraints. During the 45 years since collective bargaining was introduced in the federal public service, the process has been suspended in whole or in part for at least 16 years.[84] The International Labour Organization's Committee on Freedom of Association has considered Canadian federal government wage restraint measures on several occasions. In each instance, the Committee deplored the Canadian government's eagerness to resort to such measures, and made clear its concerns about the impact that such measures have on public sector collective bargain generally.

42. In *Canada (Case No. 1616)*, the Committee considered the 1991 *Public Sector Compensation Act*, which terminated a legal strike by public sector employees and restricted pay increases during the two subsequent years to 0 and 3 % respectively. In

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[83] *Health Services*, at paras. 69-79. See also *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General)*, 2012 SKQB 62, at paras. 100 – 114.

[84] Second Mendicino Affidavit, para. 25, *Exhibit Book*, Vol. 6, Tab 6, p. 1469; Treasury Board of Canada Secretariat, "Expenditure Review of Federal Public Sector", Vol. 1 (Excerpt), Exhibit F to Second Mendicino Affidavit, *Exhibit Book*, Vol. 6, Tab 6F, pp. 1541-1547.

assessing the impact of the Act on freedom of association, the Committee made clear that economic stabilization measures limiting collective bargaining may be justified only in "exceptional" cases, for "compelling" reasons, and for a "reasonable" period:

> As regards the economic stabilization measures which limit collective bargaining rights, the Committee has acknowledged that when a government, for compelling reasons of national economic interest, and as part of its stabilization policy, considers that pay rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards.[85]

43. Applying this principle to the economic stabilization measure at issue, the Committee found that, as a result of the *Public Sector Compensation Act*, "collective bargaining in the federal public sector will be severely restricted for a two-year period, since pay increases will be imposed by the Government unilaterally".[86] The Committee further noted the impact of such measures on unions:

> The Committee feels obliged to point out that repeated recourse to such statutory restrictions on collective bargaining cannot fail to have a harmful and destabilizing effect on labour relations if the Government intervenes frequently to suspend or halt the exercise of the recognized rights of unions and their members. Furthermore, this may undermine employees' confidence in the advantages of union membership. If the results of collective bargaining are frequently annulled by legislation, union members or potential members may conclude that there is no point in belonging to an organization whose principal purpose is to represent them in collective bargaining. [emphasis added][87]

44. As a result, in *Canada (Case No. 1616)*, the Committee urged the Canadian government "to revert to the normal system of free collective bargaining … and, in particular to a truly independent arbitration system".[88]

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[85] *Canada (Case No. 1616)*, Report No. 284, 1992, at para. 635 [*Canada (Case No. 1616)*].
[86] *Canada (Case No. 1616)*, at para. 636.
[87] *Canada (Case No. 1616)*, at para. 637.
[88] *Canada (Case No. 1616)*, at para. 641(c).

45. The federal government did not heed the Committee's recommendation. In 1993, Parliament enacted the *Government Expenditure Restraint Act*, which effectively extended the *Public Sector Compensation Act* wage restraints for a further two years. In *Canada (Case No. 1758)*, the Committee considered the extension of the restraint measures, and admonished the Canadian government for its "repeated recourse" to such measures:

> The Committee also observes that the Government has, on many occasions, resorted to this kind of Act over the last decade. The Committee expresses its serious concern at the frequent recourse had by the Government to statutory limitations on collective bargaining and even more so given the fact that the Committee has been seized with a new complaint, presented by the same complainant organization, relating to a further extension of the Public Sector Compensation Act, 1991. The Committee points out that repeated recourse to such statutory restrictions on collective bargaining can, in the long term, only prove harmful and destabilize labour relations, as it deprives workers of a fundamental right and means of defending and promoting their economic and social interests.[89]

46. According to the Committee, even taking into account Canada's fiscal and economic difficulties (on which the government purported to justify the wage restraint measures), the appropriate course of action was to seek to preserve, as far as possible, the collective bargaining process and the autonomy of the parties in that process – the goal being a "fair and reasonable compromise" between the parties. In *Canada (Case No. 1758)* it found that the Canadian government's repeated resort to legislated economic stabilization measures "in no sense correspond[ed] to the fair and reasonable compromise" required.[90]

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[89] *Canada (Case No. 1758*), Report No. 297, 10 February 1994, at para. 227 [*Canada (Case No. 1758)*].
[90] *Canada (Case No. 1758)*, at paras. 228-229.

47. Despite the Committee's clear reprimand of the Canadian government's suspension of public sector employees' collective bargaining rights, the government again ignored the Committee's findings and recommendations, and in 1994, enacted the *Budget Implementation Act*, which extended the economic stabilization measures from the prior two statutes for a further two years. In *Canada (Case No. 1800)*, the Committee considered the *Budget Implementation Act*, and once again made clear its concerns with the Canadian government's willingness and apparent eagerness to restrict collective bargaining in the name of the economic stabilization:

> In the present case, the second extension of the 1991 Act [the *Public Sector Compensation Act*] is clearly not an exceptional measure, as the criteria established by the Committee have not been met. The Committee cannot but express its concern at the danger of institutionalization in a permanent fashion recourse to the legislation in order to fix wages in the public sector unilaterally. The Committee notes that the combined effects of the three Acts will place the burden of a six-year wage control programme – under which wages will have been frozen for five years and increments for two years – on the shoulders of federal public sector workers. The Committee deplores that as a result the Act will have a further negative impact on the living standards of the workers concerned and that the legislation contains no adequate safeguards in this respect.[91]

48. The Committee concluded that, given the Canadian government's repeated and sustained resort to legislation restricting public sector wages, its six-year program of wage restraints "clearly goes beyond what the Committee has considered to be permissible restrictions on collective bargaining, in particular with respect to a reasonable time-limit".[92] These Committee decisions arising from previous wage restraint measures strongly support the conclusion that the *ERA* substantially interferes with the associational activity of collective bargaining.

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[91] *Canada (Case No. 1800)*, Report No. 299, 6 October 1994, at para. 182 [*Canada (Case No. 1800)*]. [Emphasis added]

[92] *Canada (Case No. 1800)*, at para. 182.

B. The Legislation is not Justified Under Section 1

1. Minimal Impairment

49. In his decision on the merits, Justice Grace found that the *ERA* was unjustified to the extent that it reached back to the 2006-2007 fiscal year. The Appellant has alleged that he made a palpable and overriding error in so finding, and complains that his conclusion is "illogical, based on irrelevant considerations and not supported by the evidence".

50. First, the Appellant argues that it was illogical to note that FY 2006-07 was one in which the Canadian economy was robust and the government enjoyed a substantial surplus. The Appellant alleges that "Justice Grace did no appreciate that a higher wage increase and different pay grid for 2006-07, retroactively awarded in 2009, would have affected the government's finances during the crisis". With respect, this claim is directly contradicted by Justice Grace's express acknowledgment that present dollars would be used to pay unpaid increases earned in earlier years.[93]

51. Justice Grace found, on the basis of ample evidence before him, that limiting the *ERA*'s reach to the years originally intended would not have compromised the federal government's ability to meet the objectives the *ERA* was intended to serve. Indeed, the only evidence before the Court on the options considered by the government related to the 2007-2011 period.[94]

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[93] Decision on the Merits, para. 136, *Appeal Book and Compendium*, Tab 4, p. 35.

[94] "Compensation Expenditure - Cost Containment Measures", Exhibit M to First Laurendeau Affidavit, *Exhibit Book*, Vol. 1, Tab 1M, p. 234-237.

52. The Appellant further argues that Justice Grace relied upon "irrelevant" public pronouncements. However, the lack of any such pronouncements relating to the 2006-2007 fiscal year is quite relevant in the circumstances of this case. First, it illustrates that the original scope of the legislation was thought to be sufficient to achieve Parliament's objectives. For example, in its November 27, 2008 Economic Statement, the government described the impact of its intended legislation, confined to 2007-2011, and set out the anticipated savings from the legislation.[95] There is no evidence that the government was wrong in its initial assessment of the degree of infringement on the collective bargaining process that would be necessary for the government to achieve its objectives.

53. Second, the public pronouncements are relevant because the Appellant specifically relied upon them to describe the government's objectives and the options considered to meet them. Indeed, the Appellant's affiants were careful not to go beyond these public pronouncements in their testimony on the legislation. With respect, Justice Grace could only evaluate the government's reasons for including the 2006-2007 fiscal year on the basis of the evidence put before him.

54. Finally, the Appellant argues that Justice Grace's findings were not supported by the evidence. However, both sides led voluminous evidence on the context of the *ERA*, including evidence relating to the operation of its various exemptions and exclusions. These exemptions and exclusions demonstrated that the last-minute extension of the

[95] November 27, 2008 Economic Statement, Exhibit R to First Mendicino Affidavit, *Exhibit Book*, Vol. 5, p.1369.

retroactive reach of the *ERA* back to FY 2006-07 was not necessary to achieve the objectives of the Act.

55. For example, just as the government's own executives were permitted to have their own recruitment and retention issues addressed by receiving salary increases for FY 2007-08 and 2008-09 that were in many cases substantially above the limits set out in the *ERA*, before the wage restraints became applicable to them, the government could have allowed the AJC's claim for FY 2006-07 to be addressed before subjecting the Law Group to the *ERA*. Likewise, there was evidence that some other groups (such as the Border Services and Occupational Services Groups) were permitted to work towards resetting or restructuring their rates of pay prior to the application of the *ERA*'s limits. This evidence had the following significance:

> Those exceptions demonstrate that the limit for the fiscal year 2006-2007 is not analogous to *N.A.P.E.* Increases for some employees within the federal public service could be accommodated. Times were dire but affordability was not the issue.[96]

56. In short, Justice Grace was not convinced on the evidence that limiting the *ERA* to the period from April 1, 2007 forward, as originally foreseen, would have significantly undermined the government's ability to achieve its objectives. Since the government bore the onus of justifying the breach, the result was that the retroactive reach of the *ERA* back to FY 2007-07 was struck down.

57. The Appellant also raises a new justification for the first time in this Court, without supporting evidence, that the inclusion of FY 2006-07 "was intended to close a potential

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[96] Decision on the Merits, para. 137, *Appeal Book and Compendium*, Tab 4, p. 35.

loophole" that would permit an arbitrator who wanted to "make up" for the limits in years subsequent to FY 2006-2007. With respect, aside from being unsupported by anything in the record, this purported rationale is unnecessary because this scenario is already caught by s.57 of the *ERA*, which prohibits parties or arbitrators from compensating for amounts that employees did not receive because of the restraint measures of the Act.[97]

2. Proportionality

58. The Appellant claims that there is "clear evidence of the benefits" of s.16(a) and 34(1)(a)(ii), and a lack of evidence of any negative effects. However, the Appellant cites no evidence or authority in this party of its factum. Justice Grace, having had the benefit of reviewing a voluminous record and hearing three days of argument, reached the opposite conclusion. There was ample evidence upon which he could do so.

59. Sections 16(a) and 34(1)(a)(ii) effectively perpetuated the exclusion of Federal Crown counsel from collective bargaining over the most central term of employment, for a further five years from their date of certification. They perpetuated the legacy of under-compensation and the significant challenges of recruitment and retention that accompanied it. The AJC led a substantial amount of evidence on these matters, as set out above. By contrast, there was no specific evidence before the Court of any benefits that would arise from extending the legislation's retroactive reach back to FY 2006-2007. To the contrary, the only evidence of justification before the Court was in relation to the subsequent fiscal years. The AJC therefore respectfully submits that no palpable or overriding error has been demonstrated on this branch of the test.

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[97] *ERA*, s.57.

PART IV - OTHER ISSUES RAISED BY THE RESPONDENT

60. The Respondent raises no additional issues.

PART V - ORDER REQUESTED

61. The Respondent respectfully requests that the appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: May 31, 2012

"Andrew Lokan"
Andrew K. Lokan

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Lawyers for the Association of Justice Counsel

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. *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199

2. *Fraser v. Ontario*, 2011 SCC 20

3. *Health Services and Support – Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391

4. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016

5. *Meredith and Roach v. Canada (Attorney General)*, 2011 FC 735

6. *Communications, Energy and Paperworkers Union of Canada, Local 87-M v. Ming Pao Newspapers (Canada) Ltd.*, 2011 CanLII 77758 (ON LRB)

7. Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration*, 4th ed., Vol. 1, looseleaf (Toronto: Canada Law Book, 2006) at 8.1

8. *Evangelista v. Number 7 Sales Ltd.*, [2006] O.J. No. 2742 (S.C.J.), aff'd [2008] O.J. No. 3224 (C.A.)

9. *Saskatchewan Federation of Labour v. Saskatchewan (Attorney General)*, 2012 *SKQB* 62

10. *Canada (Case No. 1616)*, Report No. 284, 1992

11. *Canada (Case No. 1758*), Report No. 297, 10 February 1994

12. *Canada (Case No. 1800)*, Report No. 299, 6 October 1994

SCHEDULE "B"
TABLE OF STATUTORY AUTHORITIES

Expenditure Restraint Act, S.C. 2009, c.2, s.393

Assented to 2009-03-12

An Act to restrain the Government of Canada's expenditures in relation to employment

[Enacted by section 393 of chapter 2 of the Statutes of Canada, 2009, in force on assent March 12, 2009.]

SHORT TITLE

1. This Act may be cited as the *Expenditure Restraint Act*.

INTERPRETATION

Definitions

2. The following definitions apply in this Act.

"additional remuneration"
« rémunération additionnelle »

"additional remuneration" means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.

"arbitral award"
« décision arbitrale »

"arbitral award" means an arbitral award governing employees to whom this Act applies.

"bargaining agent"
« agent négociateur »

"bargaining agent" has the same meaning

(*a*) as in subsection 3(1) of the *Canada Labour Code*, in relation to employees to whom Part I of that Act applies;

(*b*) as in section 3 of the *Parliamentary Employment and Staff Relations Act*, in relation to employees to whom that Act applies; and

(*c*) as in subsection 2(1) of the *Public Service Labour Relations Act*, in relation to employees to whom that Act applies.

"collective agreement"
« convention collective »

“collective agreement” means a collective agreement governing employees to whom this Act applies.

“Her Majesty”
« Sa Majesté »

“Her Majesty” means Her Majesty in right of Canada.

“National Joint Council”
« Conseil national mixte »

“National Joint Council” has the same meaning as in subsection 4(1) of the *Public Service Labour Relations Act*.

“rate of pay”
« taux de salaire »

“rate of pay” means a base rate of pay, whether expressed as a single rate of pay or a range of rates of pay — or, if no such rate or range exists, any fixed or ascertainable amount of base pay — but does not include any additional remuneration.

“restraint period”
« période de contrôle »

“restraint period” means the period that begins on April 1, 2006 and ends on March 31, 2011.

Deemed bonus

3. For the purpose of this Act, any lump sum that an employer is required by an arbitral award to pay to employees is deemed to be a bonus.

National Joint Council recommendations

4. Any reference in this Act to additional remuneration does not include any additional remuneration that is provided for by a directive, policy, regulation, agreement or other instrument issued or made

(*a*) on the recommendation of the National Joint Council and with the employer’s approval; or

(*b*) unilaterally by an employer in respect of a subject matter that, in the opinion of the Treasury Board, is the same as or is related to the subject matter of any instrument made in accordance with paragraph (*a*).

When certain collective agreements are deemed to have been entered into

5. (1) For the purpose of this Act, a collective agreement is deemed to have been entered into before December 8, 2008 if it was actually entered into on or after that date but its parties had, before that date, agreed in writing to enter into it with effect on the expiry of a previous collective agreement and they entered into it without alteration.

When provisions of certain terms and conditions of employment are deemed to have been established

(2) If subsection (1) applies in respect of a collective agreement and terms and conditions of employment were established on or after December 8, 2008, the provisions of those terms and conditions of employment that are identical in all material respects to those of the collective agreement and that are applicable to non-represented and excluded employees that normally have terms and conditions of employment that are similar to those of the employees governed by the collective agreement are, for the purposes of this Act, deemed to have been made before December 8, 2008.

EFFECTS OF ACT

Right to bargain collectively

6. Subject to the other provisions of this Act, the right to bargain collectively under the *Canada Labour Code*, the *Parliamentary Employment and Staff Relations Act* and the *Public Service Labour Relations Act* is continued.

Right to strike

7. Nothing in this Act affects the right to strike under the *Canada Labour Code* or the *Public Service Labour Relations Act*.

Amendments permitted

8. Nothing in this Act precludes the bargaining agent for employees governed by a collective agreement or arbitral award and the employer of those employees from amending, by agreement in writing, any provision of the collective agreement or arbitral award, other than a provision relating to its term, so long as the amendment is not contrary to any provision of this Act.

Workplace improvements

9. Nothing in this Act precludes the co-development of workplace improvements by bargaining agents and employers under the auspices of the National Joint Council or any other body that they may agree on.

Incremental and merit increases

10. Nothing in this Act is to be construed as precluding the entitlement of any employee to incremental increases — including any based on the attainment of further qualifications or the acquisition of further skills — or to merit or performance increases, in-range increases, performance bonuses or similar forms of compensation.

Conflicts with other Acts

11. In the event of a conflict between a provision of this Act and a provision of any other Act of Parliament, including a provision in Part X of the *Financial Administration Act*, the provision of

this Act prevails to the extent of the conflict, unless the other Act expressly declares that it or any of its provisions apply despite this Act.

APPLICATION

Members of Parliament

12. This Act applies to members of the Senate and the House of Commons.

Employees

13. (1) This Act applies to employees who are employed in or by

(*a*) the departments and other portions of the federal public administration named in Schedules I and IV, respectively, to the *Financial Administration Act* and the separate agencies named in Schedule V to that Act, other than the Financial Consumer Agency of Canada and the Staff of the Non-Public Funds, Canadian Forces;

(*b*) the Crown corporations and public bodies named in Schedule 1; and

(*c*) the Senate, the House of Commons, the Library of Parliament, the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner.

Members of the Royal Canadian Mounted Police

(2) For greater certainty, members of the Royal Canadian Mounted Police are employees.

Deemed employees

(3) This Act applies to the following persons, who are deemed to be employees for the purposes of this Act:

(*a*) the staff of members of the Senate and the House of Commons;

(*b*) directors of the Crown corporations and public bodies named in Schedule 1;

(*c*) officers and non-commissioned members of the Canadian Forces; and

(*d*) the Chief Electoral Officer.

Persons appointed by Governor in Council

(4) This Act applies to persons who are appointed by the Governor in Council, and those persons are deemed to be employees for the purposes of this Act. Despite this subsection, this Act does not apply to lieutenant governors, judges who are paid a salary under the *Judges Act*, military judges appointed under section 165.21 of the *National Defence Act* and prothonotaries appointed under section 12 of the *Federal Courts Act*.

Persons designated by Governor in Council

14. The Governor in Council may, by order, designate any person or class of persons as persons to whom this Act applies, and those persons are deemed to be employees for the purposes of this Act.

Locally engaged persons and independent contractors

15. This Act does not apply to a person who is locally engaged outside Canada or, for greater certainty, to a person who is engaged as an independent contractor.

RESTRAINT MEASURES

Increases to Rates of Pay

Increases to rates of pay

16. Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:

(*a*) the 2006–2007 fiscal year, 2.5%;

(*b*) the 2007–2008 fiscal year, 2.3%;

(*c*) the 2008–2009 fiscal year, 1.5%;

(*d*) the 2009–2010 fiscal year, 1.5%; and

(*e*) the 2010–2011 fiscal year, 1.5%.

Employees Represented by a Bargaining Agent

Increases to rates of pay — collective agreements or arbitral awards after coming into force

17. (1) The provisions of any collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may not provide for increases to rates of pay that are greater than those set out in section 16, but they may provide for increases that are lower.

12-month periods

(2) For greater certainty, any collective agreement that is entered into, or any arbitral award that is made, after the day on which this Act comes into force and that provides for increases to rates of pay for any period that begins during the restraint period must do so on the basis of a 12-month period.

Increases to rates of pay — collective agreements and arbitral awards — December 8, 2008 until coming into force

18. The provisions of any collective agreement that is entered into, or any arbitral award that is made, during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

Increases to rates of pay — collective agreements and arbitral awards — before December 8, 2008

19. With respect to a collective agreement that is entered into, or an arbitral award that is made, before December 8, 2008,

(*a*) section 16 does not apply in respect of any period that began during the 2006–2007 or 2007–2008 fiscal year; and

(*b*) for any 12-month period that begins during any of the 2008–2009, 2009–2010 and 2010–2011 fiscal years, section 16 applies only in respect of periods that begin on or after December 8, 2008 and any provisions of those agreements or awards that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

Other than 12-month periods — section 18

20. If a collective agreement or arbitral award to which section 18 applies provides for an increase to rates of pay for a period of other than 12 months that begins during any particular fiscal year in the restraint period, that increase is of no effect or is deemed never to have had effect, as the case may be, and is deemed to be an increase for that period of other than 12 months, determined on an annualized basis to the nearest 1/100%, that provides for the increase referred to in section 16 for a period that begins during that particular fiscal year.

Other than 12-month periods — section 19

21. If a collective agreement or arbitral award to which section 19 applies provides for an increase to rates of pay for a period of other than 12 months that begins during any particular fiscal year that begins during the period that begins on December 8, 2008 and ends on March 31, 2011, that increase is of no effect or is deemed never to have had effect, as the case may be, and is deemed to be an increase for that period of other than 12 months, determined on an annualized basis to the nearest 1/100%, that provides for the increase referred to in section 16 for a period that begins during that particular fiscal year.

Lower percentages not affected

22. If a collective agreement or arbitral award to which section 18 or 19 applies provides for an increase to the rates of pay for any particular period that is lower than the increase referred to in section 16 for that period, section 16 does not apply in respect of that increase.

Restructuring prohibited

23. Subject to sections 31 to 34,

(*a*) no provision of a collective agreement that is entered into, or of an arbitral award that is made, after the day on which this Act comes into force may provide for the restructuring of rates of pay during any period that begins during the restraint period;

(*b*) any provision of a collective agreement that is entered into, or of an arbitral award that is made, during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force that provides for the restructuring of rates of pay during any period that begins during the restraint period is of no effect or is deemed never to have had effect, as the case may be; and

(*c*) any provision of a collective agreement that is entered into, or of an arbitral award that is made, before December 8, 2008 that provides for the restructuring of rates of pay during any period that begins during the period that begins on December 8, 2008 and ends on March 31, 2011 is of no effect or is deemed never to have had effect, as the case may be.

No increases to additional remuneration — after coming into force

24. No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement, or the arbitral award, as the case may be, becomes effective.

No increases to additional remuneration — December 8, 2008 until coming into force

25. If a collective agreement that is entered into, or arbitral award that is made, at any time during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force contains provisions that provide, for any period that begins during the restraint period, for an increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement, or the arbitral award, as the case may be, became effective, those provisions are of no effect or are deemed never to have had effect, as the case may be.

No increases to additional remuneration — before December 8, 2008

26. If a collective agreement that is entered into, or an arbitral award that is made, before December 8, 2008 contains provisions that, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, provide for an increase to the amount or rate of any additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the first period that began on or after December 8, 2008, those provisions are of no effect or are deemed never to have had effect, as the case may be.

No new additional remuneration — after coming into force

27. No collective agreement that is entered into, or arbitral award that is made, after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award immediately before the collective agreement or the arbitral award, as the case may be, becomes effective.

No new additional remuneration — December 8, 2008 to coming into force

28. If a collective agreement that is entered into, or an arbitral award that is made, at any time during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force contains a provision that provides, for any period that begins during the restraint period, for any additional remuneration to the employees governed by the collective agreement or the arbitral award that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or the arbitral award, as the case may be, immediately before it became effective, that provision is of no effect or is deemed never to have had effect, as the case may be.

No new additional remuneration — before December 8, 2008

29. If a collective agreement that is entered into, or an arbitral award that is made, before December 8, 2008 contains a provision that provides, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, for any additional remuneration to the employees governed by the collective agreement or the arbitral award that is new in relation to the additional remuneration that applied to the employees governed by the collective agreement or arbitral award, as the case may be, immediately before the first period that began on or after December 8, 2008, that provision is of no effect or is deemed never to have had effect, as the case may be.

Canada Border Services Agency

30. Sections 24 to 26 do not apply in respect of pay notes applicable only to employees in the Canada Border Services Agency who were transferred to the Agency on its creation, but the rates of those pay notes may not be increased during any period that begins in any of the fiscal years referred to in section 16 by a percentage that is higher than the percentage set out in that section for that fiscal year.

Border Services Group

31. The following rules apply in respect of collective agreements that govern employees in the Border Services Group whose employer is Her Majesty as represented by the Treasury Board:

(*a*) paragraph 23(*a*) does not prevent any collective agreement that is entered into after the day on which this Act comes into force from restructuring, as a result of a classification conversion, the rates of pay during the 2007–2008 or 2009–2010 fiscal year, and the increases set out in section 16 apply in respect of the restructured rates of pay;

(*b*) if a collective agreement is entered into during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force and, as a result of a classification conversion, it contains provisions for the restructuring of rates of pay during the 2007–2008 or

2009–2010 fiscal year, paragraph 23(*b*) does not apply in respect of those provisions, and the increases set out in section 16 apply in respect of the restructured rates of pay; and

(*c*) if a collective agreement is entered into before December 8, 2008 and, as a result of a classification conversion, it contains provisions for the restructuring of rates of pay during the 2009–2010 fiscal year, paragraph 23(*c*) does not apply in respect of those provisions, and the increase set out in section 16 applies in respect of the restructured rates of pay.

Groups subject to national rates of pay

32. The following rules apply in respect of collective agreements that govern employees in the Operational Services Group whose employer is Her Majesty as represented by the Treasury Board and employees in the General Labour and Trades Group and the General Services Group whose employer is Her Majesty as represented by the Parks Canada Agency or Her Majesty as represented by the Canadian Food Inspection Agency:

(*a*) paragraph 23(*a*) does not prevent any collective agreement that is entered into after the day on which this Act comes into force from restructuring the rates of pay during the 2009–2010 fiscal year in order to create national rates of pay, and the increase set out in section 16 applies in respect of the restructured rates of pay;

(*b*) if a collective agreement is entered into during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force and, in order to create national rates of pay, it contains provisions for the restructuring of rates of pay during the 2009–2010 fiscal year, paragraph 23(*b*) does not apply in respect of those provisions, and the increase set out in section 16 applies in respect of the restructured rates of pay; and

(*c*) if a collective agreement is entered into before December 8, 2008 and, in order to create national rates of pay, it contains provisions for the restructuring of rates of pay during the 2009–2010 fiscal year, paragraph 23(*c*) does not apply in respect of those provisions, and the increase set out in section 16 applies in respect of the restructured rates of pay.

Ships' Officers Group

33. The following rules apply in respect of any arbitral award that is made before December 8, 2008 and that governs employees in the Ships' Officers Group whose employer is Her Majesty as represented by the Treasury Board:

(*a*) paragraph 23(*c*) does not apply in respect of the provisions of any arbitral award that provide for the restructuring of rates of pay during the 2010–2011 fiscal year, and the increase set out in section 16 applies in respect of the restructured rates of pay; and

(*b*) section 29 does not apply in respect of the provisions of any arbitral award that provide for the payment, during the 2010–2011 fiscal year, of a sum in lieu of vacation leave factors.

Law Group

34. (1) The following rules apply in respect of any collective agreement or arbitral award that governs employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period:

(*a*) in the case of a collective agreement entered into — or an arbitral award made — after the day on which this Act comes into force,

(i) it may not have retroactive effect in respect of a day that is earlier than May 10, 2006,

(ii) any increase to rates of pay that it provides for in respect of any period that begins during the 2006–2007 fiscal year must be based on the rates of pay set out in Schedule 2,

(iii) it must provide, for all employees in the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date, but those plans may not have retroactive effect,

(iv) it may provide for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, but the amount or rate of that additional remuneration for a particular position level may not be greater than the highest amount or rate that applied to employees of that position level on that date, and

(v) it may not provide for additional remuneration if that additional remuneration applied to no employee in the Law Group on May 9, 2006; and

(*b*) in the case of a collective agreement entered into — or an arbitral award made — on or before the day on which this Act comes into force,

(i) if any of its provisions has retroactive effect in respect of a day that is earlier than May 10, 2006, that retroactive effect is deemed never to have had effect, the provision is deemed to have had retroactive effect as of May 10, 2006 and the first day of every other period that is related to that provision is deemed to be moved forward by the number of days that is equal to the number of days between the first day the provision was expressed to have retroactive effect and May 10, 2006,

(ii) if the increase provided to rates of pay for any period that begins during the 2006–2007 fiscal year is based on rates of pay that are greater than those set out in Schedule 2, those greater rates of pay are of no effect or are deemed never to have had effect, as the case may be, and the increase is deemed to be based on the rates of pay set out in Schedule 2,

(iii) if subparagraph (ii) applies, its provision that provides for the rates of pay for any other period that begins on or before March 31, 2011 is of no effect or is deemed never to have had effect, as the case may be, and the rates of pay in that provision are deemed to be the rates of pay that applied immediately before the beginning of that period as a result of this Act,

(iv) if it provides for performance pay plans and those plans are not the same as those that were in effect on May 9, 2006 for any employees in the Law Group or the amounts or rates provided for in those plans in relation to any particular position level are not the same as those of the performance pay plans that were in effect on that date — or the plans were expressed to be retroactive — the provisions that provide for those plans are of no effect or are deemed never to

have had effect, as the case may be, and are deemed to be provisions that provide, for all employees in the Law Group, as of the day that the agreement was entered into or the award was made, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group at the same amounts or rates, in relation to any particular position level, that were in effect on that date,

(v) if it does not provide for performance pay plans, it is deemed to provide, for all employees in the Law Group, as of the day that the agreement was entered into or the award was made, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group at the same amounts or rates, in relation to any particular position level, that were in effect on that date,

(vi) if it provides for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, and the amount or rate of that additional remuneration for a particular position level is greater than the highest amount or rate that applied to any employees of that position level on that date, the provision that provides for that payment is deemed to be of no effect or is deemed never to have had effect, as the case may be, and is deemed to provide for the highest amount or rate, as the case may be, that applied in respect of any of those employees on that date, and

(vii) if it provides for any additional remuneration, and that additional remuneration applied to no employee in the Law Group on May 9, 2006, the provision that provides for that payment is of no effect or is deemed never to have had effect, as the case may be.

Other provisions apply

(2) For greater certainty, the provisions of this Act that are not inconsistent with subsection (1) apply to collective agreements and arbitral awards that govern employees in the Law Group.

Non-represented and Excluded Employees

Definitions

35. (1) The following definitions apply in sections 36 to 54.

“employee”
« employé »

“employee” means an employee who is not represented by a bargaining agent or who is excluded from a bargaining unit.

“terms and conditions of employment”
« condition d’emploi »

“terms and conditions of employment” means terms and conditions of employment that apply to employees.

When terms and conditions of employment are considered to be established

(2) For the purposes of sections 36 to 54, terms and conditions of employment are considered to be established if they are established by an employer acting alone or agreed to by an employer and employees.

Increases to rates of pay — terms and conditions established after coming into force

36. (1) Terms and conditions of employment established after the day on which this Act comes into force may not provide for increases to rates of pay that are greater than those set out in section 16, but they may provide for increases that are lower.

12-month periods

(2) For greater certainty, terms and conditions of employment established after the day on which this Act comes into force that provide for increases to rates of pay for any period that begins during the restraint period must do so on the basis of a 12-month period.

Increases to rates of pay — terms and conditions of employment — December 8, 2008 until coming into force

37. The provisions of any terms and conditions of employment established during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force that provide, for any particular period, for an increase to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

Increases to rates of pay — terms and conditions of employment — before December 8, 2008

38. With respect to any terms and conditions of employment established before December 8, 2008 that provide for increases to rates of pay

(*a*) section 16 does not apply in respect of any period that began during the 2006–2007 or 2007–2008 fiscal year; and

(*b*) for any 12-month period that begins during any of the 2008–2009, 2009–2010 and 2010–2011 fiscal years, section 16 applies only in respect of periods that begin on or after December 8, 2008 and any provisions of those terms and conditions of employment that provide, for any particular period, for increases to rates of pay that are greater than those referred to in section 16 for that particular period are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide for the increases referred to in section 16.

Other than 12-month periods — section 37

39. If any terms and conditions of employment to which section 37 applies provide for an increase to rates of pay for a period of other than 12 months that begins during any particular fiscal year in the restraint period, that increase is of no effect or is deemed never to have had effect, as the case may be, and the increase is deemed to be an increase for that period of other than 12 months, determined on an annualized basis to the nearest 1/100%, that provides

for the increase referred to in section 16 for a period that begins during that particular fiscal year.

Other than 12-month periods — section 38

40. If any terms and conditions of employment to which section 38 applies provide for an increase to rates of pay for a period of other than 12 months that begins during any particular fiscal year that begins during the period that begins on December 8, 2008 and ends on March 31, 2011, that increase is of no effect or is deemed never to have had effect, as the case may be, and is deemed to be an increase for that period of other than 12 months, determined on an annualized basis to the nearest 1/100%, that provides for the increases referred to in section 16 in respect of a period that begins during that particular fiscal year.

Lower percentages not affected

41. If any terms and conditions of employment to which section 37 or 38 apply provide for an increase to the rates of pay for any particular period that is lower than the increase referred to in section 16 for that period, section 16 does not apply in respect of that increase.

Section 16 does not create authority to increase

42. If any terms and conditions of employment established before, on or after the day on which this Act comes into force do not provide for an increase to the rates of pay for any particular period that begins during the restraint period, section 16 is not to be construed as authorizing any increase to those rates of pay.

Restructuring prohibited

43. Subject to sections 51 to 54,

(*a*) no provision of terms and conditions of employment established after the day on which this Act comes into force may provide for the restructuring of rates of pay during any period that begins during the restraint period;

(*b*) any provision of terms and conditions of employment established during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force that provides for the restructuring of rates of pay during any period that begins during the restraint period is of no effect or is deemed never to have had effect, as the case may be; and

(*c*) any provision of terms and conditions of employment established before December 8, 2008 that provides for the restructuring of rates of pay during any period that begins during the period that begins on December 8, 2008 and ends on March 31, 2011 is of no effect or is deemed never to have had effect, as the case may be.

No increases to additional remuneration — after coming into force

44. No terms and conditions of employment established after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any increase to the amount or rate of any additional remuneration that applied to the employees governed by

those terms and conditions of employment immediately before those terms and conditions of employment become effective.

No increases to additional remuneration — December 8, 2008 until coming into force

45. If any terms and conditions of employment established at any time during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force contain provisions that provide, for any period that begins during the restraint period, for an increase to the amount or rate of any additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before those provisions became effective, those provisions are of no effect or are deemed never to have had effect, as the case may be.

No increases to additional remuneration — before December 8, 2008

46. If any terms and conditions of employment established before December 8, 2008 contain provisions that, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, provide for an increase to the amount or rate of any additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before the first period that began on or after December, 8, 2008, those provisions are of no effect or are deemed never to have had effect, as the case may be.

No new additional remuneration — after coming into force

47. No terms and conditions of employment established after the day on which this Act comes into force may provide, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before the terms and conditions of employment become effective.

No new additional remuneration — December 8, 2008 until coming into force

48. If any terms and conditions of employment established at any time during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force contain, in relation to any employees, a provision that provides, for any period that begins during the restraint period, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before the effective date of the provisions, that provision is of no effect or is deemed never to have had effect, as the case may be.

No new additional remuneration — before December 8, 2008

49. If any terms and conditions of employment established before December 8, 2008 contain, in relation to any employees, a provision that provides, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, for any additional remuneration that is new in relation to the additional remuneration that applied to the employees governed by those terms and conditions of employment immediately before the first period that began on or after December 8, 2008, that provision is of no effect or is deemed never to have had effect, as the case may be.

Canada Border Services Agency

50. Sections 44 to 46 do not apply in respect of pay notes applicable only to employees in the Canada Border Services Agency who were transferred to the Agency on its creation, but the rates of those pay notes may not be increased during any period that begins in any of the fiscal years referred to in section 16 by a percentage that is higher than the percentage set out in that section for that fiscal year.

Border Services Group

51. The following rules apply in respect of terms and conditions of employment governing employees in the Border Services Group whose employer is Her Majesty as represented by the Treasury Board:

(*a*) if the restructuring permitted by paragraph 31(*a*) occurs, paragraph 43(*a*) does not prevent terms and conditions of employment established after the day on which this Act comes into force from restructuring, as a result of a classification conversion, the rates of pay during the 2007–2008 or 2009–2010 fiscal year, and the increases set out in section 16 apply in respect of the restructured rates of pay;

(*b*) if any terms and conditions of employment were established during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force and, as a result of a classification conversion, they contain provisions for the restructuring of rates of pay during the 2007–2008 or 2009–2010 fiscal year and the restructuring permitted by paragraph 31(*b*) occurs, paragraph 43(*b*) does not apply in respect of those provisions, and the increases set out in section 16 apply in respect of the restructured rates of pay; and

(*c*) if any terms and conditions of employment were established before December 8, 2008 and, as a result of a classification conversion, they contain provisions for the restructuring of rates of pay during the 2009–2010 fiscal year and the restructuring permitted by paragraph 31(*c*) occurs, paragraph 43(*c*) does not apply in respect of those provisions, and the increase set out in section 16 applies in respect of the restructured rates of pay.

Groups subject to national rates of pay

52. The following rules apply in respect of terms and conditions of employment governing employees in the Operational Services Group whose employer is Her Majesty as represented by the Treasury Board and employees in the General Labour and Trades Group and the General Services Group whose employer is Her Majesty as represented by the Parks Canada Agency or Her Majesty as represented by the Canadian Food Inspection Agency:

(*a*) if the restructuring permitted by paragraph 32(*a*) occurs, paragraph 43(*a*) does not prevent terms and conditions of employment established after the day on which this Act comes into force from restructuring rates of pay during the 2009–2010 fiscal year in order to create national rates of pay, and the increase set out in section 16 applies in respect of the restructured rates of pay;

(*b*) if any terms and conditions of employment were established during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force and, in order to create national rates of pay, they contain provisions for the restructuring of rates of pay during

the 2009–2010 fiscal year and the restructuring permitted by paragraph 32(*b*) occurs, paragraph 43(*b*) does not apply in respect of those provisions, and the increase set out in section 16 applies in respect of the restructured rates of pay; and

(*c*) if any terms and conditions of employment were established before December 8, 2008 and, in order to create national rates of pay, they contains provisions for the restructuring of rates of pay during the 2009–2010 fiscal year and the restructuring permitted by paragraph 32(*c*) occurs, paragraph 43(*c*) does not apply in respect of those provisions, and the increase set out in section 16 applies in respect of the restructured rates of pay.

Ships' Officers Group

53. The following rules apply in respect of terms and conditions of employment established before December 8, 2008 that govern employees in the Ships' Officers Group whose employer is Her Majesty as represented by the Treasury Board:

(*a*) paragraph 43(*c*) does not apply in respect of the provisions of those terms and conditions of employment that provide for the restructuring of rates of pay during the 2010–2011 fiscal year, and the increase set out in section 16 applies in respect of the restructured rates of pay; and

(*b*) section 49 does not apply in respect of the provisions of those terms and conditions of employment that provide for the payment, during the 2010–2011 fiscal year, of a sum in lieu of vacation leave factors.

Law Group

54. (1) The following rules apply in respect of terms and conditions of employment governing employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period:

(*a*) in the case where the terms and conditions of employment are established after the day on which this Act comes into force,

(i) the provisions of those terms and conditions of employment that provide for increases to rates of pay may not have retroactive effect in respect of a day that is earlier than May 10, 2006,

(ii) any increase to rates of pay that the terms and conditions of employment provide for in respect of any period that begins during the 2006–2007 fiscal year must be based on the rates of pay set out in Schedule 2,

(iii) the provisions of those terms and conditions of employment must provide, for all employees of the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date but those plans may not have retroactive effect, and

(iv) the provisions of those terms and conditions of employment may provide for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, but the amount or rate of that additional remuneration for a particular

position level may not be greater than the highest amount or rate that applied to employees of that position level on that date, and

(v) those terms and conditions of employment may not provide for additional remuneration if that additional remuneration applied to no employee in the Law Group on May 9, 2006; and

(*b*) in the case where the terms and conditions of employment were established on or before the day on which this Act comes into force,

(i) if any of their provisions have retroactive effect in respect of a day that is earlier than May 10, 2006, that retroactive effect is deemed never to have had effect, the provision is deemed to have had retroactive effect as of May 10, 2006 and the first day of every other period referred to in that provision is deemed to be moved forward by the number of days that is equal to the number of days between the first day the provision was expressed to have retroactive effect and May 10, 2006,

(ii) if the increase provided to rates of pay for any period that begins during the 2006–2007 fiscal year is based on rates of pay that are greater than those set out in Schedule 2, those greater rates of pay are of no effect or are deemed never to have had effect, as the case may be, and the increase is deemed to be based on the rates of pay set out in Schedule 2,

(iii) if subparagraph (ii) applies, the provisions of the terms and conditions of employment that provide for rates of pay for every other period that begins on or before March 31, 2011 are of no effect or are deemed never to have had effect, as the case may be, and the rates of pay in those provisions are deemed to be the rates of pay that applied immediately before the beginning of that period as a result of this Act,

(iv) if those terms and conditions of employment provide for performance pay plans and those plans are not the same as those that were in effect on May 9, 2006 for any employees in the Law Group or the amounts or rates provided for in those plans in relation to any particular position level are not the same as those of the performance pay plans that were in effect on that date — or the plans were expressed to be retroactive — the provisions that provide for those plans are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide, for all employees in the Law Group, as of the day that the terms and conditions of employment were established, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group at the same amounts or rates, in relation to any particular position level, that were in effect on that date,

(v) if those terms and conditions of employment do not provide for performance pay plans, they are deemed to provide, for all employees in the Law Group, as of the day that they were established, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group at the same amounts or rates, in relation to any particular position level, that were in effect on that date,

(vi) if those terms and conditions of employment provide for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, and the amount or rate of that additional remuneration for a particular position level is greater than the highest amount or rate that applied to any employees of that position level on that date, the provisions that provide for that payment are deemed to be of no effect or are deemed never to have had effect, as the case may be, and are deemed to provide for the

highest amount or rate, as the case may be, that applied in respect of any of those employees on that date, and

(vii) if those terms and conditions of employment provide for any additional remuneration, and that additional remuneration applied to no employee in the Law Group on May 9, 2006, the provision that provides for that payment is of no effect or is deemed never to have had effect, as the case may be.

Other provisions apply

(2) For greater certainty, the provisions of this Act that are not inconsistent with subsection (1) apply to terms and conditions of employment governing employees in the Law Group.

Members of Parliament

Increase

55. (1) Despite subsections 55.1(2), 62.1(2), 62.2(2) and 62.3(2) of the *Parliament of Canada Act* and subsections 4.1(2), (4) and (6) of the *Salaries Act*, the increase in respect of allowances and salaries to be paid to members of the Senate and the House of Commons for the 2009–2010 fiscal year is to be 1.5%.

No increase

(2) Despite the provisions referred to in subsection (1), there are to be no increases in respect of allowances and salaries to be paid to members of the Senate and the House of Commons for the 2010–2011, 2011–2012 and 2012–2013 fiscal years.

Transition — 2013–2014 fiscal year

(3) In calculating the allowances and salaries to be paid to members of the Senate and the House of Commons for the 2013–2014 fiscal year, the indexing mentioned in the provisions referred to in subsection (1) is to be applied to the allowances and salaries payable to the members for the 2009–2010 fiscal year.

2009, c. 2, s. 393 “55”; 2010, c. 12, s. 1649.

General

Inconsistent provisions

56. Any provision of any collective agreement that is entered into — or of any arbitral award that is made, or of any terms and conditions of employment that are established — after the day on which this Act comes into force that is inconsistent with this Act is of no effect.

Compensating for restraint measures prohibited

57. No provision of any collective agreement that is entered into — or of any arbitral award that is made, or of any terms and conditions of employment that are established — after the day on

which this Act comes into force may provide for compensation for amounts that employees did not receive as a result of the restraint measures in this Act.

Provisions compensating for restraint measures of no effect

58. If a provision of a collective agreement that is entered into — or of an arbitral award that is made, or of terms and conditions of employment that are established — on or before the day on which this Act comes into force provides for compensation for amounts that employees did not receive as a result of the restraint measures in this Act, that provision is of no effect or is deemed never to have had effect, as the case may be.

No changes to performance pay plans — new collective agreements, etc.

59. No provision of any collective agreement that is entered into — or of any arbitral award that is made, or of any terms and conditions of employment that are established — after the day on which this Act comes into force may, for any period that begins during the restraint period, change the performance pay plans, including the amounts or rates, that apply to any employees governed by the agreement, award or terms and conditions of employment.

No changes to performance pay plans — existing collective agreements, etc.

60. If a provision of a collective agreement that is entered into — or of an arbitral award that is made, or of terms and conditions of employment that are established — during the period that begins on December 8, 2008 and ends on the day on which this Act comes into force changes, for any period that begins during the restraint period, the performance pay plans, including the amounts or rates, that apply to any employees governed by the agreement, award or terms and conditions of employment, the change is of no effect or is deemed never to have had effect, as the case may be.

No changes to performance pay plans — existing collective agreements, etc.

61. If a provision of a collective agreement that is entered into — or of an arbitral award that is made, or of terms and conditions of employment that are established — before December 8, 2008 changes, for any period that begins in the period that begins on December 8, 2008 and ends on March 31, 2011, the performance pay plans, including the amounts or rates, that apply to any employees governed by the agreement, award or terms and conditions of employment, the change is of no effect or is deemed never to have had effect, as the case may be.

Royal Canadian Mounted Police

62. Despite sections 44 to 49, the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.

ADMINISTRATION

Powers and duties of Treasury Board

63. (1) The Treasury Board may exercise the powers and shall perform the duties in relation to this Act that are necessary to enable it to determine whether an employer of employees, other than employees referred to in paragraph 13(1)(*c*) or (3)(*a*), is complying with this Act.

Information and documentation

(2) The Treasury Board may require from the employer any information and documentation that it considers necessary to enable it to determine whether the employer is complying with this Act.

Treasury Board directive

(3) If the Treasury Board determines under this section that the employer is not complying with this Act, it may issue any directives that it considers appropriate to ensure the compliance.

Debt due to Her Majesty

64. (1) Every amount paid — including amounts paid before the day on which this Act comes into force — to any person in excess of the amount that should have been paid as a result of this Act is a debt due to Her Majesty and may be recovered as such.

Overpayment

(2) Any amount that is a debt due to Her Majesty as a result of subsection (1) is deemed to be an overpayment to which subsection 155(3) of the *Financial Administration Act* applies.

Application

(3) For greater certainty, subsection (1) applies to, but is not limited to, the following amounts:

(*a*) amounts paid under a provision that by the operation of this Act is of no effect or is deemed never to have had effect; and

(*b*) amounts paid as a result of the payment of any amount referred to in paragraph (*a*).

Orders

65. The Governor in Council may, on the recommendation of the Treasury Board, by order, amend Schedule 1 by adding to or deleting from it the name of any Crown corporation or public body.

SCHEDULE 1
(Sections 13 and 65)
CROWN CORPORATIONS AND PUBLIC BODIES

Canada Council for the Arts
Conseil des Arts du Canada

Canadian Broadcasting Corporation
Société Radio-Canada

Canadian Centre for Occupational Health and Safety
Centre canadien d'hygiène et de sécurité au travail

Canadian Commercial Corporation
Corporation commerciale canadienne

Canadian Museum of Civilization
Musée canadien des civilisations

Canadian Museum of Immigration at Pier 21
Musée canadien de l'immigration du Quai 21

Canadian Museum of Nature
Musée canadien de la nature

Canadian Tourism Commission
Commission canadienne du tourisme

International Development Research Centre
Centre de recherches pour le développement international

National Arts Centre Corporation
Corporation du Centre national des Arts

National Battlefields Commission, The
Commission des champs de bataille nationaux

National Gallery of Canada
Musée des beaux-arts du Canada

National Museum of Science and Technology
Musée national des sciences et de la technologie

Office of the Communications Security Establishment Commissioner
Bureau du commissaire du Centre de la sécurité des télécommunications

Telefilm Canada
Téléfilm Canada

2009, c. 2, s. 393 "Sch. 1"; 2010, c. 7, s. 7.

SCHEDULE 2
(Sections 34 and 54)
RATES OF PAY — EMPLOYEES IN THE LAW GROUP

All regions except Toronto	Minimum	Maximum
LA-DEV	$27,410	$62,155
LA-01	$54,580	$77,868
LA-02(A) or LA-02(I)	$75,622	$108,525
LA-02(B) or LA-02(II)	$94,097	$119,975
LA-03(A)	$107,300	$136,300
LA-03(B)	$124,400	$152,200
LA-03(C)	$141,700	$172,800

Toronto region	Minimum	Maximum
LA-DEV	$27,410	$62,155
LA-01	$54,585	$77,868
LA-02(A) or LA-02(I)	$75,630	$124,940
LA-02(B) or LA-02(II)	$98,840	$138,075
LA-03(A)	$113,600	$148,100
LA-03(B)	$124,400	$152,200
LA-03(C)	$141,700	$172,800

***Public Service Labour Relations Act*, S.C. 2003, c. 22 ("*PSLRA*"), preamble, s. 106, Division 9**

Preamble

Recognizing that

the public service labour-management regime must operate in a context where protection of the public interest is paramount;

effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;

collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment;

the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;

the Government of Canada recognizes that public service bargaining agents represent the

interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;

commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Duty to bargain in good faith

106. After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,

(a) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and

(b) make every reasonable effort to enter into a collective agreement.

DIVISION 9
Arbitration
Application of Division

Application

135. This Division applies to the employer and the bargaining agent for a bargaining unit whenever

(a) the process for the resolution of a dispute applicable to the bargaining unit is arbitration; and

(b) the parties have bargained in good faith with a view to entering into a collective agreement but are unable to reach agreement on a term or condition of employment that may be included in an arbitral award.

Request for Arbitration

Request for arbitration

136. (1) Either party may, by notice in writing to the Chairperson, request arbitration in respect of any term or condition of employment that may be included in an arbitral award.

When request may be made

(2) The request may be made

(a) at any time, if the parties have not entered into a collective agreement and no request for arbitration has been made by either party since the commencement of the bargaining; or

(b) not later than seven days after a collective agreement is entered into by the parties, in any other case.

Contents of notice

(3) The party requesting arbitration must

(a) specify in the notice every term or condition of employment in respect of which it requests arbitration and its proposals concerning the award to be made in respect of that term or condition; and

(b) annex to the notice a copy of the most recent collective agreement entered into by the parties.

Notice to other party

(4) On receiving the notice, the Chairperson must send a copy to the other party.

Request for arbitration of additional matters

(5) The other party may, within seven days after receiving the copy, by notice in writing to the Chairperson, request arbitration in respect of any other term or condition of employment that may be included in an arbitral award and that remained in dispute when the first request for arbitration was made.

Notice to include proposal

(6) The party making the request under subsection (5) must specify in the notice its proposal concerning the award to be made in respect of every term or condition of employment in respect of which it requests arbitration.

Establishment of Arbitration Board

Establishment

137. (1) On receiving a request for arbitration, the Chairperson must establish an arbitration board for arbitration of the matters in dispute.

Delay

(2) The Chairperson may delay establishing an arbitration board until he or she is satisfied that the party making the request has bargained sufficiently and seriously with respect to the matters in dispute.

Constitution

138. The arbitration board consists of either a single member or three members, appointed in accordance with section 139 or 140, as the case may be.

Board with single member

139. If the parties jointly recommend the appointment of a person to be an arbitration board consisting of a single member, the Chairperson must appoint the person to be the arbitration board.

Board with three members

140. (1) If either party requests that an arbitration board consisting of three members be established, the Chairperson must, by notice, require each of the parties, within seven days after receipt of the notice, to nominate a person to be a member of the arbitration board, and on receipt of the nominations, the Chairperson must appoint the nominated persons as members of the arbitration board.

Failure to nominate

(2) If a party fails to nominate a person within the time provided for in subsection (1) or nominates a person who is not eligible for appointment, the Chairperson must appoint as a member of the arbitration board a person whom he or she considers suitable, and that person is deemed to have been appointed on the nomination of that party.

Appointment of chairperson nominated by parties

(3) Within five days after the day on which the second member is appointed, the two members must nominate a third person who is eligible for appointment and ready and willing to act, to be chairperson and third member of the arbitration board, and the Chairperson must appoint that person as the chairperson and third member of the arbitration board.

Failure to nominate

(4) If the two members fail to make a nomination under subsection (3) or they nominate a person who is not eligible for appointment, the Chairperson must, without delay, appoint as the chairperson and third member of the arbitration board a person whom he or she considers suitable.

Eligibility

141. No person may act as a member of an arbitration board in respect of a matter referred to arbitration if the person has, at any time during the six months before the person's date of appointment, acted in respect of any matter concerning employer-employee relations as counsel or agent of the employer or of any employee organization that has an interest in the matter referred to arbitration.

Notification of establishment

142. (1) The Chairperson must, without delay, notify the parties of the establishment of the arbitration board and of the name or names of its member or members, as the case may be.

Effect of notification

(2) The notification constitutes conclusive proof that the arbitration board has been established in accordance with this Part and, after it is given, no order may be made or process entered into, and no proceedings may be taken in any court, to question the establishment of the board or to review, prohibit or restrain any of its proceedings.

Death, incapacity or resignation of single member

143. (1) In the event of the death, incapacity or resignation of the member of an arbitration board that consists of a single member before the arbitration board makes an arbitral award, the Chairperson must appoint another person in accordance with section 139. That person must recommence the arbitration proceedings from the beginning.

Vacancy — board with three members

(2) If a vacancy occurs in the membership of an arbitration board that consists of three members before the arbitration board makes an arbitral award, the vacancy must be filled by the

Chairperson by appointment in the manner provided in section 140 for the selection of the person in respect of whom the vacancy arose.

Referral to Arbitration

Referral to arbitration

144. (1) Subject to section 150, after establishing the arbitration board, the Chairperson must without delay refer the matters in dispute to the board.

Subsequent agreement

(2) If, before an arbitral award is made, the parties reach agreement on any matter in dispute that is referred to arbitration and enter into a collective agreement in respect of that matter, that matter is deemed not to have been referred to the arbitration board and no arbitral award may be made in respect of it.

Duty and Powers

Assistance to parties

145. As soon as possible after being established, the arbitration board must endeavour to assist the parties to the dispute in entering into or revising a collective agreement.

Procedure

146. (1) Except as otherwise provided in this Part, the arbitration board may determine its own procedure, including the date, time and place of its proceedings, but both parties must be given a full opportunity to present evidence and make representations.

Quorum and absence of members

(2) The chairperson of the arbitration board and one other member constitute a quorum in the case of an arbitration board consisting of three members but, in the absence of a member at any proceedings of the board, the other members may not proceed unless the absent member has been given reasonable notice of the proceedings.

Powers

147. (1) The arbitration board has all the powers of the Board set out in paragraphs 40(1)(a), (d), (e) and (h) to (j).

Delegation

(2) The arbitration board may authorize any person to exercise any of its powers set out in paragraphs 40(1)(d), (e), (i) and (j) and require that person to report to it on the exercise of those powers.

Factors to be considered

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.

Making of Arbitral Award

Making of arbitral award

149. (1) The arbitration board must make an arbitral award as soon as possible in respect of all the matters in dispute that are referred to it.

Award to be signed

(2) The arbitral award must be signed by the chairperson of the arbitration board, or by the single member, as the case may be, and a copy must be sent to the Chairperson.

Award not to require legislative implementation

150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if

(a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;

(b) the term or condition is one that has been or may be established under the Public Service Employment Act, the Public Service Superannuation Act or the Government Employees Compensation Act;

(c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;

(d) in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or

(e) doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.

Matters not negotiated

(2) The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.

Decision of majority

151. (1) If the arbitration board consists of three members, a decision of a majority of the members in respect of the matters in dispute is a decision of the board on those matters and is the arbitral award in respect of those matters.

Decision where majority cannot agree

(2) If a majority of members of the arbitration board cannot agree in respect of the matters in dispute, the decision of the chairperson of the board is the arbitral award in respect of those matters.

Form of award

152. The form of the arbitral award must, wherever possible, permit the award to be

(a) read and interpreted with, or annexed to and published with, a collective agreement dealing with other terms and conditions of employment of the employees in the bargaining unit in respect of which the arbitral award applies; and

(b) incorporated into and implemented by any instrument that may be required to be made by the employer or the relevant bargaining agent in respect of the arbitral award.

Copy sent to parties

153. On receipt of a copy of the arbitral award, the Chairperson must, without delay, send a copy to the parties and may cause the award to be published in any manner that the Chairperson considers appropriate.

Duration and Operation of Arbitral Award

Binding effect

154. Subject to and for the purposes of this Part, as of the day on which it is made, the arbitral award binds the employer and the bargaining agent that are parties to it and the employees in the bargaining unit in respect of which the bargaining agent has been certified. To the extent that it deals with matters referred to in section 12 of the Financial Administration Act, the arbitral award is also binding, on and after that day, on every deputy head responsible for any portion of the federal public administration that employs employees in the bargaining unit.

When arbitral award has effect
155. (1) The arbitral award has effect as of the day on which it is made or, subject to subsection (2), any earlier or later day that the arbitration board may determine.

Limitation on retroactive effect

(2) The arbitral award or any of its parts may be given retroactive effect, but not earlier than the day notice to bargain collectively was given.

Effect on previous collective agreement or award
(3) If a provision of an arbitral award is to have retroactive effect, the provision displaces, for the retroactive period specified in the arbitral award, any term or condition of any previous collective agreement or arbitral award with which it is in conflict.

Term of arbitral award

156. (1) The arbitration board must determine the term of the arbitral award and set it out in the arbitral award.

Factors

(2) In determining the term of an arbitral award, the arbitration board must take the following into account:

(a) if a collective agreement applicable to the bargaining unit is in force or has been entered into but is not yet in force, the term of that collective agreement; or

(b) if no collective agreement applying to the bargaining unit has been entered into,

(i) the term of any previous collective agreement that applied to the bargaining unit, or

(ii) the term of any other collective agreement that it considers relevant.

Limitation on term

(3) An arbitral award may not be for a term of less than one year or more than two years from the day on which it becomes binding on the parties, unless the arbitration board determines otherwise in any case where paragraph (2)(a) or (b) applies.

Implementation

Duty to implement provisions of the arbitral award

157. Subject to the appropriation by or under the authority of Parliament of any money that may be required by the employer, the parties must implement the provisions of the arbitral award within 90 days after the day on which the award becomes binding on them or within any longer period that the parties may agree to or that the Board, on application by either party, may set.

Matters Not Dealt With

Reference of matters not dealt with

158. Any party that considers that the arbitration board has failed to deal with a matter in dispute that was referred to arbitration may, within seven days after the day on which the arbitral award is made, refer the matter back to the arbitration board which must then deal with it.

Amendment

Amendment

159. The Board may, on the joint application of both parties to whom an arbitral award applies, amend any provision of the arbitral award if it considers that the amendment is warranted having regard to circumstances that have arisen since the making of the arbitral award, or of which the arbitration board did not have notice when the award was made, or to any other circumstances that the Board considers relevant.

Court File No.: C54656

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

- and -

ATTORNEY GENERAL OF CANADA
Respondent
(Appellant in Appeal)
(Respondent in Cross Appeal)

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