

COURT OF APPEAL FOR ONTARIO

DATE: 20120501
DOCKET: M41258 (C54656)

Juriansz J.A. (In Chambers)

BETWEEN

Association of Justice Counsel

Applicant (Respondent in appeal)

and

Attorney General of Canada

Moving Party/Respondent (Appellant)

Kathryn Hucal and Joseph Cheng, for the appellant

Andrew Lokan, for the respondent

Heard: April 26, 2012

Motion for a stay of the judgment arising from the decisions of Justice A. Duncan Grace of the Superior Court of Justice dated November 1, 2011 and March 26, 2012.

ENDORSEMENT

[1] The Attorney General of Canada moves for a stay pending the appeal of the judgment of Justice A. Duncan Grace finding ss. 16(a) and 34(1)(a) of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 (“*ERA*”) unconstitutional because they violate s. 2(d) of the *Charter of Rights and Freedoms* insofar as they limit collective bargaining over rates of pay for the fiscal year 2006-2007. The trial

judge held that this restriction violated the s. 2(d) freedom of the individuals represented by the respondent. The trial judge suspended the declaration for a period of 30 days. Before reserving this motion I varied the suspension so that it remained in effect until I ruled on this motion.

[2] The respondent consents to a partial stay of the implementation of any pay rates negotiated or determined, but otherwise opposes the stay. The respondent argues that there is no reason the process to determine the 2006-2007 pay rates cannot carry on in accordance with the application judge's judgment, given its agreement that no payments would be made to its members until this court, or perhaps the Supreme Court of Canada, has finally determined the dispute. In this scenario, the declaration of the statutory provisions' invalidity would not be stayed, as the statutory process to determine the pay rates would conflict with those provisions if they remained in effect.

[3] The respondent concedes that there is a serious issue to be tried.

[4] In my view, irreparable harm to the public interest is established when statutory provisions enacted by Parliament are rendered invalid: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, para 71.

[5] In addressing where the balance of convenience lies, both parties invoked a number of considerations involving the morale and sensibilities of various

groups and similar matters. In my view, the submissions on these matters involved much speculation. I did not find these submissions helpful.

[6] I accept that, in the event the Attorney General's appeal is unsuccessful, the dispute between the parties will be resolved sooner if the process to determine the pay rates is allowed to proceed. On the other hand, the respondent concedes that the process to determine pay rates could be initiated and completed in the usual timeframe for a case to be dealt with by the Supreme Court. I am satisfied that this case will proceed to the Supreme Court.

[7] I have also considered the fact that the ruling of the trial judge is legally effective only in Ontario, but the pay rates are national, and the statutory process to determine the pay rates and the administrative agency that supervises that process is federal. This leads to the conundrum of how the statutory process to determine national pay rates could proceed when the provisions of the *ERA* remain in effect in the other provinces and the territories. The jurisdictional and logistical problems caused by this conundrum tip the balance of convenience in favour of granting the stay. It will be easier to resolve the jurisdictional and logistical problems when the case is pending before the Supreme Court.

[8] The motion is granted and the judgment of Grace J. is stayed until the Attorney General's appeal is determined by this court, or subject to further order of this court.

[9] The respondent sought an order expediting the appeal. The appeal is to be heard on June 13, 2012 when both parties have indicated they are available. If the parties cannot agree on a timeframe for perfecting the appeal and cross-appeal, they may arrange a conference call with me.

A handwritten signature in blue ink, consisting of a large, stylized initial 'R' followed by a horizontal line and the letters 'J.A.' with a period.