CITATION: Association of Justice Counsel v. Canada (Attorney General), 2012 ONSC 1894
COURT FILE NO.: CV-10-404604
DATE: 20120326

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
ASSOCIATION OF JUSTICE COUNSEL Applicant	*Andrew K. Lokan*, for the Applicant
- and -	
ATTORNEY GENERAL OF CANADA Respondent	*Dale Yurka* and *Susan Keenan*, for the Respondent
	HEARD: January 19, 2012

GRACE J.

REASONS ON REMEDY

[1] In reasons released November 1, 2011, I concluded that sections 16(a) and 34(1)(a) of the *Expenditure Relief Act* ("*ERA*")[1] infringed s. 2 (d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[2] I found that mandating a wage increase limit for the 2006-2007 fiscal year under the ERA was not justified by s. 1 of the *Charter* and was therefore unconstitutional.

[2] At the parties' request, argument with respect to the appropriate remedy was deferred. Submissions have now been made.

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[1] S.C. 2009, c. 2, s. 393.
[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

A. THE PARTIES' POSITIONS ON REMEDY

[3] The parties agree that in light of my findings,[3] a declaration of invalidity with respect to ss. 16 (a) and portions of 34 (1) (a) pursuant to s. 52 of the *Constitution Act, 1982* should follow.[4] They do not agree on much else.

[4] For example, the Association of Justice Counsel ("AJC") asks that the declaration be immediately effective. The Attorney General of Canada ("AG") asks that it be suspended for eighteen months.

[5] The AJC asks that ancillary relief and declarations be granted so that it is clear the parties are restored to the position they were in immediately before enactment of the *ERA*. The AG disagrees. It submits that the orders sought constitute individual remedies under s. 24 (1) of the *Charter* which can only be joined with a declaration under s. 52 of the *Constitution Act, 1982* in rare and exceptional cases.[5] The AG submits this dispute does not fit within that category.

B. ANALYSIS and DECISION

i. Scope of the Declaration

[6] During argument, I explained to counsel the intended effect of my decision. I envisioned the parties being restored to the same position they were in before the *ERA* was enacted insofar as the 2006-2007 fiscal year was concerned.

[7] Whether the process was one of negotiation or arbitration, the parties or arbitration panel, would not be constrained by this new legislative scheme. Simply and theoretically, the rates of pay earned by the AJC's members during the 2006-2007 fiscal year could be higher than those established by the *ERA*.

[8] The remaining task is to ensure that the *ERA* allows bargaining to restart and reach its pre-*ERA* conclusion.

[9] I turn to the provision, which most obviously requires attention.

[10] Section 16 establishes a general rule. Absent a limiting or contrary provision, the wages of affected employees were increased by a stipulated percentage for five years starting with the 2006-2007 and ending with the 2010-2011 fiscal year. A more significant increase set forth in a collective agreement, arbitral award or elsewhere could not operate.

[11] I concluded s. 16 (a) of the *ERA* did not satisfy the minimal impairment test, the third branch of the *Oakes* test. Given that conclusion, s. 16 (a) of the *ERA* is of no force or effect.

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[3] The Attorney General of Canada has filed a notice of appeal and the Association of Justice Counsel a notice of cross-appeal in respect of my decision.
[4] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[5] *Schacter v. Canada*, [1992] 2 S.C.R. 679 at para. 89 ("*Schacter*")

[12] I approach the other sections canvassed with counsel cautiously. The remedy should be no more broad than necessary to preserve the freedom of association, which has been limited improperly.[6] For that reason, I decline the AJC's invitation to amend the definition of "restraint period" appearing in s. 2 of the *ERA* by substituting the year 2007 for 2006. By my count, this phrase appears approximately twenty times in the statute, in provisions covering a range of employees including those who are not members of a bargaining unit. This case involved a review of the *ERA* with particular regard to its impact on the AJC. The subsequent decision was intended to address the particular concerns expressed on behalf of its members and potentially any other federal public service employees in a virtually identical position.

[13] Section 34(1)(a) of the *ERA* applies exclusively to members of the AJC. Three subsections deal with aspects of compensation other than rates of pay. My decision did not relate to those features.

[14] Two subsections impact rates of pay. The first allows collective agreements or arbitral awards to have retroactive effect from May 10, 2006 onward. The AJC wishes to establish new rates of pay for its members through negotiation or arbitration as of but not before that date. That subsection should remain.

[15] The second requires increases to rates of pay for the 2006-2007 fiscal year to be based on the amounts set forth in a schedule appended to the *ERA*. That statute stopped AJC's ongoing efforts to change those amounts. Given my findings, that subsection is unconstitutional since it fixes rates of pay for a period commencing before April 1, 2007. Section 34(1)(a)(ii) is of no force or effect.

[16] In summary, the declaration of invalidity requested by the AJC is granted insofar as ss. 16 (a) and 34 (1)(a)(ii) is concerned.

[17] If rates of pay were negotiated or established by arbitration for the 2006-2007 fiscal year based on those statutory provisions, the parties should be permitted to revisit them. If new rates are negotiated or set by arbitral award they will establish the new benchmark to which the increases set forth in s. 16 (b) through (e) of the *ERA* applied. Implementation of the results of further negotiation or an arbitral award should be suspended until determination of the appeal and cross-appeal if still pending.

ii. Should Operation of the Declaration be suspended?

[18] On the AG's behalf, Ms. Yurka submitted the declaration of invalidity should be suspended to provide the federal government with an opportunity to consider the repercussions of my decision.

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[6] *Ibid.* at para. 49.

[19] *Schacter v. Canada*[7] identified three situations where a suspension is merited:

- first, where an immediate declaration would jeopardize public safety,
- second, where the resulting legislative gap would threaten the rule of law and
- third, where the declaration would have the effect of depriving deserving persons of benefits under the unconstitutional legislation without providing any assistance to those whose rights were violated.

[20] None of those circumstances are present in this case. Rates of pay earned by members of the Law Group[8] do not involve issues of public safety. As noted below, a legislative gap is not created by a limited declaration of invalidity. Furthermore, benefits are not paid under the *ERA*. My decision eliminates legislatively established rates of pay and wage increases for the 2006-2007 fiscal year so that the pre-*ERA* regime and process can once again operate.

[21] *Schacter* provided examples of situations where suspension might be appropriate. It did not establish "hard and fast rules".[9]

[22] Each side marshaled cases where a suspension was[10] or was not[11] ordered. The authorities lead me to conclude that postponing the effective date of a declaration of invalidity is also fitting where the legislature is better positioned to address the consequences of the *Charter* breach and therefore should be given "the first opportunity to remedy the constitutional wrong".[12]

[23] In this case, it was not the federal government's choice of one of a series of options which violated the *Charter*. It was the decision to implement *any* option in a year which was unaffected by an economic crisis. The *ERA* was held to be unconstitutional in a restricted, albeit important, way. The declaration has limited practical effect. Only three of more than twenty bargaining units were affected by s. 16 (a) of the *ERA*. The statutory scheme which operated

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[7] *Ibid.* at paras. 85-86.

[8] The same comment applies to the other bargaining units affected: Ship Repair (West) consisting of between 750 and 850 members and represented by the Federal Government Trades and Labour Council and the Research Group consisting of 2,669 members and represented by the Professional Institute of the Public Service of Canada ("PIPSC"). I understand PIPSC has also challenged portions of the *ERA* in an application commenced in but not yet heard by this Court.

[9] *Schacter, supra* note 2 at para. 86.

[10] See, for example, *Corbiere v. Canada*, [1992] 2 S.C.R. 203; *Re Eurig Estate*, [1998] 2 S.C.R. 565; *United Food and Commercial Workers International Union, Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Dunmore v. Ontario*, [2001] 3 S.C.R. 1016; *R. v. Guignard*, [2002] 1 S.C.R. 472; *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835; *Figueroa v. Canada*, [2003] 1 S.C.R. 912; *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R. 391; *Bedford v. Canada*, 2010 ONSC 4264 (S.C.J.)

[11] See, for example, *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).

[12] Peter Hogg *et al.*, "*Charter* Dialogue Revised – or 'Much Ado about Metaphors'" (2007) 45: 1 Osgoode Hall L.J. 1 at 15-16.

before enactment of the *ERA* still exists. My decision does nothing more than allow the process commenced by the AJC on May 10, 2006 when it served its Notice to Bargain to reach a resolution through negotiation or arbitration as the pre-existing statutory regime contemplated.[13]

[24] I recognize that the declaration does *not* guarantee a result.[14] Section 106 of the *Public Service Labour Relations Act* obligates the parties to "bargain collectively in good faith" and to "make every reasonable effort to enter into a collective agreement." I am confident the parties will meet their obligation. However, an accord is not assured.

[25] I am also acutely aware that the state of the Canadian economy and the federal government's fiscal circumstances are factors an arbitration board is directed to consider under s. 148 of that statute if the matter requires an adjudicative process. My decision is intended to resuscitate earlier methods of resolving an impasse. The uncertainty of the result returns.

[26] The AG advanced two other reasons for its request for a suspension of the declaration of invalidity. First, it maintains that my decision can only have effect within the Province of Ontario. It suggests that the federal government is not bound to follow it elsewhere and therefore could treat members of the Law Group differently in other provinces. That submission left me unaffected. The reality is this: my decision is the subject of an appeal and cross-appeal. It remains to be seen whether it has effect anywhere. Further, no mention was made of any jurisdictional limitation until the argument on remedy. This dispute involves one bargaining agent, one bargaining unit, one employer and one piece of legislation. Ontario seemed to have been accepted as the logical location to litigate the issue since the vast majority of the members of the AJC and Treasury Board are based in Ontario due to the population and the location of this nation's capital. Suspending the declaration until proceedings in other Provinces are commenced and completed seems absurd to me given the road the parties are already taking.

[27] Second, the AG submits that my decision with respect to the 2006-2007 fiscal year conflicts with that of Harris J. in *Federal Government Dockyard Trades and Labour Council (Esquimalt B.C.) & Des Rogers v. Her Majesty in Right of Canada as represented by the Attorney General of Canada.*[15] I disagree. In that decision, the Federal Government Dockyard Trades and Labour Council sought a declaration invalidating other provisions of the *ERA* which served to override a favourable arbitral award. In this case, an arbitration panel had been appointed but the hearing had not commenced when the statute was enacted. While admittedly the reasons in *Dockyards* contained passages with which I took issue, the decision in this case and that one are products of significant factual differences. The results are not inconsistent or irreconcilable.

[28] The declaration of invalidity should be immediately effective but I will suspend it for thirty days so that the AG may, instead, seek a stay pending appeal from the Court of Appeal under rule 63.02 of the *Rules of Civil Procedure*.

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[13] See the *Public Service Labour Relations Act*, S.C. 2003, c. 22.
[14] *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia, supra* note 10 at para. 19; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.
[15] 2011 BCSC 1210 (S.C.)

[29] I am hopeful the parties will be assisted by the comments set forth in paragraphs 17, 23, 24 and 25 of this endorsement which are intended to address the subject of the additional declarations requested by the AJC.

[30] In the event the parties are unable to agree on costs, they may make brief written submissions with those of the AJC to be delivered by April 13, 2012 and those of the AG by May 4, 2012. They may be provided to me through Judges' Administration in London, Ontario.

GRACE J.

Released: March 26, 2012

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