PIPSC and CAPE Constitutional Challenge: Questions and Answers

1. What type of legal action is this?

Two public service unions, The Professional Institute of the Public Service (PIPSC) and the Canadian Association of Professional Employees (CAPE) are launching a challenge by way of application in the Ontario Superior Court of Justice. The application process is a relatively more expedited procedure than trials of an action, and is typically used in Charter challenges. It proceeds by way of affidavit evidence, and cross-examinations on that evidence, and the matter is then argued through written and oral argument before the court. The co-applicants will seek to develop a reasonable timetable in conjunction with the Government of Canada to determine when evidence must be filed, when cross-examination on the affidavits will take place, the filing of written argument, and appropriate dates for the actual Court hearing.

2. Who hears the application?

The application is heard by a single judge of the Ontario Superior Court of Justice.

3. How long will the legal proceedings take?

It is difficult to predict but it is hoped that the hearing will take place within a year of the launch of the application.

4. Who is bringing the application?

The application is being brought by PIPSC, the Professional Institute of the Public Service Canada, a union representing over 55,000 scientists and professionals employed by governments throughout Canada. More than 40,000 are employed by the federal government. In addition a number of individual members of PIPSC have joined in bringing the application.

It is also being brought by CAPE, the Canadian Association of Professional Employees. CAPE is the third largest federal government bargaining agent, representing over 11,000 professional employees in the federal government. CAPE represents economists, statisticians, sociologists, social science support employees, translators, interpreters and terminologists. Individual members of CAPE have also joined in bringing the application.

5. What would be the effect of the application, if successful?

If successful, the application would invalidate certain provisions of the federal *Public Service Labour Relations Act (PSLRA)* which prohibit bargaining and inclusion in a collective agreement, including through the conciliation/strike or arbitration processes, of a large number of significant workplace issues including pensions, classifications, staffing and key elements of job security.

6. What are the legal provisions at issue?

At issue are provisions in the *PSLRA* that restrict the scope of bargaining in the federal public service. These provision are set out as follows:

Right of employer preserved

> **7.** Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.

Section 7 of the *PSLRA* directly infringes on collective bargaining by removing from the bargaining table any issues concerning the organization of the federal public service, the assignment of duties and the establishment of classifications, and instead leaving this to unilateral employer determination.

Collective agreement not to require legislative implementation

> **113.** A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if
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> (a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or
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> (b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*.

Request for conciliation

> **161.** (1) Either party may, by notice in writing to the Chairperson, request conciliation in respect of any term or condition of employment that may be included in a collective agreement.

Award not to require legislative implementation

> **150.** (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if
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> (a) doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;
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> (b) the term or condition is one that has been or may be established under the *Public Service Employment Act*, the *Public Service Superannuation Act* or the *Government Employees Compensation Act*;
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> (c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;
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> (d) in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or
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> (e) doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.

7. Why is the application being brought now?

On June 8, 2007 the Supreme Court of Canada released its landmark decision in *BC Health Services*, where the Court recognized for the first time that the right to collective bargaining is constitutionally protected by the freedom of association guarantee in s. 2(d) of the Charter. As a result, restrictions imposed by the Government on bargaining over important terms and conditions of employment for inclusion in a collective agreement now violate the guarantee of freedom of association contained in the Charter.

As the Court concluded, Athe right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them.@

Historically, federal public sector employees have strongly opposed restrictions on their ability to bargain over pensions, classifications and staffing, and on their inclusion in negotiated collective agreements.

During the current round of bargaining, despite the Supreme Court of Canada ruling, the government still refused to bargain in respect of critical issues, such as pensions and job classification systems, and instead purported to rely on the legislative restrictions PIPSC and CAPE are now challenging. As a result, the unions decided that a legal challenge was necessary to vindicate the constitutional rights of their members.

8. What are the practical effects of the litigation?

If successful the litigation will allow federal government employees to have some real say over important terms and conditions of employment through the process of collective bargaining. Both the employer and the unions will be obligated to bargain in good faith over the full range of workplace issues, and to include negotiated provisions in these areas in collective bargaining.

9. What is the legal theory underlying the case?

The challenge relies upon the guarantee of freedom of association contained in section 2(d) of the Charter as interpreted by the Supreme Court of Canada in the recent *B.C. Health Services* case. In that case, the Supreme Court of Canada overturned its previous decisions and held for the first time that freedom of association protected the process of collective bargaining. The Court concluded that the constitutional right to collective bargaining Aconcerns 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 issues and terms of employment.@ This right includes the following elements:

_ employees have the right to act in common to reach shared goals related to workplace issues and terms of employment, to present demands to employers collectively and to engage in discussions in an attempt to achieve workplace-related goals;

_ government employers have a corresponding duty to agree to meet and discuss employee demands; and

_ limits are placed on governments= ability to exercise of legislative powers in respect of the right to collective bargaining

It is the unions= position that the legislative restrictions at issue fundamentally interfere with their ability to engage in protected associational activity and that Government has substantially interfered with the ability of PIPSC and CAPE members to engage in collective bargaining by enacting these limitations.

10. Who is representing the applicants?

The Applicants are represented by Sack Goldblatt Mitchell a labour law firm with extensive experience in Charter litigation. Steven Barrett, representing PIPSC and CAPE, a partner at Sack Goldblatt Mitchell, was also counsel to the Canadian Labour Congress in the landmark *B.C. Health Services* case.

11. What is the legal situation for other employees?

In the view of the *2001 Advisory Committee on Labour Management Relations in the Federal Public Service*, the federal limitations are Amore restrictive even than that found in most other public sector regimes.@ And, as pointed out in the *2003 Treasury Board Report on Expenditure Review of the Federal Public Sector*, the broad scope of the federal limitations Acontrasts with the typical situation in the private sector and most of the public sector, where all matters for joint determination are resolved in a single collective agreement@.

12. How many employees are affected?

PIPSC is a national union representing 55,000 public sector professionals across Canada, of whom more than 40,000 work directly in the federal public service. PIPSC represents IT professionals, scientists, engineers, architects, auditors, doctors, nurses, and others.

CAPE is the third largest federal government bargaining agent, representing over 11,000 professional employees in the federal government. CAPE represents economists, statisticians, sociologists, social science support employees, translators, interpreters and terminologists.

The decision will affect 250,000 federal public service employees and their families.