Case Name:

Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)

Between
Federal Government Dockyard Trades and Labour Council (Esquimalt, B.C.) & Des Rogers, Plaintiffs, and Her Majesty in Right of Canada as Represented by the Attorney General of Canada, Defendant

[2011] B.C.J. No. 1697

2011 BCSC 1210

Docket: 09 3061

Registry: Victoria

British Columbia Supreme Court
Victoria, British Columbia

D.C. Harris J.

Heard: April 26-29, May 3 and 30, 2011.
Judgment: September 8, 2011.

(318 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Fundamental freedoms -- Freedom of association -- Collective bargaining -- Action by public sector employee council for declaration that legislation unjustifiably interfered with their rights and that they were entitled to wage increase set out in arbitration award dismissed -- Federal government enacted legislation which imposed cap on wage increases for members of federal public service and had effect of nullifying wage increase granted through binding arbitration, which was effective more than two years prior to introduction of legislation -- Nullification wage increase did not interfere with right of freedom of association because wage increase resulted from binding arbitration and was not product of negotiation within collective bargaining regime.

Action by the public sector employee council for a declaration that ss. 18 and 19 of the Expenditure Restraint Act (the "ERA") were an unjustifiable interference with their rights and that they were entitled to the wage increase set out in an arbitration award. The council represented a number of unions whose members worked in naval dockyards on the west costs and were employees of the Treasury Board of Canada. Negotiations between the council and the treasury board took place to replace a collective agreement that expired in 2006. The negotiations were unsuccessful, and the council opted to invoke binding arbitration to settle the terms of a new collective agreement. The arbitration took place in December 2008 and resulted in an award that included a wage increase for 2006. Shortly after the award was made, the federal government enacted the ERA as part of its strategy for economic recovery as a result of the recent global financial crisis. The ERA was aimed at restraining the growth of public sector compensation by imposing a cap on wage increases for members of the federal public service and it overrode any existing collective agreements and arbitration awards which were inconsistent with its terms. As a result, the ERA nullified the 2006 wage increase that had been awarded to the plaintiffs through binding arbitration. The plaintiffs alleged that the effect of the ERA was a breach of their right to freedom of association as it retroactively annulled a term of their collective agreement. In addition, the plaintiffs alleged that they were affected by the legislation in a different manner to all other federal public servants as other federal public servants who had their pay increases for the 2006 to 2009 period determined before the introduction to the ERA were allowed to keep those increases, whether or not they were consistent with the salary caps set out in the ERA. Furthermore, the plaintiffs alleged that their wage increase would not have a severe impact on the country's fiscal position and accordingly, the breach of their Charter rights, in eliminating the wage increase, was not rationally connected to any substantial or compelling objective.

HELD: Action dismissed. The nullification of the plaintiffs' 2006 wage increase did not interfere with their right of freedom of association because the wage increase resulted from binding arbitration and was not the product of negotiation within the collective bargaining regime.

Statutes, Regulations and Rules Cited:

Budget Implementation Act, 2009 S.C. c. 2, Part 10

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2(b), s. 2(d)

Expenditure Restraint Act, S.C. 2009, c. 2, s. 2, s. 6, s. 6(3), s. 6(5), s. 6(6), s. 7, s. 8, s. 9, s. 10, s. 16, s. 18, s. 19, s. 23, s. 23(b), s. 24, s. 29, ss. 35-54, s. 44, s. 49, s. 393

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2, s. 148, s. 148(b), s. 148(e), s. 154

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[Editor's note: A correction was released by the Court September 8, 2011; the change has been made to the text and the correction is appended to this document.]

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Reasons for Judgment

D.C. HARRIS J.:--

Introduction

1 In the fall of 2008 and the winter of 2009, the world faced an unprecedented financial crisis that led to the deepest global recession since the Depression. Banks failed, credit dried up, stock markets plummeted, consumer confidence plunged, unemployment soared and public finances deteriorated dramatically.

2 The virulence, speed, depth and unpredictability of the downturn threatened the collapse of the international economic and financial system. If that had occurred, the cost in human and social welfare throughout the world and in Canada can only be imagined. An international consensus quickly developed that governments, central banks and international financial institutions needed to act rapidly to mitigate the effects of the economic crisis and to lay the foundations for a stable recovery. Policymakers throughout the world did act in a concerted manner by introducing stimulus packages, addressing credit issues and the liquidity problems of financial institutions, and, often, introducing measures to restrain the growth in public-sector compensation.

3 Canada was not isolated from these international phenomena. In the early days of the crisis, the strength of Canada's public finances and its financial institutions insulated the country from the worst effects of the gathering storm. By the fall of 2008, however, it was clear that the Canadian economy was caught in the crisis. As we shall see, unemployment began rising rapidly. Public finances deteriorated; as they did so, threatening the capacity of the government to provide public services. Like other governments around the world, the federal government, in the context of some significant political controversy, responded to the financial and economic crisis by introducing a variety of policies to mitigate its effects and lay the foundation for recovery.

4 Included among those policies was legislation, the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 [*ERA*], aimed at restraining the growth of public sector compensation. The effect of that legislation on the plaintiffs, principally the Federal Government Dockyard Trades and Labour Council (West) (the "Council"), is the subject matter of this action. The plaintiffs contend that the legislation unconstitutionally breached their right to freedom of association by retroactively annulling a term in their collective agreement.

5 The *ERA* is wage restraint legislation. It imposes a cap on wage increases for members of the federal public service and overrides any existing collective agreements and arbitration awards which are inconsistent with its terms. The *ERA* nullified a wage increase for 2006 that had been awarded to the plaintiffs through binding arbitration on January 20, 2009, shortly before the *ERA* became law.

6 The plaintiffs rely on the decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*] which they argue holds that legislation extinguishing an important term of an existing collective agreement always breaches the freedom of association guarantee set out in s. 2(d) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. As a result, legislation such as the *ERA* must now be justified under s. 1 of the *Charter*, if it can be.

7 The plaintiffs do not seek any declaration about the constitutionality of the *ERA* generally. Rather, they limit their challenge to the effect of the *ERA* on them specifically and then only in relation to the nullification of a wage increase of one year beginning October 1, 2006.

8 The plaintiffs seek the following orders:

a) A declaration that s. 18 and 19 of the *Expenditure Restraint Act*, being Part 10 of the *Budget Implementation Act*, 2009 S.C., c. 2 (the "*Expenditure Restraint Act*" or "*ERA*") are an unjustifiable interference with the rights of the Plaintiffs and the Bargaining Unit Employees, as that term is defined in paragraph 1 of the Statement of Claim, under section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

b) A declaration that the Bargaining Unit Employees are entitled to the benefit of the 5.2% Pay Adjustment, effective October 1, 2006, as set out in the Arbitration Award of Arbitrator Norman, delivered on January 20, 2009.

c) Costs, including special costs.

9 The plaintiffs contend that the *ERA* affects them in a different manner to all other federal public servants by eliminating a pay increase awarded to them by arbitration in January 2009, but effective October 1, 2006, more than two years prior to the introduction of the *ERA*. They suggest that every other group who had their pay increases for the period of 2006 to 2008 determined before the introduction of the *ERA* in January 2009 were allowed to keep those increases, whether or not they were consistent with the salary caps set out in the *ERA*. For all of those employees, the *ERA* imposed wage restraint only on a prospective basis. The plaintiffs, however, had their settled pay increase rolled back retroactively because of a provision of the *ERA* which applies only to collective agreements and awards made after December 8, 2008. This they argue was highly intrusive, arbitrary and unjustifiable.

10 So far as s. 1 is concerned, the plaintiffs accept that financial justifications can, in extreme circumstances, be relied upon to justify the infringement of *Charter* rights. They also accept that the period in which the *ERA* was enacted was a period of unusually high economic uncertainty. However, they argue that a global climate of economic stress cannot be used to insulate the breach of constitutionally protected rights. The government, they say, has failed to provide evidence that eliminating their wage increase was a necessary response to Canada's economic situation in 2008. Canada cannot show that the burden of respecting the plaintiffs' *Charter* rights would have had any severe impact on the country's fiscal position. Accordingly, the breach of the plaintiffs' *Charter* rights is not rationally connected to any substantial and compelling objective.

11 The plaintiffs go further and contend that the government cannot establish that the infringement of the rights of members of the Council was minimally impairing, or that it meets the test of proportionality. Other groups were allowed to keep settled pay increases and only future wage rates were limited by the *ERA*. If the plaintiffs had been treated in the same manner, they

would have been allowed to keep the 2006 wage increase. This would have been a more minimal impairment of their rights, and would have had only a marginal impact on the ability of Canada to meet its objectives, they argue.

12 The Attorney General of Canada does not concede that the plaintiffs' right to freedom of association has been breached by the *ERA*. The Attorney General argues that the plaintiffs have failed correctly to apply the *Health Services* test for a breach of the right to freedom of association in the context of collective bargaining. He argues that the plaintiffs incorrectly equate the *Charter*'s protection of some aspects of the process of collective bargaining with an inviolable right to retain economic results of that process.

13 According to the Attorney General, the plaintiffs improperly isolate the impugned provisions of the *ERA* from the entire legislative scheme and isolate their membership from the 400,000 union and nonunion employees in the federal public sector whose compensation was affected by it. In any event, he says that their argument fails to take into proper consideration the exigent circumstances in which the *ERA* was conceived and enacted; circumstances which inform the proper analysis of both the scope of the s. 2(d) right and justification under s. 1 of the *Charter*.

14 The Attorney General's position is that the plaintiffs' action should be dismissed, but that if I conclude that there has been an unjustifiable breach of their constitutional rights, further submissions on an applicable remedy should be made.

15 The inquiry in this case must focus on the effect of nullifying one year of a wage increase awarded through a process of binding arbitration on the right of the plaintiffs to associate to pursue workplace goals through collective bargaining with their employer.

16 For the reasons that follow, I have concluded that the plaintiffs' action must be dismissed. First, the nullification of the plaintiffs' 2006 wage increase does not interfere with their right of freedom of association. This is so because that wage increase resulted from binding arbitration. It was a term imposed on the parties and was not the product of a process of negotiation within the collective bargaining regime. Accordingly, the nullification of the term in the collective agreement did not undermine a process of good faith negotiation and consultation that had led to its inclusion in the agreement.

17 This conclusion is sufficient to depose of this case. I will, however, also deal with the case on the assumption that this conclusion is in error. In my reasons, I consider the alternative grounds for challenging the constitutionality of the *ERA*, on the assumption that the fact that the collective agreement was imposed on the parties by binding arbitration is not a ground to conclude that the *ERA* does not interfere with freedom of association.

18 Based on this assumption, I have concluded that the *ERA* does interfere substantially with the collective bargaining process. That conclusion, standing alone, is not, however, sufficient to decide that the plaintiffs' right to freedom of association has been breached. Reaching that conclusion

requires also an analysis of the process through which the interference occurred. On that issue, I have concluded that the process of interference respected the principles of good faith negotiation and consultation and, accordingly, no breach of s. 2(b) of the *Charter* has been demonstrated.

19 I am, in any event, satisfied that if the *ERA* breached the plaintiffs' right of free association, the legislation can be justified under s. 1 of the *Charter*. I will explain this conclusion more fully later in these reasons. At this stage, it may be useful to make some general observations that inform not only the s. 1 analysis, but also the difficult question of the breach of the right to freedom of association.

20 In addressing these questions, I am instructed to apply a contextual analysis, certain aspects of which may usefully be highlighted here. It should be remembered, first, that it was by no means certain that the international and domestic policy initiatives undertaken in 2008 and 2009 would be effective. Policymakers had failed in 1929 to prevent the Depression. One only need be a casual reader of history to appreciate the devastating consequences of that policy failure. Policymakers in 2008 and 2009 believed that they had learned the lessons of the 1920s and 30s and that policies could be crafted that would address the fundamental causes of the economic and financial global crisis. With hindsight, it appears that they may have been correct. The economic and financial collapse was arrested, stabilized and a slow and fragile recovery occurred internationally and in Canada.

21 Wage restraint was an integral element of the policy response to the crisis. The economic strategy involved short term stimulus while laying the foundation for a return to acceptable budgetary balance in the medium term; a budgetary balance believed to be necessary to ensure the sustainable provision of public services. Policymakers considered restraining and ensuring the predictability of public sector compensation to be an essential means to achieve that goal. Furthermore, policymakers believed that restraining the growth of public sector compensation was necessary to prevent exerting upward pressure on private sector wages that could lead to increased unemployment. Wage restraint was thought necessary to prevent that from occurring.

22 The uncertainties and risks facing government and Parliament in crafting policies to respond to a rapidly evolving and dangerous financial and economic environment are also to be taken into account as an important part of the context. At some stage in the analysis, they need to be given due consideration. In giving effect to a 'margin of appreciation' to policymakers, one must be aware of the exigencies under which policy was crafted and the problems it was intended to address. One must guard against infusing the analysis of these contextual matters with the benefits of hindsight or expect that policymakers can achieve a standard of perfection in crafting a policy response.

23 Equally, in understanding context, it is important not to be beguiled by the language of budgets and deficits, interest and unemployment rates. It is easy to talk about an economic and financial crisis simply in statistical terms: to focus on bank profitability, credit squeezes, toxic debt, interbank lending rates and other arcane matters. But an economic and a financial crisis is also a

human and social crisis. Unemployment is not just a statistic; it is a human disaster and a cause of pain, misery and social dislocation. The state of public finances is not merely a matter of academic interest; it is a matter that bears directly on the capacity of governments to provide services to our citizenry; services, some of which, depending of course on political priorities, address social and other needs, provide income to the elderly and unemployed, or seek to combat poverty and its consequences.

24 How economies work, what causes unemployment, whether excessive increases in public sector compensation can cause private sector unemployment, how deficits affect the capacity of governments to continue sustainably to provide services are infinitely complex and controversial matters. These matters are the subject of disagreement among experts and endless debate among academics and policymakers. Disagreements about them are inherently both political and technical. Matters such as these are well beyond the capacity of this trial judge, sitting in British Columbia, fully to comprehend, let alone resolve.

25 Both of these matters: the human dimension of economic policy and its complexity and controversial nature, are pertinent to the context of this case. I emphasise them here because, in my view, the argument of the plaintiffs fails to give sufficient recognition to them and, accordingly, to their effect on their contention that their *Charter* rights have been unjustifiably breached. I will return to them later in this judgment, both in addressing whether the plaintiffs' right to freedom of association was breached by the *ERA* and, if so, whether that breach can be demonstrably justified in a free and democratic society.

26 As will also be apparent from these reasons, I respectfully differ from certain aspects of the analysis of some similar issues considered by Madam Justice Henegham in *Meredith v. Attorney General of Canada*, 2011 FC 735. I trust that the points at which our analyses differ will be clear from these reasons.

Background and Analytical Framework

27 A proper analysis of the issues in this case requires both a detailed appreciation of the facts and the constitutional principles that apply to them. At this stage, I set out some background to give context to the discussion that follows and attempt to identify the principal constitutional issues that arise.

28 The Council represents a number of unions whose members work in naval dockyards on the West Coast. Their members are employees of the Treasury Board of Canada. The Council acts as the bargaining agent and negotiates terms and conditions of employment with the Secretariat of Treasury Board.

29 In this case, negotiations took place to replace the collective agreement that expired in 2006. Those negotiations canvassed many topics, including topics related to compensation. They took place in late 2006 and early 2007, but they were unsuccessful. The union opted to invoke binding

arbitration to settle the terms of a new collective agreement. The arbitration took place in December 2008. It resulted in an award that included the wage increase for 2006 that shortly thereafter was eliminated by the *ERA*.

30 The parties disagree about some aspects of the history of the negotiations. The Council says that negotiations broke down because Treasury Board had given them a "final offer" that was rejected by the membership and Treasury Board had made it clear that there was, for practical purposes, no room to negotiate further wage increases. From the Council's point of view, arbitration was the only effective option to achieve a collective agreement. The Attorney General sees matters differently. He says that further negotiations were always an option and, indeed, Treasury Board invited the Council to return to the bargaining table; an invitation the Council refused.

31 As the parties moved towards arbitration, the economic crisis began to affect the Canadian economy. As fall headed into winter in 2008, the government began to develop a raft of policies to address the developing economic and financial crisis. One of those policies focused on public-sector compensation. After examining various options, government settled on restraining the rate of growth of wage increases for public-sector employees, by agreement if possible, but by law if necessary.

32 Implementing this policy involved attempting to bargain with large numbers of employees, represented by many bargaining agents. In many cases, collective bargains were struck that were consistent with government targets; but agreements were not reached in every case. One such case involved the Council. Despite requests from the Secretariat of Treasury Board to negotiate, and some effort at the time of the arbitration to reach an agreement through mediation, the parties were unable to reach an agreement through bargaining and the arbitrator imposed a collective agreement on them. The wage increases awarded by the arbitrator were consistent with the government's targets that would be incorporated in the *ERA*, except for the first year of the collective agreement (2006). The arbitrator awarded an increase of 5.2% for 2006; however, if the award was issued after December 8, 2008, the legislation permitted increases of only 2.5%. The award was issued on January 20, 2009. Hence, this dispute.

33 Since the decision of the SCC in *Health Services*, the right to bargain collectively is a constitutional right, derived from the right to freedom of association. It is a right that protects a process; it does not guarantee outcomes. It is right to "a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion": *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para. 54.

34 The scope and foundation of the ruling in *Health Services* has proven to be controversial in ways material to the issues before me. Most particularly, controversy has focussed on the practical relationship between the articulation of the constitutional right as one protecting a right to associate in order to engage in a process of collective bargaining and the protection of terms incorporated in collective agreements that have resulted from collective bargaining.

35 In *Health Services*, the Court had found at para. 113 that the legislation at issue had the potential to interfere with collective bargaining in two ways:

> ... first, by invalidating existing collective agreements and consequently undermining the past bargaining processes that formed the basis for these agreements; and second, by prohibiting provisions dealing with specified matters in future collective agreements and thereby undermining future collective bargaining over those matters.

36 The Court provided some guidance on what kinds of interference with collective bargaining by government action or legislation might constitute a substantial interference with the right to freedom of association. At para. 96, the Court said:

> While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. [Emphasis added.]

37 Among other observations, commentators were quick to conclude that the Supreme Court of Canada had "elevated collective agreements above statutes in the hierarchy of laws, and granted them virtually the same status as the provisions of the *Charter* itself": Peter W. Hogg, Constitutional Law of Canada, loose-leaf, 5th ed. supplemented (Toronto: Carswell, 2007), ch. 44 at 9. As articulated by Rothstein J., dissenting in *Fraser* at para. 216:

> "Although *Health Services* purported to constitutionalize the process of collective bargaining rather than its fruits, it in fact granted constitutional protection to the collective agreements on the basis that they were the fruits of that process. In *Health Services*, the challenged legislation had the effect of invalidating portions of existing collective agreements and consequently "undermining the past bargaining processes that formed the basis for these agreements": *Health Services*, at para. 113.

38 Rothstein J. in *Fraser* went on to criticize as unworkable the majority's instruction in *Health Services* to protect the process of collective bargaining without also protecting its substantive fruits. In his view, the distinction is unworkable because it is "impossible to divorce the process of collective bargaining from its substantive outcomes": para. 263. In support of this conclusion, Rothstein J. observed at para. 264 that *Health Services* itself:

> did not respect this distinction since the majority granted constitutional protection to "significant" terms of the collective agreements at issue in that very

> case. The majority found that the challenged B.C. legislation breached s. 2(d) not just by limiting future bargaining but also by invalidating existing collective agreements and consequently undermining the past bargaining process that formed the basis for these agreements. Therefore, the application of the collective bargaining right in *Health Services* had the result of protecting the substance of those agreements.

39 The majority of the Court in *Fraser* addressed these concerns at para. 76:

> Our colleague argues that *Health Services* gives constitutional status to contracts, privileging them over statutes. The argument is based on the view that *Health Services* holds that breach of collective agreements violates s. 2(d). In fact, as discussed above, this was not the finding in *Health Services*. The majority in *Health Services* held that the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining, undermines the s. 2(d) right to associate, not that labour contracts could never be interfered with by legislation.
>
> (Emphasis added.)

40 The majority in *Fraser* explained that *Health Services* was a modest extension and application of the principles endorsed by the Court in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. *Dunmore* had made it clear that "the right to associate to achieve workplace goals in a meaningful and substantive sense is protected by the guarantee of freedom of association, and that this right extends to realization of collective, as distinct from individual, goals": *Fraser* at para. 32.

41 The key propositions that underlay this conclusion were summarised at para. 33. They are:

> - Section 2(d), interpreted purposively, guarantees freedom of associational activity in the pursuit of individual and common goals.
>
> - The common goals protected extend to some collective bargaining activities, including the right to organize and to present submissions to the employer.
>
> - What is required is a process that permits the meaningful pursuit of these goals. No particular outcome is guaranteed. However, the legislative framework must permit a process that makes it possible to pursue the goals in a meaningful way.

> - The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association, in that it negates the very purpose of the association and renders it effectively useless. ...

42 *Health Services*, the majority tells us, affirmed "a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion": *Fraser* at para. 54.

43 The importance of the reciprocity between the right to make representations and the obligation that they be considered in good faith was underscored by the majority at para. 40, where it was made clear that more is required by s. 2(d) than the right to make representations. The right is not "limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have considered by the employer. In this sense, collective bargaining is protected by s. 2(d)".

44 Hence, the problem that arose in *Health Services*, explained the majority in *Fraser*, arose because the legislation by nullifying important existing terms in collective agreements and preventing bargaining over them in the future undermined the process that had led to agreement on them and eliminated the possibility of future bargaining, viewed both as the right to make representations in relation to them and the obligation to consider those representations in good faith.

45 It follows then that establishing a breach of the right turns on demonstrating the effect on the process of collective bargaining. State action that unilaterally extinguishes a term in a collective agreement does not breach the right simply because it removes a contractual term. It is a breach only because of the effect of extinguishing the term on the process of collective bargaining that led to its inclusion in the agreement or by affecting the possibility of bargaining over that term in the future.

46 The majority in *Fraser* was explicit, while rejecting the criticism that it had elevated contracts to a higher constitutional status than statutes, in stating that the constitutional right to bargain collectively did not mean that legislation could never interfere with labour contracts. The Court in *Health Services*, in illustrating possible breaches of the right, said only that nullifying contractual terms may, not must, interfere with the right (at para. 96). A similar point is made at para. 92 where the majority stated: "unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining." Clearly, nullifying a term in a collective agreement is not sufficient to violate the constitutional right.

47 It follows, therefore, that a key issue is to decide whether the facts of this case fall within the category of cases left open by the Supreme Court of Canada in which legislative interference with a labour contract does not breach the right to freedom of association. The plaintiffs put their case too

high, in my view, in arguing that the nullification of any important term in a collective agreement will always breach s. 2(d) and require justification under s. 1.

48 The explanation offered by the majority in *Fraser* of the nature of the constitutional right and the decision in *Health Services* focuses attention on the centrality of processes that protect negotiation and consultation. It follows, therefore, that another key issue in this case is to decide whether nullifying a term in a collective agreement that was imposed on both parties and did not result from a process of negotiation and voluntary agreement can properly be seen as affecting the process that is protected by the constitutional right.

49 A further set of issues has to do with the type and severity of the effect of state action on the right to collective bargaining before a breach of the right can be found. In *Health Services*, the Court addressed the issue in terms of substantially interfering with the right to bargain collectively. In *Fraser*, the majority explained its conclusions in *Health Services*. What is repeatedly stressed about *Health Services* is that conduct that "renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association" (para. 33) or conduct that "substantially interfered with the possibility of meaningful collective bargaining" (para. 34) is a limit on the right. In *Health Services*, the government took action that rendered the meaningful pursuit of collective bargaining of certain workplace goals "impossible and effectively nullified" (para. 38) its employees' right to associate.

50 In *Fraser*, the majority stated that: "In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals": at para. 46. The point is reiterated in the next paragraph: "What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by law ... or by government action, a limit on the exercise of the s. 2(d) right is established".

51 The analysis involves addressing the importance of a matter to the process of collective bargaining, but most particularly, to the effect of an interference with collective bargaining on the capacity of union members to associate to achieve work place objectives.

52 One of the issues argued before me turns on how broad or narrow the impact on the capacity to associate need be before the right can be breached. Is it sufficient to breach the right that one isolated element of the bargaining process is interfered with, leaving all others unaffected? Is it enough to breach the right, in other words, that state action makes it impossible to achieve a particular, important workplace goal even if the action does not impede achieving other goals and may even have the effect of enhancing the capacity of employees to associate to achieve them? This question arises here because the *ERA* left untouched the vast majority of issues that had been the subject of bargaining between the parties.

53 Related to this question is the question how one assesses the effect of an interference on the capacity of employees to associate in pursuit of workplace goals. Does one examine the actual

effect of the interference on the capacity of these particular employees to associate in pursuit of workplace objectives or does one focus on generalities or typical effects? This question arises here because nothing in the record suggests that the actual capacity of these employees to associate generally to pursue workplace goals was affected in any real or practical sense. Indeed, since the passage of the *ERA*, a new collective agreement has been negotiated that deals with all the issues that were unresolved at the time the *ERA* came into force, including wages going forward.

54 Yet another set of questions revolves around the process by which measures argued to interfere with the right to collective bargaining were implemented. This is so because the Court in *Health Services* suggests that before a finding can be made that there is a breach of the s. 2(d) right, one must examine the process by which changes are made and how they affect the voluntary good faith underpinning of collective bargaining. As the majority observed at para. 129: "Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining."

55 This passage, and several others, suggests that the Court had in mind two, possibly independent, matters that bear on whether there had been a breach of the right. First, there may be no breach if the process leading to the interference respects the principle of good faith negotiation and consultation. Second, there may be no breach if the result of the interference has preserved the principles of good faith negotiation and consultation. Both of these interpretations draw support from the judgment.

56 The Attorney General submits that even if the retroactive nullification of the 2006 wage increase is a substantial interference with collective bargaining, there is no breach of the right to collective bargaining because the interference occurred in the context of a major effort to negotiate agreements with tens of thousands of employees represented by tens of bargaining agents. Moreover, the *ERA* was modelled on rates of wage increases that reflected the going rates for the relevant years that had been achieved through collective bargaining. In that way, the legislation preserved the underpinnings of the collective bargaining regime.

57 The plaintiffs, by contrast, dispute the relevance of the efforts to negotiate agreements consistent with the wage increases that were to be incorporated in the *ERA*, and say that the *ERA* is fundamentally inconsistent with the principles of collective bargaining because it removed any possibility of negotiating anything different from its terms, thereby eliminating entirely the process of good faith consultation fundamental to collective bargaining. They too are able to point to passages in *Health Services* to support their argument.

58 I am influenced in my analysis of this issue by the decision of Madam Justice Griffin in *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, who interpreted Health Sciences as establishing that only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty to consult and bargain in good

faith, will s. 2(d) be breached.

59 Finally, on this set of issues, it will be necessary to consider the relevance of the circumstance under which the *ERA* was implemented. This issue arises because the Court recognised at para. 107 in *Health Services* that "[s]ituations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith." The question is whether that means that legislative interference with a collective agreement that might be a substantial interference with the right to collective bargaining in the absence of an urgent matter is capable of being "saved" if the interference is enacted as a result of an emergency and a good faith effort was made to consult with those affected before it came into force?

60 This issue is important to this case precisely because the reason for the legislation was to cope with an emergency, and good faith efforts to negotiate generally with government employees who did not yet have collective agreements were made as best they could be. Depending on how this question is resolved, facts relating to the exigencies of the financial crisis and the government's efforts to negotiate with its employees generally, and with the plaintiffs in particular, may be relevant to whether there has been a breach of s. 2(d) and not just to whether any breach can by justified by s. 1.

61 If a breach of s. 2(d) is established, the question arises whether the breach is justified under s. 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society. As set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, there are four stages to this analysis. The government must demonstrate:

(a) the objective of the law must be pressing and substantial;
(b) there must be a rational connection between the pressing and substantial objective of the law and the means chosen to achieve the objective;
(c) the challenged law must minimally impair the *Charter* right; and
(d) there must be proportionality between the legislative objective and measures, more specifically, between the salutary and deleterious effects of the law.

62 Each element of this analysis is in issue in this case. The plaintiffs argue that the Attorney General has not discharged his burden to justify the breach of their rights by clear, cogent and persuasive evidence. There was, they say, no substantial and compelling purpose served by enacting the *ERA* and certainly no such purpose served by the specific provisions that led to their award being nullified merely because it was issued after December 8, 2008.

63 The plaintiffs dispute the Attorney General's characterisation of the purpose of the *ERA*. They say its objectives were "budgetary" or "financial". It was all about saving money. Saving money is not a pressing and substantial reason to violate constitutional rights. But, even if it were, the means adopted by the government were arbitrary and unfair in their effect on the plaintiffs and so cannot be justified as a rational means to achieve the *ERA*'s objective. Moreover, rolling back a wage

increase for the 2006 year does not, the plaintiffs contend, minimally impair their rights. The government's objectives could have been achieved without any wage restraint being imposed for 2006 or by treating all agreements and awards made before the *ERA* was introduced in the same manner as it treated all agreements and awards made before December 8, 2008.

64 The practical point the plaintiffs make is this. They say that if all collective agreements in place at the time the *ERA* was introduced were treated in the same way that the *ERA* treated awards or agreements made before December 8, 2008, then there would be only one effect. The government would have to pay the plaintiffs their 2006 wage increase. How, they argue, can it be plausibly suggested that this would have any effect on the government's ability to respond to the financial and economic crisis? Yet, paying the award would entirely eliminate the breach of their constitutional rights.

65 It is apparent that the s. 1 analysis calls for an assessment of the reasons for enacting the *ERA*, the purpose it is intended to serve and, more particularly, why December 8, 2008 was chosen as the critical date for determining whether agreements or awards would be subject to its terms. The analysis will also require an assessment of the margin of appreciation to be accorded by the government in fashioning measures to respond to emergencies. Perhaps, most critically, it requires an analysis of how to evaluate the effect of the legislation on the plaintiffs in the context of its wider effects on other employees.

66 Before addressing these issues, I will turn to set out the relevant facts in detail.

Facts

67 The inquiry in this case focuses on the effect of nullifying one year of a wage increase awarded through a process of binding arbitration on the right of the plaintiffs to associate to pursue workplace goals through collective bargaining with their employer. This inquiry is fact specific. It must take account of the history and scope of the collective bargaining that occurred between the plaintiffs and their employer prior to the introduction of the legislation in issue. It must examine the impact of the legislation on that bargaining process to ask whether the nullification of the term rendered the meaningful pursuit of workplace goals impossible. It must also consider the effect of the legislation in the context of collective bargaining between the federal government and its employees generally. Finally, it must explore the rationale for the legislation, the circumstances that led to its introduction and the options the government considered in deciding how to achieve its objectives. To consider these questions, a detailed examination of the facts is required.

The Bargaining Process between the Council and Treasury Board

68 The Council is the certified bargaining agent for all the employees of the Treasury Board in the Ship Repair (West) Bargaining Unit. The Council is composed of three representatives from each of its constituent unions, and represents approximately 985 employees. These employees are tradespersons who maintain and repair naval vessels such as frigates, destroyers, supply ships and

submarines for the Canadian Navy.

69 The Council has been the certified bargaining agent since 1976. From 1968 to 1976, employees that met the same statutorily defined classification but worked on either the East or West Coast of Canada were a single bargaining unit represented by a single bargaining agent. On the application of the Council, this single bargaining unit was divided into East and West Coast bargaining units. Bargaining for each unit has been separate since that time.

70 The primary object of the Council is to unify all federal public service employees located on the West Coast repairing vessels within a marine repair facility, and workers employed in the repair and testing of torpedoes and sonar buoys, under the jurisdiction of the Treasury Board, for the purpose of certification, collective bargaining and administration of collective agreements including adjudications, conciliation and arbitration.

71 The employment relationship between the employees and the Treasury Board is governed by the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 [*PSLRA*].

72 In 2000, the plaintiffs' collective agreement was established through the conciliation process. The parties to that agreement were the Council, as bargaining agent, and the Treasury Board, as the employer. In 2003, the parties reached an agreement through negotiations. This led to a three year agreement, which expired in September 2006. The Council gave notice to bargain on June 16, 2006. At that time, under the *PSLRA*, the Council chose arbitration as the dispute resolution process.

73 In a pre-bargaining survey, members identified wages as a top priority. The parties exchanged proposals on July 20, 2006. Negotiations took place from October 16 to 19, 2006, November 6 to 9, 2006, February 5 to 8, 2007, and April 23 to 26, 2007.

74 Although wages and compensation generally were important issues to the members, these issues were addressed in many and various forms. Nearly 100 different items were tracked and negotiated. The plaintiff's July 12, 2006 bargaining proposal included dozens of changes related to compensation they sought in a new collective agreement. These items included earlier accumulation of vacation leave credits, additional vacation leave with pay, increased sick leave with pay, payout of sick leave when employment terminates, increases to other types of leave with pay, increases in severance pay, changes to hours of work and overtime, increases of various allowances, and an increase in shift premium.

75 The employer also negotiated compensation related items including such matters as compensation for work on a holiday, bereavement leave, hours of work and overtime, and call back pay.

76 Bargaining also addressed increases to compensation rates. The plaintiffs sought economic increases in line with increases obtained by other bargaining agents in the public sector. The going rate for those settlements was approximately 2.5% for 2006 and 2% for each of 2007 and 2008. The

plaintiffs did not seek any competitive allowance in addition to those percentages until bargaining had broken down and the binding arbitration process had been initiated. It is worth pointing out here that the legislated increase in the *ERA* was equivalent to the rate that had been negotiated with other bargaining agents in the public sector through the process of collective bargaining.

77 A central issue the parties bargained had to do with the potential to increase compensation by implementing a Broader Employability (BE) initiative. Essentially, this involved introducing greater flexibility in working practices to facilitate productivity gains, some portion of which could be passed back to the members in the form of increased compensation. Apparently, the issue was complex because it required reclassification of traditional jurisdictional job boundaries, and the creation of new job descriptions, as well as the determination of the relative value of work done within these new job descriptions.

78 The parties appear to disagree about what happened in April 2007, although the difference may be more a matter of characterization than substance. The government's evidence is that the two negotiating teams were able to reach an agreement on a potential new collective agreement, subject only to ratification by the membership. The agreement was reduced to writing in the form of a Memorandum of Agreement.

79 The Memorandum of Agreement included the following terms:

(a) Economic increases of: 2.5% in 2006; and, 2% in each of 2007 and 2008;
(b) A target implementation date for implementation of the Broader Employability (BE) initiative of July 1, 2007;
(c) Various increases in wage rate according to Pay Group for each BE-trained employee upon appointment to their revised jobs (increases from 1% to 5%); and,
(d) changes to compensatory leave.

80 The Council's evidence is that in April 2007, the Treasury Board presented a "final offer" to its bargaining team. Because it was the employer's final offer, the bargaining team felt obliged to take it back to Council. However, members of the bargaining team did not think the offer an appropriate resolution of the issues between the parties. At a Council meeting on April 30, 2007, the Council voted to take the "tentative agreement", consisting of the articles agreed to and the employer's final proposal on wages, to the membership for a vote. The Council made no recommendation about whether the members should ratify the "tentative agreement".

81 In a vote held during the week of April 30, 2007, the membership rejected the "tentative agreement" by 89%.

82 No further substantive collective bargaining occurred after the membership rejected the "tentative agreement". The Council began to prepare its case for arbitration. It appears that it had decided on arbitration rather than any further negotiation. The government's evidence is that the

Secretariat staff of the Treasury Board approached the plaintiffs on several occasions offering to return to collective bargaining. These overtures were all refused. The Council says that there were some informal discussions with the Treasury Board in September 2007, but no formal offers were made.

83 There is a conflict in the evidence about when the request for arbitration was made. The Council says that it requested arbitration of their collective agreement in October 2007. The Attorney General says that the request was not made until March 25, 2008. It appears that while there were discussions before March 25, 2008 about who would be a suitable arbitrator, the formal request for arbitration was not made until that date. Nonetheless, it appears that the Council had decided that further collective bargaining was a less attractive option than arbitration shortly after its membership rejected "the tentative agreement", apparently because it concluded, rightly or wrongly, that further collective bargaining would not yield material progress given the position of the employer.

84 The arbitration began on December 13, 2008. In the months before the arbitration began, preliminary motions were made by each side relating to such matters as the terms and conditions of the arbitration and disclosure obligations. Apparently the motions were resolved with mixed success. The parties disagree about whether these motions delayed the arbitration process.

85 In the lead up to the arbitration, two events occurred which the plaintiffs regard as material to the collective bargaining context in which they were operating.

86 First, on May 9, 2008, the arbitration award relating to the East Coast Council's collective agreement was delivered (the "East Coast Award"), setting the terms of the collective agreement for the Ship Repair (East) Bargaining Unit for the period from January 1, 2007 to December 31, 2009.

87 In that award, issued by Arbitrator Bloch, the Ship Repair (East) Bargaining Unit received a 5.6% pay adjustment, effective January 1, 2007 and an additional 2% economic increase for the year 2007 followed by economic increases of 2% in the years of 2008 and 2009. The award made other adjustments to compensation as well.

88 Second, on October 8, 2008, the employees at Victoria Shipyards signed a five year collective agreement. Employees at Victoria Shipyards are also tradespersons with similar educational preparation to members in the Ship Repair (West) Bargaining Unit. They too work in the ship repair industry; however, the employees at Victoria Shipyards do not engage in the same high level, security sensitive war ship repair work done by the members of the Ship Repair (West) Bargaining Units. The collective agreement signed by Victoria Shipyards in October 2008 provided for economic increases of 4.25% in each year of the agreement, as well as an additional $0.82 wages increase for its tradespersons in 2008, making the total wage increase for 2008, 4.28%.

89 The arbitration took place on the scheduled dates.

90 The Council's written submissions for the arbitration were 111 pages in length. The federal government's submissions were 105 pages. Both parties provided substantial background information, as well as extensive submissions on the application of the factors set out in s. 148 of the *PSLRA*. The federal government's position on wages was the same as its "final offer" sent to the Council on November 18, 2010.

91 Section 148 of the *PSLRA* provides that an arbitration award must take into account the following factors, in addition to any other factors it considers relevant:

> (*a*) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
> (*b*) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
> (*c*) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;
> (*d*) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
> (*e*) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

92 The arbitrator asked the parties if they would like assistance in resolving the dispute. The parties did try to reach a mediated agreement. They canvassed many issues in the effort to settle the collective agreement, including discussion of BE. When it became clear that the issue of compensation could not be resolved, the arbitration proceeded. However, even after the arbitration hearing concluded, the parties continued to try to resolve the issues between them through negotiations.

93 The Arbitration Board issued its award on January 20, 2009. The award states that the Board had considered all of the factors listed in s. 148, including s. 148(b) (comparability) and s. 148(e) (state of the economy and Canada's fiscal circumstances). The portion of the Arbitration Award dealing with wages states:

> For the foregoing reasons, an initial 5.2% pay adjustment is awarded as of October 1, 2006 with a view to the necessity of offering comparable compensation under s. 148(b). The term of the collective agreement will be from

> October 1, 2006, to January 30, 2010, in compliance with the strictures of s. 156. With regard to the Government of Canada's fiscal circumstances going forward, as per s. 148(e), economic increases that happen to do a bit better than keep pace with inflation, will be as follows: October 1, 2006, 2.5%; October 1, 2007, 2.3%; October 1, 2008, 1.5%; October 1, 2009, .5% [i.e., 1.5% annualized].

94 The Board referred to the East Coast Award as well as the Victoria Shipyards agreement, and the government's recent economic statements. The Board also took into account the demand for qualified tradespersons and ongoing recruitment issues.

95 The arbitrator did not consider issues related to BE because he did not have the jurisdiction to do so.

96 By operation of s. 154 of the *PSLRA*, the award became binding on the day it was made, that is, January 20, 2009.

97 At this point, it is important to recognize that the environment in which the arbitration took place had changed dramatically from the time the Council requested arbitration earlier in 2008. The mandate of Treasury Board had changed as a consequence of the developing economic crisis. As that mandate had changed, there had been some communications between the plaintiffs and the staff of the Secretariat of the Treasury Board about the revised mandate and the potential for restraint legislation that could have consequences for any arbitration award. These communications are important to the question whether any potential interference with the freedom to associate had occurred in the context of meaningful and good faith consultation. I will, therefore, return to the details of the communications between the parties in the time shortly before, during and after the arbitration. It is necessary, however, to set the context in which these communications occurred. Accordingly I now turn to the wider context.

The Global Economic Crisis and its Impact on Canada

98 The Attorney General provided evidence on the global economic crisis and its consequences for Canada through Mr. Rochon, a senior official at the Department of Finance. Mr. Rochon was personally involved in monitoring the global financial and economic crisis that arose in 2008 and continues to affect federal fiscal management in Canada. He was also personally involved in the development of the government's response to the crisis, including the planning of the Minister of Finance's November 29, 2008 speech, the preparation of the November 2008 Economic and Fiscal Statement and the 2009 Budget tabled in Parliament on January 27, 2009, along with the *ERA*. His evidence is not directly challenged.

99 Mr. Rochon deposes that beginning in August 2007 and peaking in late 2008 to early 2009, the world experienced a massive financial crisis, unprecedented in scope and severity, resulting in the most serious global recession since the 1930s. The crisis, originated in the collapse of the US housing market, but rapidly intensified and spread around the world, causing stock markets to

plummet, economic activity to contract, producer and consumer confidence to fall, employment to decline, and major financial institutions to fail.

100 The speed and steepness of the global economic downturn led to unprecedented responsive action by governments and central banks around the world. There was a strong consensus among international organizations that governments needed to act quickly to mitigate the recession and its socioeconomic impacts, as well as support the economic recovery.

101 The economic crisis escalated significantly in late September 2008, triggered by the failure and near failure of major financial institutions in the US and Europe.

102 In late September 2008, the Department of Finance saw that liquidity in financial markets had dropped sharply, raising banks' financing costs, making access to credit difficult for firms and households, and causing stock markets around the world to plunge steeply. Over a matter of weeks a cascading series of extraordinary developments struck developed economies. International credit markets seized, stock markets continued to fall, and the interest rates at which banks lent to each other soared to unprecedented levels, a key indicator of the anxiety and instability in the financial markets.

103 The Department of Finance was concerned that the international financial market crisis would spill into the domestic economy, raising the risk of a recession in Canada. The deterioration occurred so quickly that in early November 2008 the IMF issued an updated report, only one month after its previous one had been published. This was unprecedented and indicative of the extraordinarily rapidly changing economic global environment. The IMF repeatedly downgraded its economic growth forecasts, describing the financial crisis as "virulent" and the economic outlook as "exceptionally uncertain". By late October 2008, there was a palpable atmosphere of uncertainty and concern as the economic situation was deteriorating weekly. At that time, the Minister of Finance publicly stated that "after the extraordinary developments that have taken place in a matter of weeks, no one can reliably predict what will happen next".

104 By early October 2008, the global crisis was beginning to have serious implications for the Canadian economy. The Canadian economic outlook, which had appeared relatively benign in September, had to be revised down. The Canadian economy is relatively open and affected by changes in the economies of other countries. Those changes and relationships are detailed in the evidence. Suffice it to say that decreases in economic growth in the United States and internationally, and declines in commodity prices, including particularly energy prices, reduced economic activity in Canada.

105 During this period, projections for international economic growth were constantly and substantially revised down. The same is true for projections of Canadian economic growth. Between February and November 2008, government forecasts for nominal GDP projections for 2009 had been cut by 3.5 percentage points. Apart from the direct consequences of reduced economic activity, this translates roughly into a loss of $8.9 billion in projected revenue for the government.

106 The financial crisis began to have direct effects on economic activity in Canada. Employment in Canada declined abruptly in November 2008, when approximately 71,000 jobs were lost. Between November 2008 and January 2009 about 264,000 jobs disappeared.

107 Lower economic activity has a direct negative impact on the Canadian workforce and Canadian businesses, as well as on the government's financial capacity to provide Canadians with programmes, services and benefits. Low output and high unemployment reduce tax revenues while causing government expenses to rise, mainly reflecting higher employment insurance benefits payments. Econometric calculations suggest that a 1% decline in real GDP results in a $2.6 billion loss in revenue and a $500 million increase in expenses.

108 Between October 2008 and January 2009, the government began to consider and review its options to respond to the effects of the global economic crisis on Canada. Public sector wage restraint was among those options. Public announcements suggested, however, that wage restraint would apply to compensation that had not yet been settled from 2007 forward.

109 In his November 27, 2008 Economic and Fiscal Statement, the Minister of Finance announced that specific wage increase limits would be applied to federal employees; employees of separate agencies and Crown Corporations; and Members of Parliament, Senators, Cabinet Ministers and GIC appointees. The speech underlined the importance of demonstrating the government's respect for public money by exercising spending restraint in response to the financial crisis and by ensuring that, as the economy slowed, public sector pay did not exceed what taxpayers could afford.

110 Following the November Statement, global economic conditions deteriorated further, reflecting what the IMF in its January 2009 report characterized as "a pernicious feedback loop between the real and financial sectors". In that report, the IMF emphasized the need for "strong and complementary policy efforts ... to rekindle activity" and recommended "timely implementation of fiscal stimulus". It also struck a note of caution:

> Fiscal stimulus packages should rely primarily on temporary measures and be formulated with medium-term fiscal frameworks that ensure that the envisaged buildup in fiscal deficits can be reversed as economies recover and that fiscal sustainability can be attained in the face of demographic pressure.

111 The outlook for the Canadian economy was downgraded by both the IMF (which projected a decline of 1.2% in real GDP) and private-sector forecasters in Canada (who projected a decline of 0.8%). This represented the first year of negative growth since 1991. It reflected the negative impact of the global recession on Canadian exports, commodity prices, and consumer and investor confidence. It was also seen in the dramatic and sudden increase in unemployment in the winter of 2008-2009.

112 In response to the crisis, the government introduced an Economic Action Plan through the

January 2009 budget. The plan involved a complex, interlocking and multifaceted set of legislative and policy initiatives intended to address the negative effects of the recession and stimulate the economy. In broad terms, policies attempting to support the economy in the short run were combined with measures designed to ensure appropriate management of financial resources to assist in restoring budgetary balance and fiscal sustainability in the medium to long term.

113 The plan introduced $40 billion of stimulus measures over two years aimed at supporting the economy and creating jobs. The principles underlying the stimulus spending were that it should be timely, support private demand at its weakest, target businesses and families most in need, and be temporary to avoid long-term deficits.

114 Also included in the plan were tax measures, changes to employment insurance, measures to promote the stability or maintain the efficiency of the financial system and financial markets, amendments to the method of calculating equalization payments to the provinces and the Canada Health Transfer, and also temporary limits on wage increases for employees and others in the federal public sector implemented through the *ERA*.

115 Stimulus and restraint measures were purposely enacted together. In the government's view, the credibility and maximum effectiveness of the Economic Action Plan rested on the government's ability to demonstrate its commitment to sound ongoing fiscal management and long-term sustainable public finances. In order to restore confidence among Canadians, the government considered it necessary to act boldly with a stimulus package and also to ensure that the government's fiscal position was sustainable coming out of the crisis.

116 The Economic Action Plan also reintroduced most of the spending restraint measures proposed in the November 2008 Statement, including the *ERA*.

The Development of the Policy of Public Sector Wage Restraint

117 The federal government is the largest single employer in the Canadian economy with over 400,000 employees drawing their compensation directly or indirectly within the public service.

118 For the 2008-2009 fiscal year, compensation costs are approximately 37% of direct program expenditures. Within what is referred to as the Core Public Administration ("CPA"), there are approximately 210,000 active employees of whom approximately 180,000 are union. In addition, the RCMP employs approximately 23,000 members and the Canadian Forces has 94,000 members. What are known as the separate agencies employ about 65,000 employees, of whom 56,000 are union.

119 The Treasury Board negotiates terms and conditions of employment with certified bargaining agents. Currently, there are 21 bargaining agents certified to represent employees in the federal public administration, 17 representing employees in the CPA. The vast majority of employees in the CPA are covered by 27 collective agreements. The vast majority of employees in the separate

agencies are covered by 59 collective agreements.

120 In the early fall of 2008, the Treasury Board was involved in collective bargaining with major bargaining agents in the CPA. Numerous separate employers in the separate agencies were also engaged in collective bargaining. Other bargaining agents had already either signed collective agreements or were at different stages of arbitration.

121 In October 2008, in the midst of ongoing negotiations, the Secretariat of the Treasury Board was informed by officials from the Department of Finance of the emerging fiscal concerns arising from the rapidly deteriorating global economic situation and its implications for the Canadian economy. In planning the government's response, the Secretariat was asked to develop measures to restrict spending. A few days later, the Department of Finance requested more specific advice from the Secretariat on options to limit compensation costs within the current round of collective bargaining to control the growth of the wage bill.

122 Growth of the wage bill has a strong and direct influence on federal spending and the government's overall fiscal position. The Department of Finance was also concerned that increases in public sector wages would result in upward pressure on private sector wages causing, in its view, higher unemployment in the private sector. This was a particular worry for employment in Ontario. Ontario had suffered significant job losses and the government's fear was that excessive growth in public sector wages would have serious and deleterious effects on employment there.

123 The Secretariat evaluated three broad approaches to controlling the growth of public sector compensation. First, controlling the growth of the number of employees. This option was rejected because it could not produce adequate results quickly enough given the urgency facing the government. Hiring restrictions, layoffs and departure incentives would not produce immediate savings and could require additional expenditures. Moreover, laying-off public servants would require the elimination or reduction in government programmes and services.

124 Second, the Secretariat considered, but rejected, controlling the growth of public sector compensation by controlling movement of employees within pay ranges. This approach was rejected because the pay component of promotions and other movement within existing pay ranges is governed by existing terms and conditions of employment and collective agreements. Suspending them would substantially interfere with those existing terms and conditions of employment and collective agreements; a result that was undesirable and unnecessary to achieve the government's objective.

125 The third set of options involved reducing wages, eliminating wage increases or limiting wage increases. The Secretariat recommended limiting wage increases rather than freezing or reducing them, because it did not believe that either freezes or reductions in wages could be successfully negotiated through collective bargaining, but that limiting wage increases probably could be.

126 The Department of Finance supported this recommendation for a number of reasons. In particular, it considered that this option would avoid creating the upward wage pressure on private sector employers that would cause more private sector job losses, adequately reduce the rate of wage growth, and demonstrate predictability in government compensation. All of this was considered crucial to the credibility of the overall economic and fiscal response plan being developed during the crisis. The Department of Finance also thought that the overall credibility of the government's response to the economic crisis would be enhanced if the limited wage increases could be achieved through negotiation before the Economic and Fiscal Statement that was going to be delivered at the end of November 2008.

Implementing Public Sector Wage Restraint

127 The government accepted the recommendation to control the growth of the public sector by limiting wage increases. The negotiators at Treasury Board received instructions to return to the collective bargaining tables with a mandate to negotiate within new defined limits. Government also instructed that legislation be prepared that would apply where wage increases within the mandated limits had not been achieved by collective bargaining.

128 Acting on these instructions, officials in the Secretariat contacted the heads of all bargaining units, including those that were in negotiations, those that had already signed collective agreements, those headed for negotiations, and those that had gone to arbitration to inform them of the government's mandate and to open the door to attempt to secure the greatest possible number of agreements before the Economic and Fiscal Statement was delivered on November 27, 2008.

129 By November 26, 2008, there were still unresolved agreements, but bargaining had momentum and was continuing. Government thought there was a good prospect that further agreements could be concluded if the deadline for achieving agreement was extended. As a result, the Secretariat continued negotiations with those agents willing to continue bargaining, but informed them that agreements would have to be concluded by December 8, 2008.

130 By the extended deadline, the Secretariat signed agreements with 14 bargaining agents in the CPA. The collective agreements covered 122,000 employees out of a total bargaining population of about 180,000 employees. The agreements were concluded on terms consistent with the mandate that had been given to the Secretariat and consistent with the terms for wage increases that would be incorporated into the *ERA*. As well, by December 8, 2008, there were 45 actual or tentative agreements in place in the separate agencies, including Staff of the Non-Public Funds.

131 The first public announcement of the government's plans to introduce legislation to impose wage restraint was made in the November 27, 2008 Economic and Fiscal Statement. That document stated that legislation would put in place wage increases as follows:

> 2.3 per cent in 2007-08 and 1.5 percent for the following three years, for groups in the process of bargaining for new agreements. For groups with collective

> agreements already covering 2008-09, the 1.5 per cent would apply for the remainder of the three year period starting at the anniversary date of the collective agreement. In addition, the legislation would suspend the right to strike on wages through 2010-2011.

132 This statement intimated that wage restraint would start with the 2007-2008 fiscal period. In addition, wage restraint would apply to those with concluded agreements only prospectively.

133 On November 27, 2008, the Minister of Finance told the House of Commons:

> We will introduce legislation to ensure that the pay for the public sector grows only in line with what taxpayers can afford as the economy slows. This legislation would put in place annual public service wage restraints of 2.3% for 2007-08 and 1.5% for each of the following three years.

134 A similar statement was made in the House of Commons on November 28, 2008.

135 Each of the public statements referred to four years of wage restraint, with increases of 2.3% in 2007-2008 and 1.5%the following three years. None of the public statements about the *ERA* made before its introduction referred to the 2006-2007 fiscal year. None of the public statements referred to December 8, 2008 - the date before which concluded agreements and awards were exempted from the limits imposed by the *ERA*.

136 Parliament was prorogued on December 4th, 2008. The *ERA* had not yet been introduced.

Implementing Wage Restraint with the Plaintiffs

137 While there is some disagreement in the evidence about the nature and content of communications between the Treasury Board and the Council, a matter to which I will return, there is no question that the Council was contacted and informed of the effect of changing circumstances on the Treasury Board mandate to negotiate a collective agreement.

138 On November 12, 2008, Mr. Rogers, the President of the Council, received an email from the federal negotiator, Georges Hupé. In the email, Mr. Hupé referred to the current economic conditions and the Minister of Finance's recent speech. The email states, in part:

> Based on the Minster's speech, folks in the Department of Finance are saying that, given the difficult economic period that we have now entered into, they are looking for cost containment and predictability of expenditures for the period 2007/2008 to 2010/2011. Despite the fact that we find ourselves in a unique situation given that our dispute has already been referred to arbitration and that a hearing is scheduled for mid-December, I still wanted us to be able to reflect on the situation and give us the option to resume our talks if we so choose.

> Feel free to give me a call to discuss further. In any event, if I haven't heard from you by the end of the day, I will give you a call tomorrow.

139 Mr. Trottier, who was Mr. Hupé's senior in the Secretariat, deposes that he instructed him to contact the Council to inform it of the nature of the developing economic crisis, the uncertainty within the system, the significant risk that the government would proceed with legislation as part of its efforts to respond to the crisis if certainty could not be obtained through agreement, and that the parties should sit down to try and resolve the outstanding collective bargaining issues immediately to try and reach the best agreement possible that could avoid or limit the repercussions of any legislation that could be introduced.

140 Mr. Trottier says that he is satisfied that that message was delivered, but that, in any event, he spoke to Mr. Rogers and told him that any legislation would probably prevent any form of restructuring and include caps on increases to the wage rate; apply to all outstanding years to be covered by the collective agreement, including 2006; and override any award the plaintiff might obtain at arbitration, if it exceeded the government's targets.

141 Mr. Trottier deposes that he stressed to Mr. Rogers that the Council should return to the bargaining table as even the terms that had been agreed to tentatively in April 2007 might not be possible to replicate after the passage of any restraint legislation. He says that he specifically advised Mr. Rogers that any settlement that dealt with the BE initiative as it related to the fiscal year, prior to late 2008, would be respected by the employer.

142 His evidence is that Mr. Rogers advised that he would check with the rest of the Council and get back to him.

143 At about the same time and likely forming part of the context of this conversation, on November 18, 2008, the Treasury Board announced that it was issuing final offers to all bargaining agents currently in the collective bargaining process. The Council was sent a "final offer" which included the following economic increases:

> Effective October 1, 2006 - 2.5%;
>
> Effective October 1, 2007 - 2.3%;
>
> Effective October 1, 2008 - 1.5%;
>
> Effective October 1, 2009 - 1.5%;
>
> Effective October 1, 2010 - 1.5%.

144 Later, according to Mr. Trottier, Mr. Rogers did get back to Mr. Hupé to reject the final offer

and told him that the Council did not want to return to the bargaining table or have any further discussions.

145 Mr. Rogers appears not to remember being told what Mr. Trottier says he told him. He says that he and Mr. Hupé had a discussion about the final offer in the hallway of a hotel in Saint Sauveur, Quebec. Mr. Hupé indicated that it was up to the Council to reject or accept the new final offer. Mr. Rogers said he would discuss the final offer with the Council. He did not hear from Mr. Hupé again. The Council delegates met and decided not to accept the final offer. On or about November 25, 2008, Mr. Rogers tried to contact Mr. Hupé, who was away from the office. He says that instead he spoke to Mr. Trottier. From his discussions with both Mr. Hupé and Mr. Trottier, Mr. Rogers understood that there was no possibility of negotiating any additional compensation other than that set out in the final offer.

146 I should say that this conflict in the evidence caused me to question whether this matter is suitable for summary trial, if resolving the conflict were material to the issue of whether there had been meaningful and good faith consultation before the alleged interference with the s. 2(d) right. What is clear is that Mr. Rogers was aware that wage restraint legislation might be introduced and, if it were, it could nullify any arbitration award. What he and other members of the Council appear to have doubted is whether there was in fact any realistic opportunity to bargain collectively beyond the terms of the final offer. Mr. Trottier plainly says that not only was the employer willing to bargain beyond the scope of the final offer, but that he made that fact clear to Mr. Rogers.

147 It is also clear that during the period set aside for the arbitration, the parties did attempt as part of the settlement discussions to bargain over terms that could have formed part of the collective bargaining beyond the scope of the final offer. These terms included a possible agreement on the BE initiative.

148 To resolve the issue of the suitability for summary trial, the plaintiffs agreed that I could accept the evidence of Mr. Trottier, if it was necessary for me to rely on it for the purpose of reaching judgment. This concession was made, not because the plaintiffs accepted that evidence rather than own, but because it may be necessary in order to ensure that judgment can be pronounced on a summary trial. I am proceeding on the basis of the concession made by the plaintiffs.

The *Expenditure Restraint Act*

149 The *ERA* received Royal Assent on March 12, 2009. Before it was given Royal Assent, the Public Service Alliance of Canada, the Professional Institute of the Public Service of Canada, the Association of Justice Counsel and the Canadian Association of Professional Employees made submissions on the legislation to the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance.

150 The *ERA* provides, in part that:

The right to bargain collectively under the Canada Labour Code, the Parliamentary Employment and Staff Relations Act and the Public Service Labour Relations Act is continued (section 6);

Nothing in the Act affects the right to strike (section 7);

Nothing in the Act precludes the amendment of a collective agreement or arbitral award, other than a provision relating to its term, as long as the amendment is not contrary to the Act (section 8);

Nothing in the Act precludes the co-development of workplace improvements by bargaining agents and employers under the auspices of the National Joint Council or any other body that they may agree on (section 9);

Nothing in the Act is to be construed as precluding the entitlement of any employee to incremental increases -- including any based on the attainment of further qualifications or the acquisition of further skills -- or to merit or performance increases, in-range increases, performance bonuses or similar forms of compensation (section 10);

Wage increase limits were set out are as follows: 2.5% for the 2006-2007 fiscal year, 2.3% for 2007-2008, 1.5% for 3 years from 2008-2009 to 2010-2011 (section 16);

For collective agreements that were entered into or arbitral awards that were made before December 8, 2008, the wage increase limits did not apply for the 2006-2007 and 2007-2008 fiscal year (section 19);

The continuation of "additional remuneration" such as allowances, bonuses, differentials or premiums, with no increases to additional remuneration and no new additional remuneration (sections 2, 24 to 29, and 44 to 49);

Limits on restructuring rates of pay (section 23); and,

The same limits for non-represented employees' terms and conditions of employment (sections 35 to 54).

a) Application and Policy Objectives of the ERA

151 The wage growth restraint measures enacted by the *ERA* applied to approximately 400,000 unionized and non-unionized employees in the federal public sector, including Crown Corporations that are dependent upon appropriation and the compensation reserve, excluding only the Governor General and Lieutenant Governors, judges, military judges, prothonotaries, Staff of the Non-Public Funds and the Financial Consumer Agency of Canada.

152 According to the Attorney General's evidence, the *ERA*'s policy objectives were complementary elements of the government's larger economic and fiscal policy. These objectives were threefold:

i. to help reduce upward pressure on private-sector wages and salaries;
ii. to provide leadership by showing restraint and respect for public money; and
iii. to manage public sector wage costs in an appropriate and predictable manner that would help ensure the ongoing soundness of the government's fiscal position.

153 In particular, the Attorney General's evidence is that the purpose of ss. 18 and 23(b) of the *ERA* is to support those three objectives. That purpose is further particularized as:

i. to ensure that collective agreements and arbitral awards made prior to the *ERA* coming into force would not, if inconsistent with the terms established by the *ERA*, effectively override the legislative choices that had been made to achieve the aforementioned objectives of the *ERA* nor impair the ability of the *ERA* to achieve those objectives;
ii. to ensure fair application of the measures contained in the *ERA*;
iii. to preserve the relationship with those bargaining agents and their members who, before the coming into force of the *ERA*, negotiated in good faith and concluded collective agreements that provided for increases to rates of pay that were respectful of the economic conditions and that were subsequently consistent with the limits set out in the *ERA*.

b) 2.5% Wage Increases for 2006-2007 and Arbitral Awards

154 Again, according to the Attorney General, the restraint period in the legislation started in the 2006-2007 fiscal year because there were three bargaining units in the CPA that had not yet settled

terms and conditions of employment for that fiscal year. The groups were: LA (law), SR (W) (the plaintiffs), and RE (research). The wage increase incorporated in the *ERA* corresponded to the going rate for settlements that had been reached for that year.

155 The restraint measures were designed to apply to any wage increases that had not been settled by December 8, 2008, because that was the deadline imposed to conclude agreements given the Treasury Board mandate and the impending legislation.

156 The Attorney General offers several reasons why agreements or awards settling terms for the 2006-07 fiscal year or for agreements or awards made after December 8, 2008, but before the legislation was introduced were not exempted from the application of the *ERA*. In brief, it was thought that to do so would create various problems with the federal government's collective bargaining regime.

157 To begin with, the Secretariat held the view that the *ERA* should apply to arbitral awards made between December 8, 2008 and the date the *ERA* came into force to ensure consistency and fairness with other bargaining agents who had negotiated collective agreements before the deadline. The concern was that, having chosen to settle, those employees would find any other deadline offensive and unfair. Applying the *ERA* to 2006 also ensured consistency with the pattern amount, i.e. the amount of the increase agreed to with almost all other bargaining agents for that fiscal year. It was thought that this was fair and established consistency of treatment.

158 By contrast, it was thought that removing s. 18 of the *ERA*, and thereby leaving arbitral awards issued within that retroactivity period unaffected by the wage increase limits, would undermine the government's objectives in the *ERA*. It also would raise fairness concerns because there were other groups besides the plaintiffs who had elected to pursue arbitration during the crisis rather than engaging in additional discussions and bargaining.

159 In particular, there were six bargaining units in the CPA and two in separate agencies that were in arbitration when the *ERA* was tabled on February 6, 2009. The increases they sought were varied and substantial. Any arbitral awards with respect to those groups needed to be captured by the *ERA* wage increase limits for the same reason that those limits had to apply to all employees impacted by the *ERA*, namely, failure to do so would have undermined all three of the legislation's objectives.

160 There were only five groups (Border Services, Operational Services, Ship's Officer, RCMP and Law) that were allowed to restructure rates of pay and were exempted from the prohibition in the *ERA* on restructuring of pay. The rationale for these exceptions included:

(1) The Border Services Group was a new group with a new job evaluation plan, and had to have their rates of pay established;
(2) The Operational Services Group had been negotiating a national rate of pay for a few years before 2008 and an exception was necessary to complete this work;

(3) In the previous round of bargaining with the Ship's Officer group there had been an agreement to restructure the annual rates of pay and other items which resulted in a more efficient and cost effective means of managing fleet vessels.
(4) The RCMP was allowed to change or create new allowances in support of its transformation initiatives following the 2007 report of the Task Force on Governance and Cultural Change in the RCMP. The allowances must be approved by the Treasury Board.
(5) The Law Group required an exception to allow for the harmonization of the pay structure and other terms and conditions of employment for members of the LA bargaining unit, part of which had previously been represented by the PIPSC and the other part which had previously been unrepresented.

161 The Attorney General takes the position that these exemptions were not inconsistent with the general restriction on the rate of wage increases in the *ERA* and were entirely consistent with the general objectives of the legislation.

Constitutional Analysis

Is There an Interference with the Constitutionally Protected Right to Collective Bargaining?

162 The Attorney General contends that the retroactive nullification by the *ERA* of one aspect of the collective agreement imposed by the arbitration award does not interfere with the plaintiffs' s. 2(d) right to freedom of association. This is said to be so for a number of reasons.

163 First, the elimination of one year of wage adjustment does not undermine the collective bargaining process that had led to the inclusion of the wage increase in the collective agreement. The 5.2% increase was not a term that had been included in a collective agreement as a freely negotiated term. It was imposed on the parties by an arbitrator whose authority is statutory and who applies legislated criteria in making an award. Seen in this light, the effect of the *ERA* on the plaintiffs does not engage the constitutionally protected process of collective bargaining at all.

164 Second, the Attorney General says the plaintiffs have mischaracterised the substance of the *ERA*. Unlike the legislation at issue in *Health Services* that was directed solely to unionised employees and accordingly was found to be targeted at associational activity, this legislation imposed limits on wage increases for almost all employees in the federal public sector: union and non-union employees, Governor-in-Council appointees, and elected officials. The *ERA* does not target associational activity at all or the process of collective bargaining, but rather, the unprotected activity of achieving the highest possible increases in wages. Properly viewed, the *ERA* does not engage the constitutionally protected right to a collective bargaining process because it does not target that process.

165 Third, the plaintiffs have misapplied the *Health Services* test. The plaintiffs' real complaint is

that the fruits of a process have been eliminated. They are seeking to protect or guarantee a substantive outcome of the process. According to the Attorney General, the plaintiffs are conflating their right to a collective bargaining process protected by s. 2(d) with a substantive right to retain a specific economic outcome. The Supreme Court of Canada is clear in both *Health Services* and *Fraser* that only process is protected, not outcomes.

166 Fourth, the Attorney General draws attention to the fact that in *Health Services*, the Supreme Court of Canada had found that the legislation had, in relation to certain matters, "preserved the substance of the central aspects of the provisions of existing collective agreements that dealt with those questions" (para. 118) and did not, therefore, interfere with the process of collective bargaining that had led to their original inclusion in the collective agreement. In this instance, it is argued that the *ERA* preserved most of the rights of most employees affected by it and the plaintiffs themselves have retained most of the wage increases included in the arbitration award. Accordingly, the *ERA* had preserved the substance of the central aspects of the collective bargaining process and did not interfere with it.

167 Finally, the plaintiffs have failed to demonstrate that the removal of the pay adjustment interferes with their ability to come together to pursue collective goals through collective bargaining. The legislation had the effect of reducing the wage increase that the plaintiffs were entitled to for one year only. It did not affect the multitude of other terms and conditions of employment that were the subject of extensive bargaining in the collective bargaining round that culminated in the arbitration award in January 2009. The evidence demonstrates that the union/employer relationship survived without any adverse consequences. Indeed, through additional bargaining in 2010 and 2011, the parties to the collective bargaining process resolved all of the issues that had not been dealt with either by the arbitration award itself or the *ERA*. The argument, I take it, is that the absence of any effect on the process of collective bargaining and the capacity of employees to associate to pursue workplace goals is proven by observing that in 2010 and 2011 (that is, after the *ERA*), collective bargaining actually produced a negotiated agreement, whereas the bargaining in 2006 and 2007 had failed to secure one.

168 In my view, the only sound argument among these is that the term that was nullified did not arise from a constitutionally protected process because it was imposed by an arbitrator and not freely negotiated. In case my conclusion is in error, I will deal with each of the other arguments to explain why I reject them.

Is a Term in a Collective Agreement that has been imposed through Binding Arbitration Protected under s. 2(D) of the *Charter*?

169 The starting point for the consideration of this argument is paras. 120-25 of *Health Services*, where the Court dealt with some particular aspects of contracting out (as affected by ss. 6(3), (5) and (6) of the Act) and job security. In both instances the result was that the Act did not interfere with protected collective bargaining rights because the entitlements in issue did not arise from

collective bargaining. For example, the Act abolished the Employment Security and Labour Force Adjustment Agreement. The Court concluded that its abolition was not interference because the agreement did not arise out of collective bargaining but, rather, was imposed by the government on employers. At para. 125, the Court concluded: "Since neither the ESLA nor the HLAA was the outcome of a collective bargaining process, modifying them cannot constitute an interference with past bargaining processes".

170 There is, in my view, merit in the Attorney General's position deriving from several critical facts. First, the wage increase was not a term of the collective agreement that was included as a result of an agreement bargained for between employer and union. It was imposed on the parties through binding arbitration. This in my view is the critical fact. Secondly, the issue of the wage adjustment that was ultimately awarded was not the subject of the collective bargaining process that broke down when the membership rejected a tentative agreement in 2007. The tentative agreement contemplated a 2.5% increase that was both consistent with the going rate for negotiated increases for that year and the limit imposed by the *ERA*. The demand for an additional and higher increase that ultimately underlay the award was made only after the union had demanded arbitration. It had not been the subject of representations made by the union to the employer in the context of continuing collective bargaining. Indeed, it was a demand made by the union about which it elected not to bargain, believing the employer had presented a final offer and further negotiation over wages would be futile. This fact reinforces my conclusion, but for the reason set out below, is not determinative of the issue.

171 Resolving the question whether a term imposed on the parties breaches the right to freedom of association requires an appreciation of what the constitutional right protects and why. It seems clear from what the majority had to say in *Fraser* that the s. 2(d) right protects a process that permits and protects the ability of union members to associate for the purpose of making representations about terms of employment and working conditions and a correlative obligation on employers to consider those representations and consult about them in good faith. Past outcomes are protected only if their nullification undermines and renders effectively useless the process that led to their incorporation in a collective agreement. When the Court turned its attention to the nullification of existing terms as possible examples of interference with the s. 2(d) right, it expressly referred to "laws that unilaterally nullify significant negotiated terms in existing collective agreements" (emphasis added): *Health Services*, at para. 96. A similar point is made at para. 92, where the majority stated: "unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining" (emphasis added). In my view, these statements are not accidental. They are consistent with the Court's analysis in *Health Services* of the impact of legislation on terms in the collective agreement that had not been included as a result of negotiation.

172 Throughout both *Health Services* and *Fraser*, the majority stresses the protection of a right to associate for the purpose of engaging in good faith negotiations. The Court emphasises that the process does not guarantee any particular outcome or the conclusion of an agreement. The right is

expressed as a derivative right to collective bargaining "understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion": *Fraser*, at para. 54. In *Fraser*, the majority offered a characterisation of the right to bargain collectively that focused on the process of good faith exchanges. At para. 90, it said:

> The relevant question from the perspective of interpreting s. 2(d) of the *Charter* is ... whether Canadian society's understanding of freedom of association, viewed broadly, includes the right to collective bargaining in the minimal sense of good faith exchanges affirmed in *Health Services*.

173 The focus of the right and the purpose that defines its ambit appears to be the right to a process of good faith bargaining understood in the sense of good faith exchanges to negotiate terms and conditions of employment. This emphasis on a right to a process of good faith negotiation is reiterated throughout *Health Services*, including, by way of example, paras. 89, 90, 92, 95 and 109.

174 In *Health Services*, the majority emphasised that the employers' critical obligation within the process of collective bargaining is to negotiate in good faith. Again, this underscores the centrality of negotiation and bargaining to the ambit of the protected right. Indeed, in its analysis beginning at para. 98, the majority underscored the importance of negotiation when it posited that consideration "of the duty to negotiate in good faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights".

175 The majority then focussed on illustrating that duty by reference to such matters as endeavouring to reach agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation, coming together to meet and discuss, to meet and commit time to the process, to engage in meaningful dialogue and explain and justify positions, to bring good intentions to the table, and so on. But equally, the duty to bargain in good faith imposes no obligation to conclude an agreement or to accept any particular contractual provisions. It does not prevent a party taking a tough position in the hope of being able to force the other party to agree to its terms. It does require honest and genuine efforts to resolve agreement, however, and is breached if a party engages merely in "surface bargaining".

176 All of this confirms that the constitutionally protected right of collective bargaining is centred on a bargaining process; a process of negotiation and discussion in an attempt to resolve issues about working conditions and terms of employment by agreement. It is for this reason that interfering with existing terms in collective agreements that are the product of negotiated agreements or precluding negotiation over certain issues in the future undermines the process of collective bargaining. It is for this reason that the majority in *Health Services* and *Fraser* rejected the criticism that contracts have been privileged over statutes and that the distinction between procedure and substance is unworkable. It is also for this reason that the court concluded that certain changes to the employees' terms of employment did not involve any interference with the

constitutional right, precisely because they were not the product of collective bargaining understood as good faith negotiation, but were the result of changes to protections resulting from other legislation or were imposed on the parties.

177 A legitimate question remains, however, whether the right to resort to arbitration as a means of settling the terms of a collective agreement should nevertheless be seen as a constitutionally protected aspect of the collective bargaining process and whether interfering with its results undermines the collective bargaining process.

178 In this case, the plaintiffs elected to resolve an impasse in negotiations with the employer by invoking arbitration. Although negotiations had broken down after the membership rejected the tentative offer, there is no adequate basis for suggesting that the impasse resulted from a breach by the employer of its duty to bargain in good faith. The essence of the plaintiffs' complaint against the employer is that it had presented its "final offer" and, in the view of the plaintiffs, there was nothing to be gained by continuing to negotiate, even though the employer extended several invitations to continue to do so, and negotiations in fact did take place in the effort to mediate the differences between the parties at the time of the arbitration in December 2008.

179 In *Health Services*, it was made clear that a "failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record": at para. 107. Here, no such finding can be clearly made on the record. Taking a position that an offer is a "final offer" does not foreclose further meaningful discussion to resolve issues. Standing alone, describing an offer as "final" does not breach the duty of good faith. It is instructive, but not decisive, that in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102, the Public Services Labour Relations Board concluded that the same employer as here, the Treasury Board, did not act in bad faith when it provided a "final offer" to another bargaining agent, and that in doing so, the employer's position was not "inflexible and intransigent to the point of endangering the very existence of collective bargaining": at para. 92. In the light of the evidence before me of the message intended to be sent by the final offer, the willingness of the employer to continue negotiation and attempt to reach agreement on terms different from its "final offer", and the discussions that actually took place, those comments are apt.

180 I am satisfied that the decision not to continue to bargain after May 2007 and to invoke arbitration was a decision that was made by the plaintiffs, albeit for what appeared to them to be good reasons, but was not one driven by a breach of the duty of good faith by the employer. No doubt the plaintiffs decided for tactical or strategic reasons that they would likely achieve a better collective agreement through arbitration than negotiation. That does not mean, however, that nullifying the award undermined collective bargaining processes since the award was not the outcome of a protected process. It was the outcome of a process invoked only when one party decided that it could not achieve its objects through a process of negotiation. Arbitration reflects the breakdown of the bargaining process and is a substitute for it, not one form of its culmination.

181 It is of some moment that when the parties had been negotiating with each other the kind of wage increase sought by the plaintiffs in arbitration and its level had not been on the bargaining table. The union had never proposed what it received at arbitration and never negotiated with the employer about it before it elected to proceed to arbitration. The parties had been bargaining over multiple other compensation-related issues, the most significant issue of which was BE. There is, therefore, force to the observation that the subject matter of the award had not been the subject matter of voluntary collective bargaining.

182 It might be that in the right case, the fact that an arbitral award imposed on the parties dealt with matters that had not been the subject of previous bargaining could be decisive to determining there had not been an interference with s. 2(d). I am not satisfied that the fact the kind and amount of the wage increase had not been the subject of bargaining is determinative of this issue here. On these facts, I think the better view is that the position taken in the arbitration by the plaintiffs had some connection to the previous bargaining. Compensation had been the subject of bargaining. The tentative agreement dealt with compensation issues. It was rejected by the membership in a ratification vote. In electing to proceed to arbitration, the plaintiffs recast their position on compensation in light of the failure to achieve agreement acceptable to the membership on those compensation issues. In my opinion, that establishes a sufficient connection between the subject matter of bargaining and the arbitral award to permit a conclusion that there has been an interference with s. 2(d), if the outcome of an arbitral process is constitutionally protected.

183 The plaintiffs contend that I should view interference with a term in a collective agreement imposed by arbitration as no different from one reached by negotiation. They say that the federal government requires the plaintiffs to engage in collective bargaining in accordance with the scheme set out in the PSLRA. That Act contemplates use of a dispute resolution process in the event agreement cannot be reached. Indeed, it is a condition of exercising the right to bargain collectively that the plaintiffs chose a dispute mechanism within that process. Once the employer requires a bargaining agent to operate within the statutory scheme, any interference with an award resulting from that scheme undermines past collective bargaining because that is how the constitutionally protected right to engage in collective bargaining can be exercised. The plaintiffs say that they are not demanding access to a particular labour relations scheme, but that the government, having required the plaintiffs to operate under a particular process which includes the right to resolve disagreements through arbitration, cannot disregard the process that results in the collective agreement.

184 In my opinion, the flaw in this argument is that it takes an overly broad definition of collective bargaining, which includes all aspects of the process which may lead to a collective agreement including the unilateral imposition of terms, and does not differentiate between that and those aspects of collective bargaining that are protected, namely, reciprocal good faith negotiation and consultation.

185 On my reading of both *Fraser* and *Health Services*, terms imposed on the parties by a third

party and thereby included in a collective agreement are not the outcome of the exercise of a constitutionally protected process of collective bargaining; rather, they are the outcome of the failure of that process or a substitute for it. Accordingly, the nullification of those terms does not undermine or render meaningless collective bargaining in the sense that is protected by *Health Services*.

186 It is pertinent in my view that the right to take advantage of binding arbitration in the event of an impasse in negotiation is a statutory right and not one that itself is the result of agreement. If the right to invoke third-party binding arbitration to resolve disagreements were itself the product of an agreement between the parties, then unilaterally nullifying its results may interfere with the constitutionally protected process of collective bargaining because this was the method the parties had voluntarily agreed to use to resolve disputes. The interference would lie in abrogating a process that had been agreed to.

187 That is not the case here. Binding arbitration is a statutory right, imposed by legislation. The arbitrator applies certain statutory criteria to determine what the award will be. Even to the extent the arbitrator is attempting to replicate what the parties ought to have agreed to, he or she is still imposing a result in the absence of agreement. The plaintiffs may have relied on the existence of arbitration as a means of achieving a collective agreement, but reliance alone does not bring the matter within the ambit of constitutional protection. No doubt the plaintiffs in *Health Services* similarly relied on the ESLA and the protections found in the Labour Relations Code, but the Court did not find those entitlements to be protected by the process based right it had recognised.

188 I am supported in the view of take of this matter by certain of the international documents referred to in *Health Services*. There, the majority considered the ambit of the right to bargain collectively in light of international law principles and commitments. At para. 77, the majority referred to ILO principles governing collective bargaining. It is instructive that those principles focus on commitments entered into through good faith negotiations and posit that annulling or modifying the content of freely concluded collective agreements is contrary to the principle of voluntary collective bargaining. Pointedly, the learned authors note that the "imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining".

189 In the result, I conclude that the nullification of the wage term forming part of the collective agreement as the result of the arbitral award is not an interference with the constitutionally protected right to collective bargaining. This conclusion is, without more, sufficient to dispose of this matter. In the event, however, that I am in error in the conclusion I have reached, I will go on to consider the case on the assumption that the nullification of this term of the collective agreement resulting from the arbitration award is potentially an interference with the constitutional right.

Does the Fact that the ERA Targets nearly all Public Sector Employees Mean that it does not interfere with the Constitutionally Protected Right?

190 The fact that the *ERA* is not targeted only at union employees or does not directly target associational activity does not mean that it may not have the effect of interfering with the plaintiffs' capacity to associate meaningfully to pursue workplace goals. It is clear from *Health Services* that the plaintiffs' right to a collective bargaining process may be interfered with by the effects of legislation, regardless of its target. Equally, the fact that the legislation may apply to virtually all federal public sector employees does not prevent its application to the plaintiffs resulting in interference with their collective bargaining rights. The question must be framed in terms of the effect of the *ERA* on these plaintiffs. It may affect others differently, for example, because they are not members of a union and their compensation is not the product of a collective bargaining process. But that does not mean that the legislation's effect on union employees cannot interfere with their capacity to associate meaningfully. The *ERA* might have retroactively reduced compensation and prohibited any increases or changes to terms and conditions of employment for all federal employees for ten years. There can be no doubt that this would interfere with the collective bargaining rights of those employees who are union. That being so, these arguments of the Attorney General must fail.

Do the Plaintiffs improperly seek to retain the Benefits of a Collective Agreement rather than Protect Process?

191 I am also not persuaded that the plaintiffs have conflated the right to a process with protecting the outcome of the process. Certainly, the plaintiffs put their argument on the footing that the nullification of the wage increase substantially undermined the process that led to it. Whether they are right or wrong, it is clear that they attempt to justify their position by reference to the consequences of the retroactive nullification of the wage adjustment on the process of collective bargaining. In their view, the wage increase was part of the collective agreement from the time the arbitral award was issued and its nullification removed an important term from it. The plaintiffs say that any nullification of even a single important term in a collective agreement will breach s. 2(d) and result in the protection of the terms of collective agreements, but that is simply the consequence of the effect of nullifying terms on the process that led to their inclusion in the agreement. It does not conflate the distinction between protecting process and protecting the fruits of the process. In my view, not only should the plaintiffs be taken at their word, but it is apparent from their argument that they are not guilty of the error alleged against them.

Does the ERA avoid interfering with the Constitutional Right by Preserving the Subject Matter of Collective Bargaining?

192 Equally problematic is the suggestion that there has been no interference with the collective bargaining rights of the plaintiffs because the *ERA* preserved central aspects of the provisions of the collective agreements of other employees. This argument draws its support from paras. 116-19 of *Health Services*, which dealt with the way the legislation addressed the transfer and assignment of employees; matters governed by the collective agreement. The majority noted, at para. 118, that these matters were now governed by regulation which preserved "protections similar in part to what

employees had under existing collective agreements".

193 There are two difficulties with the Attorney General's argument. First, the Court did not conclude that the fact that some central aspects of what had been in the collective agreement had been preserved meant that there was no interference with collective bargaining rights, only that the impact was slight. Secondly, nothing in the reasoning of the majority supports the proposition that one can rely on the fact that the rights of other union employees are preserved by the legislation to ground a conclusion that the loss of rights gained by collective bargaining processes by this union's members does not constitute an interference with their constitutional rights. The plaintiffs' constitutional rights are theirs and what matters is the effect of state action on them. The argument of the Attorney General suggests a trading off of the rights of one group against another. This is impermissible.

194 It is necessary, therefore, to examine how this legislation affects these plaintiffs and their rights. The relevant question is the effect of this legislation on rights acquired by them through collective bargaining processes. Assuming that the plaintiffs' 5.2% wage increase is properly regarded as a term of the collective agreement resulting from constitutionally protected collective bargaining processes, the only relevant question is whether the legislated limitation on the size of the increase could be seen as preserving the central aspect of the wage increase term or is itself substantially similar to the term.

195 In my view, the rollback of the wage adjustment term is sufficiently material and substantial that it cannot be said that the legislation has substantially preserved the collective agreement on this issue. While it is true that some increase for 2006 was preserved, it did not include the 5.2% increase. The reduction is substantial and sufficient to interfere with the process that led to its inclusion in the collective agreement. The process has been rendered meaningless with respect to that term. This is not to say, however, that the extent to which the *ERA* reflected options that preserved collective bargaining processes generally is not relevant to considering whether any interference has occurred in the context of good faith consultation.

Did the ERA Undermine the Capacity of the Plaintiffs to Associate to Pursue Workplace Goals?

196 The Attorney General argues that the *ERA* has had no demonstrated adverse impact on the capacity of the plaintiffs to exercise their right to associate to pursue workplace goals. Indeed, he suggests, there has been no impact at all. The *ERA* did not foreclose negotiation over a myriad of issues of interest to the parties and negotiations did take place before and after its passage. Indeed, collective bargaining proved successful in 2010 and 2011.

197 It does appear reasonably clear that as a matter of fact, the *ERA* has had no discernable impact on the actual capacity of these employees to associate to collectively pursue workplace goals. While the *ERA* may have frustrated and angered the membership and caused them to doubt the integrity of the process they were operating within, there is nothing to suggest the bargaining

agent was weakened or its activities undermined. Certainly, as a general matter, one could hardly conclude that the effect of the *ERA* was to render the associational process effectively useless, make it impossible for employees to pursue common goals, or seriously undercut or undermine the activity of these workers to join together to pursue the common goal of negotiating work place conditions and terms of employment: see, e.g. *Health Services*, at para. 92.

198 I do not think, however, that *Health Services* necessarily contemplates an inquiry into the actual consequences of an alleged interference on the particular bargaining process or on the actual capacity of the particular employees to associate to pursue common goals. If such an analysis were required, a determination of whether the *Charter* right had been breached would be highly contingent on the resilience of the union membership and paradoxical conclusions could be reached. So, for example, essentially the same state action could in one circumstance undermine the effectiveness of a union's efforts to represent its membership, leading to its collapse as a bargaining agent, while in another, the union membership could be galvanised into solidarity with their union in ways that enhanced their capacity to pursue common goals. It does not seem plausible that the effect of *Health Services* should be that in the first instance the state action breached s. 2(d), whereas in the second it did not.

199 In *Health Services*, the Court reached its conclusions without analysing the specific effects of the Act on the health workers' actual capacity to join together to pursue common goals. It was sufficient that the legislation nullified particular important provisions of the collective agreement or precluded future negotiation over them. As was said at para. 114, "[t]he necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining."

200 Moreover, the conclusion that there had been an interference with collective bargaining in that case did not turn on the cumulative effect of precluding bargaining over a number of matters on the effectiveness of bargaining generally. Interfering with each individual matter was capable of being an unconstitutional interference with collective bargaining. This much is clear from para. 119, for example, where it is observed that it is meaningless to bargain over an issue that can never be included in a collective agreement and that fact alone is sufficient to demonstrate interference with collective bargaining. The same point is made at paras. 121 and 127.

201 From this I conclude that it is no answer in this case to the allegation that there has been an interference with collective bargaining that the impugned state action did not actually undermine the general effectiveness of collective bargaining between these particular parties. It may be sufficient unconstitutionally to interfere with collective bargaining to preclude bargaining over only one matter. If that has occurred, it is not relevant to the inquiry to examine the actual effect on bargaining in respect of other matters or bargaining more generally.

202 In my view, much of the discussion in *Health Services* focuses on establishing the rationale

for recognising and defining the ambit of a constitutionally protected process of collective bargaining. The discussion of the impact of certain kinds of state action on the capacity to exercise the right of free association is a general discussion of the necessary and typical conditions for the meaningful exercise of the right, not an invitation to delve into a particularised analysis in each case. It is an articulation of the general underlying circumstances that justify the recognition of the right.

203 Accordingly, I reject the argument of the Attorney General that I should conclude that because there has been no demonstration of adverse consequences on the particular collective bargaining relationship between the parties, there has not been an interference with collective bargaining. As *Health Services* makes clear, it may be sufficient to interfere with collective bargaining that state action precludes bargaining over only one matter and that the right to bargain is therefore meaningless in respect of that matter, regardless of the effect of that action on bargaining for other matters or the capacity of the employees to associate to do so.

204 In this case, if the term in the collective agreement had been reached through negotiation, I would have had little difficulty in concluding that its nullification interfered with the right to collective bargaining.

Was there a Substantial Interference with Collective Bargaining Substantial?

205 The Attorney General raises two principal arguments to support the proposition that the *ERA*'s removal of the wage adjustment for 2006 was not a substantial interference with the plaintiffs' collective bargaining rights.

206 First, the Attorney General argues that the 5.2% wage adjustment was not of central importance to the union and its ability to carry on collective bargaining to pursue common goals. It is pointed out that, as noted above, the 5.2% wage increase was never the subject of collective bargaining and was advanced for the first time at arbitration. Moreover, the collective bargaining round which began in July 2006 and continued until the end of April 2007 involved 16 days of negotiation and canvassed over 90 issues, many of which were compensation related. The Attorney General characterises the process of collective bargaining, including the effort to negotiate at arbitration, as robust and unfettered. The removal of the one year of wage increase, one issue among nearly 100 issues in dispute, did not prevent or deny collective bargaining about working conditions and did not substantially interfere with the plaintiffs' ability to come together to pursue goals in concert.

207 Second, the Attorney General submits that before a finding of unconstitutional interference with collective bargaining rights can be found, the court must assess the manner in which the impugned measure affects the collective right to good faith negotiation and consultation. This determination requires a consideration of the process by which the changes were made.

208 The Attorney General points to a number of passages in *Health Services* to support an argument that if a change to a collective agreement is brought about in the context of a process of good faith negotiation and consultation, then there will be no interference with the s. 2(d) right. The implication here is that state action that would otherwise interfere with an important right to associate may be "saved" if the change arose from a process that itself respected the importance of good faith negotiation and consultation. This is to be contrasted with a situation in which the change that is made, that is the result of the state action, produces a new state of affairs that preserves the right to good faith negotiation and consultation. The contrast lies between the characteristics of the process that yields a change, and the characteristics of the change brought about.

209 The plaintiffs contest each of these arguments. They say it is clear that the wage increase awarded to them for 2006 was an important term of the collective agreement and was important to the membership. And, while they appeared to accept that in some circumstances curtailing collective bargaining might not breach s. 2(d), if the change is brought about through a process that respects good faith bargaining and consultation, that did not occur here.

210 As I have noted before, there is some conflict in the evidence about the extent of effective communication by the Secretariat with the Council and what they were told both about the government's intentions and the opportunity for effective further negotiation. In their written argument, the plaintiffs dismiss the efforts made by the government to negotiate with its bargaining agents as motivated in part by a desire to forestall a finding of a breach of *Charter* rights. They characterise the contact that was made with them as "perfunctory", amounting to one substantive conversation from which Mr. Rogers understood that the only options open to the Council were to accept or reject the final offer and there was no more room to negotiate any additional compensation.

211 As a result, they submit that the "perfunctory" contact made by the government with Council was aimed at providing the appearance that the government was discharging the obligations set out in *Health Services* for engaging in consultation and good faith bargaining. In fact, however, there was no real and good faith attempt to address the concerns of the Council's members, other than through the arbitration process. The Council was only given the choice of proceeding with the arbitration (on which they had already spent significant time and resources in preparation) or accepting the government's final offer (which was the same as the government's position at the arbitration). The plaintiffs submit that to give Council that choice, and then invalidate the resolution provided by the arbitration process, is not consistent with good faith negotiation.

212 In summary, the plaintiffs contend that the actions taken by the government amounted to, at best, signaling that it might abrogate the collective bargaining process and giving the Council the opportunity to voluntarily agree to the terms which the government intended to impose. If this were sufficient, they say, to discharge the government's obligation to respect the collective bargaining process, the s. 2(d) protection is rendered practically meaningless.

213 I have already concluded that the nullification of the 2006 wage increase interfered with the collective bargaining process. The question is whether that interference is a substantial interference. I have concluded that it is.

214 As a general matter, it is obvious that wages are of central importance in collective bargaining. What compensation employees get may be calculated in many ways. It is common ground that compensation related issues were at the heart of this round of collective bargaining. As I have already concluded, when agreement could not be reached, the Council recast its compensation position for the arbitration and advanced a demand for a wage increase that the arbitrator awarded in part. Hence, it is no answer to the assertion that the wage increase is a matter of substantial importance to say that it was not the subject of bargaining in the particular form the arbitrator awarded. Given the failure to agree on other methods of compensation, the wage increase was a significant and important gain in its own right. Moreover, it reflected the arbitrator's judgment of the necessary award to ensure that the plaintiffs were comparably compensated to other similar public and private sector employees. In my view, that fact alone adds a symbolic significance to the award that justifies regarding an interference with it as "substantial".

Did the Government respect the Principle of Good Faith Negotiation and Consultation in interfering with the Award?

215 There are two distinct issues here. The first calls for an understanding of what *Health Services* has to say about the relevance of good faith negotiation and consultation in affecting collective bargaining to a conclusion about whether there has been a breach of s. 2(d). The ultimate questions may be put this way. Does legislation that eliminates an important term of a collective agreement and thereby precludes any opportunity to make representations about it and have those representations considered in good faith necessarily breach s. 2(d), even if in bringing about that change government engaged in a process of good faith negotiation and consultation? In other words, is it necessary that any substantial interference with collective bargaining bring about a state of affairs that preserves, in some sufficient form, the right to good faith negotiation and consultation?

216 If the answer to these questions is "yes", the "how" of the interference, rather than the "what", would not seem ultimately to be relevant. All the good faith consultation in the world would not seem to matter.

217 I have reached the conclusion that these questions are not unambiguously resolved by *Health Services*. There are many passages in the judgment that seem to attach an independent weight to the process by which a right is affected; as, indeed, the plaintiffs' argument implicitly accepted. Yet there are other passages that support the view that unless an interference preserves a continuing right to good faith consultation, it must breach s. 2(d).

218 The second set of issues assumes that the process of consultation may be relevant to whether a breach has occurred. It then asks whether the consultation that took place supports a finding that no breach occurred.

219 At para. 92 of *Health Services,* the majority illustrated an example of the kind of situation where there may be a breach of the right of association saying: "unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation, may also significantly undermine the process of collective bargaining". Further support for the independent relevance of the process by which change occurs is found at other points in the majority judgment.

220 At para. 129 the majority wrote:

> Second, the manner in which the right is curtailed may affect its impact on the process of collective bargaining and ultimately freedom of association. To this end, we must inquire into the process by which the changes were made and how they impact on the voluntary good faith underpinning of collective bargaining. Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining.

221 At para. 107 the following is said:

> In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith.

222 And, at paragraph 109 this is found:

> Substantial interferences must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). ... Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(d) be breached.

223 And, finally, it is worth setting out para. 112 in full, a paragraph in which the majority summarises the tests to be applied:

> On the analysis proposed above, two questions suggest themselves. First, does the measure interfere with collective bargaining, in purpose and effect? Secondly, if the measure interferes with collective bargaining, is the impact, evaluated in terms of the matters affected and the process by which the measure was implemented, significant enough to substantially interfere with the associational right of collective bargaining so as to breach the s. 2(d) right of freedom of association?

[Emphasis added.]

224 If matters stood there, it would be clear that the process by which a right is curtailed is independently relevant to the question whether the curtailment was an unconstitutional breach of the right to freedom of association. One further implication of all of this is that many considerations that are clearly pertinent to a s.1 analysis are also relevant to analysing whether s. 2(d) has been breached.

225 The majority, however, also said other things that point towards a different conclusion. It may be recalled that in *Health Services*, at para. 92, the majority wrote that in every case the question is whether voluntary, good faith collective bargaining has been or is likely to be significantly and adversely affected. *Fraser* appears to have made it clear that this involves rendering the process effectively useless, making it impossible to meaningfully exercise the right due to substantial interference.

226 In *Health Services*, in para. 107 quoted in part above, the majority after recognising that situations of urgency may affect the content and the modalities of the duty to bargain in good faith went on to identify a requirement that infringing provisions of an Act "preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line." This language is capable of implying that unless the situation that exists after the interference has preserved a process in of good faith consultation in relation to the matters affected, the right has been breached regardless of the consultation involved in making the change.

227 Similar conclusions can be drawn from other statements in *Health Services*. At para. 93 the majority described this second inquiry as one "into the manner in which the measure impacts on the collective right to good faith negotiation and consultation". At para. 132, immediately under the heading "The Process of Interference with Collective Bargaining Rights", the majority framed the issue in terms of whether the provisions of the Act "preserve the processes of collective bargaining". The focus is not on the process that led to the inclusion of those provisions in the Act in the first place. The very next paragraph opens with the following words that again characterise the issue: "This inquiry refocuses our attention squarely and exclusively on how the provisions affect the process of good faith bargaining and consultation". Once again, apparently not a focus on how they came about. And, finally, as the majority began to turn towards its analysis of this inquiry into process, it recognised the relevance of an exigency lying behind the legislative provisions and said at para. 134:

> Concerns such as these must be taken into account in assessing whether the measures adopted disregard the fundamental s. 2(d) obligation to <u>preserve</u> the processes of good faith negotiation and consultation with unions.

[Emphasis added.]

228 When it came to analyse this principle in the context of the facts of *Health Services*, the majority was quick to make two points. First, there had been virtually no prior notice and no consultation about the changes being introduced by the legislation. Secondly, and apparently decisively, the prohibitions on bargaining over future matters constituted, in respect of those matters, "a virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation": para. 135.

229 It is not immediately obvious how to reconcile these apparently conflicting statements or, for that matter, whether they can be reconciled. Extracting meaning from a judgment is not, of course, an exercise in statutory interpretation. Statements of principle must be read in light of the facts that gave rise to them. Every effort should be made to read particular statements as part of an integrated and coherent whole.

230 It seems to me that independent weight needs to be given to the majority's repeated statements that attach significance to the process by which, and the context in which, rights are curtailed. This must mean that there will be cases where the manner of interference will be sufficient to support the conclusion that there has been no breach of the right of freedom of association. This view is also supported by the fact that it was material to the decision in *Health Services* that the legislative provisions were introduced with virtually no prior notice or consultation about the subject matter of the changes.

231 Equally, however, there will be cases, as in *Health Services*, where the changes that are made so dramatically undermine the process of good faith bargaining and consultation that their failure to preserve that process must lead to a conclusion that the right of freedom of association has been breached.

232 Each case has to be decided on its facts. What seems clear, at a minimum, is that the process by which the changes were made and the context in which they were made are relevant to deciding whether the right was breached. It is not sufficient to settle this question to note that the *ERA* temporarily capped the rate of permissible wage increases and nullified the plaintiffs' wage increase for one year.

233 The consultation in the case at bar was radically different in content and timing from the notice the unions received in *Health Services*. In that case, a union representative was advised 20 minutes before Bill 29 was introduced in the legislative assembly that the "government would be introducing legislation dealing with employment security and other provisions of existing collective agreements": para. 7. This was the only consultation with the unions on the legislation before that Act was passed.

234 In this case, the bargaining agents for all government employees were notified of the new mandate for government negotiators and were put on notice that legislation would likely cap

permissible wage increases. The notice that was given appears to have been close to the maximum that could possibly have been given in the face of the crisis facing government.

235 The Attorney General contends that the plaintiffs' submissions ignore the context within which the *ERA* was introduced. He urges the court to take into account:

(a) the exigency and urgency associated with a significant and rapid downturn in the economy which warranted limiting the nature and degree of negotiation and consultation;
(b) the Secretariat's attempts to discuss the situation and negotiate with all bargaining agents notwithstanding the constraints when dealing with draft legislation, particularly budgetary legislation; and
(c) the Secretariat's attempt at consulting with the plaintiffs prior to the introduction of the *ERA*.

236 The Attorney General's evidence concerning the risks posed to the Canadian economy by the financial and economic crisis has not been challenged in this case. There can be no doubt that the crisis was unprecedented in the postwar period. On the evidence, the government had no alternative but to act decisively and comprehensively to avoid at least a significant recession and, possibly, economic collapse. Public-sector wage restraint constituted one significant and integral element of a complex and multifaceted policy response to the crisis.

237 This Court is in no position to gainsay the Attorney General's evidence that public-sector wage restraint was a necessary and important part of government policy. The plaintiffs did not mount an effective challenge to that evidence. In my view, it may be doubted whether a court is institutionally competent to pass judgment on such complex policy questions as are engaged in this case.

238 In the circumstances, I am satisfied that the exigency facing government provided a context that affects the content and the modalities of the duty to bargain in good faith. The government made a decision that controlling the cost and the predictability of public sector compensation was necessary, if it was to respond to the gathering economic crisis. This was a decision it was entitled to make. It was also entitled to conclude that its policy had to be implemented rapidly. The constitutional right to collective bargaining does not affect the government's right to make either of these decisions. It potentially affects the implementation of the decisions, not the decisions themselves.

239 The implementation of the decisions bears on preserving good faith negotiation and consultation in a number of different ways. First, the government chose an approach to controlling public-sector compensation that was intended to respect the results of past collective bargaining. It avoided options that would have required it to extinguish existing terms and conditions of employment or terms contained in collective agreements that had been settled before the decision was taken to legislate. It chose instead to limit the rate of wage increases for a limited time in the

future and affected only wage increases in the past if they had not been settled by a certain date. Moreover, the rate of wage increases permitted in each year reflected the going rate for wage increases that had been established by concluded agreements. In that sense, they reflected the outcome of actual bargaining with those employees who had bargained agreements with the government. It seems clear, as well, that the *ERA* was designed so that it did not affect other aspects of collective agreements either in the past or preclude negotiations over other matters in the future. Finally, the imposition of limits on wage increases was temporary.

240 Second, government negotiators were instructed to attempt to negotiate agreements in all cases that were still unsettled. The time available to conclude those agreements was limited by the exigency posed by the circumstances facing the government. The government policy was to negotiate first, legislate second. In my view, this approach respects the fundamental principles of collective bargaining in good faith, even if the government is engaged in hard bargaining in a compressed timeframe.

241 In fact, the efforts to conclude collective agreements were largely successful. By the time the Economic and Fiscal Statement was delivered at the end of November 2008, there was sufficient momentum in the collective bargaining process that the government extended the effective deadline for reaching agreements to December 8, 2008 in order to allow more agreements to be reached that would be exempted from the operation of the legislation when it was enacted. As noted above, a considerable number of agreements were reached covering many thousands of employees.

242 Third, the mandate given to government negotiators created the opportunity for collective agreements to be reached that dealt creatively or flexibly with many issues provided only that the basic objectives to contain public-sector compensation in a predictable fashion were satisfied. Indeed, the evidence contains a number of examples where collective agreements addressed issues of particular importance to bargaining agents, but on terms consistent with the objectives of the *ERA*. The effect of the *ERA* on collective agreements that were negotiated in its shadow was limited, indeed surgical. For example, had the plaintiffs negotiated a collective agreement in November 2008, it might have included the BE initiative; an initiative that would have provided extra compensation to the membership.

243 Fourth, the government was dealing with a complex compensation and labour relations regime. The *ERA* applies to union and non-union employees, GIC appointees, and Members of Parliament; over 400,000 employees in all. It is worthwhile to retake the measure of the task facing the Secretariat.

244 As outlined in the Attorney General's written submission, the Secretariat had to deal with 17 bargaining agents representing employees in the CPA alone. The vast majority of employees in the CPA are union and are covered by 27 different collective agreements, while those in the separate agencies are covered by 59 others. Some bargaining agents had collective agreements in place, others were still bargaining, and yet others, like the plaintiffs, had concluded collective bargaining

and were waiting for arbitration. There were other employers that needed to be informed of the upcoming restraint, including the heads of separate agencies and Crown Corporations. The Attorney General argues that the complexity of the labour relationship regime and the urgency of the situation required using a flexible method to conduct all of the discussions. I agree.

245 Courts have traditionally recognised that labour relations raises complex policy issues that requires balancing multiple interests in a challenging factual environment. Courts have recognised that legislatures and government possess an institutional expertise to handle these matters that courts do not. As a result, there has been a tendency for courts to defer, where constitutionally appropriate, to the choices made by legislatures that attempt to resolve those policy issues and balance competing interests. The effect of this is to give a margin of appreciation to policymakers' choices without abdicating the ultimate responsibility of the courts to protect the Constitution.

246 In my view, that basic disposition has not been displaced by the decisions in either *Health Services* or *Fraser*. Policymakers retain the important ability to craft appropriate policy choices provided that the basic principle of the right to good faith negotiation and consultation is respected.

247 In this case, the government made real efforts to respect the collective bargaining regime in negotiating agreements on terms consistent with its public sector compensation objectives and crafted legislation that broadly respected the results of previous collective bargaining and limited the impact on matters that are the subject of collective bargaining. Choices had to be made, and it appears to me that they were made with an eye to minimising the consequences for the collective bargaining regime generally. It was inevitable that both the negotiating mandate and the legislation would have a broad sweep if the objective was to be achieved. It was inevitable that individual groups of employees could make out a case that their particular circumstances warranted that they be exempted from the application of the policy. It is also inevitable that if too many exceptions were made, the purpose of the policy would be defeated. Policymakers were hurriedly painting in broad brush strokes on a large canvass; they were not painting a miniature portrait, nor did they have the time to do so.

248 As a general matter, I am satisfied that the government used its best efforts to consult with those affected by its wage restraint legislation and negotiated in good faith with them to achieve agreement where possible. In my view, it has not been demonstrated that the plaintiffs were treated any differently.

249 As we have seen, the Secretariat staff made a number of efforts to inform the Council of the new mandate and the risk of legislation in the effort to bring the Council back to the bargaining table. In the 13 days from November 12 to November 25, 2008 the Secretariat made five different attempts to trigger or conduct discussions with the plaintiffs regarding the government's concerns about the economic crisis, the economy and its wage growth restraint policies to combat the crisis.

250 The plaintiffs dispute this. But, despite the plaintiffs' position in argument, Mr. Rogers conceded in his examination for discovery that by November 24, 2008, he was aware of the

possibility that the pending wage restraint legislation might void any arbitral award the plaintiffs might obtain, that the government was willing to have further discussions and negotiations with the plaintiffs, and that other bargaining agents were negotiating settlements despite the "final offer" letters circulated to all bargaining agents earlier in the month. Mr. Rogers was sufficiently concerned about the uncertainty surrounding potential legislative interference with the arbitral award that he issued a Bulletin about that possibility to this membership. Nevertheless, the Council chose to pursue arbitration rather than seek further discussions or collective bargaining.

251 Given the concessions made by the plaintiffs that, if it is necessary for me to do so, I may rely on the evidence of the government about what was communicated about its plans and the possibilities of further negotiations, even though it had sent Council a "final offer", there is no basis to reach the conclusion that the government did not make a good faith effort to consult and negotiate with the plaintiffs in an effort to negotiate an agreement before legislation was introduced. Assuming that the conflict in the evidence is material to a critical issue before me, it is only this concession that permits a summary trial of this matter.

252 Here, as is apparent, there was extensive and often successful negotiation with many bargaining units to achieve negotiated collective agreements before legislation was introduced. Unsuccessful efforts were made to negotiate with the Council. The details of the impending legislation were not disclosed to any of the parties to negotiation, but the Council was aware that legislation might abrogate any arbitral award it received.

253 In my view, there is no merit in the plaintiff's argument that the government's effort to negotiate collective agreements with its employees' bargaining agents was merely an effort to forestall the conclusion that the legislation breached its employee's *Charter* rights. To the contrary, I find that the government's efforts to negotiate those agreements fulfilled the government's obligation to consult and bargain in good faith.

254 Similarly, I reject the argument that the government made only perfunctory efforts to engage the plaintiffs in negotiations in order to provide the appearance that the government was discharging its obligations to engage in good faith consultation. To the contrary, I find that the government's effort to engage with the plaintiffs to reopen collective bargaining and to mediate the disagreements between the parties when the arbitration took place fulfilled the government's obligation to respect the process of voluntary good faith consultation and negotiation.

255 These findings, however, are not yet sufficient to conclude that the plaintiffs' right to freedom of association was not breached. Before that conclusion can be made, it is necessary to consider two questions. First, did the government's obligation to respect the principles of good faith negotiation and consultation require it to consult and negotiate over the terms of the *ERA* itself? Secondly, does the nullification of the 2006 wage increase disregard the fundamental obligation to preserve the processes of good faith negotiation and consultation with unions?

256 There is, of course, no general obligation to consult about the content of legislation. In fact, a

number of employee groups did take the opportunity to make representations to committees in the House of Commons and the Senate. There is nothing to suggest that those submissions were not considered. Even though there is no general obligation to consult about legislation, the Court in *Health Services* took note of the fact that in that case, there had been no meaningful consultation before the Act was passed and no discussion of alternative ways to address the government's concerns about labour costs and the lack of flexibility in administering healthcare.

257 In this case, bargaining agents were made aware of the government's concerns about cost containment and predictability of public sector compensation. Moreover, bargaining agents, including the Council, knew that legislation would likely cap wage increases, but that there was room to conclude collective agreements that would meet the government mandate on terms the unions could agree to.

258 Given the exigency faced by the government, the limited time available to put in place policies considered necessary to address the crisis, information given to bargaining agents about the likely effect of legislation and the opportunity provided to negotiate collective agreements, I conclude that as a general matter the government did not implement changes through the *ERA* in a manner that breached its obligation of good faith negotiation and consultation and accordingly did not breach, as a general matter, the right to freedom of association enjoyed by its employees.

259 This conclusion applies equally to the plaintiffs. The plaintiffs were aware that they had an opportunity to negotiate a collective agreement up to and indeed after the arbitration occurred. They were aware that if they waited for an arbitral award, they risked the legislation overriding it. I do not think that the fact that the government chose an operative date (December 8, 2008) before which awards or agreements were exempted from the operation of the *ERA* breached the government's obligation of good faith negotiation and consultation. In the circumstances, it was reasonable for the government to select a date before which agreements or awards would be exempt as an incentive to the conclusion of collective agreements. The imposition of a deadline does not, in itself, constitute a breach of an employer's duty of good faith negotiation and consultation.

260 The final question is whether the nullification of the 2006 wage increase breached the plaintiffs' s. 2(d) rights because it failed to preserve a process of good faith negotiation and consultation with the Council. It is certainly true that the elimination of the 2006 wage increase from the collective agreement denied the opportunity for any further discussion or consultation or any other process respecting that term. There could be no further bargaining about it.

261 In *Health Services*, the majority found that the prohibitions respecting contracting out, consultation about contracting out and laying off or bumping were virtual denials of the right to a process of good faith bargaining and consultation because those prohibitions eliminated any possibility of consultation before contracting out, laying off or bumping. Since these matters were central and important matters that were the subject of collective bargaining, this denial of the right to a process of good faith bargaining and consultation was found to breach s. 2(d).

262 In each of those cases, the legislation prevented any bargaining over those terms in the future. No provision was made for any mechanism that would incorporate principles of consultation when those issues arose in the future. In this case, the legislation deals only with the past, so far as these plaintiffs are concerned. It did not preclude negotiating wage increases in the future, when the current collective agreement expired.

263 In my view, in the context of the negotiations and consultations that took place before the *ERA* was enacted, and in light of the circumstances leading to the enactment of the *ERA*, the nullification of the 2006 wage increase cannot be seen as effectively undermining the capacity of the plaintiffs to associate for the purpose of pursuing workplace goals.

264 I conclude that the *ERA*, in its application to the plaintiffs in removing the 2006 wage increase, does not breach the rights of the plaintiffs to freedom of association. In the event that I am in error in this, I will however address s. 1 of the *Charter*.

Is the Breach of the Plaintiffs' Right to Freedom of Association Justified by Section 1 of the *Charter*?

265 The onus is on government to justify any breach of *Charter* rights by demonstrating that the breach is demonstrably justified in a free and democratic society. Discharging that burden requires the government to meet the Oakes test and demonstrate that the infringing measure meets the following criteria:

(a) the objective must be pressing and substantial;
(b) there must be a rational connection between the pressing and substantial objective and the means chosen by the law to attain the objective;
(c) the impugned provision must minimally impair the *Charter* guarantee; and
(d) there must be proportionality between the objective and the measures adopted and specifically between the positive and negative effects of the law.

266 The plaintiffs submit that the government cannot discharge any component of this burden. It cannot show that the *ERA* is "demonstrably justified" by providing evidence that is clear, cogent and persuasive. They rely on the comment of McLachlin J. (as she then was) in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 129: "No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail".

267 The plaintiffs say that the government cannot demonstrate that there was any substantial and compelling purpose served by the enactment of the *ERA*. But if there was, no such purpose was served by excluding agreements entered into after December 8, 2008 but before the enactment of the legislation.

268 The parties agree that the s. 1 analysis is contextual and fact specific. They disagree, however, on the extent to which deference should be shown to Parliament. The Attorney General says that the matter before me involves complex issues of economic and social policy that are well beyond the institutional capacity of a court to properly assess. In his view, the question of the appropriate response to the global economic crisis is one that is within the specific institutional competence of Parliament and the Executive. These types of questions, he argues, call upon the institutional competence of the government to mediate among competing interests and competing social science evidence. He relies on the following observations of Dickson J. in *PSAC v. Canada*, [1987] 1 S.C.R. 424 at para. 36, as an eloquent statement of the reasons why 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 leadership 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*. Thus, in the present case, I am prepared to accept the respondent'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 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.

269 I agree with these observations, which, in my view, remain as sound today as when they were written and the authority of which has not been undermined by subsequent judicial pronouncements. Saying this, however, does not relieve government of its obligation, or lessen its burden, to demonstrate the justification of the violation of constitutional rights. It simply defines the context in which the analysis is to be undertaken.

Does the *ERA* Pursue a Pressing and Substantial Objective?

270 The plaintiffs argue that the objective of the *ERA* was merely budgetary. It was intended to assist in avoiding long term deficits and returning to a balanced budget as soon as possible. In their view, the legislation was just about saving money. They dispute the assertion that one objective of the *ERA* was to help reduce upward pressure on private sector wages and salaries.

271 The plaintiffs contend that as a general rule "a measure whose sole purpose is financial, and which infringes *Charter* rights, can never be justified under s. 1": *Ref re Remuneration of Judges of the Prov. Court of P.E.I.*; *Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, per Lamer C.J.C. at para. 284. They do accept, however, that in truly exceptional circumstances a financial crisis may provide the foundation for a s. 1 justification, but argue that whenever the objective of the law is to cut costs, that objective will always be suspect.

272 In short, the plaintiffs say that the government has failed to demonstrate that the purpose of the *ERA* was anything other than a budgetary driven policy, or that the enactment of the *ERA* was required to permit Canada to meet its other obligations, or that permitting collective bargaining to have continued in the ordinary fashion would have precipitated any severe fiscal crisis. They say that there is no evidence that Canada turned its mind to whether there was any continuing need for the imposition of legislated wage restraint after a large proportion of its employees had settled their employment terms within the Treasury Board's revised mandate in late 2008. The plaintiffs argue further that there is no evidence that Canada was itself in the midst of a severe financial crisis that threatened its ability to function effectively. They say that while the fall of 2008 was not "normal", a climate of even extraordinary global economic uncertainty cannot be used to justify the suspension of constitutional rights. In their words, "[w]hile the government may choose to manage Canada's finances in a manner which avoids deficits, the mere existence of a deficit is not sufficient to demonstrate the kind of severe economic crisis which would justify the infringement of *Charter* rights."

273 With respect, I do not find this argument compelling. The evidence is clear. The global economic and financial crisis was not merely a theoretical concern for Canada's policymakers. That crisis was affecting the Canadian economy. Economic growth was falling; unemployment rising; public finances deteriorating. Canada's capacity to maintain its public services was threatened. There was a real risk of economic collapse. It was by no means certain that policymakers could avoid that risk from materializing.

274 The government's policy response involved a complex set of policies. These policies included the *ERA* as one element in an integrated set of initiatives. To describe these policies generally, or the *ERA* in particular, as merely financial, budgetary or intended to achieve cost control is a fundamental mischaracterization of their purpose. Their purpose was to prevent a deep recession and to stabilize the economy, not as an end in itself, but as a means to prevent unemployment, protect living standards and provide a sustainable foundation for the provision of public services. Taken as a whole, I have no doubt that the government was responding to a pressing and substantial threat to the economic and social well-being of the country as a whole.

275 Whether the *ERA* was intended to achieve a pressing and substantial objective must be considered within the context of that larger goal. As the Supreme Court of Canada stated in *R. v. Advance Cutting & Coring Ltd*., 2001 SCC 70, [2001] 3 S.C.R. 209 at para. 255:

> The place and function of the challenged provisions in the legislative scheme must be carefully identified. The nature of the system and its broader objectives have to be kept in mind. The analysis should not consider the infringing provision apart from its legislative context.

276 As set out above, the stated objectives of the *ERA* were, as the government argued, threefold:

i. to help reduce upward pressure on private-sector wages and salaries;
ii. to provide leadership by showing restraint and respect for public money; and
iii. to manage public sector wage costs in an appropriate and predictable manner that would help ensure the ongoing soundness of the government's fiscal position.

277 The government says that the objectives of ss. 18 and 23(b) of the *ERA* are simply aimed at supporting the first three overriding objectives. They are:

i. to ensure that collective agreements and arbitral awards made prior to the *ERA* coming into force would not, if inconsistent with the terms established by the *ERA*, effectively override the legislative choices that had been made to achieve the aforementioned objectives of the *ERA* nor impair the ability of the *ERA* to achieve those objectives;
ii. to ensure fair application of the measures contained in the *ERA*;
iii. to preserve the relationship with those bargaining agents and their members who, before the coming into force of the *ERA*, negotiated in good faith and concluded collective agreements that provided for increases to rates of pay that were respectful of the economic conditions and that were subsequently consistent with the limits set out in the *ERA*.

278 The plaintiffs argue that there is no evidence either that the purpose of the *ERA* was to help reduce upward pressure on private sector wages or that it would in fact achieve that objective. I disagree.

279 The government's evidence is explicit that one purpose of the *ERA* was to reduce upward pressure on private sector wages. That evidence was not challenged. Moreover, apart from the affidavit evidence, public statements, for example, by the Minister in October 2008, referred to ensuring that public-sector compensation did not add pressure on businesses. The relationship between wage growth in the public sector and in the private sector was also explicitly referred to in the November 27, 2008 Economic and Fiscal Statement. The evidence also explained the economic

rationale for the concern that excessive increases in public-sector compensation can cause unemployment in the private sector as private-sector employers have to compete with the public sector to attract or retain employees. That rationale was supported by econometric analysis. Studies outlining the relationship between public and private sector compensation in advanced capitalist economies were attached to the affidavit evidence. It will also be recalled that unemployment was rising rapidly in Ontario. That fact influenced the overall policy response of the government, including the need for public-sector compensation restraint.

280 In my view, the plaintiffs misconceive the situation by treating the *ERA* as if it were merely an incidental, unnecessary and irrelevant part of the government's overall response to the economic crisis. The *ERA* cannot be so easily detached from its context. I accept that the *ERA* was an integral part of an overall policy package. Furthermore, the purpose of the *ERA* cannot so easily be detached from the overall policy of restraining public-sector compensation, by observing that the government had succeeded in the fall of 2008 in negotiating agreements consistent with its objectives with a large portion of its workforce. Those agreements had been negotiated in a context that included intended legislation to support the government's public-sector compensation objectives. The negotiation of the agreements in the face of intended legislation are different aspects of a single policy approach. As a result, the *ERA* did not cease to have a purpose once those agreements had been negotiated. Moreover, even beyond the achievement of those particular agreements, the *ERA* continued to have a purpose in contributing to public-sector compensation restraint as part of an overall policy response.

281 The evidence also establishes that one purpose of restraining public-sector compensation, in support of the broader policy objectives, was to ensure predictability of compensation costs, again not for its own sake, but to maintain sound finances with minimal disruption to public goods and services while freeing up resources or other purposes. Other options, like increasing taxes or cutting transfers to individuals through income support programmes, were rejected as more burdensome and disruptive to the economy.

282 Finally, one purpose of these measures was to demonstrate leadership in an effort to assist in maintaining or restoring confidence in support of stabilizing the economy. The validity of such an approach was recognized by Dickson J. in the quotation given above where he observed that due deference must be paid to the symbolic role of government and the importance of governmental initiatives in fulfilling an inspirational role in the economic sphere.

283 It seems clear that whether an infringing law is intended to achieve a pressing and substantial objective is not an evidentiary contest, but even if it were, I am satisfied that the Attorney General has demonstrated that the *ERA* serves a pressing and substantial purpose.

Is there a Rational Connection between the means Adopted by the Government and its Objective?

284 The rational connection stage of the Oakes test requires the government to show a causal

connection between the infringement and the benefit sought at least on the basis of reason or logic. It must, at a minimum, be possible to argue that the means may help to bring about the objective, "or that they may promote (as opposed to inevitably accomplish) the objective. This stage of the analysis has been described by the courts as 'not particularly onerous'".

285 The question is whether there is a reasonable basis for believing that the chosen means will achieve the desired objective. Conclusive proof of a relationship between an infringing measure and the objective is not essential. The Supreme Court has made it clear that a common sense analysis based on logic and reason is all that is needed to establish a rational connection. The question is whether the means employed are a logical way of attempting to achieve the objective, not whether they will in fact be successful in doing so. They must be intended to achieve the objective and cannot be based on arbitrary, unfair or irrational considerations.

286 I am satisfied that the evidence establishes the reasonableness of the belief that the limits on wage increases imposed by the *ERA* would achieve the desired objectives. I have already accepted that the evidence provides sufficient support for the belief that public-sector wage increases tends to put upward pressure on private-sector wage costs causing unemployment. Further, the government's overall approach in restraining spending, including public-sector compensation costs, and ensuring fiscal sustainability was consistent with the consensus of G-20 Leaders and the expert advice of the IMF. This is sufficient to establish a rational connection between the *ERA* and its intended benefits.

287 The choice of means was well within Parliament's discretion in such matters. This is pre-eminently an area requiring the exercise of legislative judgment. This point was underscored in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Court said at para. 136:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

288 In my opinion, the plaintiffs' argument misses the mark. They make two points. First, they say that there is no evidence that clawing back the plaintiffs' 2006 pay award would have an effect on public finances or reduce upward pressure on private sector pay. Secondly, they argue that eliminating the 2006 pay award, which reflected years in which the economy was thriving, could have no relevance to an economic crisis in 2008.

289 In my view, the plaintiffs take too narrow a view of the question whether there is a rational connection between the infringing measure and the objective. It is a mistake to isolate so starkly the effect of the legislation on them alone. Any individual union or group of employees could say that exempting their particular wage increase from the operation of the Act would not compromise the

objective of protecting public finances or could not be demonstrated individually to exert any upward pressure on private sector wages. The legislation here is not aimed at particular circumstances, viewed individually. It is necessarily intended to achieve an overall effect. The Act is not addressed to the mischief of the effect of one wage increase for one union in isolation from others. The mischief is the general and cumulative effect of a multitude of potential, particular wage increases. A beach is, after all, made up of grains of sand; but a beach is not a grain of sand.

290 Similarly, I see no merit in the argument that the nullified wage increase related to the 2006 year, a year in which the economy was apparently thriving, and two years before the economic crisis. The fact is that the obligation to pay money in respect of any unsettled claims that predate the economic crisis would accrue during the crisis, affect government finances during the crisis, and have an effect on the government's ability to achieve its objectives only from the time the award was made or an agreement reached. There is, in my view, no material difference between the award being made in respect of the 2006 year or the 2009 year.

291 In the result, I am satisfied that there is a rational connection between the means adopted and the purposes to be achieved by the legislation.

Do the means Adopted minimally impair the *Charter* Rights?

292 Even where infringing legislation is rationally connected to a pressing and substantial objective, government must still establish that the legislation minimally impairs *Charter* rights. The law must be carefully tailored to impair rights no more than necessary. In *RJR MacDonald*, McLachlin J. said at para. 160:

> As the second step in the proportionality analysis, the government must show that the measures at issue impairs the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement ... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

293 The plaintiffs argue that a more minimal impairment of their rights could have been achieved either by (a) not imposing wage restraint at all for the 2006 period, or (b) treating all agreements and awards made prior to the introduction of the *ERA* in the same manner as pre-December 8, 2008 agreements. They say that if all awards and agreements in effect at the time the *ERA* was enacted were treated in the same manner as the pre-December 8, 2008 agreements, the only fiscal impact would be that Canada would be required to pay the plaintiffs' wage adjustment. They say that it

cannot be seriously argued that this would have any significant impact on the ability of Canada to achieve the purposes of the legislation, however they are characterized. On the other hand, it would entirely eliminate the negative impact of the infringement on them.

294 In my view, the plaintiffs fail to recognise that there was a legitimate reason both for capturing unsettled wages for 2006 and for imposing the December 8, 2008 cut off date. The objective of the legislation was to capture all wages that were not settled when the decision was made to impose wage restraint. That included necessarily those limited number of groups of employees whose wages for 2006 were not yet settled. Although the total cost of those wages may have been relatively minor in comparison to wages that were unsettled for 2007 or 2008, consistency with the policy objective supported capturing them.

295 Similarly, imposing a deadline for the application of the *ERA* is an integral part of fulfilling its objectives. The point was to provide an incentive for agreements to be reached by a certain date. That date was December 8, 2008. It would, in my view, have been inconsistent with the goal of interfering minimally with the overall collective bargaining regime to have treated awards after the deadline in the same way as agreements reached before it. I accept the Attorney General's argument on this point.

296 I also do not think it is sound to argue that because the cost of exempting this one award would not have compromised the overall goals of cost containment or predictability, then the infringing measures are not minimally impairing. The same argument could be made for each group. While exempting one group may not have undermined achieving the government's objectives, exempting several would. The policy required uniform, general or overall application to the public sector as a whole.

297 In addressing the issue of minimal impairment, it is relevant to consider that the government weighed several options on how to address the problems the country faced. As stated by the Supreme Court in *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at para. 47:

> Parliament considered the alternative options proposed ... and determined the s. 329 scheme to be the most effective and least intrusive; there is sufficient evidence in the particular context of this case showing that the policy choice of Parliament is a rational and justifiable solution to the problem of informational imbalance.

298 Other options considered to contain wage costs included a hiring freeze, not replacing departing employees, laying off employees and offering departure incentives, freezing wage growth by suspending movement within pay ranges, suspending promotions and suspending upward reclassification of positions. These options were rejected as they were viewed as more intrusive and detrimental to public sector employees and collective bargaining and would not have had an immediate or great enough impact.

299 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. Moreover, employees would still receive some wage increases. Ancillary compensation through movement within pay ranges, performance, overtime and leave would not be affected. The measures were time-limited, preserved collective bargaining and were preceded by consultation and negotiation.

300 However, for this approach to be effective, it had to apply to all the groups identified. The Attorney General's evidence is clear that it was always intended that the restraint measures would apply to all outstanding collective agreements in fiscal year 2006/2007 as the pattern rate of 2.5% had already been established as the norm through the conclusion of a large number of collective agreements.

301 It is of some significance to note that other countries took more drastic measures than Canada to deal with the crisis as it confronted them. The United States, the United Kingdom and Ireland, for example, either froze or cut wages.

302 As repeatedly demonstrated by the evidence on the record, the government was faced with an unprecedented crisis that required prompt action. In light of the overall level of uncertainty at the time, determination of the precise response required weighing of numerous options and potential impacts. I am satisfied that to the extent possible, the government's choice minimized any negative consequences on *Charter* rights, while at the same time achieving the goals of the *ERA* legislation. The Supreme Court of Canada suggested in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610 at para. 43, that when Parliament is tackling complex problems of this type, deference is appropriate:

> There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing.

303 In these circumstances, there is no question that the *ERA*, as one element of the entire legislative response to the global economic crisis, is within a "range of reasonable alternatives" properly available to government and Parliament to respond to the economic crisis.

304 The minimal impairment test is therefore met in the case at bar.

Do the means Adopted Satisfy the Proportionality Test?

305 The final part of the Oakes analysis requires an analysis of whether the deleterious effects of the legislation outweigh its salutary effects? As Bastarache J. explained in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 125:

> The third stage of the proportionality analysis performs a fundamentally distinct role. ... The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.

306 The plaintiffs argue that the deleterious effect of clawing back the 2006 wage increase is a very significant effect on their collective bargaining rights. It has a significant negative effect on all workers who engage in collective bargaining. It undermines the opportunity that collective bargaining provides to enhance human dignity, liberty and autonomy of workers who thereby gain control over some aspects of their working lives. The plaintiffs go on to contend that the *ERA*, in its application to them, undermines equality and democracy. Compounding these general negative effects is the arbitrariness and unfairness of it eliminating their arbitration award, unlike the gains of others that were protected by exemption from the operation of the *ERA*.

307 By comparison, the salutary effects of rolling back an award of 5.2% was negligible in contributing to achieving the overall objectives of the government. The government has failed, they say, to explain why consistency or fairness to other employees was enhanced by removing the plaintiffs' 2006 award.

308 I agree with the Attorney General when he says that the seriousness of the global economic crisis and its actual and potential negative consequences for Canada "were such that the benefit of the responsive measures instituted, including the *ERA*, far outweighed any detrimental impact suffered as a consequence of the inability to negotiate an increase in salary beyond that provided by the statutory ceiling".

309 The gravity of the crisis cannot be underestimated. The human and social consequences of failing to respond to it were potentially staggering. The *ERA* was an essential part of that response. The *ERA* was crafted so that it (1) preserves collective bargaining subject to the limited restrictions in the Act, (2) only places limits on the size of increases rather than prohibiting bargaining on them

altogether, and (3) only temporarily restricts wage increases. Given the concerns driving government policy, this was a moderate step; a modest injection of austerity.

310 I have already concluded that the benefits of the impugned provisions must be assessed in the context of the broader goals of the entire legislative scheme. If the legislation did not apply to all groups identified collectively, the overall objectives of the legislation would be undermined. Moreover, consistency and fairness with other groups that had settled would also be undermined. I do not agree that the cost of permitting the plaintiffs' to retain their 2006 wage increase can be viewed in isolation from the achievement of the overall policy objectives of the government, including those contained within the *ERA*.

311 While I accept that the right to bargain collectively is importantly related to values of self-determination, human dignity, equality and democracy, I do not accept that the limited and temporary restraint measure imposed through the *ERA* has any significant effect on those values. Indeed, had the government failed to respond to the economic crisis or had an economic collapse occurred, the effect on those very values throughout society as a whole may well have been more profound and vastly more deleterious.

312 In my view, the *ERA*, in its application to the plaintiffs satisfies the proportionality test.

Conclusion

313 The action is dismissed.

314 I conclude that the nullification of the 2006 wage increase of 5.2% included in the collective agreement as a result of the arbitral award did not breach s. 2(d) of the *Charter* because the term was imposed on the parties and was not the product of a constitutionally protected process of collective bargaining.

315 If I am wrong about that, the nullification of the term did interfere substantially with collective bargaining, but the process of interference did not lead to a breach of the plaintiffs' s. 2(d) right to freedom of association.

316 Again, if I am wrong about that, the breach of the right to freedom of association is demonstrably justifiable in a free and democratic society under s. 1 of the *Charter*.

317 If the parties are unable to agree on costs, I am prepared to receive written submission addressing that question.

318 I must express my appreciation to counsel for the quality and thoroughness of their submissions.

D.C. HARRIS J.

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CORRECTION

Released: September 8, 2011

Incorrect spelling of second counsel for the defendant's name on the first page as follows:

* Corrected from C. Huckle to K. Hucal

cp/e/qllxr/qlvxw