

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF MARC THIBODEAU

I, Marc Thibodeau, of the City of Ottawa, in the province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am Director of Operations, Core Public Administration Compensation, in the Compensation and Labour Relations Sector of the Office of the Chief Human Resources Officer, Treasury Board of Canada Secretariat ("TBS"). I also acted as the Chief Negotiator for Treasury Board Secretariat in collective bargaining with the Association of Justice Counsel ("AJC") for the Law occupational group. TBS was the representative for the employer, Treasury Board, throughout the collective bargaining process. This affidavit is based on my personal knowledge, except where stated. Attached as **Exhibit "A"** is a copy of my curriculum vitae.

2. In preparing this affidavit, I reviewed the affidavit of Marco Mendicino, sworn June 8, 2010, filed in this proceeding. And, it is in that context and in reply to the statements

made in that affidavit in relation to negotiations that I have included statements on the content of negotiations that might have otherwise been protected by privilege.

A. LAW OCCUPATIONAL GROUP

3. The Law occupational group (“LA group”) is comprised of all lawyers employed at federal departments and agencies within the core public administration (“CPA”). The CPA, as defined in section 11 of the *Financial Administration Act*, includes the departments named in Schedule I and the other portions of the federal public administration named in Schedule IV of the *Act*.

4. The LA group represents one of 27 bargaining units within the CPA, and is represented by the AJC, one of the 17 bargaining agents within the CPA.

B. COLLECTIVE BARGAINING FOR LA GROUP

1) Legislative Context for Collective Bargaining for LA Group

5. Prior to 2006, there were represented and unrepresented lawyers employed in the CPA.

6. From 1967 until 2006, the Professional Institute of the Public Service of Canada (“PIPSC”) was the bargaining agent for the represented lawyers in the LA group. These lawyers were employed at boards, agencies and commissions. Their terms and conditions of employment were determined through the collective bargaining process.

7. The provisions of the former *Public Service Staff Relations Act* ("PSSRA"), in force from 1967 until April 1, 2005, specifically excluded lawyers in the Department of Justice from being part of the bargaining unit. Accordingly, they were not represented by a bargaining agent. The terms and conditions for the excluded lawyers were set out in Treasury Board Policies.

8. The *Public Service Labour Relations Act* ("PSLRA") came into force on April 1, 2005. It allowed lawyers employed at the Department of Justice to be represented by a bargaining agent.

9. On February 28, 2006, the collective agreement applicable to the lawyers represented by PIPSC expired.

10. On April 28, 2006, the Public Service Labour Relations Board ("PSLRB") certified the AJC, a first time bargaining agent, to represent the employees of the LA group in collective bargaining, among other things. From that point, the AJC represented those previously represented by the PIPSC group as well as those previously excluded.

2) Process of Collective Bargaining

11. The collective bargaining process takes time. In my experience, negotiating a contract renewal for a bargaining unit takes approximately 12 to 18 months. However, the length of the bargaining process is significantly influenced by the particular context and the number of issues for discussion. For example, if the bargaining agent is new or if all terms and conditions are up for negotiation, the process can take 4 years or more.

12. Nonetheless, a variety of mechanisms are available to each party to move the collective bargaining process forward towards a resolution. Section 108 of the *PSLRA* provides that either party to a negotiation may at any time request mediation. If the bargaining agent has chosen arbitration as the dispute resolution mechanism, section 136 of the *PSLRA* provides that either party can refer terms and conditions to binding arbitration by an arbitration board.

3) Process of Bargaining between Treasury Board Secretariat and the AJC

13. There are two primary reasons why it took some time to complete the negotiations for the LA group.

14. First, delays occurred at various stages in the collective bargaining process, some at the request of the AJC and some that could have been avoided by the AJC.

15. Second, the AJC presented proposals in respect of most if not all the terms and conditions of employment to be included in a collective agreement. By contrast, TBS worked from the expired PIPSC agreement that had applied to represented lawyers until February 28, 2006.

a) *Delay in the Bargaining Process*

16. Section 106 of the *PSLRA* provides that as part of the duty to bargain in good faith, parties are obligated to meet within 20 days of the notice to bargain being given, unless the parties agree otherwise. The AJC served its notice to bargain on May 10, 2006.

17. On July 7, 2006 the President of the AJC wrote to TBS suggesting a meeting on October 10, 2006 for the exchange of proposals. On September 8, 2006, the AJC wrote to TBS and advised that he was not in a position to bargain partly because the AJC had not obtained a full mandate from its membership and partly for personal reasons. He suggested dates at the end of November 2006 for the first negotiation session.

18. At the March 28, 2008 mediation session, the AJC concluded that an arbitration process would be required to resolve the remaining issues in dispute. The parties then began discussions on selecting a Chair for the Arbitration Board. However, by late June 2008, it became apparent that the parties had reached an impasse on the selection of a Chair. On September 24, 2006, with no progress having been achieved on the selection of a Chair or in the negotiations, TBS asked the PSLRB to establish an Arbitration Board under section 136 of the *PSLRA*.

19. The AJC attempted to refer non-bargainable matters (pension, staffing and classification), amongst others, to arbitration. Following submissions by the parties, the PSLRB held a terms of reference hearing on December 15 and 16, 2008 to address the AJC's request. The Board determined that some of these matters were not within the jurisdiction of the Arbitration Board. The preliminary ruling is attached to this my affidavit as **Exhibit "B"**.

b) Scope of the Discussions in Bargaining between TBS and the AJC

20. The AJC was a newly certified bargaining agent and had never before represented any group in collective bargaining. It took the position that all terms and conditions were subject to negotiation because they were negotiating a first collective agreement. It also took the

position that it was not prepared to agree to many of the standard clauses that were included in agreements across the CPA.

21. TBS took the position that the PIPSC agreement for lawyers should be the starting point, especially as it contained many standard clauses present in agreements across the CPA. It also took the position that there had to be harmonization of the terms and conditions for the excluded lawyers with those who had formerly been represented by PIPSC.

22. The arbitration brief, attached as **Exhibit "C"** to this my affidavit and filed on May 26, 2009, identifies many of the standard clauses that the AJC continued to challenge up until the start of arbitration.

23. Ultimately, most of the standard clauses were included in the collective agreement, many with the agreement of the AJC and some as a result of the arbitral award. However, negotiation and referral to arbitration of these standard clauses extended the time necessary to complete the bargaining process.

4) Disclosure Requests and Responses

24. In this application, the AJC suggests that the bargaining process was delayed because TBS did not provide the requested information in a timely manner. TBS provided the requested information as quickly as it could.

25. In the normal course, TBS gathers background information for disclosure to bargaining agents before starting a round of collective bargaining. It was gathering information for bargaining with the AJC before the first bargaining session in November 2006.

26. However, the AJC asked for information that went beyond what has been requested by other bargaining agents in past negotiations. The first request was made orally during the first negotiation sessions on November 22 and 23, 2006. This request was expanded in a letter sent by AJC's counsel on December 22, 2006, which is attached as **Exhibit "I"** to the Affidavit of Marco Mendicino.

27. As early as January 20, 2007, I sent the AJC representative an email enclosing some of the material they requested, including:

- (a) Payroll and demography information;
- (b) PSLRB decisions on vacation leave (which was in the public domain);
- (c) Treasury Board Policy on Terms and Conditions of Employment for the excluded lawyers;
- (d) The Public Service Commission Policy on Information on Promotion and Competition; and

28. Much of the information requested was publicly available to all employees and to the AJC on various websites, including:

- (a) the Treasury Board Policy on Indemnification and Legal Assistance for Crown Servants;
- (b) the Treasury Board Term Employment Policy;
- (c) the NJC by-laws;
- (d) information regarding the Bilingual Bonus;

- (e) the NJC Work Force Adjustment directive;
 - (f) the Treasury Board Terms and Conditions of Employment Policy (covering the previously excluded LAs);
 - (g) Executive Group and Certain Excluded or Unrepresented Groups and Levels – Compensation Improvement;
 - (h) Treasury Board Salary Administration Policy – LA Group (applicable to previously excluded LAs);
 - (i) PSLRB decisions dealing with vacation leave;
 - (j) Information concerning the Federal Public Service Dental Plan;
 - (k) Treasury Board Membership Fees Policy;
 - (l) Treasury Board Travel Policy;
 - (m) Treasury Board Guidelines for the Use of Employer Facilities;
 - (n) Treasury Board Policy on Learning, Training and Development; and
 - (o) all other Treasury Board human resources policies.
29. The AJC was continuously apprised, during bargaining sessions and in discussions between the parties, of the work being done and challenges encountered in gathering the material requested and the availability of that information.
30. Information was provided on an ongoing basis, including:
- (a) On January 24, 2007, the Treasury Board Guidelines on Discipline, Treasury Board Policy on Performance Pay, Treasury Board Guidelines for the Use of Employer Facilities, Treasury Board Policy on Use of Electronic Networks, Treasury Board Membership Policy; and Information on the standard clauses for the Grievance Procedure.
 - (b) On February 21, 2007, further information regarding the Dental Plan.
 - (c) On October 2, 2007, information concerning the age categories of employees, performance assessments and the excess hours worked by bargaining unit members.

- (d) On December 21, 2007, information regarding salary levels, classification level, age, gender, actual base salary, performance increases and overtime pay of bargaining unit members.
- (e) On March 26, 2008, information regarding payroll and performance pay and year of call to the bar of bargaining unit members, as well as the latest demographic analysis of the Department of Justice.
- (f) On March 28, 2008, at the request of counsel for the AJC the day before, a detailed legend explaining an earlier chart of information that had been provided.
- (g) On April 4, 2008, an excel file containing the background data and charts for the LA-2 salary comparison with the provincial Crown attorneys across Canada.
- (h) On April 7, 2008, revised salary data linking the year of call to the bar and geographical location information for members of the bargaining unit, and articling students' rates of pay.
- (i) On May 9, 2008, information relating to taxi usage and the grievance procedure.

31. The AJC requested that TBS re-organize the disclosure or information it had been given. For example, when TBS provided information about salary ranges, age groups, levels, classification, performance review, overtime, and bilingual bonuses, counsel for the AJC requested that a database organizing all of this information be provided. An example of this can be seen in an email from counsel for the AJC to me dated October 22, 2007 and attached as **Exhibit "J"** to Marco Mendicino's Affidavit.

32. Some of the information requested was protected under the *Privacy Act*, including data regarding salary, group and age distribution for individual lawyers. TBS had to ensure that disclosure of such information would not breach privacy laws or infringe privacy rights. It advised the AJC that it was prepared to provide the requested information if the AJC signed a Memorandum of Understanding ("MOU") regarding the use of the personal information.

Ultimately, on December 20, 2007, the AJC signed the MOU and the information was subsequently provided.

5) Chronology of Negotiations

33. The following table summarizes the chronology of events that took place during collective bargaining for the LA group.

May 10, 2006.	<ul style="list-style-type: none">• The AJC served the Notice to Bargain.
July 2006	<ul style="list-style-type: none">• The President of the AJC wrote to TBS suggesting dates to meet in October 2006 for the exchange of proposals.• In the meantime, the parties communicated regarding other preliminary matters such as the process for exclusions and collection of union dues.
September 8, 2006	<ul style="list-style-type: none">• Counsel for the AJC wrote to TBS and advised that he was not in a position to bargain given the work the AJC had to do to obtain a full mandate from its membership and other personal reasons.• First negotiations sessions set for the end of November 2006.• Discussions focussed on settling matters relating to union administration and dues.
October 13, 2006	<ul style="list-style-type: none">• TBS delivered a proposal which included proposed language for the use of employer's facility, leave for AJC business and deduction of union dues.
November 2, 2006	<ul style="list-style-type: none">• An MOU on interim terms and conditions of employment signed between the AJC and TBS. This allowed the TBS to begin collecting the dues on the AJC's behalf.
November 22 and 23, 2006	<ul style="list-style-type: none">• First formal negotiation sessions between TBS and the AJC• The AJC and TBS exchanged proposals. The AJC was seeking a salary increase in excess of 35%.
Week of January 22, 2007	<ul style="list-style-type: none">• Negotiation session took place.

	<ul style="list-style-type: none">• AJC provided its revised bargaining proposal.• Parties discussed leave for union representatives, use of video surveillance, vacation carry over and the grievance procedure.
Week of February 19, 2007	<ul style="list-style-type: none">• Parties discussed paid and unpaid leave for union representatives, advances of sick leave.• Education, training and career development for the LA group was also discussed.
February and March 2007	<ul style="list-style-type: none">• TBS continued work following up on AJC requests for disclosure and proposals, reviewing material relating to the mobility of counsel between provinces and territories, the AJC's proposed legal indemnification clause, court clothing entitlements.
Week of April 11 to 13, 2007	<ul style="list-style-type: none">• Parties discussed the no discrimination clause, leave for union representatives, union dues deduction for employees in acting positions, and leave for the President of the AJC.
Week of June 26 to 28, 2007	<ul style="list-style-type: none">• A variety of issues were discussed.• Court clothing for litigators in the LA group was negotiated.
September 17, 25 and 26, 2007	<ul style="list-style-type: none">• Discussions included the disclosure of requested information, timekeeping, leave for union business, vacation carry over, publication of scholarly works, education and training, professional responsibility, legal indemnification, security and monitoring, vacancies, hours of work, AWA, compensation, response on grievances, and National Joint Council matters.• Parties agreed to request the services of a mediator.
October 15, 2007	<ul style="list-style-type: none">• TBS and the AJC made a mutual request to the PSLRB for mediation.• The parties agreed to Kevin Burkett as the mediator.
Nov. 14, 2007	<ul style="list-style-type: none">• First mediation session with mediator Kevin Burkett• During this first mediation session, the mediator directed the parties to initially deal with the non-monetary issues.

December 19 2007	<ul style="list-style-type: none">• TBS addressed the AJC's proposal of November 14, 2007.• TBS (1) amended its position on the LA statement of duties to accept the AJC's last position (2) withdrew its demand for Health Canada Assessments relating to sick leave, resolving this issue between the parties and (3) withdrew its demand relating to publication and authorship of scholarly works recognizing that this issue would not be dealt with in the collective agreement.• AJC representatives refused to advise whether or not the AJC would opt out of National Joint Council directives and said they may wait until the end of negotiations to do so.• In preparation for negotiations on compensation, TBS provided the Treasury Board Policy Framework for the Management of Compensation, effective February 22, 2007, to the AJC.
January 15, 2008	<ul style="list-style-type: none">• TBS provided the AJC with a 'without prejudice' proposal addressing the following issues:<ul style="list-style-type: none">○ Parking○ Various types of paid and unpaid leave, including sick leave, education and training leave○ Dues○ Management Rights○ Court clothing○ Meal reimbursement○ Legal indemnification○ Alternate work arrangements• Certain issues had been resolved by this point, including aspects of:<ul style="list-style-type: none">○ Publication and authorship○ Discipline and discharge○ Statement of duties○ Access to employment files

January 19 and 20, 2008	<ul style="list-style-type: none">• Longer mediation sessions took place
March 29, 2008	<ul style="list-style-type: none">• Longer mediation session took place• TBS completed its response to the AJC's November 2007 salary proposal• Representatives from the AJC bargaining team reacted negatively to the TBS proposal.• AJC advised that they were not sure it was constructive to continue the discussion and advised they would begin the process to move to arbitration• AJC stated they would advise whether it was still useful to proceed to another scheduled mediation in June 2008.
June 2008	<ul style="list-style-type: none">• The parties discussed the selection of a Chair for the arbitration but were unable to agree.• TBS took the position that the Chair had to be familiar with the <i>PSLRA</i> and the unique context of collective bargaining within the federal public service.
September 2008	<ul style="list-style-type: none">• Parties reached an impasse on the identity of a Chair.
September 24, 2008	<ul style="list-style-type: none">• TBS asked the PSLRB to establish an Arbitration Board to settle the remaining issues.
October 6, 2008	<ul style="list-style-type: none">• The AJC responded with additional matters to be referred including some dealing with classification, staffing and pension issues.
October 27, 2008	<ul style="list-style-type: none">• TBS responded to the additional matters dealing with classification, staffing and pension issues by objecting to the jurisdiction of an Arbitration Board to deal with these issues.
November 15, 2008	<ul style="list-style-type: none">• TBS asked AJC if they would be interested in resuming discussions in an attempt to reach a settlement in light of the economic conditions facing Canada.
November 18, 2008	<ul style="list-style-type: none">• TBS presented a final offer to the AJC• Final offer discussed with counsel for the AJC on November 25, and 26, 2008.

November 21, 2008	<ul style="list-style-type: none">• TBS filed particulars with the Arbitrator.
December 5, 2008	<ul style="list-style-type: none">• The AJC filed its response to the particulars.
December 15 and 16, 2008	<ul style="list-style-type: none">• A terms of reference hearing was held to address the jurisdictional issues that had been raised.
February 12, 2009	<ul style="list-style-type: none">• The PSLRB rendered its decision on the terms of reference for the arbitration, and established the Arbitration Board.• The PSLRB held that matters related to staffing, classification and pensions were not within its jurisdiction.
March 12, 2009	<ul style="list-style-type: none">• The <i>Expenditure Restraint Act</i> came into force
May 20, 2009	<ul style="list-style-type: none">• The AJC and TBS met to try to reach an agreement on additional matters.• This session proved very successful and a number of terms were resolved between the parties.
On May 25, 2009	<ul style="list-style-type: none">• As one member of the Arbitration Board resigned, a replacement was appointed by the PSLRB.• Up to this point, the parties had reached agreement on aspects of the following issues, among others:<ul style="list-style-type: none">○ Rights of Lawyers○ Representatives○ Use of Employer Facilities○ Membership Dues○ Hours of Work, except for reference to overtime○ Travelling Time○ Other Leave With or Without Pay (Medical Appointment for Pregnant Employees)○ Other Leave With or Without Pay (Court Leave With Pay)○ Other Leave With or Without Pay (Personnel Selection Leave With Pay)○ Other Leave With or Without Pay (Injury-on-duty Leave With Pay)○ Other Leave With or Without Pay (Religious

	<p>Observance)</p> <ul style="list-style-type: none">○ Acting Pay○ No Discrimination <ul style="list-style-type: none">● The parties had proposed the same language for the agreement, but had not formally signed off, for the following issues:<ul style="list-style-type: none">○ Designated Paid Holidays○ Vacation Leave With Pay○ Sick Leave With Pay○ Other Leave With or Without Pay (Bereavement Leave With Pay)○ Other Leave With or Without Pay (Leave Without Pay for the Care of Immediate Family)○ Other Leave With or Without Pay (Leave Without Pay for the Relocation of Spouse)○ Other Leave With or Without Pay (Leave With Pay for Family-Related Responsibilities)○ Other Leave With or Without Pay (Maternity-Related Reassignment or Leave)○ Career Development (Attendance at Conferences and Conventions)○ Career Development (Professional Development)○ Career Development (Examination Leave With Pay)○ Leave General○ Employee Performance Review and Employee Files○ Grievance Procedure○ Joint Consultation; and○ Job Security
May 26, 2009	<ul style="list-style-type: none">● The AJC and TBS filed Arbitration submissions.● TBS' submission is attached as Exhibit "C" to this my affidavit.
June 8, 9 and 10, 2009	<ul style="list-style-type: none">● The Arbitration Board decided to use these first arbitration hearing days for mediation.

June 24 and 25, 2009	<ul style="list-style-type: none">• The arbitration hearing continued.
October 23, 2009	<ul style="list-style-type: none">• Arbitration decision and award issued.• The award addressed the following conditions of employment with respect to the collective agreement:<ul style="list-style-type: none">○ The conditions under which members would be granted leave with or without pay for various purposes;○ Information sharing between TBS and the Association of Justice Counsel;○ Designated paid holidays;○ Benefits including health insurance, dental insurance, life insurance and long-term disability insurance;○ Reimbursement for parking;○ Hours of work;○ Overtime allowances and rates;○ Travelling time compensation;○ Vacation leave;○ Sick leave;○ Meal expenses;○ Office space;○ Court clothing;○ Annual economic increases; and○ Salary ranges.• The award is attached as Exhibit "D" to this my affidavit.
November 20, 2009	<ul style="list-style-type: none">• The AJC requested that the Arbitration Board rule on certain outstanding items that had not been addressed in the first award, nor resolved by the parties.
January 28, 2010	<ul style="list-style-type: none">• Following the receipt of written submissions from both parties, the Board declined to rule on these issues.• The supplementary award is attached as Exhibit "E" to this my affidavit.

34. The collective agreement was signed by the parties on July 27, 2010. Signing of the contract was delayed because the AJC refused to sign until entitlement to certain terms and conditions for articling students were resolved.

35. TBS has implemented the retroactive economic increases ordered by the Arbitrator in accordance with the timeline set out in the decision.

C. APPLICATION OF COMPENSATION PRINCIPLES TO THE LA GROUP

1) Starting Points for Compensation Assessment

36. Treasury Board bases compensation for all employees, including the previously excluded lawyers, on the Policy Framework for the Management of Compensation ("Framework"), attached as Exhibit "F" to this my affidavit. This Framework establishes that compensation decisions are based on four overarching principles, including:

- (a) External Comparability: Compensation should be competitive with, but not lead compensation provided for similar work in relevant labour markets;
- (b) Internal Relativity: Compensation should reflect the relative value to the employer of the work performed;
- (c) Compensation should reward performance, where appropriate and practicable, based on individual or group contributions to business results; and
- (d) Affordability: The cost of compensation must be affordable within the context of the commitments to provide services to Canadians, the fiscal circumstances, and the state of the Canadian economy.

37. The Framework notes that the guiding principles relating to compensation also need to take into account relevant legislation and be balanced against other government responsibilities such as its economic policy objectives, social policy objectives and public expectations and pressures.

38. These considerations are mirrored in section 148 of the *PSLRA*, which provides that in making an arbitral award, the Public Service Labour Relations Board must take into account the following factors, in addition to any others 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.

39. All of the above factors were central considerations for TBS in the negotiations with the AJC.

2) Starting Points for Negotiations with AJC on Compensation

a) Compensation Prior to AJC Certification

40. Up until February 26, 2006, compensation for the represented lawyers was governed by collective agreements negotiated between Treasury Board and the PIPSC. The last of such agreements expired on February 26, 2006 and is attached as **Exhibit "G"** to this my affidavit. The current collective agreement for the LA group was therefore not the first. Indeed, Treasury Board and PIPSC had previously concluded 17 collective agreements for the LA group.

41. Before the advent of the *PSLRA*, the terms and conditions for excluded lawyers were set out in a Treasury Board Policy.

42. In entering into the collective bargaining process, TBS relied on the PIPSC agreement, the Policy on Terms and Conditions of Employment for excluded LA employees, and the Framework on Compensation, discussed above, as the starting point for negotiations on compensation.

b) Recruitment and Retention

43. Recruitment and retention are important factors to consider in the assessment of fair compensation for an occupational group.

44. Based on the data available, TBS took the position during bargaining that there are no recruitment or retention problems for the LA group.

45. There are two ways to assess whether recruitment and retention problems exist for an occupational group. One is to examine the number of new hires, separations and changes in population levels for the group over several years. The second is to assess the evolution of the 'hirings-to-voluntary separations' ratio.

46. Available data for the LA group for the time period between fiscal years 2002-2003 and 2007-2008 indicates there were no recruitment and retention problems. The LA group experienced strong levels of hirings. On average, 205 lawyers were hired into the LA group per

year. In fact, total hirings into the LA group between the 2004-2005 year and the 2007-2008 year increased by 162.4%.

47. During these fiscal years, there were few if any separation problems for the LA group. Separations were significantly lower than hirings over this period, taking into consideration voluntary separations (LA employees who separate from the CPA for reasons such as outside employment and personal reasons), internal separations (employees who separate from an LA group to other groups within the CPA), and external separations (LA employees leaving the CPA entirely for any reason).

48. While the total number of separations from the LA group had moved up since 2003/2004, strong hiring numbers more than compensated for outward flows. In addition, external separation rates for the LA group were historically lower than the CPA average.

49. The same holds true for the 'hirings-to-voluntary separations ratio' for fiscal years 2002-2003 to 2007-2008.

50. This ratio is defined as the number of people hired into the LA group from outside the federal public service in a given fiscal year divided by the number of people in the LA group who have voluntarily left the federal public service (for reasons such as outside employment and personal reasons) in that same year. When this ratio is greater than 1.0, the number of people hired is greater than that of those voluntarily leaving, and recruitment and retention problems are unlikely. Conversely, when that ratio is below 1.0, voluntary separations are greater than hirings, which may suggest recruitment and retention problems.

51. During fiscal years 2002-2003 to 2007-2008, more people were hired into the LA group than left voluntarily from the group. For example, in the 2007-2008 year, for every one LA employee who voluntarily left the public service, 3.0 employees were hired from outside the government on average.

52. Even the broader 'hirings-to-total separations ratio' (all hirings from outside the public service and from other groups within the public service divided by all those leaving the LA group for another group within the public service or leaving the public service entirely, for all reasons) strengthens the position that the LA group does not have a recruitment and retention problem. For the 2007/2008 fiscal year, for every one employee who separated from the LA group for any reason, 1.7 new employees were hired into the group on average.

53. There has also been strong growth in the LA group population from March 2000 to March 2009, further indicating that there are no recruitment and retention problems. From 2000 to 2009 overall, the LA population increased by 61.8%, averaging 5.5% per year.

54. The available data therefore supported TBS' position during bargaining that there are no recruitment and retention problems for the LA group.

c) External Comparability: Ontario Crown Attorneys

55. TBS has never believed that the Ontario Crown Attorneys are an appropriate comparator group for the purpose of assessing LA group compensation. There are some significant differences between the Ontario Crown attorneys and the LA group that bear this out.

56. First, unlike their Ontario counterparts, the LA group is comprised of lawyers across Canada.

57. Second, only 10.9% of employees in the LA group are lawyers practicing in Toronto. By contrast, 89.1% work elsewhere across Canada. Even within Ontario, of the 1,346 employees in that province, 1,058 or more than 78% work in the National Capital Region (NCR). Similarly, of the 217 LA Group employees working in the Province of Quebec, 51 or more than 23% are working in the NCR. Consequently, the NCR population accounts for 51% of the total group population.

58. About three quarters of the lawyers employed by the government of Ontario work in the Greater Toronto Area ("GTA"). The GTA market is different than that of the NCR. It is an environment in which the province must constantly compete to retain lawyers who might otherwise choose to go into private practice.

59. The median salary for lawyers in Toronto is consistently and significantly higher than the median salary for lawyers in Ottawa. Based on information provided in the Report of the Second Judicial Compensation and Benefits Commission, in the year 2000, the average salary for lawyers in the private sector in Toronto was 36% higher than the average median salary of private sector Ottawa lawyers. Average salaries for private sector Toronto lawyers were also higher than in any other major city across Canada. Attached to this affidavit as **Exhibit "H"** is an excerpt from the report.¹

¹ The full Report of the Second Judicial Compensation and Benefits Commission can be found at http://www.quadcome.gc.ca/archives/2003/index_en_2003.html

60. Finally, the legal industry in the National Capital Region and across Canada in such locations as Regina, Saskatchewan and Halifax, Nova Scotia cannot be compared to the Toronto market. Had the Ontario Crown Attorneys been used as the *sole* baseline for LA Group compensation, this would have resulted in a significant increase in federal government lawyers salaries across the country, which in many places would far exceed the salary levels of provincial government and private practice counterparts alike. It was TBS' position that such increases would have been inconsistent with the principles set out in the Policy Framework for the Management of Compensation.

d) External Comparability: Provincial and Territorial Crown Attorneys

61. The TBS conducts regular wage comparison between lawyers from the LA group and equivalent provincial/territorial government lawyers. This data, supplied by the provincial/territorial government authorities or obtained from provincial/territorial internet sites, is located at pages 36 to 40 of the arbitration brief, attached as **Exhibit "C"** to this my affidavit. In most cases, even though the Treasury Board rates had expired in 2006, they were still quite competitive with the average of the provincial/government rates for lawyers across the country, most of which have more recent effective dates.

62. The data demonstrates that at the outset of collective bargaining with the AJC, the salary range for LA-01s was somewhat competitive with salary ranges across 13 provinces and territories (54.6K to \$77.9K vs. 62.6K to 88.9K). The same data shows that on average, the LA-2A salary range (\$75.6K to 108.5K) is competitive with the provinces (\$82.4K to \$114.7K). Similarly, the LA-2B salary range (\$94.1K to \$120.0K) is competitive with the provincial/territorial average (\$94.5K to \$124.0K).

63. Moreover, the salary range for counsel at the LA-3A range (\$107.3K to \$136.3K) is superior to the average of 11 provinces and territories (\$103.1K to 131.0K). The data also shows that the LA-3B range (\$124.4K to \$152.2K) is competitive when compared to the provincial/territorial average (\$124.5K to \$154.4K).

64. For all of these reasons, TBS was of the view that the LA Group salary range was competitive with appropriate comparators before collective bargaining began.

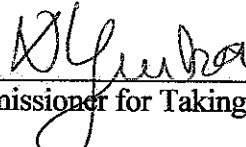
e) Internal Relativity: CPA as a Whole

65. The mean salary for bargaining unit members of the LA group as of December 31, 2006 was \$101,332. The mean salary for all employees in the CPA at that time was \$60,413.

66. For the years 2000 and 2005, the LA group had slightly higher salary increases than those received by the rest of the CPA over the same time period. Since 2000, total cumulative increases received by the LA group (16%) have outpaced those of the average CPA employee (15.7%).

67. Based on the above data, TBS' position in the bargaining process was that LA group compensation was competitive at the time that collective bargaining began.

SWORN before me at the City of Ottawa, in
the Province of Ontario on the 29th day of
October, 2010.



Commissioner for Taking Affidavits



MARC THIBODEAU

ASSOCIATION OF JUSTICE COUNSEL

AND

ATTORNEY GENERAL OF CANADA

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

AFFIDAVIT OF MARC THIBODEAU
(Sworn October 29, 2010)

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