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LEGAL ARGUMENT

I. STATEMENT OF FACTS AND ISSUES

1. This matter requires the resolution of several issues. They are:

   (a) Are the members of the British Columbia Government Lawyers Association ("BCGLA" or "Applicant") currently covered by the *Public Service Labour Relations Act*, R.S.B.C. 1996, c. 388 ("*PSLRA*") and therefore, as a matter of law, required to collectively bargain through one of the three appropriate bargaining units described in s. 4 of the *PSLRA*? As counsel for the Attorney General of British Columbia ("AGBC"), we concede that the current exclusion from the *PSLRA* of persons falling within subsection (b) of the definition of "employee" of section 1 of the *PSLRA*, is an infringement of the *Canadian Charter of Rights and Freedoms*, Part 1 of The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 ("*Charter*"), s. 2(d). However, this concession is not the equivalent of legislative amendment.

   (b) If the Applicant's members are covered by the *PSLRA*, are they entitled to be certified under the *Labour Relations Code*, R.S.B.C. 1996, c. 244 ("*Code*"). This determination will involve an interpretation of both the *PSLRA* and the *Code*.

   (c) In the event that the Board concludes that the Applicant's members are excluded from collective bargaining under the *Code* but remain entitled to bargain collectively under the *PSLRA*, the Board will have to determine further issues related to the *Charter*. In particular the Board will have to determine whether the Applicant's members' entitlements under the *Charter* require or permit the Board to direct that the Applicant's members are entitled to be represented by a bargaining agent other than the bargaining agents identified in s. 4 of the *PSLRA*.

   (d) Finally, in the event the Board was to determine that the Applicant's members' *Charter* rights extend to the right to select their own bargaining agent, the Board will be required to consider whether the limitation on the number of bargaining agents set

out in s. 4 of the *PSLRA* is a reasonable limitation which can be justified under s. 1 of the *Charter*.

II. RELEVANT BACKGROUND – HIGGINS REPORT

2. In the case of *British Columbia Government Lawyers Association et al v. Her Majesty The Queen in Right of the Province of British Columbia, Vancouver Registry No. S-1973*, the Defendant, Her Majesty the Queen in Right of the Province of British Columbia (the "Government"), filed a Trial Brief dated 31 October 2022 (Tab 1), and conceded that the exclusion of practising lawyers and articling students from the definition of "employee" in s. 1(1) of the *PSLRA* was contrary to s. 2 (d) of the *Charter*. In the Case Management proceedings which occurred in the matter at hand, the Government has again stated that it concedes that the exclusion of the Applicant's members from bargaining under the *PSLRA* is an infringement of the Applicant's members' *Charter* rights. For the record, we maintain that position in these proceedings. However, there has been no concession that the matter is not saved under s. 1.

3. Prior to the passage of the *PSLRA* in 1973 *Public Service Labour Relations Act*, S.B.C. 1973 (Second Session), c. 144 (Tab 2), employees in the Public Service of British Columbia were not entitled to bargain collectively. Decisions related to wages, salaries and working conditions in the public service were determined unilaterally by the Lieutenant-Governor-in-Council based upon recommendations from the Civil Service Commission pursuant to OIC 2204/67.

4. On October 19, 1972 the Government administration of the day under the New Democratic Party set up a "Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia" ("Commission"). The Commission issued its report and recommendations in December 1972 in a Report entitled "Making Bargaining Work in

British Columbia's Public Service" (Applicant's Materials ("A.M.") at Tab A). This Commission was chaired by Mr. R. D. Higgins and the report is colloquially referred to as the "Higgins Report" ("Higgins #1").

5. Higgins #1 identified three possible ways of providing the necessary statutory authority for the establishment of collective bargaining in the Public Service of British Columbia. They were:

   (a) by amendment or addition to the *Labour Relations Act*; (a precursor to the *Code*);

   (b) by amendment and addition to the *Civil Service Act*; or

   (c) by a new statute specifically devised for the provincial public service.

   (Higgins #1 at p. 15)

6. After examining these options, the Commission considered that neither the *Labour Relations Act* nor the *Civil Service Act* were appropriate vehicles for the regulation of labour relations in the provincial public service (at p. 15). With regard to the inclusion of employees in the public service under the *Labour Relations Act*, which would have extended collective bargaining rights to employees in the public service in the same manner as that accorded to employees in the private sector, the Commission commented:

   > …. To follow this of course would, however, <u>ignore inherent differences in the nature of labour relations in the public and private sectors</u>. In the latter, the Province is a third party and is able to impartially regulate the procedures it establishes for the conduct of collective bargaining. Thus, while the Labour Relations Act establishes an independent Labour Relations Board, the Minister of Labour is also charged with the administration of the Act. Similarly, under the Mediation Services Act, the Minister is able to play an impartial role in the encouragement of the settlement of labour disputes through the employment of mediation officers and industrial inquiry Commissions. In the public sector, the Province is in a different position as here it is the employer and a direct party to the bargaining process. In such circumstances, a provincial Minister of the Crown cannot be regarded as an independent impartial third party and it would be

> incongruous to place the operation of the collective bargaining process under the day to day administration of the employer.
>
> Special provision must therefore be made for the establishment of a separate independent agency with responsibility for the administration of collective bargaining procedures in the provincial public service. The public interest is directly involved in the services provided by the provincial government and, therefore, the Commission wishes to recommend that certain procedures be followed which, while preserving the principles of free collective bargaining, recognize the particular character of the British Columbia public service. All of these considerations would appear to make new legislation the more appropriate route.
>
> (Higgins #1 at p. 16) (emphasis added)

7. In the case at bar, to include the Applicant's members under the scheme of the *Code* would place the BCGLA under the aegis of the Minister of Labour, a representative of the employer, imperiling the notion of impartiality. It would be directly contrary to the "inherent differences" between the public and private sectors identified by Higgins #1.

8. Further to the recommendation that collective bargaining be introduced into the public service through the enactment of new legislation, the Commission went on to consider a series of issues which it felt must be addressed in the new legislation and concluded by making a number of recommendations to government which are summarized commencing at p. 80 of Higgins #1.

9. The Commission identified the structure of collective bargaining in the public sector as one of the most difficult questions confronting it. It commenced the analysis of this issue by noting:

> The determination of appropriate bargaining units is central to the collective bargaining process in the public service of British Columbia. Before negotiations can commence, appropriate units for collective bargaining must be defined and

> procedures for certifying the representative bargaining agents must be implemented.
>
> The size and composition of the bargaining units profoundly affect:
>
> - the likelihood of all groups within the public service being organized for bargaining purposes;
> - the range of subjects that can be negotiated meaningfully;
> - the probability of jurisdictional disputes arising between competing employee organizations; and
> - the chances of disputes occurring during negotiations being resolved peacefully.
>
> Indeed, the manner in which the bargaining unit question is handled can ultimately determine the success or failure of the whole idea of collective bargaining in the public service.
>
> (at p. 23). (emphasis added)

10. As part of its analysis on the issue of structure of employee representation, the Commission noted, prior to its recommendations, the following:

> "In the first place, the Commission's recommendations are designed to ensure that collective bargaining, when introduced into the public service of British Columbia will work smoothly. Secondly, it is our belief that collective bargaining should be available to as many employees of the provincial government as possible. Thirdly, we consider that the scope of subject matters for collective bargaining should be as broad as possible. But above all, the Commission believed that it had an obligation to consider all parties involved in the bargaining process when making its recommendations. Decisions should not be made, the Commission felt, without due regard to their impact not only on the government as employer and the employees, bur also upon the public of the province at large.
>
> (at p. 24) (emphasis added)

11. Based upon a lengthy period of public consultation, the Commission identified two basic approaches to the development of bargaining units structure. Those approaches ranged between the federal system which, at that time, had nearly 100 bargaining units, and a

system where a single bargaining agent was identified by statute as the bargaining representative for all provincial government employees (such as existed in Manitoba). The Commission felt that neither of these approaches appeared suitable for British Columbia (see pp. 24 – 25). The Commission noted that those in favour of the multiple bargaining unit approach placed their emphasis on the criteria of "community of interest", urging that employees having a like profession, craft or classification should each be determined to be an appropriate bargaining for collective bargaining purposes. Those who advocated this approach argued that, without the focus on community of interest, the special interests of those in a particular profession, craft or classification could be subordinated to the wishes of the larger unit's majority. In addition, certain professional groups asserted that their licensing association had available to it information, experience and resources that would enable better representation of the group involved and better results at the bargaining table. Finally, those advocating for a multiple bargaining unit structure asserted that the adoption of this type of structure was the only way to ensure the principle of "freedom of choice" whereby all government employees were entitled to pick the bargaining agent of their individual choice. The Commission rejected the multiple bargaining unit approach, finding it to be impractical.

12. However, noting that the case in favour of separate bargaining units was pressed most strongly before the Commission by certain professional groups, a number of which were subject to statutory licensing authority the Commission developed a unique solution. It concluded:

> After much deliberation, we were able to devise a formula that had the two-fold advantage of the extending collective bargaining to the professional groups involved while, at the same time, avoiding the conflict of interest about which these groups seemed so concerned. Rather than include licensed professional groups in a larger bargaining unit, the Commission recommended that all employees whose association had statutory authority to license persons to practise that profession be placed by statute within a single bargaining unit to be known as the "licensed professional bargaining unit" (PEA).

(at pp. 28-29).

13. In tandem with this approach, the Commission recommended an "all encompassing bargaining unit" (BCGEU) for other employees in the public service (referred to as the "public service bargaining unit") in order to avoid the many disadvantages associated with a proliferation of bargaining units.

14. However, it also identified a major weakness in the all encompassing approach to bargaining unit determination. It recognized that, within the broad range of public service, particular groups of employees would have different goals and aspirations which may not be able to be reflected in the single collective agreement. In order to ameliorate what was characterized as the "'loss of identity' criticism", the Commission rejected the notion of further fragmenting the public service of British Columbia by introducing a multiplicity of bargaining units. In a later portion of its report, it recommended a process whereby the interests of specialized groups in statutorily defined bargaining units could be reflected in a collective agreement (referred to as a component agreement) subsidiary to what was later referred to as a "Master Agreement".

15. However, with regard to the structure of bargaining units under the *PSLRA* the Commission's recommendations were that there were to be two bargaining units. The first unit would be the "licensed professionals bargaining unit" and the second unit would be a single unit for collective bargaining purposes for other public service employees under the *PSLRA*.

III. LEGISLATIVE RESPONSE TO THE STRUCTURE OF BARGAINING UNIT RECOMMENDATIONS OF HIGGINS #1

16. After an initial bill (Bill 182) died on the order paper, the 1973 version of the *PSLRA*, which was eventually passed, was introduced in the House by the Honourable Provincial

Secretary, Mr. E. Hall on October 15, 1973 Hansard, October 15, 1973 (Tab 3). The 1973 version of the *PSLRA* did not accept all of the Higgin's #1 recommendations. On the issue of the structure of bargaining under the *PSLRA*, the 1973 legislation provided for three separate bargaining units in the public service (s. 4). This result was contrary to Higgin's #1 recommendation which had provided for only two bargaining units. In response to questions from the official opposition that the Government was trying to "simplify things too much" by failing to recognize the community of interest shared by smaller groups within the public service (see question from Mr. D.A. Anderson at pp. 1320 to 1321), the Honourable Provincial Secretary responded:

> "In response to the Members' questioning about s. 4, it is our view that this section will ruffle feathers, that will upset certain people in the public service. There is no question about that. But I don't know how else one can actually erect a meaningful bargaining procedure with 40,000 people covering the kinds of trades and occupations there are in the civil service without falling into the pitfalls of the federal government and come up with a decent workable system.
>
> I can think of 25 trade unions that would be knocking other door tomorrow if I were to agree with one of the Members' suggestions. We have been around a bit. We've not been around the government for a long time but we had been around in life for a long time. <u>There is no way that this government is going to walk into that kind of whipsawing arrangement on behalf of the people of this Province.</u> No way at all. We love the trade union movement; we feel proud to be associated with the trade union movement in many of our political endeavours. We are not that crazy to start walking into a whipsawing arrangement, period.
>
> There are certain people who work on the 3rd floor who are left handed pencil sharpeners who claimed a singularity of endeavour that is almost frightening in its intensity. They always want to be members of their own trade union. I can think of studies I have read when I was a student of labour matters a long way away from here in which 30 members of the hog bristle processing group, which was over 105 years old in the City of Birmingham, resisted the overtures to join another union. We are in that kind of a box. We have Commissioners of the Canadian Labour Congress currently spending most of their time trying to deal with this kind of singularity of speciality that the member makes general reference to.

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> We have chosen three because, frankly, our wisdom indicated that Bill 182 that had two, was unworkable. That was just the a bit too much to expect 40,000 odd people to look at, so we took the nurses bargaining unit out because of a very cogent and cohesive history. Prior to that, if you remember, in Bill 182 we had just (a) and (b). We had to tighten up the language in sub-section (b).
>
> ●●●●
>
> We think this is a good piece; we will have a go on it. <u>We believe that the two tier system of having a component will meet those special and particular singularities to which the Member make reference.</u>
>
> Now, all it is left really is for us to persuade the Merchant Service Guild people that if they want always to have an access to that large union so they can become blue water sailors again, that's a problem they will have to meet with themselves.
>
> We think this is the best way of doing it, and that is an endorsation of the Higgins' Report that had all these hearings that you know so well.
>
> (emphasis added)

17. On January 20, 1977 the Government administration of the day under the Social Credit Party appointed Mr. R.D. Higgins as a Committee of one to review the recommendations of the Higgins #1 to enquire into the effectiveness of the legislation enacted for the purpose of implementing these recommendations and to report on the need or desirability of amendment to such legislation at an early date. The Higgins' Committee Report was provided to the Honourable Provincial Secretary on March 14, 1977 (Higgins #2, Tab 4) noted that the 1973 *PSLRA* did not accept the recommendations of Higgins #1 in their entirety and that some were modified and others were rejected. Higgins #2 noted (at p. 13) that the 1973 *PSLRA* created a "nurses bargaining unit" in addition to the two bargaining units recommended in Higgins #1, contrary to the concerns expressed in Higgins #1. However, the Government of the day maintained the bargaining unit structure set out in the 1973 *PSLRA*, s. 4. It remains the same today.

18. Finally, in 1993 the Government of the day received the "Report of the Commission of Inquiry into the Public Service and Public Sector" ("Korbin Report") (R.M., Tab "C"). As part of the Korbin Report, the Commissioner reviewed the structures and practises for collective bargaining under the *PSLRA* and the *Public Service Act* ("*PSA*"). This review included, at p. 62, a review of the bargaining units under s. 4 of the *PSLRA*. The Korbin Report recommended that s. 4 of the *PSLRA* should not be amended (at p. 62).

IV. RELATIONSHIP BETWEEN THE *PSLRA* AND THE *CODE*

(A) STATUTORY INTERPRETATION

19. The relationship between the *PSLRA* and *Code* is largely a matter of statutory interpretation to be conducted as set out below.

20. In *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 ("*Rizzo*") (Tab 5), the Supreme Court of Canada ("SCC") adopted, at paragraph 21, the following quotation from Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) (Driedger), as best encapsulating the proper approach to statutory interpretation. The SCC recognized that interpretation cannot solely be focused on the wording of the legislation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

21. The Court then went on (at para. 22) to rely upon s, 10 of the *Interpretation Act*, R.S.O. 1980, c. 2019, which closely parallels s. 8 of the British Columbia *Interpretation Act*,R.S.B.C. 1996, c. 238 ("*Interpretation Act*"), which provides:

8. Every enactment must be construed as being remedial, and must be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects.

22. What is immediately apparent is that both the quotation from Driedger, which references "the intention of Parliament", and the provisions of s. 8 of the *Interpretation Act*, which provides that statutory interpretation must be conducted in a manner "as best ensures the attainment of its objects", have the determination of legislative intention as their pivotal concern. The Court in *Rizzo* then identified the role that evidence from Hansard can play in statutory interpretation. It commented:

> [31] … the Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the Legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40(a) was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (… citations omitted …). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.
>
> (emphasis added)

This is clear endorsement from the SCC regarding reference to Hansard debates to determine legislative intention and the objects of the legislation being interpreted.

23. To a similar effect was the earlier decision of the Supreme Court of Canada in *Reference Re Residential Tenancies Act 1979 (Ontario),* [1981] 1 S.C.R.714 (Tab 6), regarding the

admissibility of Commission reports (in addition to Hansard) as being of assistance in the interpretation of legislation. In that case the Court commented:

> It seems reasonably clear that Royal Commission Reports and the Reports of Parliamentary Committee made prior to the passing of the statute are admissible to show the factual context and purpose of the legislation. Cartwright J., as he then was, said in Attorney General of Canada v. Readers Digest Association (Canada) Ltd [1961 S.C.R. 775], that the general rule is that if objected to they should be excluded. If the Reports are relevant, it is not entirely clear why they should be excluded upon objection of one of the parties.
>
> In Home Oil Distributors v. Attorney General of British Columbia [1940] S.C.R. 444, Kerwin J, with the concurrence of Rinfret J., took into consideration a report of a Commission under the circumstances there existing for showing what was in the mind of Parliament. The same approach was adopted by the Privy Council in Attorney General for British Columbia v. Attorney General for Canada [1937] A.C. 365 and in Ladore and Others v. Bennett and others [1939] A.C. 468. In Reference re Eskimos [1939] S.C.R. 104., in preliminary proceedings, this Court appointed a Registrar to hold hearings and take evidence as to whether Eskimos were "Indians" within the meaning of the B.N.A. Act. In Swait v. Board of Trustees of Maritime Transportation Unions (1966), 61 D.L.R. (2nd) 317, the Quebec Court of Queen's Bench, Appeal Side, admitted the Norris Report on Disruption of Shipping in the Great Lakes for the purpose of establishing the facts upon which Parliament based the purpose and object of an act passed essentially to an end to a danger threatened the national interest.
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> ●●●●
>
> Generally speaking, for the purpose of constitutional characterization of an act, we should not deny ourselves of such a system as Royal Commission Reports or Law Reform Commission Reports underlying and forming the basis of the legislation under study, may afford. The weight to be given to such Reports is, of course, an entirely different matter. They may carry great, little, or no weight. But at least they should, in my view, generally be admitted as an aid in determining the social economic conditions under which the Act was enacted … (citations omitted) …., the mischief at which the Act was directed, the background against which the legislation was enacted and an institutional framework in which the Act is to operate are all logically relevant … (citations omitted) … (see also Viterra Inc v. Grain Workers' Union, 2018 BCCA 455.
>
> (at p. 15)(emphasis added)

24. The SCC has also provided other helpful comments with regard to the process of statutory interpretation. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 *(*"*Vavilov*") (Tab 7), the SCC commented upon circumstances where administrative decision makers are compelled to engage in the process of statutory interpretation. It commented:

> [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purposes of the provision and the entire relevant context: (… citations omitted …) Those who draft and enact statutes expect that questions about their meaning will be resolved by an analyses that has regard to the text, context and purpose regardless of whether the entity tasked with interpreting the laws is a court or administrative decisionmaker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law – whether courts or administrative decision makers – will do so in a manner consistent with this principle of interpretation.
>
> [120] <u>But whatsoever form the interpretive exercise takes, the merits of an administrative decisionmaker's interpretation of the statutory provision must be consistent with the text, context and purpose of the provision.</u> In this sense, the usual principles of statutory interpretation apply when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", the ordinary meaning will usually play a more significant role in the interpretive exercise: (… citations omitted …). Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential element s.
>
> [121] <u>The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme that is at issue. It cannot adopt an interpretation it knows to be inferior – albeit plausible – nearly because the interpretation in question appears to be available and is expedient. The decisionmaker's responsibility to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.</u>
>
> (emphasis added)

25. In *Telus Communications v Wellman*, 2019 SCC 19 ("*Wellman*") (Tab 8), the Court also addressed the relationship between the contextual matrix, policy considerations and fairness. This case involved an attempt to certify a class action against Telus related to alleged overcharging of mobile phone customers where the proposed class would be composed of both consumer customers and business customers. Both consumer customers and business customers had contractual relationships with Telus and their contracts stipulated that claims pursuant to the mobile phone contract should be determined through mediation and, failing that, arbitration. However, consumer protection legislation invalidated the arbitration clause to the extent that it would otherwise prevent consumer customers from pursuing their claims in court. Business customers did not benefit from the same protection. When Telus sought to stay the class action proceedings with regard to the business customer claims, referencing the arbitration clause in the business customers contact, the motions judge held that a discretion which existed under the relevant legislation granted the Court discretion to refuse the stay where it would not be reasonable to separate the matters dealt with in the arbitration agreement from other matters. This would allow all of the matters to proceed in court together based upon a contextual view. The motions judge held that persons subject to an arbitration clause could participate in a class action where it was reasonable to permit them to do so.

26. The SCC allowed an appeal of this judgment and the claims of the business customers were stayed. In referencing commentary from the dissenting justices in the SCC that such an approach drew an unfair distinction between consumer customers and business customers the majority of the Court commented:

> 79 While I appreciate these concerns, I am respectfully of the view that they cannot be permitted to distort the actual words of the statute, read harmoniously with the scheme of the statute, its objects and the intention of the legislature role

> so as to make the provision say something it does not. While policy analysis has a legitimate role in the interpretive process (… citation omitted …), the responsibility for setting policy in a parliamentary democracy rests with the legislature, not with the courts. The primary role of the courts, in my view, is to interpret and apply those laws according to their terms, provided they are lawfully enacted. It is not the role of this court to rewrite the legislation.
>
> (emphasis added)

27. This point was succinctly made by the Board in *Vancouver Shipyards Ltd*., 2022 B.C.L.R.B. 144 ("*Vancouver Shipyards*") (Tab 9) where the Board commented:

> 92 …. ultimately, however, the Board's task in these proceedings is interpretive not legislative. That is to say, it is not for the Board to decide what the law should be. That is the role of the Legislature. Our task is to interpret what the law is …
>
> (emphasis added)

28. Finally, the court in *Rizzo*, emphatically stated that an interpretation which is not consistent with the object and purpose of the statute is "absurd". The Court held:

> … It is a well established principle of statutory interpretation that the Legislature does not intend to produce absurd consequences. According to Cote, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to the interpretations which defeat the purpose of a statute or render some aspect of it pointless of futile (Sullivan, Construction of Statutes, at p. 88).
>
> (emphasis added)

(B) PREVIOUS BOARD INTERPRETATIONS OF THE RELATIONSHIP BETWEEN THE *CODE* AND THE *PSLRA*

29. We start with some important factual observations related to the application of s. 4(b) of the *PSLRA*. The Legal Counsel classification is a professional classification in the public service classification structure. Employees in the Legal Counsel classification are required to be eligible to practise law under *the Legal Profession Act*, SBC 1998, c. 9 and are required to obtain a licence from the Law Society of British Columbia to practise their profession. Further, the Law Society of British Columbia has been the "statutory licensing authority" since it was created and therefore falls within the parameters of an association as described in s. 4(b) of the *PSLRA*. In addition, the Applicant's members are all appointed pursuant to the *PSA*.

30. Prior to turning to the Board's case law examining the relationship between the provisions of the *PSLRA* regarding bargaining unit structure and the provisions of the *Code*, it is important to observe that, if the exclusion of lawyers currently found in sub-section (b) of the definition of "employee" is removed, the Applicant's members will still meet the definition of "employee" under the *PSLRA* because of their appointment pursuant to the Public Service Act. The definition of "bargaining unit" in the *PSLRA* is defined as "a unit <u>of employees</u> appropriate for collective bargaining referred to in s. 4" (emphasis added). In addition, the definition of "bargaining agent" confers that status, under sub-section (a) of that definition to "a union certified by the board as an agent to bargain collectively for a bargaining unit". Thus, the only bargaining units permissible for employees who are covered by the *PSLRA* are those units described in s. 4 and, in addition, the only entity entitled to be characterized as a "bargaining agent" for those employees is a union certified under the *PSLRA* for a bargaining unit described in s. 4.

31. While there have been certain language changes or numbering changes in the *PSLRA*, the essential relationship between persons employed under the *PSA*, the bargaining units identified in s. 4 of the *PSLRA* and the Board's authority under the *Code* has not changed. The following case law is apposite:

(a) In *Re Insurance Corporation of British Columbia*, [1974] BCLRBD 63 ("*Insurance Corporation of British Columbia*") (Tab 10), the Board was called upon to determine the appropriate bargaining unit for employees employed by the Insurance Corporation of British Columbia ("ICBC"). The Board contrasted the approach it would take to determining appropriate bargaining units under the *Code* and the bargaining units structure required by the *PSLRA*. After noting that, as a Crown Corporation, ICBC was not within the ambit of the *PSLRA*, the Board commented about the approach taken in Higgins #1:

> After hearing representations from a large number of groups and canvassing the issue fully, the Higgins Commission came down with a firm policy against fragmentation of the bargaining units in the public service. A variety of reasons were advanced for that conclusion, of which the following are especially material to the case of ICBC:
>
> (i) The administrative advantage of concentrating and negotiating efforts of the public employer in bargaining with only one spokesperson for the employees;
>
> (ii) The desirability of achieving standard terms and conditions of employment for all employees of the public employer throughout the Province.
>
> (iii) The need to minimize the likelihood of a strike interrupting the availability of an essential service provided by the government are not available to the public from another source."
>
> Under the Labour *Code*, unlike the Public Service Labour Relations Act, the Board is not required to adhere to a rule of an all-employee bargaining unit ….
>
> (at p. 7) (emphasis added)

(b) In *British Columbia (Public Service Commission)*, [1974] B.C.L.R.B.D. 163 (Tab 11) the Board considered an application by the PEA for an interpretation of the scope of its bargaining unit as described in s. 4(b) of the *PSLRA*. The essential question before the Board was whether employees who work within a professional classification under the Government classification but who are not required to be statutorily registered as a condition of employment fall within the PEA or more probably in the public sector bargaining unit represented by the BCGEU. After setting out s. 4 of the *PSLRA*, the Board commented:

> The immediately striking feature of the statute for our purposes is that it creates three mandatory bargaining units. The Board does not enjoy the discretion it has under s. 42 of the Labour *Code* to tailor appropriate bargaining units having regard to particular industrial relations situation. Under s. 4 of the Public Service Labour Relations Act, "for the purpose of collective bargaining every employee shall be included in one of the following bargaining units". The Legislature sets out the conditions which must be satisfied for each unit. Then, any employee who meets those conditions, whether at the time of certification or thereafter, is automatically allocated to his or her statutory unit. The only office of this Board is to interpret the language of s. 4 in cases of dispute; we have no authority to adjust these units in a manner inconsistent with the statutory meaning in order to deal with practical difficulties which the Legislature may not have anticipated.
>
> (at 3) (emphasis added)

The Board rejected the BCGEU's position that membership in the PEA required that the individual be actually engaged in the practice of their profession, holding that it was the fact of professional registration which Higgins #1 had made the overriding element in determining issues related to inclusion in the PEA bargaining unit. The Board concluded its analysis by noting:

> … if it were within the power of this Board to define the appropriate bargaining unit, we would likely give greater weight to the second policy

> and allocate those individuals to the s. 4© unit represented by the BCGEU (as we did in an analogous case under s. 42 of the *Code* in the Campbell and District General Hospital case). However, we are not given such a discretion under s. 4 of the Labour Relations Act and there is nothing in the language, the context, or the history of s. 4 (b) which permits us to apply this further condition for inclusion in the licensed professional bargaining unit. (Q.L. version p.6 of 7) (emphasis added)

(c) In *Re Public Service Commission*, [1976] B.C.L.R.B.D. 24 ("*Enoch*")(Tab 12) the Board considered several applications by Mr. Enoch seeking a finding that he was covered by the collective agreement between the BCGEU and the Public Service Commission. In a previous decision the Board held that, notwithstanding that Mr. Enoch was employed by a society which received funding from the Government, the Board had concluded that he was legally an employee of the Provincial Government rather than the society. However, the employees of the society were excluded from coverage of the BCGEU's collective agreement by a specific appendix of the collective agreement agreed to by the BCGEU in collective bargaining. Therefore, an issue arose as to whether Mr. Enoch was covered by the BCGEU collective agreement negotiated to cover its s. 4(c) *PSLRA* bargaining unit. The Board held, based upon its interpretation of the provisions of the collective agreement, that Mr. Enoch was the type of person whom the parties had expressly intended to exclude from coverage under the collective agreement. It went on to comment:

> However, the Board cannot leave the matter simply with that conclusion. The result of our decision under s. 34 of the *Code* is that while Enoch et al are excluded from the benefits of the collective agreement negotiated by the BCGEU, they continue to be included in the statutory bargaining unit represented by the BCGEU. This means that these individuals cannot be represented by another union under The Labour *Code* (as is indicated by the cancellation of the certification granted to CUPE). It is understandable that the Legislature would place all such individuals who are effectively employed by the Crown in the one bargaining unit represented by the one trade union. This serves the statutory policy of minimizing competitive

> bargaining by different unions for contract settlements which will ultimately be paid from the one financial source. However, it is intolerable that individuals within the statutory unit be permanently denied access to the collective bargaining which they need by the mutual agreement of the bargaining agents who derive their authority from the *PSLRA*.
>
> (at 6) (emphasis added)

(d) In *British Columbia (Government Employee Relations Bureau*, [1977] B.C.L.R.B.D. 9, (Tab 13), the Board concluded that the relationship between the *Code* and the *PSLRA* is best understood by consideration of s. 2(1) and s. 26 of the *PSLRA* (currently s. 23). The issue in this case was whether or not the *Code* provisions relating to review of arbitration awards (now s. 99 of the *Code*) applied to arbitration awards in the public sector. The Board held that, based upon the sections aforesaid, but there was no conflict between the *Code* and the *PSLRA* on the issue of review of arbitration awards and therefore the *Code* continued to apply.

(e) In *Re British Columbia*, [1987] BCLRBD 55 (Tab 14) the Board considered the import of what is now s. 11 (3) of the *PSLRA*. The Government had applied pursuant to s. 12 of the *PSLRA* for a determination that 44 persons were "managers" within the meaning of s. 11(3) of the *PSLRA* and were therefore excluded from the BCGEU bargaining unit. The issue was raised because there was a difference between the language of s. 11(3) of the *Code* and Article 2 of the collective agreement between the Government and the BCGEU which provided certain guidelines to be applicable when the parties were negotiating exclusions under the collective agreement. The Board adopted the approach taken in previous decisions to the effect that the Board lacked the discretion to refuse to apply a criteria of the *PSLRA*. It commented:

> Counsel for the Union made a very careful and thoughtful presentation to the Panel. Although counsel's arguments are persuasive and made good labour relations sense, the mandate for the Board, as outlined in s. 12(3) (now 11(3)) of the *PSLRA*, is clear. Another interpretation of s. 12(3) simply cannot be coaxed from the wording of this statute in order to permit the Board to utilize the guidelines adopted by the parties in their collective agreement. Accordingly, the Union's application to consider the guidelines outlined in s. 2.01 of the collective agreement, in addition to the provisions of s. 12(3) of the *PSLRA*, on the matter of the employer's application to exclude certain employees, is dismissed.

(f) In *Vancouver Island Housing Association for the Physically Disabled (Nigel House)*, [2011] B.C.L.R.B.D. 112 (Tab 15) the Board gave significant consideration to the issue of whether a designated employer under the *PSA* fell under the legislated collective bargaining scheme for public sector employers established by the intersection of the *Code*, the *PSA* and the *PSLRA*. After referencing s. 4 of the *PSLRA* as well as the definitions of collective bargaining, collective agreement and bargaining agent under the *PSLRA* the Board held:

> 27 <u>The foregoing definitions are exhaustive.</u> Three conclusions can be gone in s. 4 is read together with these definitions: 1. All employees of Broadmead must be in one of the designated units. 2. The only collective agreement applicable to employees in the public service union is the collective agreement in place between Broadmead and the BCGEU; and 3. Nigel did not have the authority to enter into a collective agreement binding Broadmead as that authority is vested in the PSA.
>
> (emphasis added)

(C) MORE RECENT CONSIDERING WHETHER EMPLOYEES COVERED BY THE *PSLRA* ARE ENTITLED TO BARGAIN COLLECTIVELY UNDER THE *CODE*

32. In *Re British Columbia*, [1989] B.C.L.R.B.D. 224 ("Internal Auditors") (Tab 16) the Board considered whether internal auditors working at the Liquor Distribution Branch, who were excluded from the definition of "employee" under s. 1(1) of the *PSLRA*, nonetheless had

access to collective bargaining under the *Industrial Relations Act* (a predecessor to the *Code*). After reviewing the history of collective bargaining in the public service and, in particular Higgins #1, the original panel held:

> This synopsis of affairs as they existed in 1972 leads this Panel to conclude that the state of the law at the inception of the *PSLRA* was as follows. Collective bargaining in the private sector had been developing for a number of years. Employees in the private sector had access to collective bargaining pursuant to the Labour Relations Act, which was the predecessor to the *Code*. Public servants, on the other hand, had no access and were not covered by the Labour Relations Act. Moreover, the employer of public servants, the Crown in right of the Province of British Columbia, i.e. the Government qua employer, was also not covered nor bound by the Labour Relations Act and therefore not the subject of any statutory compulsion under that Act to engage in collective bargaining. The Government, based on the principle of sovereignty, exercised its right to unilaterally set wages and terms and conditions of employment for public servants. This right was, by and large, declared in the Civil Service Act, RSBC 1960 Chap. 56, which was the predecessor of the PSA. However, B.C. Hydro and Power Authority, a Crown agency, was directed by the Legislature by its enabling statute into the fold of the Labour Relations Act. There were other agencies of the Government which operated independently, such as B.C. Rail and the Queen's Printer, the employees of which had also obtained collective bargaining rights pursuant to the Labour Relations Act.
>
> The mischief to be remedied was the Government qua employer's use of its Crown prerogative to unilaterally set terms and conditions of employment, thereby denying the right to engage in collective bargaining to those public servants who were neither entitled by statute to bargain collectively under the Labour Relations Act, nor employed by agencies of Government acting in an independent capacity. The Legislature, in remedying the mischief identified by the Commission, did not elect to amend the private sector legislative scheme to encompass the Government qua employer. The Commission recognized, at page 2 of the Higgins Report, that the difficulty facing the Legislature was, "… that there are differences between employer/employee relations in the public and private sectors. These differences … caution against adopting, unchanged, the private sector bargaining practices in order to cope with the peculiar problems associated with Government employment …", and at page 4, "… should there be a special statute to govern collective bargaining and if so, what should it cover?" The Legislature elected to address this mischief by passing into law a special Act, the *PSLRA*.

This Panel concludes that by enactment of a special statute the Legislature intended to proceed cautiously in extending compulsory collective bargaining to Government. A careful reading of the *PSLRA* reveals that this caution is exemplified by the circumscription of the number of bargaining units, the numbers and types of collective agreements, and the scope of what is bargainable. All of the Government's arguments with respect to provisions and limitations in the *PSLRA* support both this notion of a cautious approach, and the view that the Legislature intended to expose the Government qua Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the *PSLRA*.

An equally careful reading of the Labour *Code* which was enacted contemporaneously with the *PSLRA*, reveals that no changes material to this issue were made to the definition of "employer" or "employee" as previously found in the Labour Relations Act nor was the addition of the definition of "person" significant. Given that the Government qua employer was not subject to the Labour Relations Act, as clearly evident from the Higgins Report, and given that no material changes relative to this issue occurred upon the enactment of its successor the Labour *Code* contemporaneously to the passage of the *PSLRA*, this Panel concludes that the Government qua employer was thus no more subject to the Labour *Code* following the passage of the *PSLRA* and the Labour *Code* than it had been subject to the previous Labour Relations Act. This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government qua employer compellable to bargain collectively only within the framework of the *PSLRA* with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only *PSLRA* that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the private sector scheme under the Labour *Code* was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act.

This Panel further concludes that as a result, there are two mutually exclusive collective bargaining regimes in the Province of British Columbia today. The first, under the umbrella of the IRA, successor to the Labour *Code*, can be loosely termed private sector but includes some public sector employees. The second regime governs the public service in the truest sense and brings under compulsion of statute, the Government qua employer. That second regime, contained in the *PSLRA*, incorporates the IRA by virtue of Section 26. The IRA as incorporated by the *PSLRA* takes on the character of the latter when applied in that statutory regime (Township of Goulbourn et al v. Regional Municipality of Ottawa-Carleton et al - (1979), 101 D.L.R. (3d) 1). The Union is thus correct in its submission when it says Section 26 only applies to those inconsistencies between the IRA and the *PSLRA*

which arise by virtue of the application of the IRA to employees who are, in fact, included in collective bargaining under the *PSLRA*, Sections 4(a), (b) and (c). This Panel concurs with the Union's interpretation of this point. However, that particular view is of no assistance to the Union because it confines the scope of the IRA's applicability to the Government qua employer within the framework of the *PSLRA*. By implication, and as the Panel has already concluded, the scope of the IRA standing alone does not encompass the Government qua employer.

In defining "employee" under the *PSLRA*, the Legislature began by including more than simply those public servants who hitherto had no bargaining rights. The Board in Robert Enoch and the Public Service Commission, BCLRB 24/76 recognized this at page 10 of that decision, "… the legal net was cast much wider by the actual language used in the statutory definition of 'employee' [in the *PSLRA*]."

But in so doing, the Legislature did not intend to erase the rights of those public servants who already bargained collectively in the private sector as described in the Higgins Report. There was no mischief which needed to be cured with respect to these public servants who bargained under the Labour Relations Act, the successor Labour *Code* and continue to bargain today under the umbrella of the IRA. This intention was manifested when the Legislature excluded them from that broader legal net thus narrowing the focus and the scope of the *PSLRA*.

The Union latches onto this fact and says if these employees by virtue of their exclusion come under the umbrella of the IRA, then all the exclusions must come under that umbrella subject to any exclusions that are found in the IRA. This thesis turns on the erroneous assumption that it is the act of exclusion from the *PSLRA* which creates rights under the IRA which flows in part, from an effort to isolate a common denominator amongst those exclusions. The common denominator to which the Union's argument is directed is the right to bargain collectively under the IRA, i.e. if some public servants who bargain under the IRA are excluded from the *PSLRA*, then all who are excluded from the *PSLRA* must be able to bargain under the IRA. However, the Board equally recognized in *British Columbia Government Professional Employees' Association and Public Service Commission, BCLRB No. 166/74* at page 8, that some of the exclusions from the definition of "employee" in the *PSLRA* were intended to preclude collective bargaining altogether. In that decision the Board held:

> First of all, in the definition of "employee" in Section 1 of the Public Service Labour Relations Act, government lawyers are excluded by this wording: "a person qualified under the Legal Professions Act … who is engaged and

working in the practice of such profession." Almost exactly the same language is used in the Labour *Code* in its general exclusion of professionals from the scope of collective bargaining:

> "employee" means a person employed by an employer, and includes a person engaged in police duties, and a dependent contractor included in an appropriate bargaining unit under section 48, but does not include a person who, in the opinion of the board.
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> ●●●●
>
> (iii) is qualified in a profession, trade, or calling and is licenced under the Architectural Profession Act, *Charter*ed Accountants Act, Chiropractic Act, Dentistry Act, Engineering Profession Act, Insurance Act, Land Surveyors Act, Legal Professions Act, Medical Act, Naturopathic Physicians Act, Optometry Act, Podiatry Act, Real Estate Act, Securities Act, 1967, or Veterinary Medical Act, or is an enrolled student under any such Act, and is engaged and working in the practice of such profession, trade, or calling;

In each provision, by contrast with Section 4 of the P.S.L.R.A., the statute made it clear that it was referring only to those licensed professionals who were actually practicing their profession. The need for the Legislature to be explicit on that point was brought home by the decision of the B.C. Court of Appeal in *Scotton and Office and Technical Employees Union, Local, Local 378* (1974) 39 DLR (3d) 392. In that case, dealing with the somewhat different wording in the predecessor Labour Relations Act, the Court held that a student engineer was excluded from the statute though he was not doing engineering work in his job. That decision was issued on June 12, 1973. It led to the revised wording, quoted earlier, of the professional exclusion in the new Labour *Code* which was enacted at the Fall 1973 session of the B.C. Legislature. The same language was inserted in the Public Service Labour Relations Act to exclude lawyers in the public service from collective bargaining …

(at 8-9; emphasis added)

Consequently, the common denominator which the Union says is present, is really not there.

> There is, however, another common denominator that is present, which the Commission identified in the Higgins Report as separating most public servants who had no bargaining rights at all, and those others that did acquire bargaining rights under the then Labour Relations Act, and which the Government says is the focus of its case namely: the characterization of the Employer. All of the exclusions from the definition of "employee" in the *PSLRA* are precluded from collective bargaining with the Government qua employer. The term Government qua employer is used in the narrower sense excluding those agencies of Government which act in an independent capacity in hiring employees or which by enabling statute, are covered by the IRA.
>
> The Panel concludes that this distinction continues to be key. It must be remembered that the object of certification is to enlist the aid of statutory compulsion to bring an employer to the bargaining table. Employees cannot obtain collective bargaining representation under a statute which does not apply to their employer. Where the Government qua employer is under the umbrella of the *PSLRA* and where certain independent agencies of Government fall under the umbrella of the IRA, so that "public service" in the broad sense of the term spans both statutory regimes, the identification of the Employer becomes critical in determining under which scheme a union representing a particular group of public servants can compel their particular employer to bargain. Similarly, the characterization of the Employer becomes critical in determining whether a particular exclusion under the *PSLRA* is denied collective bargaining altogether because it is employed by Government qua employer which is only compellable under the *PSLRA*, or whether a particular exclusion has the ability to belong to a union certified under the Industrial Relations Act because he or she actually works for another kind of employer, albeit an agency of the Crown acting in an independent capacity as an employer. In other words, all exclusions under the *PSLRA* are precluded from having a union bargaining on their behalf with the Government qua employer under the *PSLRA*. But some, who are not employed by the Government qua employer, may well be able to compel their particular employer to bargain through union representation under the IRA.
>
> (at 7) (emphasis added)

33. The original panel decision in Internal Auditors was upheld on reconsideration in *Re British Columbia*, [1990] B.C.L.R.B.D. 52 (Tab 17).

34. In its most recent decision involving the issue of whether those excluded from collective bargaining under the *PSLRA* nevertheless have rights under the *Code*, the Board addressed the circumstances of Judicial Administrative Assistants to the Superior Courts Judiciary in British Columbia. In *Re British Columbia*, [2014] B.C.L.R.B.D. 79 ("*Judicial Administrative Assistants*") (Tab 18) the Board held that the Judicial Administrative Assistants were barred from participating in collective bargaining under the *Code* through the medium of their own separate association. In the course of its ruling the Board was called upon to consider whether the *Charter* protected the rights of Judicial Administrative Assistant to bargain collectively whether or not the *PSLRA* applied to them. Judicial Administrative Assistants were excluded from bargaining under the *PSLRA* and that exclusion was not challenged. Rather, the issue was whether the *Code*, as a statute of general application permitted the Judicial Administrative Assistants to be certified under the *Code* notwithstanding their exclusion from collective bargaining under the *PSLRA*. The original panel of the Board commenced its analysis by noting that a conflict between the definitions of employee in the *PSLRA* and the *Code* existed. Judicial Administrative Assistants were excluded from the definition of employee in the *PSLRA* while, at least facially, the definition of employee in the *Code* would apply to them. Relying upon the language of s. 23 which stated that where such a conflict exists the definition in the *PSLRA* applies, the Board rejected the Association's argument that exclusion from the *PSLRA* necessarily implied they were covered by the *Code*. (see para. 38). In light of this, the original panel accepted the employer's argument that:

> "A constitutional challenge is necessary to overturn the language of the Legislation" (at para. 39).

35. In the Judicial Administrative Assistants case, the Board reviewed a number of the cases referred to earlier in this submission, all of which, they held, compelled the conclusion that government employees excluded from the *PSLRA* cannot access collective bargaining rights under the *Code* because their employer is not subject to the *Code*. (see para. 45).

The original panel's decision was upheld in *Re British Columbia*, [2014] B.C.L.R.B.D. 92 (Tab 19).

V. SUMMARY ON INTERPRETIVE ARGUMENTS

36. The straightforward answer to the question of whether or not the Applicant's members are covered by the *PSLRA* is found in the opening portion of the definition of "employee" under that legislation. It provides, for the purposes of identifying those persons covered by the *PSLRA*, that "employee" means "an employee is defined in the Public Service Act, or a person employed by or holding office at the pleasure of the Government …"

37. The *PSA*, which is identified in the definition of an employee under the *PSLRA*, defines "employee" as meaning "a person appointed under this Act". As we have indicated earlier, and the Applicant's submission acknowledges, the Applicant's members are all persons appointed to their employment pursuant to the *PSA*.

38. For further clarity, the term "Government" as used throughout the *PSLRA* is defined in s. 29 of the *Interpretation Act*. It provides that when the term "Government" is used in an enactment it means "Her Majesty in Right of British Columbia". On these simple bases alone, it is clear that the Applicant's members are subject to the *PSLRA*. The Applicant's members, who because they meet the definition of "employee" in the *PSLRA*, cannot meet the definition of "employee" under the *Code*. There is a conflict between these definitions, which s. 23 in the *PSLRA* resolves in favour of the *PSLRA*.

39. To buttress this interpretive conclusion, it is respectively submitted that it is the only interpretation which is only consistent with the legislative history of the *PSLRA* and the Board's previous interpretations of the relationship between the *PSLRA* and the *Code*.

40. In our submissions we have outlined, in detail, the circumstances related to the advent of collective bargaining in the public service of British Columbia and, in particular, have focused on the legislative history of the *PSLRA* centered on the Higgins Report which identified the "mischief" which the *PSLRA* was intended to eradicate. We will not reproduce the relevant background facts emanating from the Higgins Report which are dealt with earlier in this Submission. It suffices to say that interpretive reference to the Higgins Report, as well as to those portions of Hansard debates relevant to its passage, make it clear that persons appointed pursuant to the *PSA* have access to collective bargaining only through the auspices of the *PSLRA*. We are unaware of any relevant jurisprudence which reaches to a contrary conclusion. Indeed, the Board jurisprudence makes it clear that the Board recognises that it has no authority to tinker with the language of the *Code* or the *PSLRA* in order to achieve a specific result, even if the Board believes that that result makes more labour relations sense. It is also interesting to note that several of the cases dealt with in paragraph 31 of this argument relate to the Board's rulings that it cannot adjust the bargaining unit structure under s. 4 of the *PSLRA*.

41. The *Internal Auditors* and *Judicial Administrative Assistants* cases are a clear rebuke to the argument that those who are covered under the *PSLRA* can also have collective bargaining rights under the *Code*. We endorse the lengthy analysis from the Internal Auditor's case which we reproduced earlier in this Submission (which was upheld on reconsideration) in its identification of the relevant historical analysis and legislative interplay related to this issue.

42. Given that the Applicant's members are "employees" as defined in the *PSLRA*, both the process of statutorily interpretation and a review of the Board's jurisprudence on the issue, support only the proposition that the Applicant's members do not have the right to engage in collective bargaining under the *Code*. The Applicant's members only have access to collective bargaining through one of the bargaining units described in s. 4 of the *PSLRA*.

The *PSLRA* is the only statute pursuant to which the "government" can be compelled to bargain with its employees.

VI. *CHARTER* ISSUES

(D) EXCLUSION FROM THE *PSLRA*

43. As noted in the Board's letter of December 13, 2022, we are counsel for the AGBC in addition to representing the Province as employer. On behalf of the AGBC, we have conceded that s. 1(b) of the definition of "employee" in the *PSLRA*, which excludes the Applicant's members from the right to bargain collectively pursuant to the *PSLRA*, is an infringement of those members' freedom of association under s. 2(d) of the *Charter*.

44. S. 52(1) of the *Charter* provides:

> 52 (1) The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

45. In the event the Board grants the Applicant and its members a remedy under s. 52 of the *Charter* the Board should be guided by the principles outlined by the SCC in *Ontario v. G.,* 2020 SCC 38 ("*Ontario v. G.*") (Tab 20).

46. In *Ontario v. G.* the Court reviewed previous decisions which endorsed the notion that remedies under s. 52 of the *Charter* should be tailored to the breadth of a right's violation, thereby allowing constitutionally compliant aspects of unconstitutional legislation to be preserved. This is consistent with the language of s. 52 which provides that laws should be declared to be of no force or effect to the extent of their inconsistency with the *Charter*.

At paras 160-163 of *Ontario v. G.* the Courts set out a two-step process for determining what remedy is appropriate. In summary:

1. At the first step, a court will determine the extent of the laws inconsistency with the *Charter* by assessing the nature and scope of the infringement. This step is to ensure the remedy is broad enough to address all the *Charter* defects in the law.

2. At the second step, a court must determine whether a tailored remedy would be appropriate (for example severance, reading in or reading down), rather than a declaration of invalidity applying to the whole of the challenged law.

47. The Court went on to elaborate that a more restrictive remedy is generally preferred:

> "[116] In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the *Charter* violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (Schachter, at p. 700; Vriend, at paras. 149-50). To respect the differing roles of courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a court can fairly conclude it would have enacted the law as modified by the court. This requires the court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the court intruding on the role of the legislature, such a remedy can be granted without the court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation complies with the Constitution and by securing the public benefits of laws where possible." (emphasis added)

48. Hence, it is submitted that the appropriate remedy would be to sever the offending exclusions from the ambit of the *PSLRA* by deleting s. 1(b) of the definition of "employee" in the *PSLRA*. This remedy would address the unconstitutionality of the breach of s. 2(d) of the *Charter* while maintaining the benefit to the public of the constitutional aspects of legislation. In the SCC decision, *Mounted Police Association of Ontario v. Canada Attorney General)*, [2015] 1 S.C.R. 3 ("MPAO") (Tab 21), the Court severed a definition from the legislation and then suspended the declaration of invalidity for 12 months. This remedy also provides the Applicant's members with the right to bargain collectively.

(E) FREEDOM OF ASSOCIATION UNDER THE *CHARTER* – ITS LIMITATIONS

49. One element of the Applicant's Submissions centers on the assertion that the freedom of association rights of the Applicant's members have been substantially interfered with. At this point we simply note that, given the AGBC's concession that the definition of "employee" in s. 1(1)(b) of the *PSLRA* is not constitutionally compliant and, in accordance with s. 52(1) the *Charter*, may be severed from the *PSLRA* with the inevitable result is that, with the deletion of that exclusion, the Applicant's members will have collective bargaining rights under the *PSLRA*. This deletion will preserve the Applicant's members right to bargain collectively.

50. The underlining premise of the Applicant's position is then exposed to be that, because the bargaining unit structure under s. 4 of the *PSLRA* does not permit the BCGLA to be a separate bargaining agent for its members, s. 4 of the *PSLRA* is an infringement of the *Charter*. The recurrent theme of the Applicant's submission is that, unless a group of employees have the right to bargain collectively through a bargaining unit of their own chosen parameters, coupled with the fact that the Applicant's members have democratically chosen their own bargaining agent, there is an infringement of the *Charter*. To properly address this submission it is important to review the limitations articulated by the SCC on the scope of freedom of association.

51. The foundational cases on the scope of freedom of association establish that freedom of association under Section 2(d) guarantees a process, but does not guarantee an outcome or access to a particular model of labour relations. The following portions of those decisions are apposite:

> 89 The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stress that Section 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based upon the principles developed in *Dunmore*, and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issue and terms of employment. In brief, the protected activity might be described as employees banding together to achieve work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively, and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.
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> 91 The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not a particular model of labour relations, nor to a specific bargaining method. As P. A. Gall notes, it's impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years. ….. Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial – so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected) but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

(*Health Services and Sup–ort - Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27, "*Health Services*")) (emphasis added)

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> 42 The court in *Health Services* emphasized that Section 2(d) does not require a particular model of bargaining, nor a particular outcome. What Section 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. To use the language of *Dunmore*, it is among those "collective activities" that must be recognized if the freedom to form and maintain an association is to have any meaning. 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 meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of Section 2(d) associational rights, and both must be justified under Section 1 of the *Charter* to avoid unconstitutionality.
>
> *Ontario (Attorney General) v. Fraser,* [2011] 2 S.C.R. 3 ("*Fraser*") (emphasis added)

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> 67 Applying the purposive approach just discussed to the domain of labour relations, we conclude that Section 2(d) guarantees the right of employees to meaningfully associate in pursuit of collective workplace goals, affirming the central holdings of health services, *Fraser*. This guarantee included a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations.
>
> (*MPAO* (Tab 21)) (emphasis added)

52. From the above, it is abundantly clear that the SCC references to the concept of "collective bargaining" do not refer only to collective bargaining within a particular process or within a Wagner Act Model. Rather, the scope of freedom of association, and the concept of collective bargaining which it embraces, refers to all forms of associational activity. The principles from these foundational cases were summarized by the British Columbia Court of Appeal in *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, [2016] B.C.J. 717 ("*Dockyard Trades*") (Tab 22), as follows:

> 81. In summary, I would frame the applicable principles (tests arising out of Health Services, Fraser, MPAO, Meredith, Saskatchewan Federation of Labour and Syndicat Canadien, as follows:
>
> (a) Section 2(d) of the *Charter* guarantees the right to meaningful associate in the pursuit of collective workplace goals (*Health Services, Fraser, MPAO*).
>
> (b) Section 2(d) likewise guarantees the right to a meaningful process of collective bargaining, although it does not guarantee outcomes (*Health Services, Fraser, MPA©*
>
> (c) Meaningful collective bargaining involves the ability to make representations and have them heard in good faith (*Fraser*).
>
> (d) Legislative or state action will infringe on Section 2(d) where it substantially interferes with meaningful collective bargaining (*MPAO*).

53. Respectfully, it is clear from the Union's submission that their claim is grounded in access to a particular process under a particular statutory regime – in this case, collective bargaining under the *Code* – rather than resonating solely in the fundamental *Charter* freedom of association. The foregoing case law clearly establishes that freedom of association does not guarantee access to any particular process or model of collective bargaining.

Designated Bargaining Models

54. *MPAO*, also directly dealt with one of the fundamental aspects of this case. The SCC specifically referred to the constitutional implications of statutory structures in which a Legislature (or Parliament) provides for bargaining unit structure by statute. The SCC referred to this as the "designated bargaining model", as follows:

> 95 The Wagner Act Model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g. School Boards Collective Bargaining Act, 2014, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example;

other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

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97 The search is not for an "ideal" model of collective bargaining but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of an employee interests in the particular workplace context at issue. Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more co-operative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interest, where those diverge from their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(d) where the structures that are put into place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance. (emphasis added)

(a) The Division "C" case

55. Subsequent to the decision in MPAO the relevant legislation was amended. S. 238.14 (Tab 23) was added and provided that the relevant tribunal "must determine that the group that consists exclusively of all the employees who are RCMP Members and are the employees who are reservists constitute the single common national bargaining unit that is appropriate for collective bargaining." This provision creates a statutory designated all employee bargaining model.

56. Two applications for certification were then filed with the Federal Public Sector Labour Relations and Employment Board ("Federal Board"). In the first, the National Police Federation ("NPF") sought to be certified to represent all employees in the designated unit.

At the same time the Association des Membres des la Police Montee du Quebec ("AMPMQ") sought to represent only those regular RCMP members stationed in the Province of Quebec. The Province of Quebec is referred to as Division "C". The AMPMQ asked for a stay of the NPF application for certification to provide the Federal Board an opportunity to address certain AMPMQ arguments. The AMPMQ's position was that the designated national bargaining unit structure violated Division C's members' freedom of association rights by legislating a single bargaining unit. The AMPMQ's application for a stay was granted (see 2018 L.N.F.P.S.L.R.E.B. 31). The constitutional issue was addressed in *AMPMQ v. Treasury Board,* 2019 L.N.F.P.S.L.R.E.B. 55 (*"Division 'C'"*) (Tab 24). Based primarily on the analysis in MPAO, the AMPMQ's *Charter* challenge was rejected.

57. The Federal Board in the *Division* "C" case reviewed, in some detail, the evidence of the relationship between RCMP Members in Division C and the RCMP nationally (see paras. 7 through 91). This evidence established that there had been ongoing relationships between various organizations (under different names) who were representative of the RCMP members in Division C and included: previous legal proceedings in which the AMPMQ (or its predecessor) sought to be certified by the Canada Labour Relations Board in 1986; the unique context created by the overwhelming use of the French language by the members of Division C; and the relationship between the AMPMQ and its members and the fact that the RCMP members in Division C indicated they wished to be represented by the AMPMQ. This background is broadly equivalent to the background relied upon by the Applicant. The AMPMQ sought to have the Board answer the question of whether s. 238.14 infringed the AMPMQ members' constitutional right to associate and, further, if such an infringement was held to exist, whether it was justified under s. 1 of the *Charter* (see para. 150).

58. In the proceedings before the Federal Board, the AMPMQ provided an expert report entitled "Appropriate Bargaining Units in the Federal Public Sector". A summary of that report is set out in paragraphs 220 through 228 of the *Division "C"* decision. The expert

report was ruled to be wholly inadmissible (see para. 259). The Applicant in the matter at hand has filed a report from Professor David Doorey headed "The Treatment of Practising Lawyers in Canadian Collective Bargaining Legislation" (Tab B to the Applicant's application) ("Doorey Report"). The Report is characterized as an "expert report" although in its submission the Applicant has not expressly sought to have the Report admitted in that capacity. The AGBC objects to the admission of significant portions of the Doorey Report on the bases which will be examined later.

59. The Federal Board analysed the constitutional issues commencing at paragraph 260. The initial focus of its analysis was on the issue of whether or not s. 238.14, which imposed the single bargaining unit structure, infringed s. 2(d) of the *Charter* in that it constituted a substantial interference with a meaningful collective bargaining process. The Federal Board's analysis recommend, by reference to paragraph 81 of *MPAO* (reproduced earlier), and the notion that "… a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them". It is also noted the SCC definition of "degree of choice" in *MPAO*. As the Federal Board in the *Division "C"* case noted, the SCC has stated that the degree of choice, while important, was nevertheless limited in scope, in referring to the following SCC comment in *MPAO*:

> 83 <u>But choice and independence are not absolute: they are limited by the context of collective bargaining.</u> In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members".
>
> (emphasis added)

60. With these reference points in hand the Federal Board turned to an examination of the collective bargaining process under the Federal *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("Federal *PSLRA*"), tying certain statutory provisions to, firstly, whether the designated bargaining model in the impugned provision in s. 248.14 interfered with the Division "C" members' "degree of choice". A review of the Federal Board's comments in this regard must recognize that the *PSLRA*, unlike the Federal *PSLRA*, does not, standing alone, provide a complete catalogue of employee rights. Rather, s. 2 of the *PSLRA* provides that, under the *PSLRA*, the Board has all of its powers under the *Code*, except where the exercise of those powers would be inconsistent with specific provisions of the *PSLRA*. In large measure, the *PSLRA* is tied to the Wagner Act Model extant under the *Code*.

61. Paragraph 86 of the *MPAO* sets out that the "hallmarks of employee choice … include the ability to form and join new associations to change representatives, to set and change collective workplace goals, and to dissolve existing associations". The Federal Board found that these hallmarks were met by the Federal *PSLRA* in the following circumstances:

- s. 5 of the Federal *PSLRA* protected the right of employees to join an employee organization of his or her choice. However, the Federal *PSLRA* did not give a right to every employee organization to obtain certification as a bargaining agent. To a similar effect, s. 4 (1) of the *Code* protects the right of employees covered by the *PSLRA* to become union members. However, like Federal *PSLRA*, the *Code* does not provide that every trade union is entitled to obtain certification as a bargaining agent.

- Employees could choose to replace their bargaining agent under s. 83 of the Federal *PSLRA*. Similarly, s. 33 of the *Code* provides the right to employees covered by the *PSLRA* to replace their bargaining agent.

- There was nothing in the Federal *PSLRA* which prevented employees from setting a change in their collective workplace goals. Similarly, there are no restrictions on employees covered by the *PSLRA* in this regard to be found in the *Code*.

- S. 187 of the Federal *PSLRA* provided accountability for the bargaining agent to the employees in the bargaining unit by permitting a filing of a complaint that the bargaining agent had acted in a manner which is arbitrary, discriminatory or in bad faith. Similar protection is provided to employees covered by the *PSLRA* pursuant to s. 12 of the *Code*.

- S. 188 of the Federal *PSLRA* entitled employees to file unfair labour practice complaints against the bargaining agent. Similar protections are provided to employees covered by the *PSLRA* pursuant to the unfair labour practice provisions of the *Code*.

62. The Federal Board then turned (at para. 274) to the AMPMQ's main argument to the effect that, as in a minority group within the entity created by s. 248.14, the Division C RCMP members did not have effective input into the selection of collective goals. While recognizing that the role of employees is fundamental to the certification process, the Federal Board held that such an observation did not resolve the issue of whether imposing a single bargaining unit interfered with the freedom of association. That issue could only be resolved by looking at the legislation holistically (see para. 275). Further, it also involved recognizing that the SCC and *MPAO* did not impose an obligation to recognize every association of employees and, in particular, the SCC's observation at para. 95 of the *MPAO* (reproduced earlier) that designated bargaining models do not necessarily violate s. 2(d) of the *Charter*.

63. The Federal Board then went on (at para. 282) to identify examples of legislated limits in the form of designated bargaining units in various public sector statutes throughout Canada. It held that the focus, in the face of the designated bargaining unit model, should be whether a meaningful process of collective bargaining was interfered with (see the discussion at paras. 284-286). The Federal Board held that the presence of adequate protections such as the right to arbitration as a dispute resolution process, the obligation of bargaining in good faith, and unfair labour practice provisions prohibiting employee interference in the formation or administration of the employee representative as well as unfair labour practice provisions, were adequate protections for employees in their interactions with their employer such that there was no interference in the right to meaningfully engage in collective bargaining. Employees subject to the designated bargaining unit model in s. 4 of the *PSLRA* are entitled to a grievance procedure by s. 84 of the *Code*, the duty to bargain in good faith by s. 11 of the *Code*, the prohibition against employer interference in the formation of the employee organization found in s. 6(1) of the *Code* and the more broadly stated unfair labour practice protections found in s. 6(3) of the *Code*.

64. The Federal Board then considered, and dismissed, the argument that there was substantial interference with the meaningful process of collective bargaining because the single designated bargaining unit approach failed to consider Division C's distinctive nature arising from the use of the French language and the existence of a different "union culture" in Division C. The Federal Board summarized, on the issue of whether the fact that Division C Members were a minority within the national bargaining unit that prevented them from having meaningful representation, as follows:

> 301 The AMPMQ argues on behalf of the Members of "C" Division that their minority situation within a national bargaining unit will prevent them from having meaningful representation. This minority situation does not in itself interfere with

> collective bargaining; in fact, it is a characteristic of the Wagner model, applicable to all bargaining agents certified under the Act which gives exclusive representation to the organization that represents the majority of members. Majority rule is not deemed to constitute substantial interference within the exercise of the right protected under s. 2(d) of the *Charter*.
>
> (emphasis added)

65. We will return to the Federal Board's discussion of issues arising under s. 1 of the *Charter* later in this submission.

(b) Alberta Crown Prosecutor's Case

66. In 2018 the Alberta Crown Attorneys' Association ("ACAA") applied to be certified as bargaining agent for a unit of employees of the Government of Alberta composed of all members of the legal profession employed in their professional capacity in positions within the Alberta Crown Prosecution Service. This application for certification resulted in a decision by the Alberta Labour Relations Board ("ALRB"), *Canadian Assn. of Crown Counsel (Re)*, [2019] A.L.R.B. 111 (the "*ALRB Decision*") (Tab 25). It must be emphasised that the ACAA application to the ALRB related only to those lawyers employed in position within the Alberta Crown Prosecution Services ("Crown Prosecutors") and did not extend to civil lawyers who worked throughout Government. Indeed, the Board Officers Report of May 22, 2018 identified that there was 668 persons who were members of the legal profession employed at Alberta Justice and that the ACAA application extended only to the 357 lawyers employed in the Crown Prosecution Services.

67. Under the Alberta *Public Service Employee Relations Act*, R.S.A. 2000 c-P-43 ("*PSERA*") , the Alberta Union of Provincial Employees ("AUPE") is the statutorily designated bargaining agent for a statutorily defined bargaining unit of "the employees of the Crown in the right of Alberta". The essence of the ACAA's application was that inclusion of ACCA Members in the AUPE bargaining unit would be a breach of the *Charter* because the notion of

"prosecutorial independence" entitled the members of ACCA to their own bargaining unit. Both the Government of Alberta, Ministry of Justice and Solicitors General ("Alberta Crown") and AUPE agreed that, given the statutory requirement under *PSERA* for an all employee unit, it would be necessary, if Crown Prosecutors wish to be represented by AUPE, to be added to the all employee bargaining unit supported by the majority of all of the lawyers employed by the Crown, and not just based upon support from Crown Prosecutors. During the proceedings, the ACCA relied upon an expert report, significant portions of which the ALRB ruled to be inadmissible. We will return to this issue later in this submission.

68. The Canadian Association of Crown Counsel (CACC) was granted intervenor status in the ACCA's application. The CACC supported the ACAA's contention that the requirements in *PSERA* that prosecutors be included in the all employee bargaining unit was a violation of freedom of association under the *Charter*. The CACC also expanded beyond ACAA's *Charter* arguments contending that the inclusion of the Crown Prosecutors in the AUPE bargaining unit of approximately 24,000 employees would "submerge" the interests of Crown Prosecutors to the extent that they would be denied a meaningful collective bargaining process. CACC also asserted that, given that the Crown Prosecutors had chosen ACAA as their representative, the *PSERA* single bargaining unit provisions unconstitutionally denied them access to the bargaining agent of their choice. (See *ALRB Decision* at para. 89). The ALRB refused to consider the CACC's "submergence theory" argument because the argument extended beyond the legal position taking by the ACCA, the actual party to the application (see para. 118).

69. The ALRB commenced the analyses portion of its decision at paragraph 98. It commenced by setting out the references from *Health Services*, *Fraser*, and *MPAO* which we have referred to and relied upon earlier in this submission.

70. In dealing with the ACCA's argument that an appearance of bias or partiality would arise if Crown Prosecutors, who are intended to be independent from Government, would render the *PSERA* bargaining unit unconstitutionally unworkable. It held:

- "113… That Crown Prosecutors are grouped with others for the purposes of collective bargaining ought to be no more disqualifying than the notional fact Crown Prosecutors share an employer with other Crown employees: reasonable persons understand there are constitutional norms and ethical obligations by which Crown Prosecutors abide which prevent such considerations from entering into prosecutorial decision-making. The Board heard of circumstances in other jurisdictions where Crown Prosecutors exist in bargaining units with other lawyers: while not the "all employee" unit that exists in Alberta, it means that conflicts, both real and perceived, stemming from bargaining unit inclusion have been managed in those jurisdictions. The Board agrees with the Crown's submission that labour relations isolation is not necessary to ensure the perception of prosecutorial independence." (emphasis added)

- It is clear from MPAO that bargaining agent choice is not absolute (see para. 117).

71. The Board rejected the *Charter* arguments of the ACCA based upon prosecutorial independence. The ACCA *Charter* application was dismissed on the basis that the single bargaining unit in the *PSERA* did not unduly restrict collective bargaining by the Crown Prosecutors who will have access to collective bargaining via the single unit mechanism permitted by *PSERA* (see para. 119).

72. During the course of its decision, the ALRB set out and reviewed a lengthy agreed statement of facts related to interactions between the ACCA with the Alberta Crown Prosecutors commencing from the time the ACAA was incorporated in 1971; including detailed reference to representations from the ACCA to the Alberta Crown which had been

denied or had been ineffective. The LRB held that this type of background evidence would only be relevant to a consideration of whether there had been a meaningful opportunity to engage in collective bargaining if it were constitutionality impermissible for Crown Prosecutors to be included in the designated AUPE bargaining unit. (see para. 131).

73. The ALRB decision was subject to an application for judicial review resulting in the decision in *Alberta Crown Attorney Association v. Alberta*, [2021] A.J. 1594 (*"ABQB Decision*") (Tab 26). After noting those factual portions of the *ALRB Decision* which centered on the fact that the Government of Alberta had refused to bargain collectively with the ACCA outside the parameters of the *PSERA*, the Court commented that such evidence would only be relevant if the Court found that s. 2(d) of the *Charter* had been breached. The Court also noted that Alberta was the only province in Canada that mandated a bargaining unit composed of all Government employees (see para. 3). The intervenor CACC also participated in the judicial review.

74. The CACC argued both that it was a *Charter* imperative that the ability of an employee to choose his or her own bargaining agent be protected and, further, that it is the choice of bargaining agent that must inform the extent to which a group of employees are able to meaningfully pursue their collective goals. It argued that the threshold of substantial interference had been met because the single bargaining unit structure under the *PSERA* would force the Crown Prosecutors to be represented by a bargaining agent which would be unlikely to challenge the Government in the manner chosen by the ACCA. It is also argued that, where the placement of a subset of employees in a particular bargaining unit is contrary to their identified collective interests and contrary to their unequivocal preference to be represented by a different association, it is a constitutional imperative that a violation of a freedom of association be found (see *ABQB Decision* at paras. 18 and 19).

75. The ALRB had summarized the principles arising from *MPAO* as follows:

> 35. … Accordingly, the Court repeatedly emphasized the limits of the requirements of compliance with the *Charter* being based on the degrees of independence and choice guaranteed by the labour relations scheme and there is no absolute requirement of either. Second, that choice and independence should not be considered in isolation but must be assessed globally, always with the goal of determining whether the employees are able to associate for the purpose of meaningfully pursuing collective workplace goals. The majority also reiterated, at least on four occasions, that in recognizing s. 2(d) protected aspects of employee choice and independence, s. 2(d) did not entitle individuals to a specific model of labour relations and referred repeatedly to other Supreme Court decisions holding the same. Finally, the majority specifically cited legislation designating bargaining agents for groups of employees as an example of a labour relations model that, despite removing an element of employee choice, could nonetheless be considered constitutionally valid.
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> ●●●●
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> 46. In Mounted Police, the Supreme Court specifically stated that the Wagner Act Model of Labour Relations provides sufficient choice for employees and went further and specifically stated that designating bargaining models are acceptable under the freedom of association guaranteed by s. 2(d). The Court gave an example of a model that provides the employees' bargaining agent as designated rather than chosen by the employees that can be acceptable even where the employees' bargaining agent under a model is designated rather than chosen by the employees. The question remains whether the employees appear to retain sufficient choice of the workplace goals and sufficient independence from management to ensure meaningful collective bargaining. The Court noted that beyond the examples cited, other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.
>
> (emphasis added)

76. The Court then concluded that the single bargaining unit structure under the *PSERA* which limited the choice of bargaining agent did not violate the freedom of association guaranteed by the *Charter* (see para. 54).

77. Finally, the Court then considered the notion of prosecutorial independence referencing the Supreme Court of Canada caution in *R. v. Cawthorne,* 2016 SCC 32 (Tab 27), which cautioned against taking the independence principle too far, emphasising that prosecutorial discretion does not somehow require prosecutors as individuals to be independent of larger structures or entities (at para. 56). The Court also ruled that, even if the evidence showed that certain member's goals were not pursued by AUPE, this alone would not, as a matter of law, constitute a violation of s. 2(d) of the *Charter* (see para. 62).

(c) The Frequency of Designated Bargaining Units

78. Every province and territory, except for Prince Edward Island, has statutorily designated bargaining units of some form. Some of the mechanisms that designated the bargaining units take are contingent, such that a Labour Board must consider the employee's classifications if an application for certification is made. In most circumstances, no bargaining unit must exist by statute, but if one is to exist, it must be based on the employer's classification system. This approach is used in the Federal Sector, Saskatchewan, New Brunswick and Yukon.

79. Other provinces designate the bargaining units directly. This approach is used in the BC, Alberta, Manitoba, Ontario, Nova Scotia, Newfoundland and Yukon.

80. In British Columbia, in addition to the bargaining units designated in s. 4 of the *PSLRA* bargaining units are also designated by the *Health Authorities Act, RSBC 1996, c. 180* (see para. 19.4); designated teacher-only bargaining units in s. 5 of the *Public Education Labour Relations Act,* RSBC 1996, c. 382 and the units designated by the *Community Services Labour Relations Act*, SBC 2003, c. 27 (see s. 3).

81. In Alberta, in addition to the all employee unit set out in s. 10 of the *PSERA*, discussed earlier, designated bargaining units exist in the *Regional Health Authority Collective Bargaining Regulation* (Alta Reg 880/2003) passed pursuant to the *Labour Relations Code*, RSA 2000, c. L-1 which designates region-wide functional bargaining units (see Regulation 2); the *Police Officers Collective Bargaining Act,* R.S.A. 2000, c. P-18; and the *Public Education Collective Bargaining Act,* S.A. 2015, c. P-36.5, pursuant to which s. 5 designates bargaining units composed only of teachers.

82. In Manitoba, statutory designated bargaining units are found in the *Health Sector Bargaining Unit Review Act*, C.C.S.M., c. H29 s. 2.

83. In Saskatchewan, in addition to the bargaining units designated on the basis of classification found in s. 17 of the Saskatchewan *Public Service Act, 1998,* S.S. 1998, c. P-42.1; the *Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S. c. H-0.03, Regulation 1 designates bargaining units for health professionals.

84. In Ontario, s. 5 of the *School Boards Collective Bargaining Act, 2014,* S.O. 2014, c. 5 establishes a number of designated bargaining units for teachers; Schedule 1 to the *Colleges Collective Bargaining Act, 2008,* S.O. 2008 c. 15 establishes designated bargaining units for staff; s. 23 (2) of the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38 designates four bargaining units (a unified bargaining unit, a correctional bargaining unit, an engineer bargaining unit, and a fourth bargaining unit); s. 2 of the *Ontario Provincial Police Collective Bargaining Act, 2006,* S.O. 2006, c. 35 establishes designated bargaining units for police officers and s. 45 of the *Fire of Protection and Prevention Act, 1997,* S.O. 1997, c. 4 establishes designated bargaining units for fire fighters.

85. In Quebec, s. 4 of the *Act respecting bargaining units in the social affairs sector,* C.Q.L.R., c. U-0.1 designates bargaining units; there are designated fire fighter bargaining units under s. 176.2 of the *Act respecting municipal territorial organization,* C.Q.L.R. c. O-9; s. 85 of the *Act respecting Labour Relations, Vocational Training and Workforce Management and Construction Industry,* C.Q.L.R.C. R-20 creates a designated bargaining unit of employees of the Commission of which administers of this Act.

86. In Nova Scotia, in addition to the bargaining units designated by classification under the *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c. 71, the *Health Authority Act,* S.N.S. 2014, c. 32 creates for a bargaining units in Health Authorities.

87. In Newfoundland and Labrador, in addition to bargaining units for special projects designated pursuant to the *Labour Relations Act*, R.S.N.L. 1990, c. L-1, the *Teachers Association Act,* R.S.N.L. 1990, c. T-2 designates the teachers' bargaining unit.

88. In the territories (Yukon, Nunavut, Northwest Territories), s. 55 of the *Public Service Act*, C.S.Nu., c. P-180 establishes three bargaining units pursuant to s. 5. In addition, the *Yukon Education Labour Relations Act,* R.S.Y. 2002, c. 62 mandates a single bargaining unit for all employees covered by it.

(F) CONCLUSION ON DESIGNATED UNITS AS AN INFRINGEMENT OF S. 2(d)

89. The principles of *stare decisis* require the Board to follow the decisions of the Supreme Court of Canada on the issue designated bargaining units. The very purpose of public decisions by Courts is to provide for certainty and predictability in the law. Respectfully, the Board cannot simply refuse to apply the judgment in *MPAO*. It is a carefully considered and well-reason judgment of the highest court in the land. It is the binding authority.

90. In previous sections of this submission we have comprehensively covered the existing case law regarding the application of the principles from MPAO. We do not propose to repeat that assessment here. It suffices to say that we rely upon the analysis of MPAO in both the *Division "C"* case and the Alberta Crown Prosecutor's cases (the *ALRB Decision* and the *ABQB Decision*) . Those cases apply the principles from *MPAO* to the very issue which the Applicant has placed before the Board in these proceedings. We commend that analysis to the Board and submit that there are simply no basis to support the Applicant's position that s. 2(d) of the *Charter* is infringed in the event a group of employees are not entitled to dictate the parameters of their bargaining unit or the identification of their bargaining agent.

(G) S. 1 OF THE *CHARTER*

91. The s. 1 analysis will apply both to the exclusion and s. 4 of the *PSLRA*. It is respectfully submitted that these legislated choices are reasonable limitations on the Applicant's *Charter* rights under s. 2(d) of the *Charter*. S. 1 of the *Charter* provides:

> (1) The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Given that the case before the Board relates to the provisions of the *PSLRA*, there can be no doubt that they are "prescribed by law".

92. The Supreme Court of Canada has commented upon the role played by s. 1 of the *Charter* as follows:

> 36. [Section 1] engages what in law is known as the proportionality analysis. Most modern constitutions recognize that rights are not absolute and can be

> limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate. The concept of proportionality finds its roots in ancient and scholastic scholarship on the legitimate exercise of government power. Its modern articulations may be traced to the Supreme Court of Germany and the European Court of Human Rights, which influenced by earlier German law: (…citation omitted…). This court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality – first, the law must serve an important purpose, and second, the means it uses to obtain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of these facts.
>
> *Canada (Attorney General) v. J.T.I.-Macdonald Corp.*,
> 2007 SCC 30 at para. 36 ("*J.T.I.-Macdonald*") (Tab 28)

93. The values and principles which guide the court in applying s. 1 were clearly articulated in the seminal decision of *R. v. Oakes*, [1986] 1 S.C.R. 103 ("*Oakes*") as follows:

> 64 A second contextual element of interpretation of Section 1 is provided by the words "free and democratic society". Inclusion of these words is the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhances the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonably and demonstrably justified.

94. In *MPAO*, the Supreme Court of Canada also dealt with an analysis of s. 1 of the *Charter* as follows:

> (139) S.1 of the *Charter* permits Parliament to enact laws that limit *Charter* rights if it is established that the limits are reasonable and demonstrably justified in a free and democratic society. This requires that the objectives of the measures must be pressing and substantial and that the means by which the objective is furthered be proportionate, i.e. that the means are rationally connected to the law's objective, minimally impair the s. 2(d) right and are proportionate in effect … citations omitted … The onus rests on the party seeking to uphold the limitation of the *Charter* right and the burden of proof is on a preponderance of probabilities ……
>
> (140) We have already seen that s. 2(d) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s.1 provides additional room to tailor the Labour Relations regime to achieve pressing and substantial objectives, provided it can be shown that these are justified.
>
> ●●●●
>
> (149) At this stage, the questions is whether the measure impairs the s. 2(d) rights as little as possible in order to achieve the Government's objective. The Government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives.
>
> (emphasis added)

95. Finally, in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 32 (Tab 29), Chief Justice McLachlin wrote:

> 69. … the broader societal context in which it operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the needs of every individual claimant, but rather by whether it's infringement of *Charter* right is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the Court to consider in determining whether the infringement is justified, the Court's ultimate prospective is societal. The question the Court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.

(H) THE APPLICATION OF S. 1 OF THE *CHARTER*

(i) A Pressing and Substantial Objective

96. The question at the first stage of the analysis s. 1 is whether the objective of the infringing measure is sufficiently important to be capable, in principle, of justifying a limitation on the rights and freedoms guaranteed by the *Charter*.

97. As noted at page 23 of Higgins #1 the manner in which the bargaining unit question is handled can ultimately determine the success or failure of the whole idea of collective bargaining in the public service. In assessing the objective of the limitations inherent in the passage of the *PSLRA*, Higgins #1 noted that to simply provide public severance with access to collective bargaining under the *Code* would ignore inherent differences in the nature of Labour Relations in the public and private sector (at p. 16). The Legislatures objective in setting up a separate statutory regime for collective bargaining in the public service, and, importantly, limiting the bargaining unit structure as currently found in s. 4, was to ensure that the Government was not going to be subject to the kind of competitive bargaining or whipsawing that can only lead to unduly disruptive collective bargaining. As recoginzed by the Board in the *Insurance Corporation of British Columbia*, (reproduced in paragraph 31(a) of this submission), Higgins #1 advanced a firm policy against fragmentation of bargaining units in the public service because of the administrative advantage of concentrating and negotiating efforts of the public employer in bargaining, the desirability of achieving standard terms and conditions of employment for all employees of the public employer throughout the Province and, perhaps most importantly, thee need to minimize the likelihood of a strike interrupting the availability of Government services which are not available to the public from another source. In *Enoch* the Board recognized the statutory policy of minimizing competitive bargaining by different unions for contract settlement which will be ultimately paid from one financial source. These are all pressing societal objectives and provide an overarching context to the s. 1 analyses.

98. Recognition of the policy imperatives inherent in the limitation on a number of bargaining agents in the public service, and, indeed, the designated bargaining model is also clear from the frequency of usage of the designated bargaining model as disclosed in s. VI(E)(c) of this submission.

99. The first element of the proportionality analysis is that there must be a "rational connection" to the objective of the lawmaker. In the *Health Services*, the Court noted that this element is "not particularly onerous" (see para. 148). In *J.T.I. – Macdonald*, the threshold for meeting the requirement of a rational connection was stated as being:

> At the very least, it must be possible to argue that the means may also having about the objective
>
> (at para. 47).

100. In our submission, it is clear that there is a rational connection between the Legislature's goal of restricting the opportunities for sequential work place strikes and interruptions of public service. These goals provide a rational connection to the limitations found in the bargaining unit structure the *PSLRA*. As the Supreme Court of Canada said in *R v. Bryan,* 2007 SCC 12, s.1 should not be applied in a mechanistic fashion, but is to be applied flexibly having regard to the social context of each case. It may be applied on the basis of reason and logic alone, as opposed to definitive, objective evidence. A reasoned apprehension of harm is sufficient (see paras. 16 – 19).

101. The next element of the proportionality analysis is the concept of "minimal impairment". In *RJR Macdonald (Attorney General)*, [1995] S.C.R. 199, the Court recognized that the tailoring of law to achieve minimum impairment "seldom admits of perfection and the Courts must accords some leeway to the Legislature" (at para. 160). Thus, the question is

not whether the Applicant's members, or indeed the Board itself, can conceive of a preferable alternative which either of those parties may believe better tailors the objective to the infringement, the decision is to be left to our elected legislators.

102. Nothing in the *PSLRA* prevents the Applicant's members from articulating their collective workplace goals and pursuing those interests, even if they are pursued as a minority. These abilities are not impaired by the *PSLRA* which, as a result of its interface with the *Code*, ensures that the Applicant's members are free from employer interference and that the bargaining process would be under the control of employees generally.

103. In *J.T.I. – Macdonald*, the Court provided an overarching discussion of the proportionality analysis under s. 1 as follows

> 45. The final question is whether there is a proportionality between the effects of the measure that limits the right and the laws' objective. This enquiry focuses on impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved.? How important is the limitation on that right? When one is weighed against the other, is the limitation justified.
>
> (emphasis in original)

104. Respectfully, it is difficult to fathom a more important goal than providing a structure of bargaining which limits the prospect for competitive bargaining and the potential for sequential interruption of public services. Thus, the laws "objective" is one grounded in the very essence of the role of our elected officials. It is a law rooted in their assessment of the public interest to be served by the structure of collective bargaining in the public service. The benefits that this law will achieve are substantial. Employee choice cannot trump the Legislature's assessment of the public interest. Given that the alleged limitations on the Applicant's members' rights are based in the notion of a designated model of bargaining within a designated statutorily framework, a process which has

received imprimatur of the SCC, the overarching goals of the proportionality analysis are achieved.

105. There is one final observation to make about s. 1 of the *Charter* and the provisions of the *PSLRA*. Our research has not found another statutory designated bargaining unit model which includes the ameliorating effect on the Applicant's members' rights which to be found in s. 10 of the *PSLRA*. S. 10 of the *PSLRA* specifically acknowledges that there will be two collective agreements to apply to each bargaining unit. There is a master agreement (s. 10(1)(a)), which will include all the terms and conditions of employment common to all employees in the bargaining unit, and a subsidiary agreement s. 10(1)(b) (often referred to as a component agreement), relating to each occupational group covered by the master agreement. Under the component agreement the Applicant's members are free to advance bargaining positions which are uniquely responsive to their circumstances. This additional feature of the *PSLRA* is an important element of assessment of whether the restrictions in the *PSLRA* are reasonable limitations in a free and democratic society, consistent with s. 1 of the *Charter*. The *PSLRA* provides, by way of the component agreement, a unique vehicle for manifesting the special unions of the Applicant's members.

(I) *Charter* remedies

106. In the previous portion of this submission (s. (VI)(E)), we set out our position with regard to the Application of s. 52 of the *Charter* to the issue of the existing exclusion of the Applicant's members from collective bargaining under the *PSLRA*.

107. In s. (VI)(E) we reproduced s. 52 of the *Charter* and provided case law references with regard to its application. In the event that the Board determines that the designated bargaining model structure under s. 4 of the *PSLRA* is inconsistent with the *Charter*, and

cannot be saved under s. 1, then the Board should provide a tailored remedy in accordance with the Supreme Court the SCC's discussion in *Ontario v. G*. The appropriate remedy would be, in a manner similar to the remedy provided in *MPAO* at para. 158, to declare s. 4 of the *PSLRA* to be of no force or effect and, in addition, suspend the declaration of invalidity for a period of 12 months so that the matter may be appropriately addressed by the Legislature. It is not the role of the Board, or of the Court, to provide the positive remedy sought by the Applicants requiring the Government to recognize the BCGLA as the bargaining agent for civil lawyers. The relief set out above will allow the Board to defer to Government to determine the appropriate way to resolve the infringement.

VII. REPLY TO APPLICANT

(a) The Doorey Report

108. The Applicant's submissions make reference to the report of Dr. David Doorey, Ph.D entitled "The Treatment of Practising Lawyers in the Canadian Collective Bargaining Legislation" (A.M. – Tab "B"). It is characterized as the "Expert report" of Dr. Doorey (the Report).

109. Dr. Doorey was retained to consider and respond to 6 questions listed in paragraph 13 of the Report. After a review of background material, the responses to these specific questions posed to Dr. Dooey are set out in paragraph 162.

110. Before turning to Dr. Doorey's responses to the questions he was to address, we draw the Board's attention to the summary of the Supreme Court of Canada jurisprudence on reliance upon expert reports contained in the Federal Board's decision in the *Division "C"* case. The Federal Board commented, after reviewing in the case law cited to it on the law related to expert reports:

> 243. We have considered the decisions that the party cited, in our decision. We retain the following principles:
>
> - The expertise must be useful in reaching a decision. As expressed in *Mohan*, the expertise must not only be useful but also necessary. In *Abbey*, the Supreme Court of Canada stated that the evidence must be necessary to allow the trier of fact to understand the issues, given their technical nature.
> - "… the criteria of relevance and necessity are applied strictly, on occasion, to exclude the expert evidence as to an ultimate issue" (see *Mohan*)
> - The constitutional context must be considered (see *MacKay v. Manitoba*)
> - The expert opinion must be impartial, independent and unbiased (see *White Burgess Langille, Inman v. Abbot and Haliburton Co.*, 2015 SCC 23, at para.32)
>
> With these summary points in mind we turn to the issues addressed by Dr. Doorey.

111. The first question addressed in the Doorey Report relates to the origins, history and rational for lawyers exclusions from collective bargaining legislation in Canada. Dr. Doorey's response to this question is a summary of statutory developments throughout Canada today, commencing in 1948. The collection is historical references and does not engage any particular expertise nor is it "necessary" for the Board to understand the issues. It is not information of a technical nature. While it is not properly characterized "expert evidence" we do not oppose its admission as a summary of the history of exclusion of lawyers from collective bargaining. However, we do not accept this element of the report as an expert opinion relevant to the constitutional questions to be answered in these proceedings.

112. The second question addressed in the Doorey Report relates to the present treatment, practise and status of collective bargaining by non-lawyers across Canada in both the public

and private sectors. In addition this question addresses the issue of lawyers being included in their own bargaining unit or included in a bargaining unit with other non-lawyer employees. Again, Dr. Doorey's answers to these questions are largely a recitation of readily available in information regarding unionized employees. Again, it engages no particular expertise nor is it "necessary". However, again, we raise no objection to its admission on the basis of it being a simple recording of existing easily verifiable facts rather than an exercise of "expertise". It is worth noting that Dr. Doorey recognizes that, in a private sector, lawyers are sometimes included in unions that include non-lawyers.

113. The third question addressed in the Report seeks to have Dr. Doorey "assess whether there is a present public policy rationale for the continue exclusion of lawyers from collective bargaining." This is one of the very issues which the Board must address. The "assessment" of this issue is a question of law for the Board and is not the proper subject of an expert report. Again, it engages no particular "expertise" nor is a response to this question necessary to allow the Board, as the trial and facts to understand the issues, given their technical nature. It is not admissible evidence. (See *Division "C"* at para. 246.)

114. The fourth question addressed in the Report requires an examination of the extent to which "access to collective bargaining for lawyers, whether under collective bargaining statutes or otherwise … has given rise to adverse labour relations or public policy difficulties". We are content with Dr. Doorey's conclusion that: "there is nothing distinctive about lawyers that creates any special labour relations or public policy difficulties when they engage in collective bargaining." (at p. 55).

115. The fifth question addressed in the Report requires the author to again, "assess", the representational bargaining effects of preventing lawyers from being represented by their own democratically selected bargaining agent in their own separate bargaining unit Dr. Doorey does not address this issue because:

> … I have been unable to assess the 'bargaining effects' associated with preventing government lawyers in bargaining through their own chosen bargaining agent and the lawyers only bargaining unit, because there is no example of government lawyers bargaining in a unit with non-lawyers.

116. The final question addressed in the Doorey Report was to consider the extent to which placing lawyers into a broader "all professionals" bargaining unit is consistent with the pattern of lawyer representation in collective bargaining across Canada. Again, this is a factual investigation which does not require any particular "expertise" nor is it "necessary" for the Board to understand any technical issues. Further, the response carefully considered placement "all professional" bargaining units, rather than in bargaining units which do not reflect the choice of the lawyer group under consideration. The fact that British Columbia has created an "all professionals" bargaining unit under s. 4(b) of the *PSLRA*, while an interesting fact, is not of assistance to the Board in deciding the constitutional questions at issue.

(b) Facts

117. We do not propose to respond to each factual statement by the Applicant. Rather, we will utilize the numbering sequence in the Application to identify those facts which we either reject or which are co-mingled with non-factual assertions or speculations.

118. Prior to turning to the facts it is important to recognize the distinction between facts, speculations and inferences. As early as the Supreme Court of Canada decision in *Canadian Pacific Railway v. Murray*, [1932] S.C.R. 112, the Supreme Court of Canada identified that an inference is a deduction from evidence. Gaps in direct evidence may legitimately be bridged by an inference from facts that are actually observed and proved. If the purported inference does not come from facts actually observed and proved, it is no more than

speculation. Speculation has no legal value. (see *Sherman Estate v. Donovan,* 2021 SCC 25 at para. 97 (Tab 30)). Finally, as the Supreme Court of Canada noted in *British Columbia (Workers Compensation Appeal Tribunal) v. Fraser Health Authority, 2016* SCC 25 (at paras. 79 to 80) (Tab 31), inferences cannot be drawn up the basis of "common sense". Common sense is no substitute for proven objective facts and inferences drawn on the basis of "common sense" are, again, simply speculation.

119. We now turn to the Applicant's "facts". Prior to doing so, we note that the Applicant (in para. 5) has conceded that the Applicant's members are appointed as employees under the *PSA*:

- 9. While we do not disparage their role, there is nothing unique about the role performed by counsel for the Legal Services Branch ("LSB") or the obligations imposed on them. The Applicant seeks to tie its star to the importance of independence of legal advice to the rule of law recognized for crown prosecutors. As noted by the Supreme Court of Canada in *Cawthorne*, lawyers exercising a prosecutorial function have a constitutional obligation to act independently in order to preserve the rule of law. It was a recognition of this principle which prompted the passage of the *Crown Counsel Act* RSBC 1996 c. 87 which had its roots in the December 1999 *Mediation Report of Stephen Owen* ("*1999 Owen Report*") (Tab 32). He commented that:

  > Crown Counsel exercise prosecutorial discretion under the authority of the Attorney General in his independent role as chief law officer of the Crown. As such, Crown Counsel must act in a qusai judicial manner outside the political direction from Government, which is quite different from other public servants. …… In these special circumstances, it is my recommendation that Crown Counsel be represented by a discrete bargaining unit, notwithstanding the generally favoured trend in British Columbia of limiting the number of public sector unions."
  >
  > (at p. 2).

The role of Crown Prosecutor contrasts with the role of legal counsel in the LSB, who undertake the tasks noted in paragraph 10 of the Application. The Applicant's

members are lawyers who represent the Government in Court and tribunal hearings, further to the Attorney General's "regulation and conduct of all litigation for and against the Government or a Ministry in respect of any subjects within the authority or jurisdiction of the Legislature". Simply put, the job of lawyers in the LSB is to take instructions from Government as opposed to Crown Prosecutors who are to be aloof from instructions from Government.

- 16, 17, 18 – Again, these three paragraphs conflate the role of lawyers from the LSB with the required independence of Crown Prosecutors. There is no explanation offered as to why the functions listed in paragraph 17 are of "constitutional significance". All lawyers in British Columbia provide confidential advice pursuant to solicitor-client privilege, which can be waived by the client. There is no source for the assertion that opinions that proposed Government action may not be legally authorized can be unwelcome to Government officials. This is a classic example of speculation as it is not tied to any objective proven facts. There is also no basis for asserting any particular special constitutional status because legal counsel can be dismissed without cause. With regard to the assertions in paragraph 18, counsel who give advice or represent Government on labour or employment issues will likely be excluded from collective bargaining as a result of s. 11(3)(c) of the *PSLRA*. Similarly, those LSB lawyers who are involving setting in Government policy would be excluded pursuant to s. 11(3)(b) of the *PSLRA*.

- 22. It is a statement of the obvious that conditions of employment for Legal Counsel may be distinct from other Government employees who are in different classifications. Nor is there any constitutional significance to the fact that their salaries are set out in Treasury Board Orders. In addition, there is nothing unique about the professional legal obligations of lawyers of the LSB. Those obligations are set out in the Code of Professional Conduct for BC published by the Law Society

of British Columbia, and in particular, the obligations set out in Chapter 5 thereof. These apply to all lawyers in the Province.

- 23. There is no constitutional significance to the facts set out in this paragraph.

- 41. See our previous comments with regard to the report of Stephen Owen.

- 57. The statement of the existing internal dispute resolution process as "inadequate" is not a factual statement. It is simply an expression of opinion. With the exception of experts, a witnesses' evidence cannot be provided to the Board in the form of opinion. Similarly, the assertion that existing mechanism are "inferior" suffers from the same criticism.

- 73. The assertion that certain processes made available were "not meaningful collective bargaining" is, again, a statement of opinion, not fact.

- 88, 89, 90 & 91. The assertions contained in this paragraph are the worst form speculation. They are an attempt to provide a particular "spin" which is not justified by any reference to surrounding facts. Rather, they are an expression of vituperative belief about the Government's motives, coupled with self-serving characterizations about the Government's conduct.

- 93. There is no factual basis for the assertion that it had become "clear that the decision was not made for bona fide labour policy reasons". This is just simply the author's subjective view of matters, untethered to the facts.

- 100. We are unaware of the facts asserted in this paragraph nor is there any basis in fact provided by the author of this paragraph with regard to what may have been discussed in a meeting or what matters will consider by the participants in the meeting.

- 112. The proceedings before arbitrator John Hall December 2019 were not an "interest arbitration". They involved interpretation of existing language of the collective agreement related to the compensation relationship between Crown Prosecutors and Provincial Court judges and the duration of that relationship.

- 136. We have provided the Board with the relevant jurisprudence from the Alberta Labour Relations Board and the Alberta Court of Queen's Bench regarding Crown Prosecutors in Alberta. The subsequent recognition of the unique role of Crown Prosecutors in Alberta is consistent with the *1999 Owen Report* which established the *Crown Counsel Act*. Therefore, the current situation in Alberta parallels that in British Columbia. Crown Prosecutors, again because of their unique position, have a unique form of bargaining while other lawyers in the public service in Alberta, if they wish to participate in collective bargaining, must do so in a broad-based public sector bargaining unit.

(c) Response to legal argument

120. In response to the whole of the Applicant's legal submissions commencing at paragraph 139 of the Application, we make the following observations and submissions:

(1) In paragraph 221 of its submission, the Applicant takes the position that, given the Crown's concession that the existing applicable exclusion from the definition of "employee" in the *PSLRA* infringes s. 2(d) of the *Charter*, there is no legal basis for

permitting the Crown to rely on that exclusion in support of its proposed interpretation of the *Code*. In various places, throughout its submission this position informs the Applicant's case. Respectfully, the Applicant appears to equate the Crown's concession with an amendment to the legislation. There is no substance to this position.

Under s. 7(1) of the *Interpretation Act*: "Every enactment must be construed as always speaking". The language of sub-section (b) of the definition of "employee" under the *PSLRA* remains in full force and effect until legislative amendment or the provision is declared to be of no force and effect pursuant to s. 52 of the *Constitution Act*. Therefore, as the matter currently stands, sub-section (b) of the definition of "employee" in the *PSLRA* remains in full force and effect.

(2) In addition, the Applicant's submission proceeds on the false premise that, in the event sub-section (b) of the definition "employee" in the *PSLRA* is struck down or is otherwise held to be unenforceable, such an event would compel the conclusion that the Applicant's members are entitled to become certified under the *Code*. This is clearly not the case. Sub-section (b) of the definition of "employee" is, simply put, an exclusion from the definition of "employee". It is not a freestanding exclusion. The elimination of that exclusion would leave the definition of "employee" intact. The Applicant's members are, and will remain (even if sub-section (b) of the definition is removed), "employees as defined in the *Public Service Act*". In that capacity, their employer is the Government. As the numerous previous decisions hold (and in particularly the decisions in *Internal Auditors* and *Judicial Administrative Assistants*) collective bargaining with the Government qua employer can only occur pursuant to the *PSLRA*. In order for the Applicant to achieve the right to bargain collectively under the *Code*, the *PSLRA* would have to be struck down in its entirety. The Applicant has not taken that position.

(3) For the purpose of argument only, assuming that sub-section (b) of the definition of employee is struck down, the Applicant's members will be entitled to "bargain collectively" with their employer (the Government) under the *PSLRA*. Under no circumstances, if the exclusion in sub-subsection (b) is rendered ineffectual, will the Applicant's members be denied the right to bargain collectively in accordance with their freedom of association rights under s. 2(d) of the *Charter*.

121. As the recitation of the facts and correspondence referred to in the Applicant's submission clearly set out, the Government has always been prepared to address the circumstances so that the Applicant's members can bargain collectively under the *PSLRA*. The real issue in this case, and the issue which the Applicant has largely avoided, arises from the Applicant's express statements that it is not satisfied with the scope of collective bargaining which will be granted to it under the *PSLRA* because it would not permit them to bargain outside of the bargaining unit structure set out in s. 4. As we indicated in our submission, there is nothing unconstitutional about designated bargaining unit structures, including the structure set out in s. 4 of the *PSLRA*.

122. Shortly stated, there is no need for the Applicant's members to have access to the *Code* to engage in collectively bargaining. When, and if, sub-section (b) of the definition of "employee" is eliminated, the Applicant's members will be "employees" as defined in the *PSLRA* and entitled to bargain collectively in accordance with that statute. We will now address certain heading in the Applicant's submission.

BCGLA MEETS THE REQUIREMENTS TO BE CERTIFIED UNDER S. 23 OF THE *CODE*

123. We do not propose to respond to the Union's descriptions of the certification process under the *Code*. As noted above, there is no avenue for the Applicant's members to be covered by the *Code*. The simple reality is, for the purposes of collective bargaining, the

Government qua employer is only obliged to bargain collectively in accordance with the terms of the *PSLRA*.

THE *PSLRA* IS IRRELEVANT TO WHETHER BCGLA SHOULD BE CERTIFIED UNDER THE *CODE*

124. It is accurate to state, as the Applicant does, that the bargaining units set out in s. 4 cannot be appropriate bargaining units for public servants while excluded from the definition of "employee" under the *PSLRA*. However, that observation does not change the fact that their employer is only obliged to bargain pursuant to the *PSLRA*. The persons who are excluded from the definition of employee under the *PSLRA* remain employees as defined in the *Public Service Act* and, as such, their employer is the Government. The Government's obligations to bargain collectively with its employees are fully contained within the *PSLRA* as augmented by the Code except in instances of conflict.

125. As a further aspect of its submissions under this heading, the Applicant asserts that the Board is no longer bound to follow "historic decisions" and that those historic decisions do not properly reflect "*Charter* values". It is asserted that all interpretation decisions must "take into account the values underlying the *Charter*". This is a very broad overstatement of the law relating to *Charter* values. The use of *Charter* values in the interpretation of legislation is dependant upon a finding of the legislation is ambiguous. The Supreme Court of Canada jurisprudence to that effect is legion. Indeed, the Board has recently commented on utilization of *Charter* values in *Vancouver Shipyards Co. Ltd.*, 2022 B.C. LRB 146 (Tab 33) as follows:

> 130 Because we have found, on the basis of our *Rizzo* analysis, that there is no ambiguity in the Phrase, there is no basis on which to consider *Charter* values. In *Bell Express Vu*, the Supreme Court of Canada explained both how to determine whether statutory language is ambiguous and when consideration of *Charter* values is appropriate (that is, only in circumstances of genuine ambiguity). With

respect to what constitutes ambiguity in statutory language, the Court in *Bell Express Vu* explained:

> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, at p. 115). The words of the provision must be reasonably capable of more than one meaning" (*Westminster Bank Ltd. v Zang [1966] AC 182*) H.L. (at p. 222, per Lord Reid. By necessity, however, one must consider the entire context of the provision before one can determine if it is reasonably capable of multiple interpretations. In this regard Mayor J's statement in *Canadian Oxy Chemical v. Canada (Attorney General), [1999] 1 S.C.R. 743*, at para. 14, is apposite: "it is only when genuine ambiguity arises between two or more plausible readings, each equal in accordance with the intentions of the statute, that the Court needs to resort to external interpretative aids, to which I would add, "including other principles of interpretation".
>
> 131 Thus, for statutorily language to be ambiguous, it must be reasonably capable of more than one meaning, when considered in its entire context. There must be two (or more) plausible readings, each equal in accordance with the intentions of the statute. If there is no such ambiguity, then the Court in *Bell Express VU* expressly explained it is not appropriate to apply a *Charter* values analysis to interpret the legislation.
>
> (emphasis added)

126. As we have stressed throughout our submissions and, as repeatedly found by the Board in previous decisions relating to the relationship between the *Code* and the *PSLRA*, there is no "genuine ambiguity" about the relationship between the *Code* and the *PSLRA* because of the identification of who is the employer in the *PSLRA*. Higgins #1, the discussion in the Hansard debates and all of the Board's previous rulings on the issue are all part of the context to be considered when determining whether an ambiguity exists. It would defy credulity, in the face of the overall context, to find that there is an ambiguity permitting recourse to *Charter* values. The plain ordinary textural meaning of the definition of "employee" in the *PSLRA* could not be more specific. If employees appointed pursuant to the *PSA* wish to bargain collectively, their right to do so is constrained by the *PSLRA*. The simple fact that they might also meet the definition of "employee" under the *Code* without

reference to who is their employer does not create an ambiguity in the *PSLRA*. Further, the difference between who is the "employer" creates a clear conflict with the provisions of the *Code*. In such circumstances, as a result of s. 23 of the *PSLRA*, the *PSLRA* provision prevails.

127. The Applicant also purports to draw support from the *Queen's Printer* case citing it for the proposition that "other public servants excluded from the definition of "employee" under the *PSLRA* do bargain under the *Code* (Applicant's submission para. 199). Respectfully, this assertion is based upon a misreading of the *Queen's Printer* case. The express finding of the panel in the *Queen's Printer* case (upheld on reconsideration) was that the *Queen's Printer* employees at issue were not "clerical or administrative employees subject to exclusion under the *PSLRA* but, rather, were in fact "employees of the BC Printing Bureau" and therefore covered by the terms of the certification and collective agreement between the *Queen's Printer* and the Printing units. With regard to the headings in the Applicant's submission that the "Board did not apply a proper purposive analysis" and "reliance on the *PSLRA* would be inconsistent with *Charter* values", we have dealt with the interpretation process utilized by the Board which focused on who was the "employer" and have provided an analysis of the role of *Charter* values in interpretation. However, it is worth noting that, again, at para. 221 of the Applicant's submission, the Crown's concession that sub-section (b) of the definition of employee in the *PSLRA* infringes s. 2(d) of the *Charter* is treated like the equivalent of an amendment to the legislation. It is not.

Exclusion of Legal Counsel from the *Code* would constitute an unjustified infringement in s. 2(d) of the *Charter*

128. We do not quarrel with the Board's authority to grant constitutional remedies. However, this element of the Applicant's submissions asserts, that access to collective bargaining under the *PSLRA* is not *Charter* compliant. In essence, the Applicant's submission is that, excluding the Applicant's members' right access to the *Code*, constitutes an infringement

under s. 2(d) of the *Charter*. Respectfully, there is no "hierarchy" of access to collective bargaining. The Applicant assumes that its members will not be entitled to bargain collectively under the *PSLRA* (as we have indicated, such will not be the case) in the event the Board holds that sub-section (b) of the definition of employee in the *PSLRA* is unconstitutional. It simply makes no sense to find that the Applicant's members have a right to bargain collectively under the *Code* even though they will have a right to bargain collectively under the *PSLRA* if the exclusion is struck down.

SUMMARY

129. The application for certification should be dismissed. The Applicant cannot bargain collectively with the Government under the auspices of the Code. Collective bargaining is available to the Applicant's Members under the PSLRA.