

CITATION: Association of Justice Counsel v. Canada (Attorney General), 2011 ONSC 6435
COURT FILE NO.: CV-10-404604
DATE: 20111101

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
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 ASSOCIATION OF JUSTICE COUNSEL) *Andrew K. Lokan*, for the Applicant
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- and -)
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)
 ATTORNEY GENERAL OF CANADA) *Dale Yurka, Kathryn Hucal and Susun*
) *Keenan* for the Respondent
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)
) **HEARD:** April 19, 20 and 26, 2011.
) Supplementary written submissions
) provided June 15, 2011

Grace J.

REASONS FOR DECISION

[1] Much has been and will continue to be written about the constitutionality of the *Expenditure Relief Act* (the “*ERA*”).¹ This application involves a challenge by the Association of Justice Counsel (the “*AJC*”). It was initiated because the *ERA* impedes efforts by lawyers in the federal public service to address long existing concerns about salary.

1. The Context of the Dispute

[2] The *AJC* is the certified bargaining agent for approximately 2,700 lawyers employed by the federal government (collectively “*Federal Crown counsel*”).²

¹ S.C. 2009, c. 2, s. 393. It was proclaimed into force March 12, 2009. Decisions have been rendered in *Meredith et al. v. Attorney General of Canada*, 2011 FC 735 and *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*, 2011 BCSC 1210 (S.C.)

² Lawyers employed by the federal government in managerial or particularly sensitive positions are not eligible for membership in the *AJC*.

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[3] These lawyers work across Canada in the Department of Justice, the Public Prosecution Service of Canada, various federal agencies, tribunals and courts.

[4] While the AJC has existed since 2001, Federal Crown counsel were statutorily prohibited from unionizing until the passage of the *Public Service Labour Relations Act* (the "PSLRA") in 2005.³ Immediately after the passage of the PSLRA, the AJC applied to become the certified bargaining agent for Federal Crown counsel. Certification followed in April, 2006.

[5] The AJC maintains the salaries paid to its members are uncompetitive. Those earned by lawyers employed by Ontario's Ministry of the Attorney General ("Ontario Crown counsel") are used as a comparator. The AJC argues that the Ontario Crown counsel is an appropriate point of comparison, since almost two thirds of Federal Crown counsel are employed in this province.

[6] AJC's argument follows this path. For many years, salaries paid to Federal and Ontario Crown counsel were roughly equivalent.

[7] Starting in 1989 Ontario Crown counsel were permitted to bargain collectively. An arbitration board awarded Ontario Crown counsel a salary increase of thirty per cent effective January 1, 2001.

[8] With this arbitral award, the period of approximate equality in earnings ended. The AJC maintains the gap has grown.

[9] The AJC also relies on other information.⁴ It says that salaries paid to lawyers in the employ of the provincial governments in British Columbia, Alberta and Saskatchewan "far outstripped those of Federal Crown counsel" and that the average salary paid in the private sector is even greater.

[10] The AJC introduced evidence to support its position that less attractive compensation packages have led to difficulties in recruiting and retaining lawyers. One of AJC's objectives is to significantly reduce, if not eliminate, the disparity it maintains exists in salaries between its members and other lawyers in comparable positions.

[11] On May 10, 2006, the AJC served a Notice to Bargain on the Treasury Board, the representative of the Government of Canada, under the PSLRA.

³ S.C. 2003, c. 22, s. 2. A small number of lawyers employed at federal boards, agencies and commissions were formerly represented by the Professional Institute of the Public Service of Canada ("PIPSC") from 1967 until 2006. They were subject to a series of collective agreements. The last one negotiated on their behalf by PIPSC expired on February 28, 2006. The parties use the term "LA group" rather than Federal Crown counsel in its material.

⁴ The AJC filed affidavits of its president Marco Mendicino sworn June 8, 2010 and January 6, 2011. The Attorney General relies on affidavits of Hélène Laurendeau, Assistant Deputy Minister, Compensation and Labour Relations Sector, sworn October 29, 2010 and February, 2011, Marc Thibodeau, Director of Operations – Core Public Administration, sworn October 29, 2010 and Paul Rochon, Associate Deputy Minister and G-7 Deputy, Department of Finance, sworn November 5, 2010.

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[12] Prolonged negotiations were held during 2006 and early 2007. A mediator participated in some of them. Although some issues were resolved, the AJC and the Treasury Board were unable to conclude their first collective agreement.

[13] Compensation was a key and unresolved issue. The AJC sought salary increases of approximately thirty five per cent over the agreement's term. The Treasury Board eventually offered four and half per cent over three years.

[14] The parties moved toward arbitration.⁵ However, they could not agree on who would chair an arbitration panel.

[15] By this time ominous economic signs had already appeared. The housing market in the United States had declined significantly. Mortgage default increased alarmingly. Financial institutions began to fail.⁶ Consumer confidence declined. Other dominos teetered and began to fall.

[16] In September, 2008, the Treasury Board referred the remaining issues to the Public Service Labour Relations Board ("PSLRB") for arbitration.⁷ Annual rates of pay were identified as outstanding issues.

[17] By then, the problems in the United States had spread worldwide. Economic conditions had become increasingly grim.⁸ A global recession took hold.

[18] Canada was not immune. Businesses failed. Unemployment soared. Stock prices plunged. For many, concern turned to alarm.

[19] Central banks took dramatic action. So did governments of many nations, including Canada and its provinces.

[20] Public speeches were given.⁹ An economic and fiscal statement was delivered.¹⁰ The federal government's intention to regulate wage increases in the public sector was articulated.

⁵ This appears to have been done informally.

⁶ Institutions challenged or crippled during the crisis included The Bear Stearns Companies, Inc., the Federal National Mortgage Association known as Fannie Mae, American International Group, Inc. ("AIG") and Lehman Brothers Holdings Inc.

⁷ The AJC says the referral was made pursuant to s. 47 of the *PSLRA*. The Treasury Board indicated the matter was being referred to arbitration pursuant to s. 136 of the *PSLRA* and requested the appointment of an arbitration board under s. 140 of that statute.

⁸ The crisis appears to have started in approximately August, 2007.

⁹ The Minister of Finance pledged "responsible fiscal management that will...extend to public sector compensation in an October 29, 2008 speech. The intention of the government to introduce legislation "to ensure sustainable compensation growth in the federal public service" was announced in the November 19, 2008 Speech from the Throne.

¹⁰ This occurred on November 27, 2008.

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[21] Behind the scenes, the Treasury Board Secretariat was asked to “develop measures to restrict spending.” Recommendations were made. The drafting of legislation restricting wage increases for most federal government employees commenced.¹¹

[22] In mid-November 2008, the Treasury Board’s senior negotiators sent e-mails to various bargaining agents, including the AJC. The November 15, 2008 message received by the AJC read, in part:

The reason for my e-mail is to find out if, given the dire economic conditions, you...would be interested in resuming discussions in an attempt to reach a settlement for the LA Group.¹²

I believe we have every reason to be concerned by the Minister of Finance’s recent speech on the state of the economy and its possible impact on our mandates...

Based on the Minister’s speech, authorities of the Department of Finance are saying...they are looking for cost containment and predictability of expenditures for the period 2007/08 to 2010/11...

Although we are in the process of establishing an Arbitration Board, there’s nothing that prohibits us from having a discussion and evaluating the current situation in the best interest of the LA Group...

[23] The Treasury Board made final offers to the bargaining agents for represented employees. In a November 18, 2008 press release, the final offers were described in these terms:

A responsible approach to public sector compensation is even more critical during a time of economic uncertainty and tight fiscal circumstances.

Given the urgent need to ensure predictability in public sector wages, we are presenting final offers to the bargaining agents of the core public administration.

These offers strike the right balance: responsible, predictable spending and fair compensation. They are fair to employees and to taxpayers.

The final offers represent a total increase of 6.8% over 4 years...for four-year contracts beginning 2007-08...¹³

[24] As the press release contemplated, there was further communication between the Treasury Board and various bargaining agents, including the AJC. While a number of collective agreements were completed, the wide chasm between the AJC and Treasury Board remained.

¹¹ Bill C-10 is described in para. 25 of this decision.

¹² As mentioned, the parties use the phrase LA Group to describe Federal Crown counsel.

¹³ This offer was higher than the Treasury Board had made in March, 2008.

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[25] A far ranging piece of legislation called the *Budget Implementation Act, 2009* was finalized. Known as Bill C-10, it included provisions designed to address the state of and stimulate the Canadian economy. In some areas, money would be spent. In others, it would be saved.

[26] The introduction of Bill C-10 was delayed when Parliament was prorogued on December 4, 2008.

[27] Parliament reconvened in January, 2009. The intention of the federal government to limit wage increases in the federal public sector commencing with the 2007-2008 fiscal year was already known. With the first reading of Bill C-10 on February 6, 2009, the AJC and others were surprised to learn that the 2006-2007 fiscal year was also included.¹⁴

[28] The *ERA* came into force on March 12, 2009. It applies to approximately 400,000 people: most federal employees whether unionized or not and to members of the Senate and House of Commons.¹⁵

[29] The legislation increases base rates of pay for affected federal employees by specified percentages for five fiscal years commencing in 2006 and ending in 2011.¹⁶ Section 16 granted an increase of 2.5% in the 2006-2007 fiscal year, 2.3% in the 2007-2008 fiscal year and 1.5% in each of the three following fiscal years ending with 2010-2011. As a general rule, the restrictions apply notwithstanding any collective agreement, arbitral award or contract of employment.¹⁷

[30] The percentages applied to members of the AJC retroactively to May 10, 2006 and prospectively to March 31, 2011. They applied notwithstanding any ongoing negotiation, arbitration or other dispute resolution process.¹⁸

[31] The AJC maintains that the *ERA* is wholly or partly inoperative because it limits the constitutionally enshrined freedom of association conferred by section 2 (d) of the *Charter*. The AJC submits the *ERA* is not saved by section 1. Its first attack against the *ERA* is a broad one. It asks for a declaration that the entire statute is inconsistent with s. 2(d) of the *Charter*. It then gradually narrows the scope of the declaration it seeks: first to eight sections,¹⁹ then to three subsections which have the effect of giving the legislation retroactive effect²⁰ and in the final

¹⁴ It received second reading on February 12, 2009 and was referred to the Standing Committee on Finance. The AJC made a presentation to the Committee on February 23, 2009 as did the Professional Institute of the Public Service of Canada, the Public Service Alliance of Canada and the Canadian Labour Congress. The Bill was passed on March 4 and received Royal Assent on March 12, 2009.

¹⁵ Its scope is set forth in sections 12-15.

¹⁶ Pursuant to section 12 the *ERA* does not affect "incremental increases", "merit or performance increases, in-range increases, performance bonuses or similar forms of compensation."

¹⁷ Section 16. Section 19 provides that the limits do not apply to the 2006-2007 or 2007-2008 fiscal years if a collective agreement or arbitral award had been made before December 8, 2008.

¹⁸ Sections 33, 34 and 54.

¹⁹ Sections 16, 17, 24, 27, 34, 56, 57 and 59.

²⁰ Subsections (a), (b) and (c).

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alternative to the *ERA*'s starting point of May 10, 2006²¹ and the 2006-2007 fiscal year as set forth in ss. 16 (a) and 34 (1).²²

2. Issues

[32] The issues are:

- a) Does the *ERA* substantially interfere with the right of association of the members of the AJC under section 2 (d) of the *Charter*?
- b) If so, is the infringement saved by section 1 of the *Charter*? In other words, has the Attorney General of Canada ("Attorney General") established that the objectives the *ERA* seeks to fulfill are of sufficient importance to warrant overriding a constitutionally protected freedom and that the means chosen are reasonable and demonstrably justified in a free and democratic society?

3. Analysis and Decision

A. Does the *ERA* substantially interfere with the right of association of the members of the AJC under section 2 (d) of the *Charter*?

[33] Section 2 (d) of the *Charter* contains nine simple sounding words. It provides:

Everyone has the following fundamental freedoms:

[...]

(d) freedom of association.

[34] Federal or provincial legislation that does not respect an individual's freedom of association is void under s. 52 of the *Constitution Act, 1982*²³ unless the state is able to justify the limits imposed under s. 1 of the *Charter*.²⁴

[35] Section 2 (d) recognizes that objectives are often shared and gives individuals a constitutionally entrenched right to work together to attain them.²⁵ The right to unionize and to make collective representations to an employer has long been recognized as being protected by s. 2 (d) of the *Charter*. However, historically, the right to collectively bargain was not.²⁶

²¹ The date the AJC served a notice to bargain.

²² That year is referred to in s. 16 (a) and in s. 34 (1).

²³ Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁴ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 at para. 88; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para. 47.

²⁵ *Reference re Public Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 395; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at paras. 15-16 and 30.

²⁶ *Reference re Public Employee Relations Act (Alta.)*, *supra*, per Le Dain J. at p. 390. *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 per Dickson C.J. at pp.

[36] In 2007, that changed when the Supreme Court of Canada released *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (“*Health Services*”).²⁷ On behalf of the majority, McLachlin C.J. and LeBel J. wrote:

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work...²⁸

[37] A broader interpretation of the scope of the *Charter*'s protection was endorsed in the following terms:

We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspect of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2 (d) of the *Charter*...²⁹

[38] The consequences of the evolution of the new approach on the legislation in issue in *Health Services* remained to be considered. The following principles emerged:

- a) The protection offered by s. 2 (d) the *Charter* relates only to the process of collective bargaining. It does not protect a particular model or method of bargaining and the *Charter* provides no assurances that associational goals will be achieved;
- b) In every case, a fact-specific and contextual inquiry is required to determine “whether the process of voluntary, good faith collective bargaining between employees and employer has been, or is likely to be, significantly and adversely impacted”;
- c) A potential breach of s. 2 (d) is identified whenever a statute varics a negotiated collective agreement, limits the scope of future bargaining or relieves employers of their obligation to participate in the process of collective bargaining in a meaningful way.

373-374, per L’Heureux-Dubé J., at p. 392 and per Sopinka J. (La Forest J. concurring at p. 390) at p. 404; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

²⁷ *Supra* note 24.

²⁸ *Ibid.* at para. 82.

²⁹ *Ibid.* at para. 19.

[39] Two questions must be answered: first, does the challenged law relate to something which is important to collective bargaining and second, if so, does the state action prevent meaningful discussion and consultation?³⁰ If both questions are answered affirmatively, violation of s. 2 (d) is proven.

[40] In *Health Services*, the Supreme Court of Canada examined provisions which allowed health sector employers to transfer, re-assign, layoff or bump employees and contract out certain services notwithstanding conflicting provisions in existing or future collective agreements. The provisions were carefully reviewed, because they undermined the bargaining processes that led to the collective agreements then in force. Furthermore, they prevented any meaningful communication on a host of topics, because the matters they addressed could not be varied by a future collective agreement.

[41] Each section was analyzed. Those dealing with layoff, bumping and contracting out were held to violate s. 2 (d) of the *Charter*.

[42] Sections dealing with transfer and reassignment were regarded differently. Those provisions made minor modifications to the existing system, and significant protections for employees remained in place.³¹

[43] The scope of the protection afforded to organizations of workers under s. 2 (d) was recently addressed by the Supreme Court of Canada in *Ontario (Attorney General) v. Fraser* ("*Fraser*").³² In *Fraser*, farm workers challenged the constitutionality of the *Agricultural Employees Protection Act, 2002* ("*AEPA*").³³

[44] Farm workers had already launched a successful constitutional challenge in *Dunmore v. Ontario (Attorney General)*.³⁴ The *AEPA* was designed to address earlier shortcomings identified by the Court in *Fraser*.

[45] The majority of the Supreme Court of Canada reaffirmed that collective bargaining is an integral component of the right of association but that its constitutional protection is limited. Unionized employees have the right to make representations concerning the terms and conditions of employment and to have them considered in good faith by employers. Legislation which makes the process of presentation and consideration impossible or pointless violates s. 2 (d).

[46] The Supreme Court in *Fraser* reformulated *Health Services* test as follows:

If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by

³⁰ *Ibid.* at paras. 90-106.

³¹ *Ibid.* at paras. 113-136.

³² 2011 SCC 20

³³ S.O. 2002, c. 16.

³⁴ *Supra* note 24.

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government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*.³⁵

[47] In *Fraser*, the Court concluded that a fair reading of the *AEPA* preserved the right of associations of farm workers to make representations to employers and created a corresponding obligation on employers to consider them in good faith. These are the only matters a statute must give³⁶ or preserve.³⁷ The Court held the *AEPA* did not breach s. 2 (d) of the *Charter*.

[48] The majority's decision in *Fraser* also confirmed that section 2 (d) does not require that legislation include a particular method of dispute resolution. In any event, in *Fraser*, no remedy had been sought from the tribunal given responsibility to address an employer's alleged contravention of the *AEPA*.

[49] I turn to the *ERA*. This is now the third time its constitutionality has been tested.

[50] In *Meredith v. Attorney General of Canada* ("*Meredith*"),³⁸ members of the Royal Canadian Mounted Police ("RCMP") challenged certain provisions of the *ERA*.³⁹ Unlike Federal Crown counsel, members of the RCMP continue to be statutorily ineligible for collective bargaining. An alternative mechanism is used. The Commissioner of the RCMP solicits advice from a five person advisory board known as the Pay Council. A neutral chairperson is chosen by the Commissioner. The rest are drawn equally from management and non-management positions.

[51] The Pay Council made salary and benefits recommendations to the Commissioner for 2008 through 2010. These recommendations followed the established process and made their way to the Treasury Board. They were mostly accepted. Economic increases were announced on June 26, 2008.

[52] On December 11, 2008, the Treasury Board approved changes which eliminated some and reduced other aspects of the earlier approved compensation package. As indicated earlier, the *ERA* came into force three months later. It included a provision which allows the Treasury Board to "change the amount or rate of any allowance...if...of the opinion that the change...is critical to support transformation initiatives relating to the [RCMP]."⁴⁰ Absent the Treasury Board's initiative, wage increases for members of the RCMP are legislatively limited.

³⁵ *Fraser*, *supra* note 24, para. 47.

³⁶ *Fraser*, *supra* note 24, paras. 46-47. I use the word "give" because the *AEPA* created a labour relations scheme for farm workers.

³⁷ The word "preserve" is used because in *Health Services* British Columbia's *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, included provisions which took precedence over collective agreements to which the provincial government was a party and prohibited the parties from deviating from the statutory scheme in the future.

³⁸ *Supra* note 1.

³⁹ As well as a December 11, 2008 decision of the Treasury Board.

⁴⁰ s. 62.

[53] In finding that the restraint measures in issue⁴¹ violated s. 2 (d), Heneghan J. concluded:

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*.⁴²

[54] *Federal Government Dockyard Trades and Labour Council v. the Attorney General ("Dockyards")* is an even more recent case. There the Federal Government Dockyard Trades and Labour Council ("Council")⁴³ sought a declaration invalidating two sections of the *ERA*. The Council argued that ss. 18 and 19 of the *ERA* violated s. 2 (d) in overriding a favourable arbitral award that had been made after the December 8, 2008 cutoff date those sections established.⁴⁴ The trial judge disagreed.

[55] Harris J. held that:

a) The record did not establish the ability of employees represented by the Council to pursue workplace goals was "affected in any real or practical sense." The parties had tried but failed to negotiate a collective agreement before the passage of the *ERA*;

b) The provisions of the *ERA* did not, in that case, eliminate a "freely negotiated term" but one "imposed on the parties" by an arbitrator when there was a "breakdown of the bargaining process";⁴⁵

c) The right to resort to arbitration as a means of resolving a dispute over the terms of a collective agreement is not constitutionally protected at least where initiated in consequence of the failure of the process of discussion and consultation;⁴⁶ and

d) Had the wage increase provision made ineffective by the *ERA* in *Dockyards* been contained in a collective agreement rather than an arbitral award, a conclusion that "its nullification interfered with the right to collective bargaining" in a substantial way would have followed.⁴⁷

⁴¹ Ss. 16, 35, 38, 43, 46 and 49.

⁴² *Meredith*, *supra* note 1 at para. 92.

⁴³ *Supra* note 1.

⁴⁴ The award was issued January 20, 2009. It awarded a 5.2% pay adjustment as of October 1, 2006.

⁴⁵ *Dockyard*, *supra* note 1 at paras. 163, 168-171 and 185. Interestingly at paragraph 53, the trial judge observed that the parties had negotiated a new collective agreement after the passage of the *ERA* which resolved all outstanding issues "including wages going forward."

⁴⁶ *Ibid.* at paras. 177 and 180-189.

⁴⁷ *Ibid.* at paras. 204 and 213-214.

[56] These decisions are helpful to my analysis because they both involve the same economic circumstances and legislative response.

[57] As mentioned, in *Meredith* the Treasury Board accepted most of the recommendations resulting from the Pay Council process. The plaintiffs in *Meredith* appear to have been successful in arguing that acceptance of the recommendations resulted in something which was tantamount to an agreement between the members of the RCMP and their employer. Its terms were then unilaterally changed by the Treasury Board and then by the *ERA*. In this case, the AJC and Treasury Board never reached agreement on the economic increases to be applied to the base salaries of Federal Crown counsel.

[58] In many respects the facts of *Dockyards* resemble those in this case. In *Dockyards*, affected workers had been trying to negotiate a new collective agreement since mid-2006. Proposals had been exchanged. The parties had participated in eight bargaining sessions. Those efforts were unsuccessful. The bargaining agent made a decision to resort to arbitration.⁴⁸

[59] However, there are differences too. In *Dockyards* a tentative agreement was reached with the Treasury Board but rejected by the membership. No substantive collective bargaining followed.⁴⁹

[60] By the time the *ERA* came into force the parties had conducted the arbitration and an arbitral award had been made.

[61] I turn to this case. Does the *ERA* relate to something which is important to collective bargaining? The answer is quickly given. Yes. True, the *ERA* touches on only one issue: salaries. Admittedly, it leaves dozens untouched.⁵⁰ However, the question is not number but importance. It is difficult to regard salary as anything other than a very significant, if not pivotal, aspect of the employment relationship for most employees. To the AJC and its members, the evidence is clear salary levels are and have been a source of immeasurable concern and growing discontentment.

[62] Does the legislation prevent meaningful discussion and consultation between the AJC and the Treasury Board? In my view, it did and still does. I reach that conclusion notwithstanding the fact the parties had tried but failed to negotiate a first collective agreement. I have not forgotten they were proceeding to arbitration after negotiations over an extended

⁴⁸ In this case the Treasury Board initiated the formal request but both parties were clearly proceeding toward arbitration.

⁴⁹ *Dockyards*, *supra* note 1 at para. 82. The evidence did, however, indicate that the Treasury Board offered to return to the bargaining table. While its overtures were refused the bargaining agent acknowledged there had been informal discussions.

⁵⁰ Examples include holidays, vacations, leaves, performance review, hours of work, expenses and grievance procedure.

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period, sometimes assisted by a mediator, failed to resolve the salary issue.⁵¹ In *Dockyards*, Harris J. wrote:

Arbitration reflects the breakdown of the bargaining process and is a substitute for it, not one form of its culmination.⁵²

[63] That is not, with respect, necessarily true. An adversarial process does not preclude the possibility of further discussion.⁵³ Given the parties' history in this case, the likelihood of a negotiated settlement was small. Nonetheless, the possibility of compromise existed until eliminated by the *ERA*.

[64] I have already mentioned the November 15, 2008 e-mail from the Treasury Board's senior negotiator inviting further discussion notwithstanding the fact the parties were "in the process of establishing an Arbitration Board." Consultation and discussion can and does occur during adversarial proceedings.

[65] The Attorney General suggests the process of collective bargaining was respected. I disagree. The wage increase offer made in November, 2008 mirrored the *ERA*. It was presented on a take it or leave it basis.

[66] On February 27, 2009, the AJC was one of several bargaining agents permitted to make submissions on the draft legislation to the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance. I am not satisfied this was true consultation. The time for meaningful negotiation concerning economic increases had passed by the time the invitation was extended and submissions were made. The die was cast.⁵⁴

[67] With the *ERA* in place, the salary dispute could not be negotiated. The arbitration panel appointed under the *PSLRA* following the request of the Treasury Board no longer had jurisdiction to determine the issue.⁵⁵

[68] In tracing the history of negotiations, the AJC seemed to maintain the Treasury Board did not negotiate in good faith.⁵⁶ While the documentary record before me is substantial and cross-

⁵¹ At para. 181, Harris J. held it was "of some moment" the bargaining agent sought a wage increase during the hearing which "had not been on the bargaining table.

⁵² *Dockyards*, *supra* note 1 at para. 180.

⁵³ The November 15, 2008 e-mail from the Treasury Board's senior negotiator made that very point.

⁵⁴ I recognize collective agreements were completed with some bargaining agents between November 15 and December 8, 2008. I do not believe that any of them involved wage increases in excess of those specified in the *ERA*. In *Meredith*, *supra* note 1 at paras. 253, 259 and 263 Harris J. concluded the federal government had fulfilled its obligation to consult and bargain in good faith. While I agree with many aspects of Harris J.'s analysis on a number of issues, this is not one of them. Nor do I agree with Harris J.'s conclusion with respect to section 2 (d).

⁵⁵ This was recognized by the arbitration board when it released its ruling in *Attorney General of Canada v. Association of Justice Counsel*, 2009 CanLII 58615 (P.S.L.R.B.) at para. 5. In submitting issues to arbitration the Treasury Board asked for economic increases of 1.5% per year commencing each year from May 10, 2006 through May 10, 2010.

⁵⁶ Mr. Mendicino, the president of the AJC, acknowledged in cross-examination that AJC had not filed a complaint that the Treasury Board had failed to bargain in good faith. However, the evidence demonstrates that the AJC and

examinations on affidavits were conducted, I was unable to form even a tentative view on this topic.

[69] However and importantly, under the *ERA* it does not matter. A post December 8, 2008 arbitral award is of no effect whether previous negotiations were conducted in good faith or not. Furthermore, such an award had no effect notwithstanding the fact the state of the Canadian economy and the federal government's fiscal circumstances were factors an arbitration board was required to consider under s. 148 of the *PSLRA*.⁵⁷

[70] Unless within one of its exceptions, the *ERA* created a fixed, unalterable salary grid. There could be no other result and therefore salaries were no longer a topic of negotiation for the five year period covered by the *ERA*.⁵⁸ As Heneghan J. wrote, the legislative scheme set forth in the *ERA* establishes "the benchmark for future wage increase negotiations."⁵⁹ The opportunity to seek a salary increase for the five year period covered by the *ERA* is irretrievably lost.

[71] On this point, suffice to say that whether a law limits a *Charter* right is simply a matter of the purpose and effect of the law that is challenged, not whether the law is right or wrong.

[72] The Attorney General submits an argument under s. 2 (d) can only be advanced if the challenged legislation seeks to undo an existing collective agreement *and* hampers future collective bargaining.⁶⁰ The Attorney General submits AJC's argument must fail because the AJC was not a party to a collective agreement when the *ERA* was enacted.

[73] I disagree. Section 2 (d) protects a process designed to reach agreement on workplace issues. I can think of no reason why constitutional protection applies only to those who had successfully completed the process of negotiation on at least one occasion. The *ERA* rendered any attempt to negotiate base salaries useless for the period it operated. That, in my view, is enough to violate section 2 (d). As McLachlin C.J. and LeBel J. wrote in *Health Services*:

To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue common goals of negotiating workplace conditions and terms of employment with their employer...Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to labour laws of Ontario designed to support and give a voice to unions

its counsel were dissatisfied with the pace at which the negotiations were proceeding. In a March 21, 2008 e-mail AJC's counsel complained that "promised disclosure and responses" had not arrived notwithstanding "commitments (sic) ...to the mediator (and to the other party)" and observed "that is a minimal requirement of the good faith that is so critical to make bargaining constructive and meaningful." A short time later the Treasury Board proposed annual economic increases of 1.5% effective May 10, 2006.

⁵⁷ Section 106 of the *PSLRA* had required the parties to "bargain collectively in good faith" and to "make every reasonable effort to enter into a collective agreement."

⁵⁸ *Confederation des syndicats nationaux c. Quebec (Procureur General)*, [2008] R.J.D.T. 1477 (Que. S.C.).

⁵⁹ *Meredith*, *supra* note 1 at para. 88.

⁶⁰ *Health Services*, *supra* note 24 at paras. 129-161; *Fraser*, *supra* note 24 at paras. 34 and 37.

was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific.⁶¹

[74] In any event, the *ERA* did override collective agreements entered into by other bargaining agents and limited the terms of the collective agreement the AJC and Treasury Board could and eventually did negotiate.

[75] The statute substantially limits, both in purpose and effect, the freedom of association guaranteed by the *Charter*.⁶² In so doing the *ERA* infringes section 2 (d). The question remains, is the infringement saved by section 1 of the *Charter*?

B. Is the infringement saved by section 1 of the Charter?

[76] Section 1 of the *Charter* provides this assurance:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it *subject only* to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [Italics added]

[77] A right or freedom is not inviolate. However, section 1 imposes “a stringent standard of justification” on the party seeking to uphold the restraint on a constitutionally protected right or freedom.⁶³

[78] Four questions must be affirmatively answered for the limitation to stand:

- a) First, does the objective of the law relate to a concern which is pressing and substantial;
- b) Second, is the measure adopted carefully designed to meet the objective? In other words are the means and objective(s) rationally connected;
- c) Third, is the constitutional impairment as modest – or minimal – as it can reasonably be; and
- d) Fourth, is the measure adopted proportional to the desired objective? In other words, do the salutary or positive effects outweigh the deleterious or negative consequences?⁶⁴

⁶¹ *Health Services*, *supra* note 1 at para. 92.

⁶² *Canada (A.G.) v. PHS Community Services Society*, 2011 SCC 44 at para. 102.

⁶³ *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 65-66.

⁶⁴ *Ibid.* at para. 69-71.

[79] Throughout my analysis I have attempted to be mindful of the Attorney General's request that the court show Parliament substantial deference. The Attorney General submits the court must exercise caution because:

a) Determining the appropriate response to a global economic crisis requires a consideration of factors "within the specific institutional competence of Parliament and the executive";

b) The *ERA* was enacted as part of the strategy of combating a complex problem. It was not intended to stand alone. Instead, the *ERA* was a single, albeit significant, element in an "integrated and phased response to...extremely challenging economic and fiscal conditions."⁶⁵

[80] I will return to the issue of deference when considering the third, or minimal impairment, stage of the *Oakes* analysis.

[81] I have tried to approach the *Oakes* criteria keeping in mind the requested relief and the fact that the objectives identified by the parties apply to the *ERA* in its entirety. For the most part, the objectives do not change from section to section, by department or function. Consequently, with respect to the first two stages of the test, I rarely differentiate between Federal Crown counsel and others affected by the *ERA*. However, in the final two stages the impact of the provisions on Federal Crown counsel receives the attention it deserves.

*i. Does the objective of the ERA relate to a concern which is pressing and substantial?*⁶⁶

[82] Determining whether a violation of s. 2 (d) is saved by s. 1 requires an understanding of the context in which the *ERA* was enacted.⁶⁷

[83] The severity of the economic events of 2008 was unanticipated. Buoyant economic conditions were expected to continue in 2007 and beyond. Indeed, the 2007 federal budget proclaimed:

Canada's employment performance is the best it has been in 30 years, consumer confidence remains high and business financial positions are healthy.

⁶⁵ These excerpts were taken from paragraphs 120 and 121 of the Attorney General's factum.

⁶⁶ Satisfaction of this requirement was conceded in *Meredith*, *supra* note 1 at para. 96. Two objectives were recognized there: reducing upward pressure on wages and minimizing job losses. Heneghan J. concluded the "aim of providing leadership and showing restraint and respect for public money is quite abstract" and "political in nature." She concluded that objective was not pressing and substantial. In *Dockyards*, *supra* note 1, Harris J. rejected the suggestion the only objective of the *ERA* was to save money. Harris J. concluded at para. 274 that the legislation was designed "to prevent a deep recession and to stabilize the economy...as a means to prevent unemployment, protect living standards and provide a sustainable foundation for the provision of public services." As evidenced by para. 276 of Harris J.'s decision, the objectives relied on by the Attorney General in that case and this one are identical.

⁶⁷ *R. v. Bryan*, [2007] 1 S.C.R. 527 at para. 10.

[84] Real growth in gross domestic product (“GDP”) was projected to be 2.3% in 2007 and an even stronger 2.9% in 2008 “consistent with the U.S. economy achieving an expected soft landing in the wake of the recent correction to the U.S. housing market.”

[85] Unfortunately, time was about to be unkind to many as evidenced by the content and tone of the federal government’s February 2008 budget. While it heralded sixteen consecutive years of economic expansion, it noted “economic uncertainty from the slowdown of the U.S. economy” and “ongoing global financial turbulence.” The approaching clouds were dark.

[86] By November 21, 2008, new economic realities had been revealed internationally and domestically.

[87] The United States, Euro zone and Japan were experiencing a recession. Growth in emerging economies had slowed.

[88] In Canada, commodity prices and demand for Canadian exports fell sharply. Consumer confidence and business investment tumbled too. Real GDP growth slowly ground to a halt. Forecasts were recast reflecting an evolving, uncertain and volatile economic environment. In 2010, then Governor of the Bank of Canada Mark Carney said:

Strains that emerged in a few countries quickly spread around the world, resulting in a deep, synchronous recession.

[89] Governments and central banks around the world acted.

[90] As already noted, the *ERA* was not enacted in isolation. Other economic measures were passed and came into force simultaneously.

[91] The *ERA* did not freeze the wages of affected federal employees. However, it did stipulate that wages were to be increased by 2.5% in the first, 2.3% in the second and 1.5% in each following fiscal year going back to 2006-2007 and ending with 2010-2011.⁶⁸

[92] According to the Attorney General, the *ERA* was designed to:

- a) Reduce upward pressure on wages in the private sector;
- b) Provide leadership through restraint and respect for public money;
- c) Assist the federal government in managing its medium term fiscal position by making the cost of salaries predictable.⁶⁹

[93] In its factum, the AJC submitted:

⁶⁸ The fiscal year end is March 31.

⁶⁹ Thus avoiding the uncertainty of a collective bargaining or arbitration process.

...this Court should treat the [Attorney General's] evidence of the *ERA*'s [objectives] with skepticism. The contemporaneous evidence, together with purpose evident on the face of the *Act*, supports the conclusion that the objective was simply to restrain expenditure. That is not a pressing and substantial objective, on the record presented to Court. To the extent that this Court accepts that any of the subsidiary "policy objectives" have been made out, they are not pressing and substantial.⁷⁰

[94] I disagree. At this stage of the analysis, the question is whether the federal government "has asserted a pressing and substantial objective."⁷¹ Attempting to determine whether a stated objective was in mind when a statute was enacted or is being used as an after the fact rationalization for its existence, is difficult and seemingly inappropriate.⁷² The thirteen introductory words of the *ERA* tell the reader what the legislation does, not why it exists.⁷³

[95] Public statements do, however, suggest the objectives offered to the court are not after the fact creations. The federal government had communicated its intention to carefully manage expenditures, to determine public sector compensation "in a manner that does not add pressure on businesses that are already feeling the pinch of economic slowdown,"⁷⁴ and to meet "the urgent need to ensure predictability in public sector wages"⁷⁵

[96] I am prepared to accept that the objectives were honestly stated. I am also prepared to accept AJC's submission. Despite its packaging, cost containment was an underlying purpose of the statute.⁷⁶ The real issue is whether any of the objectives were pressing and substantial.

[97] I start with cost containment. The AJC fairly conceded that the impairment of constitutional rights and freedoms has withstood judicial scrutiny in exceptional economic times. That principle was established by the Supreme Court of Canada in *Newfoundland (Treasury Board) v. Newfoundland and Labrador Assn. of Public and Private Employees* ("N.A.P.E."),⁷⁷ In that case, the provincial government had contractually promised to increase the wages of females employed in the health care sector. Three years later, for financial reasons, the provincial government passed legislation that postponed the introduction of the increases and erased amounts otherwise payable.

⁷⁰ This excerpt is drawn from paragraph 134 of AJC's factum.

⁷¹ *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 25; *R. v. Bryan*, *supra* note 67 at para. 32.

⁷² In *R v. Bryan*, *supra* note 67 at para. 32, Bastarache J. said "the first stage of the s. 1 analysis is not an evidentiary contest."

⁷³ The introductory words are "An Act to restrain the Government of Canada's expenditures in relation to employment."

⁷⁴ The excerpt is taken from an October 29, 2008 speech by the Minister of Finance. A similar comment was made in the November 27, 2008 Economic and Fiscal Statement.

⁷⁵ The excerpt is drawn from a November 18, 2008 Treasury Board of Canada Secretariat press release. A similar statement was made in the November 27, 2008 Economic and Fiscal Statement.

⁷⁶ Indeed managing the fiscal position of any enterprise, at any time, seems to involve the ability to predict and contain costs. Paragraph 48 of the Attorney General's factum acknowledges the Treasury Board Secretariat was asked by the Department of Finance "to develop measures to restrict spending."

⁷⁷ [2004] 3 S.C.R. 381.

[98] Those affected by the legislation were understandably appalled. Yet, the legislation was upheld. Writing for a unanimous Court, Binnie J. said:

...courts will continue to look with strong skepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are *always* budgetary constraints and there are *always* other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.⁷⁸

[99] In *N.A.P.E.*, the contest was between female workers who had been the subject of systemic discrimination and a cash strapped provincial government. Provincial spending relied heavily on federal transfer payments. A planned and significant reduction turned a modest budgeted surplus into a huge deficit. That, in turn, caused some agencies to lower the province's credit rating and borrowing became more expensive. The Supreme Court of Canada concluded "averting a serious fiscal crisis"⁷⁹ was a substantial and pressing objective.

[100] The facts of *N.A.P.E.* were exceptional. Cost cutting will rarely be viewed as a pressing and substantial objective.

[101] However, I am of the opinion this is one of those rare situations. The federal government was faced with virtually unprecedented economic conditions and reacted in an effort to avoid an unimaginable financial catastrophe. Concern had taken deep root and a multi-faceted and financially responsible national response was needed. Even if the AJC is right that the only true objective in enacting the *ERA* was cost containment, I am of the view that objective was substantial and pressing given the economic reality of the day.⁸⁰

[102] I am also of the view the three objectives advanced by the Attorney General fulfill the first criteria established by *Oakes*. Wages in the public sector had been growing more rapidly even before the economic downturn. Fewer business opportunities meant lower revenue for many enterprises. Jobs were being eliminated in the private sector at an alarming rate. The gap seemed likely to increase.

[103] On the evidence presented, I am satisfied there is an interrelationship between public and private sector salaries although the influence of one on the other seems incapable of precise determination. I am also satisfied an ever widening gap would have pressured businesses to

⁷⁸ *Ibid.* at para. 72; *Public Service Alliance Canada v. Canada*, *supra* note 26 at pp. 439-440.

⁷⁹ *Ibid.* at para. 77.

⁸⁰ In *Health Services*, *supra* note 24 at para. 147 McLachlin C.J. and LeBel J. accepted that cutting costs and increasing the power of management were objectives of the legislation there in issue. They said that the objective to cut costs was "suspect" as a pressing and substantial objective given the authority of *N.A.P.E.* and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

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attempt to match increases many could not afford.⁸¹ Avoiding that risk was a pressing and substantial objective.

[104] The AJC argued the salaries paid to its members were too low to affect salaries in the private sector. Even if an accurate statement, upward pressure may have been exerted in time if potential increases remained unchecked. On this aspect of the test, there is no reason to differentiate between the AJC and other represented groups affected by the *ERA*.

[105] Similarly, the objective of providing leadership through restraint and respect for public money was real, pressing and substantial. Economic projections had been wide of the mark.⁸² Uncertainty reigned. Systemic frailties were revealed. Confidence teetered. Around the world eyes turned to governments for solutions.⁸³ Their development required leadership. Years of balanced budgets were about to end. With sources of revenue in decline, the need for services on the rise and the need for financial stimulus internationally recognized, careful fiscal management was imperative.⁸⁴

ii. Is the measure adopted carefully designed to meet the objective? In other words are the means and objectives rationally connected?

[106] Has the Attorney General established, on a balance of probabilities, a link between the limits on wage increases paid to approximately four hundred thousand federal employees and any of the articulated objectives?⁸⁵

⁸¹ The International Monetary Fund had recommended that public wage increases be avoided unless temporary in nature. See, for example, Robert Lacroix and François Dussault, *The Spillover Effect of Public-Sector Wage Contracts in Canada* (1984), 66 *The Review of Economics and Statistics* 509

⁸² Canada's GDP fell in the months of August, September, October, November and December, 2008 and again in January, 2009. The fourth quarter decline of 3.4% was the largest since the first quarter of 1991. Employment declined by 70,600 in November and by 34,400 in December, 2008. 2009 started off with even more disappointing results. There were 129,000 fewer jobs in January: the largest monthly decline in 33 years. 82,600 people lost their jobs in February, 2009. The unemployment rate grew nationally from 6.2 to 7.7 per cent. In January, 2009 the International Monetary Fund reported that financial market conditions had remained "extremely difficult" for a longer period than it had projected "despite wide-ranging policy measures to provide additional capital and reduce credit risks." Advanced economies were suffering their deepest recession since World War II.

⁸³ In November, 2008, the International Monetary Fund's World Economic Outlook Update reported that "[f]inancial conditions continue to present serious downside risks. The forceful policy responses in many countries have contained the risks of a systemic financial meltdown. Nonetheless, there were many reasons to remain concerned about the potential impact on activity of the financial crisis. In December, 2008 the International Monetary Fund urged "strong and coordinated policy actions" and said "any delays will likely worsen growth prospects." It recommended the formulation of temporary measures "that ensure...the envisaged...fiscal deficits can be reversed as economies recover."

⁸⁴ In this respect I respectfully disagree with Heneghan J. when she stated at para. 120 of *Meredith*, *supra* note 1: "The aim of providing leadership and showing restraint and respect for public money is quiet abstract. It appears to be political in nature. In my opinion, this stated aim is not pressing and substantial."

⁸⁵ *Canadian Broadcasting Corporation v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at para. 48.

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[107] If the objective is cost containment as the AJC submitted, legislation restricting salary increases is clearly connected. However, I will briefly address this stage in the context of the objectives on which the Attorney General relied.

[108] The AJC argues that the *ERA* is not rationally connected to reducing upward pressure on wages in the private sector because the *ERA* only applies to 2.2% of all employees in Canada. It submits “[t]hat small a tail is not likely to be...wagging the dog”, when it comes to salaries being paid elsewhere.⁸⁶

[109] I disagree. Proof that the legislative scheme *will* fulfill all or some of its objectives is not required. The question is whether it *may* do so.⁸⁷

[110] In *RJR-MacDonald Inc. v. Canada (Attorney General)*,⁸⁸ McLachlin J. (as she then was) wrote:

The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour...the causal connection may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective.

[111] In this case, it was not certain the *ERA* would influence salaries paid in the private sector. However, a review of the literature filed leads to the conclusion the *ERA* may have had that effect. A real possibility has been established.

[112] The AJC submitted the legislative scheme is not rationally connected to the objective of showing leadership through restraint and respect for public money, because the *ERA* is temporally limited and allows some groups to receive increases in excess of those mandated.

[113] To that, I say simply this: the *ERA* may be imperfectly connected to that objective but nonetheless there is a clear link. Most notably, the legislation applies⁸⁹ to members of the Senate and the House of Commons. The legislation limited spending and salary increases for those persons most responsible for its enactment.

[114] Lastly, the AJC argued the *ERA* added nothing on the certainty or fiscal management front, because the federal government was adept at predicting compensation without a legislative boost. It seems obvious to me that the hard rules laid out in the legislation provide a level

⁸⁶ The AJC also suggested the federal government's estimated cost savings of \$600 million in fiscal 2009-2010 and \$1 billion in fiscal 2010-2011 were modest in the scheme of things. I disagree.

⁸⁷ *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Health Services, supra* note 24; *Canada (Attorney General) v. JTI Macdonald Corp.*, [2007] 2 S.C.R. 610.

⁸⁸ [1995] 3 S.C.R. 199 at para. 154.

⁸⁹ *ERA*, s. 12.

approaching exactitude which the pre-existing method of modeling could not match, no matter how sophisticated it may have been.

[115] This is not one of the few cases that “founder” or fail on the rational connection test.⁹⁰

iii. Is the constitutional impairment as modest – or minimal – as it can reasonably be?

[116] Were the *Charter* rights of the federal Crown lawyers impaired no more than was reasonably necessary to achieve the pressing and substantial legislative objectives of reducing upward pressure on private sector wages, demonstrating leadership and managing the federal government’s fiscal position?

[117] In my view, the *ERA*’s inclusion of the 2006-2007 fiscal year fails to satisfy this aspect of the *Oakes* test.

[118] The measure chosen by Parliament need not be the perfect or even the best choice.⁹¹ It need only be within a range of reasonable alternatives.⁹² The magnitude of a financial crisis and the cost of avoiding *Charter* infringement are relevant considerations.⁹³

[119] Those principles were applied in *N.A.P.E.* in assessing a legislative response to a fiscal crisis. In that case, legislation relieved the Newfoundland and Labrador government of its obligation to pay compensation for systemic discrimination in order to achieve savings of \$24 million. In upholding the statute, Binnie J. wrote:

The government was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, *was* undertaken to promote other values of a free and democratic society.⁹⁴

[120] Later he added:

...the requirement that the measure impair “as little as possible” the infringed *Charter* right cannot be applied in a way that is blind to the consequences for other social, educational and economic programs. The provincial

⁹⁰ *Mounted Police Assn. of Ontario v. Canada (Attorney General)* (2009), 96 O.R. (3d) 20 (S.C.J.) at para. 90. This case is scheduled to be argued before the Court of Appeal shortly. *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 87 at para. 40. In this regard I agree with the analysis of Harris J. in *Dockyards*, *supra* note 1 at paras. 284-286. In *Meredith*, *supra* note 1, Hcneghan J. dealt with the issue at paras. 121-127. She concluded that a rational connection between the reduction of wage increases for the R.C.M.P. and the objectives of showing leadership and financial restraint had not been demonstrated by the Attorney General.

⁹¹ *RJR-Macdonald Inc. v. Canada (Attorney General)*, *supra* note 88 at para. 160.

⁹² *N.A.P.E.*, *supra* note 77 at para. 83.

⁹³ *Ibid.* at para. 84.

⁹⁴ *Ibid.* at para. 75.

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government...*could* have thrown other claims and priorities to the winds and simply paid the \$24 million but in its view, the cuts it would have had to make elsewhere to permit this to happen would have created even greater grief and social disruption...

...

As in most cases, resourceful counsel, with the benefit of hindsight, can multiply the alternatives.⁹⁵

[121] The Attorney General submits the same result should follow here. Faced with an unprecedented economic crisis, spending on wages had to be curtailed. A range of options was developed and considered including a hiring freeze and layoffs. The argument is further developed in its factum:

In this case it was decided that containing future pay increases throughout the public sector would accomplish the government's objective in the least intrusive manner, given the options available and the timeframe for achieving savings, for employees would still see increases, albeit lesser than in previous years. Ancillary compensation features such as movement within pay ranges, leave, performance, overtime...would not be affected. The measures were time-limited, preserved collective bargaining and were preceded by consultation and negotiation.⁹⁶

[122] Policy makers were faced with a daunting task: an evolving, far ranging and unpredictable financial world, a multitude of competing interests and demands, an urgent need for a timely and effective response. I agree "[c]rafting legislative solutions to complex problems is necessarily a complex task."⁹⁷ In *Public Service Alliance of Canada v. Canada (Attorney General)*, Dickson C.J. wrote:

...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...A high degree of deference ought properly to be accorded to the government's choice of strategy in combating this complex problem...*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.* Thus, in the present case, I am prepared to accept the [Attorney General's] submission that compensation controls, even if limited to a select class of employees, could reasonably have expected to have a positive, albeit partial and indirect, impact on combating inflation in the economy in general. I

⁹⁵ *Ibid.* at paras. 95-96.

⁹⁶ This excerpt is drawn from paragraph 165 of the Attorney General's factum.

⁹⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.*, *supra* note 87 at para. 43

am also prepared to accept that the temporary suspension of collective bargaining on compensation issues was a justifiable infringement of freedom of association having regard to the third limb of the proportionality test.⁹⁸ [italics added]

[123] However, deference and restraint do not mean abstinence. Courts must be vigilant to ensure that troubled times are not used, even if innocently, to discard constitutionally protected rights and freedoms. As Benjamin Cardozo aptly wrote:

What began as a doctrine for emergencies – a weapon of peaceful revolution to be kept under lock and key, and employed with circumspection in hours of stress and strain – is turning, it seems into a tool to be kept at one’s elbow in a compartment of the desk, and plied with all the freedom of the screwdriver or the hammer in the grasp of the handyman at home.⁹⁹

[124] I return to the dilemma, which faced policy makers in 2008. The solution was not restraint. It was a combination of stimulus and moderation. Fortunately, the federal government was not in a fiscal crisis, although finances were hardly limitless.

[125] Resources had to be allocated. Priorities had to be established. The desire to increase spending in some areas and to curb it in others was understandable.

[126] I am prepared to accept that a temporary suspension of collective bargaining to facilitate a multi-faceted economic response to a crisis affecting the financial well-being of the public was once again warranted.

[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;¹⁰⁰
- 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;

⁹⁸ [1987] 1 S.C.R. 424 at para. 34.

⁹⁹ *Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe* (Margaret E. Hall ed., 1947) at 128.

¹⁰⁰ According to the 2007 budget the surplus was \$13.2 billion.

- 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 to apply starting with that 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, 2008.¹⁰¹ 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?¹⁰²
- 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.¹⁰³ 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"¹⁰⁴ and members of the AJC were not?

[128] Answers to those questions can be found without any reference to the global financial crisis. The AJC was seeking parity with their counterparts in Ontario. The AJC sought, by negotiation or arbitration, to extinguish a gap it maintained was wide and long existing. If successful, federal Crown lawyers would have received a substantial, retroactive increase.¹⁰⁵

[129] The Attorney General's position on the wage demands is clear: it does not believe they are warranted and the Treasury Board had not, would not, and will not agree to them.

[130] Had the arbitration included the salary issue, the Arbitration Board would have considered the competing positions in the context of the factors set forth in section 148 of the *PSLRA*, including "the state of the Canadian economy and the federal government's fiscal circumstances."

[131] With the passing of the *ERA*, the Arbitration Board no longer had the power to determine whether federal Crown lawyers had been and were being fairly paid.¹⁰⁶ The result was ordained.

¹⁰¹ *ERA*, s. 19.

¹⁰² Ship Repair (West) and the Research Group were the other two.

¹⁰³ For example, section 31 (a) gave the Border Services Group the right to continue efforts to negotiate the rate of pay for the 2007-2008 or 2009-2010 fiscal year. Section 32 (a) allowed the Operational Services Group to continue to negotiate the rate of pay for the 2009-2010 fiscal year. Section 33 (a) gave the Ships' Officers Group the right to receive the benefit of an arbitral award for the 2010-2011 fiscal year.

¹⁰⁴ The excerpt is drawn from paragraph 132 of the Attorney General's factum.

¹⁰⁵ At paragraph 100 of its factum, the Attorney General acknowledged the AJC was seeking to increase the salary of its members across Canada by one-third.

¹⁰⁶ The Arbitration Board's October 23, 2009 decision and award established salary increases in accordance with the *ERA*. In paragraph 30 of its factum, the Attorney General suggested these increases were "up to the maximum allowed by the *ERA*". Section 16 did not establish a maximum. Rates of pay in the affected years were "to be increased, or are deemed to have been increased" by the specified percentages.

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[132] All of those facts were known as economic conditions deteriorated. So were the consequences. If AJC was successful, the wage increase mandated by the *ERA* would be applied to a higher base salary. 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."¹⁰⁷ That would have prevented any upward pressure on salaries paid to lawyers in the private sector.

[134] If a lower than market wage was being paid to the AJC, how is leadership or respect for public money being compromised by paying what is agreed or determined to be fair? How is predictability compromised when the Treasury Board knew AJC's monetary demands and the applicable criteria articulated in the *PSLRA*?

[135] In *Meredith*, Harris J. wrote:

The fact is that the obligation to pay money in respect of unsettled claims that predate the economic crisis would accrue during the crisis, affect the government finances during the crisis, and have an effect on the government's ability to achieve its objectives...There is...no material difference between the award being made in respect of the 2006...or the 2009 year.¹⁰⁸

[136] I understand that present dollars would be used to pay unpaid increases earned in earlier years. However, I disagree with Harris J.'s suggestion that such payments would compromise the federal government's ability to meet the objectives the *ERA* was intended to serve.¹⁰⁹ As mentioned, the provisions of the *ERA* were tailored.

[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] According to the Attorney General, an exception was made for the Operational Services Group, because "it had been negotiating a national rate of pay for a few years before 2008 and an exception was necessary to complete this work".¹¹⁰ The AJC was in the same position, but the "work" was no longer to be completed. I simply do not find the rationale for the lines of

¹⁰⁷ The phrase used in various sections of the *ERA* including s. 31, 32 and 33.

¹⁰⁸ *Supra* note 1 at para. 290.

¹⁰⁹ *Ibid.*

¹¹⁰ The excerpt is drawn from paragraph 67 of the Attorney General's factum.

demarcation to be persuasive. It seems to me 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:

If an individual's *Charter* right or freedom is violated by the state, it is no answer to say the violation was driven or is justified for political reasons. Indeed forms of state discrimination that are undertaken for political reasons are among the most odious, as the recent history of parts of the world from South Africa to the Balkans can attest.¹¹¹

[140] In 2007-2008, the crisis began to take hold. In 2008-2009, the full force of the crisis was being felt and endured. When the legislation was passed, its duration was not fully known. The inclusion of 2009-2010 and 2010-2011 as normalcy returned was likewise understandable.

[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.

[142] Section 16 (a) of the *ERA* extended the wage increase limits to 2006-2007. Section 34 (1) (a) ensures that the statutory increases are applied to the salaries being paid to Federal Crown counsel when the AJC served its notice to bargain on May 10, 2006. In my opinion the Attorney General has not demonstrated that those sections of the *ERA* meet the requirement of minimal impairment articulated in *Oakes*.¹¹²

iv. Is the measure adopted proportional to the desired objective? In other words, do the salutary or positive effects outweigh the deleterious or negative consequences?

[143] I accept that the *ERA* played a role in serving the needs of the citizens of this country. It was part of the package of measures, which helped Canada fare better than many countries during a dramatic economic downturn.

[144] On the other hand, the legislation postponed AJC's efforts to remedy a salary imbalance which it alleges has existed since January 1, 2001 for five more years.

[145] I am prepared to accept the proposition that the importance of curtailing wage increases during a deep worldwide recession can¹¹³ outweigh the importance of preserving the freedom of represented employees to negotiate their salary.

¹¹¹ *N.A.P.E.*, *supra* note 77 at para. 81.

¹¹² Section 34 (1) (b) appears to have had no practical effect. It applied to any collective agreement or arbitral award made before the *ERA* came into force on March 12, 2009. Neither event occurred.

¹¹³ I did not use the word "will". I agree with the analysis of Griffin J. in *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469 at paras. 347-376.

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[146] However, times of hardship do *not* mean that constitutionally protected rights and freedoms are automatically deserving of compromise, let alone abridgement. All of the circumstances must be closely examined to ensure that interference is warranted *and* no more than absolutely required in nature, magnitude and duration.

[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. The importance of ending a precipitous slide and providing stability and encouragement for a limited period thereafter cannot be understated.

[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. The Attorney General has failed to satisfy me that the benefits of sections 16(a) and 34 (1) (a) of the *ERA* outweigh their negative effects.

4. **Conclusion**

[149] For the reasons given, I have concluded:

- a) The *ERA* infringes section 2 (d) of the *Charter*;
- b) Inclusion of the fiscal year 2006-2007 is not justified by s. 1 of the *Charter*. In my opinion, sections 16 (a) and 34 (1) (a) of the *ERA* are unconstitutional.

[150] The parties requested an opportunity to make submissions concerning the appropriate remedy after the release of this decision. The parties may make arrangements to attend to make those submissions and to address the issue of costs, through the motions office. Alternatively, I would be pleased to discuss scheduling by teleconference. If that alternative is more attractive, a date may be arranged through Judges' Administration.


Grace J.

Released: November 1, 2011

CITATION: Association of Justice Counsel v. Canada (Attorney General), 2011 ONSC 6435
COURT FILE NO.: CV-10-404604
DATE: 20111101

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ASSOCIATION OF JUSTICE COUNSEL

- and -

ATTORNEY GENERAL OF CANADA

REASONS FOR DECISION

Grace J.

Released: November 1, 2011

Court File No.: CV-10-40460

ASSOCIATION OF JUSTICE COUNSEL - and -
Applicant Respondent
ATTORNEY GENERAL OF CANADA

ONTARIO
SUPERIOR COURT OF JUSTICE

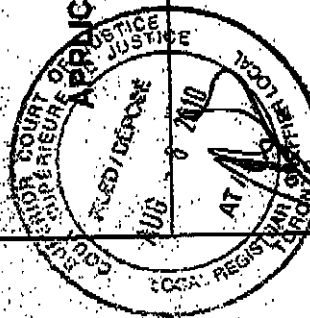
November 1, 2011

A.K. Lokan for the Applicant
D. Yurko, K. Havel and S. Keenan for
the Respondent

For written reasons released today.
I find that sections 16(1) and 34(1)(a)
of the Expenditure Restraint Act, S.C.
2009, c.2, s. 393 are unconstitutional.

Determination of the appropriate remedy
and costs are reserved pending further
submissions to be arranged in accordance with
my reasons.

A. K. Lokan
Greene S.



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