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File 18211

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The Honourable Justice Duncan Grace

Dear Justice Grace:

**Re: Association of Justice Counsel v. Attorney General of Canada
Request for Case Management
Court File No. CV-10-404604**

I write to set out the supplementary submissions of the Applicant, the Association of Justice Counsel (“AJC”), on the impact of *Ontario (Attorney General) v. Fraser*,¹ which was released by the Supreme Court of Canada shortly after we completed argument in this matter.

I. OVERVIEW

In *Fraser*, the majority of the Supreme Court of Canada confirmed once again that, in the labour relations context, s.2(d) of the *Charter* protects not only the act of collective bargaining, but also the right to engage in a *meaningful and good faith process* of bargaining. A statute that substantially interferes with such a process infringes s.2(d) of the *Charter*. The AJC submits that, consistent with *Fraser* and its predecessors, the *ERA* is such a statute.

II. FACTS

In *Fraser*, the majority of the Supreme Court of Canada concluded that the *Agricultural Employees Protection Act, 2002* (“*AEPA*”), which gave agricultural workers the right to form and join an association and to make representations to their employers on workplace issues, but did not include other statutory protections, including a statutory duty to bargain in good faith, did not infringe s.2(d) of the *Charter*.²

¹ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [*Fraser*].

² *Fraser, supra*, at paras. 2 and 101-113.

In arriving at this conclusion, the majority, led by Chief Justice McLachlin and Justice LeBel, categorically rejected the argument raised by Rothstein J. (concurring in the result) that s.2(d) of the *Charter* does not protect collective bargaining, and that the Court's decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* ought to be overturned.³ Instead, the majority reaffirmed the holding in *Health Services* that s.2(d) protects collective bargaining and guarantees a “meaningful process” through which the parties can engage in “meaningful dialogue”.⁴ Thus, in considering whether s.2(d) has been infringed, the central question remains, in the words of *Health Services*, “whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted”.⁵

According to the majority in *Fraser*, provisions in the *AEPA* which required the employer to listen to and read the employees' association's representations contemplated that the employer would do so in good faith.⁶ This was sufficient to satisfy the s.2(d) requirement of good faith bargaining.

Further, the majority found that the history of the *AEPA* did not establish a violation of s.2(d) because “the union ha[d] not made a significant attempt to make it work”, by resorting to the process for dispute resolution established by the statute. Thus, according to the majority, the *AEPA* did not infringe the *Charter*, and there was no need for a s.1 analysis.⁷

III. ISSUES AND ARGUMENT

The AJC submits that the majority's reasons in *Fraser* support its application concerning the constitutional invalidity of the *ERA*. As the majority in *Fraser* held, in line with *Health Services*, substantial interference with meaningful negotiations constitutes an infringement of s.2(d):

The Court in *Health Services* emphasized that s. 2(d) does not require a particular model of bargaining, nor a particular outcome. What s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process. ... Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have

³ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 [*Health Services*]; *Fraser*, *supra*, at paras. 52-55.

⁴ *Fraser*, *supra*, at paras. 41-42.

⁵ *Health Services*, *supra*, at para. 92.

⁶ *Fraser*, *supra*, at paras. 100-107.

⁷ *Fraser*, *supra*, at paras. 100-113.

meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(d) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.⁸

Contrary to the submissions of the Respondent on the main argument, the AJC does not seek a particular outcome or result. What the AJC seeks, and what the SCC required in both *Health Services* and *Fraser*, is the ability to engage in meaningful and good faith dialogue respecting important working conditions. The *ERA* substantially interferes with the AJC's ability to do so. As set out in the AJC's Factum, the wage limits imposed by the *ERA* leave no room for meaningful and good faith negotiations respecting wages, a substantial – if not the most substantial – term of the AJC's first collective agreement.

In this way, the legislation at issue in *Fraser* is entirely different from the provisions of the *ERA* at issue on this application. The *AEPA* specifically required that the employer listen to and read the employees' association's representations and positions, and the SCC found to be implicit in these provisions a requirement that the employer do so in good faith.⁹

By contrast, the *ERA* legislates away any requirement that Treasury Board listen to or read the AJC's representations and positions respecting wages – whether in good faith or otherwise. By enacting the *ERA*, the Respondent has taken “meaningful and good faith negotiations” respecting wages off the collective bargaining table altogether. Indeed, after the enactment of the *ERA*, Treasury Board had no power to agree to increases above the limits set out in the legislation – any such agreement would be void and of no effect.¹⁰

In this way, the *ERA* is akin to the provisions of the *Health and Social Services Delivery Improvement Act* at issue in the *Health Services* case, which imposed the government's will respecting significant terms like contracting out, layoffs and bumping, and which, according to the Supreme Court of Canada, “constitute[d] a virtual denial of the s. 2(d) right to a process of good faith bargaining and consultation”.¹¹

Further, unlike in *Fraser*, there is no element of prematurity to this application. The AJC sought to negotiate wage increases for its members, and when it was unable to move the employer from its “final offer”, Parliament simply legislated the employer's desired result. The AJC took its dispute to arbitration, but the arbitration board was bound by the *ERA*. Thus, unlike in *Fraser*, the AJC made “meaningful attempts to make [the current system] work”; it was the *ERA* that cut short those attempts and rendered them meaningless.

⁸ *Fraser, supra*, at para. 42 [emphasis added].

⁹ *Fraser, supra*, at para. 101.

¹⁰ *ERA*, s. 17.

¹¹ *Health Services, supra*, at para. 135.

Finally, in *Fraser*, the majority reaffirmed the significance of international law, including the decisions of the ILO Committee on Freedom of Association (the “Committee”), in considering whether domestic legislation like the *ERA* infringes freedom of association. In particular, the majority specifically considered and rejected the argument raised by Justice Rothstein in *Fraser*, and by the Respondent on this application, to the effect that ILO Convention No. 87, which Canada has ratified, does not address collective bargaining, and that ILO Convention No. 98, which deals with collective bargaining, has not been ratified by Canada.¹²

Indeed, the majority considered the Committee’s finding that the government action at issue in *Health Services* violated the employees’ right to freedom of association, and confirmed in *Fraser* that the principles established in *Health Services* are entirely consistent with international law:

The 1994 Report of the Committee of Experts discussed the domestic schemes that compelled employers to bargain with unions, listing Canada, and approvingly stated that such schemes illustrated “the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement”. This is precisely the general principle that *Health Services* endorses.¹³

Thus, contrary to the Respondent’s suggestion, international law in general, and the Committee’s decisions more specifically, remain important and persuasive in the court’s consideration of whether a domestic statute infringes s.2(d) of the *Charter*. As set out in the AJC’s Factum, those decisions establish that wage restraint measures like the *ERA* substantially interfere with freedom of association.

The AJC did make one submission that was based in part upon the Ontario Court of Appeal’s decision in *Fraser*, which has now been overturned. That was the submission that the failure to provide for a dispute resolution mechanism for a bargaining impasse over wages, was itself a breach of s.2(d), based upon para. 82 of the Court of Appeal’s decision.

You may recall that this issue came up in oral argument. You questioned whether it was the AJC’s submission that it had the right to binding “interest” arbitration under the *Charter*. I responded carefully to that question, mindful of the admonition that the *Charter* does not constitutionalize a particular model of labour relations, and the possibility that *Fraser* might be overturned.

My response at the time, as I recall, was that the AJC did not claim a constitutional right to binding interest arbitration. Rather, a statute that took away

¹² See *Fraser*, *supra*, at para. 48; Respondent’s Factum, at paras. 113-114.

¹³ *Fraser*, *supra*, at para. 95 [citation omitted].

the ability to bargain meaningfully over the central issue of wages, represents a substantial interference with collective bargaining.

My response as I recall it remains the position of the AJC. That is to say, the test in light of the SCC's decision in *Fraser* is whether the *ERA* substantially interferes with a meaningful process of collective bargaining, not whether the *ERA* provides a dispute resolution mechanism for a bargaining impasse. Whatever the case might be in other circumstances, a statute that imposes wage restraints and forbids any outcome inconsistent with the statute, must represent such a substantial interference.

In short, on this point, the language of paragraph 82 of *Fraser* in the Court of Appeal would have made establishing a breach of s.2(d) a "slam dunk". However, the AJC has based its case on more general principles, as set out by the SCC in *Health Services*, and as reaffirmed in *Fraser*. Those principles continue to apply, and continue to lead to the conclusion that the *ERA* infringes s.2(d) of the *Charter*. Indeed, if legislated wage restraints do not constitute a substantial interference with a "meaningful process" of bargaining, it is difficult to imagine what would.

IV. CONCLUSION

The AJC respectfully submits that *Fraser* does not change the conclusion that the *ERA* infringes the freedom of association of its membership, contrary to s.2(d) of the *Charter*.

Yours very truly,

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cc: Dale Yurka

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