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●●● Crowns win salary ruling

Wage caps for federal lawyers unconstitutional, court rules

Monday, November 14, 2011 | Written by Kendyl Sebesta | |

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As the federal government continues its aggressive approach to labour unions, it found itself losing a battle in its own backyard in a court decision that found salary caps for federal Crowns to be unconstitutional.

At the heart of the matter are wage caps on federal lawyers and prosecutors from 2006 and beyond that the government imposed through the Expenditure Restraint Act (ERA).

The Association of Justice Counsel that represents federal Crowns and has been seeking a first contract for its members argues the caps are unconstitutional and violate collective bargaining rights under s. 2(d) of the Charter of Rights and Freedoms.

Ontario Superior Court Justice Duncan Grace agreed with the association this month. "The statute substantially limits, both in purpose and effect, the freedom of association guaranteed by the Charter. In so doing, the ERA infringes section 2(d)."

In his ruling, Grace rejected government justifications for the wage restraint related to the recent recession and financial crisis.

"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. . . .

I am of the view the ERA goes too far by including the 2006-2007 fiscal year," he wrote.

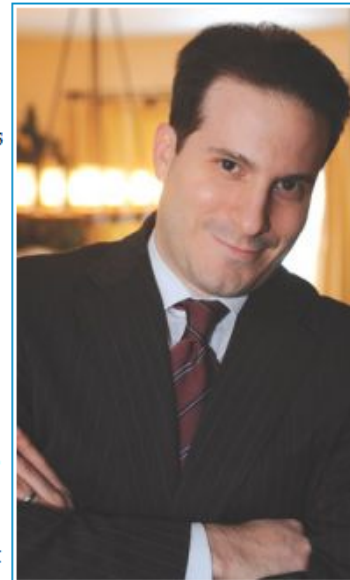
"Deference and restraint do not mean abstinence," he added. "Courts must be vigilant to ensure that troubled times are not used, even if innocently, to discard constitutionally protected rights and freedoms."

The ruling has left federal Crowns "extensively pleased," according to association president Marco Mendicino. He notes the association has since made a request for arbitration in order to continue bargaining for wage increases with the Treasury Board.

"We think the ruling affirms that the ERA interfered significantly with our ability to reach a first-ever collective agreement," says Mendicino.

"As an association that represents federal lawyers and prosecutors . . . when we sit at the table for the first time, we feel we have a right to expect that the employer will sit at the same table.

But the ERA has basically rendered our ability to collectively bargain under these terms useless." The ruling continues the association's long-standing battle for better wages for federal Crowns.



"For about the last 20 years, federal lawyers and prosecutors have seen zero growth," says Marco Mendicino.

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"For about the last 20 years, federal lawyers and prosecutors have seen zero growth," says Mendicino. "But our comparatives have continued to make good gains.

This led us to address how far we'd fallen behind with the Treasury Board, but we couldn't get an offer from them for the better part of two years. And then in 2008, the whole issue was made moot. We had no choice but to advance our constitutional challenge at that point."

In December 2008, the Treasury Board approved changes that eliminated and reduced several parts of a compensation package submitted to a number of bargaining agents, including the association, a few months prior.

Three months later, the act took effect with a provision that allowed the Treasury Board to set out increases in federal employee pay.

The changes meant federal employees would get an increase of 2.5 per cent in the 2006-07 fiscal year; 2.3 per cent in 2007-08; and 1.5 per cent in the three subsequent years.

Those actions, according to Mendicino, prevented the association from establishing an initial collective bargaining agreement.

The new court ruling, he believes, is timely given bill C-10 and its provisions to crack down on crime. In his view, the legislation will show how hard federal Crowns work.

"We welcome a bit of positive news against a challenging bargaining climate," says Mendicino. "The timing couldn't really be better, though, in terms of the justice subcommittee hearings on the C-10 bill, which would ultimately result in more work.

We are already working at full tilt, so the fact that prosecutors are seeing more charges than ever and the new crime bill is only going to add more is important."

In the meantime, the Superior Court ruling upholds collective bargaining while at the same time recognizing its limits, says Barbara Nicholls of Low Murchison Radnoff LLP in Ottawa.

"I think it's a well-reasoned decision recognizing that collective bargaining can be protected by s. 2 of the Charter," says Nicholls. "What's very interesting is that it was found the ERA went too far with 2006 and 2007 because it predated the economic climate."

The ruling could also give the association an opportunity to bargain further, says Nicholls. "It looks to give them a step up to reduce the gap that they were caught under with the ERA, particularly because of the 2006 and 2007 dates predating the poor economic climate."

In submissions to the Superior Court, counsel for the attorney general argued the act "was enacted as part of the strategy of combating a complex problem" and that "determining the appropriate response to a global economic crisis requires a consideration of factors within the specific institutional competence of Parliament and the executive."

Government counsel noted the act was a response to the economic climate at the time and was a bid to "reduce the upward pressure on wages in the private sector" while providing "leadership through restraint and respect for public money."

In light of the ruling, the Treasury Board will review the decision and "determine the appropriate course of action required in the near future," says spokeswoman Anabel Lindblad.

Mendicino notes a government appeal of the ruling would postpone a final resolution of the Crowns' contract dispute. "Ultimately, we would want the Treasury Board to look at this issue more," he says. "We're always prepared to listen."

For more information, see "'Perfect storm' brewing in Crowns' court battle against feds," "Feds lose court bid to nix Crowns' overtime," and "Feds battle lawyers over robes."

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