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# Unionization at Justice Canada: A Case Study

Andrij Roman Kowalsky

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**UNIONIZATION AT JUSTICE CANADA: CASE STUDY**

**ANDRIJ KOWALSKY**

**A DISSERTATION SUBMITTED TO  
THE FACULTY OF GRADUATE STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
DOCTOR OF PHILOSOPHY**

**GRADUATE PROGRAM IN LAW  
OSGOODE HALL LAW SCHOOL OF YORK UNIVERSITY  
TORONTO, ONTARIO**

**JULY 2015**

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## ABSTRACT

Researchers of the Canadian legal profession know very little about lawyers unionizing and collectively bargaining. A breakthrough for expanding this subject occurred in April 2005 when non-management lawyers working at the federal Department of Justice Canada (DOJ) were recognized by the *Public Service Labour Relations Act (PSLRA)* as employees. This dissertation explores DOJ lawyers unionizing by addressing two research questions: (1) what led DOJ lawyers to unionize with the Association of Justice Counsel (AJC)? and (2) what was the AJC's experience in negotiating a first collective agreement?

The dissertation is organized using a conventional structure. The literature review presented in Chapter 2 maps the academic study of lawyer unionization while also serving as a guide for framing the content of interview protocols. Chapter 3 elaborates on the dissertation's research design as a case study. Chapter 4 explains DOJ lawyers' exclusion from the *Public Service Staff Relations Act*, the DOJ's administration of the individual employment relationship, as well as introducing the Legal Officers' Advisory Committee (LOAC). Chapter 5 provides a historical analysis of events leading to LOAC becoming the AJC, which is traced to June 1990, when lawyers employed at the DOJ's Toronto office received an exclusive wage premium known as the "Toronto differential". The chapter describes how redressing the Toronto differential helped LOAC generate employee support for forming the AJC as a professional association, and, later, campaigning for union recognition under the *PSLRA*. Chapter 6 presents the AJC's negotiation and completion of a first labour agreement. Chapter 7 concludes the work by assessing the study's key goals and interpreting the overview in relation to the broader literature.

Findings from the seven chapters are synthesized into a descriptive theory that addresses the two research questions. Its thesis is that DOJ lawyers' desire for workplace representation and improved wages, executive level support from the DOJ, and introduction of the *PSLRA* facilitated the creation and development of the AJC into a vehicle that directed the unionization process. At the same time, the argument holds that the AJC negotiated a first collective agreement with an employer who engaged in hard bargaining that resulted in deadlocked negotiations, but was conduct, nonetheless, the courts determined had allowed the AJC a meaningful process of collective bargaining prior to the imposition of wage-restraint legislation. The dissertation's findings: (1) detail the establishment of a new professional union in Canada's federal public service; (2) confirm the relevance of the processual model for understanding DOJ lawyers unionizing; and (3) suggest that litigation challenging legislation remains unpredictable despite jurisprudence that protects entitlement to the process of collective bargaining.

## **DEDICATION**

I dedicate this study to Nataalka. Your love and patience inspired me to complete the work.

## ACKNOWLEDGMENT

This acknowledgment is one of the first pieces of this study that will be read, but it was the last that was written. The tribute allowed me to reflect on the university and the many people responsible for this publication. Osgoode Hall Law School funded my doctoral studies through generous scholarships which were supplemented by multi-year teaching placements in the Law and Society, and Equity Studies programs of the Faculty of Liberal Arts and Professional Studies at York University. Rhonda from the Osgoode Hall Graduate Program was a friendly, knowledgeable and invaluable aide in answering my questions about satisfying all degree requirements.

There are those contributors to the study who have anonymity. There is my key informant from the Association of Justice Counsel who supported the project from the moment they heard about it and my efforts to complete it. Then, there are my research participants. Past and present Department of Justice Canada lawyers so generously gave me their time and effort by participating in interviews. Your words, experiences and stories are important and have immeasurably enriched the worth of this work. I trust I've been able to accurately present your thoughts about the different subjects we spoke about. Finally, staff at the Supreme Court of British Columbia in Vancouver, the Superior Court of Justice in Toronto, and the Public Service Labour Relations Board in Ottawa allowed me access to court records.

Of course, there are the people who can be identified. I was extremely fortunate to have a knowledgeable and insightful committee examine my dissertation. I am indebted to them for their interest, support, and critique of my work. Professors Stephanie Ross, Greg McElligott, and Amar Bhatia unselfishly committed their time. Due credit is reserved for Professor Joseph Slater who traveled from Toledo to Toronto to serve as the external examiner. Committee members posed challenging questions during the examination and they exposed new insights which I could not have envisioned myself. Their enthusiasm for the study wowed me.

I am especially grateful to my supervisor Professor Eric Tucker. He too was a member of the examining committee. He also served as my supervisor and navigated me through each turn of the program. He recommended articles that jumpstarted my foray into the study. Never one to judge the speed of my output, he patiently read every chapter of the study (often twice) and

advised on improving the manuscript. His feedback on syntax, word choice and ideas immeasurably helped me grow as a writer and editor, and built in me the confidence to envision a final, polished product. It was a special privilege to be one of his students.

My wife Nataalka was a constant supporter of my work. Research and writing a dissertation took away from time that should have been spent with her. Nonetheless, her unconditional encouragement for my academic endeavours was amazing. Nataalka, I hope the sacrifices justified the outcome.

On a final note, I would be remiss in my duties not to mention that the views presented herein are a result of the investigator's research and do not necessarily reflect those of the Department of Justice Canada.

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## LIST OF KEY ACRONYMS

- ABA** – American Bar Association
- AJC** – Association of Justice Counsel
- DOJ** – Department of Justice Canada
- DOJ Act** – Department of Justice Act, R.S.C., 1985, c. J-2
- ERA** – Expenditure Restraint Act, S.C. 2009, c. 2, s. 393
- FAA** – Financial Administration Act, R.S.C., 1985, c. F-11
- FLAG** – Federal Lawyers Association of Greater Toronto
- FLOC** – Federal Law Officers of the Crown
- HRD** – Department of Justice Human Resources Directorate
- LA** – Law
- LOAC** – Legal Officers’ Advisory Committee
- MAC** – Management Advisory Committee
- MAG** – Ministry of the Attorney General (Ontario)
- NJC** – National Joint Council
- NLRA** – National Labor Relations Act, 29 U.S.C. §§ 151-169
- NLRB** – National Labor Relations Board
- PIPSC** – The Professional Institute of the Public Service of Canada
- PPSC** – Public Prosecution Service of Canada
- PSSRB** – Public Service Staff Relations Board
- PSLRB** – Public Service Labour Relations Board
- PSMA** – Public Service Modernization Act, S.C. 2003, c. 22
- PSSRA** – Public Service Staff Relations Act, S.C. 1966-67, c. 72
- PSLRA** – Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2
- RCGO** – Royal Commission on Government Organization
- SAP** – Salary Administration Policy – Law Group – Department of Justice and other excluded legal officers
- TBS** – Treasury Board Secretariat
- TRO** – Toronto Regional Office

## CHAPTER 1: Introduction

### 1.1 Overview

This dissertation investigates the unionization of non-management lawyers at the Department of Justice Canada, and the attempt of their bargaining agent, the Association of Justice Counsel, to negotiate a first collective agreement. Both stages of the unionization process (organization and bargaining) are interpreted from employee and union perspectives. The inquiry adopts a qualitative case study methodology for obtaining, analyzing, and reporting findings. Primary and secondary document review, twenty-three semi-structured interviews, and participant observation were the data sources used for the study.

The goal of chapter 1 is to introduce and outline the key discussion points and format of the dissertation. The first section, background to the study, presents the research problem that rationalizes the conduct of this project and that yields the study's central research questions. The next section, which deals with research aims, documents this investigation's key objectives, and then a brief segment on the appropriateness of adopting a case study approach follows. Chapter 1 concludes by prefacing the remaining six chapters of the work, which cover the literature review, research design, findings, and conclusion.

### 1.2 Background to the Study

The Canadian legal industry is slowly, but surely changing. Writing at the turn of the new millennium, futurists foresaw modernization altering the practice of law. They identified progressive technology and the new economy as liberalizing the legal services market at the expense of softening lawyers' practice monopoly.<sup>1</sup> The corresponding evolution of the access to justice movement, advances in legal services production techniques, and practitioner and law student oversupply confirm observers' speculations while also suggesting an impending

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<sup>1</sup> H.W. Arthurs, "Lawyering in Canada in the 21st Century" (1996) 15 *Windsor Yearbook of Access to Justice* 202 at 217; H.W. Arthurs & R. Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34:1 *Osgoode Hall Law Journal* 1 at 46; K. Roach, "The Changing Nature of the Legal Profession" in W.A. Bogart, ed., *Access to Affordable and Appropriate Law Related Services in 2020* (Ottawa: Canadian Bar Association, 1999) 77 at 81; R. A. Macdonald, "Let Our Future Not Be Behind Us: The Legal Profession in Changing Times" (2001) 64 *Saskatchewan Law Review* 1 at 18; D. Brusegard, *Economic Implications and Realities: The Potential Economic Impacts of Demographic and Social Change in the Law Profession and Business of Law* (Toronto: Canadian Bar Association, 2004) at 7-8, online: Canadian Bar Association <[https://www.cba.org/cba/futures/pdf/economic\\_implications.pdf](https://www.cba.org/cba/futures/pdf/economic_implications.pdf)> (last modified: 3 February 2004).

deprofessionalization of law. Lawyers adopting collective bargaining to challenge how their law firm, in-house department, or government office exploits new practice trends to restructure operations may surprise readers.

Canadian law societies, as overseers of a province's legal profession, encourage a consumer friendly, access to justice movement in the name of the public interest that de-emphasizes lawyers as exclusive providers of legal services and their maintenance of a closed practice domain.<sup>2</sup> Serving middle-class and low-income people is synonymous with solo and small firm practitioners whose availability to the general public earns them the reputation as being the backbone of the profession. Their inexorable reliance on a high-turnover, diverse, fee-paying customer base exposes them to a broad range of potential clientele. This clientele, however, is a wholly unstable lot, who are courted by, and can find better value for their dollar with, encroaching service providers. Paralegals, prepaid insurance plans, and on-line, electronic unregulated providers fill a demand for affordable and basic legal services that influences the public perception that a lawyer's services should be costly or even necessary.<sup>3</sup> Competition among the bar for work where legal expertise is obligatory will reward those practitioners capable of stirring demand by aggressively advertising value-added services as their calling card for new clients. This is a business model that favours established, financed, entrepreneurial, specialized, and lean law firms, and it has become a popular mode for mass marketing personal injury legal services in and around Canada's largest population centre, the Greater Toronto Area.<sup>4</sup> This ubiquitous legal advertising found atop of cabs, on the exteriors of public transit busses, on the walls of subway cars, and on many radio and television stations demonstrates both

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<sup>2</sup> D.R. Mah et al., *Alternate Delivery of Legal Services: Final Report* (Calgary: Law Society of Alberta, 2012) at 10, online: Law Society of Alberta <[http://www.lawsociety.ab.ca/files/adls/ADLS\\_Final\\_Report.pdf](http://www.lawsociety.ab.ca/files/adls/ADLS_Final_Report.pdf)> (last modified February 2012).

<sup>3</sup> D. Pinnington, "The Future of Law: The Challenges and Opportunities of Practicing Law in a Global Village" *LawPro Magazine* 12:2 (September 2013) 25 at 26-27.

<sup>4</sup> Statistics Canada estimated that in 2011, the census metropolitan area of Toronto, Ontario, which extends into the four outlining regional municipalities of Halton, Peel, York and Durham consisted of 5,583,064 people. Statistics Canada, *2011 Census of Population – Statistics Canada Catalogue no. 98-316-XWE* (Ottawa: Statistics Canada, 2012), online: Statistics Canada <<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=201&S=3&O=D&RPP=150>> (last modified: 1 January 2013).

a merging of lawyer professionalism with commercialism and the measures plaintiff-side lawyers have taken to ply their trade.<sup>5</sup>

Like solo and small firm practitioners, large law firm associates also face uncertain prospects. Law firm associates work long and gruelling work hours and suffer from low job satisfaction and career stagnation because of their employers perpetuating and profiting from a hierarchical division of labour and entitlements.<sup>6</sup> Recent findings suggest that these types of positions are fungible as well given the emergence of modern legal services production methods. As a matter of course, law firm human resources intensify the shedding of positions when they fragment job responsibilities by assigning contingent legal work, routinized transaction, and document review to employment agencies staffed by freelance lawyers.<sup>7</sup> These same strategists can seek even more ambitious cost reductions by off-shoring work to common-law trained lawyers who practice at lower rates than domestic competitors.<sup>8</sup> The dawn of new-age computer applications and technologies threaten to deskill and mechanize legal work all together.<sup>9</sup> Artificial intelligence and robotics excising human intervention from non-sophisticated legal tasks can antiquate outsourcing, thereby rendering the personnel administrator as redundant to the law firm as the associate positions they once shed.<sup>10</sup>

Current realities spare little relief for the newest entrants to the profession where competition for entry-level positions is stiff. Between 2004 and 2008, American law firms

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<sup>5</sup> The issue of whether law is a business or profession remains a current topic. See S.J. Levine, “Foreword to the Conference: The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century” (2012) 40 *Fordham Urban Law Journal* 1. This journal volume published papers from the Fordham Law School Conference of 23-24 April 2012, *The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*.

<sup>6</sup> J. Hagan & F. Kay, *Gender in Practice: A Study of Lawyers' Lives* (New York: Oxford University Press, 1995) at 48; S.S. Fortney, “Soul For Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements” (2000) 69:2 *University of Missouri - Kansas City Law Review* 243 at 248; W.D. Henderson & D. Zaring, “Young Associates in Trouble” (2007) 105:6 *Michigan Law Review* 1087 at 1103.

<sup>7</sup> R.A. Brooks, *Cheaper By the Hour: Temporary Lawyers and the Deprofessionalization of the Law* (Philadelphia: Temple University Press, 2011) at 28-39.

<sup>8</sup> A. Sechooler, “Globalization, Inequality and Legal Services” (2008) 15:3 *International Journal of the Legal Profession* 231 at 237-241.

<sup>9</sup> R. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (New York: Oxford University Press, 2008) at 145.

<sup>10</sup> Canadian Bar Association, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013) at 27, online: Legal Futures Initiatives <<http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/trends-issues-eng.pdf?ext=.pdf>> (last modified: 12 June 2013).

managed declining rates of growth by eliminating 20,000 jobs.<sup>11</sup> In 2009 and 2010, 250 of America's largest law firms cut 9,500 positions and delayed hiring.<sup>12</sup> Their proactive employment practices—the measuring and adjusting of labour resources according to economic hardship—showed that large law firms are similar to the organizations they represent. Intensifying competition for lucrative new clients and their business (which spin-off more work and new jobs for associates) exists in Canada too and it is causing a shakeout, or perhaps an implosion, at one or more of the nation's largest firms.<sup>13</sup> The principles of supply and demand suggest that the glut of new lawyers in America may not get their start in the profession before shrinking law school enrollments (which have fallen by 24 percent from 2010 and hover at figures not seen since 1975) correct the disequilibrium by churning out fewer graduates.<sup>14</sup> While in Ontario, the problem of excess law school graduates (trained either in the province or abroad and who became unplaced articling students) forced the Law Society of Upper Canada to implement an alternative licensing program, which consists of a four month skills-based training course, and a four month work placement, despite fears over implementing a “two-tier” system that may stigmatize the credentials of program graduates to prospective employers.<sup>15</sup> Deliberate policy intervention that allows more people to become lawyers and set up shop in a soft economy benefits the law societies who license them, and not the main street practitioners whose livelihoods are sensitive to a flood of new entrants. Adding lawyers to an already cramped system gives law societies a steady pool of fee-paying licensees, but at the expense of a bloated labour supply.

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<sup>11</sup> W.D. Henderson & R.M. Zahorsky, “Law Job Stagnation May Have Started Before the Recession—And it May Be a Sign of Lasting Change” *ABA Journal* (1 July 2011), online: [ABA Journal <http://www.abajournal.com/magazine/article/paradigm\\_shift/>](http://www.abajournal.com/magazine/article/paradigm_shift/) (last modified: (1 July 2011).

<sup>12</sup> “Law Firms: A Less Gilded Future” *The Economist* (5 May 2011), online: [The Economist <http://www.economist.com/node/18651114>](http://www.economist.com/node/18651114) (last modified 5 May 2011).

<sup>13</sup> J. Melnitzer, “Another Canadian Law Firm Will Follow Hennen Blaikie to collapse in 2014, Deloitte Report Set to Predict” *Law Post* (12 March 2014), online: [Financial Post <http://business.financialpost.com/2014/03/12/another-canadian-law-firm-will-follow-heenan-blaikie-to-collapse-in-2014-deloitte-report-said-to-predict/>](http://business.financialpost.com/2014/03/12/another-canadian-law-firm-will-follow-heenan-blaikie-to-collapse-in-2014-deloitte-report-said-to-predict/) (date accessed: 24 September 2014).

<sup>14</sup> M. Hansen, “Law school enrollment down 11 percent this year over last year, 24 percent over 3 years data shows” *ABA Journal* (17 December 2013), online: [ABA Journal <http://www.abajournal.com/news/article/law\\_school\\_enrollment\\_down\\_11\\_percent\\_this\\_year\\_over\\_last\\_year\\_data\\_shows>](http://www.abajournal.com/news/article/law_school_enrollment_down_11_percent_this_year_over_last_year_data_shows) (date accessed: 26 September 2014).

<sup>15</sup> A. Ballingall, “Law Society of Upper Canada expected to clear new path to enter profession” *Toronto Star* (22 November 2012) A6. Articling rounds out an aspiring lawyer's pre-service training by requiring them to apprentice under an approved principal (lawyer) for a requisite time period and receive experiential training in order to satisfy requirements for licensure by a provincial law society.

Provincial law societies will not intervene to help navigate lawyers through a laissez-faire economy. They have all but retreated from being a locus for collectively advancing the profession.<sup>16</sup> For the foreseeable future, at least, they will continue to regulate the profession by licensing members, setting professional standards, and policing disreputable counsel. Their days of restraining competition among practitioners, however, are distant history.<sup>17</sup> By the late 1980s, most provincial law societies succumbed to the demand to allow lawyers to advertise, and the courts confirmed legislation that prohibited county associations from price fixing with fee schedules.<sup>18</sup> In two noteworthy 1989 cases, the Supreme Court of Canada repealed provincial law society bans on non-nationals practicing law, and out-of-province lawyers practicing with those who were ordinarily resident in a host jurisdiction.<sup>19</sup> The economies of scale have caused law firm and government employment to become the dominant and preferred practice structures in comparison to the insecurities of sole-proprietorship.<sup>20</sup> These workplaces are bureaucratized, though, and lawyers yield their professional autonomy and work control to the employer in exchange for a career.<sup>21</sup> As a general rule, professional associations and law societies do not intercede in disputes between employee-members and employers.<sup>22</sup>

Workers of various skill levels and occupations have embraced trade unionism in order to shield themselves from an open labour market, except for lawyers employed in private practice. Historically, lawyers professionalized law and profitably sold it as an intellectual product and service to businesses and affluent families.<sup>23</sup> This privileged and exclusive standing in the

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<sup>16</sup> A.M. Francis, “Out of touch and out of time: lawyers, their leaders and collective mobility within the legal profession” (2004) 24:3 *Legal Studies* 322 at 323.

<sup>17</sup> J. Nieuwenhuysen & M. Williams-Wynn, *Professions in the Marketplace: An Australian Study of Lawyers, Doctors, Accountants, and Dentists* (Carlton: Melbourne University Press, 1982) at 20; M. Angel, “Professionals and Unionization” (1981) 66:3 *Minnesota Law Review* 383 at 391.

<sup>18</sup> D.A.A. Stager & H.W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990) at 193, 219.

<sup>19</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC); *Black v. Law Society of Alberta*, [1989] 1 SCR 591, 1989 CanLII 132 (SCC).

<sup>20</sup> M. Fleming, *Lawyers, Money and Success: The Consequences of Dollar Obsession* (Westport: Quorum Books, 1997) at 11; D. Litowitz, *The Destruction of Young Lawyers: Beyond One L* (Akron: University of Akron Press, 2006) at 71; E. Raymer, “Fewer Lawyers want to become sole practitioners, survey finds” *The Lawyers Weekly* (8 July 2005) LB7.

<sup>21</sup> M. Crain, “The Transformation of the Professional Workforce” (2004) 79:2 *Chicago-Kent Law Review* 543 at 577.

<sup>22</sup> G.W. Adams, “Collective bargaining by salaried professionals” in P. Slayton & M.J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978) 264 at 270.

<sup>23</sup> D. Klegon, “The Sociology of Professions: An Emerging Perspective” (1978) 5:3 *Work and Occupations* 259 at 269.

marketplace afforded them a strong sense of entrepreneurialism, secure self-employment and small law firm ownership, along with the idealization of petty capitalist interests that encouraged lawyers to maximize the labour of their staff (than stand beside them in a common cause of worker advancement). While some researchers have re-conceptualized professionalization and unionization as contending processes in the struggle of an occupational group to achieve work autonomy, improved wages, and better working conditions,<sup>24</sup> others pointed out that lawyers do not fit within the paradigm of organized labour because they have limited use for unions. They maintained that lawyers achieve occupational status, prestige, and income from a monopoly that is sustained through state bar associations (the equivalent of provincial law societies in Canada).<sup>25</sup> This presumption, however, needs revisiting as ongoing structural changes in legal practice, some of which have already been noted above, expose growing fissures in the profession's market control from which its practitioners' economic self-sufficiency flows.

Work restructuring in the practice of law abets the process of deprofessionalization and will cause a decline in the autonomy and monopolistic privileges of various lawyers in Canada.<sup>26</sup> Raelin proposed deprofessionalization may incite professionals to unionize as a way to stave off structural forces from eroding the power base of the occupation.<sup>27</sup> However, due to scant academic interest in why lawyers collectively bargain in the first place, we simply lack a clear baseline to assess whether, in the face of disruptive practice developments intensifying, law firm associates and other employed counsel would continue to scorn unionization (while members of the Canadian public sector bar already exert their group influence through employee representatives). The few available studies on the subject offer a toehold to spark the overdue and multifaceted debate about lawyers reorganizing conventional practice arrangements by adopting collective bargaining.

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<sup>24</sup> M.R. Haug & M.B. Sussman, "Professionalization and Unionism: A Jurisdictional Dispute" in E. Freidson, ed., *The Professions and Their Prospects* (Beverly Hills: Sage Publications, 1972) 89 at 100.

<sup>25</sup> S.A. Levitan & F. Gallo, "Collective Bargaining and Private Sector Professionals" (September 1989) *Monthly Labor Review* 24 at 25; S. Milner, "The legal professions and trade unionism: the 'Dicey' dilemma" (1990) 21:4 *Industrial Relations Journal* 298 at 307-308.

<sup>26</sup> R.A. Rothman, "Deprofessionalization: The Case of Law in America" (1984) 11:2 *Work and Occupations* 183 at 185. For a critique of the deprofessionalization thesis' application to lawyers see S.L. Roach Anlue "The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization" (1992) 19:2 *Work & Occupations* 184 at 199-200.

<sup>27</sup> J.A. Raelin, "Unionization and professionalization: Which comes first?" (1989) 10:2 *Journal of Organizational Behaviour* 101 at 113.

In their now classic treatise of the Canadian legal profession, Stager and Arthurs skim the topic of lawyer unionization. The study's panoptic focus and finding of variations in statutory coverage for lawyers in different federal and provincial jurisdictions allowed the authors to limit the discussion by posing three rhetorical questions: (1) should lawyers be excluded from collective bargaining? (2) can unionized lawyers fully withdraw legal services? (3) does a professional obligation prohibit them from doing so?<sup>28</sup> Thornicroft's examination into collective bargaining by Canadian lawyers clarified that the federal government and the provinces of Saskatchewan, Manitoba, Quebec, British Columbia, and Ontario engage in some form of collective negotiations with Crown Attorneys, staff lawyers or legal aid lawyers.<sup>29</sup> The exploratory orientation of his study illustrated an immature state of knowledge on the subject (as of 1993, the time of article publication). Thornicroft's findings were reported through the themes of legal environment, lawyers' unions and collective bargaining, and professional responsibility, and he speculated that lawyers would be attracted to collective bargaining to improve wages, increase job security, and protect professional concerns. Certain groups of public sector lawyers were excluded from Thornicroft's analysis because of statutory bans on lawyer unionization that existed in the provinces in which they practiced. In 2000, the situation changed in one of those jurisdictions, Nova Scotia, after the province recognized the Nova Scotia Crown Attorneys Association and signed a framework agreement that allowed joint negotiations over salaries as part of an initial collective bargaining relationship with their members. Campbell analyzed the policy adjustment that circumvented legislation prohibiting counsel from organizing and went on to author a doctoral dissertation in the field of management studies. She focussed on how occupational community allowed Crown prosecutors to syncretise the dual market closure strategies of professionalization and collective bargaining in order to assert greater control over their labour.<sup>30</sup> Lawyers' motivations for pursuing collective bargaining were tested in relation to closure theory, a fundamental concept derived from sociology, in addition to being cast to understand the different bureaucratized conditions Nova Scotia's prosecutors laboured under.

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<sup>28</sup> Stager & Arthurs, *supra* note 18 at 274.

<sup>29</sup> K.W.M. Thornicroft, "Lawyers and Collective Bargaining In the Canadian Public Sector" (1993) 22:2 *Journal of Collective Negotiations in the Public Service* 137 at 144.

<sup>30</sup> S. Campbell, *Continental Drift in the Legal Profession: The struggle for collective bargaining amongst Nova Scotia's Crown Prosecutors* (PhD Dissertation, St. Mary's University, 2010) [unpublished].

Organized labour ruminated on the Supreme Court of Canada's 2001 ruling of *Dunmore v. Ontario (Attorney General)*<sup>31</sup> as a touchstone for organizing drives of professional workers, including associate lawyers in large law firms.<sup>32</sup> In that case, the nation's highest court determined that the province of Ontario had a duty to protect the fundamental freedom of vulnerable workers to form associations by prohibiting employer interference. Despite union plans for parlaying jurisprudence into an organizing movement, the campaign fizzled. A decade later, in fall 2012, lawyers employed by Legal Aid Ontario became the newest group of practitioners to demand that an intractable employer voluntarily recognize them in a collective bargaining relationship.<sup>33</sup> The situation of Legal Aid Ontario lawyers illustrates that when labour legislation restricts Canadian public and private sector lawyers from its application, there is no opportunity to research the circumstances that compel lawyers to adopt collective bargaining since there is no critical incident to explore. Without such an occurrence, the empirical basis for undertaking such a study is lacking and it leaves researchers desirous of any new developments for moving the subject past its stasis.

A significant breakthrough for the academic study of public sector lawyer unionization, however, finally occurred when lawyers working for the Department of Justice Canada (DOJ)—the bureau that represents the Canadian government in legal matters—were recognized as employees under new federal labour legislation. Since 1967, the *Public Service Staff Relations Act*,<sup>34</sup> the statute responsible for introducing and regulating collective bargaining in the civil service of Canada, deemed the positions of DOJ lawyers as managerial or confidential and prohibited these professionals from forming or being represented by an employee organization. That prohibition ended on 1 April 2005, with the *Public Service Labour Relations Act*<sup>35</sup> coming into force, repealing the *PSSRA*, and acknowledging that non-management DOJ lawyers could now collectively bargain some thirty-five years after the right was first denied to them. On 28 April 2006, the Public Service Labour Relations Board (PSLRB) certified the Association of

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<sup>31</sup> *Dunmore v. Ontario (Attorney General)* [2001] 3 SCR 1016, 2001 SCC 94 (CanLII).

<sup>32</sup> R. Mackie, "Ontario unions prepare for new membership drives" *The Global and Mail* (22 December 2001) A6.

<sup>33</sup> Legal Aid Ontario Lawyers Campaign to Secure Collective Bargaining Rights, online: The Campaign <<http://laolawyers.ca/the-campaign/>> (date accessed: 25 October 2013).

<sup>34</sup> *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 [hereinafter *PSSRA*].

<sup>35</sup> *Public Service Labour Relations Act*, S.C. 2003, c. 22, s.2 [hereinafter *PSLRA*].

Justice Council<sup>36</sup> (AJC) as the exclusive bargaining agent for an amalgamated unit consisting of 2,500 non-management lawyers employed at the DOJ and some one hundred other lawyers from various federal departments and agencies who were previously represented by the Professional Institute Public Service of Canada.<sup>37</sup>

The AJC's bargaining unit represents the single largest group of public sector lawyers in Canada who are unionized and collectively bargain. An estimated ten thousand lawyers employed by municipal, provincial, and federal governments comprise the Canadian public sector bar, which means that roughly one-quarter of all Canadian government lawyers work in the service of the federal Crown.<sup>38</sup> Despite their numbers and significance, DOJ lawyers are federal public servants whose encounters with unionization and first contract negotiations have not yet been explored. An empirical study such as this one is therefore justified in order to understand their experience with both events.

### **1.3 Study Purpose & Research Question**

This dissertation aims to expand knowledge about Canadian lawyer unionism by studying non-management DOJ lawyers joining the ranks of organized professional labour. Unionization is understood as the process by which a group of workers elect an employee representative (which a labour board legally certifies and empowers) to negotiate terms and conditions of employment with an employer. The two research questions guiding this inquiry are: (1) what led DOJ lawyers to unionize with the AJC? and (2) what was the AJC's experience in negotiating a first collective agreement? Through analysis and interpretation of the data available to answer these questions, I have created a descriptive theory in the form of an account that covers the

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<sup>36</sup> The AJC is identified in French as L'Association des juristes du ministère de la Justice (AJJ). For the purposes of this study, the English spelling and abbreviation are used.

<sup>37</sup> The Law Group bargaining unit is composed of three streams of members. The vast majority of constituents are lawyers, notaries and articling students working at the DOJ and its regional offices. On 12 December 2006, the Public Prosecution Service of Canada was created and replaced the Federal Prosecution Service of the DOJ. Hence, Crown prosecutors, about four hundred members in total, represent the second population within the bargaining unit. The third group involves roughly one hundred bargaining unit members formerly represented by the Professional Institute of the Public Service of Canada, which included lawyers working at the Canadian Human Rights Commission, Veterans Affairs, International Trade Tribunal, Immigration Refugee Board, and the Canadian Radio-television and Telecommunications Commission, as well as any other departments and agencies outside of the DOJ. The study adopts DOJ lawyers as the broad identifier for the entire bargaining unit unless otherwise specified.

<sup>38</sup> "Calling all public sector lawyers" *The National* 5:3 (May 1996) at 38, cited in D. MacNair, "The Role of the Federal Public Sector Lawyer: From Polyester to Silk" (2001) 50 *University of New Brunswick Law Journal* 125 at 125 [hereinafter "Polyester to Silk"].

transition of DOJ lawyers between individual employment and labour relations regimes, and the process of the AJC legitimizing the collective bargaining relationship through a negotiated first labour agreement. The nature of the investigation allows for at least three key study objectives and proposes that the best research practice is to conduct the project as a case study.

## 1.4 Study Objectives

### 1.4.1 *Unionization among Professionals*

The academic and union investigation of neo-liberal deregulation of Western economies and labour markets also explores the decline of union density and prospects for regeneration.<sup>39</sup> Professional employees are often drawn to unions after determining that working in organizations under rigid administrations, and lacking the ability to influence management prejudices their occupational interests.<sup>40</sup> Studies have looked at this issue to explore, for example, why associations representing American professors adopted collective bargaining, or to test and predict union-voting intentions of pharmacists and doctors in response to a top-down model of corporate bureaucracy that undermines professional values, autonomy, and work standards.

Hutcheson's historiography determined that, during the 1970s, faculty transformed chapters of the Association of University Professors into bargaining agents to defend against university administration interfering with their academic freedom, to increase faculty participation in governance, and to improve members' economic status.<sup>41</sup> In 1999, the American Pharmaceutical Association amended its policy to support pharmacists joining unions, while the American Medical Association also passed a resolution endorsing unions by forming a bargaining unit for physicians. McHugh and Bodah's nationwide survey findings of pharmacists

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<sup>39</sup> J. B. Rose & G.N. Chaison, "Unionism in Canada and the United States in the 21st Century: The Prospects for Revival" (2001) 56:1 *Relations industrielles/Industrial Relations* 34 at 56; AFL-CIO, *Rising Tide –Professionals: The New Face of America's Unions* (Washington: Department for Professional Employees, AFL-CIO, 2003) at iii, online: DFPE, AFL-CIO <<http://dpeaflcio.org/wp-content/uploads/RisingTide-Final.pdf>> (date accessed: 24 April 2014); R. W. Hurd & J. Bunge, "Unionization of Professional and Technical Workers: The Labor Market and Institutional Transformation" in R.B Freeman, J. Hersch & L. Mishel, eds., *Emerging Labor Market Institutions for the Twenty First Century* (Chicago: University of Chicago Press, 2004) 179 at 180.

<sup>40</sup> T.M. Hovekamp, "Professional Associations or Unions? A Comparative Look" (1997) 46:2 *Library Trends* 232 at 238-239.

<sup>41</sup> P.A. Hutcheson, *Unionization, Bureaucratization, and the AAUP: A Professional Professoriate* (Nashville: Vanderbilt University Press, 2000) at 173.

determined positive union voting intentions based on beliefs of union instrumentality enhancing professional development, controlling workload, and improving quality of patient care.<sup>42</sup> In another study, McHugh and his colleagues found receptivity among corporately employed staff pharmacists towards voting for a union due to increased workloads, lack of voice over practice conditions, and existing union presence in the industry.<sup>43</sup> Similarly, when young physicians were surveyed for their assessment of unionism, a sample of 359 respondents (43 percent of 835) reported support for unionization, which they believed could countervail the profit-driven management of health care that lowered levels of patient care, autonomy, incomes, and job satisfaction.<sup>44</sup> Thompson and Salmon's mixed methods study found that recouping losses in power and authority were reasons why public hospital employee physicians would join a union and pursue collective bargaining.<sup>45</sup>

Organizing campaigns of professionals seldom develop from the exact same circumstances. The workplace environment established by an organization greatly influences the propensity to unionize. Kuhn's study of unionized engineers showed that the conditions prompting one group of employees over another to support a union will vary within a firm and from firm to firm.<sup>46</sup> This finding suggests that a potential inquiry into a group of professionals unionizing at a single employer should be highly contextualized with findings that bear cautious generalizations. Moreover, preference for union representation clearly varies between members of different occupations<sup>47</sup> and between public and private sector employees.<sup>48</sup> A study investigating the relatively recent unionization of a group of federal public servants should consider Savage and Webber's finding that Canadian federal government austerity is responsible

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<sup>42</sup> P.P. McHugh & M.M. Bodah, "Challenges to Professionalism and Union Voting Intentions: The Case of Pharmacists" (2002) 23:4 *Journal of Labor Research* 659 at 668.

<sup>43</sup> D.P. Zgarrick, P.P. McHugh & M. Droege "Prevalence of and interest in unionization among staff pharmacists" (2006) 2:3 *Research in Social and Administrative Pharmacy* 329 at 342.

<sup>44</sup> V.U. Collier et al., "Correlates of Young Physicians' Support for Unionization to Maintain Professionalism" (2001) 76:10 *Academic Medicine* 1039 at 1044.

<sup>45</sup> S.L. Thompson & J.W. Salmon, "Physician Collective Bargaining in a U.S. Public Hospital" (2003) 33:1 *International Journal of Health Services* 55 at 72.

<sup>46</sup> J.W. Kuhn, "Engineers and Their Unions" in A.A. Blum et al., eds., *White-Collar Workers* (New York Random Press, 1971) 83 at 96, 117.

<sup>47</sup> F. White, "Occupational Determinants of Professional Union Membership" (1997) 52:1 *Relations industrielles/Industrial Relations* 138 at 139.

<sup>48</sup> J. Fiorito, L. P. Stepina & D.P. Bozeman, "Explaining the Unionism Gap: Public-Private Sector Differences in Preferences for Unionization" (1996) 17:3 *Journal of Labor Research* 463 at 475.

for deteriorating work conditions and encroachments on professional autonomy, which is drawing professional public servants and unions closer together.<sup>49</sup> This drift did not occur in a vacuum and it underscores the truism that no bureaucracy is ever greater than the sum of its parts; larger federal government retrenchment can impact any of its departments, even the DOJ.

On the other hand, the type and quality of legal practice the DOJ offers its lawyers yields intrinsic rewards of employment that are less reproducible at other outfits. Most DOJ lawyers work in modern offices located in the downtown business cores of major Canadian cities. As the DOJ represents the federal government in its legal affairs, its top litigators are often implicated in cases of national importance, which demands from them the highest level of advocacy before all levels of provincial courts, and sometimes, the Supreme Court of Canada. Regardless of the work performed by DOJ counsel, as civil servants they enjoy the fringe benefits of comprehensive group insurance, various leaves and paid vacation, typically less demanding work schedules than expected from associates in large law firms, and coverage under the *Public Service Superannuation Act*,<sup>50</sup> which governs an enviable pension retirement program.

Decent benefits supplement the federal government paying its workers a fair market wage.<sup>51</sup> However, salaried professionals report earning less than their self-employed counterparts and this financial strain represents a major source of discontent.<sup>52</sup> As is the case with lawyers, beginning a career with the federal government offers improved job experience and career satisfaction in comparison to lawyering in private practice.<sup>53</sup> Over time, though, noticeable discrepancies grow in the wage earning potential between lawyers employed in the public and private sectors. As of summer 2009, and prior to DOJ lawyers obtaining a first collective agreement, their salaries were comparable to the national average paid by the lower rung of middle-tier law firms (which typically consist of ten to thirty-five lawyers) at up to the

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<sup>49</sup> L. Savage & M. Webber, “The Paradox of Professionalism: Unions in the Public Sector” in S. Ross & L. Savage, eds., *Public Sector Unions in the Age of Austerity* (Black Point: Fernwood Publishing, 2013) 114 at 124.

<sup>50</sup> *Public Service Superannuation Act*, R.S.C., 1985, c. P-36.

<sup>51</sup> F. Kehoe & M. Archer, *Canadian Industrial Relations: Text, Cases, Simulations*, 8th ed. (Oakville: Twentieth Century Labour Publications, 1996) at 201.

<sup>52</sup> K. Swinton, *The Employed Professional, Working Paper #13* (Toronto: Ministry of Attorney General, Professional Organizations Committee, 1979) at 53.

<sup>53</sup> N. S. Zeppos, “Department of Justice Litigation: Externalizing Costs and Searching for Subsidies” (1998) 61:2 *Law And Contemporary Problems* 171 at 173.

ten years in practice mark.<sup>54</sup> Sensational instances of lawyers fixated with profit raise unease among regulators and academics over declining professionalism, but to tar government lawyers with like cynicism would be a gross mischaracterization.<sup>55</sup> A more accurate reflection of the prestige of government lawyers is to assess them as falling on a spectrum of affluence between that of a solo and law firm practitioner.<sup>56</sup>

Law is considered a learned and free profession, and its practitioners are thought to shun group orientation because of an incompatibility with professional values and social status ideology.<sup>57</sup> While Taylor and Bain confirm that the way unionism ever gets started in a workplace remains unclear, the general aversion of lawyers towards unions adds another layer of complexity that blurs the phenomenon this study wishes to investigate.<sup>58</sup> A nuanced analysis, therefore, should clarify whether feelings of dissatisfaction among DOJ lawyers stemmed from poor employment conditions, from a general malaise over a lack of influence in the setting of the employment contract, or, from some other factor that helped create the right environment for the AJC's popularization. The first study objective aims to demystify how unionism occurred among DOJ lawyers by identifying the context for them supporting the AJC, and it relates to the first research question. In order to accomplish this, a detailing of the AJC's origin and the change in labour legislation allowing for its legalization as a bargaining agent will be addressed.

#### 1.4.2 *Collective Bargaining in the Federal Public Service*

DOJ lawyers represent the first new group of employees in the federal public service to attain a bargaining agent within the last two decades.<sup>59</sup> Twenty years ago, the Chrétien-led Liberals introduced their February 1995 federal budget, with its details for implementing the next

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<sup>54</sup> Department of Justice Canada: Salary and Benefits, online: Department of Justice Canada <<http://www.canada.justice.gc.ca/eng/dept-min/recru/sb-pa.html>> (date accessed: August 10, 2009); Robert Half Legal, *2010 Salary Guide* (Menlo Park: Robert Half International Inc., 2009) at 17.

<sup>55</sup> P. Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Viking Canada, 2007); J.C. Goulden, *The Money Lawyers: The No-Holds Barred World of Today's Richest Most Powerful Lawyers* (New York: St. Martin's Press, 2006).

<sup>56</sup> E. A. Krause, *The Sociology of Occupations* (Boston: Little Brown & Company, 1971) at 162.

<sup>57</sup> P. Meiksins & C. Smith, "Why American Engineers Aren't Unionized: A Comparative Perspective" (1993) 22:1 *Theory and Society* 57 at 59.

<sup>58</sup> P. Taylor & P. Bain, "Call Centre Organizing in Adversity: From Excell to Vertex" in G. Gall, ed., *Union Organizing: Organizing For Trade Union Recognition* (Florence: Routledge, 2003) 153 at 153.

<sup>59</sup> *Association of Justice Counsel v. Canada (Attorney General)* 2011 ONSC 6435 (CanLII) (S.C.J) (AJC's Factum at 2, para. 4) [hereinafter *AJC v. Canada (A.G.)*].

steps in Program Review, a bold initiative for axing roughly \$17 billion in public service expenditures over three years and eliminating 45,000 bureaucratic positions.<sup>60</sup> Program Review continued the government's plans during the early to mid-1990s of downsizing operations, restructuring the service role of the state, and aggressively containing massive debt and spending. A balanced budget for 1997-1998 signalled that the federal government had returned to fiscal stability, but it did so in part by freezing the wages of civil servants and suspending collective bargaining with their unions. Ultimately, the federal government's plans for revitalizing strained labour-management relations after a tumultuous decade came to a head in 2003 with the *Public Service Modernization Act*.<sup>61</sup> The statute introduced the *PSLRA* and its revamp of the legal framework governing the federal public sector.

After the PSLRB certified the AJC as a bargaining agent, the union's tireless president, Patrick Jetté's cautious declaration that "bargaining will take months" proved highly optimistic.<sup>62</sup> In actuality, the protracted battle the AJC undertook to sign a first collective agreement tested the union's mettle in negotiating wage and workplace improvements and unfolded on several fronts. At the bargaining table, impasse set in during negotiations between the AJC's negotiating team and delegates from the Treasury Board Secretary who represented the employer, the Treasury Board of Canada. In the public arena, on 13 May 2008, the AJC staged a public rally in front of DOJ headquarters in Ottawa to expedite the selection of a chair for first contract arbitration. Within political circles, Jetté campaigned before the House of Commons Standing Committee on Finance against repressive legislation, particularly, the *Expenditure Restraint Act*,<sup>63</sup> which imposed a five-year, retroactive, public sector wide wage restraint plan that froze the maximum salary increases the AJC could attain from collective bargaining or arbitration at roughly the rate of inflation. During contract arbitration, the AJC pursued numerous contract articles covering terms and conditions of employment that were not resolved during negotiations or mediation to conclude a first collective agreement with the Treasury Board. Before the Federal Court of Canada, the AJC defended a judicial review of the arbitral ruling. Finally, at the Ontario

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<sup>60</sup> L. Scratch, *Public Service Reductions in the 1990s: Background and Lessons Learned* (Ottawa: Library of Parliament, 2010) at 1, online: Library of Parliament <<http://www.parl.gc.ca/content/lop/researchpublications/2010-20-e.htm#a2>> (last modified 12 April 2010).

<sup>61</sup> *Public Service Modernization Act*, S.C. 2003, c. 22 [hereinafter *PSMA*].

<sup>62</sup> C. Shmitz, "Labour Board holds Toronto prosecutors to national team" *The Lawyers Weekly* 26:2 (12 May 2006) at 1.

<sup>63</sup> *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 [hereinafter *ERA*].

Superior Court of Justice, the AJC partially won its *Charter* challenge to the *ERA* only to have its hard-fought victory overruled by the Court of Appeal, and later, the Supreme Court of Canada confirming the disposition.<sup>64</sup> In light of this remarkable course of events, the second research objective of this thesis is to detail the anatomy of impasse in negotiations between the AJC and the Treasury Board Secretariat and the process of resolution. The analysis aims to understand the AJC's struggles, triumphs, and evolution in obtaining a first labour contract particular to the needs of a pluralistic bargaining unit membership and addresses the second research question.

### 1.4.3 *Department of Justice Canada and its Lawyers as Research Subjects*

It is inconceivable to think of the administration of justice in Canada without the DOJ. The DOJ is one of over two hundred departments, agencies and Crown corporations that collectively comprise the federal government. The department enjoys a seminal place in Canadian history. On 1 July 1867, the *British North America Act, 1867* came into force, and with it, Confederation was complete. The new dominion of Canada was established under Cabinet-parliamentary rule with the governments of Canada and the provinces of Ontario, Quebec, Nova Scotia and New Brunswick dividing legislative powers over matters national and local in nature. Governance for the Crown in right of Canada required a legal representative to counsel the state on the law of the new land. So, on 22 May 1868, the First Session of Parliament of the Dominion of Canada created the DOJ by adopting its enabling legislation, the *Department of Justice Act*.<sup>65</sup> The DOJ's purpose was to centralize the provision of legal services to the federal government and its departments.<sup>66</sup> It has since remained as the policy architect for successive governments instituting and maintaining Canada as a rule of law nation. The constitutionally entrenched *Canadian Charter of Rights and Freedoms* coming into force on 17 April 1982<sup>67</sup> ushered a fundamental change in the extent of the DOJ's advisement and litigation services and marked a watershed in the modern history of the department.

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<sup>64</sup> *Association of Justice Counsel v. Canada (Attorney General)*, [2012] ONCA 530 (CanLII) (C.A.), aff'd [2013] CanLII 6709 (SCC) [hereinafter *AJC v. Canada (A.G.)* (C.A.)].

<sup>65</sup> 1868 (Can.), c. 39.

<sup>66</sup> J. Swainger, *The Canadian Department of Justice and the Completion of Confederation 1867-78* (Vancouver: University of British Columbia Press, 2000) at 12.

<sup>67</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [hereinafter *Charter*]; K. Roach, "Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law" (2006) 31 *Queen's Law Journal* 598 at 621; *Department of Justice Act*, R.S.C., 1985, c. J-2, s. 4.1(1) [hereinafter *DOJ Act*].

Jurists have studied the *Charter* imposing novel service obligations on the DOJ.<sup>68</sup> Kelly, a political scientist, assessed the DOJ's maturation within state bureaucracy by analyzing the department's supervision over *Charter* matters and its transformation into an executive support agency that sits in the centre of government.<sup>69</sup> His examination of the DOJ's bureaucratic activism shed invaluable light on the inner workings of the department's Executive, Charter, and Charter Litigation Committees. The federal government regularly appealing decisions to the Supreme Court of Canada spurred Hennigar, another political scientist, to study patterns of strategic behaviour regarding appeals, and yield more insight about officiating at the DOJ.<sup>70</sup> These studies assess stakeholder practices at the department, but, despite their valuable findings, their assessments cast staff lawyers as an adjunct to the operations under review.

Revisionist perspectives are developing on DOJ lawyers, positioning them as a discrete workforce with an important identity and role. A growing appreciation for the distinctiveness associated with lawyering for the federal Crown is encouraging researchers to unravel the bureaucratic anonymity of DOJ counsel. Former Deputy Minister of Justice John Tait argues that government lawyers have a duty to keep their employer bound to good governance obligations as they are guardians of the rule of public law and aides to the Minister of Justice.<sup>71</sup> Wilner urges DOJ lawyers to serve as virtuous practitioners ascribing to the highest standards of professional and ethical lawyering, which are inherent values necessary when lawyering for Canada.<sup>72</sup> MacNair used the insight developed from her many years of practice at the DOJ to fill a gap in research on government lawyers by writing several articles that focus on: the work profiles of the DOJ's Crown prosecutors, civil litigators, legislative drafters, legal advisors, and

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<sup>68</sup> M. Dawson, "The Impact of the Charter on the Public Policy Process and the Department Of Justice" (1992) 30:3 *Osgoode Hall Law Journal* 595 at 599; P.J. Monahan & M. Finklestein, "The Charter of Rights and Public Policy in Canada" (1992) 30:3 *Osgoode Hall Law Journal* 502 at 512.

<sup>69</sup> J. B. Kelly, "Bureaucratic activism and the Charter of Rights and Freedoms: the Department of Justice and its entry into the centre of government" (1999) 42:4 *Canadian Public Administration* 476 at 507.

<sup>70</sup> M. A. Hennigar, "Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases? A Strategic Explanation" (2007) 41:1 *Law & Society Review* 225 at 231; See also M.A. Hennigar, "Players and the Process: *Charter* Litigation and the Federal Government" (2002) 21 *Windsor Yearbook of Access to Justice* 91 at 96.

<sup>71</sup> J.C. Tait, "The Public Service Lawyer, Service to the Client and the Rule of Law" (1997) 23:1 *Commonwealth Law Bulletin* 542 at 543.

<sup>72</sup> J. Wilner, "Service to the Nation: A Living Legal Value for Justice Lawyers in Canada" (2009) 32:1 *Dalhousie Law Journal* 177 at 198.

policy counsel;<sup>73</sup> outlining the system of ethical standards and obligations governing legislative drafters<sup>74</sup> and federal Crown prosecutors;<sup>75</sup> arguing for the public interest as an objective legal standard in the professional ethics of Crown prosecutors;<sup>76</sup> and canvassing the interaction between public sector lawyers and solicitor-client privilege.<sup>77</sup> The courts have found that government lawyers are duty-bound by provincial law society Rules of Professional Conduct to conscientiously observe legal ethics in daily practice, while academics have wisely pointed out that unlike their colleagues in the private sector, public sector lawyers are subjected to public service codes of conduct that oblige them, as civil servants, to maintain public trust and integrity in government as a condition of employment.<sup>78</sup> It is fitting that as DOJ lawyers attract greater attention due to practice responsibilities associated with representing their client, they should be further distinguished in the legal and labour studies literature as professionals attempting to democratize their workplace through collective bargaining. A third objective of this thesis is to foment interest in DOJ lawyers as a research population by showing that unionization under the AJC has increased the level of employee voice available to them.

## 1.5 Research Design: Case Study

The nature of the social phenomena being explored often informs the particular research framework used to structure and conduct an inquiry.<sup>79</sup> When the inquiry involves an organization, a case study methodology is typically suggested.<sup>80</sup> In fact, Yin proposes the case study as the ideal research approach for analyzing the complexity of an event within an organization.<sup>81</sup> The case study is a valued strategy for teasing out the interactions between the

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<sup>73</sup> MacNair, *supra* note 38 at 125.

<sup>74</sup> D. MacNair, “Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective” (2003) 24:2 *Statute Law Review* 125.

<sup>75</sup> D. MacNair, “Crown Prosecutors and Conflict of Interest: A Canadian Perspective” (2002) 7 *Canadian Criminal Law Review* 257.

<sup>76</sup> D. MacNair, “In the Name of the Public Good: ‘Public Interest’ as a Legal Standard” (2006) 10:2 *Canadian Criminal Law Review* 175.

<sup>77</sup> D. MacNair, “Solicitor-Client Privilege and the Crown: When is a Privilege a Privilege?” (2003) 82:2 *Canadian Bar Review* 213.

<sup>78</sup> *Everingham v. Ontario*, [1992] O.J. No. 304 at paras. 17-18; P. E. Salkin, “Preface” in P.E. Salkin, ed., *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials* (Chicago: American Bar Association Publishing, 1999) xxi at xxii.

<sup>79</sup> G. Morgan & L. Smircich, “The Case for Qualitative Research” (1980) 5:4 *Academy of Management Review* 491 at 498.

<sup>80</sup> B.L. Berg, *Qualitative Research Methods for the Social Sciences*, 7th ed. (Boston: Allyn & Bacon, 2009) at 331.

<sup>81</sup> R. K. Yin, *Case Study Research: Design and Methods*, 2nd ed. (Thousand Oaks: Sage Publications, 1994) at xv.

circumstances and processes that drive employee behaviours.<sup>82</sup> This project's thesis, for example, encourages structuring the inquiry as a case study since it seeks a detailed account covering the who, what, where, and when of a phenomenon, which Clardy proposes offers a sound rubric for investigating change within an organization.<sup>83</sup> A case study is also the appropriate method for this project since the intrinsic aspect of the thesis seeks knowledge about DOJ lawyers that makes its findings difficult to generalize to other workplaces.<sup>84</sup> In addition, the idiographic aspect of the study directs attention to uncovering and describing the complexities that drive the outcomes at a single organization, which so happens to have the reputation of being Canada's largest law firm.<sup>85</sup>

## **1.6 Study Organization and Significance to Audiences**

So far, this chapter has addressed the three questions associated with introducing a dissertation: (1) what is the purpose of the research? (2) what is the context of the research? (3) how will the research be conducted?<sup>86</sup> It now turns to outlining the study's remaining organization. The literature review presented in chapter 2 maps and synthesizes the academic study of lawyer unionization to yield research issues that are relevant to this inquiry and that are used to explore the research questions. Chapter 3 elaborates on the reasons for structuring the research design as a case study, as well as touching on the methodological synergism between socio-legal and qualitative research that finds its way into the structure of this project. The chapter's discussion also focuses on data collection and analysis procedures along with the criteria used for improving the quality of study findings.

With the background chapters setting the study's foundation in place, I use chapters 4, 5, and 6 to directly address the research questions. Chapter 4 explains DOJ lawyers' exclusion

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<sup>82</sup> J. Hartley, "Case Study Research" in C. Cassell & G. Symon, eds., *Essential Guide to Qualitative Methods in Organizational Research* (London: Sage Publications, 2004) 323 at 325.

<sup>83</sup> A. Clardy, *Studying Your Workforce: Applied Research Methods and Tools for the Training and Development Practitioner* (Thousand Oaks: Sage Publications, 1997) at 100.

<sup>84</sup> D.R. Hancock & B. Algozzine, *Doing Case Study Research: A Practical Guide for Beginning Researchers* (New York: Teachers College Press, 2006) at 32.

<sup>85</sup> C.C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (Berkeley & Los Angeles: UCLA Press, 1987) at 55.

<sup>86</sup> S.W. Wall & J.L. Burrow, "Elements of an Introductory Chapter" in E.I. Farmer & J.W. Rojewski, eds., *Research Pathways: Writing Professional Papers, Theses and Dissertations in Workforce Education* (Lanham: University Press of America, 2001) 57 at 58.

from the *PSSRA* and outlines management's structuring of the individual employment relationship in the absence of a bargaining agent up and until 1990. This fourth chapter also introduces the Legal Officers' Advisory Committee, (LOAC), which was the AJC's forerunner. Chapter 5 provides a historical analysis of events leading to LOAC's transformation into the AJC that are traced to June 1990, when a significant development in DOJ compensation policy occurred: lawyers employed at the Toronto Regional Office received an exclusive wage premium known as the "Toronto differential". The chapter describes how redressing the Toronto differential helped LOAC generate popular employee support for initially forming the AJC as a professional employee association, and, later, successfully campaigning for recognition as an employee organization once the *PSLRA* allowed for unionization. Chapter 6 presents the AJC's efforts at completing a first collective agreement and the process of resolution after impasse in negotiations set in, and the *ERA* cut off the free determination of salaries. Chapter 7 importantly concludes the study by analyzing the findings from the previous chapters in order to assess how the study's objectives were met and to consider some of the study's implications.<sup>87</sup> All together, I develop an argument that considers how DOJ lawyers' desire for workplace representation and improved wages, executive level support from the Deputy Minister of Justice, Morris Rosenberg, and introduction of the *PSLRA* aided the creation and development of the AJC into a vehicle that facilitated the unionization process. At the same time, I propose that the AJC negotiated a first collective agreement with an employer who engaged in hard bargaining that led to deadlocked negotiations, but was conducted, nonetheless, in a way that afforded the AJC a meaningful process of collective bargaining prior to the *ERA*'s enactment.

In short, this dissertation offers insight, analysis, and discussion that should interest a varied readership. The significance of its findings for DOJ lawyers is in the practical insight into the DOJ as an employer, a history on the union that now serves as their representative at work, and how the first collective agreement that governed their employment came to be. For researchers of professional labour movements, particularly among lawyers, the study offers a look into the procedures and strategies involved in reaching a first labour contract and the techniques used by a union's leadership to build and maintain group cohesion during difficult negotiations with a steadfast employer. Finally, the AJC's recourse to *Charter* litigation to

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<sup>87</sup> P. Oliver, *Writing Your Thesis*, 2nd ed. (London: Sage Publications, 2008) at 133.

counteract legislated interference in the collective bargaining process attempts to use novel Supreme Court of Canada precedent to secure judicial remedies, which should be of interest to all labour scholars who follow unions' attempts to protect and expand the legal rights of their members.

## CHAPTER 2: Literature Review

### 2.1 Introduction

In chapter 1, I argued that legal services providers are proliferating in Canada, but it is important to note that the arena most influenced by their expansion is the private sector market, which consists of individuals and businesses. The consumers of other legal services, such as federal, provincial, and municipal governments, which comprise a limited public sector base, are less affected. Governments have most of their legal needs met by staff lawyers who are trained as specialists in discrete areas of law and whose practices are guided by an ethos of public service. One unique facet of government lawyering (and not performed in private practice) is advising parliamentarians on new laws and drafting regulations and legislation. Bloomquist posits that government lawyers face greater challenges than private sector counsel for incorporating vital virtues into their practice. He reasons that since their work is open to public scrutiny and exposure to media, government lawyers must juggle serving multiple constituents, for which, they are inadequately paid and overextended in their duties.<sup>88</sup> These two points represent some of the many findings jurists have made by exploring the dichotomy that separates public from private practice when studying: the specialized training of government counsel;<sup>89</sup> their importance to government;<sup>90</sup> the nuances of federal government lawyering that entail distinct career patterns;<sup>91</sup> ethical duties upon transfer between public and private sector employers;<sup>92</sup> client representation;<sup>93</sup> policy influence;<sup>94</sup> ethics;<sup>95</sup> and the special professional

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<sup>88</sup> R.F. Blomquist, “Ten Vital Virtues for American Public Lawyers” (2006) 39:3 *Indiana Law Review* 493 at 517.

<sup>89</sup> R. B. Posey, “Training for Government Service” (1938) 9:12 *American Law School Review* 1296; W. R. Robie, “The Teaching of Professional Responsibility to Government Attorneys: The Uneasy Perceptions” (1978) 80 *Military Law Review* 29.

<sup>90</sup> R.P. Baldwin & L. Hall “Using Government Lawyers to Animate Bureaucracy” (1953) 63:2 *Yale Law Journal* 197; E. S. Rockefeller “The Status of the Federal Government Lawyer is Important to the Entire Legal Profession” (1961) 47:4 *American Bar Association Journal* 350; A.C. Mayer, “The Lawyer in the Executive Branch of Government” (1970) 4:3 *Law & Society Review* 425; R.C. Cramton, “On the Steadfastness and Courage of Government Lawyers” (1990) 23:2 *John Marshall Law Review* 165; P.M. Wald, “For the United States: Government Lawyer in Court” (1998) 61:1 *Law and Contemporary Problems* 107; W. B. Wendel, “Government Lawyers, Democracy, and the Rule of Law” (2009) 77:4 *Fordham Law Review* 1333.

<sup>91</sup> R.A. Solomon, “Practice of Law in the Federal Government—Career or Training Ground” (1969) 38:4 *George Washington Law Review* 752; M. Spector, “The Rise and Fall of a Mobility Route” (1972) 20:2 *Social Problems* 173.

<sup>92</sup> G. P. Bollwerk III, “Conflicts of Interest and the Former Government Attorney” (1976) 65:4 *Georgetown Law Journal* 1025; J.P. Graceffa, “Ethical Considerations Of The Federal Lawyer Upon Entering Private Practice” (1981) 4:2 *Western New England Law Review* 199; B.G. Mance, “Toward a New Ethical Standard Regulating the Private Practice of Former Government Lawyers” (1983) 13:2 *Golden Gate Law Review* 433.

responsibilities of federal prosecutors<sup>96</sup> and civil litigators.<sup>97</sup> Despite these important studies, scholarly work focussing on government lawyers remains a niche area that is primarily concerned with practice issues, and as such, stands underdeveloped in comparison to studies on lawyers in the private sector.

The disparity in research output between the two groups of practitioners can be traced to at least the 1980s, when Canadian lawyers remained foreign to the research of jurists and sociologists.<sup>98</sup> There are two appraisals that summarized the output of scholarship at that time: one on the level of knowledge on government lawyers in particular (by White), and another on the Canadian legal profession in general (by Stager and Arthurs). White's evaluation found that, "almost nothing has been written about government lawyers in this country,"<sup>99</sup> while Stager and Arthurs noted how little is actually known about the legal profession in Canada.<sup>100</sup> Afterwards,

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<sup>93</sup> R.P. Lawry, "Who is the Client of the Federal Government Lawyer: An Analysis of the Wrong Question" (1978) 37:4 *Federal Bar Journal* 61; J.R. Harvey, III, "Loyalty in Government Litigation: Department of Justice Representation of Agency Clients" (1996) 37:4 *William & Mary Law Review* 1569; K. Clark, "Government Lawyers and Confidentiality Norms" 85:5 (2007) *Washington University Law Review* 1033.

<sup>94</sup> B.K. Landsberg, "The Role of Civil Service Attorneys and Political Appointees in Making Policy in the Civil Rights Division of the U.S. Department of Justice" (1992) 9:2 *Journal of Law and Politics* 275; F.A.O. Schwarz Jr., "Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy" (2008-2009) 53:3 *New York Law School Law Review* 375.

<sup>95</sup> S. Curran, "Government Lawyers and Conflicts of Interest" (1989) 3:1 *Georgetown Journal of Legal Ethics* 191; J. Lanctot, "The Duty of Zealous Advocacy And The Ethics of The Federal Government Lawyers: The Three Hardest Questions" (1990) 64:4 *Southern California Law Review* 951; M.S. Paulson, "Hell, Handbaskets, and Government Lawyers: The Duty Of Loyalty And Its Limits" (1998) 61:1 *Law and Contemporary Problems* 83; Notes, "Rethinking The Professional Responsibilities of Federal Government Lawyers" (2002) 115:4 *Harvard Law Review* 1170; E.S. Podgor, "Department of Justice Guidelines: Balancing 'Discretionary Justice'" (2004) 13:2 *Cornell Journal of Law and Public Policy* 167; J. Radack, "Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism" (2006) 77:1 *University of Colorado Law Review* 1; Note, "Government Counsel and Their Obligations" (2008) 121:5 *Harvard Law Review* 1415.

<sup>96</sup> R.K. Flowers, "A Code of Their Own: Updating the Ethics Codes to Include the Federal Non-Adversarial Roles of Federal Prosecutors" (1996) 37:5 *Boston College Law Review* 923; R.E. Mick, "The Federal Prosecutors Ethics Act: Solution or Revolution?" (2000) 86:4 *Iowa Law Review* 1251; B.A. Green et al., "Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors" (1999) 26:3 *Fordham Urban Law Journal* 737; F.C. Zacharias & B.A. Green, "The Uniqueness of Federal Prosecutors" (1999) 88:2 *The Georgetown Law Journal* 207; B.A. Green & F.C. Zacharias, "Regulating Federal Prosecutors' Ethics" (2002) 55:2 *Vanderbilt Law Review* 379; B.T. Tennis, "Uniform Ethical Regulation of Federal Prosecutors" (2010) 120:1 *Yale Law Journal* 144.

<sup>97</sup> C.J. Lanctot, "Government Lawyers in Civil Litigation and the Model Rules of Professional Conduct" (1997) *Professional Lawyer Symposium Issues* 125; S.K. Berenson, "The Duty Defined: Specific Obligations that Follow From Civil Government Lawyers' General Duty to Serve the Public Interest" (2003) 42:1 *Brandeis Law Journal* 13.

<sup>98</sup> P.D. Macfarlane "The Legal Profession In Canada: A Research Perspective And Prospectus" (1980) 28:2 *Chitty's Law Journal* 50 at 54; B.D. Adam & K.A. Lahey, "Professional Opportunities: A Survey of the Ontario Legal Profession" (1981) 59 *Canadian Bar Review* 674 at 674.

<sup>99</sup> G. White, "Lawyers in Government: A Preliminary Study" in R.J. Matas & D.J. McCawley, eds., *Legal Education in Canada: Report and Background Papers of a National Conference on Legal Education Held in Winnipeg Manitoba, October 23-26, 1985* (Montreal: Federation of Law Societies of Canada, 1987) 764 at 765.

<sup>100</sup> Stager & Arthurs, *supra* note 18 at 9.

when investigators studied the legal profession in greater detail, their works demonstrated the fact that the experiences and issues of practitioners in the much larger, more visible, and higher profile private sector were more amenable to research and bore greater relevance to broader intellectual currents than those circulating around lawyers employed by government. We can appreciate these inquiries for developing a scholarship on the identity of private sector practitioners, their role in law firms, practice ideals and individual achievements which educates on: professional ethics,<sup>101</sup> gender<sup>102</sup> and racial equality in the profession<sup>103</sup> as well as the ethnic diversification of the bar,<sup>104</sup> and popular conceptions of lawyers.<sup>105</sup> However, researchers excluding public sector lawyers from their general purview results in the same sorts of shortcomings identified on studies of American government lawyers when applied to the Canadian milieu. The identified limitations are various and include the following critiques: little research exists on government lawyers (other than public defenders and prosecutors);<sup>106</sup> government lawyers are not subjects of sustained empirical investigation;<sup>107</sup> few studies observe

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<sup>101</sup> P.M. Perrell, *Conflicts of Legal Interest in the Legal Profession* (Toronto: Butterworths, 1995); D. E. Buckingham et al., *Legal Ethics in Canada: Theory and Practice* (Toronto: Harcourt Bruce, 1996); A. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999).

<sup>102</sup> J. Hagan, "The Gender Stratification of Income Inequality Among Lawyers" (1990) 68:3 *Social Forces* 835; J. Ross et al., "Women in the Class of 1979: 13 Years Later" (1992) 30:3 *Alberta Law Review* 843; S. Neallani, "Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex" (1992) 5:1 *Canadian Journal of Women and the Law* 148; J. Brockman, "'Resistance by the Club' to the Feminization of the Legal Profession" (1992) 7 *Canadian Journal of Law & Society* 47; J. Brockman, "Leaving the Practice of Law: The Wherefores and the Whys" (1994) 32:1 *Alberta Law Review* 116; F.M. Kay & J. Brockman, "Barriers to Gender Equality in the Canadian Legal Establishment" (2000) 8:2 *Feminist Legal Studies* 169; F.M. Kay, C. Masuch, & P. Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession: A Longitudinal Survey of Ontario Lawyers 1990-2002* (Toronto: Law Society of Upper Canada, 2004); S. McIntyre & E. Sheehy, eds., *Calling for Change: Women, Law and the Legal Profession* (Ottawa: University of Ottawa Press, 2006).

<sup>103</sup> M. St. Patrick Baxter, "Black Bay Street Lawyers And Other Oxymora" (1998) 30:2 *Canadian Business Law Journal*; J. St. Lewis, B. Travino & A. Jewel, *Racial Equality in the Legal Profession* (Ottawa: Canadian Bar Association, 1999); C.C. Smith, "Who is Afraid of the Big Bad Social Constructionists: Unpardonable Whiteness of the Canadian Legal Profession" (2008) 45:5 *Alberta Law Review* 55.

<sup>104</sup> M. Ornstein, *The Changing Face of the Ontario Legal Profession, 1971-2001: A Report to the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, 2004), online: Law Society of Upper Canada <<http://rc.lsuc.on.ca/pdf/equity/ornsteinReport.pdf>> (last modified: 5 February 2013).

<sup>105</sup> Law Society of Upper Canada, *Sixth Colloquium on the Legal Profession: Law and Lawyers in Literature and Film* (Toronto: Law Society of Upper Canada, 2006); D. L. Blaikie, T. Cromwell & J. Pink, eds., *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012).

<sup>106</sup> T.C. Halliday, "Lawyers as Institution Builders: Constructing Markets, States, Civil Society and Community" in A. Sarat et al., eds., *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (Evanston: Northwestern University Press, 1998) 242 at 248.

<sup>107</sup> T. Rostaintain, "Professional Power: Lawyers and the Constitution of Professional Authority" in A. Sarat, ed., *The Blackwell Companion to Law and Society* (New York: Oxford University Press, 2004) 146 at 148.

the work processes of government legal bureaucracies;<sup>108</sup> the specific practice issues facing federal government lawyers invites greater attention;<sup>109</sup> and their roles are typically misunderstood.<sup>110</sup> MacNair, Hutchinson, and Dodek each found that there is insufficient knowledge and understanding about government lawyering in Canada, which, given the above cited limitations of existing research, should stir little amazement.<sup>111</sup> Today's researchers, therefore, have an important and overdue task ahead of them in raising the study of government lawyers to a refined discipline within studies of the Canadian legal profession.

The exclusion of government lawyers from mainstream studies on the legal profession does not mean that a dearth of theory or research exists on lawyers unionizing. In this instance, a review of relevant literature calls for an interdisciplinary and integrative design<sup>112</sup> that draws on studies from the disciplines of law and the social sciences. The bifurcated format provides a natural organization for this chapter. The first section maps and synthesizes the legal scholarship addressing the introduction of unionization and collective bargaining to the legal profession and its impact on the practice of law. Since American jurists detailing the law of attorney unionization are responsible for an initial phase of research, this will be discussed under the theme of lawyer unions as legal construct. Following this, the review considers the academic legal research on the interaction between collective bargaining and professional ethics and responsibility. The first half of the review ends with a summary of the most current writing appearing in the law journals today, which argues that salaried lawyers should pursue collective bargaining to oppose worsening employment conditions.

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<sup>108</sup> E. Friedson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press, 1986) at 163.

<sup>109</sup> H.W. Perry Jr., "United States Attorneys: Whom Shall They Serve" (1998) 61:1 *Law and Contemporary Problems* 129 at 131.

<sup>110</sup> C.W. Clayton, "Introduction: Politics and the Legal Bureaucracy" in C.W. Clayton, ed., *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (Lawrence: University Press of Kansas, 1995) 1 at 1.

<sup>111</sup> "Polyester to Silk", *supra* note 38 at 127; A. M. Dodek, "Canadian Legal Ethics: Ready For the Twenty-First Century At Last" (2008) 46:1 *Osgoode Hall Law Journal* 1 at 44; A.C Hutchinson, "In the Public Interest: The Responsibilities and Rights of Government Lawyers" (2008) 46:1 *Osgoode Hall Law Journal* 105 at 106; A. Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law" (2010) 33:1 *Dalhousie Law Journal* 1 at 4 [hereinafter "Lawyering at the Intersection"].

<sup>112</sup> W. L. Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 7th ed. (Boston: Allyn & Bacon, 2011) at 125. Neuman defines an integrative review as one that, "the author presents and summarizes the current state of knowledge on a topic, highlighting agreements and disagreements within it".

The second part of the literature review canvasses the social scientific literature on professional unionization, particularly sociology's subfield of interest in the professions. The review identifies two arguments—professional proletarianization and process actor—that consider bureaucracy can be a catalyst (or one of many) for sparking collective action by professionals aimed at remedying underlying sources of work dissatisfaction. Finally, the review analyzes Campbell's study of Nova Scotia prosecutors turning to collective bargaining as an example of the theorization behind provincial government lawyers following the lead of other organized counsel in the public sector. The format of this chapter is to first analyze findings from the studies and then to discuss the key concepts arising from the review. The concepts identified from the evaluation help shape the research issues that offer a focal point for collecting and discussing data by which this study's central research questions are investigated.<sup>113</sup>

## **2.2 Part I: Doctrinal Legal Scholarship and Lawyer Unionization**

### *2.2.1 Lawyer Unions as Legal Construct*

The unions responsible for organizing growing masses of white-collar employees, whose proportion of the American workforce in the 1950s rivaled that of blue-collar labourers,<sup>114</sup> would eventually force the National Labor Relations Board<sup>115</sup> to determine whether lawyers had the right to be represented by a labour organization. The 1948 case of *Lumberman's Mutual Casualty Co.* represented the first such instance of the NLRB granting attorneys separate bargaining unit recognition and protection under the *NLRA* as professional employees.<sup>116</sup> As public sector employees (including public sector attorneys) were excluded from *NLRA* coverage,

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<sup>113</sup> P. Baxter & S. Jack, "Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers" (2008) 13:4 *The Qualitative Report* 544 at 552, online: Nova Southeastern University <<http://www.nova.edu/ssss/QR/QR13-4/baxter.pdf>> (date accessed 10 May 2010); R.E. Stake, *The Art of Case Study Research* (Thousand Oaks: Sage Publications, 1995) at 20 [hereinafter *Art of Case Study*].

<sup>114</sup> D. Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* (New York: Basic Books, 1973) at 17.

<sup>115</sup> The National Labor Relations Board [hereinafter NLRB] is the federal government agency responsible for administering the *National Labor Relations Act*, 29 U.S.C. §§ 151-169 [hereinafter *NLRA*]. The *NLRA* is American federal labour legislation that extends the right of private sector employees to join unions, engage in collective bargaining, and strike.

<sup>116</sup> *In the Matter of Lumberman's Mutual Casualty Co. of Chicago, doing business in New York as American Lumberman's Casualty Co. of Illinois, Employer and Independent Insurance and Banking Employees Union, Petitioner*, 75 N.L.R.B. 1132 (1948). The certification application concerned a proposed bargaining unit of about a dozen salaried lawyers employed at the casualty insurer's New York branch office who worked under the direction of a supervising lawyer and did not exercise managerial, supervisory, or confidential authority. Of course, professionals cannot be mixed with non-professionals in the same bargaining unit unless the professional employees agree to the commingling.

U.S. federal government attorneys waited until 17 January 1962 for President John F. Kennedy to sign Executive Order 10988 into law before they could collectively bargain through employee organizations. These two advances in labour law led the authors of a seminal 1971 law review article, “The Unionization of Attorneys”, to reason that, with enshrined laws in place, there should be a frank discussion of the legal and ethical issues related to in-house corporate and government lawyers joining unions.<sup>117</sup> This initial study was significant for demonstrating a stock mode of analysis regarding the statutory laws and jurisprudence covering attorney unionization and the ethical implications of lawyers’ membership in a union. The authors determined that the majority of lawyers employed in a single-client relationship enjoyed protection under the *NLRA*, but the right was illusory if the American Bar Association (ABA), (a national body of lawyers responsible for monitoring the profession and accrediting law schools), determined that union involvement violated rules of professional conduct. Four opinions issued by the ABA under its past Canons of Professional Ethics demonstrated a gradual shift from opposition to reluctant observance of collectivized lawyers. These opinions set the background for the ABA’s newly promulgated, but not yet interpreted, Ethical Consideration 5-13 (Consideration 5-13) of the new Code of Professional Responsibility, which addressed lawyer membership in an organization of employees. The authors argued that the ABA’s concerns over potential ethical violations triggered by lawyers joining unions (whose ranks extended beyond attorneys) and the withdrawal of legal representation in the event of strikes and work stoppages, should not trump interpretations of Consideration 5-13 that would chill first amendment rights of freedom of association.

On 4 May 1977, the United File Room Clerks and Messengers made American labour law history by having the NLRB overturn a previously dismissed petition to represent clerical employees at a law firm in Boston, Massachusetts. In *Foley, Hoag & Eliot*,<sup>118</sup> the NLRB under section 14(c) of the *NLRA* asserted jurisdiction for the first time over private law firms provided that they met appropriate jurisdictional standards. On 27 May 1977, the NLRB’s ruling in

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<sup>117</sup> “The Unionization of Attorneys” (1971) 71:1 *Columbia Law Review* 100.

<sup>118</sup> *Foley, Hoag & Eliot and United File Room Clerks and Messengers of Foley, Hoag & Eliot, Petitioner*, 229 N.L.R.B. 456 (1977) [hereinafter *Foley*].

*Wayne County Neighbourhood Services*,<sup>119</sup> confirmed that non-management, staff lawyers of affiliates of the Legal Services Corporation (publicly funded, non-profit legal services provider for the indigent) were professional employees within the meaning of the *NLRA* and could form or join unions. The NLRB's assertion of jurisdiction over law firms and legal service clinics created a golden opportunity for the labour movement to seize and make significant inroads among different types of law workers. Speculation on unions infiltrating the legal profession raised an open issue canvassed by several jurists: under the *NLRA*, would the NLRB consider private law firm associates as professional employees capable of forming bargaining units?

One faction of commentators determined that the NLRB would interpret *NLRA* jurisprudence to extend coverage to lawyers throughout the profession. One author, Norton, saw a "green light for future lawyer unionization" based on the NLRB likely finding that private sector lawyers were professional employees under the *NLRA* because of unclear distinctions in responsibilities between professional and managerial job categories and given the ABA's acceptance (in 1975) of lawyers belonging to unions.<sup>120</sup> Additionally, Norton noted that lawyers should only be excluded from bargaining units where loyalty to an employer interfered with an attorney's effective participation in union activities. Finally, Norton traced the ABA's reversal of position towards attorney unionization through a series of its opinions leading to Informal Opinion 1325, which interpreted the Code of Professional Responsibility to contain no disciplinary rule prohibiting the membership of lawyers in either unions or associations. In another, like-minded evaluation, Starrett remarked that the, "time of unionized law firm has arrived".<sup>121</sup> He determined the ABA's ambiguity to lawyer representation by a union, along with the Supreme Court's position on the legal profession, created a likelihood that lawyers employed by law firms would be allowed to organize; however, he believed that associates of small to moderate-sized establishments were uninterested in unions.<sup>122</sup> The study had an applied goal of

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<sup>119</sup> *Wayne County Neighbourhood Legal Services, Inc. and Organized Workers of Legal Services, Petitioner*, 229 N.L.R.B. 1023 (1977) [hereinafter *Wayne County*]; See also *Camden Regional Legal Services Inc. and Communications Workers of America, AFL-CIO, Petitioner*, 231 N.L.R.B. 224 (1977). In this case, the NLRB clarified that prior to asserting jurisdiction over law firms and legal assistance programs their revenue stream would have to surpass the gross annual fee standard of \$250,000.

<sup>120</sup> D.A. Norton, "NLRB Asserts Jurisdiction Over Law Firms: Has The Door Been Opened to Lawyer Unionization?" (1978) 27:2 *Buffalo Law Review* 361 at 374.

<sup>121</sup> R. T. Starrett, "Comments: Unionization of the Legal Profession" (1979) 50:2 *Mississippi Law Journal* 451 at 453.

<sup>122</sup> *Ibid.* at 481.

alerting counsel to the practical unionization issues of the right to work doctrine, organizational solicitation, strikes, and the confidentiality of attorneys as necessary considerations in the event of union organizing at a law firm.

Other studies tested *Foley* against existing labour jurisprudence in order to discover whether labour law was heading in a direction that supported employees of private law firms unionizing. Vairo asked whether the NLRB possessed the constitutional authority to assert jurisdiction over private law firms and, just as importantly, whether it should exercise that authority.<sup>123</sup> The author determined that the purposes of the *NLRA* were not thwarted by the NLRB asserting jurisdiction because, one, law firms exert a substantial effect on commerce and, second, that employer arguments proposing possible breaches of attorney client privilege or conflict of interests should not preclude law firm employees from statutory coverage on confidentiality grounds (except possibly for lawyers employed at firms with a substantial labour practice). Vairo identified emergent legal issues surrounding appropriate bargaining units for associate attorneys, paralegals and clerical staff. In another study, Stavitsky also believed that a looming issue before the NLRB was the need to define and organize appropriate bargaining units within a private law firm.<sup>124</sup> He raised ethical concerns associated with lawyers forming bargaining units and addressed them by cautioning attorneys to avoid conflicts of interests between client and union and to prevent divulging confidential information. Stavitsky remarked that, “beyond a consideration of jurisdictional issues and the formation of an appropriate bargaining unit, there is little left to be discussed”.<sup>125</sup> The observation highlighted that prospects for future research rested with new developments such as bargaining issues, employer unfair labour practices and union countermeasures. The article’s other focus, a finding that jurisdictional standards regarding the unionization of lawyers were resolved, was drawn from analyzing the NLRB’s reasoning in *Wayne County* and developments from other cases as well as advisory opinions on unionized lawyers employed by quasi-governmental legal service agencies.

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<sup>123</sup> G.M. Vairo, “Note: The Unionization of Law Firms” (1978) 46:5 *Fordham Law Review* 1008 at 1010.

<sup>124</sup> B.J. Stavitsky, “Lawyer Unionization in Quasi-Governmental Public and Private Sectors” (1980) 17:1 *California Western Law Review* 55 at 55.

<sup>125</sup> *Ibid.* at 72.

By contrast, in their assessments of *NLRA*'s jurisprudence on professional workers and collective bargaining, another group of jurists argued against unionization spreading within the private bar. Ackels doubted that law firm associates would gain coverage under the *NLRA* as representing the firm, binding the firm in court and contributing to firm policy and rules anointed them with qualities of management.<sup>126</sup> Ackels determined also that law firm associates were confidential employees because of the right of confidentiality owed to firm clients, and highlighted that grievances and arbitrations involving unionized counsel may result in the impermissible release of employer records with client information obtained through the solicitor-client relationship. Sloan was another jurist who expressed reservations towards the NLRB recognizing bargaining units that were comprised solely of law firm associates because their job responsibilities arguably made them supervisors.<sup>127</sup> Secondly, she uncovered a potential limitation on the NLRB's jurisdiction after reviewing the muddled doctrine of labour law pre-emption (along with the ABA Code of Professional Responsibility) to reveal that, where unfair labour practices of the employer form part of an attorney grievance, the matter is whether the conduct is characterized as local in nature, and beyond NLRB authority.<sup>128</sup>

The short-term projections cast by jurists on the future of union organizing in the legal profession were verified by a 1981 BNA monograph that assessed post-*Foley* and *Wayne County* legal and legislative developments, elections, strikes, and union organizing at private law firms, legal services agencies, and within the public sector.<sup>129</sup> The monograph reported empirical evidence via court document analysis and interviews with union organizers and labour lawyers. Findings revealed that from June 1977 to May 1980, no elections involving law firms under the jurisdiction of the NLRB took place, but that forty-one elections were conducted at legal service agencies.<sup>130</sup> Legal staff was represented at several law firms by the employer voluntarily recognizing bargaining agents. Interview findings with union organizers uncovered that the issues of wages, working conditions, and job security involved in organizing private law firm secretaries, clerks, and paralegals were no different than those reported by other office

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<sup>126</sup> M.E. Ackels "Comments: Unionization of Law Firm Associates" (1978) 32:4 *South Western Law Journal* 987 at 999-1000.

<sup>127</sup> R. Sloan, "NLRB Asserts Jurisdiction Over Law Firms as A Class – Potential Limitations" (1979) 11:2 *Southwestern University Law Review* 691 at 698.

<sup>128</sup> *Ibid.* at 711.

<sup>129</sup> BNA Special Report, *Unionization in the Legal Profession* (Washington: Bureau of National Affairs Inc., 1981).

<sup>130</sup> *Ibid.* at 10.

workers.<sup>131</sup> Moreover, at legal services clinics, lawyers formed unions, not because they were seen a way to improve wages, but to assert greater say in the operation of programs for indigent clients.<sup>132</sup> Lawyers employed by the federal government were found to organize into large professional units that were agency wide. The monograph conjectured that a critical variable in the extent of future unionization would be the responsiveness of a law firm modernizing its personnel practices.<sup>133</sup> Coincidentally, Lewis, labour counsel to law firms and one of the interviewees for BNA investigators wrote his own commentary, arguing that the union movement was a continuing threat for law firms with “staggering” consequences in the event of organizing success.<sup>134</sup> He proposed a preventative, anti-union employee relations strategy for law firm administrators to stave off unions.

### 2.2.2 *The Ethics of Lawyer Union Membership*

Another research topic identified from the law articles involves the interplay between union membership and professional ethics. Professional ethics are protocols of behaviour for members of the legal profession that are embodied through rules of professional conduct. They prescribe minimum standards of care that guide practitioner discretion in the appropriate representation of clients, the responsible provision of services and management of a law practice, and the fulfillment of obligations to the profession, the courts, and the public. Lawyers demonstrate an affinity for professionalism<sup>135</sup> and their professionalism has been measured by making services available to people.<sup>136</sup>

There are few ethical issues that expose a unionized lawyer to greater self-reflection than effecting strike action while still respecting an individual obligation to uphold professional responsibilities. Strikes forcefully aim to secure some fundamental benefit from an employer after collective bargaining and conciliation fails. The presumption is that professionals should not strike because it is unbecoming of service values. Lawyers take strikes very seriously because strikes can interfere with the functioning of courts and undermine public trust in the

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<sup>131</sup> *Ibid.* at 13.

<sup>132</sup> *Ibid.* at 17.

<sup>133</sup> *Ibid.* at 2.

<sup>134</sup> R. Lewis, “Law Office Memos: Preventative Employee Relations in Law Firms” (1981) 67:12 *American Bar Association Journal* 1681 at 1681.

<sup>135</sup> H.L. Wilensky, “The Professionalization of Everyone?” (1964) 70:2 *American Journal of Sociology* 137 at 153.

<sup>136</sup> P.A. Freund, “The Legal Profession” (1963) 92:4 *Daedalus* 689 at 696.

administration of justice. On a more intimate scale, lawyers withdrawing services that unfairly cause a denial of service may result in complaints to a law society by former clients who allege misconduct. Consequently, jurists have keenly followed the way that lawyers have reconciled professional ethics with participation in strike activity.

Because of their disruptive nature, lawyer strikes seldom happen, and when they do, the variables responsible for their genesis and outcome make for a rich topic of investigation. In October 1982, criminal defense attorneys of the New York Legal Aid Society went on strike for ten weeks over low pay and prohibitive case loads. Arthur critiqued Ethical Opinion 82-75, (Opinion) an advisory statement issued by the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York (Committee), which commented on the ethical implications of a hypothetical strike.<sup>137</sup> The Opinion addressed silence from the ABA's Code of Professional Responsibility (ABA's Code) on the ethical responsibility of lawyers considering strike action, but Arthur believed that it misleadingly communicated that strikes were unethical. Arthur critiqued the Opinion's lack of specificity and found inconsistencies in the Opinion's application of several disciplinary rules of the ABA's Code regarding client neglect and attorney withdrawal from representation in its conclusion on when lawyers can ethically strike. He advocated the Committee reverse its position. A review of the ABA's Code and the recently proposed ABA Model Rules of Professional Conduct found that the strike by legal aid staff attorneys to improve the quality of client representation was permissible and ethically appropriate. Arthur proposed modifying the ABA Model Rules of Professional Conduct to sanction and clarify the right of attorneys to strike.

As Arthur's review of the striking lawyers demonstrated, legal services were withdrawn in the interim so that the longer term consequences of continued practice under taxing work conditions could be addressed. Concerns for the integrity of the judicial system under the banner of minimum standards of competent representation motivated other legal aid criminal defense lawyers to boycott providing their services as well. In 1983, roughly one hundred court-appointed private criminal defense lawyers practicing in the District of Columbia banded under

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<sup>137</sup> R.L. Arthur, "The 1982 New York Legal Aid Strike: Ethical Implications under the Code of Professional Responsibility" (1985) 2:2 *Hofstra Labor and Employment Law Journal* 375 at 377.

the Superior Court Trial Lawyers Association (SCTLA) and withdrew their services over poor pay and burdensome caseloads. Lawyers continued representing indigent clients under retainer, but refused to accept new cases. Within two weeks, the boycott forced the District of Columbia City to introduce legislation increasing wages. Klein detailed the judicial history and outcome of the Commissioners of the Federal Trade Commission (FTC) initiating an anti-trust suit against the SCTLA claiming they illegally fixed prices and that their boycott constituted unfair methods of competition under the *Federal Trade Commission Act*.<sup>138</sup> On final appeal by the FTC to the United States Supreme Court, a majority decision ruled that the boycott violated anti-trust laws.<sup>139</sup> Klein found that the ruling thwarted lawyers from using organized labour's tactics.

### 2.2.3 *Current Applications: Unions Saving Lawyers*

When Midwood and Vitacco rekindled the subject of American lawyers unionizing, their article mixed old and new insights to create a modern treatment of the topic.<sup>140</sup> Like previous works, along with consideration of ABA Committee Opinions on lawyers and unions, they analyzed the case law regarding lawyers qualifying as professional employees under the *NLRA* based on distinctions between supervisory and managerial exceptions. Where Midwood and Vitacco's analysis tread new ground was in its singling out of legal aid lawyers, private court-appointed counsel, and staff attorneys in public defender's offices that were facing low wages, long hours, and difficult working conditions. The article proposed collective bargaining as a way to remedy the plight of these lawyers and allow them to meet their ethical obligations. The paper outlined how unionized lawyers could strike for workplace justice and offered proposals for modifying labour law in order to square collective bargaining with professional responsibilities.

In 2003, when sixteen associates at the Phoenix, Arizona, law firm of Parker Stanbury voted to unionize under the Teamsters, they became the first group to have succeeded among private sector lawyers in America.<sup>141</sup> A first contract was never completed as the Los Angeles

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<sup>138</sup> R. Klein, "The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel" (1993) 68:2 *Indiana Law Journal* 363.

<sup>139</sup> *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

<sup>140</sup> L. Midwood & A. Vitacco, "The Right of Attorney's to Unionize, Collectively Bargain and Strike: Legal and Ethical Considerations" (2000) 18:1 *Hofstra Labor & Employment Law Journal* 299.

<sup>141</sup> T. Baldas, "Lawyers Unionize, Vote to Join Teamsters" *The National Law Journal* (8 April 2003), online: The National Law Journal <<http://www.law.com/jsp/article.jsp?id=1048518259019>> (date accessed: 13 March 2009).

based owners of the branch office specializing in pre-paid legal services folded the operation.<sup>142</sup> To date, it appears that organizing success at Parker Stanbury, much like *Foley*, has not propelled other lawyers to follow suit. Despite few examples, Chin believed that America's Great Recession of 2008 created the climate for law firm associates to begin unionizing *en masse*.<sup>143</sup> Like Midwood and Vitacco, Chin tied lawyers organizing to the larger, white-collar unionization movement in America. Her article's analysis addressed *NLRA* case law allowing lawyers to unionize, and countered employer objections that associates bore confidential or managerial employee qualities, or should otherwise be prohibited from collectively bargaining due to ethical and professional responsibilities. Chin's article updated NLRB jurisprudence regarding supervisory employee exclusions since Midwood and Vitacco's review of the topic was conducted a decade earlier, but it differed in its outlining of the process for forming a private attorney's union and addressing of the practical concerns of doing so.

Looking at large law firms, Mortazavi's analysis of attorney unionization argued that American "Big Law" profit-inducing practices spoil the personal and professional well-being of associate lawyers. Her portrayal of law firm human resources management presented exploited associates satisfying Stakhanovite-type commitments which impeded them from satisfying key ethical and professional responsibilities established under ABA Model Rules of Professional Conduct. Sector-wide unionization as the "thin edge of the wedge" that stirs a paradigm shift in firm culture and institutional practice was presented as the "most effective remaining alternative" open to private sector associates critical of dominant work patterns that diminish ethics from the practice of law.<sup>144</sup> Mortazavi's argument implied that unionization can occur when management directives overrule the independent discretion of practitioners on how to practice, how much to practice, and under which conditions to practice. Her review of *NLRA* case law, administrative jurisprudence, and ABA rules of ethics confirmed that no legal or ethical restrictions bar unionization. Nonetheless, Mortazavi's prescription carries weight insofar as being assimilated

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<sup>142</sup> R. Zapata, "Lawyer Unions at Private Firms Rare but Doable" *Law 360* (7 March 2008), online: Law360 <<http://www.law360.com/articles/49529/lawyer-unions-at-private-firms-rare-but-doable>> (date accessed: 14 March 2009).

<sup>143</sup> K.Y. Chin, "Continuing the White-Collar Unionization Movement: Imagining A Private Attorneys' Union" (2012) 32:1 *Pace Law Review* 77 at 79.

<sup>144</sup> M. Mortazavi, "Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession" (2012) 96:4 *Minnesota Law Review* 1482 at 1485.

as the appropriate action by enough lawyers in one firm who faced the same employment conditions as those typified in the article, wanted to defend their professional standing, and were permanent associates.

## **2.3 Part II: Empirical and Theoretical Approaches to Lawyer Unionization**

### *2.3.1 Professionals and Bureaucracies*

From the 1930s and onwards, the wide-scale growth of the professional and semi-professional workforces to carry out the larger economic activities of state and private organizations in the fields of commerce, science and technology, and education was necessary before such new occupations were exposed to unions and collective bargaining.<sup>145</sup> Collective bargaining by professionals is a relatively modern development in Canada. For example, in December 1966, the Government of Canada struck the Woods Task Force on Labour Relations to identify and review the pressing issues impacting the country's system of industrial relations. Studies exploring professional workers and collective bargaining under the direction of the Woods Task Force noted the lack of reliable information and statistical data for their work.<sup>146</sup> Around the same time of the Woods Task Force, federal and provincial governments instituted access to collective bargaining for their workers whose success with negotiated settlements stood to promote white-collar organizing in the private sector.<sup>147</sup> The liberalization of attitudes and labour laws encouraged engineers, teachers, social workers, and nurses (employed in the provincial and para-public sectors) to demand and attain collective bargaining rights. This change in turn, created a critical mass of semi-professional and professional workers for researchers to investigate their gains as labour collectives.<sup>148</sup>

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<sup>145</sup> C.W. Mills, *White Collar: The American Middle Classes* (New York: Oxford University Press, 1951) at 69; A.L. Stinchcombe, "Social Structure and Organizations" in J. G. March, ed., *Handbook of Organizations* (Chicago: Rand McNally & Company, 1965) 142 at 168.

<sup>146</sup> F. Bairstow, *White Collar Workers and Collective Bargaining* (Ottawa: Task Force on Labour Relations, 1968) at 13; S.B. Goldenberg, *Professional Workers and Collective Bargaining* (Ottawa: Queen's Printer for Canada, 1970) at 1.

<sup>147</sup> S.B. Goldenberg, *Public Service Bargaining: Implications for White-Collar Unionism* (Kingston: Queen's University Industrial Relations Centre, 1973) at 31.

<sup>148</sup> D. Fraser & S. B. Goldenberg, "Collective Bargaining for Professional Workers: The Case of Engineers" (1974) 20 *McGill Law Journal* 456 at 467-479; H. Smaller, "Canadian Teacher Unions: A Comparative Perspective" (1998) 69:4 *Contemporary Education* 223 at 226; J.T. Pennell, "Union Participation of Canadian and American Social Workers: Contrasts and Forecasts" (1987) 61:1 *Social Service Review* 117 at 121; D. Coburn, "The Development of Canadian Nursing: Professionalization or Proletarianization" (1988) 18:3 *International Journal of Health Services* 437 at 448-449.

Thompson observed a marked shift in professionals turning to collective bargaining during the 1960s and 1970s. In the Industrial Relations literature, he proposed a binary explanation to account for their motivations.<sup>149</sup> Thompson identified defensive reasons: professionals were organizing themselves in order to prevent their inclusion in a bargaining unit of non-professionals. American engineers unionized during the 1930s, for example, to prevent being lumped with less essential production workers.<sup>150</sup> By contrast, there were offensive considerations involved as professionals wanted to secure their own economic or social goals through bargaining. Thompson's offensive rationale identifies collective bargaining as a measure used by employed professionals when real or perceived working conditions challenge their autonomy, pride in work, and finances.<sup>151</sup> Bonds between salaried professionals and ideals of professionalism unravel in workplaces where rewards and challenges do not comport with expectations, and dissatisfaction with conditions of employment increases. When identifying the core challenge to professional values, theorists propose bureaucratization of work as a factor.<sup>152</sup> The issue of whether an underlying source of dissatisfaction (and what it represents) is indeed attributable to bureaucratization differentiates two evaluative models: the professional proletarianization thesis and process actor approach. The main difference between the two concepts is the emphasis each places on either the social structures or the rational, independent actions that account for behaviours within a workplace. As both views bear relevance to lawyers unionizing, the next few sections will take a closer look at them.

### 2.3.2 *The Proletarianization of Professionals Thesis*

During the 1970s, new sociological studies on the professions emerged. After four decades of prominence in Anglo-American sociology, the paradigm of studying and differentiating professions from other occupations based on attributes of ethics, autonomy, independence, occupational community, higher education and professional socialization among

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<sup>149</sup> M. Thompson, "Collective Bargaining By Professionals" in J. Anderson & M. Gunderson, eds. *Union Management Relations in Canada* (Don Mills: Addison-Wesley, 1982) 379 at 382.

<sup>150</sup> E.J. Dvorack, "Will Engineers Unionize?" (1963) 2:3 *Industrial Relations* 45 at 48.

<sup>151</sup> Thompson, *supra* note 149 at 383.

<sup>152</sup> M. Gunderson, "Economic aspects of the unionization of salaried professionals" in P. Slayton & M.J. Trebilcock, eds., *The Professions and Public Policy* (Toronto: University of Toronto Press, 1978) 247 at 249; G.S. Lowe, "Causes of Unionization in Canadian Banks" (1981) 26:4 *Relations industrielles/Industrial Relations* 865 at 868.

other markers waned.<sup>153</sup> Neo-Weberian scholars countered this trait-based model by introducing a monopoly approach that classified the professions as occupations seeking to establish, maintain, and control a labour market for their expert services.<sup>154</sup> With the uptake of interest in the professions, another group of social scientists, post-industrial theorists dubbed the functionalists, proposed their own theory of knowledge-based workers.<sup>155</sup> This school of thought argued that Western nations were evolving from manufacturing based economies into service and information societies and that the resulting structural changes ushered in rapid technological growth powered by knowledge. The emerging new economy's reliance on the industrialization of technical expertise would privilege and reward professionals with substantial workplace advancements and social capital.<sup>156</sup> Yet, there was a third, alternative perspective to emerge during this time: Marxian political economists adapted and applied the proletarianization thesis to stamp their own perspective on the future of employed professionals.

Proletarianization involves converging structural processes that divest increasing populations from control over the means of production.<sup>157</sup> Proletarianization theorists postulate that professionals are no different than any other wage labourer intertwined in capitalist relations of production. When surplus professionals (who are not self-employed) must sell their labour to an employer instead of offering their services directly to the public, they become proletarians.<sup>158</sup> Professional proletarianization theorists identify bureaucratization as the driver of proletarianization in workplaces where dependent employment has stripped professionals of the inherent rewards of their calling.<sup>159</sup> As a condition of salaried employment, professionals must

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<sup>153</sup> K.T. Lecht & M. L. Fennel, *Professional Work: A Sociological Approach* (Malden: Blackwell Publishers, 2001) at 26.

<sup>154</sup> D. Sciulli, "Continental Sociology of Professions Today: Conceptual Contributions" (2005) 53:6 *Current Sociology* 915 at 917.

<sup>155</sup> E. Spangler & P.M. Lehman, "Lawyering as Work" in C. Derber, ed., *Professionals as Workers: Mental Labor in Advanced Capitalism* (Boston: G.K. Hall and Co., 1982) 63 at 63.

<sup>156</sup> C. Derber, "Professionals as New Workers" in C. Derber, ed., *Professionals as Workers: Mental Labor in Advanced Capitalism* (Boston: G.K. Hall and Co., 1982) 3 at 4.

<sup>157</sup> C. Tilly, *Proletarianization: Theory and Research* (Ann Arbor: Center for Research on Social Organization, 1979) at 1.

<sup>158</sup> C. Derber & W.A. Schwartz, "New Mandarins or New Proletariat: Professional Power at Work" in P.S. Tolbert & S.R. Barley, eds., *Research in the Sociology of Organizations*, Volume 8 (Greenwich CT: JAI Press, 1991) 71 at 89.

<sup>159</sup> C. Derber, "The Proletarianization of the Professional: A Review Essay" in C. Derber, ed., *Professionals as Workers: Mental Labor in Advanced Capitalism* (Boston: G.K. Hall and Co., 1982) 13 at 15 [hereinafter "Proletarianization of the Professional Essay"].

accept subtle, but intrusive forms of management authority that is designed to direct work processes. Within organizations, professional autonomy is restricted by: supervisory hierarchy, detailed divisions of labour and documented job responsibilities, evaluations and promotions determining career advancement, and mandatory use of guidelines and policy manuals that reduce independent discretion. All of these constraints seek task rationalization and requisite standards of efficiency.<sup>160</sup> In these environments, professionals can experience technical proletarianization which entails management implementing and maintaining standardized operating procedures through administrative systems that wrest autonomy.<sup>161</sup> Derber suggests that bureaucratization more likely exposes professionals to ideological proletarianization which begins with management determining the division of labour and ends with a loss of control over the ends and uses of one's work.<sup>162</sup> While professionals may draw good salary and exercise some discretion over completing tasks, these benefits are relative to an employer extracting maximum profit from their labour. Hence, many of them face the prospect of enduring disenchantment with work or reclaim their professionalism through acts of protest.<sup>163</sup> Derber found that the professional proletarianization thesis sparked two streams of initial research: first, studies of job attitudes and discontent of professionals with employment, and second, studies of dissent and unionization by professionals.<sup>164</sup> Works using proletarianization theory as a medium to study workplace change in American medical and legal practice illustrate the second prong of research. They are discussed individually in each of the next two sections below.

### 2.3.2.a *Doctors*

Initially, in the early 1970s, American doctors sporadically unionized because government encroachment and restrictions on practice autonomy greatly dissatisfied them.<sup>165</sup>

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<sup>160</sup> *Ibid.* at 18.

<sup>161</sup> M. Oppenheimer, "The Proletarianization of the Professional" in P. Halmos, ed., *The Sociological Review Monograph 20: Professionalization and Social Change* (Hanley Stoke on Trent: J. H. Brooks Printers, Ltd., 1975) 213 at 214.

<sup>162</sup> C. Derber, "Managing Professionals: Ideological Proletarianization and Post-Industrial Labor" (1983) 12:3 *Theory and Society* 309 at 316

<sup>163</sup> J.R. Pulskamp, "Proletarianization of Professional Work and Changed Workplace Relationships" in E. P. Durrenberger & J. Marti, eds., *Labor In Cross-Cultural Perspective* (Lanham: Altamira Press, 2006) 175 at 175.

<sup>164</sup> "The Proletarianization of the Professional Essay", *supra* note 159 at 21.

<sup>165</sup> "Doctors Drawn to Unions by Abuses in Health Care System, Conference Told" *Health Law Reporter* 8:1624 (10 July 1999), online: Bloomberg BNA <[http:// http://healthlawrc.bna.com.ezproxy.library.yorku.ca/hlrc/#](http://healthlawrc.bna.com.ezproxy.library.yorku.ca/hlrc/#)> (date accessed: 12 January 2010).

American physicians intensified union organizing thereafter as the delivery of medical services became corporatized and doctors lost independence and control over patient treatment and care.<sup>166</sup> Proletarianization theorists argued that corporatized and profit-driven American health care threatened to approximate the medical labour process akin to the traditional industrial proletariat and subordinate it to capitalist interests.<sup>167</sup> McKinlay and Arches identified that the for-profit hospital, university medical and community health centres, and the health maintenance organizations were responsible for institutionalizing health care and displacing opportunities for practitioner self-employment.<sup>168</sup> Within these organizations, employed physicians face a bureaucratization of work, loss of discretion over tools of labour, declining salaries, and forced specialization. A cycle of dependent employment is seemingly assured by practitioner oversupply, as well as by prohibitive start-up and steep overhead costs associated with running a practice. Researchers of physician unionization have made two significant conclusions about collective bargaining: one, physicians join unions and collectively bargain in response to physician fee squeezing, to uphold practice autonomy, and to preserve individual professional judgment;<sup>169</sup> and two, collective bargaining is used to address workplace concerns associated with physician-specific issues and patient care concerns.<sup>170</sup>

### 2.3.2.b *Lawyers*

Academic consideration of proletarianization extending to lawyers coincided at the time when the American legal profession was undergoing exponential population growth and there was a growing concentration of employed lawyers in law firms, government and businesses.<sup>171</sup> Spangler and Lehman explored the work processes of salaried lawyers in bureaucratized

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<sup>166</sup> J.B. McKinlay & L. D. Marceau, "The End of The Golden Age of Doctoring" (2002) 32:2 *International Journal of Health Services* 379 at 381; Crain, *supra* note 21 at 581.

<sup>167</sup> J.B. McKinlay, "Towards the Proletarianization of Physicians" in C. Derber, ed., *Professionals as Workers: Mental Labor in Advanced Capitalism* (Boston: G.K. Hall and Co., 1982) 37 at 38.

<sup>168</sup> J.B. McKinlay & J. Arches, "Towards the Proletarianization of Physicians" (1985) 15:2 *International Journal of Health Services* 161 at 163.

<sup>169</sup> J. Lutsky, "Is Your Physician Becoming A Teamster: The Rising Trend of Physicians Joining Labor Unions in the Late 1990s" (1997) 2:1 *DePaul Journal of Health Care Law* 55 at 55 J.J. Deis, "The Unionization of Independent Contracting Physicians: A Comedy of Errors" (1999) 36:3 *Houston Law Review* 951 at 956; S. Choudry & T.A. Brennan, "Collective bargaining by physicians—Labor Law, Anti-trust Law, and Organized labor" (2001) 34:5 *The New England Journal of Medicine* 1141 at 1141; G. Burdys, *When Doctors Join Unions* (Ithaca: Cornell University Press, 1997) at 95.

<sup>170</sup> J. Rugg, "An Old Solution to a New Problem: Physician Unions Take the Edge off Managed Care" (2000) 34:1 *Columbia Journal of Law & Social Problems* 1 at 14.

<sup>171</sup> R. Abel, "The Transformation of the American Legal Profession" (1986) 20:1 *Law & Society Review* 7 at 14.

workplaces of large law firms, corporations, government, and legal aid services agencies.<sup>172</sup> They sourced findings from available ethnographies to describe the scope of technological and bureaucratic influence over lawyers and whether they realized traditional rewards of professional work. Their analysis identified varying degrees of labour control and subordination offset by patterns of accommodation. Unionization was proposed as a possible countermeasure that could help lawyers curb management's attempts at de-skilling and hastening of work processes.<sup>173</sup>

Spangler conducted further research on the work experiences of employed lawyers to determine the extent of ideological, technological and bureaucratic control at each of four worksites previously canvassed in her study with Lehman.<sup>174</sup> Her book's chapter on legal service advocates offered a critical empirical complement and expansion of the doctrinal scholarship identified earlier in this literature review that studied the unionization of community law clinics. Findings from interviews conducted with respondents from three non-profit Legal Services Corporation agency affiliates offered some of the first ethnographic revelations about unionized staff lawyers and their bargaining agents struggling among unit members and management over workplace organization, bureaucratic control, and influence. At the time, with scant empirical insight on why lawyers unionize, the following excerpt presents a stimulating argument:

A more plausible interpretation of unionization among lawyers would emphasize that professionals join unions not because they are part of a new ruling class, but because they are sometimes made to feel very much like the traditional working class. In the three Legal Services offices reported in this study, unionization drives were sparked by low salaries, poor working conditions, and managerial arbitrariness. And in all three settings, the staffs were willing, however reluctantly to abandon many of the challenges to managerial prerogatives in return for the most traditional of working class gains—a reasonable wage settlement. Clearly, then, the social location of lawyer unionism suggests that this particular form of collective action arises when lawyers most resemble other workers and least resemble an emerging elite.<sup>175</sup>

Spangler based her findings on confrontational managerial relations and poor pay showing that regardless of the occupation involved, workers see common benefits in collective bargaining.

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<sup>172</sup> Spangler & Lehman, *supra* note 155 at 74.

<sup>173</sup> *Ibid.* at 97.

<sup>174</sup> E. Spangler, *Lawyers for hire: salaried professionals at work* (New Haven: Yale University Press, 1986).

<sup>175</sup> *Ibid.* at 172

The current work conditions of law firm associates, in-house counsel, government and legal service attorneys, and law professors was reviewed by Crain who argued that lawyers occupying these salaried positions do not control the ideological ends to which their employer directs their work, and, therefore, have lost their professional autonomy.<sup>176</sup> She proposed that employed professionals dissatisfied with current declines in status should unionize and collectively bargain to resist employers further commodifying their labour. Crain noted that this required labour law to support them by not holding professionals to be within supervisory and managerial exclusions. Interestingly, her proposal involved sociological concepts informing legal standards as to whether management profit-maximizing techniques and policies reduce professional autonomy and control over technical aspects of work. She found that American government attorneys practiced law in the most starkly bureaucratized work settings. Particularly, government lawyers experience ideological and technical control because of their minutely detailed job descriptions, ranking systems that determine salary, relatively routine promotions based on seniority, forced specialization and highly technical work.<sup>177</sup> Overall, with class privilege and professional competence jeopardized by high degrees of bureaucratization and scientific management, lawyers like other disgruntled professionals under attack, are theorized to unionize.<sup>178</sup> However, Crain's argument is not verified by either qualitative or quantitative evaluation, which thereby leaves her conclusion as a testable proposition.

### 2.3.2.c *Summary*

Of course, as with any framing concept, proletarianization theory has attracted its fair share of critics. Some critics doubt that professionals can be proletarianized if they exert control over subordinates and remain a credentialed workforce.<sup>179</sup> Other pundits believe that being proletarianized involves absorbing working class values and attitudes that professionals will spurn.<sup>180</sup> Some argue certain instances of professionals unionizing are exceptions that prove the

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<sup>176</sup> Crain, *supra* note 21 at 577.

<sup>177</sup> *Ibid.* at 576.

<sup>178</sup> *Ibid.* at 596.

<sup>179</sup> V. Navarro, "Professional Dominance or Proletarianization? Neither" (1988) 66: Supplement 2 *The Milbank Quarterly* 57 at 70-71.

<sup>180</sup> Burdys, *supra* note 169 at 99.

rule and are therefore misleading examples of deprofessionalization<sup>181</sup> or that certain professions are only in an initial stage of proletarianization.<sup>182</sup> Still other detractors acknowledge that theories involving bureaucracies may be stimulating on paper but require empirical support.<sup>183</sup> In the area of law, several jurists question the proletarianization process because it discounts lawyers' abilities to adapt and modify work conditions.<sup>184</sup>

These observers' criticisms inform that proletarianization theory stimulates healthy debate and provides an analytical perspective on the working conditions of professionals in organizations. For example, lawyers have been incorporated within a class analysis that concludes young associates at large law firms form a professional proletariat within a stratified hierarchy of Toronto lawyers.<sup>185</sup> Rosen suggested that the professional proletarianization debate could be expanded by studying whether market conditions are altering the career patterns of lawyers and subjecting them to the alienating effects of work.<sup>186</sup> Still, in another contemporary example, Bagust used Derber's ideological proletarianization argument as an epistemological tool to interpret the perceptions of corporate law firm associates practicing in neo-liberal-leaning Australia.<sup>187</sup> The qualitative study used data from fifty semi-structured interviews conducted with partners and past and present associates of ten law firms regarding work practices. While corporate law firms historically rose in prominence because of their association with high-status clients, these same corporate entities are now rewriting existing service bargains and causing law firms to adjust to the new rules of business. Bagust found that in a thoroughly commercialized

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<sup>181</sup> R. Murphy, "Proletarianization or bureaucratization: the fall of the professional" in R. Torstendahl & M. Burrage, eds., *The Formation of Professions: Knowledge, State and Strategy* (London: Sage Publications, 1990) 71 at 78.

<sup>182</sup> D. Coburn, "Canadian Medicine: Dominance or Proletarianization?" (1988) 66: Supplement 2 *The Milbank Quarterly* 92 at 109.

<sup>183</sup> E. Friedson, "The Changing Nature of Professional Control" (1984) 10 *Annual Review of Sociology* 1 at 11.

<sup>184</sup> R.L. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (Berkeley: University of California Press, 1987) at 27; R.L. Nelson & D.M. Trubek, "Arenas of Professionalism: The Professional Ideologies of Lawyers in Context" in R.L. Nelson, D.M. Trubek & R.L. Solomon, eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1992) 177 at 203; J. E. Wallace, "Organizational and Professional Commitment in Professional and Nonprofessional Organizations" (1995) 40:2 *Administrative Science Quarterly* 228 at 247; J.E. Wallace & F.M. Kay, "The professionalism of practicing law: A comparison across work contexts" (2008) 29:8 *Journal of Organizational Behaviour* 1021 at 1043; I. Campbell & S. Charlesworth, "Salaried lawyers and billable hours: A new perspective from the sociology of work" (2012) 19:1 *International Journal of the Legal Profession* 89 at 99.

<sup>185</sup> J. Hagan, M. Huxter & P. Parker, "Class Structure and Legal Practice: Inequality and Mobility among Toronto Lawyers" (1988) 22:1 *Law & Society Review* 9 at 51.

<sup>186</sup> R. Rosen, "'Proletarianizing' Lives: Researching Careers" (1999) 33:3 *Law & Society Review* 703 at 708.

<sup>187</sup> J. Bagust, "The Legal Profession and the Business of Law" (2013) 35:1 *Sydney Law Review* 27 at 29.

and competitive high-end, legal services marketplace, law firms must promote and deliver efficient services to sustain current client bases and the high levels of profitable billable hours that associates generate. Downward pressures fall squarely on the shoulders of associates who reported that their professionalism is being compromised by having to advertise the firm. A greater threat to associates' autonomy, however, was in meeting client objectives, which threatened the goals and purposes of lawyering. Bagust argued that the flow-through effect of strict agency between firm client and counsel compromised the independence of practitioners, and could jeopardize their careers in the event that unethical behaviour was needed to maintain customers.<sup>188</sup> Overall, the study maintained a persuasive argument for ideological proletarianization conceptualizing how lawyers lose some of their professional identity.

## 2.4 Professionals Unionizing as Process Actors

In 1980, Abel reviewed the literature on the sociology of lawyers and acclaimed Larson's work as a breakthrough in the sociology of professions, which was poised to influence "all writing about professionals for many years".<sup>189</sup> Larson developed a thesis of the "professional project" a concept inspired by the neo-Weberian sociological tradition and generated to contrast the trait model of studying professions. The professional project characterized a profession as an occupation that masters and standardizes a knowledge product, creates a market for its services, and then enlists the state to preserve it through professional licensure.<sup>190</sup> If successful, the spoils of the professional project—social standing and economic rewards—accrue to occupations capable of a maintaining a collective process of upward mobility for its members who reinforce and perpetuate conditions. True to his words, Abel adapted and applied the market control thesis to American lawyers.<sup>191</sup> Abel's success with using this theory in many of his studies has been such that Marshall remarks the approach, "has dominated the contemporary literature on the legal profession" and "has become the dominant paradigm for examining lawyers".<sup>192</sup> Abel's

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<sup>188</sup> *Ibid.* at 50.

<sup>189</sup> R. L. Abel, "The Sociology of Lawyers: A Bibliographic Guide" (1980) 2:3 *Law & Policy Quarterly* 335 at 336.

<sup>190</sup> M. Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977) at 8.

<sup>191</sup> R. L. Abel, *American Lawyers* (New York: Oxford University Press, 1989) at 39 [hereinafter *American Lawyers*].

<sup>192</sup> J. Marshall, "A shift to post-structural analysis of the legal profession" (2004) 11:1 *International Journal of the Legal Profession* 21 at 21.

writings allow inquiry into how much and in what way the heyday of the legal profession (lasting until around the mid-to-late 20th century) will continue in the future.

The legal profession, like other occupations in capitalist society, strives to control the market for its goods and services.<sup>193</sup> According to Abel, the success or failure of a professional project of market control in law involves: maintaining a scarcity of legal providers (regulating the production of producers), asserting control over production of legal services (regulating the production by producers) through national and state bar associations, and stimulating demand for services.<sup>194</sup> As the legal profession's grip on market control loosens, however, classic legal professionalism weakens and changes in the division of labour and work organization of lawyers follow.<sup>195</sup> Evidence of the American legal profession splintering into disparate and unequal sectors, less interested, or even capable of maintaining market control, is demonstrated by lawyer employment growing in areas outside of the traditional sole-proprietorship and law firm paradigm. For example, Abel reviewed the working conditions of perennially dependent American government lawyers, arguing that they were noticeably underpaid in comparison to private sector lawyers and that these practitioners often leave their jobs for better opportunities elsewhere.<sup>196</sup> Accordingly, the structure and rewards of government employment shapes lawyers with interests and concerns distinct from practitioners in other, more lucrative employment arrangements. Government lawyers are middling beneficiaries of the professional project who should be expected to influence more immediate spheres of economic interests. Providing their services to the government shields them from the larger market, and so their attempts at improving employment rewards unfold at the level of their employer. Kritzer argues that Abel's analysis reveals just how the motivational basis of upholding a professional project involves preserving the economic self-interest of individual practitioners.<sup>197</sup>

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<sup>193</sup> R.L. Abel, "Comparative Sociology of Legal Professions: An Exploratory Essay" (1985) 10:1 *American Bar Foundation Research Journal* 1 at 6.

<sup>194</sup> *American Lawyers*, *supra* note 191 at 27-28.

<sup>195</sup> *Ibid.* at 167.

<sup>196</sup> *Ibid.* at 167-8.

<sup>197</sup> H.M. Kritzer, "Abel and the Professional Project: The Institutional Analysis of the Legal Profession" (1991) 16:3 *Law & Social Inquiry* 529 at 536. In H.W. Arthurs, R. Weisman & F. H. Zemans, "The Canadian Legal Profession" (1986) 11:3 *American Bar Foundation Research Journal* 447, the authors tested the applicability of the professional project thesis to Canadian lawyers. The authors surveyed the structure and functioning of the Canadian bar to conclude it has sustained, in several respects, strong indicia of classic professionalism in comparison to its American counterpart. The profession has been less successful in preventing erosion of market control and supply

Abel's study was a historical analysis of the macro-level social organization of the legal profession. In outlining the parameters of his work, he averred that explanation was not its focus, nor did it look at the daily work of lawyers.<sup>198</sup> Moreover, Abel excluded the exploration of lawyer unionism by positioning it as a suggested alternative organizational form among multiple options available to practitioners.<sup>199</sup> The neo-Weberian-inspired premise that argues employed professionals will attempt to influence the organizations where they work at as part of an occupational group's continuing struggle for institutional recognition helped Harrison develop and apply a processual approach to explain unionization among professionals.<sup>200</sup> The processual approach concerns itself with the capacities of entire professions and sub-groups within them to improve realms of control that unfold at the levels of the organization, work process, politics, and institution.<sup>201</sup> The approach anticipates that subgroups within a profession have different prerogatives, and that various stakeholders take different kinds of actions to protect their interests.<sup>202</sup> In the case of employed professionals unionizing, this outcome may occur when elements such as: legislative and judicial decisions, social norms concerning unionization, recruiting strategies of non-professional unions, collective bargaining patterns among non-professional service occupations, and leadership orchestrating worker mobilization create an opportunity for workers to act and improve their influence over economic, strategic, and operational control.<sup>203</sup> The processual model differs from proletarianization theory by prioritizing contextual, organizational, and interactional factors that propel union activity, rather than bureaucratization invariably threatening professional control, which depends on the power relationships between members of a workforce and administrators.<sup>204</sup>

## 2.5 Nova Scotia Crown Attorneys and Collective Bargaining

Campbell's study on collective bargaining by Nova Scotia Crown prosecutors is the most

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over legal services due to expanding ranks, internal stratification, and sizeable growth of practice in public and private bureaucratic settings.

<sup>198</sup> *American Lawyers*, *supra* note 191 at 14.

<sup>199</sup> *Ibid.* at 211.

<sup>200</sup> M. I. Harrison, "Professional Control as Process: Beyond Structural Theories" (1994) 47:10 *Human Relations* 1201 at 1202.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.* at 1208.

<sup>204</sup> *Ibid.* at 1206.

relevant research into public sector lawyer unionization in Canada.<sup>205</sup> Campbell explored Crown lawyers adopting collective bargaining as a usurpatory strategy aimed at securing greater control over work that exposed one element of a dual form of closure with the other component being that lawyers exclude non-licensed practitioners as members of a self-regulated profession. The study illustrated that collective bargaining was an expedient solution for a faltering professional project associated with dependant employment, while showing prosecutors as a unique occupational community capable of sustaining an ideology of professionalism and collective action.<sup>206</sup>

Campbell explained that Crown attorneys resorted to collective bargaining due to historical and political evolution in employment relations with the province of Nova Scotia. By introducing a Public Prosecution Service that reigned in control over the prosecutorial labour process and developed it as an organization under ineffective management, the province created a hostile working environment.<sup>207</sup> Frustration among prosecutors grew as they felt marginalized by diminishing professionalism, low pay, wage roll-backs and freezes, lack of offices with appropriate amenities and administrative support, arbitrary promotions, and the growing complexity of *Charter* prosecutions.<sup>208</sup> Their dissatisfaction reached a tipping point after demands to the provincial Attorney General for improved working conditions went ignored. Frustrated prosecutors mobilized through their agent, the Nova Scotia Crown Attorney's Association (NSCAA), and staged a provocative, two-day illegal strike in June 1998, calling for a salary setting process.<sup>209</sup> A subsequent inquiry into the Provincial Prosecution Service included a recommendation that prosecutors receive collective bargaining rights.<sup>210</sup> Campbell determined that the actions of Nova Scotia Crown attorneys leading to the acquisition of collective bargaining rights showed them as a group who were neither de-professionalized nor proletarianized, but as workers who had adopted working class militancy to achieve their goals.<sup>211</sup>

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<sup>205</sup> Campbell, *supra* note 30.

<sup>206</sup> *Ibid.* at 84.

<sup>207</sup> *Ibid.* at 181.

<sup>208</sup> *Ibid.* at 189.

<sup>209</sup> *Ibid.* at 193.

<sup>210</sup> *Ibid.* at 195.

<sup>211</sup> *Ibid.* at 183.

## 2.6 Synopsis of Research Literature on Lawyer Unionization

### 2.6.1 *Doctrinal Legal Literature and Lawyer Unionization*

American legal scholarship has produced a substantial literature on the law of lawyer unionization. The methodology of these studies involves jurists analyzing modifications in labour law doctrine and the practice and professional responsibility issues linked to lawyers' collectively bargaining. The output of these studies can be characterized as a literature written for lawyers by academic lawyers. Doctrinal studies on lawyer unionization are steeped in technical and prescriptive analysis and this, ultimately, narrows the scope of inquiry and findings. Consider Rubenstein's brief article on attorney labour unions published in 2007.<sup>212</sup> The article canvassed the familiar discussion of employers opposing attorney unionization on the basis of confidential employee, supervisor or managerial employee exclusion, or, in the alternative, potential concerns with unionized attorneys breaching ethical standards. As the article indicates with, "surprisingly little NLRB precedent with regard to attorneys"<sup>213</sup> jurists are hard pressed to add fresh insight to the subject without new case law. This project proposes that a better use of information yielded from a labour relations board certifying a bargaining agent for a unit of lawyers is to study events leading to that act and its implications (than have, as a study's main goal, an interpretation of a decision as evidence of new directions in jurisprudence governing professional unionization).

The most current studies on attorney unionization published in the law reviews contrast the older literature by advocating for lawyers stationed on the margins of the profession to unionize. Challenging the terms and conditions of employment that interfere with legal aid and large law firm practitioners' regard for responsible client representation and ethical legal practice as the basis for jurists' reasoning, however, does not seem to aid the understanding of DOJ lawyers' interest in collective bargaining. The premise is important, however, for identifying professional ethics as a relevant issue in the determination of whether lawyers should enjoy the right to unionize, bargain collectively, and strike. Professionalism propagates a common culture that shapes the behaviour of practitioners.<sup>214</sup> For example, professionals are influenced by

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<sup>212</sup> M. H. Rubenstein, "Attorney Labor Unions" *New York State Bar Association Journal* (January 2007) 23 at 23.

<sup>213</sup> *Ibid.* at 27.

<sup>214</sup> W. J. Goode, "Community Within a Community: the Professions" (1957) 22:2 *American Sociological Review* 194 at 195.

attitudinal markers that reinforce the perception that unionization and professionalism are mutually exclusive.<sup>215</sup> It remains contested in the literature whether unionization as a blue-collar phenomenon is compatible with professionalism and if collective bargaining can account for the distinct traits of professional work.<sup>216</sup> Yet, examples of collective agreements suggest organized professionals seek contractual provisions that advance professional standards.<sup>217</sup> Ambiguity caused by researchers debating the issue creates an empirical question that this study explores through inquiry into DOJ lawyers' experience with practicing law under a collective agreement. Insight from respondents will provide important (and previously missing) perspective on how DOJ lawyers view belonging to a union while maintaining professional values and ethics, which is relevant to the issue of decreasing departmental resources and increasing practice volumes inciting the AJC to consider job action.

### 2.6.2 *Social Scientific Literature and Lawyer Unionization*

Conflict theories that assume the autonomy and ideals held by employed professionals clash with the demands of an organization offer a logical starting point for considering how dissatisfied professionals react to workplace conditions detrimental to their interests.<sup>218</sup> While the professional proletarianization thesis offers a pattern of thinking for unionism among government lawyers, the question remains whether concepts from the theory apply to events at the DOJ. This is another key empirical question explored in this project through interviews with DOJ lawyers that seek their perception of whether and to what extent collective bargaining was seen as offering a solution to poor working conditions reducing practitioner autonomy and technical control over legal practice.

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<sup>215</sup> L. B. Alexander, "Professionalization and unionization: compatible after all?" (1980) 25:6 *Social Work* 476 at 476; M. McColl & C. Miles-Tapping, "Professional Representation and Conflict in the Workplace" (1986) 53:3 *Canadian Journal of Occupational Therapy* 135 at 136.

<sup>216</sup> E.S. Lightman, "Professionalization, Bureaucratization and Unionization in Social Work" (1982) 56:1 *Social Service Review* 130 at 137; D.M. Rabban, "Is Unionization Compatible With Professionalism?" (1991) 45:1 *Industrial and Labor Relations Review* 97 at 97.

<sup>217</sup> K.P. Swan, *Professional Obligations, Employment Responsibilities and Collective Bargaining* (Kingston: Queen's University Industrial Relations Centre, 1978) at 7; A.M. Ponak, "Unionized Professionals and the Scope of Bargaining: A Study of Nurses" (1981) 34:3 *Industrial and Labor Relations Review* 396 at 406.

<sup>218</sup> L. Cohen et al., "Professional Work and Management" (2003) 32:2 *International Studies of Management & Organization* 3 at 4.

Gorman and Sandefur identify that in the current literature on professional and expert work, researchers are explaining collective group actions by focussing on the processes and social actors that produce outcomes.<sup>219</sup> The process analysis approach concedes that professionals unionizing may be a response to bureaucratic employment, but views it as one of many different options a workforce may choose as they strive to achieve greater influence at work. Process researchers query whether bureaucratic threats to professional control alone can account for the attractiveness of unionization to improve wages and working conditions. This outlook unveils another issue for research that investigates whether DOJ lawyers were attracted to collective bargaining as a means to advance wages and benefits. Asking respondents to reflect on these considerations will provide insight as to whether economic issues—in addition to other contextual and interactional factors—helped the AJC rally around a common cause as part of its development into a champion for the interests of its members.

A review of Campbell's study revealed two gaps this dissertation intends to fill. First, unlike the NSCAA, which was voluntarily recognized as bargaining agent for prosecutors, the *PSRLA* required the AJC to conduct an organizing campaign of DOJ lawyers and prove majority support in order for it to become certified by the PSLRB. This fact creates the opportunity to study that organizing drive and explore the reasons why the majority of DOJ lawyers supported it. This may, in turn, provide evidence whether the proletarianization model or processual model better frames the events under study. Second, Campbell's exploration of Crown prosecutors negotiating a collective bargain was limited to the efforts of NSCAA bargaining team negotiators dealing with the challenges of disclosure, establishing positions, and strategically revealing information briefs (which was related to the strengthening of an occupational community amongst prosecutors).<sup>220</sup> The initial framework agreement that allowed for the Province of Nova Scotia and Crown prosecutors to negotiate pay was not amicably resolved and had to be settled by binding arbitration.<sup>221</sup> While Campbell's assessment of contract negotiations offers an important perspective, an inconclusive picture still remains of how negotiators representing a

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<sup>219</sup> E.H. Gorman & R.L. Sandefur, "'Golden Age,' Quiescence and Revival: How the Sociology of Professions Became the Study of Knowledge-Based Work" (2011) 38:3 *Work and Occupations* 275 at 291.

<sup>220</sup> Campbell, *supra* note 30 at 271.

<sup>221</sup> *In The Matter of Interest Arbitration Between Nova Scotia Crown Attorney's Association and the Province of Nova Scotia by its Department of Human Resources – Decision* (18 January 2008), online: PIPSC <<http://www.pipsc.ca/portal/page/portal/website/groups/nscaa/nscaa-decision-feb08.en.pdf>> (last modified 21 February 2009).

bargaining unit of lawyers prepare for, handle, and analyze the experience of first contract negotiations ending in stalemate. The process of DOJ lawyers negotiating a first collective agreement took a different path that also resulted in arbitration, but ended through *Charter* litigation. The AJC's first contract bargaining negotiations and its outcomes are therefore treated as subjects of interest in and of themselves.

## **2.7 Conclusion**

To conclude, the research literature suggested that the motivations for DOJ lawyers unionizing can be seen as a defense against ideological proletarianization or as a workforce interested in improving its position within the DOJ. It also indicated that to gain improved pay and work conditions collective bargaining is necessary. The review demonstrated that professional ethics and responsibility are a consideration when lawyers unionize and collectively bargain and that further research on the topic is necessary to address differing viewpoints raised by the extant literature. It is therefore appropriate to develop both these areas into topics that are explored in this project through interviews with respondents and in document analysis. As for bargaining agents negotiating a first collective agreement governing lawyers, the available literature reported little about the experience, thus directing an emergent design using initial data for generating research parameters. A grounded approach will allow for an understanding of the situation from documentary and interview data. Now that the background literature that informs this study has been explored, the next chapter will deal with the practicalities of generating a research design.

## CHAPTER 3: Research Design

### 3.1 Introduction

To analyze and discuss the complexities of DOJ lawyers unionizing and the AJC negotiating a first collective agreement, it is important to develop a strong and clear research design. The first step of the process, and before discussing the mechanics of conducting the study, involves identifying how a doctoral dissertation in law that seeks empirical understanding of a workplace phenomenon relates to academic legal scholarship. The early twentieth century American legal realist movement may have petered out during the interwar period, but not before introducing an appreciation for empiricism and the techniques of social science to the study of law. Heise credits empirical scholarship gradually becoming rooted in the academy during the mid-1950s through to the 1970s with: (1) University of Chicago Law School producing the groundbreaking Chicago Jury Project; (2) Walter E. Meyer Research Institute of Law supporting research; (3) generous foundational funding reaching a critical mass; and (4) development of the Law and Society Association.<sup>222</sup> It is not until the turn of the twenty-first century, however, that Diamond and Mueller pinpoint legal scholars popularizing empiricism through their research.<sup>223</sup> Currently, within the Anglo-Commonwealth legal academy, enthusiasm for empirical scholarship continues to steadily grow. This evolution signals important progress because academics producing greater volumes of empirical work strengthen the field's vitality.

In the United Kingdom, the demand for empirical studies to inform policy making and evaluate policy implementation may outstrip producer capacities.<sup>224</sup> The Nuffield Inquiry on British Empirical Research recommends increasing the supply of empirically trained legal scholars to replenish scores of retiring faculty.<sup>225</sup> The study proposes to bolster the empirical

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<sup>222</sup> M. Heise, "The Past, Present and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism" (2002) 4 *University of Illinois Law Review* 819 at 823-24.

<sup>223</sup> S.S. Diamond & P. Mueller, "Empirical Legal Scholarships in Law Reviews" (2010) 6 *Annual Review of Law and Social Science* 581 at 584.

<sup>224</sup> M. Adler, *Recognizing the Problem: Socio-Legal Research Training in the UK* (Edinburgh: University of Edinburgh, 2007) at 12-14, online: UCL.AC <[http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/Adler\\_REPORT.pdf](http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/Adler_REPORT.pdf)> (last modified: January 2007).

<sup>225</sup> D. H. Genn, M. Partington & S. Wheeler, *Law in the Real World: Improving our Understanding of How Law Works* (London: Nuffield Foundation, 2006) at 40, online: Nuffield Foundation <<http://www.nuffieldfoundation.org/sites/default/files/Law%20in%20the%20Real%20World%20full%20report.pdf>> (last modified: November 2006).

studies knowledge of early to mid-career academics through dedicated funding streams, fellowships, professional mentorships, and promoting greater collaboration and improving teaching relationships between law and social science departments.<sup>226</sup> This institutional recognition of applied and theoretical empirical legal scholarship attests to its value as a prized intellectual property.

The Nuffield study informs what the influential Consultative Group on Research and Education in Law foreshadows when it examined Canadian law schools in the early 1980s.<sup>227</sup> *Law and Learning* recommends shoring up law as a scholarly discipline by developing fundamental legal research, which involves studying law as a social phenomenon using empirical and interdisciplinary methods. *Law and Learning* positioned graduate law programmes at the hub of the initiative, as fostering a pluralistic intellectual environment would instill future scholars with diverse research interests. The vast majority of faculty members unfamiliar with fundamental research practices, however, left the leadership overseeing the endeavour unclear in their direction. Macdonald, assessing two decades of *Law and Learning's* legacy, finds that scholars do not produce enough fundamental research.<sup>228</sup> Backhouse confronts the field's inertia by urging professors and graduate students to conduct more interdisciplinary work.<sup>229</sup> Her clarion call reprises graduate students' role as participants in *Law and Learning's* plan for sophisticated legal scholarship. Graduate law students who lack social or natural sciences training, however, may not be keen on conducting an empirical dissertation as minimal experience breeds doubts over producing a valid study, which, in turn, stunts initiative. Good empirical research is distinguished by an investigator revealing how observations are collected and analyzed so that conclusions reasonably follow from data, while poor empirical research overlooks these principles.<sup>230</sup> For graduate students unskilled in empirical research, law school

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<sup>226</sup> *Ibid.* at 41-44.

<sup>227</sup> Information Division of the Social Sciences and Humanities Research Council of Canada, *Law and Learning: Report to the Social Science and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Ottawa: Minister of Supply and Services, 1983) at 194 [hereinafter *Law and Learning*].

<sup>228</sup> R. A. Macdonald, "Still Law and Still Learning" (2003) 18:1 *Canadian Journal of Law & Society* 5 at 18.

<sup>229</sup> C. Backhouse, "Dossier: Revisiting the *Arthurs Report* Twenty Years Later" (2003) 18:1 *Canadian Journal of Law and Society* 33 at 41.

<sup>230</sup> S.S. Diamond, "Empirical Marine Life in Legal Waters: Clams, Dolphins, and Plankton" (2002) 4 *University of Illinois Law Review* 803 at 804.

journals do not necessarily help make the training easier as they publish articles demonstrating both good and bad examples of empirical work.<sup>231</sup>

This chapter offers a framework for empirical training by articulating the procedures involved in collecting and analyzing the data used to answer the study's research questions. The chapter categorizes the various research methods of legal scholarship and then describes how the study falls within the socio-legal rubric. The nature of this investigation invokes the case study because, as Rowley observes, employing the format calls for some evidence of mastery in its use.<sup>232</sup> This comment alerts us to the fact that readers frown upon case studies that neglect sound research design.<sup>233</sup> Case studies are crafted using a range of data from many sources. After data is collected, it must be analyzed and reported. As the task is the investigator's responsibility and requires some assurance of trustworthiness, Caelli, Ray and Mill's four-point design for demonstrating the credibility of findings is applied to the study. Taking up this credibility framework, which consumes a considerable portion of the chapter's discussion, also attends to Luck, Jackson and Usher encouraging investigators to manage the reliability and researcher bias associated with case study research by clarifying their theoretical and philosophical positions, logic of thinking and assurance of rigour.<sup>234</sup> Finally, the chapter concludes by outlining the limitations of the study and then summarizing the key points regarding the construction of a research design.

### **3.2 The Four Approaches to Legal Scholarship**

When enough scholars share common perspective on studying law they create an intellectual community. Learned groups differ from one another because the proponents of each

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<sup>231</sup> E. Chambliss, "When Do Facts Persuade? Some Thoughts On The Market for "Empirical Legal Studies" (2008) 71:2 *Law & Contemporary Problems* 17 at 21; L. Epstein & G. King, "The Rules of Inference" (2002) 69:1 *University of Chicago Law Review* 1 at 6; V.V. Palmer & J. Lavendis, "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function" (2008) 82:4 *Tulane Law Review* 1291; But see K. R. Tully and E. P. Gay, "The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function" (2009) 69:2 *Louisiana Law Review* 281 at 287; R. Newman, J. Speyrer & D. Terrel, "A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function" (2009) 69:2 *Louisiana Law Review* 307 at 307.

<sup>232</sup> J. Rowley, "Using Case Studies in Research" (2002) 25:1 *Management Research News* 16 at 25.

<sup>233</sup> S. Dopson, "The potential of the case study method for organisational analysis" (2003) 31:2 *Policy & Politics* 218 at 219.

<sup>234</sup> L. Luck, D. Jackson & K. Usher, "Case study: a bridge across the paradigms" (2006) 13:2 *Nursing Inquiry* 103 at 109.

subscribe to different epistemologies that instruct specific conceptions about law. Each consortium maintains differing intellectual priorities, research agendas, and a body of representative literature that affords prospective adherents models with which to align their research. The main methodologies used in dissertations of law and associated with leading schools of legal philosophy are: doctrinal, historical, comparative, and socio-legal.<sup>235</sup>

Doctrinal scholarship represents the study of law as a self-contained and professional discipline. The researcher views court decisions, statutes, and legislation as sources of legal rules that provide data for evaluation. Their analysis may involve identifying or explaining a new area of law or trends in an existing one. Legal doctrine is often critiqued, and normative prescriptions for judges or policy makers on how to reform an unsatisfactory law can encompass a study.<sup>236</sup> Doctrinal studies represent the leading form of academic legal research conducted. The bench and bar use doctrinal literature for their practice, while the professoriate relies on it for their teaching.

Legal history involves examining past events, laws, institutions, lawyers and judges.<sup>237</sup> The methodology involves describing how legal landscapes once existed as crucial to our understanding of the ways modernization shapes and transforms the legal culture of a society. *Law and Learning* defines historical methods as, “tracing the history of a particular development within the law and possibly as well its relationship to the history of society”.<sup>238</sup> The legal historian uses primary sources such as court records, legislation and government documents that are relevant to the period and topic under study.

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<sup>235</sup> Taxonomy developed from M. Salter & J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (New York: Pearson Longman Publishing, 2007) at 118; M. McConville & W. H. Chui, “Introduction and Overview” in M. McConville & W. H. Chui, eds., *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 1 at 5.

<sup>236</sup> See G. England, “Evaluating the Implications of *Honda Canada v. Keays*” (2008) 14:3 *Canadian Labour and Employment Law Journal* 327; C.J. Hutchinson, “Which Kraft of Statutory Interpretation? A Supreme Court of Canada Trilogy on Intellectual Property Law” (2008) 46:1 *Alberta Law Review* 1; Y. Van Wachem, “Spousal Support Obligations on Death: More than You Bargained For” (2009) 28:1 *Canadian Family Law Quarterly* 51.

<sup>237</sup> See C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999); G. P. Marchildon, “Corporate Lawyers and the Second Industrial Revolution in Canada” (2001) 64:1 *Saskatchewan Law Review* 99; C. Backhouse & W. Pue, eds., *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009).

<sup>238</sup> *Law and Learning*, *supra* note 227 at 92.

While it is neither new nor novel comparative legal scholarship is currently in vogue and is enjoying a considerable upsurge in visible practice. Given that globalization exerts tremendous pressure on the growing integration of foreign and domestic laws, the structuring of international legal norms, and the creation of new regulatory frameworks that overlap countries, comparative legal scholarship looks at the ways law develops and works in one national legal systems in comparison or contrast to another.<sup>239</sup> It is a preferred methodology for evaluating how disparate jurisdictions react to similar legal issues confronting them.

Socio-legal approaches round out the methodological taxonomy. This last approach studies people's interactions and intersections with law and legal institutions. The socio-legal scholar views law as a social construct and studies its workings through theoretical perspectives, interdisciplinary approaches, and methods of the social sciences, economics, the humanities and other non-law disciplines. In this methodology, research questions are posed and answered in terms of law as a phenomenon with analysis directed towards evaluating, predicting, and understanding legal doctrine or building theory.

This study involves an inquiry about lawyers forming an association to represent their workplace interests through collective bargaining. Once formed, their union engages with the employer and judicial institutions where each interaction adds another level of depth and complexity for analysis. Understanding the developments responsible for outcomes requires data collection methods that allow for historical and contemporary assessments. Of the four methodologies defined above, the socio-legal research strategy is most appropriate for this study because it offers access to the tools of the social sciences that can capture and expose the multiple perspectives of lawyers interacting with collective bargaining.

### **3.3 Socio-legal Paradigm: Law as Social Research**

Jurists and social scientists produce empirical knowledge about law and their scholarship is pragmatic. As Singleton and Straits note, "all research begins with the selection of a

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<sup>239</sup> See J.C. Reitz, "How to Do Comparative Law" (1998) 46 *The American Journal of Comparative Law* 617.

problem”.<sup>240</sup> This includes legal scholarship.<sup>241</sup> Academics pursue specific research problems because the questions raised by their examination can expose a gap in knowledge of some practical or theoretical condition.<sup>242</sup> Conducting a study to address a deficiency builds understanding that may otherwise remain obscured. A study that explores, describes, or explains law as a phenomenon affecting individuals represents social research.<sup>243</sup> Steinus and her colleagues propose that the fundamental goal of all social research is to detail a conceptually adequate description of a historically specific topic.<sup>244</sup> Within this definition then, social research is the objectively organized and systematic pursuit of knowledge about reality through data and theory,<sup>245</sup> whereas data is empirical evidence or information gathered according to a procedure and protocol,<sup>246</sup> and theory constitutes, “the systematic set of interrelated statements intending to explain some aspect of social life”.<sup>247</sup> Theory helps an investigator communicate discoveries about their project and compare and apply study findings to what the literature reports or what occurs in actual practice. The type of theory generated depends on the investigator’s underlying philosophy which manifests itself through a positivist, interpretive, or critical positioning.<sup>248</sup>

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<sup>240</sup> R. A. Singleton Jr. & B.C. Straits, *Approaches to Social Research*, 3rd ed. (New York: Oxford University Press, 1999) at 65.

<sup>241</sup> E. Volokh, “Writing a Student Article” (1998) 48:2 *Journal of Legal Education* 247 at 248; E. Fajans & M. R. Falk, *Scholarly Writing For Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers*, 3rd ed. (St. Paul: Thomson West, 2005) at 15; T.B. Dawson, “Legal Research in a Social Science Setting: The Problem of Method (1992) 14 *Dalhousie Law Journal* 445 at 459.

<sup>242</sup> S. B. Merriam, *Qualitative Research and Case Study Applications in Education* (San Francisco: Jossey-Bass Publishers, 1998) at 58; W.C. Booth, G.G. Colomb, & J. M. Williams, *The Craft of Research*, 2nd ed. (Chicago: University of Chicago Press, 2003) at 59; F.M. Nasser, “Selecting an Appropriate Research Design” in E.I. Farmer & J.W. Rojewski, eds., *Research Pathways: Writing Professional Papers, Theses and Dissertations in Workforce Education* (Lanham: University Press of America, 2001) 91 at 93.

<sup>243</sup> Y. Wadsworth, *Do It Yourself Social Research*, 3rd ed. (Walnut Creek: Left Coast Press, 2011) at 9.

<sup>244</sup> K. Steinus et al., “How to Write Publishable Qualitative Research” in T.F. Babor et al., eds., *Publishing Addiction Science: A Guide for the Perplexed*, 2nd ed. (Brentwood, UK: Multi-Science Publishing Company, 2008) 82 at 84, online: [http://www.parint.org/isajewebsite/bookimages/isaje\\_2nd\\_edition\\_chapter6.pdf](http://www.parint.org/isajewebsite/bookimages/isaje_2nd_edition_chapter6.pdf) (date accessed: 2 March 2011).

<sup>245</sup> M.E. Amin, *Social Science Research: Conception, Methodology & Analysis* (Kampala: Makerere University Press) at 29.

<sup>246</sup> W. L. Neuman, *Basics of Social Research: Qualitative and Quantitative Approaches*, 5th ed. (Boston: Allyn and Bacon, 2003) at 7.

<sup>247</sup> E.R. Babbie, *The Practice of Social Research*, 10th ed. (Belmont: Wadsworth Thompson, 2004) at 12.

<sup>248</sup> Merriam, *supra* note 242 at 5; M. D. Myers, *Qualitative Research in Business & Management* (Thousand Oaks: Sage Publications, 2009) at 37.

A research design within the positivist tradition, for example, tests or develops theory using hypotheses.<sup>249</sup> Positivist research works deductively to discover causal relationships as the basis of generalized knowledge.<sup>250</sup> Objective knowledge is produced by translating data into quantifiable variables, through statistics as proxies for population parameters, and by purposely controlling for external variations.<sup>251</sup> An interpretive approach, alternatively, represents a phenomenological tradition of exploring human behaviour and experience from the perspective of the audience under investigation.<sup>252</sup> Inductive research understands and describes a group, institution, situation, or event to develop theory from written, observed or imaged data.<sup>253</sup> When the study's goal is to critique power structures that oppress people, however, a critical positioning works best. Critical theorists' research looks at lived experiences and human interactions within society. Critical theory involves ethnographic and historical studies of organizational processes and structures aimed at confronting an injustice of a particular community.<sup>254</sup> Such studies educate audiences about hidden interests and contradictions by critiquing oppressive power relations and the critical theory that supports the purpose is built either deductively or inductively.<sup>255</sup>

The literature review in chapter 2 shows that public sector lawyer unionism, and the process and outcome of lawyers collectively bargaining, are topics in need of greater understanding. To this purpose, descriptive theory building in the interpretivist tradition, as

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<sup>249</sup> J. W. Creswell, *Research Design: Quantitative, Qualitative and Mixed Method Approaches*, 2nd ed. (Thousand Oaks: Sage Publications, 2003) at 22 [hereinafter *Research Design*]; K.G. Esterberg, *Qualitative Methods in Social Research* (New York: McGraw Hill, 2002) at 7.

<sup>250</sup> G. Pare, "Enhancing the Rigor of Qualitative Research: An Application of a Case Methodology to Build Theories of IT Implementation" (2002) 7:4 *The Qualitative Report*, online: Nova Southeastern University <<http://www.nova.edu/ssss/QR/QR7-4/pare.html>> (date accessed: 20 July 2009).

<sup>251</sup> G. Langelett, "The Qualitative Tradition: A Complimentary Paradigm for Research in Economic Education" at 4, online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=377000](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=377000)> (date accessed: 14 September 2009).

<sup>252</sup> M. Del Balso & A.D. Lewis, *First Steps: A Guide to Social Research*, 3rd ed. (Toronto: Thomson Nelson, 2005) at 38.

<sup>253</sup> T. Palys, *Research Decisions: Quantitative and Qualitative Approaches*, 2nd ed. (Toronto: Harcourt Canada, 1997) at 19; K. Smith, M. Todd & J. Weldman, *Doing Your Social Science Dissertation* (New York: Routledge, 2009) at 54.

<sup>254</sup> J.L. Kincheloe & P.L. McLaren, "Rethinking Critical Theory and Qualitative Research" in N.K. Denzin & Y.S. Lincoln, eds., *Handbook of Qualitative Research* (Thousand Oaks: Sage Publishing, 1994) 138 at 140; S.J. Taylor & R. Bogdan, *Introduction to Qualitative Research Methods: A Guidebook and Resource*, 3rd ed. (New York: John Wiley & Sons, 1998) at 3.

<sup>255</sup> B. Gay & S. Weaver, "Theory Building and Paradigms: A Primer on the Nuances of Theory Construction" (2011) 1:2 *American International Journal of Contemporary Research* 24 at 30.

outlined above, is appropriate.<sup>256</sup> The qualitative approach is the methodological compliment for interpretivism as its methods represent a naturalistic research strategy that can document a causal process within an individual case and the ways people make sense of it.<sup>257</sup> Qualitative research is better comprehended by its unifying features rather than by any standard definition.<sup>258</sup> Academic disciplines conceive qualitative research differently as well as do practitioners working within the same field. For example, jurists must determine which form of qualitative research suits their intellectual preference and reflects their work. Dobinson and Johns argue that doctrinal research is qualitative because, in addition to understanding social context and interpretation, it is non-numerical and involves the process of selecting and weighing materials in light of hierarchy and authority.<sup>259</sup> Webley's understanding of the method partially echoes that of Dobinson and Johns' as the case-based approach of studying law through precedent is a form of qualitative research. She acknowledges, however, that qualitative legal research also encompasses an orthodox form. This mode involves capturing and categorizing social phenomena and their meaning using direct observation, in-depth interviews, and document analysis.<sup>260</sup>

### 3.4 Qualitative Methods: The Case Study

As it has been established, this study's qualitative orientation is empirical, and a qualitative study can be conducted in one of five ways: (1) Biography; (2) Phenomenology; (3) Grounded Theory; (4) Ethnography; or (5) Case Study.<sup>261</sup> The selection of the most appropriate

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<sup>256</sup> J. Fawcett, *The Relationship Between Theory and Research*, 3rd ed. (Philadelphia: F. A. Davis Company, 1999) at 15; D.R. Cooper & C.W. Emory, *Business Research Methods*, 5th ed. (Boston: Irwin, 1995) at 27.

<sup>257</sup> M. Goodwin, "Constructing and Interpreting Qualitative Data" in A. Bond, ed., *Writing Your Master's Thesis* (Bishops Lydeard: Studymates Ltd., 2004) 21 at 21; D. Skinner, C. Tagg, & J. Holloway, "Managers and Research: The Pros and Cons of Qualitative Approaches" (2000) 31:2 *Management Learning* 163 at 165; J. Mahoney & G. Goertz, "A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research" 14:3 (2006) *Political Analysis* 227 at 230.

<sup>258</sup> J. V. Maanen, "Reclaiming Qualitative Methods for Organizational Research: A Preface" (1979) 24:4 *Administrative Science Quarterly* 520 at 520; A. F. Long & M. Godfrey, "An Evaluation Tool to Assess the Quality of Qualitative Research Studies" (2004) 7:2 *International Journal of Social Research Methodology* 181 at 183; R.C. Bogdan & S.K. Bilken, *Qualitative Research for Education: An Introduction to Theories and Methods*, 5th ed. (New York: Pearson Education, 2006) at 4; Merriam, *supra* note 242 at 6; *Research Design*, *supra* note 249 at 181.

<sup>259</sup> I.R. Dobinson & F.B. Johns, "Qualitative Legal Research" in M. McConville & W. Hong Chui, eds., *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007) 16 at 19, 22.

<sup>260</sup> L. Webley, "Qualitative Approaches to Empirical Research" in P. Cane & H. M. Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (New York: Oxford University Press, 2010) 926 at 928.

<sup>261</sup> J. W. Creswell, *Qualitative Research and Design: Choosing Among Five Traditions* (Thousand Oaks: Sage Publications, 1998) at 65.

mode depends on the research question and the phenomenon under investigation.<sup>262</sup> In the instance of this research, the case study offers the most effective structure for handling:

- (1) A research area that is newer and less developed, and an examination of the phenomenon under investigation requires an understanding of context;<sup>263</sup>
- (2) Actual practices, including the details of significant activities that may be unusual or infrequent;<sup>264</sup>
- (3) A research question that has a what, how, and why component;<sup>265</sup>
- (4) The study's call for the concentration on the description of social processes and an explanation of their dynamics.<sup>266</sup>

The criteria for using a case study match up with the aims of this project. First, union organizing drives among Canadian public sector lawyers occur infrequently. Second, the study's central research questions involve a "what" component. Third, the perceptions, meanings and attitudes to unionizing and working under a collective bargain agreement are variables that are not easily quantifiable. Fourth, as case studies describe and explain events within context, the behaviours involved in the collective bargaining process are to be understood holistically. All of these stated factors pointed towards designing and conducting this inquiry as a qualitative case study.

Tellis advises that if the uniqueness of a phenomenon disallows for comparison with another case then a single-case design should be chosen, as it is in this project.<sup>267</sup> A single-case design will be embedded when a phenomenon under investigation is complex. The larger subject (i.e. unionization) is looked at in terms of units with each part being studied individually. The results from each unit of analysis are then drawn together to yield an overall picture of the

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<sup>262</sup> C.A. Romano, "Research Strategies for Small Business: A Case Study Approach" (1989) 7:4 *International Small Business Journal* 35 at 36; M.M. Byrne, "Linking philosophy, methodology, and methods in qualitative research" (2001) 73:1 *AORN Journal*, online: Expanded Academic ASAP (GALE) <<http://find.galegroup.com.ezproxy.library.yorku.ca/gtx/start.do?prodId=EAIM>> (date accessed: 4 September 2009).

<sup>263</sup> P. Darke, G. Shanks & M. Broadbent, "Successfully Completing Case Study Research" (1998) 8 *Information System Journal* 273 at 279.

<sup>264</sup> D.J. Cooper & W. Morgan, "Case Study Research in Accounting" (2008) 22:2 *Accounting Horizons* 159 at 160.

<sup>265</sup> C. Mariano, "Case Study: The Method" in P. L. Munhall, ed., *Nursing Research*, 3rd ed. (Sudbury: Jones and Bartlett Publishers, 2001) 359 at 366.

<sup>266</sup> E. Hijmans & F. Wester, "Comparing the Case Study with Other Methodologies" *Encyclopedia of Case Study Research* (Thousand Oaks: Sage Publications, 2009), online: York University Library <[http://www.sageereference.com.ezproxy.library.yorku.ca/casestudy/Article\\_n65.html](http://www.sageereference.com.ezproxy.library.yorku.ca/casestudy/Article_n65.html)> (date accessed: 5 June 2011).

<sup>267</sup> W. Tellis, "Introduction to Case Study" (1997) 3:2 *The Qualitative Report*, online: Nova Southeastern University <<http://www.nova.edu/ssss/QR/QR3-2/tellis1.html>> (date accessed: 27 January 2011).

subject.<sup>268</sup> This case study is embedded and broken down into two parts with each component corresponding to a research question: one unit of analysis consists of what instigated DOJ lawyers to unionize under the AJC, and the other involves the AJC concluding a first collective agreement. Each unit invites particular understanding and reporting which are developed as the subjects of chapters 5 and 6 respectively.

### 3.5 Case Study Assessment Standards

#### 3.5.1 *Generic Qualitative Case Study*

Yin, Stake, Merriam, and Perry, among other methodologists offer helpful strategies for designing and conducting case study research.<sup>269</sup> Their guidance offers a necessary orientation for jurists who want to conduct a case study but better know the term as part of their pedagogy.<sup>270</sup> Jurists, like the novice researchers from other disciplines, must confront a body of literature on case study methodology that is contradictory and confusing at first blush.<sup>271</sup> Appleton proposes that if an investigator adopts a particular author's case study strategy it should align with their philosophical and methodological stance.<sup>272</sup> This suggestion makes sense because positivist and interpretive philosophies each articulate the process and assess the outcome of inquiry differently.<sup>273</sup> Qualitative case studies produce research that requires appropriate assessment standards which suit the design of this project.<sup>274</sup>

The interdisciplinary orientation of this dissertation situated the evaluation criteria in need of specific framing. Merriam's discussion on the characteristics of generic qualitative case study offers an approach that accounts for the vagaries of interdisciplinary synthesis. She

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<sup>268</sup> Rowley, *supra* note 232 at 22.

<sup>269</sup> Yin, *supra* note 81, *Art of Case Study*, *supra* note 113, Merriam, *supra* note 242; C. Perry, "Process of a case study methodology for postgraduate research in marketing" (1998) 32:9/10 *European Journal of Marketing* 785; Hancock & Algozzine, *supra* note 84; G. Thomas, *How To Do Your Case Study: A Guide for Researchers and Students* (Thousand Oaks: Sage Publications, 2011).

<sup>270</sup> R.L Weaver, "Langdell's Legacy: Living with the Case Method" (1991) 36:2 *Villanova Law Review* 517

<sup>271</sup> P.A. Brown, "A Review of the Literature on Case Study Research" (2008) 1:1 *Canadian Journal for New Scholars in Education* 1 at 2.

<sup>272</sup> J. Appleton, "Critiquing approaches to case study design for a constructivist inquiry" (2002) 2:2 *Qualitative Research Journal* 80 at 97.

<sup>273</sup> E.G. Guba & Y.S. Lincoln, "Competing Paradigms in Qualitative Research" in N. Denzin & Y. Lincoln, eds., *Handbook of Qualitative Research* (Thousand Oaks: Sage Publications, 1994) 105 at 108.

<sup>274</sup> G. Symon, C. Cassell & R. Dickson, "Expanding our research and practice through innovative research methods" (2000) 9:4 *European Journal of Work and Organizational Psychology* 457 at 460.

describes a basic or generic qualitative study as one that seeks, “to discover and understand a phenomenon, a process, or the perspectives and worldviews of the people involved”.<sup>275</sup> Findings consist of a mix of description and analysis of an event,<sup>276</sup> and the generic qualitative approach can work in conjunction with the case study.<sup>277</sup> Caelli, Ray and Mill use credibility as a benchmark for validating a generic qualitative research. A case study seeking credibility as outlined by the generic qualitative format should address four factors: (1) theoretical positioning of the researcher; (2) methodology and methods; (3) rigour; and (4) analytic lens.

### 3.5.2 *Theoretical Positioning*

Theoretical positioning invites reflexivity from the researcher as to the motivation, assumptions and history that are instigating and influencing their study.<sup>278</sup> Acknowledging a researcher’s position to the research group and data helps identify their entry point to the inquiry.<sup>279</sup> Any study capable sustaining an investigator’s prolonged efforts must strongly capture their notice at the outset. My own interest was piqued after inadvertently discovering the PSLRB decision on the AJC’s certification application. The importance of reading this ruling was magnified by my understanding as a lawyer that unionism was unheard of amongst my private bar colleagues. As I found out about lawyers unionizing after the fact (and through print, not direct experience) it shaped my identity as a researcher: I came to the subject as an outsider.

I commenced the study with minimal knowledge of the DOJ and its workforce. Limited understanding fed my curiosity as a researcher and as a lawyer interested in the practice of law on behalf of the federal government. Having litigated one judicial review against counsel from the DOJ provided a focussed, albeit limited perspective of their work. I further learned about my subject while conducting research in the field, and it was there that my legal training helped me gather relevant data. When I was conversing in court hallways and interviewing respondents, my

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<sup>275</sup> Merriam, *supra* note 242 at 11.

<sup>276</sup> *Ibid.*; M. Sandelowski, “Whatever Happened to Qualitative Description” (2000) 23 *Research in Nursing & Health* 334 at 336.

<sup>277</sup> Merriam, *supra* note 242 at 20.

<sup>278</sup> K. Caelli, L. Ray & J. Mill, “‘Clear as Mud’: Toward Greater Clarity in Generic Qualitative Research” (2003) 2:2 *International Journal of Qualitative Methods* 1 at 9, online: University of Alberta <<http://www.ualberta.ca/~iiqm/backissues/pdf/caellietal.pdf>> (date accessed: 5 September 2009).

<sup>279</sup> Bogdan & Bilken, *supra* note 258 at 38.

familiarity with the *lingua franca* of practicing law helped me greatly in building an initial rapport with the individuals involved.

### 3.5.3 *Methodology and Methods*

Achieving congruence between methodology and methods requires that researchers understand and convey the differences between these two fundamentals of social research.<sup>280</sup> Evans and Gruba distinguish the concepts by defining the former term as a philosophical underpinning taken towards a study while the latter represents steps taken to answer the research question.<sup>281</sup> Once the researcher identifies an empirical dimension to a study, he or she can then direct attention to the ways in which data is collected and analyzed. Obtaining evidence from miscellaneous sources is the hallmark of case study methods, and Cunningham explains that tapping multiple data streams is necessary as the investigator has no control over the research setting of a case.<sup>282</sup> Various sources are used, therefore, because each contributes evidence independently of, or in corroboration with, the other. Whether the researcher's choice of techniques was appropriate to obtain data is also important because it offers a partial measure of study quality.<sup>283</sup> Typically, case study evidence comes from archival records, documents, interviews, direct observation, participant observation, and physical artefacts.<sup>284</sup> For this particular study, interviews, documents, and participant observation were consulted and employed.

### 3.5.4 *Interviews*

#### 3.5.4.a *Ethics*

An interview involves two people participating in a focussed, mutual conversation. An interview seeks to learn the perspective of others, so the interviewer must take care to minimize any risks associated with interviewees sharing their thoughts. Before I could conduct interviews for this study, my project first had to clear an ethics review. The process is overseen by the

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<sup>280</sup> Caelli, Ray & Mill, *supra* note 278 at 12.

<sup>281</sup> D. Evans & P. Gruba, *How To Write A Better Thesis*, 2nd ed. (Carlton: Melbourne University Press, 2005) at 89.

<sup>282</sup> J. B. Cunningham, "Case study principles for different types of cases" (1997) 31:4 *Quality & Quantity* 401 at 403.

<sup>283</sup> J. Kitay & R. Callus, "The Role and Challenge of Case Study Design in Industrial Relations Research" in K. Whitfield & G. Strauss, eds., *Researching the World of Work: Strategies and Methods in Studying Industrial Relations* (Ithaca: Cornell University Press, 1998) 101 at 104.

<sup>284</sup> Yin, *supra* note 81 at 80.

Office of Research Ethics at York University (“ORE”), which looks to preserve the safety, welfare and dignity of research participants. The ORE expects that investigators adhere to university guidelines for ethical research. I was required to complete a Human Participants Review Sub-Committee tutorial on the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans. I also submitted a proposal and requisite protocol forms before ORE issued their certificate of ethics approval (#STU 2010-095).<sup>285</sup>

#### 3.5.4.b *Semi-Structured Interviews*

The semi-structured interview format was used to organize interview questions. Semi-structured interviews involve the interviewer identifying themes of interest and generating questions prior to speaking with respondents. Each of the five qualitative research modes puts interview data to different use. Gubrium and Holstein’s taxonomy of qualitative research assisted in clarifying whether the final interview protocols fulfilled the objectives of this inquiry.<sup>286</sup> Elliott, reviewing Gubrium and Holstein’s work explains the naturalist approach recognizes the social world provides an external reality, observable and describable by the researcher.<sup>287</sup> This allows for interview questions focusing on who, what, where, when, how, and the why behind the subject of investigation, which is what Clardy proposes the language should be when investigating developments in an organization.<sup>288</sup>

There were two primary interview protocols produced: one was for DOJ lawyers and the other for AJC personnel. A pilot interview protocol for DOJ lawyers was circulated to a solicitor and a small, general practice law clerk for feedback on the relevancy of interview questions. Afterwards, the interview protocol was submitted for consultation on syntax to a member of York University’s Writing Centre. Another edit to the protocols came after losing a potential respondent. A DOJ lawyer initially expressed interest in being interviewed, but later declined citing time constraints. Their withdrawal alerted me to respect the fact that many respondents have tight schedules. Both interview protocols were then scrutinized for superfluous background

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<sup>285</sup> A copy of the Certificate of Ethics Approval for this study is included in Appendix A.

<sup>286</sup> J. F. Gubrium & J.A. Holstein, *The New Language of Qualitative Research* (New York: Oxford University Press, 1997) at 19.

<sup>287</sup> J. Elliott, *Using Narrative in Social Research: Qualitative and Quantitative Approaches* (Thousand Oaks: Sage Publications, 2005) at 18

<sup>288</sup> *Ibid.* at 19, Clardy, *supra* note 83.

questions, such as what law school respondents attended, and duplicative questions were consolidated in order to shorten the time commitment. They were revised in anticipation of interviews lasting between forty to sixty minutes in length. Polished interview protocols were sent to a strategic informant aligned with the AJC. The importance of recruiting a key contact from an organization under study is well documented.<sup>289</sup> The reviewer analyzed interview questions and provided suggestions on content. Their insight was particularly helpful in linking DOJ lawyers unionizing with legislative amendments. Several questions on union organizing were amended to be less directional.

### 3.5.4.c Accessing and Interviewing Respondents

Locating study respondents takes work, and recruiting lawyers can be especially tricky. Danet et al., report their funded observational study on lawyers and clients being scuttled because the investigators could not negotiate access to solicitor-client interactions.<sup>290</sup> Bumatay, citing Lund, notes government lawyers may hesitate being interviewed because multiple pressures deter them from speaking candidly with researchers.<sup>291</sup> It is quite possible that several of the people I contacted for participation in the study considered this rationale when overlooking the request. Respondents agreeing to an interview were primarily secured using the tactics of purposeful and snowball sampling. Their recruitment was informed with the contextualized-consequentialist ethics model in mind. The philosophy requires the researcher develop relationships of respect and trust that are non-coercive and not based on deception.<sup>292</sup>

Obtaining a list of lawyers employed by the DOJ is an undemanding task. A search of commercially published lawyer listings and on-line provincial law society member directories yields their contact information. A “shot in the dark” mass mailing campaign undercuts

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<sup>289</sup> R.S. Weiss, *Learning From Strangers: The Art and Method of Qualitative Interview Studies* (New York: The Free Press, 1994) at 20; P.C. Yeager & K. E. Kram, “Fielding Hot Topics in Cool Settings: The Study of Corporate Ethics” in R. Hertz & J.B. Imber, eds., *Studying Elites Using Qualitative Methods* (Thousand Oaks: Sage Publications, 1995) 40 at 51; W.S Harvey, “Methodological Approaches for Interviewing Elites” (2010) 4:3 *Geography Compass* at 196.

<sup>290</sup> B. Danet, K. Hoffman & N. Kermish, “Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure” (1980) 14:4 *Law & Society Review* 905 at 905.

<sup>291</sup> P.J. Bumatay, “Causes, Commitments and Counsel: A Study of Political and Professional Obligations Among Bush Administration Lawyers” (2007) 31:1 *The Journal of the Legal Profession* 1 at 23.

<sup>292</sup> N.K. Denzin & Y.S. Lincoln, “Entering the Field of Qualitative Research” in N.K. Denzin & Y.S. Lincoln, eds., *The Landscape of Qualitative Research: Theories and Issues* (Thousand Oaks: Sage Publications, 1998) 1 at 39.

conventional wisdom on recruiting elite respondents and was disregarded. Initial respondents were therefore solicited based on their advanced educational standing or service to the broader legal community which suggested an increased predilection for study participation. Court transcripts and AJC news bulletins identifying noteworthy people associated with the union were other resources consulted for spotting potential respondents. This particular enlisting technique underlies purposeful sampling which suggests interviewing specific individuals who will most likely broaden the theoretical explanation.<sup>293</sup> Snowball sampling occurred with a few interviewees who recommended the names of their colleagues who might be interested in the study. Two interviews came about spontaneously during fieldwork.

By learning a little about potential respondents, I was able to better tailor their letters of study invitation. A customized letter creates space for introducing the study, the researcher, study voluntariness and anonymity, and noting the significance of contributing to the study.<sup>294</sup> In short, the letters sent were meant to encourage participation. When counsel is tasked with concluding a business transaction or preparing argument for trial, time is a commodity that is understandably guarded. An hour spent partaking in the study was an hour of lost productivity needing to be recouped later in the day for my participants. As well, counsel's hourly *diem* dwarfs the \$50 honorarium offered for study involvement, thus the decision to be interviewed was ultimately based on the respondent's interest. Mailed letters were followed up by e-mails. A respondent positively replying opened the door for an interview to be scheduled. Interviews were conducted by phone in all cases except for one where the respondent preferred an in-person interview. I went to Ottawa to meet with them. Of course, travelling to various cities across Canada for interviews would be a time-consuming and expensive endeavour. Under these circumstances, telephone interviews were acceptable.<sup>295</sup>

Twenty-three interviews were conducted. They are divided among eleven current and three former DOJ lawyers, seven AJC negotiating team members, and two senior AJC administrators. One standard interview protocol was used for rank-and-file DOJ lawyers and

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<sup>293</sup> Bogdan & Bilken, *supra* note 258 at 73.

<sup>294</sup> K.J. Delaney "Interviewing Organizational Elites" (2007) 1:1 *Sociological Compass* 208 at 212.

<sup>295</sup> M-F. Gratton & S. O'Donnell, Communications technologies for focus groups with remote communities: A case study of research with First Nations in Canada (2011) 11:2 *Qualitative Research* 159 at 160.

another for AJC personnel to assure some comparability between answers provided by respondents from each of the two pools.<sup>296</sup> Questions for DOJ lawyers covered issues of ethics, bureaucracy or economic factors behind the decision to unionize, the AJC's organizing campaign and delay in negotiating a first contract. Questions for union representatives focussed on involvement with the AJC, the AJC conducting an organizing campaign, and first contract negotiations.<sup>297</sup> Two interview protocols were tailored for specific individuals whose unique experiences required some modification in questions. As interviewing progressed, questions to the DOJ lawyer protocol were adjusted to improve procedure and tease out new data emerging from previous interviews.

Before interviews started, respondents were reminded of the voluntariness and confidentiality of study participation. They were asked whether they wished the interview be audio taped or transcribed by hand. If respondents declined being recorded, then notes were taken and later typed up. Audio taped interviews were produced in mp3 format and sent to a professional transcriptionist for processing. The distribution between audio-taped and hand transcripts was roughly proportional. Respondents are acknowledged in the analysis by a lawyer or AJC negotiating team member designation and a number. Respondent privacy requires data not disclose an interviewee's identity.

### 3.5.5 *Unobtrusive Measures*

For additional data collection, this project employed unobtrusive measures. Unobtrusive measures involve inconspicuous data collection methods. Webb et al., explain that unobtrusive sources in the form of physical traces, archives, and observation are used to supplement or cross-validate interviews and questionnaires.<sup>298</sup> Unobtrusive measures are necessary components of a case study as researchers should turn to discrete observation or examination of records as a first means for collecting case study data.<sup>299</sup> Unobtrusive data for this study involved judicial, government, institutional and mass media records as well as direct observations.

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<sup>296</sup> H. Arksey & P. Knight, *Interviewing for Social Scientists: An Introductory Resource with Examples* (Thousand Oaks: Sage Publications, 1999) at 7.

<sup>297</sup> Sample copies of the interview protocols for DOJ and AJC members are included in Appendix B.

<sup>298</sup> E.J. Webb et al., *Unobtrusive Measures* (Chicago: Rand McNally & Company, 1966) at 2.

<sup>299</sup> *Art of Case Study*, *supra* note 113 at 12.

### 3.5.5.a *Primary Documents*

Archival records consist of historical and contemporary primary and secondary documents which are a staple of case study evidence, and, in fact, can be used as principal data.<sup>300</sup> Primary documents are original and contemporaneous first-hand recordings of events, whereas secondary documents provide an interpretation of a primary event. The value of both types of documents is in their capture, dissemination or evaluation of social or historical matters that a researcher could not personally observe or analyze. In this study, primary documents were obtained from York University's Scott Library government collections, court and labour board registrars, Access to Information requests, and the AJC's website.

### 3.5.5.b *Court and Public Service Labour Relations Board Records*

The use of court records as data in this study requires greater elaboration as to their definition and accessibility. The open court principle presumes that legal hearings and documents that contain information about proceedings are available to the public.<sup>301</sup> Court documents involve: statements of claim and defence, application records, motion records, court transcripts, affidavits, factums of law, written submissions, exhibits, and judgments. Obtaining paperwork related to the matters of *Babcock et al., v. Attorney General (Canada)*,<sup>302</sup> *Federal Law Officers of the Crown v. Treasury Board of Canada*; *Association of Justice Counsel v. Treasury Board of Canada*; *Treasury Board of Canada v. Professional Institute of the Public Service of Canada*,<sup>303</sup> and *AJC v. Canada (A.G.)*<sup>304</sup> involved visiting the Supreme Court in Vancouver, the PSLRB in Ottawa, and the Superior Court of Justice in Toronto. Court registrars in the jurisdiction wherein the proceedings originate maintain copies of court documents. Files were indexed by their style of cause which is distinguished by a court file number, and the title of proceedings that are drawn from the names of the plaintiff and the defendant. Records are released to the public only for on-premise viewing and their form and content is unknown prior

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<sup>300</sup> "Editor's Introduction" in R. Yin, ed., *The Case Study Anthology* (Thousand Oaks: Sage Publications, 2004) 155 at 155.

<sup>301</sup> *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, 1996 CanLII 184 (SCC) at para. 23.

<sup>302</sup> *Babcock et al. v. Attorney General (Canada)*, [2005] BCSC 513 (CanLII) [hereinafter *Babcock*].

<sup>303</sup> *Federal Law Officers of the Crown v. Treasury Board of Canada*; *Association of Justice Counsel v. Treasury Board of Canada*; *Treasury Board of Canada v. Professional Institute of the Public Service of Canada*, 2006 PSLRB 45 (CanLII) [hereinafter *FLOC, AJC v. TBC*].

<sup>304</sup> *AJC v. Canada (A.G.)*, *supra* note 59.

to an inspection. The AJC's website posted documents related to the arbitration over the first collective agreement<sup>305</sup> and judicial review by the Federal Court of Canada in *Canada (Attorney General) v. Association of Justice Counsel*.<sup>306</sup>

For those researched for this project, each case file yielded different amounts of data and reflected various time periods. Three boxes of court records were available from *Babcock*. The suit commenced in May 1996 and the decision was released in April 2005. The case involved lawyers from the DOJ's Vancouver Regional Office suing their employer for breach of employment contract over not receiving a salary increase awarded to lawyers employed at the Toronto Regional Office. A court clerk advised me that in 2008, much of the file's physical contents became inaccessible to the public, except for remnants the registrar preserved for use in another case. Available materials included statements of claims and examination for discoveries of seven deponents conducted between 1998 and 2004. Affidavits sworn in support of motions contained sundry internal records of the DOJ from 1990 to 2002 that were appended to supplement the facts being deposed. The documents involved consolidated terms and conditions of employment for non-management lawyers, salary setting policies, correspondences, DOJ news releases and records of senior committee meetings, and salary studies. One of the affidavits in the file, sworn by Joan McCoy, appears to have been the one resulting in an appeal before the Supreme Court of Canada regarding Cabinet confidences and whether the document was exempt from disclosure.<sup>307</sup> Another key affidavit contained documents produced by former Deputy Minister of Justice Morris Rosenberg, which revealed important information about the AJC's creation as a professional association. Additional materials were twenty-four days of transcripts out of a forty-six day trial produced by the testimony of office managers of the DOJ's Vancouver Regional Office, past human resources staff from DOJ headquarters, Lois Lehman, the AJC's first president, and Morris Rosenberg.

The *FLOC, AJC v TBC* was a sizeable record. Court documents detail the history and process the PSLRB took to confer bargaining agent status on the AJC. Correspondences from

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<sup>305</sup> *In the Matter of the Public Service Labour Relations Act, And In the Matter of A Dispute Referred to Arbitration*, PSRLB File 585-02-25 (2009) [hereinafter PSRLB File 585-02-25].

<sup>306</sup> *Canada (Attorney General) v. Association of Justice Counsel; Association of Justice Counsel v. Canada (Attorney General)*, [2011] FC 530 (CanLII) [hereinafter *Canada (A.G.) v. AJC*].

<sup>307</sup> *Babcock v. Canada (Attorney General)*, [2002] 3 SCR 3, 2002 SCC 57 (CanLII) at para. 4.

the PSLRB, exhibits entered on consent by parties to the proceeding, the litigants' factums, and the Book of Documents of the Federal Law Officers of the Crown, a rival employee association seeking certification of DOJ lawyers employed in Toronto, offer insight into the AJC's early history. Staff at the PSLRB informed me that exhibits raised in evidence during hearings are destroyed two years after a matter is heard. They noted that, in tribunal proceedings, transcripts are not recorded.

The court registrar's copy of the *AJC v. Canada (A.G.)* file involving the AJC's *Charter* challenge offered less content in comparison to the other court files. It contained the Application Record of the AJC and supporting documents, motion scheduling confirmations, as well as affidavits of service. Documents not included with pleadings and those associated with subsequent appeals to the Ontario Court of Appeal and Supreme Court of Canada were found on the AJC's website. Material from this file contained information I understood was difficult to get. My strategic union informant told me that neither employer nor union negotiate in public, so AJC personnel might be hesitant to disclose sensitive information about confidential discussions. *Charter* litigation, however, forced union and management-side deponents to outline in their affidavits the history of first contract negotiations, resolved collective bargaining terms, those mired in dispute, and reasons for impasse. Hence, I was able to glean the information contained in these affidavits, as well as data from the briefs prepared for first contract arbitration, without having to press respondents directly on the topic during interviews.

### 3.5.5.c Access to Information Requests

The *Access to Information Act*<sup>308</sup> makes information in records held by Canadian government institutions available to the public. Anyone can request a record by completing and filing an Access to Information request with the department holding the documents. A nominal application fee covers up to five hours of search and preparation time and photocopy fees. The cost of additional searching beyond the initial review period is \$10 per hour.<sup>309</sup> Five Access to Information requests were sent to the DOJ for documents of interest I identified from court transcripts and other records. One Access to Information request was sent to both the Treasury

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<sup>308</sup> *Access to Information Act*, R.S.C., 1985, c. A-1, s. 2 [hereinafter *Access to Information Act*].

<sup>309</sup> Search fees set out by section 7 of *Access to Information Regulations* (SOR/83-507).

Board Secretariat and Privy Council Office respectively. While many documents were enquired about, only a few were actually produced.<sup>310</sup> Written decisions from the Access to Information and Privacy Coordinator noted if the results of a search yielded no records. Alternatively, replies cited that information is exempt from release pursuant to section 19.1 of the *Access to Information Act* as it includes disclosure of information related to personal privacy. Whalen finds that solicitor-client privilege and its application to records of the Department of Justice forecloses many records to historical research.<sup>311</sup>

#### 3.5.5.d *Association of Justice Counsel*

The AJC's website is the primary means by which the union communicates with its membership across Canada. As an information portal, the website supplies information on union basics such as membership structure, union representation and member services. It functions as a newswire by posting periodic bulletins and updates on union business and activities. The most valuable data sources that are provided on the website and were used for the study consisted of updates on collective bargaining negotiations, court documents, and pictures of AJC events.

#### 3.5.5.e *Direct Observation*

Direct observations were conducted of DOJ counsel participating in continuing legal education, of DOJ offices, and of federal prosecutors practicing criminal law. The risk of a researcher's presence jeopardizing solicitor-client confidentiality rendered my observations of lawyers working on the premises of DOJ offices simply untenable. As well, sitting in on negotiations between employer and union bargaining teams was not feasible. Instead, I attended a full-day annual conference offered by Osgoode Hall Law School Professional Development on Crown liability and two workshops organized by the Ontario Bar Association on ethics and professionalism for government lawyers.<sup>312</sup> During fieldwork in Ottawa, I visited the headquarters of the DOJ, and received a private guided tour. Offices in Saskatoon, Edmonton,

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<sup>310</sup> A copy of an Access to Information Request response is included in Appendix C.

<sup>311</sup> J.M. Whalen, "The Application of Solicitor-Client Privilege to Government Records" (1984) 18 *Archivaria* 135 at 140.

<sup>312</sup> "7th Annual Conference on Crown Liability" (Osgoode Hall Law School Professional Development Program, Toronto, Ont., 18 February 2011); "Ethics and Professionalism: The Ethical Framework" (Ontario Bar Association, Toronto, Ont., 2 March 2011) [videostream]; "Ethics and Professionalism: The Public Sector Lawyer as an Advocate" (Ontario Bar Association, Toronto, Ont., 7 June 2011); "Ethics and Professionalism: The Public Sector Lawyer as Advisor [Solicitor Focus]" (Ontario Bar Association Toronto, Ont., 11 September 2011).

Vancouver and Toronto were also visited. These are restricted, contemporary worksites that are located in impressive downtown buildings. Seeing these places helped me appreciate part of the environment in which DOJ lawyers work.

I attended an afternoon of *Charter* litigation at the Superior Court of Justice in Toronto between the AJC and the Attorney General of Canada. I spent one week observing and informally interviewing seven federal Crown attorneys between two Greater Toronto Area courthouses. The experience provided first-hand insight on prosecutorial work. Before discussions started, I told lawyers about the study, the anonymity received by speaking with me, and their consent to participate. They were asked about the intersection between professional ethics and union membership. In almost all instances, counsel was pleased to talk with me. Observations and answers were recorded by hand in a field note log.

### **3.5.6 Document and Interview Data Analysis**

Data analysis involves interpreting collected information through an analytical cycle. Jorgensen explains the process as the disassembly of research material into components that are then reassembled and reconstructed to illustrate classes, processes or wholes.<sup>313</sup> Once arranged, facts form an explanatory or descriptive theory that responds to a research question or problem. In case study applications, direct interpretation of data invokes a similar process. Stake notes that direct interpretation involves concentrating on an instance, pulling it apart and then putting it back together more meaningfully.<sup>314</sup> Direct interpretation was applied to employer, union and court documents in order to identify facts about human resource and salary policies at the DOJ, and to build the story about the founding of the AJC, its certification as a bargaining agent, its experience with first contract negotiations, and its involvement with *Charter* litigation.

My analysis of interview data incorporates Kvale and Brikman's *bricolage* format, which involves mixing different analytic techniques and concepts and applying them to interview data.

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<sup>313</sup> D.L. Jorgensen, *Participant Observation: A Methodology for Human Studies* (Newbury Park: Sage Publications, 1989) at 107.

<sup>314</sup> *Art of Case Study*, *supra* note 113 at 75.

Interpretations from this method are meant to generate rich descriptions.<sup>315</sup> As Leavy notes, interviews are tools for eliciting people's subjective experiences and personal accounts.<sup>316</sup> Excerpts from interview transcripts are reproduced to speak for themselves and are incorporated into the discussion to complement other sources in describing events. Thematic content analysis was reserved for analyzing interview data regarding legal ethics and collective agreement bargaining.<sup>317</sup> Using this technique, I manually reviewed transcripts for noteworthy responses and then reduced them into short, themed phrases. Phrases from the initial coding framework were collected, reviewed and grouped into overlapping categories that reflected patterns and similarities across concepts, and offered a guide for reading the transcripts for evidence to support my textual interpretations.

### 3.5.7 Rigour

Efforts to promote quality of dissertation findings involved data triangulation and compliance with best practice guidelines for case studies. Tellis states that case study is known as a triangulated research strategy.<sup>318</sup> Stake expands on this point by presenting triangulation as a quality assurance tactic.<sup>319</sup> Yin agrees that the study's construct validity improves through triangulation, as corroborating evidence can counteract researcher bias in collection and analysis of data.<sup>320</sup> When possible, then, I triangulated a point of information from documents and transcripts by cross-checking it against more than one source.

A second measure of quality assurance involves the researcher using critical appraisal guidelines to determine how well a case study informs about a subject. Myers proposes that developing an answer involves the assessment of the case study against several features. The table below sets out the way this study addressed each standard set out by Myers' taxonomy:

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<sup>315</sup> S. Kvale & S. Brinkman, *Interviews: Learning the Craft of Qualitative Research Interviewing*, 2nd ed. (Thousand Oaks: Sage Publications, 2009) at 235.

<sup>316</sup> P. Leavy, *Oral History: Understanding Qualitative Research* (New York: Oxford University Press, 2011) at 23.

<sup>317</sup> The process of analyzing interview data is drawn from P. Burnard et al., "Analyzing and presenting qualitative data" (2008) 204:8 *British Dental Journal* 429 at 429.

<sup>318</sup> Tellis, *supra* note 267.

<sup>319</sup> *Art of Case Study*, *supra* note 113 at 107.

<sup>320</sup> Yin, *supra* note 81 at 93; M.B. Miles & A.M. Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*, 2nd ed. (Thousand Oaks: Sage Publications, 1994) at 266.

Criteria	Application in Study
The case must be interesting	First instance of DOJ lawyers unionizing.
The case must display sufficient evidence	Multiple data sources to enhance data credibility.
The case should be complete	Case study covers period before and after founding of the AJC to completion of first collective bargain.
The case study must consider alternative perspectives	Research issues expand scope of inquiry to consider alternative explanations for lawyer unionization.
The case study should be written in an engaging manner	Narrative style, complemented by data vignettes that describe lawyers unionizing and negotiating a collective agreement.
The case study should contribute to knowledge. <sup>321</sup>	Research literature on Canadian lawyer unionization is underdeveloped.

### 3.5.8 Analytic Lens

Caelli, Ray, and Mill refer to analytic lens as the methodological and interpretive presuppositions a researcher brings to bear on the data.<sup>322</sup> In other words, it is how the researcher engages data in light of their underlying assumed theoretical beliefs, which in the case of a socio-legal-interpretive study, can be approached through the disciplinary tradition of Law and Society or New Legal Realism scholarship. Law and Society as an interdisciplinary, and empirical approach to studying how law works and what it does, focuses on the legal profession as a social institution and its interactions with the public.<sup>323</sup> Researchers working in this paradigm carry out diverse fieldwork projects such as: studying relations between divorce lawyers and their clients,<sup>324</sup> conducting case studies of lawyers working in franchise law firms<sup>325</sup> and of cause lawyering in Seattle, Washington,<sup>326</sup> and interviewing a cohort of lawyers in British

<sup>321</sup> Myers, *supra* note 248 at 83.

<sup>322</sup> Caelli, Ray & Mill, *supra* note 278 at 17.

<sup>323</sup> S.S. Sibley, "Law and Society Movement" in H.M. Kritzer, ed., *Legal Systems of the World: A Political, Social and Cultural Encyclopedia* Volume II: E-L (Santa Barbara: ABC Clio, 2002) 860 at 860.

<sup>324</sup> A. Sarat & W.L. Felsteiner, *Divorce Lawyers & Their Clients: Power and Meaning in the Legal Process* (New York: Oxford University Press, 1995).

<sup>325</sup> J. Van Hoy, "Selling and Processing Law: Legal Work at Franchise Law Firms" (1995) 29:4 *Law & Society Review* 703.

<sup>326</sup> S. Scheingold, "The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle" in A. Sarat & S. Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998) at 118.

Columbia, Canada about the impact of gender on practice.<sup>327</sup> Law and Society scholarship diversifies studies of lawyers away from monolithic roles in the administration of courts to showing them working as professionals whose aspirations for the practice of law are shaped by their worksites. Law's impact on lawyers, either as individuals or as a group, creates experiences amenable to investigation<sup>328</sup> and outcomes are studied empirically.<sup>329</sup>

Two recent jurisprudential movements gaining momentum are responsible for stirring interest in empirical scholarship: the Empirical Legal Scholarship (ELS) group and the New Legal Realism (NLR) group. Chambliss informs that social-science trained law school professors created the ELS association to improve the quality of empirical legal scholarship.<sup>330</sup> ELS research provides an accurate and objective representation of law and legal doctrine using quantitative research methods. The methodology adopts a, "model-based approach that seeks a positive theory of law or legal institution and then tests that theory using quantitative techniques developed from the social science".<sup>331</sup> By contrast, the NLR, the other emerging and contemporary circle of legal scholars, seek sound synthesis between law and social science through theory and empiricism to build stronger understandings of law and the formulation of legal policy.<sup>332</sup> NLR does not prioritize an overriding method paradigm for conducting research. Quantitative and qualitative approaches are used either independently or in tandem depending on the nature of the research question.<sup>333</sup> In this way, NLR practitioners emphasize the role of study questions in determining research methods which shows evidence of a well-planned project.<sup>334</sup>

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<sup>327</sup> J. Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: University of British Columbia Press, 2001).

<sup>328</sup> F. Munger, "Mapping Law and Society" in A. Sarat et al., eds., *Crossing Boundaries: Traditions and Transformations in Law & Society Research* (Evanston: Northwestern University Press, 1998) 21 at 51.

<sup>329</sup> L.M. Friedman, "Coming of Age: Law and Society Enters an Exclusive Club" (2005) 1 *Annual Review of Law and Social Sciences* 1 at 6.

<sup>330</sup> Chambliss, *supra* note 231 at 31.

<sup>331</sup> T.E. George, "An Empirical Study of Empirical Legal Scholarship: The Top Law Schools" (2006) 81:1 *Indiana Law Review* 141 at 141.

<sup>332</sup> H. Erlanger et al., "Foreword: Is It Time For A New Legal Realism" (2005) *Wisconsin Law Review* 335 at 337.

<sup>333</sup> M.C. Suchman & E. Mertz, "Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism" (2010) 6 *The Annual Review of Law and Social Science* 555 at 560.

<sup>334</sup> *Ibid.* at 562; J. Grix, "Introducing Students to Generic Terminology of Social Research" (2002) 22:3 *Politics* 175 at 180.

NLR builds on its predecessor, Law and Society, with a few additional nuances. NLR aims to produce social scientific inquiry without reproducing the politics of its investigator.<sup>335</sup> Its epistemology is one of pragmatism that links practice to theory through social context and real world action as sources of meaning and truth.<sup>336</sup> Legal phenomena are studied from either a “top-down” or “bottom-up” perspective. The “bottom up” or “contextualist” vein of NLR stresses how law works in practice on everyday people as well as for elites and professionals by investigating behaviour in social context.<sup>337</sup> Assessments are made about law affecting people,<sup>338</sup> as well as institutions, as they offer a backdrop for understanding how law works in practice and at ground level.<sup>339</sup> Contextualist studies of lawyers produce understanding about causes and remedies for unethical litigation practices in large firm litigation,<sup>340</sup> yield narratives about diversity in law firms,<sup>341</sup> and inquire about the roles and responsibilities of Bar Associations in law reform.<sup>342</sup>

The NLR research orientation, more than that of Law and Society or ELS, informed my assumptions about conducting an interpretive, socio-legal study. Sensitivity to methodology is a key component of NLR research in bridging effective translations between law and social science and addressing concerns over quality. By contrast, judging a Law and Society study as Friedman suggests, on the basis of its utility and theoretical value within a particular sphere may be problematic when integrating case study methods, as this format is criticized as a weak form of scientific inquiry itself.<sup>343</sup> NLR’s focus on respectful translations between differences in empirical method and legal theory offered this project the leeway to collect and analyze data using case study techniques. Moreover, during interviews, several respondents noted that they appreciated knowing when the study was published, so they could read a copy of it. These

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<sup>335</sup> B. Tamanaha, *Realistic Socio-Legal Theory* (New York: Oxford University Press, 1997) at 24.

<sup>336</sup> Suchman & Mertz, *supra* note 333 at 561.

<sup>337</sup> *Ibid.*

<sup>338</sup> H. Erlanger et al., *supra* note 332 at 339.

<sup>339</sup> V. Nourse & G. Shaffer, “Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory” (2009) 1:1 *Cornell Law Review* 61 at 81

<sup>340</sup> R. W. Gordan, “The Ethical Worlds of Large Firm Litigators: Preliminary Observations” (1998) 67:2 *Fordham Law Review* 709.

<sup>341</sup> J.M. Conley, “Tales of Diversity: Lawyers’ Narratives of Racial Equity in Private Law Firms” (2006) 31:4 *Law & Social Inquiry* 831.

<sup>342</sup> E. Chambliss & B. A. Green, “Some Realism About Bar Associations” (2008) 57:2 *De Paul Law Review* 425.

<sup>343</sup> J.L. Jensen & R. Rodgers, “Cumulating the Intellectual Gold of Case Study Research (2001) 61:2 *Public Administration Review* 235 at 235.

observations suggested that DOJ lawyers and AJC union members are a readership likely interested with the study and NLR research is produced for a broad audience with the goal of making empirical knowledge accessible.<sup>344</sup>

### **3.6 Limitation of Study**

This dissertation bears several limitations regarding the perspective of the data and its availability. Describing union organizing invariably prioritizes the findings developed from the experience of employees and their representatives, which narrows an understanding of the employer's perspective. Employer insight is contained to DOJ internal documents, reactions tangentially raised and filtered by union materials, and court documents that advocate management's legal interests. Interviews with DOJ managers and employer bargaining team members were not conducted.

Interpreting past events depends on available and trustworthy information. Marginal success with Access to Information requests limited the extent of documents internal to the DOJ to those collected from court records. With the passage of time, court registrars should not be presumed to house a complete file, as this project discovered. Findings raised by this study are restricted, then, by the scope of documents obtained and people interviewed. Nonetheless, the court documents used in the study should be considered as yielding reliable information. Documents placed into production during a proceeding are meant to prove some fact and are presumed truthful in content. Furthermore, lawyers are ethically obligated not to mislead a court with false evidence. Testimonial proof is reliable to the extent a witness can accurately recall their memory and perceptions and witnesses are sworn to tell truth under punishment of perjury for flouting their oath. Court transcripts accurately render testimony and court reporters affirm that they transcribe audio taped proceedings to the best of their abilities. They must also certify transcripts as evidence of the official trial record.

Critique that case study findings cannot be generalized to other settings should be seen as a misunderstanding rather than an inadequacy of the method.<sup>345</sup> Some methodologists maintain

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<sup>344</sup> T. Mitchell & E. Mertz, "The Empirical Turn in the Legal Academy: A New Legal Realist Perspective" *Law & Society Newsletter* (2006) 4 at 4.

single-observation case studies that produce causal stories with a view to encouraging legal reform but do not follow principles of causal and inductive reasoning are flawed.<sup>346</sup> However, as Stake writes, single case studies excel at focussing on a local situation rather than proposing how it represents other cases more broadly.<sup>347</sup> Due to the idiographic nature of a single case study, it is not assumed similar circumstances exist in another context. Carrothers observes that it is extremely difficult if not impossible to generalize about collective bargaining for employed professionals.<sup>348</sup> For this project it is true that: DOJ lawyers work for the largest employer of public sector lawyers in Canada; the collective bargaining regime and law governing the federal public services is particularized to that workforce; and, collective bargaining disputes amongst collectivized lawyers typically do not result in *Charter* litigation. Thus, this case study intends to create a critical narrative that both explains and describes and while carrying theoretical import.<sup>349</sup> Conclusions drawn from case study findings can then be generalized to theory and recommendations for further research can also be proposed.<sup>350</sup>

### 3.7 Conclusion

The chapter's discussion of a research design anchors the methodological framework of the study. To borrow Gibbert and Ruigrok's phrasing, this chapter sought to "talk the walk" by illustrating the logic and purpose of adopting a particular research design for this project.<sup>351</sup> The task involved reviewing the various approaches available for carrying out academic legal research and determining that an empirical-interpretive study in the qualitative case study mode was the most appropriate selection. A framework for evaluating the case study's credibility was provided with reference to the generic qualitative orientation. The chapter covered the issue of

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<sup>345</sup> B. Flyvberg, "Five Misunderstandings About Case-Study Research" (2006) 12:2 *Qualitative Inquiry* 219 at 224.

<sup>346</sup> G. Mitchell, "Case Studies, Counterfactuals, and Causal Explanations" (2004) 152:5 *University of Pennsylvania Law Review* 1517 at 1546.

<sup>347</sup> R.E. Stake, *Multiple Case Study Analysis* (New York: Guildford Press, 2006) at 8 [hereinafter *Multiple Case Study Analysis*].

<sup>348</sup> A.W.R. Carrothers, "Collective Bargaining and the Professional Employee" in J. H.G. Crispo, ed., *Collective Bargaining and the Professional Employee Conference Proceedings December 15-17, 1965* (Toronto: Centre for Industrial Relations, 1965) 1 at 13.

<sup>349</sup> W.G. Dyer Jr. & A.L. Wilkins, "Better Stories, Not Better Constructs, To Generate Better Theory: A Rejoinder to Eisenhardt" (1991) 16:3 *Academy of Management Review* 613 at 618; R. E. Stake, "Qualitative Case Studies" in N.K. Denzin & Y.S. Lincoln, eds., *Strategies of Qualitative Inquiry*, 3rd ed. (Thousand Oaks: Sage Publications, 2008) 119 at 136.

<sup>350</sup> Yin, *supra* note 81 at 30.

<sup>351</sup> M. Gibbert & W. Ruigrock, "The What and How of Case Study Rigour" (2010) 13:4 *Organizational Research Methods* 710 at 726.

credibility by canvassing the motivation behind the study, appreciating the distinction between methodology and methods, addressing rigour, and noting the project's analytic lens. The necessary background is now set for chapter 4 which presents non-unionized staff relations governing DOJ lawyers as a historical antecedent to collective bargaining. That discussion follows next.

## CHAPTER 4: Administrating the Individual Employment Relationship at Canada's Largest Law Firm

### 4.1 Introduction

A union collectively represents all employees in a bargaining unit as the sole agent for negotiating terms and conditions of employment with the employer. For an unrepresented workforce, the employer determines the employment contract by incorporating industry precedents and observing minimum employment standards. In 1967, the *PSSRA* implemented a system of individual employment relations that sanctioned the Treasury Board to establish rates of pay and conditions of work governing DOJ lawyers as a group of professionals excluded from labour legislation. This long-standing arrangement is a starting point for contextualizing lawyer interest in a formal employee representative with collective bargaining rights. The purpose of this chapter, then, is to discuss the DOJ's emergence as a supplier of comprehensive legal services to the federal government from the late 1960s and onwards, and to describe the employment policies governing the lawyers who provided them up to a critical juncture in the department's compensation policy: lawyers at the department's Toronto Regional Office receiving an exclusive salary increase in 1990, known as the "Toronto differential".

In terms of structure, the chapter will start by explaining the *PSSRA*'s ban on DOJ lawyers from joining bargaining units, which will then be followed by a description of the Royal Commission on Government Organization's (RCGO) role in making the DOJ into Canada's original, national law firm. The next portion of the chapter outlines the department's place in the mosaic of federal government administration as the *DOJ Act*<sup>352</sup> entrusts the Minister of Justice with the functions of the department, and is followed by discussing the framework that determined the conditions of employment for DOJ lawyers. The third portion of the chapter introduces the origin and purpose of the Legal Officers' Advisory Committee (LOAC), which was a consultative intermediary between management and non-management DOJ lawyers.<sup>353</sup> The discussion closes by analyzing the findings that emerge from the retrospective and largely descriptive material presented in this chapter.

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<sup>352</sup> *DOJ Act*, *supra* note 67.

<sup>353</sup> In the late 1990s, the DOJ's changing perspective on arm's length employee representation helped LOAC become a professional association and eventually an employee organization as the AJC once the *PSLRA* allowed for its certification as a bargaining agent. That examination is reserved for chapter 5.

## 4.2 DOJ Lawyer Exclusion under the *PSSRA*: Legislative and Judicial Rationale

The introduction of legislated collective bargaining rights for federal public servants has a rich gestation period, evolving over a half-century of employment relations between the Government of Canada and its public servants.<sup>354</sup> A thumbnail sketch takes us to an Order in Council of May 1944 when the National Joint Council (NJC) was established. The NJC was an advisory forum that allowed civil servant employee associations to address labour issues with employer representatives and advance policy recommendations for government consideration. The employee associations' initial optimism for the advisement process gradually faded, however, after finding their influence was trivial: significant terms and conditions of employment such as pay were non-negotiable and joint proposals carried non-binding weight. The result of staff associations demanding improved joint consultation led in September 1957 to the creation of a Pay Research Bureau under the direction of the Civil Service Commission to recommend pay increases on behalf of civil servants to the government. In reality, though, Pay Research Bureau input was ignored and the state continued to unilaterally set wages for government employees.<sup>355</sup>

A turning point for federal civil servants attaining collective bargaining rights proved to be legislation that failed to remedy the mischief it was intended to cure. The Civil Service Act of 1961 granted employee associations the ability to consult with the Minister of Finance over pay and between the Minister of Finance and the Civil Service Commission regarding the terms and conditions of employment. Unfortunately, the bifurcated system proved cumbersome, the employee organizations still lacked genuine negotiating powers, and the government remained the arbiter over rates of pay.<sup>356</sup> It was the mounting frustration with employer paternalism that propelled the staff associations to exploit the political turmoil that overthrew the minority Progressive Conservative government led by John Diefenbaker. They demanded collective

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<sup>354</sup> H.W. Arthurs, "Collective Bargaining in the Public Service of Canada: Bold Experiment of Act of Folly?" (1969) 67:5 *Michigan Law Review* 971 at 971.

<sup>355</sup> H.W. Arthurs, *Collective Bargaining by Public Employees in Canada: Five Models* (Ann Arbor: Institute of Labour and Industrial Relations, 1971) at 20.

<sup>356</sup> Canada, *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (Ottawa: Queen's Printer, 1965) at 18 [hereinafter *Report of the Preparatory Committee*]; Public Service Commission of Canada, *The 100 years of the Public Service Commission of Canada, 1908-2008* (Ottawa: Public Service Commission of Canada, 2008) at 15, online: Public Service Commission of Canada <<http://www.psc-cfp.gc.ca/abt-aps/tpsc-hcftp/hist-eng.htm>> (last modified: 28 July 2008).

bargaining rights from any political party willing to curry their favour.<sup>357</sup> Before the federal elections of 1963, Civil Service Federation president Claude Edwards sought each of the campaigning parties' position on collective bargaining. The tactic was a decisive one as Lester Pearson, leader of the Liberal Party and Official Opposition, heeded the call and endorsed collective bargaining and arbitration for public servants as an election platform.<sup>358</sup>

Pearson's newly elected minority Liberals honoured their pledge to the electorate and in August 1963, the government appointed Arnold Heeney to head a Preparatory Committee on Collective Bargaining in the Public Service. The Preparatory Committee was to make provisions for the introduction of collective bargaining and arbitration into the federal public service, as well as to consider reforms for systems of classification and pay. In July 1965, the Preparatory Committee published its report, which included the draft labour relations legislation as a touchstone for realizing study recommendations, and the blue print for the most significant overhaul of employer-employee relations in the history of the federal public service. The report proclaimed collective bargaining and arbitration as a dispute settlement mechanism for all employees of the federal government, including almost all professional and scientific staff. There was little reason to exclude professional workers as they were found to enjoy a productive history of organization and considerable participation in the development of processes of consultation regarding pay and terms and conditions of employment.<sup>359</sup> The Preparatory Committee recommended excluding DOJ lawyers from bargaining units, though, fearing that their membership could provoke a conflict of interest.<sup>360</sup> Those individuals who exercised a significant amount of responsibility for managing employees or who were involved in a role that may be considered as confidential to management were the workers whose membership in a union were deemed as potentially prejudiced in their duties.<sup>361</sup> A tidbit of legislative history on the exclusion of DOJ lawyers is provided by then Secretary of the Treasury Board, George Davidson's testimony before the Parliamentary Committee when he articulated that proposed

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<sup>357</sup> M. Lemelin, *The Public Service Alliance of Canada: A Look at a Union in the Public Sector* (Los Angeles: Institute of Industrial Relations, 1978) at 25.

<sup>358</sup> R. Armstrong, "Some Aspects of Policy Determination in the Development of the Collective Bargaining Legislation in the Public Service of Canada" (1968) 11:4 *Canadian Public Administration* 485 at 488.

<sup>359</sup> *Report of the Preparatory Committee*, *supra* note 356 at 28.

<sup>360</sup> *Ibid.* at 32.

<sup>361</sup> *Ibid.*

legislation did not contemplate coverage for a workforce identified under a managerial exclusion:

The Legal Officers of the Department of Justice are called upon from time to time to provide the government, the employer, with advice and counsel in a great variety of matters that could be related to this legislation, and consequently, it is considered that they should be regarded as persons employed in a managerial capacity, with all that implies for their position under this legislation.<sup>362</sup>

Davidson's observation implied that the best interests of the employer required that DOJ lawyers provide clients with advice not tainted by mixed allegiances or employee sympathies, which could spoil its quality and impair government decisions about labour relations.

On 20 February 1967, when the House of Commons assented to the *PSSRA*, *Public Service Employment Act*,<sup>363</sup> and *An Act to Amend the Financial Administration Act*,<sup>364</sup> a legal framework for collective bargaining in the federal public service was created. The *PSEA* governed staffing hires, deployments and lay-offs. The *Financial Administration Act* amendments confirmed the evolution of Treasury Board as representative of the Crown for the management and employment concerns of the federal public service.<sup>365</sup> The Preparatory Committee recommendations regarding who was an employee for the purposes of collective bargaining were observed by legislative drafters of the *PSSRA*. Section 2 defined an employee as a person employed in the public service; it was also subject to several exceptions, one of which was a person employed in a managerial or confidential capacity. For greater clarity, the *PSSRA* plainly spelled out that a legal officer in the Department of Justice occupied a managerial or confidential position. Other persons defined within this non-employee class were those in a position: of confidentiality to a number of specified officials; with executive duties in developing and administrating government programs; involved in personnel administration, the process of collective bargaining, or handling grievances; of confidentiality to another employed in a managerial or confidential capacity; and any other role the Public Service Staff Relations Board (PSSRB) designated. Nevertheless, DOJ lawyers were still entitled to grievance and

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<sup>362</sup> Canada, Special Joint Committee of the Senate and the House of Commons on Employer-Employee Relations in the Public Service of Canada, *Minutes of Proceedings and Evidence*, Vol. 2, No.18 (Ottawa: Queen's Printer, 1966) at 891.

<sup>363</sup> S.C. 1966-67, c. 71 [hereinafter *PSEA*]

<sup>364</sup> S.C. 1966-67, c. 74.

<sup>365</sup> C. Rootham, *Labour & Employment Law in the Federal Public Service* (Toronto: Irwin Law, 2007) at 42.

adjudication procedures under legislation. Two years after *PSSRA*'s passage, over 95 percent of eligible federal civil servants unionized. On 31 March 1969, the PSSRB certified the Professional Institute of the Public Service of Canada (PIPSC) as the bargaining agent for a unit of sixty-four employees holding law positions in departments and agencies outside of the DOJ.<sup>366</sup> In an annexed schedule to the decision there was an agreement between the Treasury Board and PIPSC that designated DOJ legal officers and senior management as confidential and management employees.

The *PSSRA* definition of a “managerial and confidential employee” was a legal standard for excluding federal civil service lawyers from bargaining units. During the *PSSRA*'s time, the National Energy Board, Canadian Human Rights Commission, Canadian Radio-television and Telecommunications Commission, and the Immigration and Refugee Board of Canada all requested hearings asking that the PSSRB determine whether their lawyers conducted confidential or managerial work.<sup>367</sup> By contrast, PIPSC's applications inquired whether positions held by lawyers working as editors at the Supreme Court of Canada and Immigration and Refugee Board lawyers remained managerial or confidential.<sup>368</sup> However, it was the PIPSC's appeal of the PSSRB's decision in *Cuddihy and Norton*<sup>369</sup> to the Federal Court of Appeal that elicited the judicial reasoning on DOJ lawyers being excluded from collective bargaining.

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<sup>366</sup> *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board* (1969), PSSRB file 142-2-130.

<sup>367</sup> *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board* (1978), PSSRB file 172-2-262, aff'd [1979] 2 F.C. 60, online: QL; *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board* (1980), PSSRB files 148-2-29, 148-2-31 and 148-2-42; *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board* (1981), PSSRB file 148-2-49; *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board* (1981), PSSRB file 148-2-50; *Professional Institute of the Public Service of Canada and Treasury Board (Immigration Appeal Board – Lalonde and Cantin)*, [1984] C.P.S.S.R.B. No. 194, online: QL.

<sup>368</sup> *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board* (1980), PSSRB file 172-2-96; *Professional Institute of the Public Service of Canada and Treasury Board*, [2000] P.S.S.R.B. 10, online: QL. Pursuant to section 21 of the *PSSRA*, PIPSC applied before the PSSRB seeking to add legal advisers at levels LA-1, LA-2A and LA-2B employed at the Immigration and Refugee Board of Canada to their bargaining unit. Their application was denied because they could not show that the duties and responsibilities of legal advisers covered by the application had changed since Treasury Board first deemed them as managerial and confidential.

<sup>369</sup> *Professional Institute of the Public Service of Canada and Her Majesty in right of Canada as represented by the Treasury Board*, [1971] C.P.S.S.R.B. No. 10, online: QL.



information between parties. Solicitor-client privilege facilitates this exchange and courts generally uphold it as a rule of law. The Chief Justice's observations about the advisory services provided by DOJ lawyers at the time, therefore, appear to be grounded in fact. He could draw his insight from a highly successful legal career with the DOJ, having started work there in January 1939, developing a tax specialty, and ultimately serving as the eighth Deputy Minister of Justice from 1957 to 1960.<sup>373</sup> Around the time of Jackett's tenure as Deputy Minister of Justice, the Legal Branch of the DOJ was divided into Civil Litigation, Taxation, Criminal Law, Civil Law, Legislation, Advisory, and Departmental Service practice sections.<sup>374</sup> Lawyers in the Departmental Services section regularly acted as counsel for nine government departments providing most, if not all, of their legal services.<sup>375</sup> The Civil Law Section addressed matters pertaining to Quebec's Civil Code. When departments, boards, commissions, and agencies required legal opinions lawyers from any section with relevant expertise provided them.<sup>376</sup> Opinions that did not fall within the specialty of section solicitors were handled by an Advisory unit. During the twelve months ending May 1961, the sections produced an average of 107 opinions per month.<sup>377</sup> Thus, the many aspects of providing legal advice to client departments consumed the bulk of the department's lawyers' work and defined their roles as counsel to management.<sup>378</sup>

#### **4.3 Royal Commission on Government Organization and Re-Organization of the Federal Civil Service: Impact on the Department of Justice**

On 16 September 1960, the Diefenbaker Progressive Conservative government authorized Order in Council P.C. 1960-1269 and established the RCGO. The Commission, headed by prominent businessman J. Grant Glassco, investigated and reported on the organization and processes of federal government departments and agencies. Under broad terms

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<sup>373</sup> R. Pound, *Chief Justice W.R. Jackett: By the Law of the Land* (Montreal: McGill-Queen's University Press, 1999) at 60, 68.

<sup>374</sup> Department of Justice Canada, *Memorandum on the Legal Branch of the Department of Justice Government of Canada* (Ottawa: Department of Justice, 1956) at 7 [hereinafter *Memorandum on the Legal Branch*]; Canada, Royal Commission on Government Organization, *Supporting Services for Government, Report 11: Legal Services*, Vol. 2 (Ottawa: Queen's Printer, 1962) at 396 [hereinafter *Glassco Report*].

<sup>375</sup> *Glassco Report, ibid.*

<sup>376</sup> Department of Justice Canada, *The Department of Justice: Government of Canada* (Ottawa: Queen's Printer, 1963) at 7.

<sup>377</sup> *Glassco Report, supra* note 374 at 383.

<sup>378</sup> *Ibid.* at 369.

of reference, its purpose was to improve public service delivery by recommending measures for the introduction of efficiency and economy into government operations.<sup>379</sup> Checks and balances were needed to contain bureaucratic overlap and spending, improve management of departments and agencies, and streamline the machinery of government. First published in September 1962, the Commission's findings and recommendations stretched over five volumes in what is colloquially referred to as the Glassco Report.

A survey of the federal government's legal needs, who met them and how well, turned the investigators' attention to the DOJ. Project Group auditors discovered that departments and agencies retained their own lawyers, and more significantly, that the DOJ was understaffed and its practice of farming out work to other firms and agents created inefficiencies in the system. Within the DOJ, some practitioners became intertwined with management in policy making decisions while other counsel went underutilized. In both instances, lawyers drifted from their intended roles. The report noted that DOJ lawyers expressed feelings of reduced career prospects and that the department had a problem recruiting and retaining experienced lawyers.<sup>380</sup> Recommendations for solving this bureaucratic malaise involved forming an integrated legal service and opening branch offices throughout Canada.<sup>381</sup> The modernization plan put forward by the Glassco Report helped raise the department out of relative obscurity and overturned its modest operations.

Given the obvious need for reform, DOJ senior management moved to implement the first of Glassco's proposals. In 1965, Alban Garon, the former Director of the Legal Division in the Department of Public Works was appointed to oversee the centralization of legal services in the DOJ.<sup>382</sup> Commercially-orientated and independent agencies (the Judge Advocate General's office at National Defence, External Affairs, Pension Advocates at Veteran's Affairs and Royal Canadian Mounted Police) were excluded from the consolidation exercise. Undoubtedly, Garon's diplomacy skills as the Director of Departmental Legal Services were taxed by selling

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<sup>379</sup> D.C. Rowat, "Canada's Royal Commission on Government Organization" (1963) 41:2 *Public Administration* 193 at 197

<sup>380</sup> *Glassco Report*, *supra* note 374 at 412.

<sup>381</sup> *Ibid.* at 421.

<sup>382</sup> M. Brunet, *Out of the Shadows: The Civil Law Tradition in the Department of Justice Canada, 1868-2000* (Ottawa: Department of Justice Canada, 2000) at 67.

Deputy Ministers on the benefits of the department's reprisal as the state's exclusive legal representative.<sup>383</sup>

A new administrative model and operational mandate necessitated closer ties between the DOJ and the federal departments and agencies it intended to serve. A network of regional offices stood to reinforce headquarters' operations and fulfill the second of the Glassco Report's edicts for the DOJ. Improved efficiencies and policies were put in place by in-sourcing work previously referred to private firms and by delegating better supervised agents. DOJ branches were opened in Montreal (1965), Toronto and Yellowknife (1966), Vancouver (1967), Winnipeg (1969), Halifax and Whitehorse (1970), Edmonton (1972), and Saskatoon (1974). Expansion into these cities firmly established the DOJ's presence in Quebec, Ontario, British Columbia, as well as the Atlantic, Northern, and Prairie regions. The expansion also aided in diversifying the department's work as lawyers employed at the regional offices conducted criminal, tax, civil, immigration, and administrative law litigation on behalf of the Crown. While policy development, legislative services, and the departmental legal service units remained concentrated within the Ottawa area, the new regional branches influenced the department's local labour needs and compartmentalized lawyers into geographically discrete practice specialties.

Patterning the DOJ as a primary legal service provider continued after the Glassco Report.<sup>384</sup> The *Government Organization Act, 1966*<sup>385</sup> passed to implement, and later consolidate, Glassco's recommendations transferred the DOJ's handling of Parole Service, Combines Investigation, Bankruptcy Administration, Royal Canadian Mounted Police and Superintendence of Jails to other departments.<sup>386</sup> Department resources were therefore freed from administering extraneous programs in order to focus on core competencies. The DOJ experienced unprecedented personnel boom. From the mid-1870s to 1939, departmental staff was an inconspicuous lot that consisted of two lawyers and a few clerks inherited from the office

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<sup>383</sup> *Ibid.* at 68.

<sup>384</sup> Department of Justice, *Department of Justice Annual Report 1982-1983* (Ottawa: Minister of Supply and Services, 1983) at 7 [hereinafter *Annual Report 1982-1983*].

<sup>385</sup> *Government Organization Act, 1966*, S.C. 1966-67, c. 25.

<sup>386</sup> *Annual Report 1982-1983*, *supra* note 384 at 7.

of the Attorney General of Upper Canada.<sup>387</sup> In 1965, the DOJ employed about sixty lawyers.<sup>388</sup> From 1966 to 1970, as the Glassco Report reform plan took shape, the DOJ absorbed one hundred departmental and agency lawyers from the broader federal public service. By 1972, of the roughly 280 staff lawyers, over 120 worked in departmental legal service units to provide counsel to government departments and agencies.<sup>389</sup>

In April 1974, the influx of lawyers from external government departments and agencies required the Department to implement further organizational reforms. Duties of senior management were clarified and new senior positions created<sup>390</sup> and the department continued to establish new legal service units to serve additional government departments and agencies. The department became more active in law reform activities after its Legal Research and Planning Branch opened to conduct policy-oriented studies. Lawyers advised on reforming Canadian divorce law, reviewed criminal law provisions, and prepared Access to Information and Privacy Acts.<sup>391</sup> In 1982, as a further refinement to operations, a corporate management system for the DOJ was implemented.<sup>392</sup> A Human Rights Law Section was opened to assist the department oversee the *Charter* and handle the corresponding growth in litigation. By 1984, the number of lawyers employed at the DOJ rose to 686 lawyers; by 1991 roughly 735 lawyers were employed.<sup>393</sup> Thus, the full impact of Glassco Report reforms, as well as having to steward a national justice system influenced by changing societal norms in Canada during the late 20th century, expanded the department's lawyer labour force and broadened their practice responsibilities to eclipse those of a once modest complement of legal advisors.

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<sup>387</sup> Department of Justice, "History of the Department of Justice", online: Department of Justice <<http://www.payequityreview.gc.ca/eng/dept-min/hist.html>> (last modified: December 4, 2009).

<sup>388</sup> Office of the Minister of Justice, "Press Release: Lang Announces Changes at Justice" (17 April 1974) in *Department of Justice Addresses, Statements, News Releases 1974-1985* (Ottawa: Department of Justice, 1985) at 2 [hereinafter "Press Release"].

<sup>389</sup> Department of Justice, *Department of Justice* (Ottawa: Information Canada, 1972) at 1 [hereinafter *Department of Justice 1972*].

<sup>390</sup> "Press Release", *supra* note 388 at 2.

<sup>391</sup> *Annual Report 1982-83*, *supra* note 384 at 10-11.

<sup>392</sup> Office of the Minister of Justice, "Statement By the Honourable Mark MacGuigan Minister of Justice and Attorney General of Canada To The Legal Standing Committee on Justice and Legal Affairs On Considerations of Supplementary Estimates for 1982/83" (30 November 1982) in *Department of Justice Addresses, Statements, News Releases 1974-1985* (Ottawa: Department of Justice, 1985) at 5.

<sup>393</sup> Department of Justice, *Department of Justice Annual Report 1983-84* (Ottawa: Minister of Supply and Services, 1985) at 11 [hereinafter *Annual Report 1983-84*]; Department of Justice, *Department of Justice Annual Report 1990-1991* (Ottawa: Department of Justice, 1992) at 3.

## 4.4 DOJ Lawyers within the Bureaucracy

### 4.4.1 *The Minister of Justice's Role*

Canada is a constitutional monarchy where formal executive authority is vested in the Crown, which is embodied in Queen Elizabeth II. As of 1 October 2010, she is represented in Canada by the 28th Governor General since Confederation, David Johnston. While executive state functions are Crown prerogatives, it is the Prime Minister working with Cabinet, an executive committee of the Queen's Privy Council for Canada, which is responsible for introducing most legislation in the House of Commons.<sup>394</sup> The Prime Minister staffs Cabinet with Ministers who are elected members of the majority party, as well as department heads. Section 2(1) of the *DOJ Act* appoints the Minister of Justice to preside over the DOJ.

Section 2(2) of the *DOJ Act* specifies that the Minister of Justice, by virtue of holding office, is also the Attorney General of Canada. This dual role embodies the diversity of solicitor and barrister practice necessary for the Minister to discharge a wide scope of statutory obligations. Sections 4 and 5 of the *DOJ Act* respectively detail the separate functions of the Minister of Justice and Attorney General. The Justice Minister advises on the administration of national justice, supervises statutes covering areas of law assigned to the federal government under the constitutional division of powers, and examines the content of all proposed regulations and bills to ensure their compliance with the *Charter*. The Attorney General acts as chief legal advisor to the heads of departments and agencies, and represents the Crown in all legal action brought for or against the federal government. The *DOJ Act* defines the Minister's duties and therefore also conditions the need of lawyers for its operations.

To note the obvious, the Minister of Justice and Attorney General cannot personally execute all of her or his duties.<sup>395</sup> The work of the Minister is delegated to the bureaucracy assigned to the DOJ. The Prime Minister appoints the department's most senior bureaucrat: the Deputy Minister of Justice and Deputy Attorney General of Justice. Section 24(2)(c) of the *Interpretation Act*<sup>396</sup> permits the Deputy to assume any powers, duties or functions conferred on the Minister of Justice and Attorney General. The Deputy Minister serves the Minister by

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<sup>394</sup> E. Forsey, *How Canadians Govern Themselves*, 7th ed. (Ottawa: Library of Canada, 2010) at 3.

<sup>395</sup> *Memorandum on the Legal Branch*, *supra* note 374 at 3.

<sup>396</sup> *Interpretation Act*, R.S.C. 1985, c I-21.

advising them on policy development and providing organizational leadership to the department. Section 3.3 of the *DOJ Act* provides for two Associate Deputy Ministers who complement the pinnacle of executive command. Senior management is further distributed through a network of chief public servants including Assistant Deputy Ministers, Assistant Deputy Attorneys General, Chief Legislative Counsel, and Regional Director Generals, all of whom report to the Deputy Minister (who in turn accounts to the Minister). In this arrangement, lawyers conduct the full range of the department's day-to-day legal services.

The Treasury Board is a Cabinet committee of the Queen's Privy Council for Canada and employer of personnel at departments and organizations grouped within the core federal public administration, which includes the DOJ. Treasury Board has expansive personnel management authority pursuant to section 7(1) of the *Financial Administration Act*.<sup>397</sup> Section 11.1(1) of the *FAA* elaborates its powers to cover personnel requirements and allocation of human resources, classification of positions and employees, rates of pay, hours of work, leave and other terms and conditions of employment as necessary for the effective management of staff. The Treasury Board Secretariat (TBS) conducts Treasury Board's work by providing administrative services and support and monitoring departmental compliance with employer policies. The Deputy Minister of Justice is accountable to TBS for the DOJ following Treasury Board's employment programs and standards. The Deputy Minister was assisted by department's Human Resources Directorate (HRD). As noted in the 1989 *Guide to the Organization of the Department of Justice*, the HRD was also responsible for (among other duties) administering the department's personnel management, supervising programs in staff relations, and interpreting legislation, regulations, policies, and collective agreements.<sup>398</sup>

#### 4.4.2 *Employment of DOJ Lawyers*

The practice of the DOJ was to issue new lawyers letters of employment that confirmed the position hired for, its salary, length of term, and that Treasury Board fixed the terms and

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<sup>397</sup> *Financial Administration Act*, R.S.C., 1985, c. F-11 [hereinafter *FAA*]

<sup>398</sup> Department of Justice, *Guide to the Organization of the Department of Justice Canada* (Ottawa: Department of Justice, 1989) at IX-3.

conditions of employment.<sup>399</sup> Treasury Board's "Consolidated Terms of Conditions and Employment Law Group" outlined employer rules regarding work hours, holidays, pay entitlement, leaves and discipline. Separate versions covered non-management and management lawyer groups. Treasury Board unilaterally set rates of pay for DOJ lawyers through a classification standard that established the relative worth of jobs in the public service as a basis for determining compensation. Lawyers belonged to the Law (LA) Occupational Group which was a subdivision of the Professional and Scientific occupational category. Positions assigned to this group were those involving the application of a comprehensive knowledge of law and its practice in performing legal work. Classifying a position within the Law Group involved both a job analysis and evaluation component.<sup>400</sup> A description was used to understand the purpose and function of a job which was referred to as a collection of duties assigned and performed by an employee. A job was evaluated by comparing its duties relative to levels of responsibility within an occupational group and in relation to other classified position descriptions.<sup>401</sup>

Furthermore, each occupational group received a classification standard and pay plan. Treasury Board administered payment of DOJ lawyers in accordance with the "Salary Administration Policy – Law Group – Department of Justice and other excluded legal officers" (SAP). SAP was contained as a chapter in the Personnel Management Manual (PMM). The PMM, carried on as the Treasury Board Manual, was a compendium of service-wide employment policies and guidelines issued by Treasury Board and updated through circulars, information notices and amendments.<sup>402</sup> SAP outlined six classification levels for lawyers divided into LA-1, LA-2A, LA-2B, LA-3A, LA-3B and LA-3C rankings. Jobs were assigned to various grades based on the required functions, complexity and skills of a position. Each occupational level had a specific salary range that consisted of minimum and maximum pay rates commensurate to a practitioner's experience.

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<sup>399</sup> *Babcock, supra* note 302 (Affidavit of Kathy Nicol, sworn 29 May 1998 at 2, paras. 4-5) [hereinafter Nicol Affidavit].

<sup>400</sup> Treasury Board of Canada, *Treasury Board Manual, Personnel Management: Classification* (Ottawa: Canada Communications Group, 1991) at Chap. 1, App. B, pg. B-1.

<sup>401</sup> Treasury Board of Canada Secretariat, *Classification Standard: Law, Scientific and Professional Category* (Ottawa: Minister of Supply and Services, 1987) at 1.

<sup>402</sup> Treasury Board of Canada, "Salary administration policy – Law Group – Department of Justice and other excluded legal officers" in *Treasury Board Manual, Personnel Management: Compensation* (Ottawa: Canada Communications Group, 1991) at Ch. 3-1, Appendix "A".

Categories moved upwards to reflect increasing degrees of specialization. LA-1, for example, was an entry level designation. Lawyers typically spent four years of practice before reaching LA-2A standing, which was reserved for skilled lawyers practicing under minimal supervision. Level LA-2B represented first stage management though senior, non-management specialist practitioners populated this and higher stages. Promotion to these stages was merit based, and required a minimum of eight years of experience from the bar.<sup>403</sup> Lawyers at the LA-3 stage were expected to manage an organization providing legal services. As noted in *Lehman v. Canada*, the HRD annually screened DOJ lawyers for inclusion on an eligibility list for promotion.<sup>404</sup> However, composition of the LA-2B and higher group was capped at 30 percent of the lawyer workforce.

Section 6 of the SAP instituted a performance pay system. Periodic in-range increases allowed for progression through a salary range. A lawyer's assessed level of job performance determined the rate of increase as a percentage of the individual's salary. Lawyers at LA-2A levels and higher received an additional bonus provided their performance evaluations were ranked as superior or outstanding, their salary reached the maximum of the pay band, and the annual payroll budget allowed for the expense. The Treasury Board wage policy encouraged lawyers to be rewarded for outstanding individual contributions to the department.

An overview of the Treasury Board's administration of DOJ lawyers' salaries would not be complete without an understanding of how pay rates were determined. Management lawyer salaries were benchmarked to executive group levels within the greater federal public service. The Treasury Board received recommendations for changes to salary and terms and conditions of employment from the Advisory Committee on Senior Level Retention and Compensation which reviewed annual findings of the Advisory Group on Executive Compensation in the Public Service. Law Group non-management and management pay scales were set to maintain relativity with one another. The Treasury Board set salary ranges for non-management lawyers based on an average rate derived from the earning level of lawyers in the public and private practice from across Canada. Good fringe benefits and pension plan factored in the overall

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<sup>403</sup> *Lehman v. Canada (Attorney General)*, [1995] F.C.J. No. 1004 at para. 2, online: QL.

<sup>404</sup> *Ibid.*

compensation cost. Lawyers received the same pay rates regardless of the location of their employment. Provincial Crown salaries provided a natural comparator for Law Group wages because of the similarity of work performed by the two workforces. Salaries paid to DOJ lawyers typically matched or exceeded those received by lawyers employed by provincial governments. Section 4 of the SAP allowed Treasury Board to periodically adjust these wages. HRD monitored wage competitiveness by reviewing surveys from the Pay Research Bureau of the PSSRB and compensation trends in the broader legal labour market. Staff recruitment and retention difficulties, inflation, or simply an economic adjustment were considered in justifying an annual increase to lawyer salaries.

In the era prior to collective bargaining for DOJ lawyers, proposals to Treasury Board for amending Law Group compensation proceeded at the discretion of the Deputy Minister working through the department's Executive Committee. The Executive Committee, a plenary session of about twenty senior managers, addressed significant management issues by recommending to the Deputy Minister a course of action. It was one of many advisory panels tasked with handling some specific facet of departmental policy, practice or operational issue. DOJ and HRD senior management liaised with their counterparts at TBS in preparing salary submissions. TBS measured the feasibility of Law Group wage submissions when reviewing the request. For example, analysts from the Senior Level Retention and Compensation Group, Classification and Excluded Groups Division of the Human Resources Branch assessed external comparability and affordability of Law Group wage proposals based on similar sources of data used by HRD. The contents of formal submission sought authority from Treasury Board Ministers to adjust salary ranges for specific levels within the Law Group. Approved rates had effective dates that generally lasted in short-term yearly spans and they remained in place until revisited by subsequent submission.

#### **4.5 Legal Officers' Advisory Committee ("LOAC")**

In the early 1980s, Bill Halprin a Crown Prosecutor in the Vancouver Regional Office, proposed Justlaw. Halprin and like-minded colleagues became proactive about their employment situation after government anti-inflation measures capped salaries. They formed

Justlaw as an employee association to represent the interests of lawyers.<sup>405</sup> The usual business of setting up an organization took place: a cast of founding directors was named, some people signed up while others refused, meetings took place, and funds were collected. The movement spread east by recruiting members in other regional offices. A reasonable salary increase to lawyers' salaries dissipated the fledgling organization and curtailed its further growth.<sup>406</sup> Don Christie, Associate Deputy Minister of Justice and overseer of regional offices at the time, doubted lawyers could form an association, aware that legislation would render any further efforts as an ill-conceived spectacle.<sup>407</sup> In such belief, he informed Halprin of his serious reservations who clearly understood the subtext of the message.

Justlaw was an upstart to the established Management Advisory Committee (MAC). MAC was a forum between representatives of legal officers and management. Representatives met with their office constituents to discuss developments and concerns over salary, working conditions and the terms and conditions of employment, which they later relayed at meetings with management.<sup>408</sup> MAC was disbanded after Deputy Minister of Justice Roger Tassé determined the organization needed new direction. Apparently, legal representatives from Ottawa disavowed management's positions and sealed MAC's fate.<sup>409</sup> MAC representatives from different regional offices wrote to Tassé about a revived committee. The drive succeeded when in early 1982 LOAC, a joint committee of management and lawyer representatives, started.<sup>410</sup>

LOAC's beginnings seem to indicate a departmental culture where management saw the employment interests of lawyers as secondary to their work. LOAC offered lawyers a way to participate in the affairs of the department, and management the mechanism for constructing a decent working relationship with its lawyers. DOJ annual reports produced throughout the mid-

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<sup>405</sup> *Babcock*, *supra* note 302 (Affidavit # 1 of Harry J. Wruck, sworn 29 April 2004 at 4, para. 14) [hereinafter Wruck Affidavit]; *Babcock*, *ibid.* (Transcript of Examination for Discovery of Karl F. Burdak, 26 April 2000 at 47, question 219) [hereinafter Burdak Transcript].

<sup>406</sup> Wruck Affidavit, *ibid.*

<sup>407</sup> *Ibid.*

<sup>408</sup> Burdak Transcript, *supra* note 405 at 54, question 248.

<sup>409</sup> *Ibid.* at 51, question 237.

<sup>410</sup> *Babcock*, *supra* note 302 (Legal Officers' Advisory Committee, Document, 10 November 1994) [hereinafter LOAC Document].

1980s revealed LOAC's early work.<sup>411</sup> Since LOAC's inception, staffing and promotion processes and policies were regular topics addressed, as were lawyers' salaries, benefits, and training. LOAC also advised on official languages policy and on employment equity issues, and it helped propose new criteria for the performance review system. By 1987, LOAC provided input on a departmental submission to Treasury Board on terms and conditions of employment.<sup>412</sup>

LOAC operated within a committee-consultation model. Its membership consisted of five management nominees appointed by the Deputy Minister and sixteen non-management lawyer-representatives.<sup>413</sup> The non-management lawyer representatives consisted of voluntary members elected from each of the regional offices, headquarters and departmental legal service units. A management chair, appointed by the Deputy Minister, presided over meetings. The co-chair was a secretary chosen from non-management lawyer representatives. Recommendations on employee-employer matters were communicated through at least two management members of LOAC who reported to the Executive Committee.<sup>414</sup> LOAC meetings were held bi-annually in Ottawa. LOAC representatives convened among themselves, typically by conference call, to address matters as required.

LOAC's mandate outlined its roles: to advise management on terms and conditions of employment, employee-management relations, departmental personnel management systems, the quality of the work environment, and "to be actively involved in the formulation and presentation of compensation submissions by *inter alia* legal officer compensation on the LA Compensation Committee".<sup>415</sup> Vancouver Regional Office lawyer 1, a former LOAC regional office representative, explained the group's work as such:

So we had sort of an association of lawyers bringing forward issues with respect to primarily employment issues. So rate of pay and terms and conditions of employment

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<sup>411</sup> *Annual Report 1982-83*, *supra* note 384 at 12; *Annual Report 1983-84*, *supra* note 393 at 12; *Department of Justice Annual Report 1984-85* (Ottawa: Minister of Supply and Services, 1985) at 11; *Department of Justice, Department of Justice Annual Report 1985-86* (Ottawa: Minister of Supply and Services, 1986) at 10 [hereinafter *Annual Report 1985-86*].

<sup>412</sup> Department of Justice, *Department of Justice Annual Report 1986-87* (Ottawa: Minister of Supply and Services, 1987) at 6.

<sup>413</sup> *Annual Report 1985-86*, *supra* note 411 at 10.

<sup>414</sup> LOAC Document, *supra* note 410.

<sup>415</sup> *Ibid.*

etc... I would've described it as a loose association and each regional office had a representative... I would say a key role, as I thought when I was the LOAC representative, was a conduit for information. Information from the lawyers, up the line to management, and information from management down the line to the lawyers.

This respondent identified LOAC's function as a communication channel. LOAC's power as an advocate for lawyers, however, was constrained. Lawyers could talk to supervisors about their individual work concerns and more intractable disputes were pursued through formal grievances. LOAC's influence was primarily in consulting with management and its recommendations extended as far as management deemed appropriate. Turnover of representatives was common and their work suffered from inadequate resources and budget. Without the authority or legal right to bargain on behalf of lawyers, LOAC strove to act as a voice for employees, but its more fundamental problem was that it was grossly unequal in power to management, which did not necessarily have to listen to its proposals on compensation and other terms and conditions of employment.

#### **4.6 Conclusion**

DOJ lawyers designated as confidential and management employees under the *PSSRA* were prohibited from forming bargaining units. The Preparatory Committee wanting to prevent potential conflicts of interest reflected the industrial relations type of thinking of a particular time and place that applied to the work conducted by a relatively small bureaucracy of lawyers. The expansion and diversification of operations publicized by the DOJ from at least the early 1970s,<sup>416</sup> however, created lawyering roles for its staff that were distinct from advisory functions. Over time, not all lawyers could be expected to provide labour and employment advice to clients regarding the *PSRRA* or determine general organizational policy by sitting on departmental committees. Management responsibilities consumed no more than a third of the workforce which left the remaining majority subject to inapt labour provisions regarding membership in a bargaining unit. As the factual predicate underlying the *PSSRA*'s blanket exclusion changed, the rationale for excluding positions occupied by DOJ lawyers from a bargaining unit lost its force. Unable to bargain collectively, staff lawyers had little say over the way their work was directed. LOAC was never intended as an employee association, and previous attempts at the department to establish one unceremoniously petered out. Discussions

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<sup>416</sup> *Department of Justice 1972, supra* note 389 at iii.

between DOJ and TBS on matters of annual compensation or operational problems were conducted with a view to how best manage staff in support of efficient department operations.

A workplace converting from a non-union to a union form of representation is an instance of organizational change. Pentland suggests studies can explore such developments by looking at the connection between antecedent and consequence and describing the events that connect them.<sup>417</sup> The management system designed for directing unrepresented DOJ lawyers characterizes an initial condition. Outdated legislation and a compensation scheme set by the employer were elements of that framework incapable of independently sparking a unionization movement. They highlight, however, the primary variables capable of interacting and overlapping with actors intrinsic to the department. For example, LOAC's non-management representatives desired greater representative capacities during the mid-1990s when the centrally-commanded federal public service was being downsized and restrained from wage increases.

The multi-jurisdictional legal practice of the DOJ inevitably faced operational difficulties that demanded adaptability from a rigid employment administration. In 1990, a dire recruitment and retention problem at the Toronto Regional Office forced an unprecedented deviation from national salary policy in favour of the Treasury Board approving a Toronto differential. The department's failure to rescind the benefit demonstrated the inequities in the management system by aggravating employee expectations of fair dealing. Employment environments prone to organizing drives are those where feelings of job dissatisfaction and autocratic leadership pervade amongst workers,<sup>418</sup> which appeared to be the case for the DOJ. The events responsible for DOJ lawyers finally obtaining the right of collective bargaining are presented in the following chapter.

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<sup>417</sup> B.T. Pentland, "Building Process Theory with Narrative: From Description to Explanation" (1999) 24:4 *Academy of Management Review* 711 at 718.

<sup>418</sup> D.M. Zinni, P. Singh & A.F. MacLennan, "An Exploratory Study of Graduate Student Unions" (2005) 60:1 *Relations industrielles/Industrial Relations* 145 at 165.

## CHAPTER 5: DOJ Lawyers Become Employees

George Thomson, when he was deputy minister, turned up at Treasury Board and said the issues of non-management lawyers are not his responsibility. Lawyers at Justice had been willing to rely on the paternalism of management but not any longer.<sup>419</sup>

### 5.1 Introduction

In Canada's Parliamentary democracy, a political party that wins the most seats in the House of Commons after an election forms the country's next federal government. The reigning government will proceed to pass laws to implement political priorities identified in the Governor General's throne speech, which opens every new session of Parliament, or, as part of its established governance, modify existing laws to chart new public policy. On 6 February 2003, the majority Liberals instituted a fundamental policy shift in federal public sector labour and employment relations by introducing Bill C-25, the *Public Service Modernization Act*, into the House of Commons.<sup>420</sup> Bill C-25 heralded the most significant changes to human resources management in the federal civil service in over three decades, which directly affected the DOJ.<sup>421</sup> Under new labour legislation, the *Public Service Labour Relations Act (PSLRA)*, non-management DOJ lawyers could now unionize. For them to exercise their individual free choice and realize their newfound privilege, however, required an employee organization to campaign for recognition and convince a majority of DOJ lawyers that the benefits of pursuing workplace objectives through a collective outweighed those associated with maintaining the existing, management-driven system of individual employment relations.

This chapter's goal is to understand the factors and events responsible for the AJC conducting a successful organizing campaign of DOJ lawyers. I propose that a majority of DOJ lawyers' support for the AJC was attributed to changes in employment relations both internally, at the DOJ, and externally, in the broader federal public service between 1990 and 2003. My analysis develops a holistic schema that embeds the unionization process within a historical,

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<sup>419</sup> M. Bourrie, "Bill makes Justice lawyer union possible" *Law Times* 14:6 (17 February 2003) 1 at 2.

<sup>420</sup> Bill C-25, *An Act to modernize employment and labour relations in the public service and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other acts*, 2d Sess., 37th Parl., 2003 [hereafter *PSMA*].

<sup>421</sup> This is because, in addition to establishing the *PSLRA*, the *PSMA* would: (1) repeal the existing *PSEA* and introduce a new *Public Service Employment Act* that would regulate appointments to the federal public service; (2) amend the *FAA* to appoint deputy heads with human resources management powers; and (3) create a new Canada School of the Public Service.

bureaucratic, and legal context that arose from three key institutional developments: (1) employee dissatisfaction with the employer as a pre-condition for collective action; (2) the Legal Officers' Advisory Committee's (LOAC) development into the AJC based on employee support to secure formal workplace representation and improve wages through collective bargaining; and (3) the AJC's organizing campaign of DOJ lawyers as an extension of its initial mandate for becoming a professional association.

To mark the start of this series of events, this discussion begins with a close look at the Treasury Board's decision in June 1990 to approve a rare deviation in the DOJ's national salary plan: a Toronto differential that paid lawyers at the Toronto Regional Office (TRO) more than lawyers working elsewhere in the department (in order to remedy a staffing crisis exacerbated by wage gains secured by Ontario government lawyers collectively bargaining).<sup>422</sup> The introduction and prolongation of the Toronto differential is traced to show how a stop-gap measure sustained by a half-decade of federal government wage-restraint legislation and the department's inability to manage employee expectations for extending salary equity helped LOAC's non-management representatives structure a mandate for becoming a professional association. The introduction of the *PSMA*, with its goal of promoting harmonious labour relations in the federal public service, allowed the AJC to recruit DOJ lawyers and stand to become certified by the PSLRB as a union once the *PSLRA* came into effect on 1 April 2005. The following discussion will analyze the AJC's mobilization of lawyers that defused the organizing entreaties of the Professional Institute of the Public Service of Canada (PIPSC), but could not appease lawyers employed at the TRO (who formed their own employee organization as the Federal Law Officers of the Crown, [FLOC] with the goal of striking out as their own employee organization under the *PSLRA*). Ultimately, this chapter traces each of the three key sequences of events in the unionization process to provide a concise history that argues that lawyers supported the AJC based on its perceived instrumentality of increasing input in the determination of the employment agreement through collective bargaining—particularly for wage equity and increase—with Treasury Board.

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<sup>422</sup> At the time of events leading up to the introduction of the Toronto differential, the DOJ's Ontario office was identified as the Toronto Regional Office before being renamed as the Ontario Regional Office (ORO). To maintain consistency in usage, this chapter retains the Toronto Regional Office identifier despite the name change overlapping the events being discussed.

## 5.2 DOJ Law Group National Wage Policy Schism: The Toronto Differential

### 5.2.1 Background

The Toronto differential was tied to the city's dynamic legal market, of which the DOJ's Toronto operations were a part. During the late 1980s, Toronto, as Ontario's commercial and financial capital, enjoyed economic prosperity that was driven by rapid population growth, booming real estate market, and lead-up to the Canada-US Free Trade Agreement that kept reputable downtown Toronto law firms' solicitors busy with commercial transactions, and their barristers litigating an abundance of court files. Upper-tier law firms were hiring lawyers and legal secretaries to maintain high service levels and to prepare for expansion into new practice areas.<sup>423</sup> An upbeat legal labour market prompted the management of the DOJ's TRO to closely follow developments concerning its roughly sixty-five lawyers, the vast majority of whom occupied the LA-1 and LA-2A ranks. In fall 1987, management's attention to staffing increased after turnover destabilized the DOJ's flagship regional office.

The TRO was strategically located to supply legal and advisory work to various government departments operating throughout the populous Greater Toronto and southwestern Ontario area. Toronto's many local tribunals and courthouses, including the province's Divisional Court, and the Court of Appeal (where the federal government initiated and defended all types of legal actions), assured the office had its share of both high profile and mundane cases. Between 1987 and 1988 the central Toronto office was extremely busy opening some five thousand new files and closing a similar amount.<sup>424</sup> Its lawyers were spread across a General Counsel group and diverse practice sections, which consisted of Advisory, Commercial and Property Law, Civil Litigation, Tax Litigation, and Criminal Prosecution. High volume operations were sustained through a division of labour between legal support staff (who handled the administrative duties of a file) and lawyers (who practiced in courts and boardrooms). With half of the office's law assistants and clerks quitting, however, lawyers had to make up the

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<sup>423</sup> C. Languedoc, "Lawyers' fortunes tied to local economy: Popularity and mergers and acquisitions helped growth" *The Financial Post* (21 May 1988) 149; D. Lipovenko, "Hunt is on for rare legal secretary" *The Globe and Mail* (14 November 1988) B1.

<sup>424</sup> Department of Justice, *Justice: Annual Report 1987-1988* (Ottawa: Minister of Supply and Services Canada, 1988) at 23.

labour shortfall by working more hours.<sup>425</sup> The extra work kept piling on lawyers' desks and, compounding the stress, operations were relocated to an upper floor within the historic Dominion Public Building at the foot of downtown Toronto. The move into reconverted warehouse space greatly displeased staff as environs were cramped and office procedures were not automated.

In response to office turmoil, between 1987 and 1990, roughly thirty lawyers left for the private bar or relocated to other DOJ offices.<sup>426</sup> Replacing the departures was difficult as heavy workloads and lack of mentoring, compounded by poor compensation packages that Toronto's steep cost of living magnified, produced a revolving door of new personnel.<sup>427</sup> New lawyers lasted only twelve to eighteen month and whereas previous job postings attracted upwards of forty applicants, the number plummeted to five or six hopefuls.<sup>428</sup> This passage, drawn from a memorandum written by a member of the External Competition Committee to the TRO's Director, Ted Thompson, outlined the many factors causing the hiring problem:

As I indicated to you verbally, during the course of our interviews of the candidates who applied for the position with the Advisory, Commercial and Property Law Section of our office on January 17, 1990, the candidates all expressed surprise at the low rates of pay within the federal government...In the advertisement that was posted, the recruitment rates for the Department of Justice were not included. Given the reaction of all the candidates on January 17, 1990, if the recruitment rates had been posted, I question how many candidates would still have applied to the Department of Justice. Even if we are able to recruit and hire a candidate, it is questionable how long we will be able to keep that candidate given the significant disparity between the salaries paid by the Department of Justice and the salaries paid by other law firms not only in downtown Toronto but in the suburbs.<sup>429</sup>

Mounting recruitment and retention difficulties demonstrated that the DOJ had more than lost its lustre as an employer: its TRO was in the throes of a dismal staffing dilemma.

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<sup>425</sup> *Babcock*, supra note 302 (Proceedings at Trial of 9 September 2004, Transcript of Lois Lehmann at 25, lines 24-28) [hereinafter 9 September 2004 Lehmann transcript].

<sup>426</sup> *Ibid.* at 64, lines 44-45.

<sup>427</sup> The 1989 articling program did little to rebuild the ranks as students slotted several dozen spots deep on a priority list after being matched against one another considered job offers.

<sup>428</sup> *Babcock*, supra note 302 (Affidavit of Valarie Hartney sworn 15 April 1999, Schedule "C" Documents Produced by Plaintiffs But Not Defendants, Exhibit 3, Department of Justice Ministerial Executive Summary Memorandum, Title & Subject Matter: Treasury Board Submission – Law Group (LA) Compensation [20 April 1990] at 8) [hereinafter Schedule "C" Documents].

<sup>429</sup> Schedule "C" Documents, *ibid.* (Exhibit 3, Annex I: Department of Justice Canada Memorandum to Ted Thompson from Diane Winters [18 January 1990] at 1-2).

Lawyers who remained with the department pursued several strategies to strengthen their demands for better wages and a reason to stay. One approach indicated by Ted Thompson's memorandum to the Associate Deputy Minister Litigation, Douglas Rutherford, involved lawyers documenting their grievances:

The letter to the Deputy of October 5, 1989, signed by many of the Toronto lawyers is another cry of despair. It is clear they have many misperceptions. Unfortunately, I have not been able to obtain a concise and consistent statement of our salary policies so that I am in a position to provide accurate information as to how LA-1 increases will be applied and calculated. While these issues are being settled, a feeling of abandonment and a sense that the real problems in Toronto are going unrecognized and the dedicated efforts by our staff to cope are unappreciated.<sup>430</sup>

Another approach, expressed by former Toronto Regional Office lawyer 1, was a constitutional challenge over the *PSSRA* prohibiting DOJ lawyers from collective bargaining. The idea developed during the summer of 1989, inspired by the successes of provincial lawyers employed by the Ontario Ministry of Attorney General (MAG). After years of provincial government lawyers working under poor conditions and pay,<sup>431</sup> the Ontario government appointed labour law professor Paul Weiler to prepare a report with recommendations for establishing compensation levels and terms and conditions of employment for professional public servants without statutory entitlement to collective bargaining.<sup>432</sup> The January 1988 Weiler Report recommended that the province's lawyers have access to collective negotiations over salary and terms of conditions of employment accompanied by binding arbitration. On 21 July 1989, the lobbying of the Ontario Crown Attorney's Association (OCAA) and Association of Law Officers of the Crown (ALOC) led to the province recognizing both employee associations through the signing of the Framework Agreement on Collective Bargaining, which affirmed collective bargaining and the scope of issues to be covered during upcoming negotiations.<sup>433</sup> Some of Toronto's DOJ lawyers

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<sup>430</sup>Schedule "C" Documents, *ibid.* (Exhibit 3, Annex I: Department of Justice Canada Memorandum to D.J.A. Rutherford, Q.C., Associate Deputy Minister from Ted Thompson, Subject: Toronto Regional Office [19 October 1989] at 1).

<sup>431</sup> P. Bilodeau, "Crown attorney slowdown could stall court system" *Toronto Star* (8 November 1985) A12; K. Makin, "Reports say Ont. Crowns face job stress, poor morale" *The Lawyers Weekly* (27 November 1987) 29.

<sup>432</sup> P.C. Weiler, *The Professional Employee in Government: A Report to the Honourable Murray Elston, Chairman, Management Board of Cabinet, Government of Ontario, On the Methods for Establishing Salaries and Employment Conditions for professional employees of the Government of Ontario* (Toronto: Ontario Management Board of Cabinet, 1988) at 72.

<sup>433</sup> P. Kaufman, "ALOC at 25" *Public Sector Lawyers Section of the Ontario Bar Association* (1 July 2013), online: Ontario Bar Association <[http://www.oba.org/en/pdf/sec\\_news\\_pub\\_jul13\\_kau\\_alo.pdf](http://www.oba.org/en/pdf/sec_news_pub_jul13_kau_alo.pdf)> at 2 (date accessed 20 October 2013).

believed that suing the federal government could jumpstart similar gains, so they each contributed \$50 to fund a retainer for labour lawyer Paul Cavaluzzo to prepare a legal opinion. On its strength, a statement of claim was issued but the action died soon thereafter. Despite his prominence in co-ordinating the suit, former TRO lawyer 1 did not bemoan the suit's demise—he left the DOJ for private practice.

In January 1990, OCCA, ALOC, and the Province of Ontario achieved a first collective agreement that gave provincial government lawyers, on average, a 30 percent pay raise over two years retroactive to January 1989, a new salary classification plan, and the payment of law society fees.<sup>434</sup> The agreement caused the MAG to stand out as a cross-town, public sector rival to the DOJ, which offered a much better employment package and desperately needed prosecutors to tackle a backlog of cases clogging the courts.<sup>435</sup> As the current workforce could not maintain service levels, any drain of talent to the province imperiled the office's viability. Government departments already bemoaned their current representation by the TRO regardless of the embarrassment caused to the DOJ. An excerpt from this senior Toronto counsel's memorandum to Rutherford portrays the level of frustration expressed by upset clients:

In addition, more and more our departmental clients express concern about whether we can or will deliver the high quality of legal services that they were receiving in the past. They are increasingly asking to be represented by the private bar because there is little or no turn-over in lawyers handling their cases and they have more senior staff and resources (adequate resources). They do not have to wait long periods of time for something to be done on their files because there is more than one lawyer handling their case. They can call up the office and speak to the same lawyer that they have been dealing with during the course of the proceedings, rather than be told when dealing with our office, that their lawyer(s) has left the Department, and someone will call them back later. Later means probably a week to ten days, if they are lucky.<sup>436</sup>

Proposed solutions in the form of farming out work to Ottawa or even shuttering Toronto's operations were debated but rejected for being impractical, short-sighted, and ineffective at catching up to existing workloads and meeting future demands. Outsourcing excess legal files to

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<sup>434</sup> T. Walkom, "Hey Doctor, look what the lawyers got" *Toronto Star* (25 June 1990) A19; T. Hadwen et al., *Ontario Public Service Employment and Labour Law* (Toronto: Irwin Law, 2005) at 188.

<sup>435</sup> P. Todd, "Ontario unveils \$39 million plan to unclog courts" *Toronto Star* (22 November 1990) A2.

<sup>436</sup> Schedule "C" Documents, *supra* note 428 (Exhibit 3, Annex I: Letter to D.J.A. Rutherford, Q.C., Associate Deputy Minister – Litigation from Thomas L. James, Senior Counsel [22 January 1990] at 3-4).

agents was not a way out either, since staff lawyers still needed to supervise contractors. At this point, saving Toronto's operations required measures beyond Thompson's immediate powers.

On 31 January 1990, DOJ senior managers, consisting of Douglas Rutherford, the Assistant Deputy Minister – Corporate Management Sector Norman LaBarre, and Human Resources Directorate (HRD) Director General Sandra Stoddard, attended the Toronto office to canvass employees for their concerns and alert them to operational problems being addressed. The mission returned to Ottawa and debriefed Deputy Minister John Tait, who then ordered an action plan for saving the TRO. As the Law Group compensation package expired on 1 April 1989, the pending HRD proposal to TBS regarding revised terms and conditions of employment, performance pay, and an adjustment to the national salary range of articling students, LA-1, LA-2A and LA-2B lawyers, retroactive to 1 April 1989, would include a non-pensionable, terminable regional allowance tacked on to the national salary scale (rather than a base salary increase) and paid solely to lawyers employed at, or reporting to, the TRO. This “parity allowance” proposal would adjust salary ranges to match those received by Ontario MAG lawyers effective 1 January 1990 (with subsequent range adjustments implemented in August and October).

Non-management LOAC representatives monitored the department's compensation proposal through its members' participation on the LA Compensation Committee. On 12 March 1990, LOAC LA Compensation Committee members convened a conference call with regional LOAC members to discuss the department's proposal. LOAC's non-management chair, Guy Faggiolo, advised the plenum that a national rate increase could not match the parity allowance. This was because introducing an across-the-board gain at Ontario MAG rates of \$12,000 to \$16,000 would distort relativity between non-management and executive pay scales, which was a cornerstone of Treasury Board compensation policy.<sup>437</sup> Montreal's LOAC representative and member of the LA Compensation Committee suggested a competitiveness increase to the national salary rate that would narrow the difference between the parity allowance for Toronto to \$5000 and make the introduction of the differential less shocking to other lawyers. This salary

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<sup>437</sup> *Babcock, supra* note 302 (Proceedings at Trial of 10 September 2004, Transcript of Lois Lehmann at 55, lines 30-42) [hereinafter 10 September 2004 Lehmann transcript].

competitiveness measure was advanced through a memorandum to LaBarre to be considered by the department's executives during their negotiations with TBS.<sup>438</sup>

A 15 March 1990 meeting between TBS and DOJ representatives cast a new die for the department's draft Law Group compensation submission. TBS rejected the DOJ's retroactive start date of 1 April 1989 for national salary rate adjustments, and instead proposed 31 March 1990. Furthermore, approving the DOJ's regional parity allowance plan as it stood troubled TBS's representatives. They did not want regional economics to skew the remuneration of lawyers. During the steep inflation years of the early 1980s, the DOJ adhered to a single pay policy despite lawyers in Vancouver, Toronto, and Edmonton calling for a salary raise to match escalating cost of living expenses. As well, TBS disliked the notion of special treatment for one set of civil servants while other unionized government departments in Toronto also had their own recruitment and retention issues. They suspected influential national unions, such as the Public Service Alliance of Canada, would use the precedent to seek similar concessions in upcoming collective bargaining negotiations. Thus, TBS recommended a prudent compromise: the TRO would receive its own salary scale, distinct and separate from the national standard, at rates comparable to those paid by the MAG. At the LA Compensation meeting of 30 March 1990, LaBarre relayed to LOAC's representatives that the parity allowance was being dropped for a separate Toronto salary scale.

By 20 April 1990, HRD staff finalized the Law Group compensation proposal and readied it for the signature of the Associate Deputy Minister, Deputy Minister, and Minister of Justice. Once the TBS received the DOJ's submission, its staff prepared an aide-memoire to accompany the proposal and delivered the completed package to the Treasury Board. In decision number 814117, dated 6 June 1990, Treasury Board ministers approved the DOJ's request for establishing a regional salary scale for lawyers employed at the TRO. The Treasury Board decision overlooked any restructuring of the national salary ranges as TBS withheld that portion of the submission. Deputy Minister Tait's memorandum of 11 June 1990 to lawyers explained the decision to bifurcate the salary submission as follows:

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<sup>438</sup> 9 September 2004 Lehmann transcript, *supra* note 425 at 44, lines 13-20.

As a result of discussions with Treasury Board officials concerning our submission, and given the urgency of the situation regarding the Toronto Regional Office, it was decided to proceed to the Board with respect to the Toronto rates of pay only, as the consideration of the salary range changes sought on a national basis would have led to delays in the approval process. We proceeded on this basis on the understanding that Board officials would continue to work with us on a priority basis to review the general Law Group salaries and that an appropriate submission to the Board would be made in that regard as soon as possible...Consultations with the LA Compensation Committee on this next phase of negotiations with the Treasury Board will continue, and all efforts will be made to advise you of the outcome in a timely way.<sup>439</sup>

The decision naturally heightened lawyers' interest in learning the eventual margin between the two salary scales. The suspense ended on 25 July 1990, after Treasury Board ministers approved the national DOJ Law Group compensation proposal and awarded economic adjustments in the amount of 0 percent and 3 percent effective 31 March 1990 and 31 March 1991 respectively. The decision set national salary ranges for lawyers at the LA-2A level roughly \$6,000 lower than the starting range of the Toronto scale and \$13,000 less at its upper end.

DOJ senior management's handling of the Law Group compensation proposal demonstrated that LOAC's involvement in the salary determination process was moderated. After its 7 June 1990 conference call with LaBarre, LOAC's non-management representatives understood that the Treasury Board would likely approve the competitiveness increase advanced by its members on the LA Compensation Committee. Instead, Treasury Board ministers approved the same wage increases proposed by the 20 April 1990 Law Group compensation submission. Moreover, LOAC's LA Compensation members believed that Treasury Board would review the national salary proposal in August, only to discover the national salary submission had proceeded in July.<sup>440</sup> LA Compensation Committee members documented the unease caused by their peripheral involvement as this memorandum written to LaBarre notes:

...Following the Board's decision to adopt special rates of pay for lawyers in the Toronto Regional Office, you indicated, in the course of a telephone conversation with the representatives of the Legal Officers on LOAC, that there was a 90% chance that the Board would approve the Department's request for a competitiveness increase for non-Toronto LA's...We asked you whether the Board had any problems with our Department's proposed submission. The only problem you mentioned was the Board

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<sup>439</sup> Wruck Affidavit, *supra* note 405 (Exhibit "B", Department of Justice Canada Memorandum to All Lawyers from Deputy Minister, Subject: Rates of Pay in the Law Group [11 June 1990] at 2-3).

<sup>440</sup> 9 September 2004 Lehmann transcript, *supra* note 425 at 60, lines 1-6.

officials' reluctance to make a retroactive rate change. You further indicated that apart from this, Board officials found our request...reasonable. Needless to say, as we had not been informed of any other problems with our submission, the Board's unfavourable decision, the details of which we are unaware, came as a disagreeable surprise.

In his memorandum of June 11, 1990...John Tait, indicated that... the Department would continue to work with it on a priority basis to review the general Law group salaries and an appropriate TB submission would be made as soon as possible. He...sa[id] that "[c]onsultations with the LA Compensation Committee on this next phase of negotiations will continue..." No such consultations took place on the content of or strategy pertaining to this submission nor were the representatives of the Legal Officers given a copy of the second submission...

We have been instructed by the representatives of the legal officers on LOAC to register their displeasure with the lack of consultation between management and LA representatives during this last phase of the salary negotiation process. By not volunteering timely and relevant information to the LAs' representatives on the Compensation Committee the Department was certainly not living up to the spirit of its own Mission and Values Statement which states that "[t]he Department's strength comes from all members of the organization who are committed to working together on the basis of mutual trust, support, and respect."

...LOAC representatives recognize that management must be given considerable leeway in carrying out negotiations, nonetheless, they are of the view that, where these could lead to results totally different from those sought by the Department and agreed to by the LAs representatives on the LA Compensation Committee, the latter ought to be advised beforehand in order to ascertain possible input.<sup>441</sup>

The Toronto differential, as an exceptional deviation from the SAP's objective for the consistent administration of salaries for DOJ lawyers, was a zero-sum and divisive compensation policy. The longer the two unequal salary scales existed, the more lawyers who did not work at the TRO could ask their LOAC representatives to inquire about plans DOJ management had for increasing the national salary scale or for formalizing provisions to allow for allowances to any office facing labour circumstances like Toronto's. In the event that lawyers wanted to take a more proactive stance, there was always the idea floated by Vancouver's LOAC representative to revive Justlaw and agitate for an improvement in national salary rates.<sup>442</sup> By and large, however, non-management LOAC representatives preached patience. They saw a silver lining in the

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<sup>441</sup> Nicol Affidavit, *supra* note 399 (Exhibit "A", Department of Justice Canada Memorandum to Normand LaBarre, Assistant Deputy Minister Corporate Management Sector from G. Faggiolo, M. Bittichesu, & L. Lehmann, LOAC Representatives, LA Compensation Committee, Subject: Competitiveness Increase [8 August 1990] at 1-2).

<sup>442</sup> *Babcock*, *supra* note 302 (Proceedings at Trial of 20 October 2004, Transcript of Lois Lehmann at 24, lines 26-27).

Treasury Board having to maintain comparability between the Toronto differential and salaries paid by the Ontario MAG—the national salary scale would have to be adjusted upwards as well. By contrast, TBS’s preference was for the two salary scales to return to one and it believed that, with recent Pay Research Bureau data showing that the national benchmark for lawyer salaries at a plateau due to a national recession and the legal labour market cooling in Toronto, the convergence would occur sooner than later. However, economic and political factors beyond the control of either the TBS or the DOJ instigated measures responsible for the Toronto differential’s immediate perpetuation.

### 5.2.2 *Legislative Deep Freeze*

The emerging salary compensation picture at the DOJ was overshadowed by the recession of the early 1990s, which compounded a fiscal crisis in federal government finances, and the Conservative (and subsequent Liberal) government’s program of tackling deep budget deficits. On 26 February 1991, the government’s budget, tabled in the House of Commons, called for aggressively restraining state debt and expenditures. The budget initiated the period of federal government restraint and retrenchment lasting from 1991 to 1997, which involved Ottawa reducing government services, downsizing the federal public service, and freezing public sector wages. With the enactment of the *Public Sector Compensation Act*<sup>443</sup> (*PSCA*) on 2 October 1991, the government implemented its budget prerogatives and quelled federal employee unrest over wage restraints in one fell swoop. Every compensation plan along with terms and conditions of employment extant in the federal public service as of February 1991 was extended by twenty-four additional months. The law froze salary ranges of both DOJ national and Toronto compensation plans for the first year of the *Act*, but they would rise by 3 percent for the second annum.

The salaries of DOJ lawyers were directly affected by *PSCA*’s cost-containing provisions. The Toronto differential stalled behind the salaries of Ontario MAG lawyers after an increase raised it by an additional 5.78 percent effective 1 January 1991. On 22 November 1991, TBS’s Personnel Policy Branch issued a directive suspending in-range salary performance pay and

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<sup>443</sup> *Public Sector Compensation Act*, S.C. 1991, c. 30.

bonuses for DOJ lawyers at the LA-2A and higher level for the 1991-1992 appraisal year.<sup>444</sup> The course of *PSCA*'s cost restrictions required LaBarre's successor, Mario Dion, to monitor and liaison with TBS regarding the Toronto differential's continuance since the Treasury Board approved the benefit on the understanding of it being periodically reviewed. In October 1992, Pricewaterhouse Coopers was retained to conduct a study analyzing the city's short-to-medium term labour market as a measure for assessing the differential's longevity. TRO lawyers responded by forming a committee that denounced the need for the project. Their concerns were allayed on 2 April 1993 by the passage of the *Government Expenditure Restraint Act, 1993 No. 2*<sup>445</sup> as the *Act* extended section 5 of the *PSCA*'s salary range and performance pay moratoriums for two additional years. The *Budget Implementation Act, 1994*<sup>446</sup> (*BIA*), the third and final piece of wage-restraint legislation, extended the legislative freeze on public servant compensation plans until 31 May 1997.<sup>447</sup> The three *Acts* preserved the Toronto differential over the length of their legislated terms, which prevented the TBS and DOJ from formally revisiting its necessity.

Legislation artificially sustaining the Toronto differential far beyond the market conditions that justified it perplexed senior management at the DOJ who wanted a return to a single national salary plan. As it stood, the differential flouted the DOJ's cost-cutting prerogatives as its operational budget was slashed by 10 percent from 1993 to 1997.<sup>448</sup> Continued administration of the Toronto differential hampered employee morale and fanned the

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<sup>444</sup> Performance pay for the LA-1 group remained in place until December 1992. It was suspended from 1 April 1993 to 31 March 1995.

<sup>445</sup> *Government Expenditure Restraint Act, 1993 No. 2*, S.C. 1993, c. 13.

<sup>446</sup> *Budget Implementation Act, 1994*, S.C. 1994, c. 18.

<sup>447</sup> *Granger v. Canada (Conseil du Trésor)*, 1998 CanLII 7593 (F.C.) involved DOJ lawyers from various offices protesting against statutorily imposed performance pay moratoriums and frozen salary increases. Roughly thirty of them, some particularly upset with PIPSC represented lawyers continuing to receive salary increases between 1991 and 1994, filed grievances alleging restraint legislation contravened provisions of the SAP-Law Group, DOJ. Grievers reasoned that after the Deputy Minister provided the requisite annual evaluation, they were *prima facie* entitled to a performance increase. Five representative grievances that Deputy Minister Thomson dismissed proceeded to judicial review before Justice Lufty of the Federal Court Trial Division. Justice Lufty dismissed the appeal, and his ruling was upheld by the Federal Court of Appeal with reasons reported at *Granger v. Canada (Treasury Board)*, 2000 CanLII 15317 (FCA). The judge's interpretation of SAP sections 6.2 and 6.3 confirmed that the Treasury Board could override deputy minister discretion through binding administrative directives. Denying DOJ lawyers performance pay did not represent a change to the SAP as the plan could be implemented differently from year to year. Thus, there was no contravention of section 7 of the *PSCA*, which required compensation plans continue in force without change.

<sup>448</sup> Schedule "C" Documents, *supra* note 428 (Exhibit 12, Department of Justice Canada, *Info Justice* "The Deputy Minister Replies" [20 October 1993] at 4).

discontent of other lawyers working in large cities who did not receive the benefit.<sup>449</sup> The lawyers most incensed by the Toronto differential were those employed at the Vancouver Regional Office. They performed the same work as lawyers in Toronto and also faced soaring housing and living costs. In May 1995, Vancouver lawyers apprised their Regional Director, Jim Bissell, of ten criteria that they determined further investigation would support their calls for higher wages.<sup>450</sup> A few months later, they voiced their demands through numerous grievances to Deputy Minister Thomson, albeit unsuccessfully, claiming financial and geographic discrimination because of Treasury Board implementing the Toronto differential. These failed complaints encouraged lawyers to initiate a collection (seeking \$100 from each member) to fund a legal opinion about suing the government and to review of a draft statement of claim. On 31 May 1996, fifty-three Vancouver lawyers sued the Attorney General of Canada, Treasury Board of Canada, Minister of Justice and Deputy Minister of Justice for damages, claiming that the Toronto differential breached an express term of their contract of employment and declaring that the *PSSRA*'s prohibition on DOJ lawyers organizing to collectively bargain infringed their *Charter* right of freedom of association.<sup>451</sup> The *BIA* expiring, along with the market conditions responsible for the Toronto differential dissipating, therefore offered the DOJ a window of opportunity to settle some of its finance and personnel issues by revisiting the Toronto differential. In April 1996, Thomson wrote to the secretary of TBS requesting measures to allow the DOJ to adjust the Toronto differential. When the DOJ's HRD followed up with the TBS about the Toronto salary scale review process they were advised to advance a salary position based on an objective market analysis.<sup>452</sup>

Six years of fiscal restraint and downsizing understandably damaged the reputation of the federal government as an employer. This assessment, noted by the Clerk of the Privy Council,

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<sup>449</sup> *Babcock, supra* note 302 (Examination for Discoveries of 8 December 2003, Sandra Stoddart at 56, lines 19-22); *Babcock, ibid.* (Proceedings at Trial of 18 November 2004, Transcript of Fiona Spencer at 55, lines 9-14).

<sup>450</sup> *Babcock, ibid.* (Proceedings at Trial of 25 October 2004, Transcript of Barbara Burns at 94, lines 9-25) [hereinafter 25 October 2004 Burns Transcript].

<sup>451</sup> *Babcock, ibid.* (Plaintiffs' Writ of Summons, Court file number C963189, Vancouver Registry). In their claim, the plaintiff lawyers also plead that the defendants breached their fiduciary duty to them when the DOJ failed to advocate for, and continued to deny, their entitlement to the Toronto differential. They also asserted that the defendants withholding from the plaintiffs payment of the differential breached section 15 of the *Charter*. On 4 June 1996, two additional Vancouver lawyer plaintiffs issued a separate, but mirror Writ of Summons. That matter is associated with Court file number A961830. Before trial started, the two files were consolidated into one.

<sup>452</sup> *Babcock, ibid.* (Proceedings at Trial of 17 November 2004, Transcript of Fiona Spencer at 12, lines 2-10) [hereinafter 17 November 2004 Spencer Transcript].

Jocelyne Bourgon, in her February 1997 *Fourth Annual Report to the Prime Minister on the Public Service of Canada*, illustrated the “quiet crisis” brewing in the federal public service endemic of low morale, job dissatisfaction and flight among civil servants caused by cutbacks.<sup>453</sup> Strained labour and employment relations demanded the government launch the ambitious human resources reform programme of *La Relève*, which was a wholesale review and multi-year action plan for revitalizing the federal bureaucracy. At the DOJ, the *La Relève: Justice Action Plan* saw the department meeting its future business challenges through a new competency-based system for all DOJ human resources policies, practices, processes, and systems. The document outlined the department’s strategy for reforming human resources management and proposed that its primary challenge was to create an engaged and resourceful workforce within a changing legal service delivery environment.<sup>454</sup> The department faced the immediate issues of compensation, automatic promotion between LA-1 to LA-2A that was suspended since January 1993, senior promotion, and improved employee recognition that could hinder employee participation in the department’s larger reform agenda.<sup>455</sup> To address these matters, as well as the changes to the Toronto differential, implementation of performance pay for 1997, and revising terms and conditions of employment, the report noted a sub-committee of the Human Resources Committee would investigate and make recommendations to the department’s Executive Committee.<sup>456</sup>

Indeed, in April 1997, the DOJ’s Human Resources Committee (HRC) struck an LA Compensation Subcommittee (LACS) (comprised of managers and three LOAC non-management representatives) to allow for employee representation on the panel. Compensation policies needed normalizing after the triumvirate of wage restraint *Acts* caused several anomalies in the wages of the DOJ Law Group: salary ranges required an economic adjustment without allowing for retroactive increase; recruiting rates were outdated; LA-2A and LA-2B lawyers accumulated tenure and their salaries needed repositioning within the salary grid to reflect their advancement. Furthermore, there were no salary adjustment for lawyers within the LA-2A pay

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<sup>453</sup> Canada, Privy Council Office, *Fourth Annual Report to The Prime Minister on The Public Service of Canada*, online: Clerk of the Privy Council Office <<http://www.clerk.gc.ca/eng/feature.asp?mode=preview&pageId=148>> (date accessed 11 August 2010).

<sup>454</sup> *Department of Justice: La Relève Justice Action Plan* (May 28, 1997) at 4 (Released pursuant to the *Access to Information Act*. Document on file with the researcher) [hereinafter *La Relève Justice Action Plan*].

<sup>455</sup> *Ibid.*

<sup>456</sup> *Ibid.* at 19.

band, but progression for lawyers at the LA-1 level resulted in “leapfrogging” where, upon a subordinate’s promotion between levels, they surpassed the salary of their superior despite having less experience. The HRC was short on resources previously dedicated to researching lawyers’ compensation as the Research Pay Bureau folded in February 1992, which was followed by the shuttering of the Law Group Compensation Committee one year later. In spring 1997, Deputy Minister Thomson retained an external consultant, Robert Casault, to serve as a liaison to the HRC and address the Toronto differential by investigating whether the recruitment and retention problems justifying the benefit remained, and, if not, options for its discontinuance. Vancouver lawyers, who advocated for Casault’s work to advance a regional rate scheme that extended pay increases to offices based on need, elicited a cool response from the department and exposed the contentiousness of the Toronto differential.

### 5.2.3 *The Differential Remains: Gain to Some, Pain to Others*

Robert Casault’s initial report of May 1997 found that the Toronto office’s recruitment and retention problems had dissipated. He proposed seven options for reducing or eliminating the Toronto differential, from which LACS members picked four.<sup>457</sup> Since members could not narrow their decision to one selection, they solicited feedback from within the department. Vancouver lawyers knew of Casault’s findings through their LOAC representative who sat on the LACS subcommittee, and they critiqued them for not fully assessing the implications of repealing the Toronto differential without hearing from lawyers most impacted by the decision. LACS accepted their request to speak with Casault and he was dispatched to Vancouver in mid-June 1997 for two days. His instructions were to obtain information from the office’s management committee about phasing out the Toronto differential. Casault attended the Vancouver office, met with the office director and, management committee, and discussed his report with LOAC’s representative and other lawyers. He maintained that a regional wage premium depended on data showing atypical and extended staff loss undermining operations, and noted that he welcomed material from lawyers that substantiated their assertions. Casault also conducted fieldwork at the department’s Montreal and Toronto offices. During the Toronto visit, he canvassed lawyers for their views on entitlement to the differential, heard about repercussions if it were repealed, and received an endorsement for other offices receiving a

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<sup>457</sup> 17 November 2004 Spencer Transcript, *supra* note 452 at 27, lines 13-21.

similar allowance on the basis of demonstrated need. Apparently, the Toronto visit was important, as Casault's final study of 31 October 1997 recommended maintaining the Toronto differential, albeit with the observation that the rate was a source of lingering bad feelings throughout the department.<sup>458</sup>

On 7 November 1997, HRC members met in Ottawa to review the Casault report findings and discuss the Toronto differential's future. The committee's agenda expanded after Toronto and Vancouver Regional Office Directors were allowed to present their office's positions on the matter.<sup>459</sup> Vancouver's newly appointed Regional Office Director, Barbara Burns, saw the intervention as a calling on a manager's duty to advocate for her staff's financial interests.<sup>460</sup> Burns, accompanied by the Director of Federal Prosecution Services for British Columbia, Robert Prior, and LOAC's office representative presented a written submission on recruitment and retention problems that included stories of lawyers quitting, statistical data on departures, recent staffing actions, wage comparisons with the Attorney General of British Columbia (showing a shortfall in salaries at LA-1 and LA-2A levels), and memorandums detailing labour shortages in various practice sections. The material set the premise for the delegation's bold proposal overlooked by Casault: a submission to Treasury Board entailing a temporary, non-pensionable, regional allowance to any office that qualifies on the basis of defined criteria demonstrating a recruitment and retention difficulty.<sup>461</sup> Prospects for expanding regional rate allowances as a feature of the department's salary plan were staked on the extent of Vancouver's operational difficulties.

While the Toronto differential was in the process of being reviewed, LOAC's bi-annual meeting of 23 October 1997 resulted in committee members determining that the other aspects of the post-legislated restraint Law Group compensation submission should be completed by a

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<sup>458</sup> *Ibid.* at 48, lines 7-10.

<sup>459</sup> Schedule "C" Documents, *supra* note 428 (Exhibit 13, Final Records of Decisions #35, Human Resources Committee Meetings on LA Compensation Including Toronto Rates of Pay, Held on 7 November 1997 at 2).

<sup>460</sup> *Babcock*, *supra* note 302 (Proceedings at Trial of 28 October 2004, Transcript of Barbara Burns at 32, lines 15-21) [hereinafter 28 October 2004 Burns Transcript].

<sup>461</sup> *Babcock*, *ibid.* (Proceedings at Trial of 27 September 2004, Transcript of Robert Prior at 104, lines 18-30) [hereinafter 27 September 2004 Prior Transcript].

dedicated and impartial body.<sup>462</sup> The resolution compelled Deputy Minister Thomson to ask, and TBS to permit, the department to retain an expert that would build on the Casault Report findings and generate recommendations for a fiscally responsible compensation proposal that the department could use in negotiations with TBS. That expert was Jim Thomas, whose hiring was announced at the 27 November 1997 HRC meeting.<sup>463</sup> This HRC meeting was also notable for other reasons. On the eve of the meeting, one of LOAC's non-management representatives alerted the HRD that the HRC was not considering input from lawyers outside of Toronto and Vancouver in its decision-making process and that some allowance for additional contributions should ensue.<sup>464</sup> Furthermore, committee members conceded that the available data supported maintaining the Toronto differential. They also believed that figures from Vancouver demonstrated operational problems, but sought more information on which a case for a special regional rate could be defended. Attendees learned that tinkering with the national salary plan by introducing regional rates could open a Pandora's Box of funding reform. The Treasury Board provided the DOJ an annual budget from which salary expenses of different regional offices were drawn. Unless the Treasury Board financed proposed regional allowances, the department would have to source funding internally, and, possibly, by diverting resources from the budgets of other offices where wages surpassed local comparators.

A proposed regional rate pay system disconcerted lawyers working in Ottawa and Montreal, who disapproved of geographic differentials and were determined to inform decision-makers of their opposition. Ottawa lawyers enlisted their regional director to oppose salary gains for Vancouver.<sup>465</sup> Lawyers and notaries at the Quebec Regional Office, with the endorsement of their regional director and managers, petitioned Treasury Board ministers to deny any departmental proposal seeking regional allowances by denouncing salary inequity and calling for an end to existing regional differentials.<sup>466</sup> The question remained whether the DOJ's Executive

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<sup>462</sup>Schedule "C" Documents, *supra* note 428 (Exhibit 15, Department of Justice Canada Memorandum to George Thomson, Deputy Minister from Susanne N. Frost, Counsel, LOAC Non-Management Co-Chair, Subject: Preparation of an LA Compensation Submission to Treasury Board [25 November 1997] at 1).

<sup>463</sup> Schedule "C" Documents, *ibid.* (Exhibit 16, Final Records of Decisions #36 Human Resources Committee Meetings on LA Compensation Including Toronto Rates of Pay, Held on 27 November 1997 at 1).

<sup>464</sup> *Babcock*, *supra* note 302 (Proceedings at Trial of 26 October 2004, Transcript of Barbara Burns at 66, lines 14, 27-47).

<sup>465</sup> *Babcock*, *ibid.* (Proceedings at Trial of 29 September 2004, Transcript of Barbara Burns at 56, lines 29-35 [hereinafter 29 September 2004 Burns Transcript]).

<sup>466</sup> 17 November 2004 Spencer Transcript, *supra* note 452 at 84, lines 22-45.

Committee deemed regional rates advantageous for Vancouver, while mulling on whether to eliminate or reduce the amount of the Toronto differential. Robert Prior advanced the Vancouver office's case by giving policy makers sufficient data on its recruitment and retention difficulties.<sup>467</sup> Overall, Thomas, through his dealings with the HRD, meetings with TBS, consults with Casault, and information provided from Vancouver, had enough material to consider regional salary rates as part of his recommendations.

At the Executive Committee meeting of 16 January 1998, Thomas presented his initial analysis on Law Group compensation and proposals for discussion with TBS. He suggested that the DOJ leverage the gains PIPSC attained through a June 1997 collective bargain covering its lawyers by requesting the same performance pay increase of 5 percent within salary range, as well as an economic increase of 2 percent to salary ranges for the 1997 and 1998 fiscal years. He also supported maintaining the Toronto differential, but economic adjustment to its salary ranges would be limited to 1 percent, which was half of the gain sought for the national salary scale. The Toronto differential would enjoy a higher maximum rate at the LA-2A level and above, but minimum and maximum salary ranges at the LA-1 level would merge into one national rate along with the minimum salary level for LA-2A group. As for the DOJ's management lawyers, economic and performance raises were sought at levels recommended by the Advisory Committee on Senior Level Retention and Compensation chaired by Lawrence Strong.<sup>468</sup> Furthermore, increased national recruiting rates for LA-1 and LA-2A level lawyers, with variations from the standard on a regional basis for Vancouver and Toronto were encouraged (rather than a regional rate premium). Regional variations were proposed in the event of

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<sup>467</sup> These included a supplementary memorandum to Mr. Casault on recruiting difficulties and departure numbers that showed lawyers in the LA-1 and LA-2A groups represented fifteen of sixteen staffing losses from April to November 1997. Another memorandum to Casault comparing DOJ salaries with those of British Columbia's provincial crowns showed that from eighty-nine LA-1 and LA-2A lawyers, sixty-four were paid less than their coequals at the province. However, comparisons at level LA-2B and higher positions showed general equivalency or better pay offered between groups, and, hence, little support for increasing salary ranges for lawyers in these categories. Another memorandum was sent to the Assistant Deputy Attorney General for Criminal law in Ottawa detailing the majority of personnel losses were prosecutors. Overall, attrition rates for the Vancouver office were calculated at 18.4 percent (15.2 percent was the departure rate factoring only personnel transfers and resignations). Mr. Thomas received two additional memorandums: one, that showed recruiting rates for entry level lawyers were uncompetitive in comparison to the private bar, and, in comparison to the province, rates that were uncompetitive after one year of service, and, a second, that updated departures numbers for the end of the year.

<sup>468</sup> The Strong Committee replaced the Burns Committee and released its first report on executive compensation in January 1998 [hereinafter Strong Committee].

recruiting and retention difficulties that were not associated with cost of living increases, and to allow for adjustments to LA-2A lawyer salaries to prevent wage compression.

The DOJ's executive simply could not adopt a controversial regional rate allowance proposal for inclusion in a compensation proposal to TBS. Given the hostility towards the Toronto experience, they noted what Thomas observed was a need for great caution before introducing another regional rate differential. As well, Thomas' finding of separation rates amongst those leaving the Vancouver office for pay reasons at 10 percent for 1997 (and double the attrition rate for 1994-1995) was crucial since TBS considered this measure as the standard for assessing the level of personnel loss.<sup>469</sup> As the numbers did not suggest Vancouver staffing problems approximated Toronto's crisis in 1990, or demonstrate what TBS understood substantiated a recruitment and retention dilemma, the DOJ placed confidence in lessening that office's staffing shortages through pay adjustments that increased salary ranges to parity with salaries paid by the province of British Columbia. Vancouver lawyers from the LA-1 and LA-2A complement who quit represented the majority of the office's staffing losses and they typically cited salary non-competitiveness as the reason for their departure (which, the cited difference of \$10,000, is roughly what calculations of the proposed PIPSC economic and performance increase would raise non-management lawyer salaries).<sup>470</sup> Compensation meetings between representatives from both the DOJ and TBS continued while TBS studied the proposal before they finally presented a formal submission to the Treasury Board. On 6 June 1998, Treasury Board ministers approved the DOJ's Law Group compensation submission based on Thomas' report recommendations. Vancouver's regional rate proposal was short lived, but it kept pay allowances based on regional differences on the department's radar.

The department struck an LA Compensation Working Group to deal with other perennial concerns affecting DOJ lawyers' terms and conditions of employment such as the Law Group classification system, performance pay and assessment standards, inter-level progression, and overtime. The LA Compensation Group's tasks became encompassed with the work of the

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<sup>469</sup> 29 September 2004 Burns Transcript, *supra* note 465 at 87, lines 31-36; 25 October 2004 Burns Transcript, *supra* note 450 at 14 lines, 39-47.

<sup>470</sup> 29 September 2004 Burns Transcript, *ibid.* at 83, lines 29-32; 27 September 2004 Prior Transcript, *supra* note 461 at 42, lines 29-36.

Reference Level Review. Reference Level Review was a collaborative initiative between DOJ and TBS that assessed the DOJ's current and future human, technological, and resource funding requirements. Five areas of operations ranging from government client to federal prosecution services were evaluated with a view to assist the DOJ meet its priorities. Identified deficiencies were earmarked and would be remedied by requests to TBS for additional funding. One of the five modules studied was Law Group compensation and its sub-issues of pay rates, terms and conditions of employment, benefits, overtime, attrition, and regional premiums.

The Reference Level Review Reports of Spring 1999 marked one of four inquiries conducted through September 2001 that yielded TBS and DOJ a composite analysis of DOJ Law Group compensation. The Reference Level study of 20 April 1999 informed that TBS officials would only consider extending a regional rate allowance to other offices based on solid evidence showing attrition caused by market variables alone and not by job security or cost of living factors.<sup>471</sup> Subsequent studies demonstrated serious difficulties in any one regional office qualifying for a Toronto-type wage premium. The LA Compensation Working Group retained Ruth Matte of Consulting and Audit Canada to study whether compensation trends between 1992 and 1999 prompted recruitment and retention problems at the department. The study found minimal attrition among DOJ lawyers based on insufficient compensation.<sup>472</sup> A June 2001 Pricewaterhouse Coopers (PwC) study investigated the DOJ's future recruitment and retention needs. Recent attrition rates of lawyers were calculated at 5 percent, which allowed the study to find that the DOJ did not suffer an immediate recruitment and retention crisis, but faced imminent retirements and a need for more lawyers.<sup>473</sup> Finally, TBS commissioned a private consultancy firm on compensation, to assess the positioning of DOJ lawyer salaries *vis-a-vis* corporate, private and public sectors based on year 2000 data.<sup>474</sup> Released in September 2001, the Hay Group's analysis of provincial Crown labour markets found that, other than for Ontario, salary ranges for Law Group counsel positions were between 15 to 40 percent higher than similar positions with differences especially pronounced at senior levels.<sup>475</sup>

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<sup>471</sup> *Babcock, supra* note 302 (Reasons for Judgment of Smith J. at para. 127) [hereinafter Judgment of Smith J.].

<sup>472</sup> *Babcock, ibid.* (Proceedings at Trial of 27 October 2004, Transcript of Barbara Burns at 95, lines 36-45).

<sup>473</sup> 28 October 2004 Burns Transcript, *supra* note 460 at 60, lines 23-45.

<sup>474</sup> *Babcock, supra* note 302 (Affidavit of Morris Rosenberg # 1 sworn 23 January 2004, Exhibit "A" Hay Study at 1).

<sup>475</sup> 28 October 2004 Burns Transcript, *supra* note 460 at 66, lines 8-17.

This collection of DOJ Law Group compensation studies allowed Mario Dion to write to lawyers in late December 2001, and advise them of management's assessment of their salaries:

Taken together, the Consulting and Audit Canada study and the PriceWaterhouse Coopers study, which looked at recruitment and retention issues, and the Hay Report, which examined rates of pay in both the public and private sectors, have provided us with a comprehensive understanding of the overall and regional recruitment, retention, compensation and work environment issues that are important to Justice counsel. Based on the research, we know that recruitment and retention are not a major problem at this time in the Department and, based on the Hay Report, we also know that salaries are competitive, with the exception of the Toronto region.<sup>476</sup>

The message reinforced the Department's view that its national salary ranges were adequate, and on the right track towards slowly narrowing the gap between the Toronto differential.<sup>477</sup> No regional office required special rate amendments to offset staffing shortages, other than a potential one developing at the TRO due to significant, arbitrated wage gains secured by Ontario government lawyers.

The brief period of relative wage competitiveness between the Toronto wage scale and the salaries of the Ontario MAG was caused by the freezing of provincial government lawyers' salaries from January 1992 to October 2000. The freeze was due to the Ontario New Democrats' "Social Contract Act," which was closely followed by the Conservative government's "Common Sense Revolution." As the initial round of collective bargaining between MAG, ALOC, and OCAA demonstrated, however, extended recesses in upward compensation leading to salary disparities were compensated for by a generous wage increase. History repeated itself as the interest arbitration award between the province of Ontario and its lawyers of 26 October 2000, issued by Chair William Kaplan, dispensed an exceptional 30 percent increase in the annual

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<sup>476</sup> *FLOC, AJC v. TBC*, *supra* note 303 (From the DM Team No. 345 – A Message to Justice Counsel [12 December 2001] at 1).

<sup>477</sup> Treasury Board ministers continued the convergence trend in salaries between the national and the Toronto salary rates after they approved salary increases to the national salary plan for the 1999 and 2000 fiscal years by 2 percent in each year, while the Toronto differential received a 1 percent economic increase for the same period. On 4 July 2001, for the 1999 and 2000 fiscal years, Treasury Board gave an unexpected 1 percent lump-sum retroactive payment to lawyers in Toronto working at the LA-2A and LA-2B levels in order to maintain relativity with salary increases for management lawyers proposed by Strong Report recommendations. The increase had the effect of slowing the post-legislative trend of merging the National and Toronto salary rates; but, the TBS still did not want to abandon the convergence of the two salary scales. *Babcock*, *supra* note 302, Affidavit #1 of Valarie Howander, sworn 28 April 2004, 14th supplemental list of documents of the Attorney General of Canada attached as Exhibit "B" (E-mail from Mario Dion to Morris Rosenberg, Subject: FW: LA Compensation – Toronto Visit, [30 July 2001] at 248) [hereinafter 28 April 2004 Howander Affidavit].

salaries of provincial lawyers employed by the MAG retroactive to 1 January 1999 (Kaplan award).<sup>478</sup> MAG salaries spiked an average 20 percent higher at both the minimum and maximum levels in comparison to each of the Law Group classification levels at the Toronto salary scale. The difference stood in even starker contrast to the national DOJ salary scale, which languished between 5 and 15 percent below that of the Toronto differential rates. DOJ management, having research indicating that national salary rates were competitive, could not change lawyers' perception that the Toronto differential was unjust, and could do nothing to head off more frustration if further increases outpaced comparable gains to the national salary scale. As the following sections will show, the Kaplan award emboldened LOAC's non-management representatives to proceed with a referendum seeking the approval of DOJ lawyers for a professional association with one of its directives being to reduce salary disparity between the national and Toronto salary rates through collective bargaining.

### **5.3 Reforms at the DOJ**

#### *5.3.1 Background to LOAC Becoming a Staff Association*

On 1 July 1998, Morris Rosenberg succeeded George Thomson as the Deputy Minister of Justice of Canada. The timing of his appointment installed him as custodian over the ongoing human resources reform endeavour underway at the department. Initiated in January 1998 by Rosenberg's predecessor, the "Big Conversation" was a department-wide, town hall meeting tour for staff and senior management to interact with another, take stock and discuss numerous appreciable shifts in DOJ operations.<sup>479</sup> Certain changes, such as the introduction of timekeeping by lawyers for legal services, were banal.<sup>480</sup> Other innovations, though, were more structural and sought cost and work process efficiencies through investments in information management systems and technology, development of service agreements with client departments, and reorganization of the department into a portfolio management system to

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<sup>478</sup> *Association of Law Officers of the Crown v. Ontario (Management Board of Cabinet)(Salaries Grievance)* [2000] O.L.A.A. No. 790, online QL.

<sup>479</sup> 29 September 2004 Burns Transcript, *supra* note 465 at 86, lines 10-41.

<sup>480</sup> Canada, Office of the Auditor General of Canada, "Chapter 5: Managing the Delivery of Legal Services to Government— Department of Justice Canada" in *Report of the Auditor General to the House of Commons, May 2007* (Ottawa, Minister of Public Works and Government Services, 2007) at 22, para. 5.66, online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca/internet/docs/20070505ce.pdf>> (last modified: 1 May 2007).

improve the delivery of legal services.<sup>481</sup> The variables responsible for the DOJ's personnel expansion throughout the 1990s, however, most affected the day-to-day work of staff.<sup>482</sup> The DOJ's labour needs expanded partly due to an increase of legal work and advising associated with government initiatives in Aboriginal and international affairs, partly due to sheer growth in the volume and complexity of civil, criminal, and *Charter* litigation, and partly due to client departments' demands for services and willingness to pay for staff.<sup>483</sup> The DOJ's growth was facilitated using a term-work model where staff was hired on a contract basis to handle spikes in workloads and temporary projects. The employment practice of integrating the department's LA-1 population into an inclusive workplace culture would need re-assessment, of course, as 80 percent of lawyers in this complement worked on a term basis.<sup>484</sup> Overall, the Justice Forums were intended for staff to raise their employment concerns and allow management to take their issues into consideration when considering human resources policies. Improved employee relations were part of the new mantra at the department as it strove to become a "workplace of choice." LOAC's non-managerial members also had their rationale for improving the workplace that centred on their committee becoming a more effective, service-oriented entity.

The period of legislated moratoriums on public sector wage increases may have suspended the work of the LA Compensation Committee, but the break in responsibilities helped divert LOAC's non-management members' attention to other committee functions. The April 1995 LOAC semi-annual meeting in Ottawa seemed to have marked a change in non-management LOAC representatives' view towards the committee's potential. They attended with a steering committee in the works to evaluate LOAC and its mandate in light of: its non-

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<sup>481</sup> *Ibid.* at 6, para. 5.3; *La Relève Justice Action Plan*, *supra* note 454 at 6; D. Lemaire, R. Thompson, & A. Lamoreux, "Transformations at Justice" (1998) 28:4 *Optimum, The Journal of Public Sector Management* 19 at 24-25.

<sup>482</sup> In 1997, the DOJ had 2,556 employees. Between 1997-98 and 2002-03 the department added an additional 2,198 employees. See Treasury Board Secretariat, "Expenditure Review of Federal Public Sector – Volume Two – Compensation Snapshot and Historical Perspective, 1990 to 2003", online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/report/orp/2007/er-ed/vol2/vol203-eng.asp>> (last modified: 24 July 2007).

<sup>483</sup> Canada, Office of the Auditor General of Canada, "Chapter 17: Department of Justice—Legal Advisory and Litigation Services" in *Report of the Auditor General of Canada 1993*, at paras. 17:18, 17:25, 17:43, 17:65, online: Government of Canada Web Archive <<http://www.collectionscanada.gc.ca/webarchives/20061027054841/http://www.oag-bvg.gc.ca/domino/reports.nsf/html/ch9317e.html>> (last modified: 27 October 2006); *Babcock*, *supra* note 302 (Proceedings at Trial of 31 January 2005, Transcript of Morris Rosenberg at 32, lines 3-15) [hereinafter 31 January 2005 Rosenberg Transcript].

<sup>484</sup> *La Relève Justice Action Plan*, *supra* note 454 at 9.

management members' growing involvement in lawyers' grievances; their interest in re-assessing LOAC's structure; and their possible participation on the Policy, Operations, and Human Resources Subcommittees of the department, which were evolving to assume greater managerial responsibilities.<sup>485</sup> Granted, LOAC's expansion into staff advocacy added more work for its regional representatives who had neither the added resources nor the permission to fulfill an employee need, but, the practice of addressing employee performance assessments particularly startled the department's HRD. As this passage, taken from the testimony of Lois Lehmann<sup>486</sup> recorded during the *Babcock*<sup>487</sup> trial reveals, the appropriate course of action was to abstain from employee representation all together:

It was a thrust that management was getting into in the late 90s that resulted in some difficulty for a couple of people listed above. We had all been representing our constituents in our own regional offices with respect to potential grievances, complaints, competition appeals. We'd done that since I started in 1990. That was the other facet—the individual facet—of the nature of the work we did, we represented. And suddenly over time, but certainly this makes it clear that management is taking a dim view of that and saying, well, you're not—you're not the employees' representative, you don't have any status, and therefore they can come—they should come directly to us. That was that kind of attitude probably was something that propelled us to say, well October 1998, it's time to move forward into an association so that we can, in fact, provide that representation.<sup>488</sup>

The observations raised in this passage encapsulated a sentiment shared by Lehmann's colleagues: that LOAC surpassed being a mere transmitter of communications. With the culture of change unfolding at the DOJ, the appropriate climate was formed for non-management LOAC members to advance their own agenda.

On 15 September 1998, LOAC's non-management regional representative hosted an information session in Ottawa regarding alternate models of employee representation. Several provincial lawyers' association presidents were invited to attend and discuss their organizations' experiences, and, afterwards, LOAC non-management and management representatives gathered

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<sup>485</sup> *Babcock*, *supra* note 302 (Proceedings at Trial of 21 October 2004, Transcript of Lois Lehmann at 9, lines 25-33, 39-45) [hereinafter 21 October 2004 Lehmann Transcript].

<sup>486</sup> Lehmann was counsel with the civil litigation group at the Toronto Regional Office. In January 1990, she was elected as LOAC's regional representative and remained a stalwart with the organization prior to and during its evolution into the AJC. As will be discussed later in the chapter, she also became the AJC's first president.

<sup>487</sup> The context for the *Babcock* suit was discussed *supra* at p. 109 of this chapter. The plaintiffs in the case called Lehmann as their witness. Her testimony for the purposes of this study is used as factual information.

<sup>488</sup> 9 September 2004 Lehmann Transcript, *supra* note 425 at 6, lines 7-27.

to discuss findings. On 8 October 1998, LOAC non-management representatives followed up the meeting by sending a memorandum to Rosenberg that formally requested changes to LOAC. The memorandum expressed their concern about LOAC's inability to act for the interests of non-management lawyers, senior management not considering the views of non-management LOAC members, and a request for changing LOAC's structure by creating two full-time positions (assisted by secretarial support) to handle employee representation.<sup>489</sup> These observations helped substantiate Rosenberg's decision to initiate LOAC's re-evaluation by investigating whether it was satisfying its objectives as a communication vehicle in light of the DOJ expanding its personnel and responsibilities.<sup>490</sup> In April 1999, Rosenberg commissioned a "Beyond LOAC" Committee with a mandate of: (1) examining the different models for how the interests of non-management lawyers are better represented; (2) consulting broadly with non-management lawyers as to their preference for a form of representation; and (3) submitting recommendations for a new model to him.<sup>491</sup>

The outcome of the Beyond LOAC project was a formal report produced with the assistance of labour mediator George Adams, who facilitated consultations between three management and three non-management LOAC representatives. Committee members met on 6 and 27 April 1999, and for a third session on 25 June 1999. During the Beyond LOAC consultations, non-management committee members unanimously backed a recommendation for removing the *PSSRA*'s prohibitions on DOJ lawyers participating in an employee organization.<sup>492</sup> Management committee members rejected the proposal, citing that collective bargaining spoiled the development of a professional partnership.<sup>493</sup> The framework enshrining LOAC's new consultative role then culminated from compromises in negotiations between

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<sup>489</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Department of Justice Canada Memorandum to Morris Rosenberg, Deputy Minister & Richard Thompson, Management Co-Chair, LOAC from Non-Management Lawyers, Subject: Enhanced LOAC [8 October 1998] at 37).

<sup>490</sup> 31 January 2005 Rosenberg Transcript, *supra* note 483 at 43, lines 12-16; Babcock, *supra* note 302 (Proceedings at Trial of 1 February 2005, Transcript of Morris Rosenberg at 32, lines 17-24).

<sup>491</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Department of Justice Canada Memorandum For the Deputy Minister: Beyond LOAC Committee Report [13 August 1999] at 91).

<sup>492</sup> 28 April 2004 Howander Affidavit, *ibid.* (Letter from Non-Management Members "Beyond LOAC" Committee to Morris Rosenberg, Deputy Minister of Justice [8 October 1999] at 104) [hereinafter Beyond LOAC Committee Letter].

<sup>493</sup> 28 April 2004 Howander Affidavit, *ibid.* (Report of the "Beyond LOAC" Committee To The Deputy Minister of Justice [19 July 1999] at 90).

parties regarding the extent formal representation was permissible within the parameters of the *PSSRA*. On 19 July 1999, the report was presented to Rosenberg for his consideration.

The Beyond LOAC Report findings were based on a review of LOAC's functions, insights from non-management and management on its utility, and their consensus on recommendations for refurbishing the committee into a vehicle for improving employee-employer relations. The report detailed LOAC's many deficiencies. Operationally, LOAC's bi-annual meetings with management that lasted for a day and a half were too short and management-dominated, which prevented meaningful consultation with non-management members. Other factors disadvantaged LOAC, such as lack of resources allotted for representatives' work, no operating budget, and high turnover of voluntary representatives. Structurally, LOAC did not participate in any of the DOJ senior decision-making committees. It had no dealings with TBS, and it lacked a representational framework for redressing employee issues of salary, workload, and performance evaluations. In short, without significant reform LOAC was not viable. The Beyond LOAC Report's three central recommendations attempted to improve the situation and involved: (1) creating a professional association of non-management lawyers that represented lawyers in employment relations with the DOJ and Treasury Board; (2) the DOJ and Treasury Board committing to acknowledge the association as exclusive representative of non-management lawyers for the purposes of non-management lawyer representation; and (3) representing lawyers in advancing grievances.<sup>494</sup> LOAC's non-management members approved the report on the encouragement of their outgoing chair, Tom McMahon, who suggested that the proposal was a vast improvement over LOAC's existing

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<sup>494</sup> *Ibid.* at 86-90. The thirteen other recommendations set out by the Beyond LOAC Committee Report were: (1) voluntary check-off of association dues based on evidence of majority support; (2) DOJ funding of \$150,000 for association start-up and initial operating costs and similar level of funding over the next two years; (3) employee association intranet page and e-mail communication system; (4) Treasury Board and DOJ commitment to meaningfully consult with the association regarding annual pay plan; (5) DOJ commitment to meet quarterly with the association regarding terms and conditions of employment; (6) independent third-party mediation available to either party to resolve impasses in deliberations; (7) incorporation of all existing terms and condition of employment in a base document; (8) one Association representative to sit on the DOJ Executive Committee and meetings of the Departmental Management Committee; (9) association consultation with the DOJ's Human Resources Committee; (10) DOJ and Treasury Board commitment not to discriminate against lawyers participating in the affairs of the association; (11) freedom of association and its members to work for the elimination of the *PSSRA* exclusion without reprisal; (12) joint review of Beyond LOAC framework after three years; (13) formal memorialisation of representational commitments that documents agreement was brought to the attention of Treasury Board ministers and that the Government of Canada supports the agreement.

model and a stepping stone to collective bargaining.<sup>495</sup> What remained was gaining the Deputy Minister's approval, without which the plans for LOAC's new future would remain unfulfilled. Rosenberg accepted the Beyond LOAC Report recommendation that the department provide \$150,000 to defray the costs of studying the association's creation and allow for staff consultations to measure popular support for implementing other report recommendations.

LOAC non-management members agreed to a three-person transition team comprised of their peers Jeff Hutchinson and Beyond LOAC non-management committee members Francisco Cuoto and Lois Lehmann to spearhead LOAC becoming an association. Lehmann was also appointed to a full-time, one-year assignment dedicated to coordinating the association's launch. Lawyers, however, first needed to be acquainted with the details of the project. Throughout the autumn of 1999, management and non-management Beyond LOAC committee members visited DOJ regional and departmental legal service unit offices to consult with staff on Beyond LOAC report proposals and solicit feedback.<sup>496</sup> Audiences generally supported Beyond LOAC non-management members' goals for creating an employee association that was formally recognized by and collectively negotiated with the Treasury Board to achieve a national salary equivalent to the rate paid by the Ontario MAG.<sup>497</sup> In June 2000, both casts of Beyond LOAC committee members reconvened to update each other on steps towards realizing the association. At the meeting, Beyond LOAC management committee members confirmed that Rosenberg would implement all Beyond LOAC report recommendations within the DOJ's authority provided they had the support of a majority of staff lawyers.<sup>498</sup> Those recommendations that affected the Treasury Board required their consent, and they refused direct negotiations with DOJ lawyers.<sup>499</sup>

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<sup>495</sup> Beyond LOAC Committee Letter, *supra* note 492 (Attachment, E-mail of Tom McMahon to LOAC Colleagues [11 August 1999] at 109).

<sup>496</sup> Around the time of campaigning, support for a non-management lawyer employee association was offered by the Supreme Court of Canada's decision of 2 September 1999 in *Delisle v. Canada (Deputy Attorney General)* [1999] 2 S.C.R. 989, 1999 CanLII 649 (SCC). The court held that that the *PSSRA* preventing Royal Canadian Mounted Police officers from establishing a union did not stop them from creating an employee association that could conduct any activities that its members could do so individually. By extension, the decision confirmed DOJ lawyers were entitled under section 2 of the *Charter* to form an independent employee association.

<sup>497</sup> 9 September 2004 Lehmann Transcript, *supra* note 425 at 72, lines 18-25; 21 October 2004 Lehmann Transcript, *supra* note 485 at 67, lines 40-47.

<sup>498</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Department of Justice Canada Memorandum For The Deputy Minister: Beyond LOAC Report – Follow Up, prepared by Michael Richard, Legal Operations Sector [23 February 2001] at 165) [hereinafter Beyond LOAC Report Memorandum].

<sup>499</sup> Without the *PSSRA* recognizing the ability of DOJ lawyers to participate in an employee association they could not use the automatic *Rand* formula for collecting mandatory dues, which is a system that applies to certified

Instead, TBS preferred an agreement outlining its role in meetings between the lawyers' employee association and DOJ management.<sup>500</sup>

Another retainer for Ruth Matte Consulting resulted in a report recommending a consultation system to guide the lawyers' employee association and the DOJ in discussions with TBS. The consultant advised creating a compensation council as a system for DOJ management and its lawyers to reach agreement on pay and terms and conditions of employment. Input from the council would be informational and used in recommending a position on compensation that DOJ management would communicate to TBS; however, final recommendations remained within each of the authorities' scope of decision-making powers.<sup>501</sup> The Beyond LOAC transition team balked at the inability to negotiate with TBS and abandoned compensation council discussions. They preferred to finalize the association after the October 2000 Kaplan award could be used to sell lawyers on the power of collective action, and, once established, position the association to capitalize on the federal government's imminent revamp of the legal framework governing federal public service labour and employment relations.

### 5.3.2 *Labour Reforms in the Broader Federal Public Service*

Beyond LOAC Committee Report recommendation #14 acknowledged that non-management DOJ lawyers enjoyed rights of freedom of association and could work to eliminate their exclusion from the *PSSRA*. This recommendation gained traction in October 1999, after the Secretary of the Treasury Board appointed a nine-member advisory group that was chaired by John Fryer (and so called the Fryer Committee) with an eighteen-month mandate to review the state of labour relations between Treasury Board and civil service unions.<sup>502</sup> The Fryer

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bargaining agents. Furthermore, *Delisle* confirmed that the Treasury Board did not have to recognize an employee association that is excluded under the *PSSRA*, and, therefore, no legal grounds existed that authorized the AJC to assume direct negotiations with the employer.

<sup>500</sup> Beyond LOAC Report Memorandum, *supra* note 498 at 165.

<sup>501</sup> *Ibid.*

<sup>502</sup> Other investigators were assessing human resources management practices in the federal public service. See Canada, Report of the Auditor General of Canada, "Chapter 9—Streamlining the Human Resources Management Regime: A Study of Changing Roles and Responsibilities" in *Report of the Auditor General – 2000 April* (Ottawa: Auditor General of Canada), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca/internet/docs/0009ce.pdf>> (last modified 11 April 2004). The report called for Parliament to cut administrative complexity from departmental policies and reform personnel institutions and practices. The report found several deficiencies with rigid staffing processes and job classification systems characteristic of a dated framework unsuitable for managing an evolving bureaucracy within a fluid work environment. Legislation

Committee was to diagnose the system of collective bargaining under the *PSSRA* and assess whether the labour management system effectively served the tax-paying public. Recommendations were to help TBS determine whether to propose amendments to the *Act*.

In May 2000, the Fryer Committee released its initial report. Committee members reviewed history, conducted surveys, and heard from key stakeholders to determine that collective bargaining functioned well during its first decade. They also found that over the next fifteen years, periods of unilateral government restraint and retrenchment, made possible by the government's dual role as employer and legislator undermined collective bargaining.<sup>503</sup> Management's overextension into labour relations under the *PSSRA* was highly problematic for the committee, as was: the *Act's* exclusion of significant terms of employment from bargaining; haphazard legislative determination of highly complex bargaining units; a convoluted redress mechanism; prohibitions on policy grievances; and complex and anachronistic managerial exclusions.<sup>504</sup> In sum, the report concluded that the existing collective bargaining regime in the federal public service was unsustainable.

Fryer Committee members prepared their second and final report for an audience that anticipated its arrival. The Liberals won a third federal government and in his reply to the Throne Speech of 31 January 2001, Prime Minister Chrétien committed the government to modernizing the public service.<sup>505</sup> An additional call to action came in March, with the Clerk of the Privy Council, Mel Cappe, tabling the *Eighth Annual Report to the Prime Minister on the Public Service of Canada*, which called for a fundamental reform of the legislative framework

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regulating the staffing process was burdensome and slow, which promoted litigious appeals, and an impractical administration. Staffing reform was called for, as was transforming managing roles and accountability in human resources systems. The report observed that collective bargaining needed changes. The Fryer committee's work stood to expand the point by identifying whether pressures exerting modernization initiatives in human resources management administration carried over to the labour relations arena.

<sup>503</sup> Canada, *First Report of the Advisory Committee on Labour Management Relations in the Federal Public Service* (Ottawa: Secretariat Office Advisory Committee on Labour Management Relations in the Federal Public Service, 2000) at 39, online: Treasury Board Secretariat of Canada <<http://www.tbs-sct.gc.ca/report/fryer/iti-ide-eng.asp>> (last modified 1 May 2000).

<sup>504</sup> *Ibid.* at 40-43.

<sup>505</sup> Address by Prime Minister Jean Chrétien in Reply to the Speech from the Throne (Ottawa, Ontario, 31 January 2001), online: Government of Canada Privy Council Office <[http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2001\\_reply-eng.htm](http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2001_reply-eng.htm)> (last modified: 31 January 2001) wherein the Prime Minister noted: "And we will make the necessary reforms to modernize the public service for the requirements of the 21st century."

governing human resources management.<sup>506</sup> On 3 April 2001, Prime Minister Chrétien fulfilled his commitment by announcing the creation of the Task Force on Modernizing Human Resources Management in the Federal Public Service (Quail Task Force). Within eighteen months, the task force chair, Deputy Minister of Public Works and Government Services Canada, Ranald A. Quail, and an external advisory group were to recommend a contemporary policy, legislative, and institutional system for managing human resources in the federal civil service. Proposing new legislation first involved examining current laws, and for that analysis, the Quail Task Force looked to the work of the Fryer Committee.

The Fryer Committee released its final report on 13 June 2001 (Fryer Report). The Fryer Committee proposal for more harmonious labour relations was to create a new institutional framework consisting of: a reformed and modernized *PSSRA* that would incorporate recommendations proposed by the Committee; transferring the *PSSRA*'s administration to the Canada Industrial Relations Board; reconstituting the PSSRB as the Public Service Rights Redress Board to adjudicate all grievances; creating a Public Interest Dispute Resolution Commission to resolve impasses in collective bargaining; and expanding the role and legal recognition of the National Joint Council.<sup>507</sup> The committee suggested three principles to guide labour management relations in the administration of the new regime: embracing collective views; recognizing workers enjoy freedom of association to form unions and collectively bargain; and committing to cooperative solutions.<sup>508</sup> Committee members proposed that every subject that arises in the workplace is a matter for union-management interaction through a “three-C” model of consultation, co-development and collective bargaining.<sup>509</sup> The Fryer Report's recommendations, numbers 3, 8, 9, 10, for amending the *PSSRA* increased the level and

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<sup>506</sup> Canada, Privy Council Office, *Eighth Annual Report to the Prime Minister on the Public Service of Canada* at 14, online: Privy Council Office <[http://www.clerk.gc.ca/local\\_grfx/docs/reports/8rept2001-eng.pdf](http://www.clerk.gc.ca/local_grfx/docs/reports/8rept2001-eng.pdf) > (last modified: 10 February 2014). In February 2001, the Office of the Auditor General also called for streamlining and modernizing the human resources management regime of the federal public service. Canada, Office of the Auditor General, *Public Service Management Reform: Progress, Setbacks and Challenges* (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 21, online: Office of the Auditor General <<http://publications.gc.ca/collections/Collection/FA3-27-2001E.pdf>> (last modified: 28 February 2001).

<sup>507</sup> Canada, Advisory Committee on Labour Management Relations in the Federal Public Service, *Working Together in the Public Interest, Final Report of the Advisory Committee on Labour Management Relations in the Federal Public Service* (Ottawa: Treasury Board of Canada, 2001) at 18, online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/report/fryer/wtpi-teip-eng.pdf>> (last modified: 1 June 2001) [hereinafter *Working Together*].

<sup>508</sup> *Ibid.* at 13.

<sup>509</sup> *Ibid.* at 15.

scope of worker involvement in determining workplace issues and supported the efforts of DOJ lawyers forming an employee association. Recommendation 3 proposed amending the *PSSRA* to allow for consultation between employer and employee representatives in the development of policies; recommendations 8 and 9 advanced the concept of two-tier collective bargaining and negotiations of terms and conditions of employment at both the service-wide and departmental levels. In recommendation 10, the Fryer Committee thought to relax the *PSSRA*'s employee exclusions to mirror those of the Canada Labour Code's less stringent criteria and bar only those employees from coverage who performed management functions or were employed in a confidential capacity in matters relating to industrial relations. They reasoned that the *PSSRA*'s current exclusions were restrictive, unnecessary, and "inconsistent with the facilitative, enabling approach" the committee sought.<sup>510</sup> The Fryer Report was referred to the Quail Task Force for its deliberations in a creating a new labour relations framework.<sup>511</sup>

### 5.3.3 *Formalization of the AJC and First Moves*

Set against this backdrop of stirring federal public service labour legislation reform, the Beyond LOAC transition team prepared for a referendum to determine whether non-management lawyers supported the creation of a professional association. The Beyond LOAC transition team used the 2 March 2001 edition of JustInfo (DOJ Intranet newsletter) to announce the Beyond LOAC intranet site featured a proposal and a discussion brief covering compensation, annual performance review and employee appraisal, management leave and overtime, promotions, grievance procedures, lack of regional rate policy, maternity leave, and term employment as issues bolstering the need for an association to monitor them.<sup>512</sup> As previously foreshadowed, the proposal intended to create a professional association to: act as bargaining agent for non-management DOJ lawyers on all terms and conditions of employment with Treasury Board;

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<sup>510</sup> *Ibid.* at 23.

<sup>511</sup> On 7 December 2001, the Standing Committee on Public Accounts (a group of parliamentarians assembled to review the Fryer Report) recommended that: "That the report and recommendations of the Advisory Committee on Labour-Management Relations in the Federal Public Service be seriously considered and expeditiously acted upon." See Canada, Standing Committee on Public Accounts, Thirteenth Report, of the Advisory Committee on Labour—Management Relations in the Federal Public Service (Fryer Report), online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032045&Language=E&Mode=1&Parl=37&Session=1>> (last modified: 7 December 2001).

<sup>512</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Department of Justice Canada Memorandum to Deputy Minister from Michael Richard, Leslie Holland & SuzAnne Doré, Subject: Consultation document published on LOAC web site regarding new Professional Association Project [2 March 2001] at 172-73).

enlist third-party binding arbitration as a bargaining dispute resolution mechanism; and use a Rand-type formula for collecting membership dues.<sup>513</sup> The Beyond LOAC transition team returned to each regional and departmental legal service unit office to discuss the proposed association with audiences. Lawyers supporting a plebiscite encouraged members of the Beyond LOAC transition team to ready a vote.

This period of tremendous progress also saw the Beyond LOAC transition team contain internal adversity stemming from the Kaplan award, which caused ninety-five percent of non-management lawyers at the TRO to form the Ontario Justice Lawyers' Association (OJLA) with the purpose of achieving wage parity with Ontario government lawyers.<sup>514</sup> In May 2001, OJLA renamed itself as the Federal Lawyers' Association of Greater Toronto (FLAG). An immediate executive decisions facing the FLAG's Board of Directors was whether to support the AJC's referendum while pursuing its own wage campaign.<sup>515</sup> The FLAG's Executive Committee determined that it could pursue its mandate by working within a national association, and so asked the membership to vote for the AJC (which they overwhelmingly did).

The Beyond LOAC transition team prepared for the referendum. They secured a voters list, decided on a balloting process, recruited volunteers to assist with polling, and advised management of their use of JustInfo.<sup>516</sup> In anticipation of the historic vote, the 21 May 2001 edition of JustInfo advertised the Key Points of the Association of Justice Counsel, a summative proposal for creating a professional association. From the 18th to 27th of June 2001 non-management DOJ lawyers voted in an office-by-office referendum: of the 1,452 votes cast, 1,274 approved of the association.<sup>517</sup> From the department's perspective, mass support for the AJC occurred because:

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<sup>513</sup> *FLOC, AJC v. TBC*, *supra* note 303 (Association of Justice Counsel: Compensation Proposal for Justice Counsel for 2001-2002: "Principled and Fair" at 2) [hereinafter AJC Compensation Proposal 2001-2002].

<sup>514</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Letter to Morris Rosenberg from FLAG [4 May 2001] at 187).

<sup>515</sup> *FLOC, AJC v TBC*, *supra* note 303 (Federal Law Officers of the Crown, Written Submissions at 5, para. 24) [hereinafter FLOC Written Submissions].

<sup>516</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (E-mail to Morris Rosenberg from Lois Lehmann, Subject: Association of Justice Counsel Project [10 May 2001] at 186).

<sup>517</sup> 28 April 2004 Howander Affidavit, *ibid.* (Department of Justice Canada Memorandum For the Deputy Minister: Positioning the Association of Justice Counsel in the Context of Human Resources Modernization from Barry Deeprose, Director of Human Resources Regional Liaison [5 October 2001] at 262).

Over the years, lawyers in Justice have come to feel that they have been disadvantaged in their wages and that the Department has not represented their interests adequately before the Treasury Board. Employee relations in the Department have consequently eroded.<sup>518</sup>

AJC executives, Lehmann and Cuoto, however, explained the AJC's genesis as follows:

Unlike the vast majority of Federal government employees, Justice counsel are denied to be represented by a union and to engage in collective negotiations, because they are specifically excluded from the definition of "employee" under the Public Service Staff Relations Act (PSSRA). They have formed the AJC to represent their interests, as a result of having no access to the normal system for addressing employee concerns about terms and conditions of employment and redress process.<sup>519</sup>

The AJC's goal for a single national salary plan as the cornerstone of its position on compensation seemed to have found resonance amongst voters:

Whatever the reasons for imposing economic segregation, eleven years later it is something that still deeply divides the Department: both counsel and management. In both the CAC (Ruth Matte Study) focus groups of 2000 and the AJC cross-country consultations of 2001, this came out as a major topic of frustration.<sup>520</sup>

The AJC was voted into existence to increase due process in the workplace, restore external market comparability caused by the salary freezes of the 1990s and to address internal imbalance from the existence of the Toronto differential. However, the AJC's identity as a national association was brief once FLAG ended its truce. Its members initiated the break after concluding that their salaries were uncompetitive, that the department would have to raise the Toronto differential to prevent another recruitment and retention problem, and that by supporting the AJC's goal of national salary range parity with the Ontario MAG, they prejudiced their own prospects since the evidence from the Hay Report substantiated only their claim to increased wages.<sup>521</sup>

In July 2001, the AJC's interim Governing Council drawn from representatives of each of the regional and Ottawa area offices, elected Lois Lehmann as president, and filled the positions

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<sup>518</sup> *Ibid.* at 261.

<sup>519</sup> AJC Compensation Proposal 2001-2002, *supra* note 513 at 2. Lehmann and Cuoto were the report's main authors.

<sup>520</sup> *Ibid.* at 17-18.

<sup>521</sup> FLOC Written Submissions, *supra* note 515 at 6, paras. 33, 35. In December 2001, FLAG polled its members about whether they supported the AJC's position for one national rate of pay and to advocate for the elimination of regional rates of pay. Seven votes were cast for the AJC and 145 were cast against it. Results of the referendum were used by FLAG to have its members disassociate from the AJC. However, DOJ management did not formally acknowledge FLAG because of the AJC's recent election.

of vice-president, secretary, and treasurer. The Deputy Minister assigned Mario Dion to liaison with the AJC on behalf of the department. The AJC's leadership held discussions with DOJ management over TBS recognizing the association and they responded to the Quail Task Force's calls for submissions during its consultations (since unions received only a limited opportunity of addressing the committee or presenting reports up to 31 August 2001).<sup>522</sup> On 29 August 2001, Lehmann wrote to the Quail Task Force and outlined the AJC's position on DOJ lawyer exclusion from labour legislation.<sup>523</sup> In September, when the AJC's interim executive met with Dion and other DOJ officials, they learned: that one of the Beyond LOAC recommendations of membership on the Deputy Minister's Executive Council was unrealizable; of TBS's openness to the AJC as an interest-based association; and of TBS's request for DOJ management to oversee compensation discussions with the AJC.<sup>524</sup>

Notwithstanding the loss of the Toronto base, the AJC continued its membership drive throughout the rest of the department in preparation of general elections scheduled from 23 to 25 January 2002, and also to increase its dues base to cover operating costs once departmental funding ended on 30 June 2002. The AJC's constitution instructed that, before 31 January 2002, elections needed to take place to choose representatives for a first permanent Governing Council. Once council members were elected, they were to select a new executive consisting of a President, Vice-president, Secretary and Treasurer.<sup>525</sup> In the result, Patrick Jetté, succeeded Lois Lehmann as the AJC's president. On 28 March 2002, three of the AJC's four member Executive Council consisting of Jetté, Vern Brewer and Denyse Côté had their first official meeting with Dion.<sup>526</sup> Discussions covered the AJC's Executive Council's responsibility for arranging the organization's financial and administrative affairs, a process expected to last six months. To

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<sup>522</sup> "The Fryer Report: A Plan of Action Working Together in the Public Interest" *Professional Dialogue: Newsletter of the Canadian Association of Professional Employees* 5:1 (July 2009) 1 at 5, online: Canadian Association of Professional Employees <[http://acepcpe.blob.core.windows.net/media/4652/pd\\_july09\\_websiteversion\\_e.pdf](http://acepcpe.blob.core.windows.net/media/4652/pd_july09_websiteversion_e.pdf)> (date accessed: 7 February 2013).

<sup>523</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Letter to Morris Rosenberg, Deputy Minister from R.A. Quail, Deputy Minister and Head of HRM [2 January 2002] at 265). On 30 November 2001, the AJC followed up their earlier letter with further submissions on the subject in order to assist the task force in their deliberations.

<sup>524</sup> 28 April 2004 Howander Affidavit, *ibid.* (E-mail to Morris Rosenberg from Mario Dion, Subject: Meeting with the Association [18 September 2001] at 260).

<sup>525</sup> *FLOC, AJC v. TBC*, *supra* note 303 (Application for Certification, Form 1, Association of Justice Counsel, Attachment: Association of Justice Counsel Constitution, Article 18: Interim Management of Association at 12).

<sup>526</sup> *FLOC, AJC, & TBC*, *ibid.* (Minutes – Meeting of the Association of Justice Counsel, the Department of Justice, and the Associate Deputy Minister of Justice [28 March 2002] at 1).

allow the AJC's executives perform their duties, management planned to provide them with release time and the organization with interim office space until it established its own headquarters. The parties agreed to meet bi-monthly thereafter to discuss ongoing matters, such as AJC representation of members in grievances and its efforts before the Quail Task Force to eliminate the exclusion of DOJ lawyers from legislation. The immediate priority for the AJC's executive, however, was to monitor the DOJ's solution to the wage discrepancy caused by the Kaplan award after hearing plans that the Toronto differential would be supplemented with an allowance. Several weeks earlier, on 15 January 2002, the AJC had submitted to the DOJ-TBS Joint Working Group,<sup>527</sup> a compensation proposal that critiqued the methodology and data used in the Hay Report, and asked for a single national job rate, which would raise the maximum rates of pay to the equivalent of the Ontario MAG, and a market adjustment increase of 11 percent.<sup>528</sup>

#### 5.3.4 *The Toronto Differential and the AJC's Pre-Unionization Campaign for Wage Equity*

On 23 November 2001, the DOJ-TBS Working Group achieved tentative consensus on supplementing the Toronto salary scale by an additional 8 percent non-pensionable allowance, and for allowing an economic adjustment to non-management DOJ lawyer salaries over a three year term at levels to match those received by lawyers represented by PIPSC.<sup>529</sup> The proposal, however, was not supported by other TBS representatives who opposed the measure as the 2001 PwC study showed the Toronto office was not experiencing a recruitment and retention crisis (only a potential one) and, therefore, without proof of a severe staffing problem for at least two years, no hard criteria existed to justify the allowance. TBS also hesitated raising the Toronto differential because of its effect on wage relativity vis-à-vis other professionals and executives working in and around Toronto.<sup>530</sup> Finally, TBS wanted to avoid increasing the Toronto differential to prevent any inference that supported allegations identified in the lawsuit by Vancouver lawyers.

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<sup>527</sup> In September 2001, senior DOJ management and TBS officials struck a working group on lawyer compensation. The AJC was excluded from the alliance since the TBS did not wish to negotiate with the AJC on matters of confidence.

<sup>528</sup> AJC Compensation Proposal 2001-2002, *supra* note 513 at 1. The study critiqued Hay report findings regarding Toronto's legal market based on calculations that overlooked recent pay awards received by provincial lawyers in Nova Scotia, Quebec and Manitoba, which inflated findings on the competitiveness of the DOJ's national salary scale.

<sup>529</sup> 31 January 2005 Rosenberg Transcript, *supra* note 483 at 83, lines 16-37.

<sup>530</sup> 28 April 2004 Howander Affidavit, *supra* note 477 (Letter from Morris Rosenberg to M. Judith Sheppard [19 June 2001] at 233).

TBS's position on the Toronto differential delayed the national Law Group salary compensation proposal from proceeding. On 16 April 2002, Deputy Minister Rosenberg met with TBS secretary, Frank Claydon, to push for the allowance. Expediting a resolution weighed heavily on Rosenberg who, after evaluating the Hay Report evidence and the significant wage disparity caused by the Kaplan award, determined that without the allowance personnel losses were imminent (even though only a few lawyers left the Toronto office after the decision's issuance) and would undermine the DOJ's mandate in Ontario.<sup>531</sup> His support for the extraordinary payment influenced Claydon to ease established policy and include the Toronto differential adjustment as part of the Law Group compensation proposal submitted to the Treasury Board. On 6 June 2002, Rosenberg's efforts were successful when Treasury Board ministers approved the DOJ's salary submission including the Toronto allowance.<sup>532</sup> Described by TBS as the "Toronto Market Competitiveness Allowance" (TMCA), the benefit paid lawyers in the Toronto office a non-recurring lump sum payment of 8 percent of their base salary as of 31 March 2002. TMCA was open for renewal for the 2002-2003 fiscal year depending on the need for salary competitiveness with the Ontario MAG.

The TMCA greatly complicated the AJC's national wage mandate. The granting of the TMCA legitimized the Hay Report findings, which implicitly dispelled the AJC's premise for raising the national salary scale to the level of the Toronto differential (since the role of wages causing a staffing predicament was localized to only one regional office). TMCA forced the AJC's Governing Council members to debate on two separate occasions whether supporting a regional salary scheme benefitted its constituents<sup>533</sup> as the policy fueled the perception of management favouring the financial well-being of the Toronto office to the exclusion of

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<sup>531</sup> 31 January 2005 Transcript of Morris Rosenberg, *supra* note 483 at 74, lines 1-14. Tensions between Toronto lawyers and management had escalated by this time. FLAG's dedicated writing campaign demanded DOJ senior management end salary inequity with the Ontario MAG. FLAG's members threatened work-to-rule action by not working beyond minimum job requirements, and by completing 140 applications for professional development days. On 30 July 2001, roughly sixty Toronto lawyers met for two hours with Deputy Minister Rosenberg, other DOJ senior management, and a senior compensation analyst from TBS to discuss whether the department would table a submission to TBS requesting a boost to the Toronto differential. Numerous lawyers threatened to defect to the Ontario MAG unless wage discrepancies between the two government employers were narrowed.

<sup>532</sup> The salary range adjustments to the non-management Law Group were made retroactive to 1 April 2001. They restructured national and Toronto salary scales at the minimum and maximum levels for the LA-1 group by 4.6 percent and by the same percentage at the maximum range for LA-2A and LA-2B groups. Both salary scales would receive an annual economic increase of 3.2 percent effective 1 April 2001 after applying the restructure, 2.8 percent effective 1 April 2002, and a 2.5 percent increase effective 1 April 2003.

<sup>533</sup> FLOC Written Submissions, *supra* note 515 at 9, para. 52.

others.<sup>534</sup> The AJC disliked the TMCA for pitting the financial interests of one group of lawyers against another and for undermining the AJC's ability to represent the Toronto office. This latter point was raised by the AJC's executive in their 28 February 2003 meeting with Mario Dion and was addressed by Rosenberg. They received confirmation that the department planned for the TBS to ask the Treasury Board to renew the allowance since the circumstances responsible for its introduction did not dissipate within a matter of twelve months.<sup>535</sup> In response, the AJC wrote to the TBS to reiterate its demand for an increased national pay rate at the level of Toronto differential and to state its opposition to the TMCA by asking for a redistribution of the \$2 million expenditure to increase payment of annual performance reviews by 1 percent for lawyers evaluated at the highest two performance levels.<sup>536</sup> Treasury Board ministers denying TMCA's renewal for 2003 surprised the DOJ and strained relations between Toronto lawyers and the AJC.

The TMCA's cessation did not prevent the AJC from continuing to solicit DOJ management about a return to a single national salary scale at the level of the Toronto differential. With no legal requirement for the Treasury Board to negotiate with the AJC, its written advocacy culminated with the AJC's Submission on Compensation of February 2004, which was prepared by a study committee and addressed the Law Group compensation plan expiring on 31 March 2004. Its rhetoric phrased a single national pay scale at the level paid by the Ontario MAG as a basic principle of AJC compensation policy and as a necessity to address wage disparity between comparable public sector lawyers based on the principles of interest arbitration. Private sector lawyers and government appointed judges were identified as relevant comparators for compensation calculations. The key features of the proposal called for: lock-step progression from LA-1 to LA-2A levels after four years; an annual performance review and employee assessment increase for 2003-2004; a merger of LA-2A and LA-2B levels to restructure pay grids in line with Ontario provincial lawyers (as the historically closest wage and workforce comparator) and to remove arbitrariness in promotions; and adding the same percentage increase achieved by gains to national salary range to that of the Toronto differential. The compensation submission did not prevent Treasury Board ministers from approving typical

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<sup>534</sup> *Ibid.* at para. 53.

<sup>535</sup> *FLOC, AJC v. TBC*, *supra* note 303 (Letter to Patrick Jetté from Morris Rosenberg [24 June 2003] at 2).

<sup>536</sup> *FLOC, AJC v. TBC*, *ibid.* (Letter to Brent DiBartolo, Assistant Secretary Labour Relations and Compensation Operation Division from Patrick Jetté, Re: Position of the AJC concerning Toronto's differential payments [10 June 2003] at 1).

economic increases to the non-management Law Group salary ranges of 2.5 percent for 2004 and of another 2 percent for 2005. However, the compensation submission served another role of outlining the AJC's position on wages that it could use to build momentum for its organizing campaign once new labour legislation became law.

## **5.4 The AJC's Campaign for Recognition**

### *5.4.1 Introduction of the PSLRA*

The work and eventual recommendations of the Quail Task Force led to Bill C-25, the *PSMA*. Rootham observed that the *PSMA* ignored many of the Fryer Report's most sweeping recommendations.<sup>537</sup> Fortunately for the AJC, lawmakers followed the Fryer Committee's guidance on excluding managerial and confidential employees from labour legislation and recognized in the *PSLRA* that all employees under the *Act* enjoy the freedom to join an employee organization and participate in its activities.<sup>538</sup> On 6 February 2003, President of the TBS and Member of Parliament responsible for human resources modernization, Lucienne Robillard, tabled Bill C-25 before the House of Commons. Senior AJC administrator 1 noted that as various drafts of legislation were completed, the AJC became privy to them and knew that the statutory prohibition on lawyers unionizing would be removed. The process leading to de-exclusion was understood by National Capital Region lawyer 1 as an issue of pragmatism, as she viewed unionization as a way for Treasury Board to regularize relations with DOJ lawyers. By contrast, National Capital Region lawyer 2 saw the policy shift as a matter of legality:

I'm sure we had something to do with it, we the lawyers that work inside the department, inside the cell block we call the "CALs" (Constitution and Administration Law Section). We have a think tank of these legal brains who analyze the *Charter*. These people caught the *Charter* and we are sure, I'm sure that they had a lot to do with giving advice to senior managers saying we have a problem here, we discovered something that somehow we think there's something wrong with our prohibitions.

On 7 November 2003, the *PSMA* received Royal Assent. As a statute intended to be implemented over stages, the Governor General in Council delayed the establishment and

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<sup>537</sup> Rootham, *supra* note 365 at 49. In addition to DOJ lawyers, previously excluded employees such as lawyers from the Canada Customs and Revenue Agency and staff at the TBS were not automatically deemed as managerial or confidential employees.

<sup>538</sup> Subsection 2(1) of *PSLRA* defined an employee as a person employed in the public service other than occupying one of ten specific positions, which included, among others, managerial and confidential appointments. See also section 5 of the *PSLRA* regarding "Employee Freedoms."

coming into effect of the *PSLRA* and its provisions on bargaining agent certification until 1 April 2005. *PSMA*'s passage initially allowed the TBS to confirm a relationship with the AJC in similar fashion to the one enjoyed with the Association of Professional Executives of the Public Service of Canada, but the probability of competing employee organizations vying to become certified as bargaining agents forced TBS to rescind the arrangement as of 22 April 2004.<sup>539</sup> A delayed implementation date allowed many months for interested employee associations and the DOJ to prepare for the introduction of new labour legislation. DOJ lawyers could also use the time to consider whether joining a union suited them.

Public sector unions typically conduct organizing drives without employer opposition to unions, as is common in the private sector.<sup>540</sup> Section 48 and 49 of Part 5 of *PSLRA*'s transitional provisions set out the certification procedures for DOJ lawyers. DOJ lawyers were not automatically absorbed into the existing Law Group bargaining unit represented by PIPSC.<sup>541</sup> The statutory stipulation mandated that any employee organization applying to the PSLRB to become certified as a bargaining agent for DOJ lawyers would have to follow the normal course of procedures and show, in its application, documentary evidence that it enjoyed the support of a majority of employees within a proposed bargaining unit.<sup>542</sup> In this "card check" type

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<sup>539</sup> *FLOC, AJC v. TBC*, *supra* note 303 (Letter to Brent DiBartolo, Assistant Secretary, Treasury Board Canada, Secretariat & Morris Rosenberg, Deputy Minister Justice Canada from Patrick Jetté [17 February 2004] Re: Compensation for Justice LA's at 1); See also 28 October 2004 Burns Transcript, *supra* note 460 at 96, lines 1-16.

<sup>540</sup> K. Bronfenbrenner & T. Juravich, *Union Organizing in the Public Sector: An Analysis of State and Local Elections* (Ithica: ILR Press, 1995) at 2. For jurisprudence and research on private sector employer opposition see *United Steel Workers of America v. Radio Shack*, [1980] 2 Can. L.R.B.R. 99; T. Thomason, "The effect of accelerated certification procedures on union organizing success in Ontario" (1994) 47:2 *Industrial and Labor Relations Review* 207 at 224; T. Thomason & S. Pozzebon, "Managerial Opposition to Union Certification in Quebec and Ontario" (1998) 53:4 *Relations industrielles/Industrial Relations* 750 at 764; K.J. Bentham, "Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions" (2002) 57:1 *Relations industrielles/Industrial Relations* 159 at 174.

<sup>541</sup> Bill C-25 contained Transitional Provisions arising from the enactment of the *PSLRA*, Part 1, wherein section 49 and its subsections read as follows: 49.(1) For the purposes of the new Act, including any application under section 58 of the new Act, an employee who, on or after the day on which the definition "managerial or confidential position" in subsection 2(1) of that Act comes into force, is employed as a legal officer in the Department of Justice or the Canada Customs and Revenue Agency is deemed not to be included in any unit determined, in accordance with the former Act, to constitute a unit of employees appropriate for collective bargaining. 49.(2) For greater certainty, any employee organization that wishes to represent employees in a bargaining unit that includes one or more employees referred to in subsection (1) must proceed by way of an application under section 54 of the new Act. Administrative details and procedures covering an application for certification under section 54 are set out by sections 23 to 32 of the *Public Service Labour Board Regulations*, SOR/2005-79, [hereinafter *PSLRB Regulations*].

<sup>542</sup> *PSLRB Regulations* *ibid.* subsection 30. (1) An application for certification shall be accompanied by the documentary evidence on which the applicant intends to rely to satisfy the Board that a majority of the employees in the proposed bargaining unit wish the applicant to represent them as their bargaining agent.

certification system, the PSLRB recognizes employee organizations who can confirm a minimum endorsement of “50 percent plus one” among a group of workers.

#### 5.4.2 *The Organizing Campaign*

Three employee associations vied to represent the DOJ Law Group: FLAG, PIPSC, and AJC. Each group had their own certification strategy to encourage DOJ lawyers to join. FLAG reconstituted itself as the Federal Law Officers of the Crown (FLOC) and conducted a membership drive of lawyers employed at the Toronto office. Over 90 percent of these lawyers signed up, many of whom opposed inclusion in a national bargaining unit, and assisted the new organization with a couple of hundred dollars. On 15 February 2005, FLOC ratified its constitution.

FLOC’s executive knew that creating a separate bargaining sub-unit from within a larger occupational Law Group based on the receipt of differential salaries was a difficult case to make. They prepared for the challenge of setting a legal precedent by retaining the law firm of Paliare Roland Rosenberg Rothstein LLP and by instructing their counsel to prepare a detailed and thorough application. Toronto lawyers were prepared to defend their exclusive entitlement to the differential in court against the AJC as an absolutely vital payment that recognized only their office operated in a unique labour market, a claim that they believed the Treasury Board would use to thwart the AJC’s demands for raising the national salary rates to the level of the Ontario MAG. Ontario Regional Office lawyer 3 explained that the benefit compensated lawyers for providing exceptional services in a higher-end legal market. He illustrated the point by saying the calibre of legal work in Toronto attracts a better quality of file handled by a different talent pool. He views Toronto as the centre of immigration work; it is where advocacy groups commence their cases; and it is home to big business with resourceful Bay Street lawyers at their disposal.

The FLOC’s overwhelming popularity in Toronto left PIPSC and AJC to consider organizing those lawyers employed at the DOJ’s other regional and department legal service unit offices. PIPSC’s selling point as the preferred union for DOJ lawyers was their history and

experience in representing other federal government lawyers.<sup>543</sup> Despite the sensible message, PIPSC abandoned its recruitment drive after determining that DOJ lawyers had little interest in siding with them. This was because, as AJC negotiating team member 2 recalled, the AJC had surveyed its membership as to who they wanted representing them and found that some 96 percent of those polled voted for “lawyers representing lawyers”. Other respondents’ observations, communicated during interviews as to why PIPSC stood little chance with their organizing plans, clarify why the AJC became the logical incumbent for representing DOJ lawyers. Prairie Regional Office lawyer 1 recalled the AJC winning his membership support. He backed the AJC because lawyers are professionals with their own special interests, so, for him, it seemed a natural fit to be represented by an organization of his own people. He did not recall PIPSC’s campaign materializing in the various offices comprising the Prairie Region. The absence of another contending employee organization automatically bolstered the AJC’s viability. Prairie Regional Office lawyer 2 also believed that the AJC understood the important issues facing lawyers, of which another union would be unfamiliar. She saw this perspective as a benefit for lawyers once at the bargaining table because a union with better negotiation power is one that communicates the interests of its members. As this lawyer did not want to be commingled in a larger union, it made the AJC the only choice.

Undoubtedly, as a strong national union, PIPSC, had more clout in federal labour relations than the upstart AJC. Atlantic Region Office lawyer 1 did not doubt that PIPSC offered quality representation. He realized, though, that he was better off with the AJC for the following reason:

I thought PIPSC, because of their experience and success with other professions, like the doctors who got a huge bonus, anyway, I thought they would’ve been able to represent us quite well. But, I think most people felt we would lose our identity and specialization within the whole organization.

Other DOJ lawyers also did not see supporting the AJC as involving a trade-off in benefits between unions, but as a wise choice directed to maintaining an accepted and established occupational community. National Capital Region lawyer 4 emphasized that being a lawyer

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<sup>543</sup> Bourrie, *supra* note 419 at 2; M. Bourrie, “Justice department lawyers close to decision on new union” *Law Times* 14: 23 (30 June 2003) at 4.

entails being part of a professional culture, one that a larger union may overlook based on what it believes is important to the membership:

I think it was definitely a perception that lawyers need to be...and again, this is coming from the perspective of from what I've heard from lawyers who were previously represented by a different association. There was a sense that lawyers needed to be represented by an association that was familiar with and was looking after lawyer interests, that they weren't being lumped together with other professionals in a variety of areas who didn't necessarily understand. The person we were talking about before...the fact that lawyers were subject already to a set of professional obligations, but also other realities about the work of lawyers and things in the collective agreement about providing robes and things like that, you know are more easily overlooked when you're part of a larger association dealing with a wide variety of employees.

The common belief of these two lawyers was that a specialized bargaining agent restricted to the DOJ, as well as being a familiar entity, offered a better option than another union despite its experience representing other lawyers in collective bargaining negotiations with TBS.

Another advantage the AJC possessed, in contrast to the PIPSC, was that it enjoyed an established membership base comprised of DOJ lawyers. The AJC's time as a professional association socialized its members to a common organization with a generally positive experience, prompting them to continue supporting the AJC and allow it to make good on securing collective bargaining rights.<sup>544</sup> During the certification campaign, current AJC members maintained their affiliation by signing an application or renewal for membership. They (and new members) completed a form that authorized the AJC to apply for certification as their bargaining agent, acknowledging that the AJC was their choice for representation as a bargaining agent.<sup>545</sup> A membership fee of five dollars accompanied the application, which encouraged broad participation and ensured lawyers signed on their own volition. Voluntary donations from signees were accepted and used to fund the AJC's campaign expenses. National Capital Region lawyer 1 recalled that many lawyers simply dropped off completed membership forms, which was a tremendous boost.

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<sup>544</sup> C. Ichinowski & J.S. Zax, "Today's Associations: Tomorrow's Unions" (1990) 43:2 *Labor & Industrial Relations Review* 191 at 194; D. Gotlieb & J. Copping, "The Transition from Formal Nonunion Representation to Unionization: A Contemporary Case" (1998) 52:1 *Industrial and Labor Relations Review* 22 at 28.

<sup>545</sup> AJC By-laws as of 4 May 2006, "Initial Membership Fee of \$5" at 18 (on file with the researcher) [hereinafter 4 May 2006 AJC By-laws].

As for enlisting undecided lawyers, the AJC engaged in the “low-intensity” organizing campaign tactics identified by Juravich and Bronfenbrenner of person-to-person contact, large group meetings, and using union literature.<sup>546</sup> The AJC’s network of representatives sitting on the Governing Council situated key personnel in all regional offices throughout the department, which allowed them to spread the message of the AJC’s drive. There were also the volunteer organizers who enrolled new members. National Capital Region lawyer 1 knew of ten or fifteen “hard core” people involved with organizing lawyers. Recruiters’ experience ranged from easy to difficult, depending on the audience. For example, National Capital Region lawyer 1, solicited lawyers on maternity leaves and achieved good results. National Capital Region lawyer 2 shared his views in candid detail on the importance of demographics when recruiting people:

That was very difficult signing up people. People didn’t want to unionize. People thought that if they signed up for a union their job was on the line. Some people were afraid. What we did is we signed up all the “fogie’s,” all the ones that didn’t give a damn if they put them on the street. They signed. I was one of them. That’s funny because you’re in a different situation in life. When you’re 25 years old you’ll think about it. But when you’re in 50’s, if they want to fight we’ll fight it. It’s a very different philosophy. You’ve been there. You’ve done that. So most young people wouldn’t dare sign. So we signed up a lot of the old people. Guess what, there’s a lot of older people. They’re the majority still. So yeah, signing up was not easy, not easy at all and remains difficult today.

When this same lawyer was asked how the AJC was able to run a successful organizing campaign, he considered that one’s tenure with the DOJ was a key factor:

The successful drive was caused by the need, by the pain, by the absence of perceived fairness. Once you’ve been around long enough, maybe five years, then you see it. Then you say, yeah, this needs to be improved. That was the answer to the problem—unionization.

The efforts of organizers supplemented President Jetté’s executive campaign of raising the AJC’s profile to undecided lawyers. Senior AJC administrator 1, a lawyer knowledgeable about the organizing drive, recognized the importance of Jetté’s work:

We did telephone meetings and informal information sessions—Q & A’s—but I think the clincher was, after we did that, we got the president to travel across the country from office to office, do a presentation, indicate what the goals of the union were, highlight the shortcomings of LOAC, what LOAC had not been able to establish, what we hoped the

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<sup>546</sup> T. Juravich & K. Bronfenbrenner, “Preparing for the Worst: Organizing and Staying Organized in the Public Sector” in K. Bronfenbrenner et al., eds., *Organizing to Win: New Research on Union Strategies* (Ithaca: Cornell University Press, 1998) at 261 at 269.

union, with the authority and clout of the union could do, that LOAC could not do. And again, have the president there to answer questions of concern, to canvass the issues that people felt uncomfortable with and to identify how it would try to resolve conflicts in the workplace through the union that perhaps had not been successfully done under LOAC. And that included things like discipline matters, people being placed on probation, risked being dismissed because of performance issues, heavy-handedness by management on certain files, those kinds of things, all of which the union could intervene in either to prepare arguments or to provide for a presentation to somebody who's being disciplined and none of those things could properly happen in the LOAC days, because again, there was no mechanism or structure to address those things.

As a good organizer, Jetté focussed on the traditional issues of grievance procedures and job security during his meetings, which operated to emphasize the worth of a union to workers.<sup>547</sup>

The impression of strong leadership channelled through an effective communications platform, either through print, website, or in-person, raised the perception that the AJC could satisfy its stated objectives and resonated with the interests of lawyers. The AJC had a strong communication plan. One of its slogans encouraged lawyers to “Sign up and give us the power to do more”. In the case of Vancouver Regional Office lawyer 1, the legacy of Treasury Board’s mismanagement of the Toronto differential raised the AJC’s efficacy in correcting a disliked policy. Before the AJC’s literature swayed him, this lawyer felt that a union was unnecessary. The Treasury Board ignoring lawyer demands for addressing the Toronto differential made the decision all the more easier for him, and other office colleagues, to back the AJC. The AJC may have lacked a track record of improving wages, but they created a prospect of future success that outweighed the belief in the Treasury Board reversing its refusal to increase the national salary rate to the level of Toronto’s. For another Vancouver lawyer, however, supporting the AJC was about combating the employer in a different forum after the Supreme Court of British Columbia dismissed the plaintiff lawyers’ case in *Babcock*:

Well I think so in the sense that if the lawsuit had been successful, then I’m sure there wouldn’t have been any interest in going to a formal professional association, union type thing. I think that after the lawsuit was unsuccessful that it was well, what choice do we have? We have to somehow get to the bargaining table and we didn’t know how to get to the bargaining table.<sup>548</sup>

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<sup>547</sup> M.L. Lynn & J. Brister, “Trends in Union Organizing: Issues and Tactics” (1989) 28:1 *Industrial Relations* 104 at 110.

<sup>548</sup> Judgment of Smith J., *supra* note 471 at para. 252. Madame Justice Smith dismissed the plaintiffs’ claims for failing to establish that their employment contracts contained an express or implied term that prohibited the

After roughly eight months of campaigning among non-management DOJ lawyers, the efforts of the AJC's cross-country membership drive (with the exception of the Toronto office) netted a membership of 1,482 lawyers (from a possible 2,500 candidates).<sup>549</sup>

## 5.5 Conclusion

This chapter detailed the historical process of LOAC developing from a staff committee into a professional association to emerging as a front-runner for certification as a union by the PLSRB. The direction taken by the AJC diverged from the pre-campaign route common in most workplaces, where either a small group of workers surveys the situation and then enlists a union to coordinate the organizing campaign, or, a union targets an employer, assesses the level of employee interest, and then determines whether to launch an organizing drive.<sup>550</sup> For this reason, the sources of available data were looked at to pinpoint fundamental elements that accounted for LOAC's rise as an in-house employee agent capable of assuming a representative function with respect to both grievances and pay. The Toronto differential was therefore studied in relation to its origin and eventual catalyst for non-management Beyond LOAC members generating a popular mandate for becoming a professional association and resolving a source of employee dissatisfaction at work. When the *PSLRA* was introduced (the context and details responsible for DOJ lawyers obtaining recognition under the *Act* were also presented in this chapter), the AJC reacted much more like any other prospective union and prepared an organizing campaign around the core economic issues of pay equity and increase, benefits, grievances, and promotions that appealed to the interests of various lawyers within the workplace (who were either existing AJC members or new recruits). These were the advantages lawyers could potentially receive through collective bargaining if the AJC was certified as their bargaining agent. Before it was tested on delivering its campaign promises during first contract negotiations with TBS, though, the AJC first needed to obtain legal status as an employee

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defendant from setting rates of pay based on geographical location; for failing to demonstrate unjust enrichment; for failing to establish that their employment contracts included a term that imposed on Treasury Board an implied duty to act in good faith; and, finally, for failing to demonstrate that the circumstances of their employment relationship gave rise to a fiduciary obligation.

<sup>549</sup> *FLOC, AJC v. TBC*, *supra* note 303 (Reasons for Decision of Tarte, Matteau, & Quigley at para. 124) [hereinafter Reasons for Decision of Labour Relations Board].

<sup>550</sup> J.J. Lawler, *Unionization and Deunionization: Strategy, Tactics and Outcomes* (Columbus: University of South Carolina Press, 1990) at 130.

organization, so that it could force the employer to the bargaining table. The following chapter details the outcome of the AJC's and FLOC's certification applications before the PSLRB.

## CHAPTER 6: First Collective Bargain—Long Road Ahead

### 6.1 Introduction

On 1 April 2005, the Association of Justice Counsel (AJC) and the Federal Law Officers of the Crown (FLOC) marked the first day of the *PSLRA* coming into effect by each filing their Form 1, Application for Certification with the Public Service Labour Relation Board's (PSLRB) busy registry office.<sup>551</sup> FLOC applied to become certified as the exclusive bargaining agent for a unit of 315 non-management lawyers and articling students who were employed across Ontario at the DOJ Toronto, and satellite offices in Brampton, Kitchener, Newmarket and London. FLOC maintained that its proposed bargaining unit was appropriate as its people shared a community of interest based on geographical location, litigation emphasis, receipt of the Toronto differential, and employee wishes, which were demonstrated through the overwhelming evidence of membership support. By contrast, the AJC vied to become the certified bargaining agent for all legal officers employed in the DOJ Law Group (except for those who were not employees within the meaning of subsection 2[1] of the *PSLRA*) given that all lawyers in its proposed bargaining unit shared a community of interest and that the unit was consistent with the occupational group established by the Treasury Board. Registry staff set 11 May 2005 as an initial closing date for FLOC and AJC to intervene in each others' matters and as the Treasury Board's deadline to reply to both employee organizations' applications. The date also marked the minimum time frame the PSLRB allowed the Treasury Board to post copies of the notice to employees of an application for certification at affected worksites. The notice instructed that lawyers, who were opposed to the proceedings, to file with the PSLRB a Form 4, Statement of Opposition.

The Treasury Board replied to FLOC's application by outlining the unacceptability of its proposed bargaining unit for excluding other DOJ and the Professional Institute of the Public Service of Canada (PIPSC) lawyers, which, it argued, disrupted the Law Group occupational structure. Similarly, the Treasury Board's response noted that the AJC's proposed bargaining unit did not include those lawyers in the bargaining unit represented by PIPSC. Instead, the

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<sup>551</sup> With the coming into force of the *PSLRA*, the Public Service Relations Board (PSLRB) was created under section 12 of the *Act* to replace the former PSSRB and provide adjudication and mediation services.

Treasury Board conceded that if the PSLRB established a bargaining unit consisting of DOJ lawyers, then it should affirm them as part of a single bargaining unit consisting of all employees of the employer in the Law Group as described in Part I of the *Canada Gazette* of 27 March 1999.<sup>552</sup> This consideration spurred the Treasury Board's plea for an order revoking the PIPSC's certificate as the bargaining agent for the Law Group members outside of the DOJ. Additionally, it asked the PSLRB for an order declaring that positions in the bargaining unit be excluded for being managerial and confidential in nature, as pursuant to section 59(1) of the *PSLRA*. Now provoked, PIPSC applied for intervener status in the proceedings in order to oppose the Treasury Board. With PIPSC's involvement established, all of the organizations affected by the certification applications involving DOJ lawyers confirmed their appearances before the PSLRB.

The PSLRB's case management system moved the multi-party proceeding towards resolution. On 26 July 2005, both applications for certification, along with the Treasury Board's request for a review of the PIPSC's bargaining unit, were consolidated. On 3 November 2005, representatives for the parties attended a pre-hearing conference before a Board member so to learn the order and location of the proceedings. An Amended Notice of Hearing confirmed the trial dates of November 30th to December 2nd and December 5th to 7th, 2005 at the PSLRB offices (located on the 7th floor of the C.D. Howe Building in downtown Ottawa). Counsel for the AJC and FLOC prepared for hearings by requesting, producing, and exchanging books of documents and exhibits which included the *curriculum vitae* of two witnesses for the FLOC, (Christopher Leafloor and Fergus O'Donnel) and a witness for the AJC, (Patrick Jetté). A PSLRB panel consisting of Chairperson Yvan Tarte, Vice-Chairperson Sylvie Matteau and Board Member Dan Quigley presided over the proceedings. The trial portion of the hearing allowed for the litigants to deliver oral argument, enter documents into evidence and examine witnesses. The PSLRB ordered all four parties to deliver written arguments to it, and each other,

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<sup>552</sup> *Canada Gazette*, Part 1, Vol. 133, No: 13 (27 March 1999) "Law Group" at 817. The Gazette defined The Law Group as: The Law Group comprises positions that are primarily involved in the application of a comprehensive knowledge of law to the performance of legal functions. Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities: 1. The provision of legal advice; the preparation of contracts, leases and other legal documents; the representation of litigants; and the provision of legal research and editing services; 2. The drafting and interpretation of legislation; and 3. the leadership of any of the above activities. Also included are positions in the Department of Justice requiring the performance of legal functions pursuant to the *Department of Justice Act*.

by 22 December 2005 with replies due by 13 January 2006. The panel reserved its ruling until 28 April 2006, the date of issue for its decision.<sup>553</sup>

The Board members decided the merits of rival certification applications using section 57 of the *PSLRA* which outlines the factors the PSLRB considers when determining whether a group of employees comprise an appropriate bargaining unit. Namely, sub-section 57(3) of the *Act* requires the Board to establish bargaining units that are co-extensive with the occupational group or subgroup created by the employer (unless doing so denies employees within the proposed unit satisfactory representation). Combined with the Treasury Board's, AJC's, and PIPSC's support for a bargaining unit of lawyers in the Law Group of which the Treasury Board is the employer, this statutory provision directed Board members' attention to the merits of FLOC's case. In dismissing the FLOC's application for certification, but granting the AJC's, the Board followed federal labour relations practice of promoting administrative efficiency by preventing the splintering of members of one occupational group across several different bargaining units. The Board rejected FLOC's argument that a Toronto-centric bargaining unit constituted an occupational subgroup based solely on a pay differential, and that inclusion of its members in a service-wide bargaining unit would deny them adequate representation. Since the AJC demonstrated that a majority of lawyers in the workplace wished them to be their bargaining agent, this allowed the PLSRB to forego a representation vote. Pursuant to section 64 of the *PSLRA*, the AJC was certified as exclusive bargaining agent and representative for a bargaining unit consisting of all non-management and non-confidential DOJ lawyers employed by the Treasury Board in the Law Group. This group also included those lawyers previously represented by the PIPSC, as the PSLRB annulled its certificate.<sup>554</sup>

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<sup>553</sup> Reasons for Decision of Labour Relations Board, *supra* note 549.

<sup>554</sup> The AJC's certification created two additional administrative duties for the new union and TBS. The parties could now return to the TBS's stayed request for identifying managerial and confidential positions in the new bargaining unit. Over the summer and fall of 2006, AJC and TBS representatives consulted each other over lawyers being excluded from the Law Group bargaining unit. The parties filed a joint application before the PSLRB requesting a declaration that any position in the bargaining unit identified in an annex was a managerial or confidential position as of 4 December 2006. See *Treasury Board v. Association of Justice Counsel*, 2007 PSLRB 44 (CanLII). On 22 May 2007, the AJC and TBS returned to the PSLRB to amend and clarify positions previously declared managerial or confidential. See also *Treasury Board v. Association of Justice Counsel*, 2007 PSLRB 75 (CanLII). The second administrative matter involved resolving the status of articling students and notaries. On 11 July 2007, Treasury Board and the AJC filed with the PSLRB another joint application to expand the initial Law Group certificate to include these two groups of workers within the LA bargaining unit. The PSLRB dutifully approved the request. See *Treasury Board v. Association of Justice Counsel*, 2007 PSLRB 84 (CanLII).

On 1 May 2006, the AJC performed one of its first official duties as agent for the Law Group bargaining unit by filing notice with the PSLRB that it opted for binding arbitration over conciliation in the event collective bargaining negotiations with the Treasury Board failed. The AJC's purposeful selection of a conservative conflict resolution mechanism was intended to placate the union membership and modelled the approach of other professional unions.<sup>555</sup> National Capital Region lawyer 1 recalled that her colleagues often discussed striking in relation to provincial Rules of Professional Conduct, thereby giving union representatives a sense of the bargaining unit members' tolerance for organized protest. AJC senior administrator 1 expressed that the union's approach towards job action was "to get around it:"

When the AJC was organizing lawyers, one of the things that we indicated from the start is that, should the AJC be determined through the process under the *PSLRA* to be the sole bargaining agent for the lawyers' group, that our method of dispute resolution would be negotiation-arbitration and not conciliation-strike. One of the reasons we did that is because we realized very early on—and every lawyer understood that—that if we are in a dispute resolution mode where strike is one of the options for the resolution of an impasse, that striking would place many lawyers in an ethical dilemma. So striking by professionals is not unheard of, as only striking by legal professionals is not unheard of. But you have to take appropriate steps when you strike to make sure that your obligations to the client are not jeopardized. But that would be if you were in a situation where strike was your dispute resolution mode. That's not the AJC's mode right now. So we're advancing the interests of the LA Group through collective bargaining, but in such a way that we are not in the strike context; we're in the negotiation-arbitration context.

The chosen protocol for resolving mass employee grievance, therefore, allowed the AJC to circumvent a tough-to-implement alternative that would have divided bargaining unit members, like former Ontario Regional Office lawyer 2, who disliked: "the union is going to tell me when I can come to work, whether I have to go on strike, whether I have to work to rule—etcetera, etcetera. No, no, no, no, no! It's like telling a doctor work to rule. No, it just doesn't fit." This practitioner's discomfort towards a group mentality exhibits a lawyer's trait of avoiding conflict of interest situations by exercising independent discretion. The AJC's leadership did not want to incite dissension amongst union members with less extreme remedies being available, much less than pursue a course of action that deviated from third-party arbitration as one of its selling points for becoming a professional association.

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<sup>555</sup> Savage & Webber, *supra* note 49 at 116.

Despite section 106 of the *PSLRA* imposing an obligation on the union and employer to bargain in good faith and exert every reasonable effort to enter into an agreement, the AJC's preference for arbitration expressed their realization that their first contract negotiations could break down and exhaust mediation. A statutory duty to bargain in good faith, of course, does not assure negotiations produce a labour contract. At least theoretically, if the collective bargaining reached an impasse, the arbitration could counterweigh the Treasury Board's intractability on contested terms and conditions of employment by empowering an arbitrator to decide on their reasonableness. The October 2000 Kaplan award proved that interest arbitration could yield significant wage increases for Ontario government lawyers from an obstinate provincial employer.

With the process of collective bargaining dispute resolution resolved, on 10 May 2006, President Jetté wrote to the Executive Director of the Treasury Board of Canada Secretariat (TBS) (which represents the Treasury Board in collective bargaining) and provided Hélène Laurendeau with notice that the AJC had initiated collective bargaining. The letter thrust the AJC into the novel position of replacing DOJ management as the direct negotiator with TBS with respect to the terms and conditions of employment covering DOJ lawyers. The AJC had a clean slate on which to improve the employment contract; however, it remained unclear whether the union's gains would come at the expense of management prerogatives. In any situation, achieving a freely negotiated, first collective agreement is a complicated and messy process, and the AJC's accomplishment was potentially overshadowed by the agreement being birthed from a polarized union-management relationship. Ideally, the first collective agreement establishes a foundation for future expectations long after its expiry,<sup>556</sup> and that as the bargaining relationship matures the antagonism surrounding a first agreement may lessen and give way to greater collaboration between the contractual parties. This trajectory, unfortunately, is not guaranteed. One matter of certainty was that many of the AJC's negotiating team delegates had high expectations heading into collective bargaining as illustrated by member 5's enthusiasm: "And we just wanted...the moon. I mean we wanted the cheese, the whole kit and caboodle that we worked on. And we wanted lots more of these things and lots of that and better language on

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<sup>556</sup> C.S. Loughran, *Negotiating a Labor Contract: A Management Handbook* (Washington: Bureau of National Affairs, 1984) at 390.

this.” They were naturally confident in their abilities to capitalize on opportunities for an employment contract moulded by collective bargaining.

The purpose of this chapter, then, is to detail the process by which the AJC and the Treasury Board reached their first collective bargain. The analysis is presented as a narrative documentary, which is a format used in case studies in order to portray situations through illustrative descriptions of key events.<sup>557</sup> As members of the AJC’s negotiating team were focal actors during labour contract negotiations, they were interviewed for their participant perspectives. Their personal recollections and perceptions along with evidence from documentary sources, provide a phenomenological and empirical referent for identifying the actors, actions, and consequences associated with appointing negotiating team members; solidifying a bargaining strategy; exchanging bargaining proposals; meetings; bargaining impasse; demonstrations; political lobbying; first contract arbitration; and judicial intervention. All of these elements comprise a linear sequence of actions taken in the AJC’s collective bargaining experience. When tied together, these events create an account that argues the AJC negotiated a first collective agreement in a contested and mediated model, which resulted in arbitration and *Charter* litigation over wage restraint legislation. This legislation limited the salary gains of the Law Group bargaining unit to roughly the level of inflation over the five-year term of their first collective agreement.

## **6.2 Collective Bargaining Phase 1: Preparation**

### *6.2.1 Assembling a Negotiating Team*

After confirming the union’s intent to enter collective bargaining, Jetté’s priorities over the summer months of 2006 involved coordinating bargaining session dates with TBS, assembling a negotiating team and solidifying a bargaining agenda. He met with the AJC’s executive to discuss staffing the negotiating team with people demonstrative of inter-organizational diversity. Lawyers drawn from different regional offices, who understood the interests of their local constituents, ensured the geographical diversity of the team as well the need for bilingual representation. The AJC also included a cross-section of male and female lawyers of different ages and Law Group classification stages. Ideally, with such diverse

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<sup>557</sup>*Multiple Case Study Analysis*, *supra* note 347 at 3; Hancock & Algozzine, *supra* note 84 at 10.

representation, the negotiating team members, each with their different legal specialties, could best assess the impact of TBS proposals on a variety of practice areas and recommend counter-proposals that were more reasonable to the interests of lawyers occupying similar positions.

Bargaining unit members applied to fill spots on the negotiating team. Jetté, in conjunction with other AJC executives, selected eleven members from the LA-1 to LA-2B ranks. One candidate was selected from each of the Atlantic, Northern, Quebec, Prairie and British Columbia Regions, and two members from the Ontario Region were added to the committee. The National Capital Region put forward four representatives. At a Governing Council meeting of October 2006, negotiating team member 5 recalled features of the assignment that would discourage all but the most interested recruit. She explained that the mystique of the negotiating team solidified her interest in the job:

Patrick made it clear that we didn't know going into it whether we would be on a without pay basis or not which could result in some people, going without some part of their regular salary for some time because we didn't even know at that point whether the AJC could carry us or not. So, you were effectively, if you were interested in possibly volunteering, to do this for free, and also committing your time. We didn't know going into it how long these sessions would take. We didn't know how long you could be involved in them. We had visions of these, crazy all-nighters, week-on-end sort of thing. And so you had to be willing to commit your energy, your time and possibly your money to this endeavour on a go-forward basis. And I thought it sounded marvelous, so I put my name forward.

Other lawyers committed to the union negotiating team for different reasons. Jetté, for his part, as AJC president, was an *ex officio* member of all committees.<sup>558</sup> Negotiating team member 3 felt compelled to join the negotiating team after no one else from their office displayed any interest in the post. The two representative positions on the negotiating team reserved for Ontario Region afforded a place for a member of FLOC's contingent to participate and keep an eye on the AJC's high-level dealings. Overall, the AJC's negotiating team formed an eclectic group.

Involvement with the negotiating team meant an indeterminate time commitment for the volunteers. Appendix B of an interim agreement dated 7 November 2006 granted the AJC negotiating team members leave to attend preparatory and contract negotiating sessions, albeit

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<sup>558</sup> 4 May 2006 AJC By-laws, *supra* note 545 Article 9 – Duties of President and the Vice President at 11.

without pay.<sup>559</sup> Negotiating team members still needed to fulfill their daily job duties and their workloads grew because of the additional responsibilities imposed on them by assisting the union. Negotiating team member 4 noted that the time involved in preparing for negotiations was not compensated, yet there was so much to accomplish. He and another negotiating team member likened their involvement on the union committee as working “two jobs” or performing “double duty”. The AJC’s negotiating team had to spend time identifying bargaining priorities, determining the bargaining strategy, and preparing bargaining proposals. Despite the additional workload, negotiating team members flattened the learning curve of bargaining preparations by leveraging their skills developed from practice and motivation to climb what remained.

The negotiating team’s importance justified forming an auxiliary committee. The Negotiation Advisory Committee was a forum that offered the negotiating team a breadth of additional perspectives on the conduct of negotiations. Negotiating team member 1 explained that this special committee operated to:

Give even more of a regional spread and representation from different offices, and there were all of as many as eight of nine people on it. It was a group to funnel messages and tell things to the negotiation team itself, to drop ideas and say what we think should be important or what shouldn’t be important; so, like a committee that fed into the negotiation team.<sup>560</sup>

Members of the negotiating team knew of the critical assignment bestowed upon them as well as them satisfying a vital role in the AJC’s democratic governance by serving on one of the several sub-committees that were tasked with handling union business. The negotiating team was accountable to the union’s decision-makers through the AJC’s Executive Committee and Governing Council.

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<sup>559</sup> Memorandum from Carl Trottier to Directors of Human Resources, Directors/Chiefs of Staff Relation: Interim Agreement Law Group (LA) 7 November 2006, Appendix “B” Clause B.05, “Contract Negotiation Meetings” & Clause B.06, “Preparatory Contract Negotiation Meetings”, online: Treasury Board Secretariat <<http://www.tbs-sct.gc.ca/archives/hrpubs/ca-cc/la/la-ia-ep-eng.asp>> (last modified: 18 April 2007) [hereinafter November Interim Agreement].

<sup>560</sup> AJC, AJC Newsletter (1 November 2006) 1, online <AJC: [http://ajc-ajj.net/files/library/01\\_-\\_November\\_1,\\_2006.pdf](http://ajc-ajj.net/files/library/01_-_November_1,_2006.pdf)> (date accessed: 17 April 2011 [hereinafter November 2006 AJC Newsletter]). The Newsletter outlines that the Negotiating Advisory Committee was derived from members of the Governing Council. It also notes that the negotiating team had access to a team of Consultants on Compensation, Costing, Benefits and Pension in negotiations with the federal Treasury Board.

Negotiating team members reported to the AJC's Executive Committee which consists of seven officers elected by the AJC's Governing Council.<sup>561</sup> The Executive Committee oversees the AJC's day-to-day administration between meetings of Governing Council—the AJC's ruling and managing body.<sup>562</sup> Members of the Governing Council assemble at least four times annually either in person or through audio/video conferencing, to conduct directorial duties, regulate internal affairs, and determine policies.<sup>563</sup> Representatives from National Capital, Ontario, British Columbia, Quebec, Atlantic, Edmonton, Calgary, Manitoba, Saskatchewan, Yukon, Northwest Territory, and Nunavut Regions comprise the assembly. Clause 8.3 of the 2006 AJC Constitution allotted each regional office to appoint one member to Governing Council for every one hundred lawyers.<sup>564</sup> The large cluster of lawyers working within the Ottawa area requires a special formula for calculating the council member representation for the National Capital Region. The distribution of positions on the Governing Council allows for proportionate geographic representation of bargaining unit members. When the PSLRB certified the AJC as bargaining agent, its Governing Council consisted of forty-three members, twenty-two of whom were drawn from the National Capital Region.<sup>565</sup> The AJC's governance structure was far more democratic and purposefully arranged to create greater and varied executive input than LOAC's previous one representative limit from each of the regional offices.

Given the task at hand for the new organization, the issue of funding was a priority before collective bargaining started. A significant financial worry was lifted for the AJC when it attained institutional stability with union security. Appendix C of the November Interim Agreement instituted the Rand Formula. Whether a card-carrying member of the AJC or not, the employer deducted a sum equal to the amount of membership dues from all employees in the Law Group bargaining unit as a condition of employment. That amount was outlined by section 6.2 of the 2006 AJC Constitution, which quantified membership dues as a deduction of 0.75

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<sup>561</sup> AJC, AJC's Constitution as of 21 March 2006, at 9, art. 9.1, online: AJC <[http://ajc-ajj.net/files/library/01\\_-\\_AJC\\_Constitution\\_-\\_March\\_21,\\_20061.pdf](http://ajc-ajj.net/files/library/01_-_AJC_Constitution_-_March_21,_20061.pdf)> (last modified 21 March 2006) [hereinafter 2006 AJC Constitution]. Pursuant to section 9.1 of the 2006 AJC Constitution, the number of executive officers was increased from four to seven positions. The amendment was made to account for the AJC's coverage of lawyers employed in departments and agencies outside of the DOJ and to improve operational efficiencies.

<sup>562</sup> *Ibid.* art. 9.2.

<sup>563</sup> *Ibid.* at 5, art. 7.4.

<sup>564</sup> *Ibid.* at 7. The 2006 AJC Constitution upped the representation amount from seventy-five to one hundred Justice Counsel.

<sup>565</sup> Reasons for Decision of Labour Relations Board, *supra* note 549 at para. 59.

percent of annual salary. The union arranged for dues deduction to begin on 1 November 2006, but the check-off was not implemented until 10 January 2007. For lawyers who voluntarily paid annual dues in 2004 to 2006 and prior to the AJC's certification, the AJC's by-laws entitled them to a dues holiday equivalent to 133.33 percent of amounts paid. Now in control of a steady flow of income, the AJC could defray lines of credit that kept the organization afloat while mustering the finances to pay for and weather an unknown end to negotiations.

### 6.2.2 *Finalizing a Negotiating Strategy*

The AJC followed general union practice of soliciting bargaining unit members' views on priorities for negotiations through a survey.<sup>566</sup> Participation by lawyers was highly encouraged, and they were invited to continue adding their feedback afterwards through e-mails and phone calls to regional Governing Council representatives. The scope of employee demands identified by survey findings illustrated the many complaints about existing work conditions and terms of employment. Having assembled a laundry list of potential bargaining considerations, the AJC's executive consulted their legal counsel to winnow employee demands. Some requests identified by respondents were unattainable. Section 113 of the *PSLRA* restricts the scope of bargaining issues and sets limits on what negotiations cover. The hiring, assigning, evaluating and dismissal of positions and the control of pensions and workers' compensation are handled by other legislation regulating the administration of the federal public service (and are therefore excluded from a collective agreement). Other concerns identified by the survey related to benefits covered by directives issued by the National Joint Council.<sup>567</sup>

Issues such as wages, working conditions, and overtime entitlement are addressed in federal public service collective bargaining negotiations. In particular, the focus of the AJC's membership on the topic of wages was clear: they identified salary parity with Ontario Crown

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<sup>566</sup> H.C. Katz, T.A. Kochan & A.J.S. Colvin, *An Introduction to Collective Bargaining & Industrial Relations*, 4th ed. (New York: McGraw Hill, 2008) at 203.

<sup>567</sup> First noted in chapter 4, the National Joint Council is the forum where participating public sector unions and Treasury Board develop public service-wide, benefits and terms of employment. Common workplace policies and best practices are standardized and reduced to various general directives that are incorporated into all collective agreements involving the Treasury Board, thereby limiting the discussion about their subjects during negotiations. See *AJC v. Canada (A.G.) supra* note 59 (Affidavit of H el ene Laurendeau sworn 29 October 2010 at 8-9, paras. 25, 29) [hereinafter Laurendeau Affidavit]. On 21 September 2006, the AJC joined the NJC, but without them committing to its directives, TBS's negotiators would not discuss related matters until the union decided which directives it agreed to be bound by. See Laurendeau Affidavit at 13, paras. 42, 45.

lawyers as their primary monetary issue.<sup>568</sup> They further highlighted the non-monetary policies of annual leave, alternative work arrangements and representation in employee discipline as other key matters of concern. Part of the bundle of professional obligations concerning the bargaining unit involved maintaining offices with closed doors as an extension of solicitor-client privilege, ongoing education and training opportunities, reimbursement for lawyer expenses, and timekeeping.<sup>569</sup> The scope of the Law Group bargaining unit's demands followed Kleingartner's findings that public sector professionals are inclined to seek professional goals associated with work responsibilities as part of their call for better pay and working conditions.<sup>570</sup> After these bargaining priorities were short-listed, the majority opinion of the negotiating team members determined the priority demands received.

Before the start of formal collective bargaining, the AJC's negotiating team finalized their strategy for pursuing an agreement that balanced employee calls for workplace equity and better wages with employer demands for efficiencies that warranted the granting of benefits. The AJC considered either to adopt and tidy the PIPSC agreement or seek a more tailored and distinct product. Their scrutiny of the PIPSC contract, and of the collective bargains covering other public sector lawyers, led them to take the latter option. While a few standard articles from the PIPSC agreement would resolve uncomplicated matters, the stock language and generic terms and conditions of employment provided by the PIPSC's compact mismatched the provisions needed for the more comprehensive agreement sought by the negotiating team. In contrast, TBS considered the PIPSC collective agreement that expired on 28 February 2006 as its reference point, which reflected a conventional approach of using comparative agreements to set a negotiating position.<sup>571</sup> The precedent offered TBS's negotiators a model that was consistent with the reasonable expectations of past Law Group bargaining units and had the advantage of a contract with uniform articles found in collective agreements covering other federal public service workers.<sup>572</sup> The AJC's negotiating strategy was a calculated gamble, but one they

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<sup>568</sup> AJC, Collective Bargaining Update (August 2007) at 1 (on file with the researcher) [hereinafter August 2007 Update].

<sup>569</sup> *Ibid.*

<sup>570</sup> A. Kleingartner, "Collective Bargaining between Salaried Professionals and Public Sector Management" (1973) 33:2 *Public Administration Review* 165 at 169.

<sup>571</sup> J.P. Sanderson, *The Art of Collective Bargaining*, 2nd ed. (Aurora: Canada Law Book, 1989) at 28.

<sup>572</sup> *AJC v. Canada (A.G.) supra* note 59 (Affidavit of Marc Thibodeau sworn 29 October 2010 at 6, para. 21) [hereinafter Thibodeau Affidavit].

believed would convince a seasoned opponent that their principled demands could not be accommodated by a collective agreement developed for a group of one hundred or so lawyers outside of the DOJ. With a resolved bargaining agenda in place, the AJC negotiating team foresaw a collective agreement that addressed the interests of bargaining unit members and, therefore, it was the one to best recommend as a good deal once completed.

### **6.3 Collective Bargaining Phase 2: Negotiations**

#### *6.3.1 Negotiating Team Meetings: Meeting Bargaining Conventions*

The AJC's negotiating team and TBS representatives met in Ottawa on 22-23 November 2006 to commence an inaugural round of negotiations. Toronto labour counsel, Steven Barrett represented the AJC at the bargaining table.<sup>573</sup> TBS's negotiating committee included its Director of Collective Bargaining Operations, another negotiator, and representatives from the DOJ, Public Prosecution Service of Canada, and Veterans Affairs.<sup>574</sup> The parties met and exchanged bargaining proposals. The AJC's negotiating team addressed salary increases as a bargaining priority, but was told that non-monetary proposals would be addressed first. This order of proceedings is typical in labour contract negotiations since agreeing to matters of less significance allows the parties to achieve initial gains, and generate an atmosphere of progress before broaching controversial terms.<sup>575</sup> The parties planned a second set of negotiating meetings for 23-25 January 2007. More dates were arranged for 20-22 February 2007 in Montreal, followed by additional sittings scheduled for April and June of 2007.

When lawyering for the federal government, the interests of the AJC's negotiating team members were aligned solely with those of the employer. Now, their partisanship had shifted to representing bargaining unit members in order to get them the best deal possible. To participate in negotiations, members of the AJC's negotiating team reproduced bargaining conventions. Preparatory discussions were held prior to bargaining sessions with the AJC's lawyer, and, afterwards, the negotiating team members reviewed the plan for future meetings.

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<sup>573</sup> November 2006 AJC Newsletter, *supra* note 560 at 1.

<sup>574</sup> PSRLB File 585-02-25, *supra* note 305 (Submission of the Treasury Board to the Arbitration Board in Respect of the Law Group at 9) [hereinafter TBS, Law Group Arbitration Brief].

<sup>575</sup> S.D. Saxe, *Ontario Employment Law Handbook: An Employer's Guide*, 3rd ed. (Toronto: Butterworths, 1995) at 82.

Representatives formed a cohesive group and they assumed particular roles. On this point, AJC negotiating team member 4 recalled his specific involvement during bargaining sessions:

We did caucus a lot to try to make sure we were not on different pages to try to be together. My role, I tended not to speak too much, but I sat there and I listened carefully and I would sort of pipe in at strategic times. I think some members might remember that I sort of played the role of a second sober thought, is one way to put it.

The efforts of individual negotiating team members bolstered the collective capacities of the group. As bargaining sessions progressed, Jetté asked negotiating team colleagues to conduct different tasks and the AJC's negotiating team members enjoyed empowering responsibilities. Bargaining sessions were held in camera, but through the recollection of negotiating team member 2, it is possible to create a picture of how their preparation translated to action at the bargaining table:

I was actively involved in all of the negotiations. I was active at the table and we all had a number of things that we did. We did research on particular and specific areas. We were asked to speak at certain times at the negotiation table about certain topics. So if you can imagine the contract was very large and there were a number of things that needed to be looked at. So there were comparisons that were done to other contracts, there were cross-country comparisons done with respect to salaries, with respect to work, and different employment situations. All of those comparisons needed to be looked at. We were involved dealing directly, one-on-one with the lawyers that were representing us.

During the negotiation sessions between January and April of 2007, the parties discussed grievance procedures, education, training and career development for lawyers, vacation carry-over, sick leave advances, use of video surveillance, court clothing entitlements, leave for union representatives and the AJC President, union dues deduction for employees in acting positions, and the no discrimination clause.<sup>576</sup> While the AJC's envoys came to every negotiating session to argue their bargaining proposals, in terms of movement towards a completed collective agreement there were few advances that the AJC could report to the bargaining unit.

### 6.3.2 *Negotiating Impasse Sets In*

Despite the efforts of a dedicated AJC negotiating team, obstacles to a settlement between the parties emerged once the meetings began dealing with specific details. The employer's immobile position towards key union demands on monetary and non-monetary

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<sup>576</sup> Thibodeau Affidavit, *supra* note 572 at 10, para. 33.

proposals became increasingly apparent to AJC negotiating team members after observing disciplined conduct from TBS's negotiators. Members of the negotiating team perceived that their counterparts were intentionally stalling negotiations, which created doubt as to whether TBS's representatives even possessed bargaining authority. Negotiating team member 4 made sense of this particular bargaining conduct as follows:

The people who make the decisions are not the people who are at the negotiating tables. It's always the messenger that gets sent out and they always have to keep checking with their masters. That's what my colleagues have learned from the experience of negotiating. They thought they could go in and just basically out-lawyer the other side and they just got hit with a wall.

As the passage alludes to, TBS's practice of subjecting proposals and counterproposals for consideration to higher chains of management authority chilled the negotiating dynamic of give-and-take necessary for spontaneous compromise on important articles. Katz, Kochan and Colvin identify inadequate authority of negotiators as evidence of typical surface bargaining that amplifies opportunities for impasse and, as such, is common practice in public sector negotiations.<sup>577</sup> Other employer inactions during the bargaining process made AJC negotiating team members wonder if there was the goodwill necessary for meaningful discussions. On more than one occasion, TBS was unprepared at meetings, which hampered a day or two of bargaining progress. The AJC collective bargaining update of August 2007 captured the negotiating team's growing unease with TBS's tactics. The document revealed that TBS wanted to replicate provisions of the PIPSC agreement, exhibited a general stubbornness to share decision-making powers over key employment terms and practices that predated collective bargaining, and did not satisfy commitments to produce information or counter-proposals prior to bargaining sessions.<sup>578</sup> The AJC considered these attitudes and behaviours of TBS as impediments to negotiations.

For some AJC negotiating team members, their expectations for a successful negotiated settlement progressively lowered as a result of TBS's conduct. It became apparent to negotiating team member 2 that the meetings had lost their usefulness. The following passage captures the mixed motives she believed TBS had for continuing collective bargaining and the trouble that this posed for the AJC:

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<sup>577</sup> Katz, Kochan, & Colvin, *supra* note 566 at 196.

<sup>578</sup> August 2007 Update, *supra* note 568 at 4.

Much of those meetings were completely unproductive. And if they were, there were certainly questions about whether the Treasury Board was trying to in fact break us where we weren't making any progress on really any of the issues even though we were in agreement on many basic things; just dragging the meetings out. But I'll tell you, this was not a two-way negotiation. This was a one-way negotiation with goodwill and good faith on the union's side, really just wanting to get to some solution and to work through solutions. And Treasury Board just taking unreasonable positions and not really having discussions with us in any meaningful and reasonable way.

The aloofness of the employer's agents towards collective bargaining motivated the AJC negotiating team members' efforts to extend nuanced understanding about union proposals to aid in advancing discussions. Union negotiating team member 4 reported the following surprise as a result of one such attempt:

It arose during the course of negotiations. Treasury Board looked at lawyers as being just another category. I remember directly the negotiator for Treasury Board asking, "Why are you so different from CR4s or clerical workers or other professionals, like physicians or pilots"? And we tried to respond in our ignorance that we were unique but we were sort of coming up flat against the Treasury Board notion that you were not different from other job categories. So, if we were able to convince that negotiator we would have definitely had a different outcome from what we did.

In a similar vein, negotiating team member 5 discovered that the employer maintained pre-conceptions about DOJ lawyers bargaining collectively. The gap widening between her expectations for the negotiations and the TBS's actual tendencies led her to the following conclusion:

Well, the difficulty of course was that we didn't understand and appreciate the approach that the Treasury Board took with everybody in negotiations. Which is, and they actually said it to us in one of our sessions with them, that you are not special, you are not different, you are not unique even if you are lawyers. You are still public servants and you are governed by a collective agreement that we will impose on you basically just like we do on CAPE or PSAC and all the other public servants of the federal government. We really went in there thinking they have to appreciate how different we are because we are their lawyers. And I don't think we really appreciated that until quite a ways, I mean almost at the end I think it sunk in that no, they really didn't think we were different.

The respondent's perception of the negotiations changed because of TBS's position: a coalition of lawyers did not confer greater bargaining authority or power. Her belief that collective bargaining could compel the employer to reward lawyers for their importance to the department was dashed. This was an unexpected bargaining interaction for her that was made more profound by a forced change in awareness about the standing of lawyers.

By pursuing a broad spectrum of employment issues, the AJC may have unwittingly succumbed to TBS's negotiating ploy—or at least one member of the AJC's negotiating team thought so. In particular, she believed the redirected emphasis on non-monetary priorities may have depleted negotiating capacities over monetary ones. Negotiating team member 3 explained her view by saying:

Well, I had different view than many of the members of the bargaining team and my view didn't prevail. My view was that the real issue to be addressed should be money. That's really what people signed up for. They weren't happy as you said because provincially employed lawyers were making more money. There was perceived unfairness. So the real impetus, at least in my region, was the bottom line, which was compensation, monetary compensation.

Apparently, in some of the other regions, this is just that I'd heard, maybe they weren't so unhappy about monetary compensation because you're being paid relatively well. So, you might have some other concerns about how many sick-leave days am I going to get? So there was some other issues and many, many, other issues. I mean it got down to the minutia of how many court shirts could you buy for the year? Could you have a cell-phone paid for?

It just got into every single area and it seems that many in the bargaining unit wanted to re-invent the wheel from the beginning and have a very comprehensive first agreement where every issue was argued between the AJC and the management committee and not just compensation. Whereas my view was why don't we just sort of agree that all the terms and conditions as status quo, accept all of them that we've been living with and just say the real issue is money. And that's not what happened.

Bargaining a long list of demands, article by article, seemed to have surprised the employer's negotiators. As TBS's chief negotiator noted, the union's position that all terms and conditions were open to negotiation, as well as the rejection of many standard articles contained in other collective bargains in the federal public service, led to proposals on most, if not all, aspects of the employment arrangement.<sup>579</sup> As a result, the greater number of demands raised, the more interests needed to be discussed during meetings, which in themselves only allowed for a small window of opportunity to settle matters face-to-face.

Without question, the AJC's negotiating team faced a steep and uphill struggle in having TBS accept its salary and overtime bargaining demands. The AJC's compensation proposal of 2004 provided the basis for requesting salary gains in the amount of 35 percent for the LA-1 and

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<sup>579</sup> Thibodeau Affidavit, *supra* note 572 at 4-5, paras. 15, 20.

LA-3B pay scales, 40 percent for the LA-3A pay scale and a 45 percent pay increase for a merged LA-2 level pay scale.<sup>580</sup> As negotiating team member 1 relayed: “We were seeking parity with Ontario and we wanted to make a lot of headway in that regard. We probably would have settled for something shorter but that was the number one goal.” The AJC’s bargaining chip was that the wages paid to federal government lawyers were grossly undervalued and uncompetitive due to the legislative freezes of the 1990s and yearly economic advances of roughly 2.5 percent for LA-1 and LA-2A lawyers thereafter. During bargaining, the AJC’s negotiating team could point to the health of the Canadian economy as a factor justifying wage demands, and, perceptively, the Treasury Board’s ability to pay fairly. Canada’s economy and finances were unusually strong in 2005-2006, with the federal government projected to enjoy an \$8 billion budget surplus.<sup>581</sup> The union anticipated that a high starting position on wages would at least stir some compromise. Instead, the employer’s opening proposal denied overtime entitlement<sup>582</sup> and was silent on a salary proposal.<sup>583</sup>

It became obvious that the TBS was simply not interested in meeting the AJC’s wage demands and moving towards what Chaykowski calls a “zone of agreement” and the common ground necessary for agreement.<sup>584</sup> Instead, settling wage and overtime demands started as and remained a battle of wills between bargaining camps that favoured the much stronger Treasury Board. According to negotiating team member 4: “We knew the Treasury Board was not going to agree with us, especially with—it turns out—salary demands being quite high, according to Treasury Board. So there was no backing down from that position throughout. It was quite consistent from day one.” The AJC’s salary proposal typified distributive bargaining by attempting to secure as high as a wage increase as possible.<sup>585</sup> If successful, it would alter the employer’s practice of benchmarking DOJ salaries to a national median wage by replacing it with the norm the province of Ontario paid its lawyers. Faced with this proposition, the TBS’s

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<sup>580</sup> AJC, Collective Bargaining Update (December 2007) 1 at 2 (on file with the researcher).

<sup>581</sup> Department of Finance Canada, *The Budget in Brief 2006: Focussing on Priorities Canada’s New Government Turning a New Leaf* (Ottawa: Department of Finance, 2006) at 15.

<sup>582</sup> August 2007 Update, *supra* note 568 at 1.

<sup>583</sup> *AJC v. Canada (A.G.)*, *supra* note 59 (AJC’s factum at 14, para. 36).

<sup>584</sup> R.P. Chaykowski, “Collective Bargaining: Structure, Process and Innovation” in M. Gunderson, A. Ponak & D. Taras, eds., *Union-Management Relations in Canada*, 4th ed. (Toronto: Addison-Wesley Longman, 2001) 234 at 255

<sup>585</sup> Kehoe & Archer, *supra* note 51 at 114.

negotiators were content with a strategy that held the AJC's wage demands in check. For the first seventeen months of bargaining, TBS stalled on delivering a counterproposal to the AJC's salary demands, which delayed the costing out of other monetary and non-monetary proposals. Negotiating team member 1 recounts his view on TBS's stand towards salary rate increases:

We were really trying to negotiate our own agreement and not just sort of add to the one already in place. As well, I'm reading into the mind of the other side, but Treasury Board very much wants to not allow our salaries to go up and to fight us tooth and nail to ensure that didn't happen. The reason why I say that is there's this huge document about the salaries in the federal public service. And it lays out the whole structure of how it all works. They would sort of line us up against a certain level of executives and say, okay this is what these guys' salaries should be. That's the way they set our salaries before.

So the long and the short of it is if we were to get a significant pay increase, like the 30 or 40 percent we were seeking to get parity with Ontario that would put immense pressure on the entire upper part of the triangle of the central public service. Because they all will say, hey wait a minute here, in our big graph here these guys are equivalent and now they make 30 percent more than us, so give us all a 30 percent pay increase. I think that was an immense barrier to us.

The guideline this negotiating team member may have had in mind was the Treasury Board's Policy Framework for the Management of Compensation (Employer's Policy Framework), which outlined specific principles and methodology for managing compensation in the federal civil service. The framework dictated that wage decisions for occupational groups are determined by external comparability, internal relativity, affordability and individual/group performance.<sup>586</sup> The employer saw the principles of the Framework on Compensation as an objective standard that demonstrated that compensation for the Law Group was fairly sufficient as it stood and the AJC wage demands were wholly unreasonable.<sup>587</sup>

At the close of negotiations on 26 September 2007, the slow progress of discussions alarmed both the union and the employer, forcing them to consider mediation. On 15 October 2007, the AJC and TBS decided on third-party mediation through the PSLRB. The first of several meetings with noted labour arbitrator Kevin Burkett proceeded with one-day sessions on 14 November and 19 December 2007, with mediation continuing on 19 and 20 January 2008.

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<sup>586</sup> TBS, Law Group Arbitration Brief, *supra* note 574 at 31; Thibodeau Affidavit, *supra* note 572 at 17, para. 36. As detailed in Chapter 5, before the introduction of collective bargaining the DOJ's management and TBS would not consider increasing the national rate to the Toronto differential in order to preserve internal relativity of lawyer wages comparative to the value of work performed by managers.

<sup>587</sup> Thibodeau Affidavit, *ibid.* at 18, 24, paras. 39, 67.

Sessions facilitated resolution of a few non-monetary matters.<sup>588</sup> At the third mediation meeting of 29 March 2008, the AJC received TBS's proposal on compensation. The offer proposed adopting standard language for generic terms and conditions of employment as necessary, an annual economic increase to salary ranges of 1.5 percent over three to four years, retroactive to April 2006, and rejecting any change to the pay structure.<sup>589</sup> TBS's proposal struck a chord with the AJC's executive: they characterized the tender as an offer designed for rejection.

TBS's unsatisfactory offer marked an end to conventional negotiations. In retrospect, negotiations between the AJC and TBS faltered because expectations for a first collective agreement prevented the two parties from yielding concessions on chief monetary and non-monetary proposals. Negotiating positions started far apart and remained that way. The AJC attempted to craft a contract responsive to the financial, professional, and practical demands of bargaining unit members that conflicted with the TBS plan for re-circulating the PIPSC agreement. TBS engaged in positional bargaining through its inaction on numerous key article proposals, which consumed the limited meeting time for resolving the extensive issues, while subtly informing the AJC that wages were non-negotiable. With bargaining at a standstill, the AJC realized that it had to initiate binding arbitration through the PSLRB. The AJC could satisfy the requirement of sub-section 135(b) of the *PSLRA* that it had bargained in good faith, as well as meet the *Act's* other condition under sub-section 137(2) that it negotiated sufficiently and seriously with respect to the matters in dispute, but still could not reach agreement with TBS. The parties disagreed over all monetary issues and only minimal progress was made on key non-monetary matters of closed doors, time keeping, and access to education and training.

#### **6.4 The Dispute Goes Public: Federal Lawyers Deserve Justice**

The aborted negotiations did not undermine the credibility of either the AJC or TBS too much because neither party conceded defeat at the bargaining table. The possibility of an independent arbitration board imposing terms and conditions carried incentives for both sides to continue to refine and settle matters they preferred not to leave to third-party resolution. An

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<sup>588</sup> *Ibid.* at 12, para. 33.

<sup>589</sup> *AJC v. Canada (A.G.)*, *supra* note 59 (AJC Notice of Application, Affidavit of Marco Mendicino sworn 8 June 2010, Exhibit "N": AJC, Law Group Negotiations, Employer's Response to the AJC Salary Proposal Mediation Sessions March 2008 at 153) [hereinafter AJC Notice of Application, 8 June 2010 Mendicino Affidavit].

arbitration board, though, first needed to be struck that consisted of either a single member by agreement of the parties, or, at the request of either group, a tripartite committee consisting of a chairperson and one representative each appointed by the union and employer.<sup>590</sup> Even in the process of selecting a chair for the arbitration board, the TBS and AJC disagreed. This impasse illustrated the skepticism the union and employer had in the judgment of the other, which was likely exacerbated by the protracted negotiations. The AJC preferred an impartial arbitrator selected by the parties or through an independent procedure; the TBS wanted a chair who was familiar with collective bargaining in the federal public service.<sup>591</sup> An arbitrator being selected by the PSLRB's chairperson disquieted the AJC because that position was tied to a Governor in Council appointment.

With no deadline looming for reaching and entering a first collective agreement or the rendering of an arbitral award, the AJC was saddled with managing the expectations of a bargaining unit of intelligent professionals who were desirous of a contract with significant salary increases, but who instead saw their wages frozen as of May 2006 by the start of collective bargaining. As could be expected with a large and diverse group spread across Canada, member interest in the union ranged from an understanding majority to an impatient minority. Sporadic negotiation sessions that yielded marginal progress created an information vacuum and management dilemma for the AJC. The problem of satiating bargaining unit member curiosity in collective bargaining was compromised by the union and employer agreeing to negotiate in confidence and on legal advice received by the AJC that instructed them to keep the contents of negotiations private. For these reasons, the AJC's release of information bulletins regarding bargaining sessions was limited, and, when published, reported redacted news.

The informational needs of a bargaining unit new to the tribulations of first collective agreement negotiations became apparent to negotiating team members who were singled out by office colleagues as beacons for information. Negotiating team members 2 and 4 tried to fill the information void by holding meetings to inform attendees about negotiations without, of course, revealing prohibited details. Negotiating team member 1 recalled dealing with lawyers telling

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<sup>590</sup> *PSLRA*, *supra* note 35 at sections 137-140.

<sup>591</sup> Thibodeau Affidavit, *supra* note at 572 at 12, para. 33.

him how to advance negotiations. He found informing inquisitive colleagues using ambiguities challenging, and reveals the feeling as follows:

We tried to keep the word out there that we're working. But part of the problem also is that lawyers are kind of difficult clients. Many of them are extremely supportive, wonderful, but you get a real mix. And with lawyers, when someone has a disagreement, doesn't like a particular way something is going, we're trained to be fairly vocal about it. We put the strongest argument we can to somebody to say, hey fix this problem—I don't like this. And so, from a perspective of somebody on the negotiating team when you get these e-mails or phone calls they can be really intimidating in a way because they're really well put. Even though you know it's not going to be that we'll turn and do whatever this person is saying. Still, they do a good job of telling us what they think. And that puts a lot of pressure on you.

So, the other thing is that they have high expectations. Not that many federal lawyers deal with labour relations law. And so a lot of them completely misunderstood how the process works and how much you can sort of drive the process from the side of the union. In other words, they thought we should be bringing all these amazing applications in to the board to do this and to do that and force the employer to speed up everything. And meanwhile the advice we were getting from our lawyers was no, this is the way it works—it's a slow process. If we rush off to the board with that we'll just get shot back. It'll slow things down even more, you shouldn't do that. So, we were kind of between a rock and a hard place.

This description illustrates that lay bargaining unit members expressed opinions without full knowledge of the dispute resolution procedures of collective bargaining. Three negotiating team members conceded that the AJC did not inform the membership as early, and with enough information as they could have. The slow, filtered information left lawyers less apprised about the bargaining process and developments; this was the uneasy course the AJC initially took to prevent the errant disclosure of information that could inadvertently jeopardize strategic positions on contract terms.<sup>592</sup>

The union's leadership sensed that with little to tout and show about negotiations, the transition to arbitration unnerved the constituency. At the time, bargaining unit morale was "very low" according to negotiating team member 2. The AJC faced a bargaining unit full of frustrated members who complained about the length of negotiations and hold-up in receiving economic increases, disapproved of the wait in pursuing arbitration to determine salary increases,

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<sup>592</sup> November 2006 AJC Newsletter, *supra* note 560 at 1

and questioned why salaries were not the only focus for negotiations.<sup>593</sup> Further impediments and delay in arbitration threatened to raise the bargaining unit's perception of the AJC's weakness. Faced with an imminent problem that, if left unattended, could unravel the union's legitimacy, negotiating team member 5 spoke about the AJC's idea for a workable solution: "Our members were mad as hell and we tried to think of something to do that would help. You, know, sort of re-energize them and bring more of a positive collegiality, if you will; or, a positive group mentality." The AJC's leadership mulled a campaign to heighten employee solidarity. One theme of the effort was to hold the Treasury Board accountable for the economic hardships caused by low pay rates. Another theme was to awaken the bargaining unit to the employer's role in undermining the completion of a freely negotiated collective agreement. In a way, a united expression of employee discontent would demonstrate the bargaining unit to be an active group involved in, and concerned with, the determination of a speedy and fair arbitrated resolution. After careful deliberation, the union's leadership adopted the slogan of "Federal Lawyers Deserve Justice" to capture the AJC's cause. News of the campaign circulated throughout regional offices on memorandums, stickers, and buttons. Naturally, the strength of the campaign depended on bargaining unit members buying into the idea.

On 13 May 2008, the "Federal Lawyers Deserve Justice" campaign went public. Patrick Jetté planned an outdoor brown-bag luncheon between 12:00 and 1:00 p.m. in the courtyard of DOJ headquarters located at the East Memorial Building on Wellington near the corner of Kent Street in downtown Ottawa. Every AJC member in the NCR was invited to the luncheon as was Justice Minister Rob Nicholson and Treasury Board president Vic Toews. Bargaining unit members in regional offices who obviously could not attend the luncheon were asked to display their support by posting stickers and wearing blue buttons at work that day. Jetté planned to address the audience on the state of first contract negotiations, and, hopefully, achieve some headway in resolving their dispute with TBS. Negotiating team member 1 spoke of advice received that involved other federal public employees faring well once their labour dispute with the government garnered publicity. Particularly, negotiating team member 2 recalled talk about how financial administrators silently paraded on Parliament with pencils in the air and achieved their goal of a raise shortly after their demonstration.

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<sup>593</sup> August 2007 Update, *supra* note 568 at 1.

Jetté and the other lawyer attendees were dressed in business attire and totting empty blue legal size folders, distinguishing them from other protestors, which, at that time, included demonstrators denouncing Canada's military intervention in Afghanistan. An oversize white placard in front of, and adjacent to a plaque of Henriette Bourque, (the first female lawyer employed by Department of Justice), created a focal point for Jetté's speech. The union sign featuring the bilingual motto "federal lawyers deserve – Justice – pour les juristes du fédéral" in black print, set against the AJC's blue proprietary logo, dressed the speaker's pulpit. Negotiating team member 4 recalled his experience as an attendee:

Well, I was surprised at the turnout. We didn't have a big space to do it in. Initially we thought about going out to the street corner and get on the lawn and we were advised we're not able to do that. Us being lawyers, we followed the advice. So, they told us that that place was available, the courtyard in front of the East Memorial Building. And I know—I remember it was almost like a party because I was just running into all of my colleagues that I knew personally there and they were just chatting away. Our president gave a real good speech. I don't know if the Deputy was listening or not, in his 4th floor office. But, I doubt he'd be there.

Jetté's speech enlivened his audience. In covering the event, the newspaper *The Lawyers Weekly* reported on the show of camaraderie among an estimated three to four hundred lawyers who waved their blue folders on the president's call to symbolize their frustration with an elusive collective agreement.<sup>594</sup> The protest encouraged the President of the Treasury Board to write to the AJC with interest in discussing the union's request for appointing an independent chair to head the arbitration board.<sup>595</sup> In an atmosphere of benevolent rhetoric, the parties agreed (with the help of Kevin Burkett) to try to mediate the selection of a mutually acceptable nominee.

After the rally, the AJC's executive enacted another strategy for better engaging the membership: they adopted a new communication platform to report on union dealings. Over the summer of 2008, the AJC released "All the details," a rebranded and slick looking newsletter. The communiqué was posted on the AJC's website, the union's communications pipeline, and distributed through electronic subscription to members. Going forward, developments in the negotiation and arbitration process were reported more promptly and in greater detail.

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<sup>594</sup> C. Smitz, "Federal Crowns protest stalled salary talks: The union has opted for binding arbitration to achieve its first contract" *The Lawyers Weekly* 28:4 (23 May 2008) at 17.

<sup>595</sup> AJC, *All the details*. 1:2 (August 2008) 1, online: AJC <[http://ajc-ajj.net/files/library/01\\_-\\_August\\_2,\\_2008.pdf](http://ajc-ajj.net/files/library/01_-_August_2,_2008.pdf)> (date accessed 1 March 2012).

## 6.5 Collective Bargaining Phase 3: Conclusion

### 6.5.1 *Bill C-10*

On 24 September 2008, TBS's senior negotiator wrote to the PSLRB with an application to establish an arbitration board and request that the empanelling process be left to procedures under the *PSLRA* as the parties could not settle on a mutually acceptable chair. The TBS and AJC moved closer to interest arbitration, the next stage of third-party dispute resolution available to them. A completed first collective agreement would now result from the adjudicators determining terms and conditions of employment, which, judging by the Treasury Board's application, entailed their significant intervention. Negotiations and mediation resolved clauses across seventeen articles; however, twenty-eight articles, some of which included work force adjustment policy and the contentious issue of pay, remained in dispute and were referred to arbitration.<sup>596</sup> The AJC submitted its proposed articles for terms and conditions of employment that remained contested to the arbitration panel as well.

The holdup incurred by FLOC's certification application (that initially favoured the AJC's wage demands at the start of negotiations with TBS due to the government's healthy budget surplus) destabilized the union's position heading into arbitration. Canadian federal public service collective bargaining negotiations underway at the time were not immune from the financial crisis emanating in America as of August 2007. By December 2007, stock, lending, banking and housing markets crashed, causing industrialized economies uncertainty, insecurity, and turmoil in what is now called the "Great Recession" (which lasted until June 2009). In Canada, politics momentarily overtook the economy in the news with federal elections on 14 October 2008, which produced a minority Conservative government. Election results affected the course of collective bargaining negotiations in the federal public service.

One month later, on 15 November 2008, TBS proposed the AJC reconsider discussions and possible settlement involving its salary demands in light of the Conservative government's immediate fiscal priorities.<sup>597</sup> Accordingly, on 18 November 2008, the AJC received TBS's final wage offer that indicated the Law Group bargaining unit would receive: a 2.5 percent economic

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<sup>596</sup> AJC Notice of Application, 8 June 2010 Mendicino Affidavit, *supra* note 589 (Exhibit "Q": Marc Thibodeau letter to PSLRB dated 24 September 2008 and Form 8: Request for Arbitration at 173).

<sup>597</sup> *AJC v. Canada (A.G.)*, *supra* note 59 (Affidavit of Paul Rochon sworn 5 November 2010 at 11-12, paras. 30-31).

increase for 2006-7, and increases of 2.3 percent for 2007-08 and 1.5 percent over the next three years respectively. The AJC's consideration of TBS's offer swiftly came to a head with Governor General Michaëlle Jean's speech to the throne of 19 November 2008, which opened the first session of the 40th parliament with a regimented plan for Canada's uncertain post-recession recovery. The speech declared an economic policy of fiscal prudence by shoring up the balance sheet with spending restrictions directed at the familiar pairing of government operations and federal public service compensation. In particular, it promised legislation aimed at "responsible fiscal management of public sector compensation," as well as the Minister of Finance, Jim Flaherty, delivering in a week's time the government's Economic and Fiscal Statement.<sup>598</sup> The spectre of imminent and aggressive legislation pushed the collective bargaining committees of certain employee groups belonging to the Canadian Association of Professional Employees and the Public Service Alliance of Canada to reluctantly sign tentative collective agreements; the AJC negotiating team had to ponder a similar outcome to its negotiations. On 27 November 2008, Minister Flaherty's Economic and Fiscal Statement outlined the details of legislation that limited annual public service wage increases for 2007-2008 at 2.3 percent and for the following three years at 1.5 percent.<sup>599</sup> On 1 December 2008, the AJC responded to the Treasury Board's latest wage offer, which provided little more than what had been previously on the table. In the eyes of the union, this was an offer so low and disparaging that the AJC stood tall by rejecting it.

On 4 December 2008, Governor General Jean granted Prime Minister Stephen Harper's request to suspend Parliament that was designed to evade a non-confidence motion in the minority Conservatives planned by opposition parties upset with Minister Flaherty's Economic and Fiscal Statement (and unafraid of toppling the sitting government in order to replace it with their own coalition rule).<sup>600</sup> After Parliament reconvened, the first order of the chastened

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<sup>598</sup> M. Jean, "Speech from the Throne to Open the First Session of the 40th Parliament of Canada" (Parliament of Canada, Ottawa, 19 November 2008), online: Privy Council Office <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/sft-ddt/2008-eng.htm>> (last modified: 19 November 2008).

<sup>599</sup> J. Flaherty, "The Economic and Fiscal Statement 2008" (House of Commons, Ottawa, 27 November 2008), online: Department of Finance, Canada <<http://www.fin.gc.ca/ec2008/speech/speech-eng.html>> (last modified: 27 November 2008).

<sup>600</sup> D.A. Desserud, "The Governor General, The Prime Minister, and the Request to Prorogue" (2009) 3:3 *Canadian Political Science Review* 40 at 40.

Conservative government's business was to present its revised budget to the House of Commons on 27 January 2009. On 6 February 2009, the omnibus Bill C-10<sup>601</sup> received first reading in the House of Commons and contained at Part 10, the *Expenditure Restraint Act*<sup>602</sup> with its provisions for implementing federal public sector compensation restraint. The *ERA* intended to freeze pay rates and cap maximum salary increases for any collective agreement or arbitral award before 8 December 2008 at rates noted in finance Minister Flaherty's Fiscal and Economic Statement.<sup>603</sup> However, entitlement to performance pay allowing for an annual bonus remained unaffected during the period of restraint that lasted from 1 April 2006 to 31 March 2011. Sections 34 and 54 of the *ERA* detailed specific rules as to the *ERA*'s application regarding a negotiated or an arbitrated award, as well as the terms and conditions of employment covering the Law Group, and it made no exception for the AJC as the only group in the federal public service negotiating a first contract within the restraint period. The negotiated settlements of the Canadian Border Service Guards and employees in both the Ships' Officers and Operational Services Group, however, were excluded from section 23 of the *ERA*'s provisions prohibiting pay range restructuring. The legislation also preserved Treasury Board's ability to change existing pay allowances associated with a modernization initiative for the Royal Canadian Mounted Police.

With the House of Commons Standing Committee on Finance planning to review Bill C-10, the arbitration process involving TBS and AJC continued on its own track. The PSLRB's chairperson determined that a hearing should clarify and set terms of reference for the arbitration panel in light of TBS opposing the AJC's proposals on terms and conditions of employment that it referred to arbitration. The hearing was held on 15 and 16 December 2008, and on 12 February 2009, Vice-Chairperson Ian Mackenzie released his decision.<sup>604</sup> The Vice-Chairperson's legal analysis involved vetting the content of the AJC's proposals against section 150 of the *PSLRA*, which sets parameters on the terms and conditions of employment an arbitral award can determine. Vice-Chairperson Mackenzie found the AJC's proposals on key bargaining issues of time keeping, filling vacancies, promotion from LA-1 to LA-2 after four

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<sup>601</sup> Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2d Sess., 41st Parl., 2009.

<sup>602</sup> *Ibid.* Part 10: *An Act to restrain the Government of Canada's expenditures in relation to employment* [hereinafter *ERA*].

<sup>603</sup> As an addition to the fiscal years initially noted by Flaherty's speech, the 2006-2007 fiscal annum was added for inclusion in wage-restraint legislation. Economic increases for the year were capped at 2.5 percent.

<sup>604</sup> *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 (CanLII).

years of service, requirement for at least 30 percent of lawyers in the bargaining unit being classified at level LA-2B or higher, and incorporating the existing Performance Review and Employee Appraisal Policy into the collective agreement conflicted with the *Act* and were therefore excluded from the arbitral terms of reference. The ruling redeemed TBS's strategy of denying the AJC's impugned bargaining demands by using statutory norms as a buffer.

Bill C-10 becoming law spurred the AJC to once again venture into the public realm. This time, the AJC planned political intervention by retaining the public relations firm Earnscliff Strategy Group to lobby federal political parties about the *Act's* impact on the AJC's first contract arbitration.<sup>605</sup> In his role as president and spokesperson for the AJC, Jetté appeared on 23 February 2009 before the House of Commons Standing Committee on Finance's deliberations and study of Bill C-10. He argued for: reprieve from the provisions of the *ERA* directed at the Law Group; advised on wage discrepancies between federal and provincial counsel leading to retention issues in the public prosecution service and low morale at the DOJ; urged members to consider the constitutionality of the legislation given its discriminatory and disproportionate effect on lawyers; and answered questions from politicians.<sup>606</sup> His presentation lasted fifteen minutes. In the end, the AJC's request for Bill C-10 being amended was more consultative than persuasive. On 12 March 2009, Bill C-10 received Royal Assent, and when that caused the *Budget Implementation Act*<sup>607</sup> to become law, so too did the *ERA* come into force.

Undeterred, the AJC's politicking continued. Responsible for the ongoing campaign was the AJC's newly appointed President, Marco Mendicino. On 25 April 2009, the succession from Jetté was executed by the Governing Council unanimously approving a motion tabled to appoint

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<sup>605</sup> AJC, *All the details* 1:5 (24 November 2008 AJC) at 1, online AJC < [http://ajc-ajj.net/files/library/05\\_-\\_November\\_24,\\_2008.pdf](http://ajc-ajj.net/files/library/05_-_November_24,_2008.pdf) > (date accessed: 1 March 2012); C. Smitz, "Federal lawyers slam wage restraints: disappointed judges seek pay hike when economy recovers" *The Lawyers Weekly* 28:38 (20 February 2009) at 1 [hereinafter "Federal lawyers slam wage restraints"].

<sup>606</sup> "Federal Lawyers Appear before House of Commons Standing Committee on Finance, Citing Injustice on the Part of the Federal Government" *CNW Newswire* (23 February 2009), online: CNW <<http://www.newswire.ca/en/story/480411/federal-lawyers-appear-before-house-of-commons-standing-committee-on-finance-citing-injustice-on-the-part-of-the-federal-government>> (last modified 23: February 2009); Parliament of Canada, Proceedings of the Standing Committee on National Finance, *Presentation to The House of Commons Standing Committee on Finance by the Association of Justice* (23 February 2009) (Video presentation on file with the researcher).

<sup>607</sup> *Budget Implementation Act*, 2009, S.C. 2009, s. 2 [hereinafter *Budget Implementation Act*, 2009].

Mendicino as acting president.<sup>608</sup> His ascension to the post during a tumultuous arbitration process magnified the responsibilities demanded of an already tough assignment, but Mendicino was capable of leading the bargaining unit flock. Like his predecessor, Mendicino's calling was driven by a desire to improve the lot of federal government lawyers. Gritty, articulate, and affable, the federal crown from Toronto was no stranger to high-pressure roles. He prosecuted sensitive and complex anti-terrorism charges as part of Canada's post-9/11 national security regimen. Within short course, his advocacy was showcased before proceedings of the Standing Senate Committee on National Finance regarding Bill C-10. Not one to miss a critical opportunity for promoting the AJC, President Mendicino called upon the senators to tell the Treasury Board that in future collective bargaining it should better value its lawyers and treat them fairly on compensation and non-monetary terms.<sup>609</sup>

### 6.5.2 Arbitration Hearing and Judicial Review

As arbitration neared, the AJC replaced Sack Goldblatt Mitchell with the Ottawa law firm of Nelligan O'Brien Payne to represent them in the upcoming hearings set for June 8-10, and 24-25, 2009.<sup>610</sup> The AJC and TBS recommended their appointees to the arbitration board, which would then nominate a third person to serve as chairperson, or, in the event the nominees disagreed, allow the Chairperson of the PSLRB to appoint the third member. Preparations ramped up with the parties delivering briefs to the arbitration board and to each other, which contained proposed models for monetary and non-monetary contract articles. These briefs illuminate the extent of division that prevented negotiators from reaching a collective agreement. Particularly, the AJC's brief disclosed where the AJC sourced its non-monetary article proposals.

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<sup>608</sup> AJC, *All the Details* 2:8 (29 April 2009) at 1, online: AJC <[http://ajc-ajj.net/files/library/Bulletin\\_-\\_Vol\\_2\\_No\\_8\\_-\\_April\\_29\\_avril\\_2009.pdf](http://ajc-ajj.net/files/library/Bulletin_-_Vol_2_No_8_-_April_29_avril_2009.pdf)> (date accessed 1 March 2012) [hereinafter *All the Details* 2:8].

<sup>609</sup> Parliament of Canada, *Proceedings of the Standing Senate Committee on National Finance, Issue 7: Evidence*, (6 May 2009), online: Parliament of Canada <[http://www.parl.gc.ca/Content/SEN/Committee/402/fina/07evb-e.htm?comm\\_id=13&Language=E&Parl=40&Ses=2](http://www.parl.gc.ca/Content/SEN/Committee/402/fina/07evb-e.htm?comm_id=13&Language=E&Parl=40&Ses=2)> (date accessed: 28 June 2013). Mendicino further appeared before the House of Commons Standing Committee on Justice and Human Rights to argue for the link between low pay and the problems of counsel recruitment and retention, which, of course, raised the union's plight to influential politicians. See AJC, *All the Details* 2:9 (7 May 2009) at 1, online: AJC [http://ajc-ajj.net/files/library/Bulletin\\_-\\_Vol\\_2\\_No\\_9\\_-\\_May\\_7\\_mai\\_2009.pdf](http://ajc-ajj.net/files/library/Bulletin_-_Vol_2_No_9_-_May_7_mai_2009.pdf)> (date accessed: 1 March 2012).

<sup>610</sup> Under law society *Rules of Professional Conduct* the solicitor-client relationship can be unilaterally discontinued by the client at any time. Legal counsel, however, can only withdraw legal services with good cause and on sufficient notice to client so as to not prejudice their legal interests. On 16 April 2009, Sack Goldblatt Mitchell terminated its retainer with the AJC citing a breakdown in communications, outstanding legal bill surpassing \$700,000 (though money alone did not account for the disengagement), and other factors. *All the Details* 2:8, *supra* note 608 at 2; AJC, *All the Details* 2:10 (8 May 2009) at 1, online: AJC <[http://ajc-ajj.net/files/library/Bulletin\\_-\\_Vol\\_2\\_No\\_10\\_-\\_May\\_8\\_mai\\_2009.pdf](http://ajc-ajj.net/files/library/Bulletin_-_Vol_2_No_10_-_May_8_mai_2009.pdf)> (date accessed: 1 March 2012).

Contract terms and language informing proposals were drawn from labour contracts between lawyers and the provinces of Ontario,<sup>611</sup> Manitoba,<sup>612</sup> British Columbia,<sup>613</sup> and Quebec.<sup>614</sup> Other influences were terms and contract language from the PIPSC collective agreement,<sup>615</sup> legislated standards,<sup>616</sup> Provincial Rules of Professional Conduct,<sup>617</sup> National Joint Council directives,<sup>618</sup> and extant terms governing the employment contracts of DOJ lawyers.<sup>619</sup> The proposed articles illustrate the negotiating team’s use of precedents to establish favourable terms and conditions of employment while still viewing lawyers as distinct professionals (rather than as “ordinary” white-collar civil servants). They also underlie the AJC’s legal argument that an arbitral award should yield a contract containing terms and conditions of employment that are common in agreements covering other collectivized public sector lawyers.

On the side of management, TBS opposed the AJC’s proposals on the grounds that the proposed changes could impact any one of the twenty-six collective agreements between the Treasury Board and other federal public sector unions.<sup>620</sup> TBS’s argument on twenty-three disputed articles invoked the stock phrase of: “The Employer proposed provision/definition/language is consistent throughout almost every collective agreement to which the Employer is a party. This provision was contained in the previous collective agreement applicable to the LA employees previously represented by PIPSC. These provisions

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<sup>611</sup> PSLRB File, 585-02-25, *supra* note 305 (Submissions of the Association of Justice Counsel, Art. 3.01 – No Derogation from Employee Rights; Art. 10.8b-10.16 – Leave for Association Business; Art. 10.17 – Leave with Pay for Association President and Officers; Art. 11.03 – Disclosure during grievance process; Art. 13.02-13.04 – Accumulation of Vacation Credits; Art. 20 – Benefits).

<sup>612</sup> *Ibid.* Art. 7.01 – Management Rights; Art. 10.8b-10.16 – Leave for Association Business; Art. 12.02 – Alternate Work Arrangement; Art. 13.02-13.04 – Accumulation of Vacation Credits; Art. 14.07 Additional Remuneration for Work on Paid Holiday; Art. 15.02 – Allowances and Expenses (court clothing); Art. 26.05 – Sick Leave.

<sup>613</sup> *Ibid.* Art. 12.06 – Compensatory Leave (in lieu of overtime).

<sup>614</sup> *Ibid.* Art. 10.17 – Leave with Pay for Association President and Officers.

<sup>615</sup> *Ibid.* Art. 12.04, 12.05, 12.07 – Overtime Pay; Art. 12.06 – Compensatory Leave (in lieu of overtime); Art. 12.10-12.15 – Travel Time; Art. 23.04 – Employee Performance Review and Employee File; Art. 43 – Injury-On-Duty Leave With Pay; Art. 45 – Other Leave With or Without Pay.

<sup>616</sup> *Ibid.* Art. 6.01 – Information; Art. 11.03 – Disclosure during grievance process, *Access to Information and Privacy Act*, R.S.C., 1985, c. A-1; Art. 11.02, 11.05, 11.07, 11.14, 11.19, 11.30, 11.22, 11.36, & 11.45 – Pre-Grievance, Grievance and Adjudication Process, PLSRB Regulations (SOR/2005-79); *Public Sector Equitable Compensation Act*, S.C. 2009, c. 2, s. 394.

<sup>617</sup> *Ibid.* Art. 16.01 – Professional Responsibilities; Art. 49.06 – Paid Professional Days.

<sup>618</sup> *Ibid.* Art. 15.04 – Allowances and Expenses (Overtime meals); Art. 20 – Benefits.

<sup>619</sup> *Ibid.* Art. 13.06 – Vacation Leave; Art. 13.07 – Carry Over and Liquidation of Vacation Leave; Art. 15.01 – Allowances and Expenses; Art. 17.02 – Health and Safety (Taxi re-imburement); Art. 26.05 – Sick Leave.

<sup>620</sup> TBS, Law Group Arbitration Brief, *supra* note 574 at 21.

have not proved to be problematic in that context”.<sup>621</sup> The Treasury Board clearly strove for conformity in its collective agreements including the one intended for the AJC.

The parties continued seeking agreement on clauses referred to arbitration but on which they were close to a resolution. Senior AJC administrator 2 discussed that administrative clauses were resolved before the start of hearings because of compromises at the “eleventh hour” as the parties realized that their interests were best served by settling less contentious issues. Arbitration commenced with mediation absorbing the first three days of hearings. Two days of oral hearing were reserved for the Board to determine disputed contract articles. Employer and union counsel made their arguments on proposed articles in light of section 148 *PSLRA*, which outlines the factors arbitrators consider in the making of an arbitral award in the federal public service.<sup>622</sup> As for pay and remuneration (notwithstanding the salary caps provisions of section 16 of the *ERA*) the AJC argued that section 34(1)(a)(iv) of the *Act* allowed for the awarding of additional remuneration for a particular position level. They reasoned that the *ERA* defined additional remuneration as a differential, which they maintained characterized the Toronto rate. Union counsel urged the panel to award a salary increase to the level of the Toronto differential to all lawyers at level LA-2A and above not receiving the pay, but cap increases beyond the amount at rates imposed by law. TBS countered the union’s arguments through its interpretation of the factors set out by section 148 of the *PSLRA*.

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<sup>621</sup> *Ibid.* Art.2 – Interpretations and Definitions; Art. 5 – Management Rights; Art. 6 – Rights of Employees; Art. 7 – Representatives; Art. 9 – Information; Art. 11 – Leave With or Without Pay; Art. 12 – Membership Dues; Art. 15 – Pay Administration; Art. 16 – Designated Paid Holidays; Art. 17 – Vacation Leave with pay; Art. 18 – Sick Leave with Pay; Art. 19 – Other Leave With or Without Pay (Bereavement Leave) (Maternity and Parental Leave) (Immediate Family Care) (Personal Needs) (Volunteer Leave) (Other Leave With or Without Pay) (Maternity Reassignment or Leave); Art. 20 – Career Development; Art. 22 – Severance Pay; Art. 23 – Employee Performance Review and Employee Files; Art. 26 – Safety and Health; Art. 27 – Employment References; Art. 28 – Registration Fees; Art. 29 – Agreement Re-Opener; Art. 30 – National Joint Council Agreements; Art. 31 – Part-Time Employees; Art. 32 – Statement of Duties; Art. 33 – Publications and Authorships; Art. 35 – Standards of Discipline.

<sup>622</sup> These considerations are: (1) the necessity of attracting and retaining competent persons to the federal public service; (2) the necessity of offering compensation and terms and conditions of employment that are comparable to those employees in similar occupations in the public service; (3) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classifications levels within an occupation and between occupations in the public service; (4) the need to establish compensation and other terms and condition of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and nature of the services rendered; (5) state of the Canadian economy and the Government of Canada’s fiscal circumstances.

On 26 October 2009, the PSLRB released the arbitral award, and with it, the AJC reached a milestone. The Treasury Board's proposals on: representatives, leave with or without pay for association business or other activities under the *PSLRA*, membership dues, designated paid holidays, other leave with or without pay, and sick leave found favour with the arbitration panel, while the AJC's proposals won out on existing benefits, overtime and travelling time for LA-1s and LA-2As, reimbursement of meal expenses and court clothing. The panel sided with proposals drawn from both parties on management rights, information, standards of discipline, and overtime for LA-2B and LA-3 lawyers and vacation leave. As for the AJC's argument on salary increases, the award deferred to section 16 of the *ERA*. The panel returned matters of pay administration back to the parties to resolve. The question of office space was determined through an article detailing a joint-consultation provision. The arbitrator's order permitted a ninety-day implementation period for the award, except for overtime and travel time, which was set at 120 days. The arbitral award was made effective as of 1 November 2009, and its term lasted until 9 May 2011. A provisional first collective agreement between the AJC and Treasury Board was now in place on decided matters, wage adjustments and retroactive salary entitlement effective to 10 May 2006. Finalizing the collective agreement, however, depended on the outcome of a potential judicial review of the arbitral award, and the AJC and Treasury Board resolving matters returned to them by the panel. Indeed, the AJC believed the arbitral board exceeded its jurisdiction by ordering a 120-day implementation phase for overtime and travel time when, without an agreement between the parties, it was under a mandatory ninety-day implementation period; so, it appealed the ruling by filing a notice of application to the Federal Court of Canada.<sup>623</sup> On 3 December 2009, the employer filed their own judicial review of the award's ruling on overtime, travel time, meal allowances, and court clothing. Final resolution of these collective agreement provisions was left in the hands of a federal court judge.

The arbitral award confirming the *ERA*'s disposition on salary increases disappointed the AJC's leadership, but they were prepared for the outcome. Undermined at the bargaining table, unsuccessful within the political realm, and wedded to an arbitration process with a fixed wage result, the AJC considered recourse to the courts to vindicate lost rights. The AJC requested a

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<sup>623</sup> *Canada (A.G.) v. AJC*, *supra* note 306 (Applicant's Application Record, Appendices A and B at 30, para. 10).

legal opinion on the potential of a constitutional challenge to wage-restraint legislation.<sup>624</sup> In August, the Governing Council caucused during a special meeting dedicated to addressing the merits of a suit.<sup>625</sup> Ultimately, the decision to initiate *Charter* litigation proceeded by a vote of the Governing Council in consultation with bargaining unit members. On 23 December 2009, the AJC announced news of an impending action against the Attorney General of Canada.<sup>626</sup> Despite this move, imminent litigation still could not bring the parties together to finalize and sign a collective agreement as a lingering impediment was the TBS confirming insurance and disability coverage for articling student bargaining unit members. A meeting between Mendicino and Treasury Board President Day seemed to have overcome the roadblock.<sup>627</sup> Finally, on 27 July 2010, the AJC's negotiating team and TBS's representatives signed a monumental first collective agreement. With an expiry date of 9 May 2011, the question of whether the lifespan of a settled labour contract would overlap with outstanding provisions depended on the speed of the federal court determining judicial review applications.

With the Treasury Board withdrawing their initial claims for reimbursement of court clothing and meal expenses before the start of judicial review proceedings, its case involved overturning the arbitral award regarding overtime and travel time. The employer argued that the arbitral award rendered overtime duplicative remuneration considering that the extant DOJ Law Group performance pay plan already rewarded lawyers for performing additional work hours. Under this logic, section 34(1)(a)(iii) of the *ERA*<sup>628</sup> prohibited overtime because the section required arbitrators to maintain the same performance plan in place as of 9 May 2006. A second

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<sup>624</sup> AJC, *All the details* 2:7 (30 March 2009) at 3, online: AJC <[http://ajc-ajj.net/files/library/Bulletin\\_-\\_Vol\\_2\\_No\\_7\\_-\\_March\\_30\\_mars\\_2009.pdf](http://ajc-ajj.net/files/library/Bulletin_-_Vol_2_No_7_-_March_30_mars_2009.pdf)> (date accessed: 1 March 2012).

<sup>625</sup> AJC, *All the details* 2:17 (5 August 2009) at 4, online: AJC <[http://ajc-ajj.net/files/library/Bulletin\\_-\\_Vol\\_2\\_No\\_17\\_-\\_August\\_5\\_aout\\_2009.pdf](http://ajc-ajj.net/files/library/Bulletin_-_Vol_2_No_17_-_August_5_aout_2009.pdf)> (date accessed: 3 March 2012).

<sup>626</sup> AJC, *All the details* 2:27 (23 December 2009) 1, online: AJC <[http://ajc-ajj.net/files/library/05\\_-\\_December\\_23\\_décembre\\_2009.pdf](http://ajc-ajj.net/files/library/05_-_December_23_décembre_2009.pdf)> (date accessed: 1 March 2012).

<sup>627</sup> AJC, *All the details* 3:5 (25 June 2010) at 1, online: AJC <[http://ajc-ajj.net/files/library/05\\_-\\_June\\_25,\\_2010.pdf](http://ajc-ajj.net/files/library/05_-_June_25,_2010.pdf)> (date accessed: 1 March 2012).

<sup>628</sup> Section 34.(1) of the *ERA* notes: The following rules apply in respect of any collective agreement or arbitral award that governs employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period: (a) in the case of a collective agreement entered into — or an arbitral award made — after the day on which this Act comes into force...(iii) it must provide, for all employees in the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date, but those plans may not have retroactive effect.

extension of the argument sourced section 34(1)(a)(v) of the *ERA*,<sup>629</sup> which disqualified overtime and paid travelling time as additional remuneration akin to a performance bonus or pay. A further claim proposed that the overtime award upset sections 148(b)(c)(d)(e) of the *PSLRA*<sup>630</sup> for reasons ranging from overtime being unusual in the practice of law, creating pay discrepancies favouring LA-2A counsel over LA-2B, and ignoring the status of Canada's economy. In Justice O'Keefe's ruling of 6 May 2011,<sup>631</sup> he first rejected TBS's argument on section 34(1)(a)(iii) of the *ERA* by finding that no equivalency existed between working additional hours and performance assessment resulting in increased pay. To support his point, he noted that the DOJ's system for rewarding additional hours was through management leave, a system separate from the performance pay plan. Second, that the arbitral award on overtime and travel time did not provide for payment that exceeded rates in place as of May 2006 (as provided by the PIPSC collective agreement) was not contrary to section 34(1)(a)(iv) of the *Act*. Third, the court dismissed the argument regarding section 148 of the *PSLRA* since the arbitrator's reasoning contemplated the principles raised by the section. For its part, the AJC failed to convince the court to shorten the 120-day implementation period for overtime and paid travel time provisions after the award became binding. Neither party appealed the ruling.

## **6.6 Conclusion: Negotiating Lessons Learned from the Bargaining Table**

A collective bargain is a living document. The terms and conditions by which the Law Group bargaining unit members provide legal services to the federal government and its departments and agencies will evolve in subsequent rounds of contract renewal negotiations. Just as in the past, a ruling government's legal policies, budget constraints, and civil service reforms loom over the AJC attaining salary parity with Ontario government lawyers. Other bargaining priorities may surface from time to time with the union reviewing terms that worked better in theory than in practice. Insight from AJC's negotiating team members' reflections on collective bargaining signals a maturation of knowledge about the process that, when applied to future practice, will better equip the negotiating capacities of the union.

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<sup>629</sup> Subsection (iv) adds to section 34.(1) and 34.(1)(a) by indicating: it may provide for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, but the amount or rate of that additional remuneration for a particular position level may not be greater than the highest amount or rate that applied to employees of that position level on that date.

<sup>630</sup> See *supra* note 622 for a description of the relevant factors.

<sup>631</sup> *Canada (A.G.) v. AJC*, *supra* note 306.

In their roles as the representatives of the AJC, the negotiating team members were enlightened about the assumptions they carried into collective bargaining. Negotiating team member 2 realized that a vibrant negotiating team requires diverse representation from the people it serves and embraces differences in regional representation, gender, culture, areas of legal practice, and union experience. Negotiating team member 6 described how the assignment required dealing with the practical realities of bringing a team together, reconciling competing interests and finally realizing that not everyone's needs could be satisfied. Negotiating team member 4 echoed similar appreciation for working as a collective:

And so, it really taught me how to sort of work with a disparate group of people in terms of a bargaining committee. This is different from when I did bargaining for Canada where we all—it was just one voice. It was basically the negotiator; we support the negotiator and that's it. In negotiating in the union, you have to work with a bunch of different interests, come to some kind of resolution to provide points of position contrary to what the employer was saying. So, that's a lot of work.

These observations suggest bargaining team members developed relationships with one another to effect orderly and effective bargaining. Over the course of bargaining and interest arbitration the composition of the AJC negotiating team members changed. Some team members took other posts within the department, while others bowed out due to other commitments, and were replaced by new individuals. There is enough experience imparted between past and present AJC negotiating team representatives to instruct pragmatism as a guide for advancing negotiations. The interests of bargaining unit members are best represented by progress at the bargaining table.

Uncertainty about what bargaining with TBS holds has passed. A wiser negotiating team will conduct contract renewal negotiations. Negotiating team member 5 sees the experience of a first round of collective bargaining as creating a window with a view on their opponent's practices. Gone is the naivety bargaining team members first possessed with their lofty contract demands and belief in the good faith intentions of TBS. The AJC negotiating team members learned through trial and error, that stalemate is an enemy in collective bargaining notwithstanding the fact that in first contract negotiations there will always be more terms and conditions of employment to determine than when renewing a collective agreement. The focus now is to judiciously weigh areas that improve the collective agreement. Negotiating team

member 5 continues by identifying pursuable terms and conditions as those that are crucial to a better labour contract, putting aside those of less urgency as future possibilities. Bargaining demands that improve fringe benefits and salaries will be pursued in relation to whether they can yield gains from the employer. This can mean that in future negotiating sessions, the AJC will have to overcome the TBS's adherence to standard contract articles used in other public service collective agreements and have it accept demands deriving from the unique needs of the members in the bargaining unit. Negotiating team member 1 expresses that learning process is ongoing when he says:

So, there are some areas where we realize having gone through the process, that yeah, we can actually say fine whatever, we'll settle for that. Even though we thought it was important, we'll settle for that. But there are others that don't work that way and we really want to kind of change the way Treasury Board looks at everything to get something custom tailored. So again, that's kind of the learning from a filter process of what's important and what isn't worth fighting for. We've learnt an awful lot in our negotiations about where we ought to be in the future.

This bargaining team member perceives that assessing future goals should be done in relation to past experiences. Overall, this individual reflection that, when pooled together with the thoughts of other negotiating team members, reveals germane perspective on what collective bargaining with TBS entailed.

The end result of first contract negotiations is the establishment of terms and conditions of employment for members of the Law Group bargaining unit within a unionized workplace. These first contract negotiations have also modelled a paradigm for the AJC's negotiating team to follow in future rounds. They will attempt to bargain in a style consistent with the professional goals and ideals that resonate with bargaining unit members. Negotiating team member 7, a newcomer to the committee, comments that: "We don't want to be caught doing things that we're accusing the employer of doing. We don't want to be caught being accused of surface bargaining because that's not our intention, so we do try the principled negotiation approach." Thus, the AJC will demonstrate the standard it wants emulated during negotiations with TBS. Ultimately, the success of this idealized approach depends on the AJC's negotiating capacities to deliver on improvements to the collective agreement.

## CHAPTER 7: Conclusion

### 7.1 Introduction

This dissertation investigated the phenomenon of DOJ lawyers unionizing. Chapters 1, 2, 3, 4, 5, and 6 each added a different component to the inquiry by respectively introducing the study, canvassing doctrinal studies and social scientific theories on lawyer unionization, outlining case study methodology, describing the history and application of the legal framework governing non-unionized human resources practices at the DOJ, detailing the context for lawyers supporting the AJC, and documenting the union's involvement with collective bargaining and the courts. Chapter 7 aims to synthesize the findings of earlier chapters in order to assess some key implications that arise from having addressed the study's two research questions. Another goal is to reflect on what the future may hold for labour relations between the Treasury Board and the AJC given that federal Conservative government austerity hinders DOJ lawyers exercising employee voice. The chapter concludes with a "slice-of-life perspective" drawn from the perceptions of AJC bargaining unit members on practicing law under a labour contract. I include their views to question the belief that collective bargaining by lawyers is "unprofessional"—an assumption that prevents employed counsel from considering the viability of unionism.

### 7.2 DOJ Lawyers Unionizing: Proletarianized Employees or Rational Actors

The findings from this case study allow for some interesting parallels to be drawn between federal public service staff associations obtaining collective bargaining rights (with the *PSSRA*'s enactment in 1967) and the AJC's start as a bargaining agent (after the *PSLRA* became law in 2005). As touched on in chapter 4, the staff associations' frustration with the hollow association-consultation practice fueled their demands for collective bargaining legislation and direct negotiations with the government over terms and conditions of employment. Similarly, while functioning without the benefit of labour legislation, non-management Beyond LOAC members also determined that collective bargaining was the only meaningful way to influence the employment contract. Another connection involves the political promises of past Liberal Prime Ministers as the penultimate steps for formal committees and task forces attaining mandates either to investigate the introduction of collective bargaining or to provide

recommendations for its overhaul. Finally, the access to collective bargaining of both federal public servants and non-management DOJ lawyers' came about through new labour legislation designed to quell civil servant unrest (though three-and-half decades apart) and, ostensibly, to improve employer-employee relations. These historical similarities were discovered by studying a change in employment systems at the DOJ.

The AJC's creation was explained using inferences about behaviours that were context-bound (hence the descriptive orientation of the analysis).<sup>632</sup> I assessed the motivations for initial associational activity and union formation with a fundamental premise derived from the research literature: a professional employee's decision to support a union unfolds at the individual level and in relation to job dissatisfaction.<sup>633</sup> Job dissatisfaction served as a construct for filtering the events that comprise the narrative presented in chapter 5, with its goal of addressing the first research question of understanding what led DOJ lawyers to unionize with the AJC. The analysis advanced in that chapter can now be revisited in order to analyze the theoretical implications of the AJC's establishment and emergence as a union using the processual model concepts of: (1) salary and working conditions; (2) employee leadership; and (3) appropriate environmental conditions.<sup>634</sup>

To recognize the initial moves towards unionization, employment relations between the DOJ and its unrepresented lawyers were studied as a flashpoint for employee dissatisfaction. It was discovered that the introduction of the Toronto differential (and its extension by a legislative freeze) was a Treasury Board decision that situated wages as a paramount employment concern and influenced employee perceptions of workplace inequity.<sup>635</sup> The department's treatment of lawyers under an individual employment regime precipitated a grassroots, employee-driven movement that incrementally developed in response to policy adjustments affecting the department's management of its staff. Professionals will support an association or union based on its relevance, which, in turn, flows from its perceived utility. DOJ lawyers abandoned LOAC

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<sup>632</sup> Hartley, *supra* note 82 at 325.

<sup>633</sup> J. Barling, C. Fullagar & E. K. Kelloway, *The Unions and Its Members: A Psychological Approach* (New York: Oxford University Press, 1992) at 48.

<sup>634</sup> Harrison, *supra* note 200 at 1208.

<sup>635</sup> H.N. Wheeler & J.A. McClendon, "The Individual Decision to Unionize" in G. Strauss, D. G. Gallagher & J. Fiorito, eds., *The State of the Union* (Madison, WI: Industrial Relations Research Association, 1991) 49 at 50.

and formed the AJC for the purpose of having formal representation in grievances and dealings with management along with using collective bargaining to improve wages and working conditions.

This project's interview and documentary evidence uncovered few signs to support an argument that lawyers' dissatisfaction and corollary interest in unionization was tied to an over-bureaucratized workplace (with feelings of a lack of professional autonomy and control associated with such ideological proletarianization). In their interviews, in fact, four DOJ lawyers commented on the quality of work at the department. Two of these respondents, and most of the other lawyer interviewees, noted that they supported unionization to gain better salaries, transparent promotions, and recognition for overtime. Their responses did not suggest that collective bargaining's other function of taking wages out of the competition factored as a consideration. A more quantitative assessment of perceived economic improvements in terms and conditions of employment achievable through collective bargaining supports the lawyers' primary interest in improved pay and promotion rates—roughly three-quarters of the DOJ lawyer population is designated at the LA-1 and LA-2A ranking, with majority located at the latter stage.<sup>636</sup> With the DOJ's management not addressing pay discrepancies between the Toronto and national salary scales, those directly affected by employer indifference realized that inaction came at an appreciable cost to finances and morale.<sup>637</sup> Suing the employer over the Toronto differential appealed to only several dozen or so of the most displeased counsel situated at the Vancouver Regional Office, leaving other DOJ lawyers eager for a more moderate redress mechanism: the AJC. Supporting the AJC was a calculated choice for DOJ lawyers based on the perceived need for employee representation relative to federal labour legislation restricting the agent's powers.

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<sup>636</sup> 27 September 2004 Prior Transcript, *supra* note 461 at 83, line 5; 10 September 2004 Lehmann transcript, *supra* note 437 at 73, lines 29-31. For a count of the DOJ's lawyer workforce demographic as of 31 March 2007 see : AJC Notice of Application, 8 June 2010 Mendicino Affidavit, *supra* note 589 (Exhibit "E" Department of Justice Human Resources Management Plan 2007-2010 at 96). The Human Resources Management Plan listed the composition of the DOJ Law Group as follows: Articling, 45 (1.9 percent); LA-1, 340 (14.1 percent); LA-2A, 1348 (56.0 percent); LA-2B, 416 (17.3 percent); LA-3A, 184 (7.6 percent); LA-3B, 64 (2.7 percent); LA-3C, 11 (0.5 percent). Promotion between LA-1 to LA-2A ranges takes form between five to eight years, but thereafter movement beyond the LA-2A range is uncertain with many lawyers spending their career with the DOJ at the LA-2A level.

<sup>637</sup> M. Hannay, "The Unionization of Professionals: A Case Study" (2002) 23:3 *Journal of Labor Research* 487 at 496.

This study exposed the importance of a strong leadership organizing their fellow employees, a construct that is also central to mobilization theory.<sup>638</sup> LOAC's non-management members advocating for a new organization marked an embryonic stage for the AJC. They executed an ambitious plan for fixing LOAC's deficiencies by demanding a new organizational format that Deputy Minister of Justice Rosenberg conceded warranted further investigation. A core three-person transition team lead by Lois Lehman assumed the task of seeing the Beyond LOAC process to fruition. This group was able to clearly articulate to their cohort the benefits of employee representation that was similar to models used by Ontario and British Columbia government lawyers. The AJC's transitional leadership adopted a plan, monitored progress, and modified strategies to seize a propitious environment for instituting the AJC that was triggered by the Kaplan award dispelling comparability between Ontario MAG rates and the Toronto salary scale.<sup>639</sup> Lehman enjoyed an active and crucial tenure overseeing the AJC's formation, which was a solemn responsibility that Patrick Jetté carried on as her replacement. Jetté's work, aided by a small executive, subsequently increased when he was called on to coordinate a certification drive, prepare for collective bargaining, and oversee first contract negotiations. Negotiating team member 6 who worked with Jetté during the early stage of his presidency poignantly remarked how: "The president worked unbelievably hard. He really gave his life and soul to the AJC and I think he felt that responsibility not as just as the president, but because he was being paid and he knew that the rest of us were volunteers". Jetté fulfilled his duties, making up for limited institutional resources available to the AJC once departmental funding ran out and fundraising and voluntary dues from association members kicked in.

Enabling collective bargaining legislation is crucial to processual model analysis for proposing that professionals, like other workers, will unionize when it suits their interests. This is not to say that workers will not force coverage where excluded from a federal or provincial labour statute, but the risk-to-reward calculation of law suits and political campaigning are other considerations a group must weigh. The capacity of the AJC's initial leadership to obtain collective rights clearly depended on the Treasury Board voluntarily recognizing them as a

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<sup>638</sup> J. Kelly, *Rethinking Industrial Relations: Mobilization, Collectivism, and Long Waves* (London: Routledge, 1998) at 35.

<sup>639</sup> A.H. van de Ven & M.S. Poole, "Explaining Development and Change in Organizations" (1995) 20:3 *The Academy of Management Review* 510 at 516.

bargaining agent, which the Treasury Board did not do because of the *PSSRA*'s prohibitions. To overcome this legislative inadequacy, the AJC lobbied the Quail Task Force on Modernizing Human Resources Management for inclusion under new labour legislation, and by conducting an organizing campaign of lawyers to prepare for an eventual change in the law. As the AJC's experience shows, where restrictive legislation prohibits professionals from collective bargaining, it also becomes a site for various activities directed at changing prevailing exclusions.

### **7.3 The AJC's First Contract Negotiation and the Law of Collective Bargaining**

The second research question posed by this dissertation was to detail the AJC's experience in negotiating a first collective agreement. Chapter 6 addressed this goal by noting union preparations for bargaining, providing insight on the conduct of negotiations, detailing the reasons for an impasse in negotiations with TBS and its impact on relations between the union and its members, as well as by detailing the process of resolution, which involved court battles to both uphold the arbitrated first collective agreement, and challenge its statutorily imposed wage limits. Chapter 6's empirical presentation of collective bargaining negotiations stands as its own social scientific depiction of the process, in addition to offering a rich account that supplements the predicate facts reported by Ontario Superior and Court of Appeal judges in their reasons for judgment on the AJC's case.<sup>640</sup> The AJC's involvement before the courts warrants attention because for the new AJC to have dedicated the time, expenditure, and energy to launch a *Charter* challenge (and willingness to engage the Attorney General of Canada in high-stakes litigation all the way to the Supreme Court of Canada) was a long-shot strategy with very significant ramifications if successful. The AJC's application tested the legality of the state's unilateral conduct of overriding collective bargaining negotiations to engineer compliance with a tough budget that accounted for economic recession and uncertainty. Had the outcome favoured the AJC, the ruling would have rebuked legislatures for drafting overbearing legislation, demanded more care from them in the future by instilling a greater respect for collective bargaining, and

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<sup>640</sup> K..L. Levine, "The Law is Not the Case: Incorporating Empirical Methods Into the Culture of Case Analysis" (2006) 17 *University of Florida Journal of Law & Public Policy* 283 at 301.

established a persuasive legal precedent aiding other unions in their suits against the government for imposing the *ERA*'s wage caps.<sup>641</sup>

The cycle of federal public servants having to bear the economic burden of legislated wage controls was regularized in 1982 with Trudeau's Liberals implementing the Public Sector Compensation Restraint Act, which suspended collective bargaining and striking by extending the wage plans and arbitral agreements of all federal collective agreements for two years, and by fixing wage increases by 6 percent in 1982 and 5 percent in 1983.<sup>642</sup> The Public Service Alliance of Canada put the constitutionality of this controversial *Act* before the Supreme Court of Canada, which concluded, nonetheless, that no freedom of association rights protected by the *Charter* were violated since the law did not restrict the union's role as employee representative.<sup>643</sup> What, then, made the AJC's *Charter* challenge to the *ERA* noteworthy? The case seems to confirm a scenario predicted for collective bargaining where legislatures impose temporary restrictions at will.<sup>644</sup> It would also suggest the federal government uses economic instability to introduce legislation that effectively resolves collective bargaining disputes.<sup>645</sup> The whole background leading to litigation also casts a negative light on the apparent goodwill surrounding the *PSLRA*'s introduction that was intended to erase past attitudes and stoke fresh approaches for more equitable dealings in labour relations. Certainly, the AJC's *Charter* challenge to the *ERA* contributes to an emerging dialogue unions have opened between the courts and legislatures on the legality of restraint legislation and the utility of the courts, rather than the political process, for upholding new freedom of association protections for collective worker activities.

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<sup>641</sup> *AJC v. Canada (A.G)*, *supra* note 59 is one of several cases involving unions challenging the *ERA* infringing their members' section 2(d) *Charter* rights. The cases are: *Federal Government Dockyard Trades and Labour Council v. The Attorney General*, [2011] BCSC 1210 (CanLII), *aff'd* [2013] BCCA 371 (CanLII); *Canada (Royal Canadian Mounted Police) v. Canada (Attorney General)*, [2011] FC 735 (CanLII), *rev'd* [2013] FCA 112 (CanLII), leave to appeal to S.C.C. granted [2013] CanLII 59897 [hereinafter *Meredith*]; *Canada (Procureur général) c. Syndicat canadien de la fonction publique, section locale 675*, *Association des réalisateurs c. Canada (Procureur général)*, [2012] QCCS 3223 (CanLII), *rev'd* [2014] QCCA 1068 (CanLII); *The Professional Institute of the Public Service of Canada; Public Service Alliance of Canada v. Canada (Attorney General)*, [2014] ONSC 965 (CanLII).

<sup>642</sup> G. Swimmer, "Collective Bargaining in the Federal Public Service of Canada: The Last Twenty Years" in G. Swimmer & M. Thompson, eds., *Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning* (Kingston: IRC Press, 1995) 368 at 382.

<sup>643</sup> *PSAC v. Canada*, [1987] 1 SCR 424, 1987 CanLII 89 (SCC) at para. 57 [hereinafter *PSAC*].

<sup>644</sup> G. Swimmer & T. Bartkiw, "The Future of Public Sector Collective Bargaining in Canada" (2003) 24:4 *Journal of Labor Research* 579 at 588.

<sup>645</sup> T. Fowler, "Working for the Clampdown: How the Canadian State Exploits Economic Crises to Restrict Labour Freedoms" (2011) 88 *Studies in Political Economy* 77 at 78; J.B. Rose, "Regulating and Resolving Public Sector Disputes in Canada" (2008) 50:4 *Journal of Industrial Relations* 545 at 556.

Collective bargaining is an exercise of negotiating power, advanced through institutional resources, and tempered by a statutory duty to bargain in good faith. The law acknowledges that any party that exercises more strength and resources between the negotiating table and shop floor (or office) to impose contract terms than its adversary is simply leveraging their might and will not attract censure.<sup>646</sup> A different claim arises, however, when a negotiating party infringes their obligation through actions and proposals on standard contract terms that show no intent for reaching agreement.<sup>647</sup> Likewise, not complying with requests for disclosure during negotiations is actionable for bad faith in an unfair labour practice complaint, as progress occurs only through adequate information sharing on which proposals originate and counter-proposals are assessed.<sup>648</sup> The AJC's *Charter* application put into issue the legality of whether the employer's negotiating tactics of dilatory disclosure, unproductive bargaining sessions, and stalled salary proposals denied the union procedural fairness during collective bargaining in light of the important precedent established by the case of *Health Services*.<sup>649</sup> This June 2007 Supreme Court of Canada decision partly reversed two decades of the court's own jurisprudence laid down in the "Labour Trilogy," which had excluded collective bargaining and striking from freedom of association protection.<sup>650</sup> *Health Services* determined that a procedural right to collective bargaining (but not a substantive or economic outcome) has constitutional protection under section 2(d) of the *Charter* and correspondingly obliges a government employer to bargain in good faith.<sup>651</sup> The ruling implies that collective bargaining negotiations should be devoid of substantial state interference in the form of laws or state actions that usurp discussion, meaningful negotiations, and consultation over key working conditions.<sup>652</sup>

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<sup>646</sup> *Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local No. 304 v. Canada Trustco Mortgage*, [1984] CanLII 1106 (ON LRB) at para. 34.

<sup>647</sup> *Professional Institute of the Public Service of Canada v. Treasury Board*, [2009] PSLRB 102 (CanLII) at para. 84; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 SCR 369, 1996 CanLII 220 (SCC) at para. XLIV.

<sup>648</sup> M.D. Yates, *Why Unions Matter* (New York: Monthly Review Press, 1998) at 61.

<sup>649</sup> *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 (CanLII) [hereinafter *Health Services*].

<sup>650</sup> Three decisions comprising the trilogy are: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 CanLII 88 (SCC); *PSAC, supra* note 643 & *RWDSU v. Saskatchewan*, [1987] 1 SCR 460, 1987 CanLII 90 (SCC).

<sup>651</sup> *Health Services, supra* note 649 at para. 90.

<sup>652</sup> *Ibid.* at 96.

Based largely on their assessment of *Health Services*' ratio, lawyers for the AJC believed that their client did not get the full benefit of the law during first contract negotiations with Treasury Board's representatives. They were partially correct. At the application stage of the hearing, Grace J. of the Ontario Superior Court of Justice agreed with the AJC's lawyers' contention that for the 2006-2007 fiscal years, sections 16(a) and 34(1)(a) of the *ERA* infringed their clients' rights under section 2(d) of the *Charter* and failed the minimal impairment test under section 1 of the *Charter*.<sup>653</sup> A monumental victory, it was celebrated only until the Ontario Court of Appeal vindicated the employer by overturning Grace J.'s ruling and annulling his remedy.<sup>654</sup> The appellate decision clarifies that government employers can engage in hard bargaining and satisfy their good faith negotiating obligations, so long as meaningful discussion and engagement occurs with a union prior to the introduction of legislation that resolves the impasse. The reversal of fortunes for the AJC's bargaining unit is an example of the flaws academics cite with *Charter* legalism. Their observations are that it reinforces a loss of unions' political power;<sup>655</sup> symbolizes litigation as a defensive, reactive, and narrow response;<sup>656</sup> and places faith and confidence in judges who are expected to interpret formal abstract principles in a linear fashion to produce legal precedents that sequentially improve worker protections.<sup>657</sup> When called upon, appellate judges understand very well the balance of power the law affords unions and employers under Wagner-styled collective bargaining legislation,<sup>658</sup> and, as Tucker argues, will read down earlier decisions to scale back overbroad legal entitlements benefitting unions.<sup>659</sup> Consider that in *AJC v. Canada (A.G)*<sup>660</sup> the Ontario Court of Appeal relied on the

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<sup>653</sup> *AJC v Canada (A. G.)*, *supra* note 59 at para. 149.

<sup>654</sup> In *Association of Justice Counsel v. Canada (Attorney General)*, 2012 ONSC 1894 at paras. 16, 23, Grace J.'s remedy was for collective bargaining or arbitration to determine pay rates for the 2006-07 fiscal year, before the *ERA*'s legislated restraints were to take effect and last until 31 March 2011 as the remaining fiscal years covered by the *ERA* passed constitutional muster.

<sup>655</sup> L. Savage, "Workers' Rights as Human Rights: Organized Labor and Rights Discourse in Canada" (2009) 34:1 *Labor Studies Journal* 8 at 16.

<sup>656</sup> J. Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support Case* and Beyond" (2008) 37:1 *Industrial Law Journal* 25 at 47.

<sup>657</sup> T. J. Bartkiw, "Proceed With Caution, or Stop Wherever Possible? Ongoing Paradoxes in Legalized Labour Politics" (2010) 15:1 *Canadian Labour & Employment Law Journal* 77 at 85.

<sup>658</sup> See for e.g. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2012 ONCA 363 (CanLII) at paras. 23-44, Jurianz J.A., leave to appeal to S.C.C. granted [2012] CanLII 81979 (SCC) [hereinafter *Mounted Police Association of Ontario*].

<sup>659</sup> E. Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 *Labour/Le Travail* 151 at 173.

<sup>660</sup> *AJC v. Canada (A.G.) (C.A.)*, *supra* note 64.

Supreme Court of Canada's decision in *Ontario (Attorney General) v. Fraser*.<sup>661</sup> *Fraser*, a constitutional challenge to the *Ontario Agricultural Employees Protection Act*,<sup>662</sup> refined the test for assessing a breach of section 2(d) of the *Charter* to require that an impugned law or state action must make it impossible to act collectively to achieve workplace goals, thereby ratcheting down protections established by *Health Services*.

Sharpe J.A. writing for a unanimous court (Armstrong and Peppal JJ.A. concurring) determined *Fraser* was dispositive law for determining the AJC's appeal.<sup>663</sup> Sharpe J.A. also referred to *Mounted Police Association of Ontario*, released twelve days before the hearing of the AJC's appeal. In that case, Juriensz J.A.'s interpretation of the derivative rights inquiry from *Fraser* confirmed that a duty on a government employer to bargain in good faith is imposed when legislation makes it effectively impossible for employees to act in concert and pursue collective goals.<sup>664</sup> Having outlined the guiding case law, Sharpe J.A. turned to analyzing the facts of the case, and the *ERA*'s impact on collective bargaining between the AJC and TBS. Sharpe J.A. used *Fraser* to confirm that constitutional protection in the collective bargaining milieu guarantees a basic process, but not a result. Accordingly, the court confirmed that section 2(d) of the *Charter* is not violated if negotiations do not yield a collective bargain, nor does *Fraser* offer a constitutional right to an arbitrated settlement in the event of failed negotiations. In sum, the Attorney General of Canada won its case before three judges of the Ontario Court of Appeal because they found that the *ERA*'s removal of wages from the arbitration process did not preclude the AJC from meaningfully engaging in a collective bargaining process or prevent TBS from considering its demands in good faith. The upshot of the appellate ruling is that it maintained the acceptability of the *ERA* restraining negotiations or arbitration from independently determining lawyers' salaries. The AJC's *Charter* application received the first appellate determination on the constitutionality of the *ERA*.<sup>665</sup> By virtue of this distinction, the

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<sup>661</sup> *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3, 2011 SCC 20 (CanLII) [hereinafter *Fraser*].

<sup>662</sup> *Ontario Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16.

<sup>663</sup> *Fraser*, *supra* note 661 at para. 46.

<sup>664</sup> *Mounted Police Association of Ontario*, *supra* note 658 at para. 111.

<sup>665</sup> *AJC v. Canada (A.G.) (C.A.)*, *supra* note 64 at para. 21.

ruling also became the first case involving the constitutionality of the *ERA* that the Supreme Court of Canada declined to hear.<sup>666</sup>

The AJC's *Charter* challenge reflected the union's limited choice for using the courts to level the disproportionate bargaining power wielded by the Treasury Board in first collective agreement negotiations. The AJC's own bargaining strength was diminished after the union rejected the option of conciliation and strike, replacing its most forceful weapon with more conservative political action and litigation (as typically used by other government unions).<sup>667</sup> Despite the AJC supporting a *Charter* action for both principled and financial reasons, the disposition of the Ontario Court of Appeal reinforces the highly speculative nature of litigation that is subject to jurisprudence unpredictably changing. In the final analysis, no matter how the AJC's loss was a significant letdown that thwarted its professed mission for securing significant salary gains, and shook union members' expectations of the courts delivering justice, the outcome illustrates that its litigation against the state was an imperfect remedy for counteracting legislation that unduly interfered with the collective bargain process.

#### **7.4 Employee Voice at Work under the AJC and its Future Prospects**

Chapter 4, and the first portion of chapter 5, presented an individual employment relationship covering non-management DOJ lawyers that the Treasury Board had determined at will and then modified in 1990, for example, to remedy the labour turmoil at the department's Toronto office. In this scheme, the input of DOJ lawyers regarding the terms and conditions of work was limited to what, if anything, DOJ representatives choose to relay from LOAC's reports on their consultations and proposals with TBS's agents. Once lawyers were determined to reform LOAC—and discussed the various reasons for doing so and the necessary measures to take—the course of events that followed outline the creation of a new union in the federal public service. As the legally certified representative of 2,600 federal government lawyers, the current organization, the AJC, is a small but highly specialized craft union (especially in comparison to

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<sup>666</sup> By contrast, the Supreme Court of Canada heard the *Meredith* case involving RCMP employees challenging the *ERA* usurping any employee representations on scheduled wage increase limits. Expected to be released in January 2015, the court's ruling will allow commentators to globally evaluate public sector unions litigating the *ERA*.

<sup>667</sup>R. Hebdon, J.E. Slater & M.F. Masters, "Public Sector Collective Bargaining: Tumultuous Times" in H.W. Stranger, P.F. Clark & A.C. Frost, eds., *Collective Bargaining Under Duress: Case Studies of Major U.S. Industries* (Ithaca: ILR Press, 2014) 255 at 275.

others in the federal public service that represent much larger and more diverse professional groups such as PIPSC, whose numbers total 60,000, or CAPE whose members total 12,500).<sup>668</sup> By documenting a new entrant to the federal labour relations scene (when current prospects for union growth are limited),<sup>669</sup> this study's presentation of the AJC's history, organization, and mission provides original insight about a dynamic union.

A third objective of this study was to assess DOJ lawyers' ability to exercise greater employee voice (influence in organizational decision-making) because of their unionization under the AJC. The findings from chapters 4, 5 and 6 satisfied this goal by comparing and contrasting the level of employee voice available under the initially ineffective LOAC to that afforded by the AJC. Dissatisfaction at work as the precursor to DOJ lawyers supporting the AJC's creation and transformation into a union is consistent with Frost and Taras' assessment for workers exercising voice.<sup>670</sup> Unions both legitimize and optimize employee influence through collective bargaining and its purpose of expressing desired employment conditions to the employer.<sup>671</sup> Indeed, the first collective agreement has fundamentally transformed the social and cultural environment for lawyers employed at the DOJ (and other places where members of the Law Group bargaining unit work) by minimizing some of the authority of management. Management reign over how lawyers worked once went unquestioned, and now, job obligations and entitlements are distributed across thirty-eight articles and five appendices that comprise an enforceable and written record of the rules for providing services. National Capital Region lawyer 2 noted, "I mean if all managers were perfect we would not need any unions...There are rules that have not been respected, implicit rules have not been respected and we think that through unionization through the collective agreement will guarantee certain rights, at least". Entitlements under the collective agreement assist bargaining unit members of all stripes. This

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<sup>668</sup> The Professional Institute of Canada, "Who We are", online: PIPSC <<http://www.pipsc.ca/portal/page/portal/website/aboutinstitute>> (date accessed: 20 December 2014); Canadian Association of Professional Employees, "Press Release, CAPE Asking Members for the Means to Maintain Quality Services, online: CAPE <<http://www.acep-cape.ca/en/contact-us/media/>> (last modified: 13 May 2013).

<sup>669</sup> J. B. Rose, "Canadian Public Sector Unions at the Crossroads" (2007) 31:3 *Journal of Collective Negotiations* 183 at 196.

<sup>670</sup> A.C. Frost & D.G. Taras, "Understanding the Unionization Decision" in M. Gunderson, A. Ponak & D.G. Taras, eds., *Union-Management Relations in Canada*, 4th ed. (Toronto: Addison-Wesley Longman, 2001) 25 at 42.

<sup>671</sup> R.B. Freeman & J.L. Medoff, *What Do Unions Do* (New York: Basic Books, 1984) at 8; D. Lewin & D.J.B. Mitchell, "Systems of Employee Voice: Theoretical and Empirical Perspectives" (1992) 34:3 *California Management Review* 95 at 100.

makes for a more egalitarian workplace. National Capital Region lawyer 3 expressed, “The benefits of being in a union...ensures that lawyers, whether you are incoming first year call or somebody who has spent an entire year career, twenty-five—thirty years with the department, you’re equally and fairly represented before Treasury Board.” The respondent continued, “It makes a big difference that lawyers are allowed, I wouldn’t say luxury, but we can now be focussed on lawyering as it were, and not be taking up matters of benefits and pay and working conditions and so on. We have representatives who act on our behalf.” This lawyer values the certainty of terms of employment being fixed for the life of the collective agreement. Like her, other lawyers will realize the full utility of the collective agreement by guiding their work according to principles established by each of its articles.

Bargaining unit member participation in the union is another dimension of employees exercising voice in the work context.<sup>672</sup> The PLSRB certifying the AJC as a bargaining agent was a crucial first step in forcing the Treasury Board to recognize the AJC as the exclusive representative of the Law Group bargaining unit, granting lawyers access to industrial relations, and permitting their involvement in shaping the AJC’s bargaining agenda. But, in order for the AJC to achieve its goals for collective bargaining, the process still demanded skillful negotiation from the union’s representatives and lawyers. The Treasury Board denying the AJC’s salary demands forced the union to unite its membership in a common cause that was necessary for shifting the battle against the employer from the bargaining table to public, political, and judicial arenas. The union’s attempt at periodic mobilization was designed to dispel member complacency and vest lawyers with a direct stake in first contract negotiations. Its effect has been to improve opportunities for member involvement in union activities.

Clearly, the AJC has matured in its information sharing and activist capacities since the start of collective bargaining. Bargaining unit member involvement in union business has grown from the early days when lawyers provided survey input in the setting of collective bargaining priorities and sourced negotiating team members from within its ranks. The opening of the union’s information network was a culmination of the AJC’s Executive Committee decision in

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<sup>672</sup> D.M. Buttigieg, S.J. Derry & R.D. Iverson, “Voice within trade unions? A test of the voice and loyalty hypothesis” (2014) 56:1 *Journal of Industrial Relations* 3 at 5.

the midst of first contract negotiations to liberalize the content and the frequency of communications with members and to satisfy their growing expectations. Now that it has been opened, access to greater knowledge and more in-depth perspective about the AJC's dealings will not be easily shut, and this transparency can be used to encourage lawyers' input in a collective decision-making process.<sup>673</sup> While a second initiative, the Federal Lawyers Deserve Justice Campaign, informed that the AJC, as a newly formed organization, could enlist bargaining unit members to exercise collective agency, attempt to influence the determination of an arbitration board, and leave, in the process, an imprint of the effort in the public record. The AJC may well have to re-mobilize its members to resist the federal government reducing funding to the DOJ that limits its expenditures and invites service and personnel cutbacks. The current political economy pervading the federal public service is marked by a decidedly adversarial and confrontational turn in labour relations that threatens employee voice. A neoliberal approach to governance is unlikely to dissipate any time soon.

Several commentators point out that in the wake of the Great Recession, public sector unions are channelling employee voice into protest against governments streamlining their operations and interfering with collective bargaining.<sup>674</sup> Amidst Jackson's plea for the labour movement to contest right-wing political ideologies steering Canadian public sector employment policies, federal public service professionals are crusading against Conservative federal government austerity.<sup>675</sup> The AJC is one union that solicited its members' input for affiliating

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<sup>673</sup>In February 2012, the AJC launched its re-developed website that it considered was a more expansive informational and member resource for its followers. AJC, "AJC Goes 2.0: Website Upgrade Improves Service Platform", online: AJC Announcements <<http://ajc-ajj.net/news/article/42/AJC-Goes-2-0-Website-Upgrade-Improves-Service-Platform/>> (last modified: 24 February 2012).

<sup>674</sup>Savage and Webber, *supra* note 49 at 123; J. Slater, "Attacks on Public-Sector Bargaining as Attacks on Employee Voice: A (Partial) Defence of the Wagner Act Model" (2013) 50:4 *Osgoode Hall Law Journal* 875 at 881; S. Bach & G. Gall, "Public Service Voice under Strain in an Era of Restructuring and Austerity" in A. Bogg & T. Novitz, eds., *Voices at Work: Continuity and Change in the Common Law World* (New York: Oxford University Press, 2014) 322 at 331.

<sup>675</sup>A. Jackson, "Up Against the Wall: The Political Economy of the New Attack on the Canadian Labour Movement" (2013) 20 *Just Labour: A Canadian Journal of Labour and Society* 51 at 62; D. Camfield, "Renewal in Canadian Public Sector Unions: Neoliberalism and Union Praxis" (2007) 62:2 *Relations industrielles/Industrial Relations* 282 at 287. After winning a majority government in June 2011, the federal Conservative's interference in labour matters and attack on the public service involved: (1) introducing back to work legislation to end labour disputes at Canada Post, Air Canada, and Canadian Pacific Railway (2) passing Bill C-4 (*Economic Action Plan 2013 Act No. 2, 2013, c.40*), & Bill C-525 (*Employees' Voting Rights Act, S.C. 2014, c.40*); and (3) between July 2011 and July 2014, eliminating 36,900 civil service jobs. D. MacDonald & K. Hatt, *At What Cost? The Impacts of Rushing to Balance the Budget* (Ottawa: Canadian Centre For Policy Alternatives, 2014) at 4, online: CCPA,

with other employee organizations. In September 2011, in anticipation of the introduction of 2012 Federal Budget, with five other federal public sector professional unions, the AJC formed the “Professionals Serving Canadians Campaign” with its purpose of using a broad social media platform to expose government cuts in the federal public service (as well as forming a community outreach of public program and service defenders).<sup>676</sup> The AJC supported the endeavour due to a Law Practice Model hollowing out the DOJ’s operations by eliminating \$12.5 million from the salary budget and passing increased responsibilities on to junior counsel.<sup>677</sup> Moreover, by 2014-15, the DOJ intends to trim its workforce by 6.5 percent.<sup>678</sup> Treasury Board policy has further directed that the DOJ evaluate its litigation branch, and consider whether outsourcing its work to private law firms would realize savings.<sup>679</sup> Labour speed-up at the DOJ has escalated for lawyers with billable-hour targets being increased from 1,300 to 1,400 hours and the results being measured as part of the annual performance review.<sup>680</sup> Job intensification and degradation have forced today’s DOJ lawyers to adjust their practice of law to pressures far different from those of their predecessors a decade ago (and even more so from their predecessors of twenty years earlier). As the DOJ re-evaluates its spending priorities, the AJC’s Governing Council may also wish to reconsider conciliation and strike as a possible dispute resolution procedure. It might be time to contemplate a coordinated withdrawal of labour as a means for defending collective bargaining gains.<sup>681</sup>

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<[https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/11/At\\_What\\_Cost.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/11/At_What_Cost.pdf)> (last modified: 12 November 2014).

<sup>676</sup> AJC, “Public Service Professionals Unite to Defend Public Safety” Press Release (22 March 2012), online: AJC Resources <[http://ajc-ajj.net/awareness-campaigns/professionals-serving-canadians/PSC\\_Press\\_Release\\_Eng\\_Final\\_March\\_22\\_2012.pdf](http://ajc-ajj.net/awareness-campaigns/professionals-serving-canadians/PSC_Press_Release_Eng_Final_March_22_2012.pdf)> (last modified: 1 May 2012). The five other federal public sector unions are PIPSC, the Canadian Association of Professional Employees, Association of Canadian Financial Officers, Canadian Federal Pilots Association and the Professional Association of Foreign Service Officers.

<sup>677</sup> AJC, “What you need to know about the Law Practice Model” (Strategic Review – Law Practice Model), online: AJC Hot Topics <<http://ajc-ajj.net/library/category/8/Strategic-Review-Law-Practice-Model/?action=category&lcid=8>> (date accessed: 23 October 2013).

<sup>678</sup> E. Thompson, “Delays Predicted as DOJ chops more jobs” *Law Times* 23:23 (9 July 2012) 3. Around one-half of departmental staff are lawyers, and, as of 2009, the DOJ employed 4800 workers. See “Do Your Career Justice” *Justice Canada* 8:1 (Spring 2009) at 11.

<sup>679</sup> E. Thompson, “Tender raises spectre of Justice Department outsourcing: Union worried as federal government calls for evaluation of litigation branch” *Law Times* 24:28 (9 September 2013) 4.

<sup>680</sup> G. Kauth, “Feds look to bolster government lawyers’ billable hour targets” *Legal Feeds: The Blog of Canadian Lawyer and Law Times*, online: Canadian Lawyer Magazine <[http://www.canadianlawyermag.com/legalfeeds/2247/feds-look-to-bolster-government-lawyers-billable-hour-targets.html?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.canadianlawyermag.com/legalfeeds/2247/feds-look-to-bolster-government-lawyers-billable-hour-targets.html?utm_source=twitterfeed&utm_medium=twitter)> (last modified: 25 August 2014).

<sup>681</sup> M. Gunderson, “Two Faces of Union Voice in the Public Sector” (2005) 26:3 *Journal of Labor Research* 393at 399.

During the study's participant interviews, lawyers were asked to evaluate whether tensions exist between adhering to provincial law society Rules of Professional Conduct and collective activity. Ontario Regional Office lawyer 1 highlighted the choices that need consideration if the union asked bargaining unit members to take up job action: "it'll be a question for the individual professional to have to determine how he's going to resolve that conflict, and in my mind, you know your profession has to come first." This response captures the recurring theme of the professional balancing act. Government lawyers weigh professional responsibility as officers of the court and as public servants. The federal prosecutor is obliged to promote the administration of justice rather than secure a criminal conviction. The government civil litigator conducts trials to advance the best interests of the Crown within adversarial proceedings. As a public servant, however, the government lawyer is also required to conduct their responsibilities with regard for the public interest, which speaks to observing the general welfare of the public at large.<sup>682</sup>

Lawyers spoke passionately about representing the government client, be it the Minister of Justice, a department or agency head, or the tax-paying public at large. Prairie Regional Office lawyer 2 indicated that bargaining unit members hold their public service obligations in high regard. For some respondents, the choice between these duelling loyalties is straightforward. Prairie Regional Office lawyer 1 stated that the supremacy of a lawyer's oath to the profession supersedes union loyalties as the obligation imposes a professional responsibility to advance and defend a client's legal interest. National Capital Region Office lawyer 5 expanded on this idea by noting that the upholding of professional standards is inherent in the provision of legal services since being a lawyer comes first and union membership comes second. Given these responses, if the AJC was to ask bargaining unit members to support job action, there would be a great deal of contemplation over reconciling professional interest with union solidarity.

From the respondents' answers, this project suggests that unionization has not interfered with the ethics of bargaining unit members during the life of the first collective agreement

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<sup>682</sup> S.K. Berenson, "Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest" (1999-2000) 41:4 *Boston College Law Review* 789 at 789; *Black's Law Dictionary*, 7th ed, s.v. "public interest".

between the Treasury Board and AJC. This was mainly due to the AJC opting for arbitration to resolve disputes during collective bargaining negotiations. The measure was to prevent extreme circumstances that might force the likelihood of an unpopular labour disruption that could then possibly discredit the public service image of the legal profession (which bargaining unit members represent). However, after the tabling of the *Budget Implementation Act, 2009*, President Jetté averred a remarkable change in the AJC's position to the press: the bargaining unit would, if possible, strike to protest the *ERA*.<sup>683</sup> Providing that his assessment remains accurate, and a disagreement over collective bargaining escalates into a future labour dispute, the AJC would determine the muscularity of job action based on its members' professional responsibilities. The need for compromise is evident in this passage from AJC senior administrator 1:

So if we were in a situation where our efforts to advance our interests by way of collective bargaining should that run into a conundrum with respect to our ethical obligations or professional obligations to our clients, we would probably have to govern ourselves—and would govern ourselves—in a way that allowed us to preserve our ethical obligations to our client and still allow us to pursue our legitimate interests by way of the collective bargaining process.

The AJC's Governing Council may have to advise bargaining unit members on the appropriateness and ethicality of job action. Their position will be determined after a careful review of the issues involved, interests being affected, careful study of the test cases and instructive examples set by lawyers who have conducted previous slowdowns,<sup>684</sup> and, likely, a comprehensive legal opinion that assesses legalities and demonstrates the leadership's due diligence in recommending a position. The union's advice to its members would substitute for the recently implemented Department of Justice Values and Ethics Code, which is a protocol intended to direct lawyers' ethical behaviour and decision-making in professional activities. In the case of unusual ethical issues or in potential conflicts of interests or duties, lawyers are

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<sup>683</sup> "Federal lawyers slam wage restraints", *supra* note 605 at 1.

<sup>684</sup> In 2009, members of the Ontario Criminal Lawyers' Association boycotted accepting new legal aid client retainers for serious crimes. In 2012, the Trial Lawyers Association of British Columbia's work-to-rule strategy involved directing duty counsel to increase the frequency and extent of withdrawing duty counsel legal services from courthouses as long as the British Columbia's Legal Aid Services Society ignored their demands for better pay. See F. Adario, "Penny-ante legal aid system creates two tiers of justice: Lawyers' boycott has focused attention on chronic inequality in Ontario courts" *Toronto Star* (28 September 2009) A15; "B.C. trial lawyers take stand over lack of legal aid: Trial Lawyers Association withdraws duty counsel service" *CBC News British Columbia*, online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/b-c-trial-lawyers-take-stand-over-lack-of-legal-aid-1.1219277>> (last modified: 4 January 2012).

directed to discuss concerns with their manager.<sup>685</sup> The sensitive subject of labour protest, however, exposes the paradox of this code's utility, and constrains its normative value. Law review articles have lately debated the correctness of law society Rules of Professional Conduct imposing the same ethical and behavioural standards on counsel with no differentiation between public or private practice.<sup>686</sup> These theoretical exercises add little to the job action debate affecting DOJ lawyers because they do not conceptualize collective bargaining as a unique component of government employment that may even bolster calls for distinct forms of regulation (since a collective exercise of a labour right may impact the public interest). Nor, can the AJC look to provincial law societies for guidance as Thornicroft urged them to establish policies on the ethics of work stoppages.<sup>687</sup> The Law Society of Quebec did not take a position

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<sup>685</sup> Section 5(1) of the *Public Servants Disclosure Protection Act*, (S.C. 2005, c. 46) [hereinafter *PSPDA*] required the Treasury Board to establish a code of conduct applicable to the public sector. On 12 April 2012, the *Values and Ethics Code for the Public Sector* (Public Sector Code) became law and replaced the 2003 *Values and Ethics Code for the Public Service*. The Public Sector Code is a service-wide code of conduct for the federal public service. Section 6 of the *PSPDA* further required that each organization to implement its own organizational code of conduct that is consistent with standards of behaviour set out in the Public Sector Code. See Treasury Board of Canada Secretariat, "FAQs On the Values and Ethics Code of the Public Sector", online: Treasury Board of Canada Secretariat <<http://www.tbs-sct.gc.ca/faq/pdaf2-eng.asp#faq>> (last modified: 23 November 2012). On 26 February 2013, the *Department of Justice Values and Ethics Code* came into effect. Its protocols form a part of lawyers' condition of employment.

<sup>686</sup> In D. MacNair's article, "In the Service of the Crown: Are Ethical Obligations Different for Government Counsel?" (2005) 84 *Canadian Bar Review* 502, she recognized that the ethical challenges between public and private sector practitioners are different, but not necessarily requiring an imposition of higher ethical duties. Hutchinson, *supra* note 111 argued government lawyers should have their professional responsibilities and ethical expectations governed according to circumstances relevant to their practice rather than those geared towards the private sector, especially with respect to client advocacy and confidentiality. Dodek, in "Lawyering at the Intersection", *supra* note 111, argued that the current model of professional ethics does not account for practice responsibilities incumbent on government counsel as they serve as public servants, as lawyers, and as representatives of the Attorney General. To address forms of inadequate regulation regarding the exercise of public power, he proposed introducing specific codes of conduct for Crown lawyers, proactive government disclosure, and implementing an office of professional responsibility at both federal and provincial departments of justice. Dodek's proposals for imposing higher ethical duties on government lawyers were counter-argued by M. Wilson, T. Wong & K. Hille "Professionalism and the Public Interest" (2011) 38:1 *Advocates Quarterly* 1 at 14-17. M.H. Morris & S. Nishikiwa's article, "The Orphans of Legal Ethics: Why government lawyers are different – and how we protect and promote that difference in service of the rule of law and the public interest" (2013) 26 *Canadian Journal of Administrative Law & Practice* 172 at 173, attempted to re-focus the debate from whether government lawyers should be held to a higher standard to appreciating their existing ethical role, which is to protect and promote the rule of law and public interest. They called for better appreciating the ethical role of government lawyers play internally, so that position could be promoted through localized codes of conduct.

<sup>687</sup> Thornicroft, *supra* note 29 at 146. Thornicroft's prescription raises a policy implication that this study considers. Public sector lawyers are represented by various bargaining agents located in several different provinces. As such, the Federation of Law Societies of Canada could spearhead a policy initiative at the national level by developing a prototype rule regarding lawyers and job action for inclusion in its Model Code of Professional Code. The Federation of Law Societies of Canada is the national coordinating body of Canada's provincial and territorial law societies. Its Model Code of Professional Responsibility is a template for the Rules of Professional Conduct that several law societies have implemented while others study its adoption. The Model Code attempts to harmonize professional standards across different jurisdictions.

between Quebec public sector lawyers and the province during protracted and failed labour negotiations that forced lawyers to strike in 2011.<sup>688</sup> When determined lawyers erected picket lines, staged public demonstrations, and walked off the job for two weeks, the province's legislature ordered them back with ad hoc legislation that ended their strike along with granting a 6 percent wage increase over five years.<sup>689</sup>

Assessing the integrity of service disruption by the AJC bargaining unit thus entails an analogous application of principles drawn from Rules of Professional Conduct regarding a solicitor–client relationship being terminated by a lawyer withdrawing services. The competing interests at hand propose that the salutary effects of the AJC bargaining unit members exercising *Charter* protected labour activities, such as picketing,<sup>690</sup> outweigh the deleterious effects imposed by ethical guidelines attempting to mitigate the impact of a government client losing non-essential legal services. In any event, whatever job action the Governing Council proposes to the bargaining unit, a majority of its members would still need to approve of it in a referendum.<sup>691</sup> Their decision could be swayed by sustained retrenchment that negatively influenced lawyers' psychological affiliation with professional standards and public accountability. A workplace injustice could also galvanize the appeal of militant action.<sup>692</sup>

## 7.5 Post Script: Practicing Law under a Collective Agreement

The introductory chapter of this dissertation argued that significant transformations in the legal labour process may pique lawyers' interest in collective bargaining as a defense against job

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<sup>688</sup> L. Millan, "Quebec public lawyers ready to strike: Frustration mounts for Crown prosecutors and government lawyers" *The Lawyers Weekly* 30:36 (4 February 2011) 1 at 2.

<sup>689</sup> L. Millan, "Quebec public lawyers forced back to work: Indignant lawyers vehemently admonishing Quebec government" *The Lawyers' Weekly* 30:40 (4 March 2011) 1 at 1.

<sup>690</sup> Provincial Rules of Professional Conduct are governed by the *Charter: Klein and Dvorak v. Law Society of Upper Canada*, [1985] O.J. No 2321, 16 D.L.R. (4<sup>th</sup>) 489 (Ont. Div. Ct.). In *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 (CanLII) at para. 59, the Supreme Court of Canada assessed the correctness of a Law Society's discipline panel reprimanding a lawyer for lacking professional civility to the bench, and the application of the *Charter*-protected right of freedom of expression to a lawyer's professional duties. In a much earlier case, the Supreme Court of Canada determined that disruptive picketing in front of a court interferes with the proper administration of justice and is a contempt of court. A court injunction restraining the conduct impeded strikers' freedom of association rights, but it was a justified infringement pursuant to section 1 of the *Charter*. See *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214, 1988 CanLII 3 (SCC) at paras. 41, 67-72.

<sup>691</sup> 2006 AJC Constitution, *supra* note 561 at Article 5.5 Membership Decisions informs that: "any collective job action by the membership of the Association must be approved by a majority of the votes cast in a vote of the membership that is proposed to be involved in the action".

<sup>692</sup> *Kelly*, *supra* note 638 at 27.

insecurity. This case study did not formally test whether the deprofessionalization hypothesis explains why DOJ lawyers unionized under the AJC (although a cursory assessment suggests that the thesis would bear little relevance). First, the statutory monopoly of the DOJ over the provision of legal services to one client—the federal government and its departments and agencies—largely shields its practitioners from the competitive pressures tied to an open private market saturated with lawyers and budding new service providers. Second, the study documented changes affecting the DOJ's operations and the *PSSRA*'s repeal that pre-date the onset of outsourcing and information technology threatening lawyer jobs. In this regard, the findings of this case study provide little support for the deprofessionalization paradigm. However, given the seeming relevance of deprofessionalization to account for changes in the practice of law today, a future study of lawyers unionizing would benefit from testing the theory's application to more contemporary events at hand. As well, this study did not analyze legal solutions for overturning prohibitions contained in Canadian provincial labour statutes, such as those in Alberta and Ontario, that exclude lawyers and other professional occupations (medical, dental, architectural) from organizing to collectively bargain or belong to a bargaining unit with other non-professionals. The legality of outdated exclusions applying to certain professions is a topic for investigation given that the Supreme Court of Canada acknowledged in *Health Services* that at international law, and under the *Charter*, collective bargaining is an extension of the basic human right of freedom of association.<sup>693</sup>

This dissertation was intended to increase understanding about lawyer unionism in Canada. Presenting the AJC's story helps familiarize unrepresented lawyers with how a bargaining agent secures legal recognition, and the probable conduct of a public sector employer negotiating a first collective agreement. The content of the thesis establishes the informational, theoretical, and methodological groundwork for conducting further studies on collective bargaining by lawyers. Research has the important role of expanding on this, and other related works by assessing the highly variable and contextual dimensions that would motivate a new set of employed lawyers to collectivize their labour relations. Another useful contribution this study makes is to reveal the condition of lawyers practicing law under a collective agreement. This

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<sup>693</sup> *Health Services*, *supra* note 649 at para. 79.

analysis can encourage a qualitative investigation that develops theory on organized counsel making sense of lawyering in a non-standard employment situation.

To study unionized lawyers at in action, I observed the prosecution of criminal law by members of the AJC's bargaining unit at the Old City Hall Courthouse in downtown Toronto. It is where the Public Prosecution Service of Canada (PPSC) staffs a team of about fifteen Crown attorneys who conduct federally-prosecuted summary and select hybrid trials under the *Controlled Drug and Substances Act*,<sup>694</sup> and who also service Drug Treatment, Mental Health, and Gladue (Aboriginal offender) Courts.<sup>695</sup> Prosecution of drug crimes in the city of Toronto falls under the jurisdiction of Old City Hall Courts, which makes these the busiest criminal tribunals in Canada. Prosecutors, early in their careers with the PPSC, discussed their work during informal interviews. They reported appearing before different criminal courts—bail, set date, plea, federal practice—which is an experiential circuit for them honing their craft. For three respondents who articulated with the PPSC (and were then hired in 2009, 2010, 2011, respectively), they are familiar with practicing law under a first collective agreement. When asked how belonging to a union affects their daily work, they shared similar sentiments, as did two other prosecutor colleagues, who all saw little conflict between their duties and union membership given the responsibilities they owe to the court as Crown attorneys. One respondent noted that the collective agreement allowed the AJC to discuss with management new accommodations for dealing with an overcrowding of lawyers confined to an inadequate office that would allow them to better observe professional standards and uphold their sense that the employer cared about the quality of the workplace.

A factor for DOJ lawyers that extends beyond any one regional office or courthouse and that affects bargaining unit members is the interplay between professional responsibilities and collective bargaining. During his interview, National Capital Region lawyer 2, noted that membership with the AJC did not imply suffering a loss of professional status. The idea of being both a lawyer and a proud union member did not faze this long-standing AJC member. It was

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<sup>694</sup> *Controlled Drug and Substances Act*, S.C. 1996, c. 19.

<sup>695</sup> Sittings of the Drug Treatment are held on Tuesdays and Thursdays while Gladue Court occurs on Wednesdays and Fridays. Both take place in Old City Hall Courtroom 116. Mental Health Diversion Court proceedings are in Old City Hall Courtroom 102.

about a change in perceptions, as he remarks: “...It is a sacrifice of perhaps preconceived ideals one had when one was entering law school. No one enters law school saying I’m going to be a lawyer, and I’m going to be a unionized lawyer.” The observation touches on an assumption implied from private practice that lawyers’ fortunes stem their “rainmaking” talents and prowess for winning big cases that brings them a favourable reputation, paying clients, and a lucrative income. The perspective, however, does not seem to mesh with lawyering in the federal public service where success is based on speedy progress along a defined career track, despite the current roadblocks to promotion.

The collective agreement has made advances in fashioning the delivery of legal services closer to the professional standards desired by the AJC. Prairie Regional Office lawyer 2 informed that the first collective agreement allowed the union to reduce terms and conditions of employment into clauses that enhance professional values. Senior AJC administrator 1 noted that the first collective agreement confirmed policy and procedure on lawyer entitlement to legal professional development days. For example, Article 20 of the labour contract provides for paid leave allowing unit members to attend conference and workshops as part of their career development. The clause responds to the licensure and competency requirements of continuing professional development programs administered by provincial law societies that force lawyers to complete annual programs of study or suffer summary administrative suspension. Overtime, a welcomed development from arbitration, is another example of how several respondents see the collective agreement enhancing professional values.<sup>696</sup> Lawyers shared different beliefs on how that occurs.

National Capital Region Office lawyer 5 explained that daunting files sometimes cross her desk, which is an inescapable facet of the work life of a small, federal government agency lawyer. She complained of being under-resourced and disadvantaged when litigating claims defended by prominent law firms representing dominant corporations who systematically flex

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<sup>696</sup> Between the time interviews were conducted and the case study being completed, the practice of overtime ceased as of 1 April 2013. The policy amendment came about from negotiations for renewing the first collective agreement after its expiry on 9 May 2011. In exchange for overtime and travel time, the second collective agreement (ratified by the bargaining unit in October 2012) secured a 15.25 percent salary increase over the course of its three-year lifespan, lasting from 10 May 2011 to 9 May 2014. The practice of management leave, which rewarded lawyers working for extended periods of time before the dawn of collective bargaining replaced overtime.

their powerful clients' resources against a lone government counsel. These are the types of cases that raise a potential ethical dilemma. Her conundrum is to work longer and harder and satisfy a demanding workload, or, otherwise risk generating the impression of file unpreparedness before keen judges. With a collective agreement in place, her additional efforts can be remunerated and the extra time invested in preparing for a big file should not be in vain. Atlantic Regional Office lawyer 1 observed that, in the past, a lawyer's overtime was considered in an annual performance review, which induced him to simply produce more work as required. As he noted, this practice was detrimental to lawyers because: "...I think the history we've experienced is the employer is depending on people...people's own sense of integrity to pursue and maintain their professional values irrespective of the demands put on them and the actions by the employer." Overtime entitlement ends the practice of forced professionalism guiding conduct. However, Prairie Regional Office lawyer 2 noted, entitlement and receipt of overtime are two different things. Management authorization for overtime is difficult in cost-sensitive environments. The quantity and importance of work at hand will guide negotiations between lawyer and supervisor in claiming and actually being compensated for their work.

To conclude, case studies are used to build theories about an organization where changes in its industry, employees' interests, and legislative environment activate forces that yield some phenomenon which becomes a subject for social research. This dissertation on DOJ lawyers unionizing under the AJC provides one such example. One can critique the study for describing an isolated event and surmise that collective bargaining by lawyers is restricted to the public sector. Law firm associates and corporate counsel will not revolt against their employers and risk losing a well-paid job or ruin career advancement. Surely, a "fight or flight" scenario would see most practitioners opt for a peaceable exit by joining another firm, but not those lawyers who would want to stay and resolve a conflict. The fact is that their dissatisfaction would be subjective and experienced relative to the wants and attitudes about improving work conditions. As Kearney and Mareschal put it, dissatisfaction alone is not enough to establish collective bargaining, but it requires workers believing that union representation will achieve valuable benefits that outweigh the costs and risks associated with unionizing.<sup>697</sup> This, then, is the

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<sup>697</sup> R.C. Kearney & P. M. Mareschal, *Labor Relations in the Public Sector*, 5th ed. (Boca Raton: CRC Press, 2014) at 23.

ultimate issue any group of lawyers would need to consider when deliberating on the merits of bringing in an association or union to serve as their spokesperson at work. Researchers of professional unions can only hope that another group of lawyers see the inherent value of collective bargaining and pursue it.

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**Approval Period: 06/23/10-06/23/11**

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## Memo

**To:** Andrij Kowalsky, Osgoode Hall Law School, andrij.kowalsky@xxxxxx.ca

**From:** Research Ethics Review Coordinator

**Cc:** Sr. Manager and Policy Advisor, Research Ethics

**Date:** **Wednesday 23<sup>rd</sup> June, 2010**

**Re: Ethics Review**

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White Shirts, Blue Collars: A Qualitative Case Study of Unionization at the  
Department of Justice Canada

I am writing to inform you that the Human Participants Review Sub-Committee  
has reviewed and approved the above project.

Should you have any questions, please feel free to contact me at: 416-736-5914  
or via email at:

Yours sincerely,

## APPENDIX B

### INTERVIEW PROTOCOL FOR JUSTICE CANADA LAWYERS

Good Morning/Afternoon. Thank you for speaking with me today and sharing your insight on Justice Canada lawyers unionizing. Your participation allows for research on this subject. The interview seeks your thoughts on why Justice Canada lawyers unionized and the negotiation of a first collective agreement. The interview canvasses five research themes that are explored through supplementary questions.

By speaking with you today I assume that I have your voluntary consent to participate in the study. That said, you can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researcher, or York University. In the event you withdraw from the study, all associated data collected will be immediately destroyed.

Study participation is on a non-attribution basis. Your confidentiality and anonymity in participating in this study is assured. Your name will not be used in the study. The interview will be digitally recorded, unless you prefer me to take notes of our discussion. Once completed, the interview will be transcribed. A copy of that transcript is available to you on request. The interview should take about 45 minutes. Full and frank responses are welcomed and encouraged.

#### Research Issue #1

*Are ethical obligations a concern in the decision to unionize*

- 1.1 What tensions are there between the rules of professional conduct and collective bargaining?
- 1.2 Do you see collective bargaining as a way to preserve professional values and autonomy?
- 1.3 Should ethical values such as upholding the public trust influence membership in a union (duty to client/employer, withdrawal of legal services, and strikes)?
- 1.4 Does choosing a union mean sacrificing professional values?

#### Research Issue #2

*Whether DOJ lawyers perceived bureaucratic over-administration as a factor in the decision to unionize under the AJC. If so, what form did this perception take*

- 2.1 Why did you enter the federal public service?
- 2.2 What are your perceptions of the DOJ as employer?
- 2.3 Prior to unionization, did you notice working conditions deteriorating?

- 2.4 Was management responsive to addressing any workplace concerns prior to the AJC being certified as bargaining agent?
- 2.5 Prior to unionization did management encroach on workplace autonomy or performance?
- 2.6 Are there other quality of work issues that made unionization attractive?
- 2.7 Do you think that any specific action of management influenced the decision to unionize?
- 2.8 When did you realize that union representation was necessary in the workplace?

### Research Issue #3

*Whether DOJ lawyers perceived the prospect of improved wages and benefits associated with collective bargaining as a factor in the decision to unionize under the AJC? If so, what form did this perception take*

- 3.1 Was the unionization decision influenced by job security?
- 3.2 Do you believe that DOJ lawyers are underpaid in comparison to other public sector lawyers?
- 3.3 Were perceived economic improvements in terms and conditions of employment achievable through collective bargaining a factor in the unionization decision?
- 3.4 Were other issues of economic gain important in the decision to unionize, and if so, why?
- 3.5 What benefits has collective bargaining delivered for DOJ lawyers?

### Research Issue #4

*How was the AJC able to conduct a successful organizing campaign among DOJ lawyers*

- 4.1 How did you first hear about the AJC?
- 4.2 Why do you think the AJC was selected as the bargaining agent for DOJ lawyers?
- 4.3 Was the AJC able to get your support? If so, why?
- 4.4 What other factors do you think were important to the AJC's organizing drive and why?
- 4.5 In your opinion, why did DOJ lawyers unionize under the AJC?

## Research Issue #5

*Has the delay in negotiating a first collective agreement with the Treasury Board altered your outlook on the decision to unionize*

- 5.1 Was the membership involved in the process of establishing bargaining priorities? If so, how well?
- 5.2 Why do you think completing the first contract between the Treasury Board and the AJC took so long?
- 5.3 Do you believe that the delay in signing a first contract was an attempt by management to undermine the union?
- 5.4 How did the union keep the membership involved in union activities during first contract negotiations? How well did it do?
- 5.5 How did you keep up to date on developments from the bargaining table?
- 5.6 Do you foresee any further challenges the AJC faces in representing the membership?

## INTERVIEW PROTOCOL FOR AJC MEMBERS

Good Morning/Afternoon. Thank you for speaking with me today and sharing your insight on Justice Canada lawyers unionizing. Your participation allows for research on this subject. The interview seeks your thoughts on the AJC's experience in organizing DOJ lawyers and negotiating a first collective agreement. The interview canvasses three research themes that are explored through supplementary questions.

By speaking with you today I assume that I have your voluntary consent to participate in the study. That said, you can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researcher, or York University. In the event you withdraw from the study, all associated data collected will be immediately destroyed.

Study participation is on a non-attribution basis. Your anonymity is assured and no reference to your name will be made in the study. Unless you direct me otherwise, I'll audiotape our discussion. Once completed, the interview will be transcribed. A copy of that transcript is available to you on request. This interview provides the data I'll be using in my dissertation. This may include any direct quotes from the interview or from information recorded in my notes.

### Research Issue #1

#### *Involvement with AJC*

- 1.1 When did you begin working for the DOJ? What attracted you to this work?
- 1.2 Why do you believe the AJC was formed?
- 1.3 Tell me about your work with the AJC? How did you become an AJC member?
- 1.4 Why did you get involved with the AJC?
- 1.5 How do you find time to balance competing obligations between work and the union?
- 1.6 Could you speak about the idea behind having AJC representatives in regional offices?

### Research Issue #2

#### *The AJC's conduct of a successful organizing campaign*

- 2.1 Why did DOJ lawyers unionize?
- 2.2 How was the AJC able to conduct a successful organizing drive of DOJ lawyers?
- 2.3 Why do you believe DOJ lawyers chose to have the AJC as their bargaining agent?
- 2.4 Is there an employment climate particular to your office that would influence the unionization decision either positively or negatively?

2.5 Did the introduction of collective bargaining change how you go about your work?

### Research Issue #3

#### *First Contract Negotiation*

- 3.1 How was the negotiating team selected?
- 3.2 What was your role on the negotiating team?
- 3.3 Did you bring the concerns and interests of your constituents to the bargaining table or was there a pre-determined agenda?
- 3.4 Are there challenges of having the office's concerns voiced within the overall AJC?
- 3.5 How were bargaining priorities selected, then?
- 3.6 What is the relationship between the bargaining team and the executive?
- 3.7 What goals did the AJC pursue in negotiating a first contract?
- 3.8 Tell me about how the negotiating process unfolded with the Treasury Board? How did the negotiating team prepare for the meetings?
- 3.9 Did goals change during negotiations? How did you feel about that?
- 4.1 What were the difficulties in negotiating a first collective agreement?
- 4.2 As negotiations proceeded how did the AJC keep its membership involved?
- 4.3 Tell me about the AJC's website
- 4.4 I noticed that as the AJC was negotiating its 1<sup>st</sup> collective bargain with the Treasury Board the media took an interest in the story. How did that come about?
- 4.5 Why do you think the Treasury Board took the position it did?
- 4.6 What was the idea behind the AJC's Federal lawyers deserve justice campaign of 2008?
- 4.7 What was your reaction to the first collective bargain being referred to arbitration?
- 4.8 What do you think about the AJC litigating the *Expenditure Restraint Act*?
- 4.9 Has your experience in negotiating a first contract taught you about the process of being on a bargaining committee? If so, what?

APPENDIX C



Department of Justice  
Canada

Ministère de la Justice  
Canada

Telephone: (613) 952-8361  
Facsimile: (613) 957-2303

Access to Information and Privacy Coordinator  
275 Sparks Street, 9th Floor  
Ottawa, Ontario K1A 0H8

**PROTECTED B**

Our File:

January 9, 2013

Mr. Andrij Kowalsky

Dear Mr. Kowalsky:

This letter is further to your request of December 18, 2012, filed under the *Access to Information Act* to obtain:

- (1) *All correspondences between LOAC/Association of Justice Counsel and the Deputy Minister of Justice/Attorney General's office between 1998-2005;*
- (2) *Any minutes of meeting of the Association of Justice Counsel, the Department of Justice, and/or the Associate Deputy Minister of Justice;*
- (3) *All correspondences between FLAG/FLOC, and the Deputy Minister of Justice/Attorney General's office;*
- (4) *All submissions/records maintained and/or produced by the Department of Justice to a task force or government body regarding the exclusion of legal officers from collective bargaining.*

I am pleased to enclose the releaseable documents relevant to your request (17 of 17 pages). You will notice that information is exempt from release by virtue of sections 19(1) [personal information] of the *Access to Information Act*.

This completes our processing of your request. If you have any questions concerning the above, do not hesitate to contact

Please be advised that you are entitled to complain to the Informational Commissioner concerning the processing of your request within sixty days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

Office of the Information Commissioner  
Tower B, Place de Ville  
112 Kent Street, 7th Floor  
Ottawa, Ontario K1A 1H3

Sincerely,

Coordinator