Court File No. CV-10-404604

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

REPLY SUBMISSIONS ON REMEDY OF THE ASSOCIATION OF JUSTICE COUNSEL

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A. OVERVIEW

1. The Attorney General, in his Submissions on Remedy dated January 6, 2012, raises a number of objections to granting an immediate or effective remedy. The Attorney General argues for suspended declarations of invalidity, based on a number of alleged difficulties with the declarations sought by the AJC. In particular, the Respondent raises *for the first time* an argument that this Court's decision raises difficulties for certain members of the Law Group who work in other provinces or who are excluded from the AJC's bargaining unit. This is despite the following:

- Approximately 65% of the members of the bargaining unit are based in Ontario;

- The AJC, Department of Justice, and Public Prosecution Service Canada are all headquartered in Ontario;
- Counsel for the AJC have at all material times been based in Ontario, not just in these proceedings, but in the negotiations that preceded the *ERA*, and in the proceedings before the PSLRB;
- Representatives of Treasury Board in these negotiations and proceedings were at all material times based in Ontario;
- All witnesses who gave evidence in these proceedings were based in Ontario;
- The evidence of both parties was clearly national in scope, and no objection was raised by the Respondent to this evidence at any time.

2. The position taken by the Respondent contrasts sharply with the position recently taken by Treasury Board in the context of the establishment of an arbitration board to resolve all outstanding issues in the current round of collective bargaining between the AJC and Treasury Board. By letter dated November 30, 2011, Treasury Board requested that the arbitration process be delayed because the "parties to this arbitration process do not know what the baseline for comparison is",[1] pending this Court's decision on remedy. Significantly, no mention was made of possible different results in different provinces, nor of any possible suspension of the remedy.

[1] Letter dated November 30, 2011, Treasury Board Secretariat to Public Service Labour Relations Board (attached as Appendix A).

3. It appears that whether before the PSLRB or this Court, the government's main objective is to delay still further any possibility that the rights of the AJC and its members will be given effect.

4. The Respondent also seeks to limit any remedy by this Court, so that it will have no practical effect. The Respondent resists any declarations that would result in the parties negotiating or arbitrating fair rates of pay for FY 2006-07. The Respondent's position is that even though the *ERA* was found to have unjustifiably breached the *Charter* rights of the Applicant and its members in its retroactive application to FY 2006-07, the result should be the same as if the legislation had been upheld in its entirety.

5. This Court should reject the Respondent's position, and grant the remedies requested by the Applicant in its submissions in chief.

B. SCOPE OF DECLARATIONS OF INVALIDITY

6. The Respondent has agreed that s.16(a) and 34(1)(a) should be declared to be invalid, but disagrees that there must be any change to the definition of "restraint period" or to the prohibition on negotiating a restructuring of pay during FY 2006-07.

7. Contrary to the Respondent's position, this Court's decision on breach makes abundantly clear that the constitutional defect in the *ERA* was the

unsupported and unjustified inclusion of FY 2006-07 in the restraint period. This is abundantly clear from the following paragraphs:

> [117] In my view, the *ERA*'s inclusion of the 2006-2007 fiscal year fails to satisfy this aspect of the *Oakes* test.
>
> * * *
>
> [127] However, I am of the view the *ERA* goes too far by including the 2006-2007 fiscal year. I reach that conclusion because:
>
> 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 applied starting with the 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. 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?

* * *

[132] …Yet, 2006-2007 was not mentioned until late in the day and a satisfactory rationale for the change of position has not been articulated.

[133] The reasonableness of the expansion of the legislation's grasp is not self evident to me. If 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.

* * *

[137] Some groups were treated differently and permitted to work toward resetting or "restructuring" salaries. If successful, those reestablished amounts became the benchmarks to which the statutory increases were applied. 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.

[138] …I simply do not find the rationale for the lines of demarcation to be persuasive. It seems to me that the difference between Federal Crown lawyers and other represented groups related to the magnitude of their demands, not principle.

[139] In this case, the Court is being asked to assume that 2006-2007 had to be included for the same reasons that apply to 2007-2011. Deference and respect do not go that far…

* * *

[141] However, in my view, the *ERA*'s inclusion of the 2006-2007 fiscal year fails to satisfy this aspect of the *Oakes* test. It seems arbitrary and motivated by considerations beyond the economic reality of the day.

* * *

[147] Given the extraordinary circumstances initiated by developments in the United States in 2007, I am satisfied the *ERA* meets the proportionality requirement established in *Oakes* for all years *except* the 2006-2007 fiscal year. …

[148] However, I am not satisfied that the federal government's objectives or the effectiveness of its recovery plan would have been compromised by limiting the legislation to the years originally contemplated.

8. All of these passages make abundantly clear that the underlying logic of the decision is that the respondent failed to justify the expansion of the restraint period to cover FY 2006-07. These passages further make clear that the Applicant ought to have been able to negotiate restructured rates of pay prior to the imposition of the *ERA*'s restraints, just as other groups did. The requested declarations of invalidity relating to the definition of "restraint period" and s.23(a), simply give effect to this Court's clear and unambiguous findings.

C. THE RESPONDENT HAS NOT DEMONSTRATED THAT THE DECLARATIONS SHOULD BE SUSPENDED

9. The Respondent argues that suspended declarations are sometimes granted by the courts in circumstances that go beyond the factors listed in *Schachter*. However, almost all of the cases relied upon by the Respondent fit squarely within the *Schachter* test, in that they involve situations where an immediate declaration would create a legal vacuum and thereby compromise the rule of law, or threaten public safety. The remaining cases relied upon by the Respondent raise quite different considerations from the present case.

10. For example, in *R. v. Guignard*, the Supreme Court expressly found that striking down the municipal zoning bylaw would create a legal vacuum.[2] Likewise, in both *Fraser v. Ontario (Attorney General)*[3] and *Mounted Police Association of*

[2] [2002] 1 S.C.R. 472, at para. 32.
[3] 2008 ONCA 760 (CanLii); rev'd on the merits 2011 SCC 20.

Ontario v. Attorney General of Canada,[4] the *Charter* breach consisted of the wholesale exclusion of a category of employees from collective bargaining legislation. In both of those cases, positive legislative action was required (or, at the very least, an appropriate response) to remedy the breach - either by including the employees within existing collective bargaining legislation, or devising a new legislative regime, to remedy the legal vacuum in which the employees found themselves. Likewise, in *R. v. Demers* a suspended declaration was held to be justified both because it would create a legal *lacuna* and because it would create a potential threat to public safety.[5] By contrast, on the findings of this Court in its previous decision, there is no legislative vacuum once the overbroad aspects of the *ERA* are struck down, and there are no threats to public safety.

11. The Respondent has argued that the declarations should be suspended for two reasons: to provide time to "address the repercussions of the decision", and to "consider legislative and non-legislative options". However, neither reason provides persuasive grounds for suspending the declarations. Unlike the case in *Health Services*, where the SCC overturned 20 years of jurisprudence on freedom of association, in the present case the government had ample reason to anticipate that the *ERA* might be found to be unconstitutional in whole or in part – as it recognized even before the *ERA* was enacted – and has had ample opportunity to consider its options. Rather, the present case is like those where suspended

[4] 2009 CanLii 15149 (ONSC).

[5] [2004] 2.S.C.R. 489, at para. 57. *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766, also relied upon by the Respondent, may also be viewed as a case where an immediate declaration would have created a legal vacuum.

declarations have been rejected because the delay involved in a suspension would work to the prejudice of the applicants, by potentially denying them rights or benefits to which they are entitled.[6]

(a) A Suspension is Not Required to "Address the Repercussions of the Decision"

12. The Applicant submits that the Respondent has vastly overstated the alleged difficulties that he claims flow from the decision on the merits.

(i) Impact Outside of Ontario

13. It is not accurate to claim, as the Respondent does, that this Court's ruling cannot be applied outside of Ontario. Given that the matter was fully litigated in Ontario, the overwhelming number of factors connecting the case to Ontario, and the fact that a significant majority of the AJC's members work in Ontario, it is difficult to conceive of the good faith basis on which the Respondent now advances his purported discretion to ignore and challenge this Court's declaration of unconstitutionality in other provinces, as a reason for suspending the declarations. Granting such relief would be to sanction the Attorney General's power to change the jurisdictional field of play on the basis of an outcome that he thinks unfavourable. However, for the reasons stated, this Court should reject the Respondent's position.

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[6] See e.g. *Falkiner v. Ontario (Director, Income Maintenance Branch, Min. Community and Social Services)* (2002), 59 O.R. (3d) 481; *R. v. Powley*, [2003] 2 S.C.R. 207, at paras. 51-52.

14. The Attorney General should instead exercise his discretion to decline to apply provisions of the ERA that have been struck down, in jurisdictions outside of Ontario. This discretion was confirmed in the litigation over the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and Regulations thereunder ("Money-Laundering Legislation"), which were found to impose regulations on lawyers that interfered unconstitutionally with solicitor/client privilege and the relationship between lawyer and client.

15. In *Federation of Law Societies v. Canada (Attorney General*) the Federation of Law Societies of Canada ("FLSC") originally obtained an injunction against the enforcement (against lawyers) of the Money-Laundering Legislation in British Columbia. In response, the Attorney General took the position that she could not agree to the extension of the injunction outside of that province. Justice Cullity of the Superior Court of Justice in Ontario ruled as follows:

> [16] On the basis of the authorities cited to me, I am not convinced that counsel for the Attorney General was correct in his insistence that it would be unlawful, or constitutionally improper, for the Attorney General, in her discretion, to defer administratively to the decision of Allan J. [of the British Columbia Supreme Court] on a national basis and that such deference could properly be given only to a decision of the Federal Court. The constitutional principle that withholds from the executive a power to dispense with the application of valid legislation does not entail that judicial decisions of a superior court of a province that raise doubts about the constitutional validity of the statute must, should, or can properly be, ignored. In particular, I do not believe the reasoning of members of the House of Lords in *Pretty v. Director of Public Prosecutions* (November 29, 2001), on which counsel for the Attorney General relied heavily, supports any inference to the contrary.[7]

[7] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2002 CanLII 49401 (ON S.C.)

16. In the litigation over the Money-Laundering Legislation, the Attorney General insisted that the FLSC move for companion injunctions in a total of five provinces. After each subsequent court essentially followed the decision of the British Columbia courts, the Attorney General ultimately consented to injunctions in the remaining jurisdictions.[8]

17. Thus, the Respondent is in no way precluded from applying the decision of this Court in other provinces, to allow collective bargaining over FY 2006-2007 to take place in a manner consistent with the *Charter*, either by administratively suspending the application of the invalid provisions to the members of the AJC bargaining unit or, if necessary, by consenting to orders in those other jurisdictions.

18. Indeed, some courts have held that it is an abuse of process for the Attorney General to seek to relitigate the merits of a *Charter* case in another province after the issue has been finally determined against the Attorney General in the first province.[9] In any event, the Respondent has vastly exaggerated the supposed difficulties of dealing with the AJC on a national basis in light of this Court's decision on the merits. As set out above, these supposed difficulties do not appear to have occurred to Treasury Board when its letter of November 30, 2011 was drafted. Rather, they are an *in terrorem* argument raised to achieve delay.

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[8] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 B.C.S.C. 1270 (CanLII), at paras. 18-19.

[9] *R. v. Clark*, 2003 N.S.P.C. 12 (CanLII); *R. v. Stavert*, [2003] P.E.I.J. No. 28 (PEI Prov. Ct.).

(ii) Impact on Other Bargaining Units

19. The Respondent has also raised as a potential difficulty (and justification for suspending the declarations of invalidity), the possibility that the Court's ruling will have an impact on the Research Group bargaining unit. However, the Respondent cites no cases in support of this submission, which is contrary to the normal principle that there is no reason why non-litigants should not benefit from a decision striking down an invalid law.

20. Moreover, even if there is substance to the Respondent's concern, that concern can be fully met by appropriately tailored relief. The analysis in *Health Services* requires the Court to consider whether legislation and/or other government conduct substantially interfered with collective bargaining, in a manner that is not justified under s.1 of the *Charter*. This analysis makes it necessary in many cases to consider the specific attributes and circumstances of the affected group. In this respect, findings of breach may be specific to the group being considered. Indeed, this Court recognized this possibility when it noted that the circumstances pertaining to the Ship Repair Group West were quite different from those applying to the AJC's bargaining unit.

21. Section 52 of the *Constitution Act, 1982* provides that any law that is inconsistent with the Constitution is of no force or effect, but only *to the extent of the inconsistency*. This may authorize a declaration that is limited in its effect to those whose rights have been substantially interfered with, under the *Health*

Services test. Similar declarations that a law was invalid to the extent that it applied to a specific defined group, have been made in *Victoria (City) v. Adams*[10] and a number of cases in which the application of hunting and fishing laws of general application have been found to be unconstitutional in their application to aboriginal groups.[11]

22. Alternatively, if this Court does consider suspending the declarations on this ground, the normal rule is that the successful litigant is exempted from the suspension so as not to be deprived of a remedy.[12] That was the remedy granted in *R. v. Guignard* (relied upon by the Respondent), where the declaration of invalidity of a municipal by-law restricting advertising was suspended for six months, but an acquittal was entered in favour of the accused.[13] On this approach, the Applicant and its members would be able to negotiate or arbitrate rates of pay for FY 2006-07 unconstrained by the provisions of the *ERA*, while the declarations of invalidity would be suspended for all other potential litigants.

23. Thus, to the extent that the Respondent's concerns about the application to another bargaining unit are valid, these concerns can be met by tailoring the declarations of invalidity, or exempting the Applicant and its members from the suspension.

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[10] (2009), 313 D.L.R. (4th) 29 (B.C. C.A.).
[11] *R. v. Goodon*, 2008 MBPC 59, at paras. 10-11, and cases cited therein.
[12] See e.g. *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at paras. 118-121; *Hodge v. Canada (Min. Human Resources and Development)*, [2003] 1 F.C. 271 at para. 62 (C.A.), rev'd on the merits [2004] 2 S.C.R. 357.
[13] *R. v. Guignard*, [2002] 1 S.C.R. 472, at para. 34.

(iii) Potential Impact on AJC's Members in Ontario

24. The Respondent has argued further that difficulties could be created if the AJC and Treasury Board negotiate or arbitrate different rates of pay for FY 2006-07, and the Court of Appeal subsequently allows the Respondent's Appeal. With respect, this is not a good argument for suspension of the declarations of invalidity. It appears to be more in the nature of an argument for stay pending appeal, which is more properly directed to the Court of Appeal.

25. In any event, this argument is far from compelling. As noted above, in the context of the current round of collective bargaining, Treasury Board has argued that it cannot proceed without knowing the appropriate base rates of pay for AJC members as a necessary precondition to the negotiations. Yet, before this Court, the Respondent seeks to delay the process of setting appropriate salaries for FY 2006-07 by agreement or arbitration, to some undefined point in the distant future when all appeals have been exhausted. On the applicable test for a stay of judgment, the balance of convenience strongly favours the AJC and its members. There is no reason why the parties cannot move directly to negotiation or arbitration of appropriate pay rates for that fiscal year.

26. The concern that members might be exposed to financial risks if negotiation or arbitration produces different rates of pay, if valid, would be much better answered by a more tailored stay that allowed the parties to *establish* rates of pay through negotiation or arbitration, but stayed their *implementation* pending the

exhaustion of appeals. This would be a much better approach because it would allow the negotiation/arbitration process to run parallel with the appeals, and avoid yet further delay. Indeed, the Respondent's position could result in a situation in which the parties can only establish rates of pay for FY 2006-07 several years from now, perhaps as much as a decade after the event. This would run directly counter to the maxim that labour relations delayed are labour relations defeated and denied.[14]

(iv) Impact on Excluded Lawyers

27. The Respondent has further argued that difficulties will be created if the members of the AJC bargaining unit are able to negotiate increases that do not apply to excluded lawyers. With respect, this borders upon the absurd.

28. First, the government itself devised a system whereby excluded management employees were able to retain increases that were well in excess of those permitted under the *ERA*, for managers in the EX, DM and GCQ classifications. (These included all of the Respondent's witnesses, one of whom was a lawyer). It is strange to see the Respondent now argue that such divisions in the workplace present insurmountable difficulties that warrant denying an effective remedy to members represented by the AJC.

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[14] *National Waste Services Inc. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada)*, 2009 CanLII 58584 (ON SCDC), at para. 26.

29. Second, even if one accepts that the Respondent's concerns are valid, they do not lead to the conclusion urged by the Respondent. To avoid such divisions, surely the best approach is to have the negotiation or arbitration process run its course for the lawyers represented by the ACJ, which will establish appropriate pay rates for them. There will then be a benchmark for the excluded lawyers (who do not claim a constitutionally protected right to collective bargaining), and if this process has resulted in increases for the AJC bargaining unit, the government can match the increases for excluded lawyers when and if it so chooses.

30. Third, if the Respondent's position is correct, the government could prevent the successful Applicant from obtaining an effective remedy indefinitely, by the simple expedient of refusing to adjust the rates of pay of excluded lawyers. For these reasons, this argument should be rejected.

(b) Consideration of Options

31. The Respondent argues that it needs time to consider both legislative and non-legislative options to deal with the overbroad aspects of the *ERA*.

32. With respect to legislative options, the Respondent has not given the slightest hint as to what these might be, but he does appear to have made unwarranted assumptions about this Court's decision on the merits.

33. The Applicant respectfully submits that this Court's previous decision found that no case had been made out for the extension of the restraint period to FY 2006-07 at a late stage in the legislative process. No evidence was presented as to why this year was included or what was intended to be achieved by its inclusion, either in financial or other terms. This Court does not even have an estimate of the cost impact of its inclusion.

34. On this Court's findings in its previous decision, Parliament had already achieved its key objectives in a constitutional manner by the imposition of restraints for FYs 2007-11. There is no demonstrated need for Parliament to seek to achieve more by replacing the retroactive extension of the restraint period back to FY 2006-07 with some other cost-cutting measure.

35. As for non-legislative options, there is no evidentiary basis upon which this Court could conclude that the government needs any particular amount of time to pursue any particular possibility or proposal. Again, no specifics are mentioned.

36. Under the approach set out by the AJC, negotiations and a potential arbitration will unfold over the months following this Court's decision on remedy. In the absence of any further particulars from the Respondent, this would appear to be ample time for the government to make any proposal to the Applicant that is consistent with its obligations under the *Charter*.

(c) The Suspension Should be Limited, if Granted

37. If this Court does suspend the declarations, the suspensions should be limited in effect. First, they should not be long in duration. In *R. v. Guignard*, the suspension was for six months, and the SCC rarely suspends its declarations for longer than 12 months. Second, any suspension should be without prejudice to the ability of the Applicant to address FY 2006-07 at the expiry of the period of suspension.

D. Remaining Declarations Sought by the Applicant

38. The Respondent has argued that the Applicant is seeking to combine s.52 remedies with personal remedies under s.24 of the *Charter*, in a manner that is not supported by the jurisprudence.

39. With respect, this is simply not true. The Applicant set forth the basis for its requested declarations, founded on well-recognized jurisprudence of the Supreme Court of Canada, on grounds that do not depend upon s.24 of the *Charter*. These arguments of the Applicant have gone unanswered by the Respondent. In any event, the Respondent's position has little logical appeal, and makes no sense in the circumstances.

40. Prior to the imposition of the *ERA*, the AJC and Treasury Board were engaged in collective bargaining under a statutory scheme devised by Parliament. The *ERA* then retroactively interfered with that bargaining process, reaching back

further than this Court has found to be justified by including the 2006-07 fiscal year. Absent this legislative interference, the parties could and would have negotiated a collective agreement in a manner that complied with the *Charter*.

41. The Respondent now says that although that retroactive legislation was unconstitutional, the AJC and its members cannot have a remedy with any retroactive effect. This would mean that it would not have mattered whether the *ERA* was constitutional or unconstitutional. Either way, on the Respondent's view, it is effective to limit the ability of the AJC to bargain or arbitrate over pay rates for FY 2006-07. With respect, that cannot be right.

42. None of the cases relied upon by the Respondent, including *Schachter*, *Ferguson*, or *Demers*, involved a situation where parties were engaged in a constitutionally protected process (collective bargaining), which was then interrupted by legislation that it was itself retroactive and was found to be unconstitutional. The comments in *Schachter* that when a provision is declared unconstitutional and immediately struck down, normally "no retroactive s.24 remedy will be available", do not address such a situation. If they were, and such comments were accepted without qualification, the government would be free to interfere retroactively with the *Charter* rights of Canadians, in a manner that is unlawful under the highest law of the land, yet the Court would be powerless to grant an effective remedy. This cannot have been what the Supreme Court of Canada intended.

43. For these reasons, this Court should grant all of the declarations sought by the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 16, 2012

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TABLE OF AUTHORITIES

1. *R. v. Guignard*, [2002] 1 S.C.R. 472
2. *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLii); rev'd on the merits 2011 SCC 20
3. *Mounted Police Association of Ontario v. Attorney General of Canada*, *2009* CanLii 15149 (ONSC)
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5. *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766
6. *Falkiner v. Ontario (Director, Income Maintenance Branch, Min. Community and Social Services)* (2002), 59 O.R. (3d) 481
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9. *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 B.C.S.C. 1270 (CanLII)
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12. *Victoria (City) v. Adams*, (2009), 313 D.L.R. (4^{th}) 29 (B.C. C.A.)
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