

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF MARCO MENDICINO

I, Marco Mendicino, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of the Association of Justice Counsel ("AJC"), the Applicant in this matter. To fulfill this position, I am currently on a leave of absence as a federal prosecutor with the Public Prosecution Service of Canada. I was elected as President on May 20th, 2010, and previously served as Acting President since April 25th, 2009.

2. Prior to that, I sat on the AJC Executive as Vice President Finance beginning in February 2009. Throughout my tenure as President and Vice President Finance, I have at the same time served as a Representative on the Governing Council since November 2008. The Governing Council is the AJC's ultimate decision-making body. I am also a member of the Negotiations Committee in my capacity as President.

3. Accordingly, I have direct knowledge of the bargaining relationship between the AJC and Treasury Board of Canada between April 25th, 2009 and the present. Otherwise, the matters to which I hereinafter depose are based on information from other sources, all of which I believe to be true.

Overview

4. This affidavit is made in support of the AJC's claim that its members' fundamental rights under s.2(d) of the *Canadian Charter of Rights and Freedoms* have been infringed by the *Expenditure Restraint Act 2009*, c.2, s.393 ("ERA"). The ERA deprived Federal Crown counsel of the opportunity to bargain collectively over salary in their first ever collective agreement.

5. The ERA applies to a broad range of federal public servants, employees of certain federal agencies and Crown corporations, members of the Canadian Forces and Royal Canadian Mounted Police, and others. In practical terms, it restricts collective bargaining over salary for the period between 2006 and 2011, despite any collective agreement or arbitration award. For all of these employees, it directly and substantially interferes with a central aspect of the right to bargain collectively. However, the ERA also effectively singles out AJC members in at least two ways.

6. First, the AJC's members, who are all included in the Law Group (the government's bargaining unit designation for Federal Crown counsel) ("Law Group"), are to my knowledge the only represented employees subject to the ERA whose terms and conditions of employment had never previously been collectively bargained. As set out below, the AJC and its members had reason to expect that their first collective agreement would establish a level of compensation commensurate with their role and responsibilities, and would address disparities that had emerged between them and their natural comparators in other jurisdictions where government lawyers gained the right to collective bargaining

earlier.¹ The ERA deprived the AJC and its members of the opportunity to bargain collectively, or achieve through arbitration, an agreement that would establish an appropriate base level of compensation before the imposition of restraints.

7. Second, the *ERA* specifically singles out the members of the Law Group by retroactively imposing collective bargaining restrictions over salary back to May 10th, 2006, which was the precise date on which the AJC gave notice to bargain as the certified bargaining agent for the Law Group. The *ERA* limits increases for the 2006 – 2007 fiscal year for employees whose contracts had not been collectively bargained or set by an arbitral award prior to December 8, 2008. To my knowledge, the Federal Crown counsel were the only group of employees in that category. All other groups had already concluded collective agreements for that fiscal year by the time the *ERA* was introduced, and were permitted to keep their negotiated or awarded increases. Section 34 of the *ERA* specifically sets out this treatment of the Law Group, with reference to the May 10th, 2006 date.

8. The AJC cannot discern any policy rationale for the distinctions drawn by the federal government in its treatment of different types of employees, or for the unique retroactive effect that was imposed on members of the Law Group only.

The Association of Justice Counsel

9. The AJC is the sole bargaining agent for approximately 2700 Federal Crown counsel under the employ of the Government of Canada. We work for the Department of Justice (“DOJ”), the Public Prosecution Service of Canada (“PPSC”), and provide in-house legal services to various federal agencies, tribunals and courts across the country.

¹ In particular, the salaries of federal crown counsel used to be on par with those of provincial crown counsel in Ontario (where the majority of the AJC's members work), but are now substantially lower.

10. As delegated authorities for the Attorney General of Canada (“AGC”), Federal Crown counsel are required to discharge a solemn responsibility. Every day, we make decisions that sustain law and order, public safety, and individual liberties. Federal Crown counsel draft policy and legislation and litigate on behalf of Canada in complex and delicate areas, including First Nations land claims, health regulation, immigration, extradition, veterans’ affairs, customs and revenue, commission inquiries, and national security certificates.

11. Since its creation in 2006, the PPSC has served as the prosecuting arm of the federal government. Federal prosecutors take carriage of cases involving drugs, organized crime, money laundering and proceeds of crime, terrorism, war crimes and regulatory offences. In the northern territories, federal prosecutors conduct trials involving murder, sexual assaults and offences of all other sorts under the *Criminal Code*.

12. Of the vital importance of the work carried out by AJC members and its link to government priorities, the Attorney General of Canada recently said the following:

Thanks to the professionalism and expertise of the Department’s public servants, our Government has been able to continue pursuing its tackling-crime agenda, thus ensuring safer communities for Canadians.

To further improve the justice system, the Department continues to work with the provinces and territories to respond to issues involving victims of crime, access to justice, family justice and Aboriginal involvement in the administration of justice.

The Department’s legal support to various federal departments and agencies over the last year has helped the government to ensure the stability of our financial system during the global economic recession, in addition to successfully representing the interests of the Crown in significant litigation cases.²

² See DOJ Departmental Performance Report, 2008-2009, Minister’s Message: <http://www.tbs-sct.gc.ca/dpr-rmr/2008-2009/inst/jus/juspr-eng.asp?format=print>.

13. It was reported by the Department of Justice in 2004-2005 that the total amount of money that the federal government was being sued for at a given moment was \$1.2 trillion. Federal Crown counsel are responsible for defending these claims.

Historical Exclusion Gives Way To AJC Certification and Collective Bargaining Rights

14. Federal Crown counsel were historically excluded from collective bargaining with Treasury Board (who functions as the employer for the Government of Canada) on the basis that they held a “managerial or confidential position”. Exclusion was automatic through a series of statutes; lastly, the *Public Service Staff Relations Act*, R.S. 1985, c. P-35 (the *PSSRA*).

15. With wage freezes and staff departures on the rise in the 1990s, Federal Crown counsel became increasingly dissatisfied with the terms and conditions of employment and the process by which they were unilaterally determined by Treasury Board. Support grew for an independent body that would advocate for the employment interests of Federal Crown counsel occupying non-management positions.

16. Hence, the AJC was formed in July 2001 following a national referendum amongst non-managerial counsel. Nearly 90% of the ballots cast were in favour of its creation. However, because collective bargaining was still prohibited at the time under the *PSSRA*, the authority of the AJC to speak directly on behalf Federal Crown counsel was not recognized by Treasury Board and its role was therefore limited.

17. That changed on April 1st, 2005 when the *PSSRA* was repealed, and the successor *Public Service Labour Relations Act*, S.C. 2003, c. 22 (“*PSLRA*”) came

into force. Contrary to previous legislation, the *PSLRA* lifted the presumption of exclusion for Federal Crown counsel.

18. On April 1st, 2005, the AJC applied to the Public Service Labour Relations Board ("PSLRB") to become the bargaining agent for all Federal Crown counsel not holding management or confidential positions. The AJC was certified on April 28th, 2006. The PSLRB's certificate is attached as **Exhibit "A"** to this affidavit.

19. It has now been more than four years since the AJC was certified. As set out below, for some two and a half years direct negotiations and third-party mediation failed to yield a settlement. Treasury Board formally requested arbitration in September 2008, and an arbitral award issued by the PSLRB eventually followed on October 23rd, 2009. Notwithstanding this process, the AJC still does not have a first collective agreement. To my knowledge, we are the only bargaining unit in the federal public service to be in such an unresolved position as of the date of this affidavit. The following paragraphs provide the historical context leading to the AJC's first round of collective bargaining.

Disenfranchisement Backdrop to Collective Bargaining

20. For years prior to AJC's certification, there was a persistent sense of disenfranchisement among Federal Crown counsel. The lengthy wage freeze imposed by the federal government on March 6th, 1991 marked the beginning of a sustained period of austerity and correlative low morale. Compensation was all but frozen for the better part of a decade under the *Public Sector Compensation Act*, S.C. 1991, c. 30 ("*PSCA*"), the *Government Expenditures Restraint Act*, S.C. 1993 No. 2, c. 13 ("*GERA*"), and the *Budget Implementation Act*, S.C. 1994, c.18 ("*BIA*").

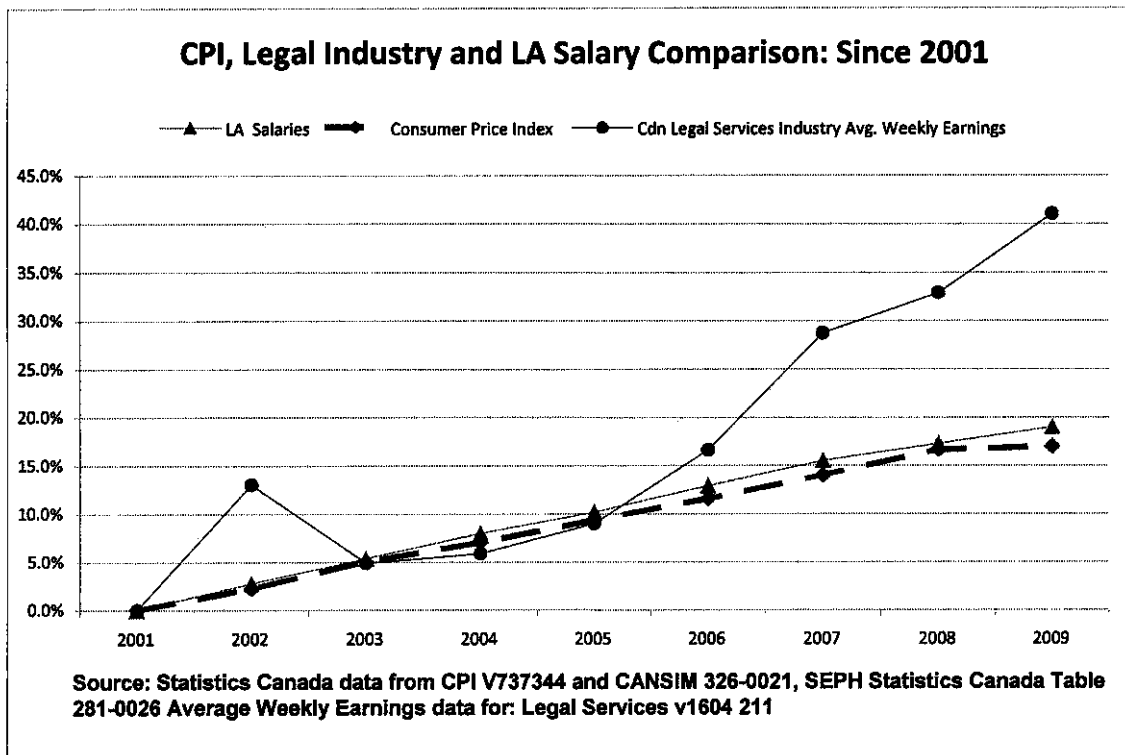
21. Under the *PSCA*, *GERA* and *BIA*, promotional opportunities were severely limited to conform to budget cuts and external recruits were hired at salary rates

above their contemporaries already on staff, resulting in salary compression and leapfrogging. All told, this lasted more than six years, from 1991 to 1997.

22. Between 1997 and 2005, Treasury Board unilaterally set annual increases that essentially tracked the rate of inflation for the vast majority of the bargaining unit.

23. In 2006, Federal Crown counsel saw their wages suspended yet again as a pre-condition of the AJC entering into first-time negotiations with Treasury Board. Our salaries would remain static for three more years during a period when the government ran substantial surpluses and the economy was comparatively stronger, while others within the public service received increases. Attached as Exhibits “B”, “C”, and “D” are copies of the Government of Canada’s documents entitled “The Budget in Brief” for the 2006, 2007 and 2008 respectively, confirming these surpluses and the projected growth for these years.

24. Thus, over the last 20 years, the AJC membership has been subject to lengthy stretches of wage controls, which have kept our salaries limited to basically zero growth in real terms. By contrast, the salaries of public sector lawyers in other Canadian jurisdictions, and private sector lawyers, have increased substantially during this time. This is graphically illustrated in part by the graph below, taken from Statistics Canada data, showing salaries for the Law Group matching the Consumer Price Index for an 8-year period from 2001 to 2009, while average earnings for the legal services industry generally have increased much more rapidly.



25. Not surprisingly, this has worked to the detriment of the DOJ and PPSC's recruitment and retention efforts. Both departments readily acknowledge and are on public record as stating that the issue must be addressed in order to guarantee the continued fulfillment of their mandates.

26. In its Human Resources Management Plan 2007-2010, the DOJ states at p.10:

Compounding the challenge of an agency workforce and future labour shortages is the fact that we are recruiting in a very competitive labour market, with private sector and other levels of government in some cases offering much more attractive compensation packages than we are.

Excerpts from a copy of the DOJ's Human Resources Management Plan 2007-2010 are attached as **Exhibit "E"**.

27. Likewise, the PPSC has stated:

The salaries of prosecutors and lawyers in some regions of Canada continue to increase, which affects PPSC's ability to retain its highly skilled prosecutors, hence creating a personnel shortage. Due to the competition for scarce resources, not all vacant positions were filled.³

28. In many provinces, the salary for provincial crown counsel has continued to increase, outpacing compensation at the DOJ and PPSC. The PPSC has cautioned:

During 2008-2009, the recruitment and retention of qualified prosecutors will continue to be a priority. The PPSC will be seeking to augment its prosecutorial cadre in order to ensure that it continues to have the capacity to fulfill its mandate in relation to a number of new government initiatives, including the National Anti-Drug Strategy. The PPSC will undertake a nationally coordinated recruitment effort to achieve this goal.⁴

29. The separation rate in DOJ (i.e., the rate at which federal crown lawyers leave the department) has increased over the past four years from 4.7% (229) in 2003-04 to 7.8% (400) in 2006-07⁵. The AJC requested and obtained certain information on the number of, and reasons for, such separations for both the DOJ and PPSC pursuant to the *Access to Information Act*. Attached as **Exhibit "F"** are copies of extracts from a DOJ document released by Treasury Board to the AJC under this Act, setting out the requested information. These extracts show an increase in the number of lawyers resigning to take outside employment, or transferring out of Justice.

30. These trends have caused the Auditor General of Canada to express concern that the DOJ does not have a corporate retention strategy or a succession plan:

³ See PPSC Annual Report: 2007-2008, <http://www.ppsc-sppc.gc.ca/eng/pub/ar08ra08/06.html>.

⁴ See *Report on Plans and Priorities* 2008-09, Public Prosecution Service of Canada, pp. 11 and 16; see <http://www.ppsc-sppc.gc.ca/eng/pub/rpp09/index.html>.

⁵ Department of Justice, Human Resources Management Plan 2007-2010, Exhibit E, p.56-61.

The Department needs to have a human resource strategy and practices in place to ensure it has appropriately qualified staff to meet its needs for quality. These practices need to include a retention strategy and succession plan, as well as defined competencies for lawyers and managers.⁶

31. In the midst of these ongoing recruitment and retention challenges, Treasury Board superimposed an additional 5% budget cut on the DOJ and PPSC initiated in 2009 and 2010, respectively. This exercise is part of a larger expenditure restraint program called Strategic Review which overlapped with bargaining.

32. At the DOJ, the targeted cut has been executed through the Law Practice Model (“LPM”), which mandated the following measures between 2009 and 2012:

- a hiring freeze between October and December 2009;
- a suspension of all promotions between October and December 2009;
- a rescinding of some term promotions beginning in January 2010; and
- a reduction in overall payroll through significant restructuring of the crown counsel population by expanding the entry level positions by 63% and shrinking the senior complement by 15%.

Attached as **Exhibit “G”** is a copy of the Deputy Minister’s announcement of the LPM, dated October 13th, 2009.

33. All of these factors have led to on-going recruitment and retention issues. For many of those who have stayed, there continues to be a pervasive sense of futility about their career aspirations and a demoralized work atmosphere.

⁶ Report of the Auditor General of Canada to the House of Commons, C. 5: Managing the Delivery of Legal Services to the Government – Department of Justice Canada (May 2007), p. 17-18.

A Natural Point of Comparison – Ontario Ministry of the Attorney General

34. DOJ and PPSC counsel provide legal services that are parallel and, in most respects, identical to the work carried out by counsel with the provincial attorneys general. Given that a strong majority of the AJC bargaining unit, nearly 65%, are employed in Ontario, and are competing in the same labour market, the Ontario Ministry of the Attorney General (“Ontario MAG”) is a natural point of comparison.

35. During the 1980s, Federal Crown counsel were paid on a scale that was roughly equivalent to the salaries earned by counsel with Ontario MAG.

36. In 1989, the Government of Ontario entered into a framework agreement with two associations representing its civil counsel, the Association of Law Officers of the Crown (“ALOC”), and crown attorneys, the Ontario Crown Attorneys’ Association (“OCAA”). ALOC and OCAA were able to bargain collectively with the province through which significant salary increases were won.

37. ALOC and OCAA were parties to an arbitration before William Kaplan, which looked comprehensively at the duties and responsibilities of provincial crown lawyers, and the terms and conditions of employment of relevant comparators. (The provincial legislative scheme for crown counsel, like the *PSLRA*, allows the parties to choose interest arbitration rather than a strike or lockout as a means of resolving an impasse in collective bargaining. Arbitrators in this process seek to replicate the results of collective bargaining by looking at a range of factors, including collective agreements negotiated by other comparable employees.)

38. On October 26th, 2000, Kaplan awarded Ontario MAG counsel salary increases of 30% for the period from January 1st, 1999, to December 31st, 2000. 22.5% of the award was retroactively applied. The increases came into effect on January 1st, 2001. This was a watershed for Ontario MAG. At the same time, the

Kaplan award opened a wide schism in compensation, which has left Federal Crown counsel lagging behind their provincial counterparts to this day.

39. The chart below compares remuneration levels for Federal Crown counsel and Ontario MAG counsel and illustrates the wage disparity between the two.

Federal Crown Counsel – effective May 1, 2009			Ontario MAG Counsel – effective July 1, 2009		Disparity %
Class	National Salary Range (\$)	Toronto Salary Range (\$)	Class	Salary Range (\$)	National Rate (Toronto)
Entry level (LA1)	58,961-84,119	58,967-84,119	Entry Level (CC1)	75,265 – 103,603	27% bottom 23% top (same)
Intermediate (LA2A)	82,917 – 118,995	82,917 – 134,969	Intermediate and Senior Counsel (CC2/3)	111,072 – 182,703	34% bottom 54% top (34% bottom 34% top)
Senior Counsel (LA2B)	101,649 – 129,604	106,774 – 149,518			9% bottom 41% top (4% bottom 22% top)
General Counsel (LA3A)	115,914 – 147,241	122,719 – 159,987	General Counsel (CC4)	151,545 - 196,965	30% bottom 34% top (23% bottom 23% top)
Senior General Counsel (LA3B)	134,386 – 164,417	134,386 – 164,417			13% bottom 20% top (same)
Senior General Counsel (LA3C)	153,075 – 186,671	153,075-186,671			0% bottom 5% top (same)

History of Collective Bargaining

40. Very shortly after certification, the AJC gave notice to bargain on May 10th, 2006. That same year, the Government of Canada would run a record surplus of \$13.8 billion.

41. The AJC came to the table with a reasonable expectation that Treasury Board would engage in a meaningful dialogue regarding the scope of the work carried out by Federal Crown counsel and would diligently exchange proposals regarding our salaries. Yet, disclosure stalled and no proposal on this most central issue would be tabled by the employer for nearly two years.

42. From the outset of negotiations, the AJC requested and anticipated meaningful and useful disclosure from Treasury Board. This was an essential starting point, especially given that this was the first ever round of collective bargaining for Federal Crown counsel. From the AJC's bargaining perspective, acquiring information relevant to the bargaining unit was vital to our ability to develop and discuss proposals. Through its counsel, the AJC repeatedly made disclosure requests of the employer relating to pre-existing terms and conditions of employment, including on salary, forms of leave, health and welfare benefits, competition and promotions, classification structure, demographic and economic information, and various other policies and conventions related to working conditions.

43. The AJC repeated its inquiries on these matters by phone, in person, and through written correspondence both before and during the initial face-to-face bargaining sessions held in November 2006.

44. A letter dated December 2nd, 2006 was sent from AJC's counsel to the chief negotiator for Treasury Board, reiterating our position that disclosure was essential for the AJC to make and respond to informed proposals in collective

bargaining. Attached as **Exhibit "H"** is a copy of this letter. AJC counsel's subsequent letter requesting disclosure, dated January 22nd, 2007, is attached at **Exhibit "I"**.

45. Face-to-face bargaining sessions were held between the AJC and Treasury Board on the following dates:

November 22nd – 23rd, 2006

January 23rd – 25th, 2007

February 20th – 22nd, 2007

April 11th – 13th, 2007

June 26th – 28th, 2007

September 25th – 26th, 2007

46. At no time during these meetings did the employer offer a monetary proposal setting out its position on appropriate salary increases. The absence of a monetary proposal from the employer also hindered negotiation of other terms.

47. In October 2007, nearly a year after bargaining had started, the AJC received a number of charts from Treasury Board. The charts contained data regarding the age categories of employees, performance assessments, and excess hours worked by members of the bargaining unit.

48. On October 19th, 22nd, 24th, and November 4th 2007, counsel for the AJC wrote to Treasury Board and stated that it was impossible to develop and update salary proposals based on the partial and often impenetrable disclosure received. Among the outstanding items particularized were salary levels, classification, age, gender, and year of call. None of this was provided until December 21st, 2007. Copies of the AJC's written requests are attached as **Exhibit "J"**.

49. Following a series of bi-lateral face-to-face negotiations throughout 2007, the parties entered into third-party mediation, facilitated by the PSLRB. Bargaining sessions were held on the following dates with mediator Kevin Burkett:

November 14th, 2007
December 19th, 2007
January 19th – 20th, 2008
March 29th, 2008

50. Here again, no salary proposal was advanced by Treasury Board. The only document that was provided to the AJC relating to monetary issues was a Treasury Board document entitled “Policy Framework for the Management of Compensation”, effective February 22nd, 2007, attached as **Exhibit “K”**, which was given to the AJC in connection with the December 19th, 2007 mediation session.

51. Insofar as the Policy Framework document recognizes the need for appropriate compensation to attract, retain, motivate, and renew the workforce, and confirms as an “overarching principle” that compensation should be competitive with that provided for similar work in relevant labour markets, the AJC reasonably expected that this document would be the precursor to a good faith monetary offer that would begin to address the concerns relating to comparability with other crown lawyers, and recruitment and retention issues, set out above. Nevertheless, the AJC still did not receive a monetary offer.

52. Indeed, despite repeated requests from the AJC, no monetary proposal was made until the mediator pointedly expressed his concerns at the slow pace of disclosure and the lack of any specifics on salary in the employer’s position. A monetary offer came only after five months had passed and the final mediation session was concluded on March 29th, 2008. Attached as **Exhibits “L” and “M”** are emails from AJC counsel to Treasury Board counsel dated March 21st and 27th, 2008 respectively, requesting a monetary proposal and additional disclosure, in advance of the March 29th, 2008 mediation session.

53. At the beginning of April 2008, the employer finally advanced a proposal on compensation for the first time. Treasury Board’s proposal would have set limited annual increases at 1.5% “in light of the global positioning of the LA salary

structure with direct comparator and the economic outlook". The term would be for a duration that would last "into the next round". Treasury Board eventually provided some of its salary comparator data thereafter, in April and in May 2008. At no time did the employer elaborate on its "economic outlook". Treasury Board's April 2008 proposal is attached as **Exhibit "N"**.

54. By August 2008, more than two years had elapsed since the start of negotiations. Salary disclosure remained incomplete, and a meaningful dialogue regarding a base salary range for Federal Crown counsel (never before freely negotiated) had yet to commence. Meanwhile, our compensation remained frozen at 2005 levels.

The Economic Downturn

55. It is well documented that economic conditions began to deteriorate significantly around the world in the summer of 2008. The Government of Canada responded with the promise of an \$8 billion dollar stimulus plan and reduction in expenditures to the public service.

56. On October 29th, 2008, the Honourable Jim Flaherty, Minister of Finance, gave a speech in which he outlined the government's strategy as including a "commitment to responsible fiscal management [that] will also extend to public sector compensation". Attached as **Exhibit "O"** is a copy of Minister Flaherty's speech.

57. Shortly after, on November 18th, 2008, the Government announced in the Speech from the Throne that it was "committed to responsible fiscal management of public sector compensation, and will table legislation to ensure sustainable compensation growth in the federal public service". Attached as **Exhibit "P"** is a copy of the Speech from the Throne. This was the first public indication that wage restraint legislation was on the horizon.

Treasury Board's Referral to Arbitration

58. In late September 2008, Treasury Board referred all unresolved matters with AJC to interest arbitration, pursuant to s.47 of the *PSLRA*. Attached as **Exhibit "Q"** is a copy of Treasury Board's request for arbitration, dated September 24, 2008.

59. Within the request for arbitration, Treasury Board included an economic proposal which would see the AJC bargaining unit receive annual salary increases of 1.5% at the beginning of each May from 2006 to 2010. This proposal foreshadowed the *ERA* in its terms.

60. For the years 2006 to 2009, the proposed 1.5% increases were well below the rate of inflation. Thus, far from addressing the disparities with other comparable lawyers set out above, this offer would have resulted in a reduction in real salaries. It could not reasonably be accepted by the AJC.

61. The PSLRB appointed an arbitration board on February 12th, 2009. Hearings were held at the end of June 2009, and the board gave its decision on October 23, 2009.

Expenditure Restraint Act Singles Out Federal Crown Counsel

62. In the interim, on November 27th, 2008, the Minister of Finance followed up on the Throne Speech by elaborating on the wage restraints which would be introduced under Bill C-10, later passed as the *ERA*. The Minister's statement referred to certain tentative settlements that had been bargained with "some of the largest public sector bargaining agents":

As indicated in last week's Speech from the Throne, the Government is also introducing legislation to ensure predictability in federal public sector compensation. [...]

This legislation will put in place annual public service wage increases of 2.3 per cent for 2007–08, and 1.5 per cent for the following three years. [...]

For groups with collective agreements already covering 2008-09, the 1.5% 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 2010-11.

Attached as **Exhibit “R”** is a copy of the Minister’s November 27th 2008 statement.

63. The *ERA* was subsequently presented to the House of Commons (as Bill C-10) and given first reading on December 8th, 2008. Contrary to the Finance Minister’s statement on November 27th 2008, the restraint measures contained therein did not commence in the 2007-08 fiscal year, but instead reached further back to 2006, thereby preventing the AJC from negotiating or obtaining in arbitration appropriate base salaries for its members before the imposition of restraints. The *ERA* fixed maximum salary increases as follows:

- (a) For the 2006-07 fiscal year, 2.5%;
- (b) For the 2007-08 fiscal year, 2.3%;
- (c) For the 2008-09 fiscal year, 1.5%;
- (d) For the 2009-10 fiscal year, 1.5%; and
- (e) For the 2010-11 fiscal year, 1.5%.

64. Federal Crown counsel were the only public servants to be affected by the 2006 – 2007 restraint period. To my knowledge, the AJC was the only bargaining agent that had been referred to interest arbitration at the same time the *ERA* was introduced. In addition, the *ERA* provided that any collective agreement entered into or arbitral award made before December 8th, 2008 would not be subject to the aforementioned limits except in respect of increases that were scheduled to take effect after that date. In other words, pre-December 8th, 2008 increases that had been agreed to or awarded prior to that date would not be rolled back. A similar

exception applied to excluded federal employees (for example, government executives), whose salary increases had been accepted by the Government prior to the December 8th, 2008 cut-off.

65. By the time that the Arbitration Board was appointed under the *PSLRA* in February 2009, the *ERA* was in force and salary increases were established as set out therein, retroactively back to May 10th, 2006 – the same day the AJC gave notice to bargain. Moreover, s. 57 of the *ERA* provides that no increase after the Act comes into force may provide for compensation for amounts that employees did not receive as a result of the *ERA*'s restraint measures. Thus, the effects of the *ERA* are permanent.

66. At arbitration, Treasury Board modified its proposal slightly to match the increases under the *ERA*. This effectively took salary negotiations outside of the realm of collective bargaining altogether. As the arbitrator himself observed, the *ERA* prohibited the arbitration board from ruling on matters related to salary. The only role for the arbitration board was to rule on other items in dispute between the parties.

Other Groups Granted Exceptions to the ERA

67. The *ERA* *collective bargaining* restrictions were not applied across the board. The government made exceptions both for union-represented public servants and executives, while simultaneously refusing to do the same for Federal Crown counsel. No explanation was offered by the employer for the different treatment of these groups.

68. What follows below are several examples of beneficial settlements reached with other groups just prior to the introduction of the *ERA* that departed from the scheduled increases otherwise required by the *ERA*:

- 7,000 employees in the Canada Border Services Agency were provided with a new wage grid that included a minimum 19.5% wage increase over the life of their collective agreement. Attached as **Exhibit “S”** is a copy of the Public Service Alliance of Canada (“PSAC”)’s ratification kit for members of the Border Services bargaining unit.
- Many of the 11,000 employees in the Operational Services bargaining unit were provided with a new national wage grid that provided average increases to affected employees of 6.8%, in addition to the maximum increases otherwise permitted by the *ERA*. Attached as **Exhibit “T”** is a copy of PSAC’s ratification kit for members of the Operational Services bargaining unit.
- Approximately 70,000 employees in the Program and Administration Services bargaining unit were given lump sum adjustments of \$4,000, and a commitment to an occupational group and classification review, in addition to the maximum increases otherwise permitted by the *ERA*. Attached as **Exhibit “U”** is a copy of PSAC’s ratification kit for members of the Program and Administration Services bargaining unit.

69. Moreover, even after the *ERA* was enacted, approximately 18,000 members of the RCMP were given increases above the *ERA* limits in June 2009. Attached as **Exhibit “V”** is a copy of a CBC news story describing the RCMP settlement.

70. With respect to the Government’s senior executives and order-in-council appointees, the *ERA* included an exception for salary increases accepted prior to December 8, 2008 that operated to preserve increases for this group in 2008. The Government’s Advisory Committee on Senior Level Retention and Compensation recommended increases for these executives in February and April, 2008. The Government’s acceptance of these recommendations prior to December 8, 2008 resulted in double-digit increases for many senior employees and appointees for the 2007-08 and 2008-09 fiscal years that were not rolled back by the *ERA*. Attached as **Exhibits “W” and “X”** are the 9th and 10th Reports of the Advisory Committee on Senior Level Retention and Compensation. The Government’s press release dated May 23rd, 2008 announcing the acceptance of these reports is attached as **Exhibit “Y”**.

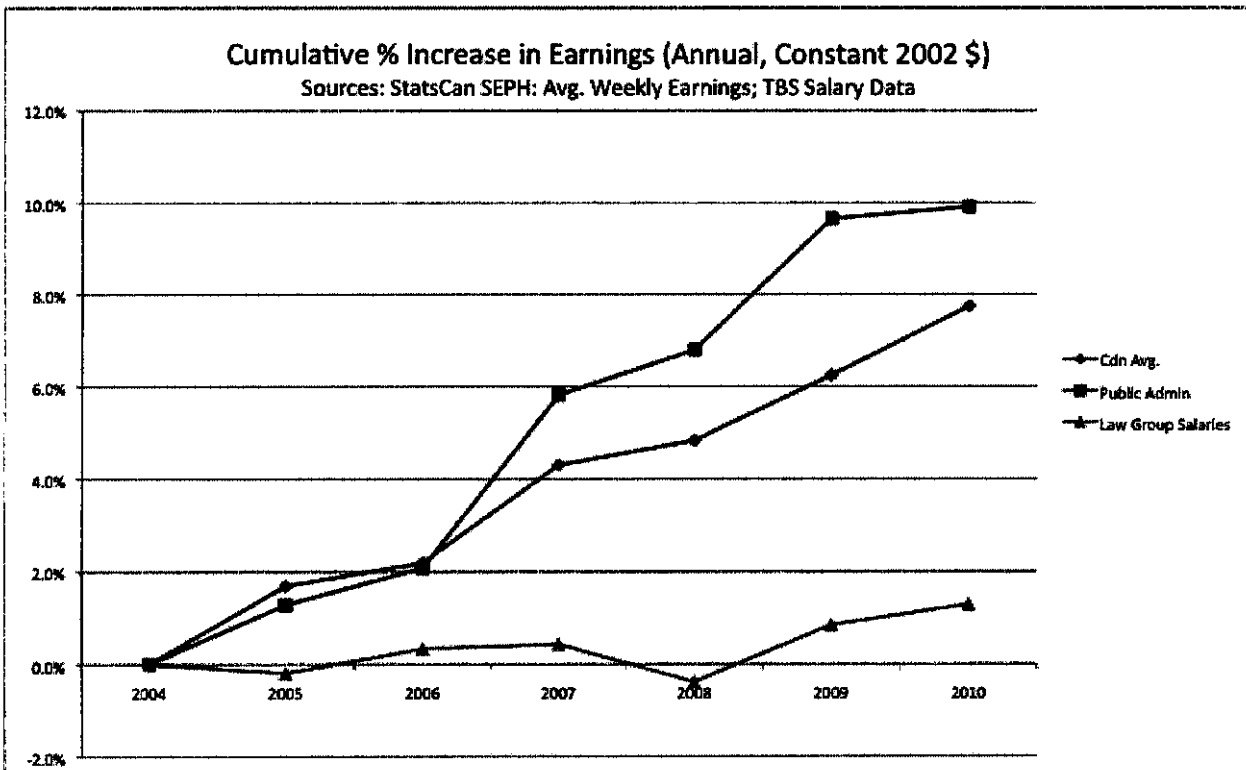
71. Like the Policy Framework for the Management of Compensation, the 9th and 10th Reports of the Advisory Committee on Senior Level Retention and Compensation stress the need to have "compensation that is appropriate to the government's recruiting and retention needs", and the "high importance" of "continuing to benchmark with the Canadian labour market".⁷ These reports found that executive compensation "falls behind the labour market at higher levels",⁸ and accordingly recommended increases that were accepted by the Government.

72. The AJC finds it difficult to understand why the Government accepted and implemented these reports with alacrity in the case of its senior executives, while delaying for years in responding to similar issues raised by the AJC for its lawyers, only to respond eventually in the form of legislated restrictions on collective bargaining.

73. The result of the *ERA*, with its unique retroactive effect on the Law Group, has been that Federal Crown counsel have been adversely affected not just in relation to others who enjoy the benefit of free collective bargaining, but also in relation to other public servants. This is graphically represented in the chart below, taken from Statistics Canada data, which shows that in real terms since 2004 (i.e. shortly before the AJC certification), Law Group salaries have risen only 1.3%, while average weekly earnings for all industries have risen 7.7%, and average weekly earnings for public administration across Canada have risen almost 10%.

⁷ 9th Report of the Advisory Committee on Senior Level Retention and Compensation, Exhibit U, p.9.

⁸ 9th Report of the Advisory Committee on Senior Level Retention and Compensation, Exhibit U, p.10.



Conclusion

74. Federal Crown counsel acquired the fundamental right to bargain collectively over their terms and conditions of employment in 2006. Four years later, we have had that right legislatively stripped away with respect to the central issue of salary. In the interim, we were subject to lengthy and unexplained delays in receiving a monetary proposal from Treasury Board, and in receiving the disclosure necessary to bargain effectively.

75. Although a salary proposal was eventually tabled by Treasury Board in April 2008, it was made in the absence of necessary disclosure, and its terms did not even begin to address the significant gap that had opened up between Federal Crown counsel and our most relevant provincial counterparts, nor the recruitment and retention issues that this gap created.


76. After the economy turned for the worse, Treasury Board referred the matter to arbitration. Treasury Board's position in the arbitration mirrored the scheduled increases proposed under the ERA, which extended back to the year, and indeed the precise day, that Federal Crown counsel gave notice to bargain. This legislation had the effect of cementing pre-bargaining rates of pay (with minor annual adjustments that were less than the rate of inflation), without any negotiation.

77. While Treasury Board bargained with other public servants, granting them compensation increases beyond those permitted under the ERA, it remained stone silent with respect to the AJC. We do not take issue with the increases granted to others – indeed, these seem to be fully justified – but we are unable to understand what policy rationale, if any, lay behind the distinctions drawn by Treasury Board and subsequently Parliament.


78. The result of this process, culminating in the ERA, has been to render nugatory the fundamental right of the AJC's members to bargain collectively.

79. I make this affidavit in support of the AJC's application, and for no improper purpose.

Sworn before me at the City of Toronto,
in the Province of Ontario, this 8th day
of June, 2010.



A Commissioner, etc.
ANDREW LOKAN



Marco Mendicino