IN THE MATTER OF AN ARBITRATION

BETWEEN:

DAVID C. DINGWALL, P.C., Q.C.
("Dingwall")

and

ATTORNEY GENERAL OF CANADA

("Canada")

BEFORE: The Honourable George W. Adams, Q.C.
Arbitrator

APPEARANCES: **For Dingwall:**

Janice B. Payne, Counsel

For Canada:

Donald J. Rennie, Counsel

Heard at Toronto on Thursday, January 12, 2006.

AWARD

The issues before me are:

(i) Was Dingwall's resignation voluntary or involuntary having regard to all of the circumstances?

(ii) If the resignation was involuntary, what is the compensation, damages or terms of departure owing to Dingwall by Canada having regard to all of the circumstances?

Dingwall was appointed as Master of the Royal Canadian Mint in February 2003 by Order-in-Council dated February 26, 2003, effective April 1, 2003 for a five-year term. From 1997 he had conducted a government relations and strategy consulting practice and before that had been a Member of Parliament from 1980. While a Member of Parliament, he was Minister of Health, Minister of Public Works and Government Services, Minister Responsible for the Royal Canadian Mint, Minister Responsible for Canada Post Corporation and Minister Responsible for Atlantic Canada Opportunities Agency. He earned his B.Comm. and LL.B at Dalhousie University, Halifax, Nova Scotia. His C.V. reveals many awards in recognition of his public service.

Dingwall held his ministerial responsibilities during Prime Minister Chretien's tenure and it was Mr. Chretien who caused Dingwall's appointment as President and CEO of the Mint. Dingwall testified that his previous close association with Mr. Chretien became, in his opinion, a liability for his working relationships with Prime Minister Martin and his political staff. Indeed, by the time of his departure from the Mint, he was the sole surviving former Chretien Cabinet Minister appointee to public office. He testified that his relationship with Prime Minister Martin's staff was not assisted by his declining to state publicly that Ms. Sheila Copps' book contained many inaccuracies. Dingwall testified that he declined because he had not read the book and thought it unwise to step back into the political fray. Dingwall believed this response was not appreciated.

Dingwall also cited a number of situations leading up to the circumstances of his departure which indicated to him a lack of support from the P.M.O. for his work at the Mint and a general lack of confidence, if not outright hostility towards him. Attendances before various House of Commons committees and his adverse treatment by the Liberal party members of those committees underlined these concerns.

Before considering the particular circumstances which Dingwall and his counsel assert constitute a wrongful termination or an involuntary resignation, it is useful to review Dingwall's performance on the job. The Mint had been losing money prior to his appointment. There were serious labour relations problems. The CRA was conducting five audits. To Dingwall, these were all clear indications that the senior management team was in need of renewal. Dingwall led a restructuring of the organization, encouraged and supported the resolution of its labour relations and CRA problems, and the Mint achieved a pre-tax profit of $15.9 million dollars in 2004. This significant turnaround included a number of very profitable new commemorative coins reflecting Dingwall's ability to seize on productive ideas and motivate others. His leadership provided the opportunity for a positive change in the Mint's culture that was well received by the Mint's Board, its management and its staff at both the Ottawa and Winnipeg Facilities. During Dingwall's tenure, the business grew by over $105 million dollars and increased employment opportunities in Winnipeg and Ottawa by almost 200 people.

As a result, Dingwall enjoyed substantial performance awards during his employment. The Mint's Board of Directors had approved a salary increase to $253,200 effective January 1, 2004 and a 2004 performance award of $37,980 which had not yet been paid at the time of his departure, i.e. they were pending PCO approval. He expected to continue to enjoy comparable increases and performance awards during the balance of his five-year term ending in April 2008 should he have stayed on for his full term. Dingwall's salary, at the date of his departure (September 28, 2005), should be treated as being $253,200 although counsel for Dingwall submits he expected a similar 3% in due course retroactive to January 1, 2005 (raising his salary to $260,800) and that he is also owed retroactive pay to January 1, 2004.

In addition, Dingwall received the following benefits:

(a) An annual bonus entitlement of up to 15% of salary;
(b) A comprehensive employee benefits plan, including health insurance coverages, as well as other benefits;
(c) Participation in the Retirement Compensation Arrangements, No. 1, in accordance with the RCA regulations;
(d) A supplementary retirement entitlement, payable by the Mint;
(e) A car allowance equal to $12,000 per annum plus reimbursement for his operating costs (approximately $4,000 per year);
(f) Reimbursement of his annual membership fees at the Rideau Club and Rivermead Golf Club; and
(g) Reimbursement of his annual fees to the Nova Scotia Barristers' Society.

Turning now to the specific facts giving rise to this dispute, on September 23, 2005 while Dingwall was on business in Bali, Indonesia, he was contacted by Mr. Alex Himelfarb, Clerk of the Privy Council. He was told of Government concern about recent media coverage of his previous lobbying activities. The media reports were erroneous and Dingwall assured the Clerk there was absolutely nothing improper about his earlier activities as a consultant. Nevertheless, Dingwall asked that the allegations be reviewed by the Ethics Commissioner and he agreed to fully cooperate in the process. The Clerk, Dingwall testified, conceded that these activities could not properly be the subject of complaint and the Government did not refer the matter to the Ethics Counsellor. However, Dingwall was shaken by the call and believed he was being "set up". While Dingwall had been a registered lobbyist at that time and his activities were all proper, there was another lobbyist independently involved who was unregistered and whose name had not been leaked to the media.

Shortly thereafter, opposition Members of Parliament on the floor of the House of Commons made serious allegations about Dingwall's expenses as President and CEO of the Mint. These allegations were made in the context of a minority Government and constant speculation of the forcing of a general election. The media carried these unsubstantiated stories alleging improper spending by Dingwall. The allegations were to

the detriment of Dingwall, the Mint and its employees. Effectively, all of the expenses of Dingwall's office ($730,000 approximately) involving several other employees were being attributed to him. In fact, well over 70% of these approved expenditures related to the other employees and two subsequent independent reviews (subsequent to Dingwall's departure) confirmed the propriety of the expenditures and the governance mechanisms in place to approve and monitor such expenses. Nevertheless, at the time, Dingwall was told by the Clerk that the Government was upset. Indeed, he received a call on Tuesday, September 27, 2005 from the Minister responsible for the Mint berating him for having to deal with an expense-related issue at such a delicate time. Minister McCallum, testified Dingwall, seemed impervious to assurances that the expenses were entirely in order and had been approved by the CFO and the Board of the Mint as well as by the Mint's auditors. Instead, the Minister seemed in a panic. The Clerk then called Dingwall again stressing these allegations were a problem for the Government despite Dingwall's assurances.

Dingwall is a very experienced politician. In light of these conversations and given his association with former Prime Minister Chretien, he now understood there would be no support from the Government regardless of the complete absence of wrongdoing on his part. Indeed, no assurances of support from the Clerk, the Minister or the Prime Minister were forthcoming. No methods of repair or other response were suggested to him. Dingwall was simply told the allegations were "a problem". It was apparent that he would be sacrificed (he said "a bullet was coming") and then he would spend years in court trying to clear his name and seeking fair compensation for an unjust termination as was the predicament of several former colleagues. Given these telephone conversations and the increasing public furor being allowed to build momentum (which the witness described as a "feeding frenzy"), Dingwall realized he had no choice but to make the best arrangement to leave that he could. In two discussions with the Clerk his departure was discussed. The Clerk, who is also very experienced, did not disagree with Dingwall's assessment of the situation or suggest an alternative strategy whereby he would stay in place. In a second telephone discussion on the morning of September 28, 2005, the two worked out the details of a mutually acceptable departure package.

Dingwall then called Prime Minister Martin and advised him he "felt compelled to step down" and why. Prime Minister Martin did not disagree with Dingwall's assessment or encourage him to stay on. Dingwall advised the Prime Minister he had spoken to the

Clerk about a severance arrangement. While no monetary details were discussed in the conversation, Prime Minister Martin assured Dingwall he would speak to the Clerk and requested Dingwall to do likewise. Shortly after this telephone call which was at about 1:00 p.m. on September 28, 2005, Dingwall received a draft Order-in-Council from the Clerk setting out in writing the terms that he and the Clerk had previously worked out. Immediately following receipt of this document, Dingwall, the Government and the Mint worked feverishly on an announcement which was to be released before the commencement of the House of Commons Question Period for that day at 3:00 p.m. Dingwall, in reliance on and as a result of all that had been said to him, also drafted a "resignation letter" to the Mint's Board of Directors in which his explanation took "the high road" to both salvage his reputation and avoid any further damage to the Mint. The Clerk and Dingwall had discussed how his departure would avoid another public termination with its adverse impact on Federal institutions. Dingwall understood, from the lack of Government support in the previous nine months, together with its particular reactions to the allegations over his expenditures, that he would be terminated within days. Waiting was not an option. His discussions with the Clerk and the Prime Minister served to confirm this overall assessment. Dingwall testified that he tendered his resignation in reliance on the draft Order-in-Council flowing from his discussions with the Clerk and in the belief that its terms had received all necessary approvals and would be honoured by Canada. The language of Dingwall's departing letter and the related public announcement as well as the timing of his departure were all intended by him to minimize any possible embarrassment to the Government, as is not uncommon in the case of the departure of senior executives in both the private and public sectors. Instead, testified Dingwall, the wording of the documents and the fact of his departure came to be used against him.

It was argued that the terms of the draft Order-in-Council also reflected Dingwall's lawful severance entitlements under the February 2003 Order-in-Council, the common law for a termination lacking cause, and the policy and practice at the Mint concerning the termination of senior employees. However, as events transpired, Canada subsequently failed to honour the arrangement, giving rise to the instant dispute and this arbitration. Dingwall testified that he has suffered personally and professionally because of the Government's decision not to publicly acknowledge its role in his departure and its involuntary character. He has had no employment since leaving the Mint and has no prospects for other work. He has not received any income from employment since his

departure on September 28, 2005 or any monies under his MP's pension or his pension from the Mint. He was not given professional job placement assistance by Canada in his search for other work as would be usual in the case of the termination of a senior executive.

I have reviewed all of the evidence and the thoughtful submissions of counsel. It is my finding that the departure of Dingwall was clearly involuntary. He was not planning to leave the Mint in the fall of 2005 regardless of whether he may have left voluntarily at some point before the end of his appointment. Had another interesting job come along before 2008, there is reason to believe that Dingwall would have taken it. But that is not evidence justifying a conclusion that his departure on September 28, 2005, without alternative employment and without payment of an equitable termination package, was voluntary. The circumstances surrounding his departure were highly coercive to the knowledge of the Prime Minister, the responsible Minister and the Clerk. Available steps to relieve that pressure were not taken. There was no basis to the criticisms levelled against him but no one in the Government was prepared to listen to him or inquire fairly. Several former Chretien Cabinet Ministers had lost their jobs and were involved in very public (and expensive) litigation. No one disagreed with his assessment he was next. No one suggested he would be defended or that the allegations would be the subject matter of a rational resolution process before he was required to do anything. Instead, he was offered terms agreeable to him in the circumstances if he was prepared to go cooperatively and quickly. He was encouraged to announce his departure before Question Period on the very day he had decided to depart – a timing that preceded the formal approval of the terms that had been negotiated with him and on which he had relied in submitting his resignation. It was this dispatch that appears to have allowed "the deal" to unravel. The circumstances are, in my opinion, also equivalent to a termination or constructive termination without cause.

The test for whether a resignation is voluntary is an objective test. The resignation must objectively reflect an intention to resign or conduct which establishes this intention. There must be evidence that the employee clearly, unequivocally and voluntarily resigned. See Stacey Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 2005) at 8-3. Similarly, it must also be established that the employee was the subject of such duress or coercion that the resignation was truly not voluntary. See *Re Head and Commissioner of the Ontario Provincial Police* (1981), 127 D.L.R. (3d) 366. On the evidence and having regard to this required approach, Dingwall has

demonstrated his resignation was involuntary. None of the persons he was dealing with could have reasonably or objectively believed he was acting of his own free will. See *Palumbo et al.* v. *Research Capital Corporation* (2004), 72 O.R. (3d) 241. He advised them that he felt compelled to resign. No one disagreed with this motivation or the necessity of leaving. Indeed, by failing to take the steps available to it in response to the very serious allegations of wrongdoing, Canada magnified the duress to which Dingwall was subjected. There was no apparent interest in determining whether the allegations had a basis in fact before he was required to decide anything and, indeed, at least one Cabinet Minister subsequently and publicly spoke against him. The resignation was manifestly involuntary.

It is also my conclusion, on the balance of probabilities, that this lack of support was similar to and connected with the absence of support he had experienced during the previous nine months and, without direct evidence to the contrary, constitutes a constructive dismissal in all the circumstances. Dingwall's culminating resignation, from this perspective, followed his constructive termination and was ineffective. See *Palumbo et al.* v. *Research Capital Corporation, supra.* Alternatively, Canada is estopped from arguing to the contrary, having led Dingwall to reasonably rely to his detriment that the terms of the draft Order-in-Council would be formally implemented to consummate the terms of his departure. See, for example, *Watson* v. *Canada Permanent Trust* [1972] 4 WWR406. Negligent misrepresentation also applies. See *Queen* v. *Cognos Inc.* [1993] 1 S.C.R. 87.

Politics as a "blood sport" may explain Canada's subsequent conduct but cannot justify its treatment of Dingwall. He had performed his job well regardless of any perceived allegiances or the etiology of his appointment. He was entitled to Canada's rational support when serious charges concerning his expenditures were made against him. If Canada was unwilling to provide that support, for whatever the reason, it was required to effect his termination on equitable terms which the Clerk, to his credit, attempted to do. Accordingly, I direct Canada (and the Mint) to pay to Dingwall the following:

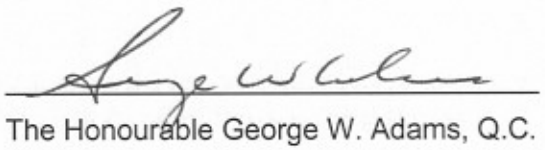
1)	18 months' salary based on Dingwall's revised salary effective January 1, 2004 (i.e. $253,200)	**$ 379,800**

2)	10% of the above amount in lieu of benefits	$ 37,980
	Lump Sum Total	**$ 417,780**
3)	(i) payable commencing September 29, 2005 an annual allowance pursuant to the PSSA and the RCA Regulations No. 1 made pursuant to the SRAA in the amount of:	**$ 21,005**
	(ii) payable commencing September 29, 2005, the Royal Canadian Mint shall pay a matching annual allowance in the amount of:	$ 21,005
	Annual Allowance Total	**$ 42,010**
4)	Canada is directed to pay Dingwall's costs of these proceedings on a total indemnity basis and I will remain seized to determine this amount, failing agreement of the parties.	

Lastly, I note that counsel have agreed that any entitlement to salary increases and performance pay for 2004 and 2005 yet to be approved and implemented has not been determined by these proceedings and the parties are free to pursue claims and defences with respect to such entitlement including the impact of same on the pension and severance, save only for the impact on severance and pension of the 2004 salary increase which is already reflected in the above numbers. If these claims are advanced, it is agreed that Dingwall will not raise the draft OIC (Ex. 1, tab 5) and the circumstances

surrounding same as the source of his entitlement and the Government will not raise the circumstances surrounding Dingwall's departure as a defence, so that Dingwall's entitlements will be based on his service up to and including September 28, 2005.

Dated at Toronto, this 19th day of January, 2006.



The Honourable George W. Adams, Q.C.
Arbitrator