Court File No. 35027

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**ASSOCIATION OF JUSTICE COUNSEL**

Applicant

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

# REPLY MEMORANDUM OF ARGUMENT OF THE ASSOCIATION OF JUSTICE COUNSEL (Application for Leave to Appeal)

1. The Attorney General's Responding Memorandum does little to address the matters actually raised by the Applicant. With respect, it simply restates the conclusions of the Court of Appeal. Further, the response mischaracterizes the Applicant's position.

2. First, the Applicant does not ignore the second step of the *Health Services* test, as alleged by the Respondent. The Applicant does not simply say that because the *ERA* affects salary, a matter of central significance to collective bargaining and the collective goals of employees, that this is enough to establish a breach of s.2(d). Rather, the Applicant submits, in accordance with *Health Services*, that the *ERA* interferes with a matter of central significance, and that the interference is substantial.

3. The *ERA* takes salaries off the bargaining table for a period of five years. It does so in a context where the effect on Federal Crown counsel is to perpetuate below-market salaries for employees whose salaries have never been set by collective

bargaining. Indeed, because of the *ERA*, Federal Crown counsel may be in a worse position for having formed a union and bargained collectively, because executives (to whom Federal Crown counsel were historically linked for salary purposes) were given increases above the *ERA* limits before the Act was passed, that they were permitted to keep. In the words of the ILO's Committee on Freedom of Association, such statutory restrictions on collective bargaining weaken unions by "undermin[ing] employees' confidence in the advantages of union membership".[1] This is substantial interference.

4. Second, the Respondent simply does not answer the Applicant's argument that, first and foremost, this case is a challenge to legislation. The *ERA* is the primary focus, not the conduct of Treasury Board prior to the *ERA*'s enactment. *Fraser* makes clear that s.2(d) guarantees a "meaningful process"; as this Court noted, "a process which permits an employer not even to consider employee representations is not a meaningful process".[2] Once the *ERA* was enacted (realistically, once it had been announced), that was precisely the situation that confronted the Applicant. It did not matter what representations the Applicant made; the *ERA* permitted Treasury Board to ignore them. The ERA rendered it "impossible" for the Applicant's members to achieve their collective

[1] ILO Committee on Freedom of Association, *Canada (Case No. 1616)*, at para. 637.

[2] *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 ("Fraser"), para. 42: "The Court in *Health Services* emphasized that s. 2(d) does not require a particular model [page45] of bargaining, nor a particular outcome. What 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 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, <u>just as effective</u>, 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." [emphasis added]

goals, thereby making their freedom of association "pointless".[3] Whatever goals the government had, it chose to achieve them not through collective bargaining, "but by the simple expedient of legislation".[4] The *ERA* fits squarely within the "substantial interference" test as described in *Fraser*.

5. The Court of Appeal avoided this conclusion by temporally limiting the scope of freedom of association to the period before the *ERA* was enacted, and inventing the concept of a defined "constitutionally protected phase of negotiations". But there is no support in *Health Services* or *Fraser* for this temporal limitation. Even if it is accepted that Treasury Board did not breach any obligations prior to the enactment of the *ERA*, the fact remains that the *ERA* foreclosed any further discussion of salaries. But for the *ERA*, Treasury Board would have remained under an ongoing obligation to consider the Applicant's ongoing representations on salary in good faith, to discuss them, and to make a reasonable attempt to reach an agreement. The *ERA* swept that away.

6. With respect, it is a *non sequitur* to argue, in response to a case alleging that the *ERA* substantially interfered with collective bargaining by taking salaries off the bargaining table for a five-year period, that Treasury Board discussed salaries with the AJC before the legislation was enacted.[5] That may be so. But it does not alter the fact that the *ERA* established a system that permitted Treasury Board to ignore any representations of the AJC with respect to salaries from the date it was announced.

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[3] *Fraser*, para. 46.

[4] *Fraser*, para. 35.

[5] As set out in the Applicant's original Memorandum, those discussions were minimal. It is also a *non sequitur*, with respect, to argue in response to the Applicant's case that there were extensive discussions on everything but salaries for a lengthy period while the Applicant tried in vain to have Treasury Board set out its (initial) position on salaries.

7. Third, the Respondent relies on the Application Judge's comment that once the parties had invoked arbitration, the chance of an agreement was "remote". However, whether or not this is true, the chance of reaching an agreement is not the only point. As this Court has stressed and the Court of Appeal itself recognized, s.2(d) guarantees a process, not an outcome. Prior to the enactment of the *ERA*, the Applicant and Treasury Board were engaged in a process of collective bargaining. Although they had referred matters to arbitration under the statutory scheme, further negotiations were not only expected, but mandatory. Absent the *ERA*, Treasury Board may well have moved on its position.[6] The *ERA* made this process of further negotiations meaningless.

8. Fourth, the Respondent argues that two other decisions finding that the *ERA* breached s.2(d) were distinguished by the Court of Appeal. However, despite factual differences, the underlying logic of these decisions is difficult if not impossible to reconcile with the Court of Appeal's approach in the case at bar. In *Meredith*, the Federal Court interpreted *Fraser* as requiring that the legislation preserve a meaningful process of collective representation. The Court stresses the refusal of Treasury Board to negotiate over salaries after December 11, 2008 (when the *ERA* was originally to have been introduced), and the impact of the *ERA* on collective bargaining.[7]

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[6] Treasury Board had in fact set aside "pressures money", or a contingency reserve, because lawyer salaries were giving rise to recruitment and retention issues, that a "market allowance" might be required to address: **Examination of H. Laurendeau, q. 162-164, *Exhibit Book*, Vol. 9, Tab 12C, p. 2562-2563.**

[7] *Meredith v. Canada (Attorney General)* 2011 FC 735:

> [85] The evidence in the record is clear that transformation initiatives, such as the increase in service pay, were the only aspect of RCMP remuneration that Treasury Board officials were willing to discuss with Pay Council and SRRs after its decision of December 2008 and the enactment of the *ERA*.
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> [86] In my opinion, this limited engagement demonstrates that the Treasury Board withdrew the

9. Similarly, in the present case, the implementation of wage restraints for the five year period covered by the *ERA* for Federal Crown counsel "is a clear indication that the matter has been removed from discussion and consultation", which "virtually eliminates" the collective bargaining process over salaries for those five years.

10. Finally, the Respondent generally fails to address the Applicant's submissions that this case raises issues of public importance because of its wide-ranging impact. The Respondent does not dispute:

- That the case at bar challenges wage restraint legislation that applies to 400,000 federal public sector employees;
- That this Court has not considered the constitutionality of wage restraint legislation under s.2(d) of the *Charter* since 1987;
- That wage restraint legislation has recently been enacted or proposed in jurisdictions other than the federal public sector (e.g. Ontario); and
- That granting leave would allow this Court to provide guidance on these issues to courts, governments, and the bar throughout Canada.

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> issue from consideration and refused to negotiate on a good faith basis…
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> [91] Much of the Pay Council's work involves making recommendations for the salaries of the Members of the RCMP. The establishment of a low wage increase for a three year period is a clear indication that the matter has been removed from discussion and consultation. This virtually eliminates the Pay Council process, with respect to establishing wages, for three years.
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> [92] The Treasury Board's decision and the *ERA* made it effectively impossible for the Pay Council to make representations on behalf of the Members of the RCMP, and have those representations considered in good faith. In my opinion, this is a substantial interference, which constitutes a violation of subsection 2(d) of the *Charter*…

Similarly, in *Association des réalisateurs c. Canada*, [2012] J.Q. No. 6770, the Quebec Superior Court relied in part upon the fact that the *ERA* rendered future collective bargaining with respect to salaries meaningless : paras. 89-91, 98-99. Again, the Court's focus was on the legislation and its impact on collective bargaining.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: November 19, 2012

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## PART VI - TABLE OF AUTHORITIES

| | | Cited at Paragraph(s) |
|---|---|---|
| *Association des réalisateurs c. Canada (Procureur général),* [2012] J.Q. no 6770 | | |
| *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391 | | |
| *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 | | |

## PART VII - TABLE STATUTORY AUTHORITIES