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Our File:
Notre dossier: 2-594433

Your File:
Votre dossier:

January 6, 2012

VIA E-MAIL & COURIER

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Dear Mr. Lokan and Ms. Gomez:

Re: Association of Justice Counsel v. Attorney General of Canada
Court File No.: CV-10-404604

As promised, please find enclosed the Respondent's Submissions on Remedy with respect to the above-noted matter.

Yours truly,

Dale Yurka
General Counsel
Public Safety and Defence Division

DY:ag

Enclosure

Canada

CV-10-404604

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

RESPONDENT'S SUBMISSIONS ON REMEDY

Dated: January 6, 2012

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A. OVERVIEW

1. A declaration of invalidity is the only appropriate remedy in this case, in light of the findings that the *Expenditure Restraint Act* (*ERA*) violates the AJC's members' rights under section 2(d) of the *Charter of Rights and Freedoms* and only sections 16(a) and 34(1)(a) cannot be justified under section 1 of the *Charter*.[1]

2. Sections 16(a) and 34(1)(a) of the *ERA* should be declared invalid under section 52(1) of the *Constitution Act, 1982* and the declaration should be suspended for 18 months for the reasons set out below.

3. The other declarations sought by the AJC should not be granted.

4. If sections 16(a) and 34(1)(a) of the *ERA* are declared invalid, it is not necessary for the definition of "restraint period" in section 2 of the *ERA* to be amended. There is no section of the *ERA* that requires an amended definition of "restraint period" to give effect to the findings of this Court.

5. The additional[2] and consequential[3] declarations sought by the AJC are effectively individual remedies under section 24(1) of the *Charter* and the applicant has not

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[1] The respondent reserves the right to advance an alternate argument on remedy (i.e. that a remedy under 24(1) of the *Charter* is appropriate) if the Court of Appeal for Ontario determines that it is not the *ERA* but government action that violates the applicant's 2(d) rights.

[2] That the AJC is lawfully entitled to bargain over rates of pay for 2006-2007 (para. 11 of AJC's submissions)

[3] (a) That bargaining for 2006-2007 rates of pay will be pursuant to the applicant's Notice to Bargain dated May 10, 2006 and the 2006-2011 collective agreement will be amended if an agreement is reached. (b) That in the event that no agreement is reached, either party may request arbitration respecting rates of pay

established that it is entitled to both a section 52(1) declaration of invalidity and a remedy under section 24(1) of the *Charter*. It is only in rare and exceptional cases that a Court will issue a section 52(1) declaration in combination with a section 24(1) remedy and the applicant has failed to demonstrate that this is one of those exceptions.

B. DECLARATION OF INVALIDITY

6. A declaration of invalidity is the only appropriate remedy in this case given the Court's determination that while the *ERA* violates the AJC's members' rights under section 2(d) of the *Charter,* only sections 16(a) and 34(1)(a) cannot be justified under section 1 of the *Charter*.

7. Section 16(a) sets the wage increase limit for fiscal year 2006-2007 at 2.5%. The provision applies to three bargaining units and the excluded employees in those occupational groups:[4]

1. Research, consisting of 2,669 members and represented by the Professional Institute of the Public Service of Canada (PIPSC);[5]
2. Ship Repair West, consisting of between 750 to 850 members and represented by Federal Government Trades and Labour Council;[6] and,
3. Law Group, consisting of approximately 2,700 members and represented by the applicant.[7]

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for 2006-2007, including any consequential adjustment to rates of pay for 2007-2011, under Division 9 of the *Public Service Labour Relations Act*. (para. 19 of AJC's submissions)

[4] S. 36 of the *ERA* applies to non-represented and excluded employees and provides that terms and conditions of employment established after the day on which the *Act* came into force may not provide for increases to rates of pay that are greater than those set out in s. 16.

[5] Affidavit of Hélène Laurendeau, sworn February 23, 2011, (H.L. 2nd affidavit) para. 8, Respondent's Application Record (RR), p. 1125

[6] H.L. 2nd affidavit, para. 9, RR, p. 1126

[7] Affidavit of Marco Mendicino, sworn Jun 8, 2010, para. 9, Application Record, p. 10

8. A declaration of invalidity of section 16(a) of the *ERA* would remove the wage increase limit of 2.5% for the Ontario members of the affected bargaining units and the excluded employees in those occupational groups.

9. Section 34(1)(a) applies to the represented members of the Law Group and governs certain terms of the collective agreement and arbitral award:

1. The collective agreement or arbitral award may not have retroactive effect to a day that is earlier than May10, 2006;
2. Sets the base rates of pay in Schedule 2 of the *ERA*, from which wage increases may be applied, beginning in fiscal year 2006-2007;
3. Freezes performance pay plans in effect on May 9, 2006 for a position level;
4. Harmonizes and freezes additional remuneration (other than performance bonuses) that applied to any position in the Law Group on May 9, 2006; and,
5. Prohibits additional remuneration if that additional remuneration did not apply to an employee in the Law Group on May 9, 2006.

10. A declaration of invalidity of section 34(1)(a)(ii) would eliminate the base rates of pay set out in Schedule 2 of the *ERA*. These base rates of pay are a harmonization of the pay structure for members of the Law Group, part of which had previously been represented by the PIPSC and the other part which was previously unrepresented.[8]

11. A declaration of invalidity of the remaining subparagraphs of section 34(1)(a) would remove the freeze on performance pay plans, remove the harmonization and freeze on additional remuneration, other than performance bonuses and remove the prohibition on additional remuneration.

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[8] Affidavit of Hélène Laurendeau, sworn October 29, 1010 (H.L. 1st affidavit), para. 79, RR, p. 23

12. The collective agreement between the Treasury Board and the AJC incorporated the provisions of section 34(1)(a) of the *ERA* and although that agreement expired on May 9th 2011, the terms remain in effect until a new collective agreement is entered into by the parties.[9]

13. If sections 16(a) and 34(1)(a) are declared invalid, it is not necessary for the definition of "restraint period" in section 2 of the *ERA* to be amended. There is no section of the *ERA* that requires an amended definition of restraint period to give effect to the findings. Further, an amendment to the definition of "restraint period" or a declaration of invalidity of section 23(a) which prohibits restructuring and is sought in the alternative, are overly broad declarations and could apply to other groups.

C. THE DECLARATION OF INVALIDITY SHOULD BE SUSPENDED

1) Factors that Support a Suspended Declaration of Invalidity

14. The declaration of invalidity should be suspended in this case to:

1. Provide time to address the repercussions of the decision; and,
2. Provide time to consider legislative and non-legislative options.

15. Canadian courts at all levels have delayed the effect of a declaration of invalidity by suspending the declaration. The Supreme Court of Canada in *Schachter v. Canada*[10] affirmed the following factors as a basis on which a suspension of a declaration could issue: a potential danger to the public, a threat to the rule of law or where an immediate

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[9] *Public Service Labour Relations Act*, S.C., 2003, c.22, s. 107
[10] [1992] 2 S.C.R. 679 at para. 79

declaration would deprive deserving persons of benefits without providing them to the claimant.

16. However, the factors set out in *Schachter* are not exhaustive and often not referred to when the courts grant a suspended declaration of invalidity. The courts are not restrained by a rigid categorical approach to the issue and instead, have been flexible and pragmatic in determining whether in all of the circumstances a suspension is warranted.

17. In *Health Services and Support – Facilities Subsector Bargaining Ass'n v. British Columbia*, the Supreme Court of Canada concluded that various sections[11] of the *Health and Social Services Delivery Improvement Act* were unconstitutional as they infringed section 2(d) of the *Charter*. The Court suspended the declaration for a period of 12 months *to allow the government to address the repercussions of the decision.*[12]

18. In *R v. Guignard*, the SCC declared a municipal zoning by-law to be invalid as it violated the freedom of expression under 2(b) of the *Charter*. The by-law prohibited the erection of advertising signs outside an industrial zone in an effort to prevent visual pollution and driver distraction. The Court determined that "given the importance of the zoning by-law in municipal land use planning and the risk of creating acquired rights, during a period in which there was a legal vacuum, which could be set up against a

[11] The sections that were found to be unconstitutional were: 6(2) which prohibited a term in the collective agreement that restricted contracting out; 6(4) which prohibited a term in the collective agreement that required consultation with a trade union before contracting out; and 9 which prohibited terms in an agreement that restricted or limited the manner in which an employer could laying off an employee.
[12] [2007] 2 S.C.R. 418 at para. 168, Respondent's Authorities (RA), Vol. 1, Tab 2

subsequent by-law, that relief must be tempered by suspending the declaration of invalidity for a period of six months, *to give the municipality an opportunity to revise its by-law.*"[13]

19. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)* the SCC held that section 77(1) of the *Indian Act* which provided that only band members ordinarily resident on the reserve would be able to vote in band elections, violated section 15(1) of the *Charter* and could not be saved by section 1. The Court declared specific words of the section to be invalid but suspended its declaration of invalidity for 18 months *to permit Parliament to carry out consultation and respond to the needs of the different groups affected.*[14]

20. In *Fraser v. Ontario (Attorney General)*, the Court of Appeal for Ontario found that the *Agricultural Employees Protection Act* was unconstitutional as it violated agricultural workers rights under 2(d) of the *Charter*. The *Act* was declared invalid and the government was ordered to provide agricultural workers with sufficient protections to enable them to exercise their right to bargain collectively, in accordance with the reasons of the Court. The declaration was suspended for 12 months *to permit the government time to determine the method of statutorily protecting the rights of agricultural workers under 2(d)*. The Court noted that this was not a situation where there was only one appropriate response to the decision and "it was up to the legislature to assess the options, taking into account constitutional, labour relations and other factors, and to design a

[13] [2002] 1 S.C.R. 472 at para. 32

[14] [1999] 2 S.C.R. 203 at para. 23-24. At the trial level, the declaration of invalidity was suspended, in part, to allow the appeal court to consider the issues. *Batchewana Indian Band(Non-resident members) v. Batchewana Indian Band*, [1994] FC 394, 1993 CanLII 2997 (FC) at p. 15

constitutionally acceptable model."[15] The decision was ultimately overturned at the SCC and therefore, no other model had to be designed.[16]

21. In *Mounted Police Association of Ontario et al. v. Attorney General of Canada*, Justice MacDonnell of the Ontario Superior Court of Justice found section 96 of the *Royal Canadian Mounted Police Regulations* which created a Staff Relations Representative Program for members of the RCMP, violated the applicants' rights under section 2(d) of the *Charter* and declared that section of no force and effect. The declaration was suspended for a period of 18 months *to give Parliament time to consider its options*.[17]

22. In *British Columbia Teachers' Federation v. British Columbia*, the Teachers' Federation challenged legislation which was similar to the legislation that was found to violate section 2(d) of the *Charter* in the *Health Services* case. Justice Griffin of the Supreme Court of British Columbia found that some of the provisions of the legislation violated section 2(d) of the *Charter*. The offending provisions were declared to be invalid and the declaration was suspended for a period of 12 months "*to allow the government time to address the repercussions of this decision.*"[18]

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[15] 2008 ONCA 760 (CanLII) at paras. 138-139
[16] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20
[17] 2009 CanLII 15149 (ON SC) at para.118. The judgment was subsequently stayed by the Court of Appeal for Ontario to expire 30 days after the SCC released its decision in *Fraser v. Ontario*. The stay was then extended to the date of the appeal Nov. 22, 2011 and then further extended until 30 days after the release of the appeal decision, variable upon motion to the Court.
[18] 2011 BCSC 469 (CanLII) at para. 382

23. In *R. v. Glad Day Bookshops Inc.*, Justice Juriansz of the Ontario Superior Court of Justice (as he then was) found that certain provisions of the *Theatres Act* and regulations that required mandatory submission of films and videos to a Board for approval prior to distribution and exhibition violated the *Charter* guarantee of freedom of expression under 2(b). He declared the impugned provisions of no force and effect and suspended the declaration for 12 months "because the mandatory requirement to submit films to the Board for approval imposed by s. 33 of the Act cannot be disentangled from the Act's provisions relating to the classification of films. The suspension will allow the government 12 months *to disentangle the classification system from the censorship scheme that has been found to be unconstitutional.*"[19]

24. In *Currie v. Alberta (Edmonton Remand Centre),* Justice Marceau of the Alberta Court of Queen's Bench found that certain sections of the *Corrections Act* and regulations relating to inmate discipline violated inmates' rights under section 7 of the *Charter*. The declaration of invalidity was suspended for one year *to allow Alberta to comply with the ruling.*[20]

25. In *Rutherford v. Ontario (Deputy Registrar General),* Justice Rivard of the Ontario Superior Court of Justice found certain provisions of the *Vital Statistics Act* violated the applicants' section 15 *Charter* rights. The impugned sections were declared invalid and the declaration was delayed for 12 months *to provide the legislature an opportunity to remedy the constitutional defects*. The suspension allowed the legislature

[19] [2004] O.J. No. 1766 at para. 175
[20] [2006] A.J. No. 1522 at para. 202

to consider the competing policy issues that arose in the case and to figure out how to give effect to the decision. [21]

2) A Suspended Declaration is Appropriate in this Case

26. A suspension of the declaration of invalidity is appropriate in this case for the reasons enumerated below.

a) Address the Repercussions of the Decision

i) The Declaration of Invalidity Applies in Ontario Only

27. If the declaration of invalidity is not suspended, the impugned provisions would be invalid in Ontario but would be valid and enforceable in all other provinces and the territories in Canada.[22] AJC members in Ontario would have the benefit of the declaration but members in other provinces and the territories would not.

28. The territorial reach of each provincial superior court is limited to its own borders and even when a provincial superior court declares a federal law invalid, that declaration is only applicable in that province. As was found by the Supreme Court of Canada in *R v. Wolf,* [23] there is no obligation on a provincial superior court in one jurisdiction to follow a decision of another superior court in a different jurisdiction. The decisions of other superior courts are persuasive and an important source of law to which another court may look in making a determination of law, but they are not binding. The

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[21] (2006) 270 D.L.R. (4TH) 90 at para. 267
[22] A decision on the constitutionality of the *ERA* is pending in the Quebec Superior Court. *Meredith and Roach v. AGC* is being argued in Federal Court of Appeal on January 17, 2012
[23] [1975] 2 S.C.R. 107 at 109

principles of comity[24] and unitary system of our courts[25] do not lend the force of law to a judgment outside the territorial jurisdiction of the court that made it. Only the Supreme Court of Canada (and where they have jurisdiction, the Federal Courts of Canada) can bring about uniformity in the law throughout all of the Canadian provinces.

29. It would undercut a main tenet of federalism if each provincial superior court's jurisdiction extended beyond the territorial boundaries of its province.[26] It is a reflection of our federal system and the jurisdiction possessed by provincial courts over federal law (as well as the *Charter* and other parts of the *Constitution*) that the interpretation of that law may vary from province to province until it is settled by the Supreme Court of Canada.

30. Section 16(a) of the *ERA* was found by this Court to violate the AJC's members' 2(d) rights but the Supreme Court of British Columbia found that the section did not violate the 2(d) rights of the members of the Federal Government Dockyard Trades and Labour Council.

31. In *Federal Government Dockyard Trades and Labour Council v. The Attorney General of Canada*,[27] (*Dockyard*) Justice Harris of the Supreme Court of British

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[24] "Judicial comity" refers to the principle that one panel of a Court ought not to depart from a decision of another panel of the same Court merely because it considers that the first case was wrongly decided. Courts should follow their prior decisions because they are responsible for the stability, consistency and predictability of the law. See: *Wannan v. Canada* (2003), 312 N.R. 247 (Fed. C.A.) at 251

[25] "Unitary system" refers to the structure of the Canadian Court system in which provincially constituted inferior and superior courts of original and appellate jurisdiction apply federal and provincial laws under a hierarchical arrangement culminating in the Supreme Court of Canada. See: *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206 at 215

[26] *Reference Re Supreme Court Act Amendment Act (Canada)*, [1940] S.C.R. 49 at 127

[27] 2011 BCSC 1210

Columbia found that the provisions of the *ERA,* in its application to the plaintiffs, in removing the 2006 wage increase arbitration award, did not breach the plaintiffs' rights under 2(d) of the *Charter*. The plaintiffs had been awarded a 5.2% lump sum payment for fiscal year 2006-2007, in addition to a 2.5% wage increase for 2006. By application of section 16(a) of the *ERA* and other provisions, the 5.2% lump sum was rendered null and void. In his section 1 analysis, Justice Harris concluded that even if there had been a breach of 2(d) rights, the breach would have been justified.[28]

32. The plaintiffs in *Dockyard* have appealed Justice Harris' decision. The Attorney General of Canada has appealed the case at bar and the AJC has cross-appealed.[29] Both the British Columbia Court of Appeal and the Court of Appeal for Ontario will have an opportunity to consider the *ERA*. To maintain uniformity in the law until a higher court rules on the constitutional issues, the declaration of invalidity should be suspended.

33. Furthermore, time would be required to determine the most appropriate legislative and\or non-legislative response to the jurisdictional conflict that has resulted from the limited reach of a superior court decision and the conflicting findings of two superior courts.

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[28] Justice Harris' conclusion that if the *ERA* did violate the plaintiffs' rights under 2(d) of the *Charter*, that such a violation was justified under s.1, was based on the same evidence that was filed in these proceedings. See in particular paragraphs 98 to 116, 276, 279, 281, 298 to 302 of the *Dockyard* decision.

[29] Timing of the appeal – Notice of Appeal filed November 29, 2011; Notice of Cross Appeal filed December 9, 2011; and perfection of appeal 30 days after the release of the remedy decision.

ii) Impact on Another Bargaining Unit

34. If the declaration of invalidity of section 16(a) is not suspended, it will have an impact on the members of the Research bargaining unit who are represented by the PIPSC.

35. As noted above in paragraph 8, the 2006-2007 wage increase limit of 2.5% applied to three groups, Ship Repair West, Research and the Law Group. The proposed declaration of invalidity will not affect the members of Ship Repair West because the *ERA* was upheld in British Columbia where that bargaining unit is located and because the effect of this Court's declaration is restricted to Ontario. However, the declaration of invalidity would affect the members of the Research bargaining unit in Ontario.

36. The PIPSC has launched its own challenge to the *ERA* and that application has not yet been heard in the Ontario Superior Court. It is being defended by the Attorney General of Canada.[30]

37. In the context of the PIPSC application, the court may find, as it did in *Dockyard*, that even if the *ERA* did interfere substantially with collective bargaining, it did not do so in a manner inconsistent with the *Charter*. Justice Harris reached this conclusion after reviewing the evidence that demonstrated the extent to which the employer engaged the

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[30] *The Professional Institute of the Public Service of Canada et al. v. Her Majesty the Queen in Right of Canada as Represented by the Attorney General of Canada*, Court File No. CV-09-375977. The application is for, among other things, a declaration that the ERA, and in particular, ss.16-34 and 56-65 violate 2(d) of the *Charter*.

bargaining agent in a process of good faith negotiations and consultations before the *ERA* was implemented.

iii) Potential Impact on AJC in Ontario

38. If the declaration of invalidity is not suspended and the additional and consequential declarations sought by the applicant are granted, Ontario members of the AJC will be exposed to financial risks.

39. The AJC and Treasury Board may have to negotiate or arbitrate base rates of pay, increases for 2006-2007, performance pay and allowances. The outcome could be a different collective agreement for AJC members in Ontario.

40. If the Court of Appeal for Ontario then allows the Attorney General's appeal, the parties would revert to the collective agreement for 2006-2011. If the declaration is not suspended and if additional amounts have been paid as greater increases for 2006-2007 or other years, for increased rates of pay, performance pay or allowances, those amounts will have to be repaid. In addition, pension and death benefit contributions based on rates of pay would have to be adjusted to reflect the pay adjustments. Also, if the Court allows the AJC's cross-appeal, then the entire restraint period from 2006-2011 might be unsettled.

41. The Ontario members of the AJC will be exposed to the same financial risks if the Court of Appeal finds that it was not the *ERA* that breached the members' 2(d) rights but it was the actions of the government before the *ERA* came into force. In that case, the

Court might order an individual remedy under section 24(1) of the *Charter* which would see the parties engaging in consultation and negotiation that would respect the members' 2(d) rights.

iv) Impact on Excluded Lawyers

42. The provisions of the *ERA* that mirror section 34(1)(a) and apply to excluded members of the Law Group remain in effect, regardless of the province in which they work.[31] Without a suspension of the declaration of invalidity, some members of the Law Group will have the benefit of the declarations, others will not.

43. The government needs time to address all the potential repercussions described above.

b) Consideration of Options

44. There are both legislative and non-legislative options available to deal with the constitutional invalidity of the impugned sections of the *ERA*.

45. Legislative and non-legislative options were open to the government in dealing with the emerging fiscal crisis in 2008. These options were outlined in the affidavit of Hélène Laurendeau, Assistant Deputy Minister, Compensation and Labour Relations Sector, at the Treasury Board Secretariat:

1. Reducing or limiting growth in the numbers of employees;
2. Suspending movement within pay ranges; or

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[31] S. 54(1)(a) of the *ERA*

3. Freezing or limiting salary increases.[32]

46. Legislative options are purely speculative. The government needs time to consider options and assess the impact of each option given the potential financial impact and current economic considerations. As in *R v. Glad Day Bookshops Inc.*, Parliament and the government must disentangle the impugned provisions from the provisions that remain valid.

47. Labour relations and fiscal matters are beyond the expertise of this Court and it should be left to Parliament and the government to fix the constitutional infirmity after consideration of all options. As noted by Dickson J. in *PSAC v. Canada*, the courts should respect the policy choices made by Parliament in matters of this kind:

> ...courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the effectiveness or wisdom of various government strategies for solving pressing economic problems. The question how best to combat inflation has perplexed economists for several generations. It would be highly undesirable for the courts to attempt to pronounce on the relative importance of various suggested causes of inflation, such as the expansion of the money supply, fiscal deficits, foreign inflation, or the built-in inflationary expectations of individual economic actors. A high degree of deference ought properly to be accorded to the government's choice of strategy in combating this complex problem. Due deference must be paid as well to the symbolic role of government. Many government initiatives, especially in the economic sphere, necessarily involve a large inspirational or psychological component which must not be undervalued. The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the Charter.[33]

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[32] H.L. 1st affidavit, para. 49, RR, p. 14

[33] *Public Service Alliance of Canada v. Canada (Attorney General),* [1987] 1 S.CR 424 at para. 34, RA, Vol. 1, Tab 9 (*PSAC*)

3) Remaining Declarations Sought by the Applicant

48. This Court need only consider these further submissions on the remaining declarations sought by the applicant if it is not inclined to suspend the declaration of invalidity.

49. The applicant seeks an additional declaration that it is lawfully entitled to bargain collectively over rates of pay for 2006-2007 (paragraph 11 of its submissions), and "consequential relief" related to collective bargaining and arbitration for fiscal year 2006-2007 rates of pay (paragraph 19 of its submissions). These additional and consequential declarations, not all of which are consistent with the statutory regime in any case, are effectively individual remedies under section 24(1) of the *Charter*. The jurisprudence is clear that it is only in rare and exceptional circumstances that a court will issue a declaration of invalidity in combination with an individual remedy under section 24(1). The applicant has not made out its entitlement to relief under both sections.

a) Section 52(1) and section 24(1) Remedies Should Not be Granted in this Case

50. The threshold question in each case where a *Charter* infringement has been found is whether the infringement arises from the impugned statute itself or the acts or omissions of government officials. If the infringement arises from the impugned statute, the appropriate remedy is a declaration of invalidity under section 52(1) of the *Constitution Act, 1982*. If the infringement arises from the acts or omissions of government officials pursuant to a statute, a personal remedy under 24(1) of the *Charter*, such as a declaration or damages, is appropriate and the statute remains in effect.

51. The distinction between these two remedies was considered by Chief Justice McLachlin in *R. v. Ferguson*:[34]

> As I noted at the outset, remedies for breaches of the *Charter* are governed by s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*.
>
> When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect..... Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties.... The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*.....
>
> Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional.....The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).
>
> It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for laws that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for government acts that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights..... Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*.... We are here concerned with a law that is alleged to violate a *Charter* right. This suggests that s.52(1) provides the proper remedy. [citations omitted][35]

52. The Chief Justice noted that in *unusual* cases a section 24(1) remedy in combination with a section 52(1) declaration of invalidity *may* be granted where the additional section 24(1) remedy is necessary to provide the claimant with an effective

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[34] The SCC was considering the constitutionality of the mandatory minimum sentence provisions in the *Criminal Code of Canada*.

[35] [2008] 1 S.C.R. 96 at paras. 59-61

remedy. *R. v. Demers*[36] was cited by the Court as an unusual case where both remedies were ordered.

53. *Demers* was a challenge to the sections of the *Criminal Code of Canada* pertaining to accused persons who were found permanently unfit to stand trial and were subject to an indefinite number of appearances before a Review Board. The SCC found that the impugned provisions of the *Criminal Code* were a violation of section 7 of the *Charter* and they were declared invalid. The declaration was suspended for a period of twelve months to allow Parliament to amend the legislation. The Court considered whether an individual 24(1) remedy would be appropriate in this case, in the future, *if* Parliament did not amend the legislation within a year. The Court noted the limited situations in which an individual remedy under 24(1) could be granted with a section 52 declaration and referred the judgment of Lamer C.J. in *Schachter*:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52 that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s.24 remedy would probably only duplicate the relief flowing from the action that court has already taken. [emphasis added in *Demers*][37]

54. The SCC in *Demers* determined that there was no reason to revisit the wisdom of the *Schachter* rule and granted the 24(1) remedy with the declaration of invalidity on a

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[36] 2004 SCC 46, [2004] 2 S.C.R. 489
[37] *Demers*, *supra*, para. 61

prospective basis conditionally i.e. to take effect only if Parliament did not amend the legislation in a year.

55. The case at bar is not one of those unusual cases where both remedies should be granted. The legislative provisions of the *ERA,* not government acts or omissions, were found to violate the rights of the members of the AJC under 2(d) of the *Charter*. As in *Schachter*, if the impugned provisions are immediately struck down, that is the end of the matter and no retroactive 24(1) remedy is available. If the declaration of invalidity is temporarily suspended for the reasons set out above, no unusual circumstances exist to grant a 24(1) remedy as in *Demers*. To grant such a remedy in this case would effectively give the declaration of invalidity an retroactive effect, thereby undermining the suspension.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 6th day of January, 2012

Dale Yurka

Kathryn Hucal

Solicitors for the Respondent

SCHEDULE "A"

TABLE OF AUTHORITIES

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1. *British Columbia Teachers' Federation v. British Columbia,* 2011 BCSC 469
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SCHEDULE "B"

TABLE OF STATUTES

1. *Expenditure Restraint Act*, S.C. 2009, c.2, s. 393
2. *Public Service Labour Relations Act*, S.C., 2003, c.22, s. 107

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SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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