

Constitutionality of Ontario Education Sector Bargaining

By

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Abstract:

At the time of writing, bargaining in Ontario's education sector is governed under two regimes; *The Putting Students First Act* - legislation which imposed Collective Agreements across Ontario, and its successor legislation; The School Boards Collective Bargaining Act – which limits workers' rights to choose who will represent them, and centralizes the bargaining process for some, while keeping it out of reach from others.

This paper examines the constitutionality of each regime under Canadian law having regard for the freedom of association, which is a protected right under Canada's Charter of Rights and Freedoms (the Charter), and the jurisprudence interpreting that right.

The author concludes that both regimes fail to pass constitutional muster. The *Putting Students First Act* violates the Charter by setting strict parameters on bargaining outcomes for the education sector, unilaterally changing working conditions during bargaining, and by imposing collective agreements which took away a unions' ability to strike.

The *School Boards Collective Bargaining Act* violates the Charter by designating which unions can represent workers at the central bargaining table, by excluding small unions from central bargaining, and by denying parties the right to strike over certain types of bargaining disputes.

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Chapter 1: Introduction

The impact of the stock market crash of 2008 and the great recession which followed has added a new dimension to public sector bargaining in Ontario - a provincial government that is keenly focused on shifting risk off of its balance sheet in order to protect its credit rating. Since 2008, credit rating agencies have been under much greater scrutiny, and as a result their ratings have become not only much more conservative but also much more meaningful to investors¹. Thus, when Ontario's credit rating was downgraded in 2009 and again in 2012, its government, fearful of losing its creditors, took notice.

Since that time the government has taken a much more interventionist role in public sector bargaining –seeking deals with unions which would allow them to move risk off their balance sheets – sometimes to the chagrin of the actual employer - in order to preserve or improve the Province's credit ratings.

Thus in August 2012, when collective agreements expired across Ontario's education sector, the government intervened directly in the bargaining process which followed; initially, by increasing its role in the consultation process involving school boards and unions which existed at the time; and later, by enacting the *Putting Students First Act* - legislation which dictated to local school boards acceptable outcomes for their negotiations with unions and which empowered the province to impose fresh terms and conditions of employment throughout the sector. In fact, the effects of *Putting Students First Act* are still felt today by many unions and School Boards who continue to be bound by Collective Agreements imposed under this legislation.

¹See for example the story by Matt Krantz, *2008 crisis still hangs over credit-rating firms*, USA Today September 13, 2013 which includes comments from such agencies on their conservatism since the financial crisis. See also, *Credit where credit is due*, the Economist, April 19, 2014 where the author notes that these agencies have never been in higher demand.

Two years later, the government formalised its place at the bargaining table when it enacted the *School Boards Collective Bargaining Act*; legislation which divided education sector bargaining across two tiers; a central tier – to which the government was deemed to be a party - where issues related to budget and policy would be discussed, and a local tier where remaining items would be dealt with.

In this paper I will explore the constitutionality of the *Putting Students First Act (PSFA)* and the *School Boards Collective Bargaining Act (SBCBA)*.

Specifically, I will examine whether the PSFA violates the Canadian Charter of Rights and Freedoms (the “Charter”) by:

- setting strict parameters on bargaining outcomes for the education sector
- unilaterally changing working conditions during bargaining, and
- imposing collective agreements, and in so doing, taking away unions’ right to strike.

I will also examine whether the SBCBA violates the Charter by:

- designating unions to represent certain employee groups at the central bargaining table,
- excluding unions from central bargaining that do not represent at least 15 bargaining units, and
- denying parties the right to strike and requiring parties to go to the Ontario Labour Relations Board over disputes related to the negotiation of the scope of central bargaining.

I will also consider one of the larger problems associated with this jurisprudence, specifically, whether governments can in fact enact legislation in instances where they want to achieve

specific fiscal outcomes but are unable to reach agreements in this regard with workers and the unions which represent them.

Following an analysis and an application of the relevant legislation and case law, I conclude that the above noted aspects of both the PSFA and the SBCBA do violate the Charter by interfering with good faith bargaining, unilaterally modifying contracts in a manner that was not minimally impairing, and interfering with the right to strike - with respect to the PSFA; and by removing the right of employees to choose their representatives, by denying certain groups the right to negotiate monetary and policy related items, by denying the right to strike over the determination of the scope of central bargaining - with respect to the SBCBA.

I further conclude that a government that is seeking a specific outcome at the bargaining table must demonstrate openness while negotiating and then show restraint when enacting laws intended to achieve those outcomes.

Chapter 2: Background to PSFA and SBCBA

In March 2012, unions representing workers in Ontario’s publicly funded schools gathered with representatives of the provincial government and the province’s school boards in downtown Toronto for the purpose of negotiating and discussing terms and conditions of employment.

This was not the first time these parties had gathered for this purpose. The parties had met under similar circumstances in 2004, and 2008; the meetings in each of those years resulting in a framework agreement on wages, benefits and other terms and conditions of employment which were then imported into local collective agreements during local bargaining. These agreements were called Provincial Discussion Table agreements or “PDT” agreements.

The incorporation of PDT agreements into local collective agreements was fairly straightforward. Parties would enter into letters of understanding or similar instruments appending their PDT agreements to their collective agreements, or negotiate their terms directly into the agreements themselves – one of the drawbacks to the latter process being the variations to the original agreements which could result from this process.

In 2004 and 2008 the parties both provincially and locally, worked out these agreements with little acrimony, owing largely to the generous wage increases and corresponding funding offered by the provincial government in those years.²

By 2011 however the government was facing a tough fiscal reality. The province’s financial obligations and debt levels were high and its revenue low due to the erosion of Ontario’s

² This was part of [then] Premier Dalton McGuinty’s strategy for reconciling the relationship between the government and Ontario’s school teachers after years of acrimony under the previous government. See for example the statement from the Ministry of Education in July 2008 announcing the PDT agreements in that year. Available at <http://www.edu.gov.on.ca/eng/document/nr/08.07/PDT.html>.

manufacturing sector, coupled with years of recession. Further compounding the problem was the downgrade of its credit rating following the financial crisis of the late 2000's - which made the province's economic future uncertain³.

To work through these issues, the Province established a Commission on the Reform of Ontario's Public Service ("the Commission"), charged with making recommendations on how best to reduce Ontario's spending and balance its budget.

On February 15th, 2012 the Commission released its recommendations in a report titled: *Public Services for Ontarians: A Path to Sustainability and Excellence*⁴.

The report included extensive recommendations for reducing education sector costs and improving its balance sheet including; the elimination of Full Day Kindergarten, increasing class sizes, reducing non teaching staff by 70%, capping spending, and offering performance incentives for teachers.⁵

Suffice it to say that, while the report was heavily criticized for its alleged conservatism and radical austerity⁶, the government was putting out to Ontarians that it could no longer afford the types of services it had offered in the past. Thus was the context heading into the 2012 PDT talks.

³ *PUBLIC SERVICES FOR ONTARIANS: A PATH TO SUSTAINABILITY AND EXCELLENCE*, a report from the Commission on the Reform of Ontario's Public Services, at page 73, available at <http://www.fin.gov.on.ca/en/reformcommission>.

⁴ Ibid

⁵ Ibid, Chapter 6: Elementary and Secondary Education, pages 203-238

⁶ See for example the harsh critique of groups like OPSEU, or Council of Canadians; who in particular are of the view that Ontario's debt problems have been over exaggerated not only for political gain but also to benefit corporations: Don Snobelen, Right? Or, is it John Drummond? Sorry, I get those two confused!, Council of Canadians, <http://canadians.org/node/3846>

To be clear, the PDT process was a voluntary one. It was not regulated by the province's labour relations statutes or any other legislation. Hence the school boards, and the unions who were attending had no obligation to participate in this process, as their collective agreements, and the right to bargain those agreements, remained exclusively between them.

On February 22, 2012, unions from across the province attended an initial meeting with the provincial government. The purpose of this meeting was to set the stage for the PDT process which was to follow. At that meeting, unions were presented with a list of fiscal "parameters" that the government would be imposing for the upcoming round of talks.⁷ What was included on this list however was not actually 'parameters' per se, but rather specific proposals for altering existing contracts for teacher and non-teacher personnel in a manner that would allow the government to eliminate the unfunded liabilities associated with those contracts from its balance sheet. Specifically, the list included proposals to reduce annual sick day entitlement from twenty days down to six days, to eliminate workers' sick banks (which not only incentivized workers not to take their sick days but also served as their short term disability coverage), to eliminate retirement gratuities (a lump sum payout of banked sick days upon retirement), and post-retirement benefits. There were also proposals to freeze wages and cap spending for a period of two years⁸.

Thus, Unions found themselves trying to negotiate with the Government, rather than their employers, that apparently conceived of its bargaining proposals as parameters. School boards for their part were thus caught in the middle, watching the Government negotiate terms and

⁷ These parameters are captured in a memo from the Assistant Deputy Minister of Education Gabae Sekaly to the Director of Education in Ontario, dated April 12, 2012, available at http://www.edu.gov.on.ca/eng/funding/1213/2012_B9E.pdf

⁸ Ibid

conditions that would normally be under their control. As a result, school boards were displaced in their role as employers.

Because of this, some unions started walking away from the PDT process altogether, preferring instead to bargain directly with their employer.⁹ By May 2012, the PDT process was effectively dead.

There were some unions however that did not walk away from these discussions altogether. Certain unions, such as Ontario English Catholic Teachers Association (OECTA), the Association des enseignants enseignantes franco-Ontariennes (AEFO), and a few other smaller unions continued to negotiate and did eventually manage to reach an agreement which would enable the government to reach its objectives and eliminate particular unfunded liabilities. The parties signed Memoranda of Understanding (“MOUs”) prior to and during summer of 2012 confirming the deals they had made.

These agreements however were not endorsed by school boards and as a result, their incorporation into local collective agreements was not certain. Further, many unions did not sign MOUs, having walked away from the PDT process altogether. These unions also collectively represented the majority of workers in the education sector.

The situation was complex and highly problematic for a government that needed to control its spending and achieve the parameters it had set out months before.

In response to these events, the government enacted a new piece of legislation the following September, *The Putting Students First Act (PSFA)*. This was sweeping legislation which completely transformed bargaining in the education sector by, *inter alia*, setting specific

⁹ Elementary Teachers Federation of Ontario was the first to walk away after only one meeting.

parameters on bargaining outcomes for all unions in the sector such that all bargaining had to result in agreements that contained the terms of the MOUs signed between the government and certain unions, unilaterally altering terms and conditions of employment for unionized employees during bargaining (which was still ongoing at the time) such that the terms and conditions set out in the MOUs were unilaterally imposed on everyone, and by granting Cabinet and the Minister of Education sweeping new powers. These included the power to review collective agreements throughout the education sector to ensure they complied with the government's objectives, the power to make orders requiring terms and conditions to be included in a collective agreement, the power to impose collective agreements, the power to require parties to negotiate a new collective agreement, and the power to prohibit strikes and lock-outs¹⁰.

The legislation also set a deadline of December 31, 2013 for those school boards and unions that were still bargaining (which was all of them) to reach a collective agreement which complied with the legislation.

The PSFA did not prohibit strikes outright however. Rather, those unions that did not sign an MOU were still permitted to strike in accordance with the rules set out in the *Ontario Labour Relations Act*.

Accordingly, some unions began initiating job action in the fall of 2013 in protest and as part of their bargaining strategy vis a vis their local school boards and the government¹¹. Over the next few months this job action escalated, and by December, 2012, ETFO¹² - a large union representing public school elementary teachers in Ontario - was on strike, holding rotating one day strikes at different school boards across the province.

¹⁰ See Putting Student First Act, 2012 c. 11 2012 sections 4 through 10.

¹¹ http://www.thestar.com/news/gta/2012/12/17/teacher_protest_updated_oneday_strike_information.html

¹² ETFO stands for Elementary Teachers Federation of Ontario

Such was the climate in Ontario as students headed into the winter holidays that year.

Thereafter, on January 2, 2013, just before students would return to school, the Cabinet issued an Order in Council, pursuant to its new powers under the Putting Students First Act, imposing collective agreements for unionized employees across the education sector¹³. Specifically, the order imposed collective agreements between school boards and unions which included the same terms that were in their previous agreements, as modified by the terms contained in the aforementioned MOUs signed by some unions, in particular that of OECTA, upon everyone else in the sector, and otherwise rolled over all other terms and conditions of employment.¹⁴

As a consequence, unions now had collective agreements with their employers and as such, their right to strike under the Ontario Labour Relations Act had come to an end.

The Demise of the PSFA

Only a few months after its creation, and a matter of weeks after collective agreements were imposed throughout the province, the PSFA was repealed. This was due in part to the fact that new faces were now in charge, with Kathleen Wynne taking over as Premier of Ontario and appointing Elizabeth Sandals as Education Minister. It was also due in part to intense criticism of the government from both the School Boards and from labour.¹⁵

¹³ The PSFA also imposed the same terms and conditions of employment on non-unionized employees across the entire education sector as well.

¹⁴ See Order in Council at Appendix B, section 2.

¹⁵ Examples of this intense criticism can be found online where many unions published materials in opposition of the Putting Students First Act. See for example the media conferences held by CUPE, ETFO, and OSSTF published on youtube: <https://www.youtube.com/watch?t=32&v=Sb1ZsjXBXrk>, or <https://www.youtube.com/watch?t=869&v=VgC72ealrYo>.

Notwithstanding its repeal however, the collective agreements which were imposed under the authority of the PSFA remained in effect by virtue of Ontario's Legislation Act.¹⁶

To say the least, these events left parties perplexed. School Boards appeared to be frustrated over having been completely pushed aside by the government¹⁷. Unions were likewise frustrated, many having been forced into an agreement bargained by another group¹⁸ - all at the hands of a government who had traditionally been sympathetic to their interests¹⁹.

In response, the Wynne government, in an apparent effort to reconcile with school boards and unions, re-invigorated negotiations with all education sector unions and by Spring 2013 they had managed to work out fresh individual agreements with almost every education sector union²⁰.

The School Boards however were again not party to these agreements. As such, incorporating their terms into collective agreements remained a problem. Thus in an apparent effort to bring school boards on side, the government offered additional funding to school boards who would adopt the these agreements²¹.

The appears to have worked – with almost all boards signing letters with their union counterparts incorporating their agreements with the government into their collective agreement, thus ending a great deal of labour strife within the sector.

¹⁶ Legislation Act, 2006 S.O. 2006, CHAPTER 21 Schedule F

¹⁷ See for example Ontario Public School Boards' Association submission to the Standing Committee on Social Policy regarding Putting Students First Act, 2012 available at: http://www.opsba.org/index.php?q=system/files/SpeakingNotes20120905_OPSBASubmissionBill115PuttingStudentsFirstAct.pdf

¹⁸ For examples of unions' frustration see youtube video at footnote 15.

¹⁹ Premier Dalton McGuinty had fashioned himself as the "education Premier" focusing much time in his early days on repairing relations with education sector unions after the damage done by his predecessor.

²⁰ A copy of these MOU's can be found at <http://www.edu.gov.on.ca/eng/studentFirst.html>.

²¹ B Memo from Assistant Deputy Minister Gabe Sekaly to Directors of Education dated May 17, 2013 available at: <http://faab.edu.gov.on.ca/Memos/B2013/B10E.pdf>

Things did not end there however. Over the next two years the government consulted with unions, school boards, and education stakeholders with regard to the development of comprehensive legislation to formalize central bargaining in the education sector – removing the PDT process, which was now viewed as ineffective and problematic, and replacing it with a process which would include formal negotiation with the government as a party, and result in a binding agreement between the unions and school boards.

Ultimately, out of these consultations was born the *School Boards Collective Bargaining Act*²² - a piece of legislation enacted in or about August 2014, just as the existing Collective Agreements were set to expire, wherein the government created a two-tier regime for collective bargaining in the education sector, one that would see negotiations take place centrally for some items and locally for other items. The legislation also enshrined the role of both the Crown and school boards as parties to the bargaining process²³.

From a constitutional perspective however this legislation, like the PSFA, has some questionable features. Rather than being a bargaining regime available to any union representing workers in the education sector, the SBCBA designates certain unions as the exclusive representatives of certain employee groups (specifically teachers). Those unions are also required to participate in the central bargaining process. Unions representing other employee groups who wish to participate in central bargaining can apply for the opportunity, provided they meet certain criteria – one of which was that they represent at least 15 bargaining units.

²² S.O. 2014 C.5

²³ Specifically a role for the School Board Trustee Associations was created whereby they would serve as the employer bargaining agent and party to the central portion of the Collective Agreement. As a result school boards could not be sidelined again during the negotiation of future agreements.

Further, the SBCBA denies parties the right to strike and/or lock out in respect of the threshold issue to be bargained at the central table: the scope of central negotiations, that is, the determination of which issues will be bargained centrally and which issues will be bargained locally.

Chapter 3 – Section 2(d) and the Freedom of Association

Section 2(d) of Canada's Charter of Rights and Freedoms (the Charter) protects Canadians' Freedom of Association. By virtue of that same instrument however, this freedom is not guaranteed outright, rather it is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society²⁴.

The application and evolution of this freedom, and the limitations which can be placed on it, has been a matter of hot debate amongst lawyers and academics in Canada (and indeed elsewhere) for decades.

Some of the most significant advancements of rights recognition under this provision have come however only in the past few years. First in *BC Health Services* in 2007²⁵, the Supreme Court of Canada recognized for the first time that freedom of association under section 2(d) of the Charter, guarantees not only individual rights, but also associational rights – including the right to collectively bargain²⁶.

Second, with a trilogy of decisions released in 2015²⁷, the court reaffirmed the protection of associational rights, including the right to strike²⁸.

These cases also establish the legal test for determining whether a labour relations regime (or lack of) violates sections 2(d); whether the regime results in "substantial interference with the right to a meaningful process of collective bargaining."

²⁴ Canadian Charter of Rights and Freedoms, sections 2(d) and 1 respectively

²⁵ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27

²⁶ It was only a few years earlier that the Supreme Court recognized for the first time that some associational rights could only be exercised through a collectivity – see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94

²⁷ Released in January 2015

²⁸ Reaffirmation was important after a decision in between cast doubt – see *Fraser*

Below I have set out a brief summary of these decisions.

Health Services and Support Decision

In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*²⁹, at issue was constitutionality of legislation which was enacted by the BC legislature to control its healthcare costs by restructuring its existing agreements with unions. Specifically, the legislation unilaterally changed existing transfer rights, contracting out and job security language, and layoffs and bumping rights.

Further, the legislation removed rights to consultation and notice respecting the reorganization of the workplace and barred future agreements inconsistent with the changes it imposed.

This legislation was also passed quickly and without consultation with unions.

Here the court, in a ground breaking decision which overturned two decades of jurisprudence, held that section 2(d) protects associational rights in addition to individual rights – and in particular the right to collectively bargain. The court stated:

“89 *The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of Dunmore, which stressed that s. 2 (d) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in Dunmore and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief,*

²⁹ Ibid note 2

the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2 (d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2 (d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below. “

The court further set out its initial test for determining a breach of section 2(d); that being the substantial interference test:

“90 *Section 2 (d) of the Charter does not protect all aspects of the associational activity of collective bargaining. It protects only against “substantial interference with associational activity...”*”

...

92 *To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as “union breaking” clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In Dunmore, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and*

consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

93 *Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries*

94 *Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2 (d) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2 (d) if they preserve a process of consultation and good faith negotiation.”*

The court took time to provide guidance for determining what constitutes “substantial interference”. Interestingly however in the trilogy of decisions which follow it, the court largely ignores this test as it was initially constructed, focusing instead on what is required to permit meaningful collective bargaining³⁰.

Ultimately the court held that certain aspects of the legislation constituted substantial interference with the duty to bargain in good faith (and therefore violated section 2(d)); specifically, those aspects of the legislation which altered existing substantial collective agreement provisions without providing for similar protections and which precluded meaningful

³⁰ Mounted police at para. 93

negotiations to take place again in respect of those items – such provisions being deemed central to the freedom of association.

Section 1

The court then turned its mind to whether the legislation could be justified under section 1 of the Charter - which allows for reasonable limits on Charter rights to be prescribed by law as long as they can be demonstrably justified in a free and democratic society.

The jurisprudence on the application of section 1 is well established. Here the court summarized the associated legal test as follows:

138 ... *A limit on Charter rights must be prescribed by law to be saved under s.*

1. Once it is determined that the limit is prescribed by law, then there are four components to the Oakes test for establishing that the limit is reasonably justifiable in a free and democratic society (Oakes, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law (Oakes, at p. 140; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at p. 889).

In its application of the above test, the court found that the violations of section 2(d) could not be justified under section 1 as the actions of the government were deemed not to be minimally impairing. In this regard the court emphasized that the government did not take the time required

to consult with the unions and to consider other options for achieving its goals. Rather, the legislation was enacted in a rush, without such considerations.

Mounted Police Association Decision

In *Mounted Police Association of Ontario v. Canada (Attorney General)*³¹, released on January 24, 2015 ("Mounted Police"), at issue was the constitutionality of the collective bargaining regime available to members of the Royal Canadian Mounted Police (RCMP).

Under this regime, RCMP members were excluded from the collective bargaining regime available to other federal employees and could only negotiate with their employer via a Pay Council – an advisory board mandated by the government made up of a neutral chair appointed by the Commissioner of the RCMP, two members of management and two staff representatives. The Pay Council was responsible for, inter alia, making recommendations to the Treasury Board Secretariat respecting wages. The Secretariat could then accept or reject these recommendations at its discretion.

While RCMP members could still form associations, such groups could not influence or impact negotiations.

Here the court reaffirmed that section 2(d) protects the right to collectively bargain. The court also summarized the test it established in *Health Services* for determining a violation of section 2(d), holding simply that the test requires a determination of whether or not there has been a "substantial interference with the right to a meaningful process of collective bargaining".

³¹ 2015 SCC 1

Further the court also expanded its interpretation of section 2(d) by identifying and defining the full scope of associational activities which are protected under that provision, stating:

[66] *In summary, s. 2 (d), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities – with the right to collectively bargain of course falling under this third class of protected activities.*

Rather than applying its substantial interference test strictly however, which would require an examination of the importance of the matter affected to the process of collective bargaining, the capacity of the union members to come together and pursue collective goals in concert, and the impact on the collective right to good faith negotiation and consultation, the court instead focused on what it considers to be essential components of a meaningful collective bargaining process, holding that such a process is one which provides employees with a degree of choice and autonomy sufficient to enable them to determine and pursue their collective interests, and that interference with such a component constitutes a breach of section 2(d) .

Specifically the majority stated (at para 81):

[81] *We have concluded that s. 2 (d) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The government therefore cannot enact laws or impose a labour relations process that substantially interferes with that right. This raises the question — what are the features essential to a meaningful process of collective bargaining under s. 2 (d)? In this section, we conclude that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.*

[82] *Collective bargaining constitutes a fundamental aspect of Canadian society which “enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work” (Health Services, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.*

In light of the above court found that the RCMP bargaining regime failed to provide RCMP Officers with sufficient choice and autonomy with respect to their representatives to allow them to meaningfully determine and pursue their collective interests and as such, violated section 2(d) of the Charter. The court also found that this violation was not justified under section 1 of the Charter, finding no rational connection between the legislation and the objectives of the government in creating it which were, inter alia, to ensure the neutrality, stability and reliability of the RCMP.

Departure from the Fraser Decision

The decision in the *Mounted Police Association* represents a reaffirmation of the rights interpretation and analysis in *BC Health Services*. This was significant because the court had departed from this line of reasoning in its decision *Ontario (Attorney General) v. Fraser*³² which came out after *BC Health Services*. In *Fraser* the court distanced itself from the substantial interference test holding that a section 2(d) violation would only be found if the absence or weakness of a particular bargaining regime made it "effectively impossible" for the right-holders to associate for any purposes. Had this threshold been maintained, the bargaining regime at issue in the *Mount Police Association* decision would likely have passed muster.

³² 2011 SCC 20

For its part the Supreme Court in *Mounted Police Association* after reaffirming its holdings in *BC Health Services* did its best to explain its decision in *Fraser* so as to ‘fit’ its reasoning in that decision into the same ‘mould’ for interpreting section 2(d) it created in *BC Health Services*. Its attempt to do so however was, in the author’s view, not convincing. On this the court stated:

[74] *The reference in Fraser to the effective impossibility of achieving workplace goals must be understood with reference to the legislative schemes at issue. For instance, in discussing Dunmore, the majority in Fraser explained that Bastarache J. had “concluded that the absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible and therefore constituted a substantial interference with the right to associate guaranteed by [s. 2\(d\)](#) of the [Charter](#)” (para. 31 (emphasis added)). Similarly, the majority in Fraser explained that the legislation impugned in Health Services — legislation that unilaterally nullified terms concerning seniority and lay-offs in existing collective agreements and precluded future bargaining over those matters — “rendered the meaningful pursuit of [workplace] goals impossible and effectively nullified the right to associate of its employees” (para. 38).*

[75] *These passages from Fraser and Health Services use terms like “impossible” and “effectively nullified” to describe the effect of legislative schemes (including legislative exclusions), not the legal test for infringement of [s. 2\(d\)](#). Explaining the reasoning in Dunmore, the majority in Fraser states that: “The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association . . .” (para. 33 (emphasis in original)). In Fraser, the majority further explains that there cannot “be any doubt that legislation (or the absence of a legislative framework) that*

makes achievement” of collective workplace goals “substantially impossible, constitutes a limit on the exercise of freedom of association” (para. 32 (emphasis added)). It is clear that such passages do not adopt “substantial impossibility” as the threshold test for finding an infringement of freedom of association. Rather, the passages demonstrate that the majority in Fraser adopts substantial interference as the legal test for infringement of freedom of association.

Rather than take this explanation at face value, the *Fraser* decision, in the author’s eyes, should be viewed as a step backward by a society that was struggling at the time to digest the implications flowing from the court’s decision in to recognize associational rights and the right to collectively bargain *BC Health Services*.

The fact is that the court, in *Fraser*, referred to the standard of impossibility at least a dozen times in its discussion of the threshold level of interference required for finding breaches of section 2(d). Indeed the court even made statements which support such a conclusion including:

*In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.*³³

This “effective impossibility test” – so called - was also applied by the Court of Appeal of Ontario in *Mounted Police Association of Ontario v. Canada*³⁴ – the appeal of which gave rise to the *Mounted Police* decision herein at issue. Here the court of appeal stated:

³³see *Fraser* at para 46 – this “effective impossibility test” – so called - was also applied by the Court of Appeal of Ontario in *Mounted Police Association of Ontario v. Canada*, 2012 ONCA 363 (CanLII) based on the decision in *Fraser*. Here the court stated:

³⁴ 2012 ONCA 363 (CanLII)

*Therefore, as I understand the Fraser majority's discussion of collective bargaining as a derivative constitutional right, a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals.*³⁵

This is not to say that the *Fraser* decision is now entirely moot. Some aspects of this decision remain good law and continue to contribute to our understanding of the components of a meaningful bargaining process. For example the majority in the Saskatchewan Labour decision (discussed below) reaffirmed the basic conclusions set out in the *Fraser*; that "freedom of association" encompasses a right to collectively bargain which includes the right to make representations to one's employer and to have those representations considered in good faith. Indeed the court stated (at paras 29.) of that decision:

...that a meaningful process under s. 2 (d) must include, at a minimum, employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.

Further, *Fraser* continues to stand for the proposition that section 2(d) does not protect one's right to a particular bargaining regime or labour relations model.

The Meredith Decision

³⁵ Ibid at para. 111

In, *Meredith v. Canada (Attorney General)*³⁶, released on the same date as the above decision, the Supreme Court addressed the extent to which the outcomes of a collective bargaining process may receive Charter protection under section 2(d).

In *Meredith* the court was concerned with whether the results of the RCMP bargaining process described above were protected by section 2(d) of the Charter. Here, pay increases for RCMP members which had been recommended by the Pay Council and approved by the Treasury Board Secretariat were scaled back by wage restraint legislation enacted by the federal government in response to the financial crisis of the late 2000's.

The court held that the legislation and its resulting impact on wages did not violate section 2(d) of the Charter. Here the court was influenced by the more limited impact of the legislation, noting that the salaries were still permitted to increase at the same rate as had been achieved by other federal trade unions in bargaining, that the legislation did not target a specific subsector of federal employees, and that some aspects of the bargaining process were permitted to proceed. Here the majority stated (at para. 28):

...the level at which the ERA [the wage restraint legislation] capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the ERA did not preclude consultation on other compensation-related issues, either in the past or the future.

³⁶ 2015 SCC 2

[29] *Furthermore, the ERA did not prevent the consultation process from moving forward. Most significantly in the case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of “transformation[al] initiatives” within the RCMP. The record indicates that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service — representing a 50% increase — and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. Actual outcomes are not determinative of a s. 2 (d) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the ERA had a minor impact on the appellants’ associational activity.*

[30] *Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place. The ERA and the government’s course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members.*

Ultimately, given its limited impact, the court held that the impugned legislation did not amount to a substantial interference with the collective bargaining process.

The Saskatchewan Federation of Labour Decision

In *Saskatchewan Federation of Labour v. Saskatchewan*³⁷, released by the Court only days after the above two decisions, the government of Saskatchewan had enacted legislation which provided the government and public sector employers with a mechanism to deem services as “essential”. As a consequence, workers who provided these services were prohibited from going

³⁷ 2015 SCC 4

on strike. Workers deemed essential were also given no alternative mechanisms for resolving a bargaining impasse.

In addition, the government of Saskatchewan had also enacted legislation which changed the certification process for unions by; increasing the minimum card support required for a certification application from 25% to 45%; requiring membership cards to have been signed within the previous three months, as opposed to six months; and, requiring a certification vote in all cases, but without specifying a time frame in which a vote must be held. This legislation was also challenged.

In an unprecedented decision, which relied heavily on developments in international law, the Court found the right to strike right to be an essential component of a meaningful collective bargaining process and therefore protected by section 2(d) of the Charter.

Here the court stated (at paras. 3 and 78):

[3] ... The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

[78] The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The PSESA demonstrably meets this threshold because it prevents designated employees from engaging in any work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the Charter.

In reaching this conclusion, the court also relied heavily on developments in international law, relying on, inter alia, Canada's international human rights obligations³⁸; its obligations as a signatory to various international instruments which explicitly protect the right to strike³⁹; its commitments under ILO Convention (No. 87)⁴⁰; as well as the adoption of similar reasoning around the world⁴¹.

The court then moved to its section 1 analysis, here the court held that the government's prohibition on strike could not be justified for two reasons:

First, it applied in respect of all services provided by government employees not simply those services which it actually deemed to be essential.

Second, the legislation failed to provide access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration – which the court held to be a requirement of any legislation which substantially impairs the right to strike.

Specifically the court said:

[25] *Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful*

³⁸ The court citing ILO Convention (No. 87) concerning freedom of association and protection of the right to organize, 68 U.N.T.S. 17 (1948), to which Canada is a signatory, as the foundation for its commitments in this regard. Here the court states that this instrument "mandates protecting the right to strike"

³⁹ Specifically the court cites Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, *Charter of the Organization of American States*, Can. T.S. 1990 No. 23. Article 45(c), and *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (ICCPR), article 22.

⁴⁰ The court cites Canada's being a party to *Convention (No. 87) concerning freedom of association and protection of the right to organize*, ratified in 1972 – which though not binding per se has been interpreted to include an affirmation that the right to strike is a fundamental right.

⁴¹ Citing jurisprudence acknowledging the right to strike at the European Court of Human Rights, in Germany and Israel and the protections found for same in the constitutions of France, Spain, Portugal, Italy and South Africa.

dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the Charter.

Obviously the ramifications of this decision are huge; potentially rendering unconstitutional all back to work legislation and essential service legislation currently enacted where such legislation prohibits the right strike; or at least requiring a re-evaluation of that legislation to ensure it contains adequate provisions for resolving bargaining impasses and can otherwise be justified under section 1.

Substantial Interference Test Revisited and the Rights Recognized in Canadian Jurisprudence under section 2(d)

Noteworthy in the above trilogy of case law is the fact that the Supreme court, in its application of the substantial interference test, focused more on identifying components of a meaningful bargaining process, and determining whether such a component was restricted by the impugned legislation, than it did applying the two part analysis for determining substantial interference it set out in *BC Health Services*.

To this end the author notes that those components of a meaningful bargaining process that have been identified as protected by section 2(d) in Supreme Court jurisprudence thus far include:

- the rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith
- The right of employees to choose their union

- The right to be represented by a union that is sufficiently independent so as to enable employees to determine their collective interests and meaningfully pursue them
- The right to strike.
- The right to have access to a bargaining regime, particularly where the exclusion from a regime renders it impossible for groups to associate for purposes of making representations to their employer.⁴² - this last component having been identified by the Supreme Court in its decision in *Dunmore*; a decision which pre dates *BC Health Services* wherein agricultural workers challenged laws which excluded them from being able to bargain collectively under any existing regimes.

As well worth noting is one aspect of labour relations which has been held not to garner protection under section 2(d). That being:

- the right to a particular bargaining regime;

As well there is one component of labour relations which may garner protection depending on the surrounding facts. That being;

- the right to a specific bargaining outcome.

The Right to a Particular Bargaining Regime

⁴² See *Dunmore v. Canada (Attorney General)* 2001 SCC 94

In *Fraser*⁴³ the Supreme Court was asked to determine whether the collective bargaining regime that was created for agricultural workers, after their decision in *Dunmore*, was adequate given that it was different from other traditional bargaining regimes and did not strictly adopt all of the aspects of the Wagner Model of industrial relations.

Here the court found that the labour relations regime created for agricultural workers was indeed adequate, that the Wagner Model is not constitutionally protected, and accordingly, that there is no right to a particular bargaining regime⁴⁴

The Right to a Particular Outcome

The *Fraser* decision also affirmed the proposition first stated in *BC Health Services* - that it is the process of collective bargaining which is protected under section 2(d), not the outcome. This interpretation was also applied in *Meredith*, noted above, where the court found that legislation which altered wage agreements did not infringe of section 2(d).

The right of governments to alter bargaining outcomes is limited however. In *BC Health Services* the court implied that it was only acceptable to unilaterally alter or restrict rights where the substance of those rights is replaced by similar protections. That is, the court found that the loss of a requirement that the employer consider enumerated criteria in making hiring decisions, a guarantee that temporary assignments would not exceed four months, some protections for seniority, and a right to refuse a transfer if the employee has other employment options with the original employer under the collective agreement; was acceptable because a Regulation was enacted which provided the substance of the central aspects of those rights - notably, the regulation provided employees with a right to refuse

⁴³ *Ontario (Attorney General) v. Fraser* 2011 SCC 20

⁴⁴ See *Fraser*, *Meredith*, and *BC Teachers* at footnote...

being transferred outside of their geographic location without their consent, and a right to reasonable relocation expenses.

However, where rights were eliminated altogether, such as an employee's right to consultation and notice, contracting out limitations, and layoff and bumping rights - this was deemed to be substantial interference in the collective bargaining process.

The court did take time to point out however that not all negotiated rights are equal. Specifically the court stated:

96 ...By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2 (d) right of freedom of association.

Interestingly however *BC Health Services* did not deal with alteration to monetary rights such as wage agreements – as was the case in *Meredith*.

Meredith questioned the validity of legislation which unilaterally imposed modest wage increases for all federal sector employees - reducing larger wage increases which had already been negotiated by the RCMP workers. As noted above, the court found that such actions did not constitute a violation of 2(d). The reasoning however is difficult to reconcile with that in *BC Health Services* – the court in *Meredith* basing its decision on the fact that the legislation's impact was limited since salaries were still permitted to increase at the same rate as had been achieved by other federal trade unions in bargaining, the legislation did not target a specific subsector of federal employees, and since some aspects of the bargaining process were permitted to proceed after the legislation was passed – this last element being seen as critical to allowing a

meaningful bargaining process to continue to exist. In fact here the court relied heavily on the fact that meaningful benefits were able to be negotiated after the enactment of the legislation.

Clearly the court is trying to distinguish between unilateral impositions which, while interfering, leave a meaningful process largely intact, from those which do not. In both BC Health Services and Meredith, impositions which left something on the table for workers either substantive or procedural, passed constitutional muster.

Hence while the most accurate statement of the law may be that while there is no right to a specific bargaining outcome – outcomes themselves are indeed afforded significant protection.

Chapter 4: Constitutionality of Fixing Outcomes

The PSFA was enacted in response to the failure of the PDT process in 2012. Specifically, it sought to achieve what negotiating could not; an outcome for the province which assured it would achieve its desired outcome.

One aspect of this legislation which significantly contributed to this was that it set specific negotiating restrictions for school boards, allowing them only to bargain outcomes identical to the terms of the MOUs that the province had signed with certain unions following the PDT talks⁴⁵.

Further in this regard, the legislation also restricted school boards from implementing terms and conditions during bargaining which were inconsistent with those MOUs. That is, it unilaterally imposed the terms of the MOUs while bargaining was ongoing, modifying existing agreements and nullifying the statutory freeze provisions of the Labour Relations Act which would have otherwise governed⁴⁶.

The first significant aspect of the legislation was thus that it effectively fixed the bargaining process so as to effect an immediate and predetermined outcome.

Having regard for the jurisprudence noted above on Section 2(d), we can put together a fairly clear framework for analysing the constitutionality of each of these aspects of the PSFA.

⁴⁵ See Putting Student First Act, 2012, s. 4. In a few specific instances, the PSFA only required School Boards negotiate agreements with unions that were “substantially similar” to MOUs which had been signed. For the vast majority of unions however, School Boards were required to negotiate agreements that were “substantively identical” to the MOU between the government and OECTA. This paper is concerned with this latter set of negotiations. Accordingly, the differences between these two phrases “substantively identical” and “substantively similar” and their significance from a constitutional perspective, is beyond the scope of this paper

⁴⁶ Ibid s. 5. The statutory freeze provisions refers to section 86 in the Ontario Labour Relations Act, 1995 which provide that existing contractual terms cannot be altered during bargaining. These provisions however are trumped by section 5 of the PSFA noted above by virtue of section 13(1).

As stated in the *Mounted Police Association* decision, the test for determining whether a bargaining regime violates section 2(d) of the Charter is whether it results in "substantial interference with the right to a meaningful process of collective bargaining".

As noted above, components which receive protection as part of a meaningful bargaining thus far identified in jurisprudence include; • the rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith; the right of employees to choose their union; the right to be represented by a union that is sufficiently independent so as to enable employees to determine their collective interests and meaningfully pursue them; the right to strike; and, the right to have access to a bargaining regime, particularly where such a regime exists for certain groups but not others.

Additionally, the right a specific bargaining outcome, as we saw in *BC Health Services*, may also be considered essential component bargaining depending on the surrounding facts having regard for things like the urgency of the situation which necessitated the alteration of bargaining outcomes and the extent to which they were interfered with.

Hence we can determine the constitutionality of fixing bargaining outcomes by determining whether or not, this aspect of the legislation substantially interfered with any of these components.

As noted above the PSFA restricted school boards such that they could only bargain terms which were identical to the agreements which were signed between the government and certain education sector unions.⁴⁷

The legislation also prescribed terms and conditions of employment between collective agreements while negotiations were still ongoing.⁴⁸

Here the considerations of choice, independence, and the right to strike as discussed in the *Mounted Police Association* and *Saskatchewan Federation of Labour* decisions as components of a meaningful bargaining process are not at issue. The right to have representations considered in good faith however, as a component of meaningful negotiations is without doubt impacted by this legislation⁴⁹ as is the right to a specific bargaining outcome.

In *BC Health Services* the court defined the duty to bargain in good faith as follows:

100 *A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process (Carter et al., at p. 301). As explained by Adams:*

The failure to meet at all is, of course, a breach of the duty. A refusal to meet unless certain procedural preconditions are met is also a breach of the duty.

...

A failure to make the commitment of time and preparation required to attempt to conclude an agreement is a failure to make reasonable efforts. [pp.10-101 and 10-106]

⁴⁷ See PFSA at Appendix B section 4. The PSFA actually required some parties the negotiate agreement that were “substantially similar” to certain MOUs while other parties were required to negotiated an agreement that was “substantively identical” to the MOUs. Again it is the latter set which we are concerned with here. Hence, the differences between these two phrases are beyond the scope of this paper.

⁴⁸ See PFSA at Appendix B section 5

⁴⁹ *Saskatchewan Labour* supra note 31, at para. 39.

101 *The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract (Adams, at p. 10-107; Carrothers, Palmer and Rayner, at p. 453). As Cory J. said in Royal Oak Mines Inc. v. Canada (Labour Relations Board), [1996] 1 S.C.R. 369:*

In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions. [para. 41]

...

103 *The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions (Gagnon, LeBel and Verge, at pp. 499-500). Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a “tough position in the hope and expectation of being able to force the other side to agree to one’s terms” (Canadian Union of Public Employees v. Nova Scotia Labour Relations Board, [1983] 2 S.C.R. 311, at p. 341).*

...

107 *In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record.*

Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.

According to *BC Health Services* then, one cannot look to the legislation alone to determine breaches of good faith bargaining, rather the consultation process which preceded it must be scrutinized as well, having regard for the urgency of the situation.

At face value, the PSFA prevented employers from being able to consider any representations made by unions other than those which matched the governments prescribed outcomes. Further, by unilaterally altering working conditions while bargaining was still going (to align them with their desired outcomes) – they made the bargaining process effectively moot.

As noted in Chapter 2 however, the government took the lead in the PDT consultation process with unions prior to enacting the PSFA, and as part of this process, they presented parameters for altering collective agreements and then entered into negotiations with unions in respect of those parameters – facts which if true would mitigate against a finding of bad faith bargaining.

It was my understanding however that during the 2012 PDT process certain groups declined to participate altogether, as the process was voluntary one, while other groups stuck around only very briefly.

Further, it was my impression that many school boards did not even attempt bargaining directly with unions prior to the conclusion of the PDT process and the passage of the PFSA.

If this is true, and consultation prior to the enactment of the PSFA either did not occur, or barely occurred, there is likely an argument that the duty consult in good faith, as referred to in *BC Health Services*, was not met and that as a result there was indeed a violation of 2(d).

That notwithstanding, it is difficult to ignore the fact that certain unions at the time were not only able to reach agreements with government, but also achieved modest compromises from the

government in respect of their initial proposals – albeit without their employer - demonstrating that at least for some, meaningful negotiations were possible.

Further it is worth noting that the government's actions were also well within the normal boundaries of labour relations. After all, in the normal course, an employer is under no obligation to compromise on their initial bargaining position - hence how can requiring them to do so under the PSFA be considered bad faith? Similarly, unilaterally altering working conditions is also acceptable in labour relations, under certain circumstance, as it is considered the counterpart to the right strike.⁵⁰

It would seem clear then that meaningful bargaining was possible for at least some groups. Whether or not meaningful, good faith bargaining occurred between every education sector union and the government prior to the enactments of the PSFA, is not at all certain. For those who can show good faith bargaining did not occur, the PSFA likely constituted a violation of section 2(d).

What is certain however is that previously bargained outcomes were modified by the PSFA during the course of bargaining so as to effect an immediate result for the province –raising an additional question regarding the legislation's compliance with section 2(d).

While the court has acknowledged in several decisions, at least rhetorically, that there is no right to a particular bargaining outcome, the fact is the court has found that certain outcomes are protected and can only be changed when the rights lost as a result of legislative modifications are replaced by similar protections elsewhere (*BC Health Services*), or where the modifications are

⁵⁰ see *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 where the Supreme Court held that once an agreement has expired, the duty to bargain is exhausted, and any statutory freeze periods have run out, there is a legal void in which the employer can change working conditions.

limited (*Meredith*) and still permit modest increases, do not target a specific subsector, and allow bargaining in some fashion to continue.

Under the PSFA however, the modifications to existing agreements included; eliminating employee sick banks, retirement gratuities, and post-retirement benefits. In terms of replacing these rights – sick banks were replaced by a new sick leave and short term disability plan which did provide employees with significant protections in the event of illness. Retirement gratuities and post-retirement benefits however were not replaced.

Retirement gratuities were a benefit acquired by workers as an incentive against their taking sick days. Essentially workers who did not use their sick days could have them bought back by the employer upon their retirement – albeit at a reduced rate. This benefit was significant for two reasons. First it was a very effective at reducing sick time usage. Second, it was very valuable because there were many workers who built up large banks of sick days, worth thousands of dollars in retirement gratuities.

Post-retirement benefits were equally valuable, as they afforded retiring workers security against health care costs associated with illness and aging such as the costs of prescription drugs, dental, eye glasses, and various paramedical services.

These changes were also directed at the education sector exclusively and were not representative of agreements made elsewhere in the public sector at the time.

Hence, applying the jurisprudence noted above, it is likely that the modifications imposed by the PSFA, particularly to retirement gratuities and post-retirement benefits (since they were not replaced), did violate workers' rights as was the case in *BC Health Services*.

If indeed violations of section 2(d) can be established on the basis of bad faith bargaining and outcome modification, then the question becomes whether such a violations can be justified in a free and democratic society pursuant to section 1 of the Charter which, as noted above, requires

an examination of whether the purpose behind the legislation is pressing and substantial and proportional to the means by which the objective is furthered.

The PSFA includes an extensive preamble wherein the government sets out its objects; being to stabilize education funding to protect the government's initiatives for students and to preserve jobs. The government also went out of its way to state in the preamble that measures being adopted are temporary and exceptional⁵¹.

This preamble establishes with little doubt that its objects were pressing and substantial⁵².

The second element of a section 1 analysis, which examines the means by which the government's objective is furthered, is where, in the author's view, this aspect of the legislation fails. This is because the PSFA does not minimally impair the right being violated.

As noted above, the Act prescribes specific bargaining outcomes for unions and school boards and modifies existing agreements accordingly in order for the government to achieve its fiscal and service objectives.

With respect to prescribing bargaining outcomes, the government did not need to go this far. It would have been more reasonable for the government to set real parameters for the sector such as budgetary and/or service level parameters, and then allow the parties to negotiate within those parameters. For example, rather than dictating a wage freeze and the elimination of sick banks, the government could have simply set out its goal of no spending increases and the elimination

⁵¹ See PSFA at Appendix B Preamble

⁵² Indeed, in most *Charter* cases this aspect of the test has been easily satisfied because, as Peter Hogg notes, "it has been easy to persuade the Court that, when the Parliament or Legislature acts in derogation of individual rights, it is doing so to further values that are acceptable in a free and democratic society, to satisfy concerns that are pressing and substantial and to realize collective goals of fundamental importance". See Peter Hogg, *Constitutional Law of Canada*, 2014 Student Edition. (Scarborough, Ontario: Thomson Canada Limited) at section 38.9c) pp. 38-23 (2nd paragraph).

of its unfunded liabilities and then let the parties try to negotiate something within that framework.

With respect to the modification of terms and conditions of employment – much will depend on the record of the government in terms of whether real alternatives were actually considered prior to legislating, as was the case in *BC Health Services*. My own impression at the bargaining table however was that alternatives were never properly considered by either the employer or the government – including proposals which would have allowed the employer/crown to achieve its goals of eliminating unfunded liabilities - such proposals being refused with little to no deliberation, and without any discussion between the parties regarding their positions and the interests which fuelled them. If this was indeed true, the legislation likely would likely fail on this basis as well.

Other Considerations

Another important consideration in terms of the constitutionality of this aspect of the PSFA is that it did not limit its interference to bargaining outcomes, which we know from the Meredith decision may be acceptable in some circumstances. Rather, the PSFA interfered with the bargaining process itself by dictating acceptable outcomes before bargaining could finish, and by unilaterally altering the status quo during the bargaining process to meet its objectives regardless of what bargaining achieved. Had the PSFA interfered with outcomes only, once bargaining was complete (as they did in Meredith), and then only to an extent that could be justified, the legislation may have been more likely to pass constitutional muster (as it did in Meredith).

However, we note as well that the government continued negotiating with unions even after the legislation was passed. In *Meredith*, the opportunity for post legislation consultation contributed

to a finding that there was meaningful bargaining process notwithstanding the imposition of the impugned legislation. Accordingly, it is possible that the post legislation consultation that occurred with unions following the PSFA would contribute to the argument that this aspect of the legislation was constitutionally sound⁵³.

⁵³ This however raises an additional question, that is – is it acceptable for governments to unilaterally impose legislation which is unconstitutional if suits their needs as long as they continue to consult? The answer cannot be yes. This issue however is beyond the scope of this paper.

Chapter 5: Constitutionality of Orders In Council and their Impact on the Right to Strike

A second aspect of the PSFA which assisted the government at achieving its fiscal goals was the imposition of collective agreements across the education sector.

As noted in Chapter 2, in January 2013, Ontario's governor in council issued two orders pursuant to the PSFA⁵⁴. Collectively these orders imposed collective agreements on all school boards and bargaining units in Ontario – agreements which were made to be consistent with the MOUs negotiated between the government and some unions following the end of the 2012 PDT process.

These agreements were also deemed to contain a no strike clause pursuant to the Ontario Labour Relations Act. Hence these orders not only imposed modifications to previous terms and conditions of employment, they also effectively nullified the unions' right to strike.⁵⁵

As discussed in the previous chapter, the court in *BC Health Services* held that unilateral modifications to important terms and conditions of employment without replacing the protections they afforded constituted a violation section 2(d). In *Saskatchewan Labour* the court recognized that the right to strike was an essential component of a meaningful collective bargaining process, and that its prohibition constitutes a prima facie violation section 2(d) of the Charter.

The Orders in Council which imposed collective agreements across the sector modified and eliminated previously negotiated terms and conditions of employment. They also nullified employee's right to strike.

⁵⁴ A copy of these orders is attached at Appendix A

⁵⁵ Section 46 of the *Ontario Labour Relations Act, 1995* deems all collective agreements to contain a no strike clause for the duration of the agreement.

In terms of the modifications to terms and conditions of employment by the Orders in Council the analysis and result is the same as that in the previous chapter and need not be repeated here.

In terms of the right to strike, the Orders in Council had the same effect as the impugned legislation in the *Saskatchewan Labour* decision; it took away the right to strike - the denial in that case constituting a substantial interference with a meaningful collective bargaining process and therefore a violation of section 2(d)⁵⁶.

It is also unlikely that this violation can be justified under section 1 as the legislation does not provide for an alternative dispute resolution mechanism to resolve a bargaining impasse, which according to *Saskatchewan Labour*, is required to justify impairment of this right.

Accordingly one can only conclude that the Orders in Council made under the authority of the PSFA are unconstitutional on this basis.

Important to note here is the fact that this conclusion might have been different prior to the release of the recent trilogy, when the PSFA was actually in force, as at that time the right to strike was not recognized as an essential component of the freedom to associate. In fact, the applicable test at the time for determining whether or not 2(d) was violated had a much higher threshold – requiring that it be effectively impossible for right holders to associate for any reason in order for a breach of 2(d) to be found. This higher threshold having been adopted by court in

⁵⁶ It is trite law that a statute can be rendered unconstitutional either by its purpose or its effect. Indeed in *In R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. observed at p. 331:

In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation... Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity.

the *Fraser* decision, prior to their reaffirmation of the test set out in *BC Health Services*, in the trilogy of decisions which followed.

Chapter 6: The School Boards Collective Bargaining Act and the constitutionality of designating certain unions to represent certain employee groups at the central bargaining table thereunder

The SBCBA, enacted in 2014, created a two tier collective bargaining regime in Ontario's education sector. As noted above, this regime was created to address the inadequacies of the PDT process and to carve out a role for government within the bargaining process itself. Recall that the PDT process was voluntary and that bargaining rights remained between the unions and school boards only. As a result, the agreements which resulted from that process were not binding until the parties incorporated them into their collective agreements in the context of their local bargaining.

The SBCBA sought to remedy this by formalizing central negotiations and the Government's role within that process such that the resulting agreements would require its approval and be binding - forming part of the collective agreement.

This legislation was developed after months of consultation with unions, school boards, and education stakeholders.

The SBCBA came in to force in August 2014 at which time it became immediately apparent that there were a few features of the legislation which were worthy of constitutional scrutiny.

First, in respect of teachers, it designates which unions could represent these workers and prohibits other unions from seeking such status.

Further it prescribes those unions to be central bargaining agents for their members – extending to them the right and the obligation to participate in central bargaining on behalf of their

members. All other groups representing employees wishing to participate in central bargaining would have to apply to the Minister of Education for a seat at the central table and to receive approval they would have to meet certain criteria including, inter alia, that they represented at least 15 bargaining units.

Finally the SBCBA prohibits strikes over issues related to determining the scope of central vs. local bargaining – which the legislation further prescribes to be the threshold issue to be negotiated at each table before specific terms and conditions of employment can be discussed.

Constitutionality of designating which unions may represent which workers

As noted above the SBCBA deems certain unions to represent all public and catholic school teachers in Ontario. The Act further prohibits any other union from representing teachers. Specifically section 10 of that legislation designates; (i) L'Association des enseignantes et des enseignants franco-ontariens as the bargaining agent for teachers at a french language district school board; (ii) Elementary Teachers Federation of Ontario as the designated bargaining agent for elementary teachers at a public district school board, boards established under Section 68 of the Education Act, boards of a district school area, and boards of a Protestant separate school; (iii) Ontario English Catholic Teachers' Association as the designated bargaining agent for teachers at an English language separate district school board, and at a Roman Catholic school authority; and, (iv) Ontario Secondary School Teacher's Federation as the designated bargaining agent for secondary teachers at a public district school board, boards established under Section 68 of the Education Act, boards established under Section 67 of the Education Act boards of a district school area, and teachers' bargaining unit at the Provincial Schools. The Act further deems each

bargaining agent to be certified under the Ontario Labour Relations Act and bars applications to displace or decertify them.⁵⁷

The act of designating one or more entity as the representative of all Teachers and then restricting access to the bargaining to process to that entity also occurred in the *Mounted Police Association* decision noted above. You'll recall that in that case the Federal Government designated a Pay Council as the entity which could bargain on behalf of the RCMP. In that case the Supreme Court found that these actions constituted a violation of 2(d) as it did not furnish employees with a sufficient degree of choice and independence to enable them to determine and pursue their collective interests – two essential components of a meaningful bargaining process.

The question then is, whether by restricting the right of teachers to determine who may represent them similarly violates section 2(d).

As a starting point, I note that in contrast to the facts in the *Mounted Police Association* decision, the unions prescribed under SBCBA to represent teachers have already obtained the right to represent those workers in accordance with the Ontario Labour Relations Act and the Education Act. Further, there does not appear to be any question as to the independence of those unions vis a vis management, or the government for that matter –which is to say that many of the facts present in the case at hand are easily distinguished from those in the *Mounted Police Association*. These facts would therefore lend themselves to a conclusion that the designation of unions under the SBCBA does not outright violate the constitution.

The question nevertheless remains, what would happen if these unions became less independent or no longer represented the interests of the members they purported to represent? For example,

⁵⁷ See School Boards Collective Bargaining Act S.O. 2014 C.5 at section 10(1) through 10(8)

what if teachers sought to be represented by a new union? Or if teachers sought to decertify? I expect were this to come to pass the legislation would be found in violation of 2(d).

Indeed, in the *Mounted Police Association* decision the court states:

*Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association.*⁵⁸

Here the court states that government cannot interfere with employee choice, including where that choice leads to the displacement of an existing association. That is, the court explicitly extends section 2(d) rights to protect the right of employees not only to choose their association, but also to displace an existing one. This certainly supports the above conclusion, that this aspect of the SBCBA is unconstitutional.

In contrast to this position however, the court in this same decisions also provides:

*Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2 (d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance*⁵⁹.

On its face, this statement appears to endorse the opposite view of the courts position noted above and does not really follow from their earlier analysis. That is, it appears to support the

⁵⁸ MPAO at para. 98

⁵⁹ Ibid at 97.

contention that governments can in fact designate collective bargaining agents to represent certain employee groups as is the case under the SBCBA.

The court however goes on to qualify its statement saying that such designation would pass constitutional muster only where “the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance”.

Arguably then, in light of the last two requirements, designation could only continue to be constitutionally acceptable as long as workers support the association. That is, where an association that was designated to represent a group of workers was then rejected by them, that association would no longer be under their control nor would it be providing them with choice over their workplace goals (particularly if their goal was to join a different association or even decertify)⁶⁰.

This reconciles the courts latter statement then with the former; that governments cannot interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. Hence our initial conclusion above; that the designation of association under the SBCBA likely violates sections 2(d).

Should the degree of choice afforded to teachers under the SBCBA be found to be insufficient and therefore violate section 2(d), the question would remain whether such a violation would be saved under section 1. As noted in Chapter 3, such a determination requiring an analysis as to whether the objective of the impugned legislation is pressing and substantial, and that the means by which the objective is furthered proportional to the objectives of the legislation.

⁶⁰ The right to disassociate also raises the issue of an employee’s right not to join a union.

In the author's view, the legislation would fail to pass section 1 scrutiny. Any conceivable objective of this legislation; be it to establish a two tier bargaining regime, to create efficiency, to create a place for the government at the bargaining table, and the means by which the objective is achieved (i.e. giving unions who already have the right represent these workers, the exclusive right to do so) do not appear to be rationally connected because these means in no way further any of the objectives identified. In fact, there does not appear to be any compelling reason as to why any of these objectives could not be achieved without such designations.

Accordingly, this aspect of the legislation would not be justified under section 1 for lack of rational connection to its objectives and thus violates the Charter.

Chapter 7: Constitutionality of requiring some unions to apply to participate in central bargaining

As stated above, the SBCBA requires non teaching groups to meet certain criteria in order to be eligible to participate in central bargaining. The legislation further provides that groups who do not apply for designation as a central bargaining agent, or who do not meet the criteria set out in the legislation, continue to bargain under the regime set out in the *Ontario Labour Relations Act 1995*.

Specifically, the legislation provides:

12. (1) Collective bargaining for a collective agreement between a school board and a bargaining agent may include both central bargaining and local bargaining.

Mandatory central bargaining

(2) Central bargaining is mandatory if a central table is established for specified school boards and specified bargaining units.

Local bargaining

(3) In any other case, collective bargaining is undertaken through local bargaining alone.

Mandatory designation of trade union

20. (1) If all of the following conditions are met, the Minister shall, by regulation, designate a trade union as the employee bargaining agency, for a specified round of collective bargaining, for the employees in specified bargaining units that are not teachers' bargaining units:

- 1. The trade union must request the designation under this subsection.*
- 2. The trade union must specify the bargaining units for which the designation is requested.*
- 3. The designation must be requested for at least 15 specified bargaining units.*
- 4. The specified bargaining units for which the designation is requested must comprise,*

i. at least two-thirds of the bargaining units (that are not teachers' bargaining units) for which the trade union and its affiliated local trade unions are the bargaining agents, and

ii. at least two-thirds of the employees in all of the bargaining units (that are not teachers' bargaining units) for which the trade union and its affiliated local trade unions are the bargaining agents.

5. The Minister is satisfied that the trade union and its affiliated local trade unions are the bargaining agents for the specified bargaining units.

Permitted designation of entity

(2) If both of the following conditions are met, the Minister may, by regulation, designate an entity as the employee bargaining agency, for a specified round of collective bargaining, for the employees in specified bargaining units that are not teachers' bargaining units:

1. The Minister is satisfied that bargaining agents for all of the bargaining units to be represented at the applicable central table have vested in the entity appropriate authority enabling it to discharge the responsibilities of an employee bargaining agency.

2. Upon being designated, the entity would represent the employees in at least 15 bargaining units at the applicable central table.

Same, council

(3) For greater certainty, a council of trade unions may be designated as the employee bargaining agency for a particular central table.

Restriction

(4) An employee bargaining agency cannot be designated to represent employees in bargaining units that are established after the designation takes effect.⁶¹

It is important to note that in the above language a union with 15 or more bargaining units shall be designated by right as a central bargaining agent by the government for a particular round of bargaining where so requested. This means they will be granted their own central bargaining table by right. In contrast however, other entities which represent at least 15 bargaining units are

⁶¹ SBCBA section 20

not guaranteed designation or their own bargaining table. Rather, the Minister has discretion in granting such a designation.

The criteria which the Minister may consider is not prescribed - which is to say the Minister can apparently consider any criteria they wish when making such a decision.

In 2014, two such groups did apply for designation as central bargaining agents and were successful in this regard. Both were councils of unions representing unions with no less than 15 bargaining units in the education sector – one of which I worked with directly. During the designation process it was our understanding that the Minister was concerned primarily with matters of efficiency. That is the Minister’s primary concern was the possibility of creating too many central tables; the Minister having at one point sought to combine these two groups into one larger table.

One question with respect to constitutionality that is raised by this legislation then, is whether or not it is permissible under the SBCBA to deny certain groups access to the central bargaining while requiring it for others?

Worth noting at the outset of this analysis is the fact that unions whose participation in central bargaining is automatic may have an advantage over unions who have to apply. This is because a central table is the only forum which brings unions face to face with the government, which controls funding, policy and other matters on a provincial scale.

Our starting point in terms of determining the constitutionality of these provisions is the decision of the Supreme in the *Dunmore* noted above, where the court stated that while 2(d) protects the

right to a meaningful process for collective bargaining it does not guarantee access to a particular regime.

Thus according to *Dunmore*, a union would have no right to participate in central negotiations under the SBCBA provided they have a reasonable alternative regime under which to bargain. Hence it would seem, at least initially, that the fractured⁶² labour relations regime contemplated under the SBCBA may pass constitutional muster provided it allows for a meaningful bargaining process⁶³.

This analysis however does not consider the current framework for education sector funding and policy making in Ontario – those aspects having become almost entirely centralized over the last three decades starting in the late 1990’s under Premier Mike Harris, when his government overhauled the process for funding education in Ontario; essentially taking it out of the hands of local school boards and putting it under the exclusive control of the provincial government.⁶⁴

This move of course gave the provincial government unprecedented control over Ontario’s education system and, as holders of education’s purse strings, made them a silent partner in education sector labour negotiations - notwithstanding the fact that bargaining rights remained exclusively between the local school boards and unions at the time⁶⁵.

⁶² I refer to it as fractured because the regime is not consistent for all unions and employers; some having the bargain certain items centrally alongside others bargaining units while other bargaining those same terms locally under an entirely different system (the OLRA).

⁶³ This is not disputed. Both process are based on the internationally approved Wagner model

⁶⁴ Joseph B Rose, *the Evolution of Teacher Bargaining in Ontario, Dynamic Negotiations: Teacher Labour Relations in Canadian Elementary and Secondary Education*, Sara Slinn and Arthur Sweetman (eds), Montreal and Kingston: McGill-Queen’s University Press, 2012, page 208.

⁶⁵ Ibid at page 216

This new found influence of course then evolved into the PDT meetings identified in the opening pages of this paper, under the leadership of Premier Dalton McGuinty (ironically the same Premier whose leadership lead to the disintegration of the PDT process in 2012).

Denying certain unions then from being able to negotiate at a central table effectively denies them the opportunity to negotiate monetary items, items impacted by policy, (such as health and safety practices, the implementation special education plans, or the integration of outside agencies into schools), or other items which are appropriately dealt with at this level.

Accordingly, one could argue then that the government, by denying them a central table, is denying them the opportunity to have a meaningful exchange regarding their terms and conditions of employment in respect of such issues – which according to the Supreme Court is a foundational right protected under 2(d) of the Charter.

Indeed as the court stated in case in *Fraser* at para 33:

The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association, in that it negates the very purpose of the association and renders it effectively useless. This constitutes a limit under s. 2 (d) which is unconstitutional unless justified by the state under s. 1 of the Charter

Were such a violation made out on this basis then, the question would turn to whether such a violation is justified in a free a democratic society pursuant to section 1(d). In the author's view this aspect of the legislation would fail for the same reasons noted above; the criteria to become eligible for a central bargaining table (i.e. being a union, representing 15 or more bargaining units) having no apparent rational connection to the objects of the legislation however they may

be defined; be it to establish a two tier bargaining regime, matters of efficiency, or establishing a place for the government at the bargaining table.

With respect to objects like establishing two tier bargaining or establishing a place for the government at the bargaining table, the lack of rational connection between this and setting a 15 bargaining unit threshold is obvious. With respect to matters of efficiency, the lack of rational connection bears some explanation.

As a starting point one must consider why the government chose 15 bargaining units as the threshold number in the first place when there are so many strong rationales for choosing a different threshold. For example, , there are currently unions across the province not eligible for central bargaining with multiple bargaining units, some with as many as 10 bargaining units across 10 school boards.⁶⁶ If matters of efficiency were the object of this legislation, then surely this group would get its own bargaining table as it would reduce 10 negotiations to one – which is far more efficient. So why would such a group not have the same opportunity to bargain centrally that is afforded a union with 15 bargaining units. Similarly, there exist councils of unions which represent far more than 15 bargaining units, and tens of thousands of employees across the province, who are also not guaranteed a central bargaining table under this legislation, that decision, as noted above, being a matter of Ministerial discretion. Surely such a group would get its own table given their number of bargaining units and size if we are concerned with matters of efficiency⁶⁷.

⁶⁶ The Association of Professional Student Services Personnel is one such example.

⁶⁷ Especially compare to groups such as ETFO who, at the time of writing, is believed to represent only 2000 or so workers in total across all 15 of their bargaining units.

The fact is that the threshold number of 15 is the exact number of non-teaching bargaining units represented by the Elementary Teacher's Federation of Ontario (ETFO). That is, by setting the number at 15 bargaining units, the government ensured that ETFO non-teaching staff would get their own central table (even despite the fact that this group represents only a small number of employees⁶⁸). Suffice to say that setting the threshold number at 15 appeared to be favour ETFO's interests more than anything⁶⁹.

In the author's view, participation in central bargaining should not be restricted to certain groups based on the number of bargaining units as it is an artificial means for distinguishing between groups. Indeed many of the smaller unions I work with will point out that despite representing less than 15 bargaining units, they have far more members than unions with a significant number of bargaining units.

⁶⁸ Anecdotally it has been reported that they have around 2000 members.

⁶⁹ Indeed, when I was consulted on the question of threshold number of bargaining units, I suggested a number lower than 15.

Chapter 8: Constitutionality of denying the right to strike over disputes related to the scope of central bargaining

The SBCBA contemplates two distinct processes for negotiating the provisions of a collective agreement. First, provisions can be negotiated centrally with other bargaining units of the same union and across the table from both the government and representatives of the applicable school boards.

Alternatively, provisions can be negotiated locally between one bargaining unit and its school board counter-part. The government is not a party to local negotiations.

The negotiation of the scope of central bargaining (those items which will be bargained at the central table vs. the local table) is a threshold issue which the parties at the central table are required to bargain first before substantive terms and conditions of employment can be discussed.

Bargaining certain issue centrally has some inherent advantages – it enables unions and employers to focus the bargaining power of several groups into one negotiation, it is efficient since the parties do not have to negotiate the same issue across several tables, it enables parties to negotiate identical terms for all of the groups represented and enforce them together, and most significantly, the government is only a party to central negotiations and they are the party directly responsible for all funding and policy related decisions in the education sector – hence if you want to have a meaningful conversation about issues which will impact costs, education policy, or which have provincial implications, this is the place to do it.

This is to say that there is a significant relationship between the bargaining process and the resulting bargaining outcomes. As a result the process under which an item is bargained may be an important outcome in and of itself.

This relationship between process and outcome and its significance has even been recognized by the Supreme Court of Canada. Specifically, in the *Fraser* decision where Justice Rothstein noted in his dissent:

[265] *...the duty to bargain in good faith cannot be described as only a “procedural” guarantee, as the Chief Justice and LeBel J. do in this case and as the majority did in Health Services. Recognizing an employee association and requiring the employer to engage in collective bargaining are themselves substantive outcomes for which workers organize. In a labour context, as in other contexts, certain “procedures” are favoured because they are more likely to produce a certain outcome.*

[266] *The very requirement that the parties engage in collective bargaining tips the economic balance between parties in favour of the workers and, as such, constitutes a particular outcome. Consequently, the act of engaging in the process itself constitutes a concession on the part of the employer. Were it not so, organized labour would have little reason to demand constitutional protection for the “right” to engage in a process of collective bargaining.*

The relationship between process and outcome was also acknowledged by the majority in this same decision in response to Rothstein’s comments above where they noted:

[86] ..All procedures affect outcomes, but that does not mean that all procedural rights are unworkable

Suffice to say that the negotiation of the scope of central items can be very important, and in some instances is determinative of bargaining outcomes.

Given its significance then, disputes over the scope of central negotiations are inevitable. Under the SBCBA however, such a dispute cannot be the subject of a strike. Rather, it must be referred to the Ontario Labour Relations Board for resolution who must evaluate the issue against a fairly narrow set of guidelines set out in the SBCBA.

Specifically the SBCBA provides:

Scope of Central and Local Bargaining

Negotiations about scope of central bargaining

28. (1) The parties at a central table and the Crown shall meet within 15 days after the notice of desire to bargain has been given under section 59 of the Labour Relations Act, 1995, or within such further period as they agree upon, and they shall bargain in good faith and make every reasonable effort to agree upon the matters to be included within the scope of central bargaining at the central table.

Restriction re: impasse

(2) No strike shall be called or lock-out authorized because there is a failure to agree upon whether a matter is within the scope of central or local bargaining.

...

Application to the Ontario Labour Relations Board

(4) If the parties at a central table and the Crown do not agree upon the matters to be included within the scope of central bargaining at a central table, either party or the Crown may apply to the Ontario Labour Relations Board to decide the issue.

...

(8) For the purpose of deciding whether a matter is within the scope of central bargaining, the Board shall consider the following factors:

1. The extent to which the matter could result in a significant impact on the implementation of provincial education policy.

2. The extent to which the matter could result in a significant impact on expenditures for one or more school boards.

3. Whether the matter raises common issues between the parties to the collective agreements that can more appropriately be addressed in central bargaining than in local bargaining.

4. Such other factors as the Board considers relevant in the circumstances.

Timing

(9) The Board shall make a decision in an expeditious manner.

The issue then is whether or not these provisions, in so far as they deny the right to strike over the scope of central bargaining give rise to a violation of section 2(d) of the Charter.

In *Saskatchewan Labour* the court held that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals⁷⁰ and that its prohibition constitutes a violation of section 2(d).

The court further held that the right to strike is not limited to the negotiation of terms and conditions of employment- it is broader, existing as a matter of course wherever it is required to preserve a meaningful bargaining process. Indeed the court stated:

⁷⁰ Saskatchewan Labour at para 46

[51] *The preceding historical account reveals that while strike action has variously been the subject of legal protections and prohibitions, the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining. Protection under s. 2 (d), however, does not depend solely or primarily on the historical/legal pedigree of the right to strike. Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.*

The right to strike then is even larger than that which has been allowed under the country's various labour relations acts wherein the right to strike is largely restricted, and only permitted to be used in limited circumstances⁷¹. As stated by the majority:

The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.

The question then is whether the determination of the scope of central negotiations is part of a meaningful process collective bargaining. If so, prohibiting the right to strike in relation to this issue, is arguably a violation of section 2(d).

Given the importance of having the government at the table in order for the parties to be able to address certain issues meaningfully, and given the relationship between the outcome of the scope negotiation to the outcome of bargaining itself, as noted above, it is difficult to deny the importance of this component to the bargaining process. Hence, according to *Saskatchewan*

⁷¹ See Brian Langille, *Is There a Constitutional Right to Strike in Canada? Papers Presented at an International Symposium, Faculty of Law, University of Toronto; What Is a Strike?*, (2009-2010) 15 C.L.E.L.J. 355 – 372, where the author notes that labour laws represent a trade off where strike rights are concerned; the right to strike is traded away in all but a few instances in exchange for more peaceful administrative processes designed to help unions achieve the same ends.

Labour, it arguably attracts the right to strike - the prohibition of which constitutes a violation of section 2(d).

If indeed the SBCBA was held to violate section 2(d) on this basis, the question would remain whether such a violation could be justified in a free and democratic society under section one.

The objective behind restricting the right to strike over scope issues is not obvious. To this end we note that Section 28(9) of the legislation requires the Ontario Labour Relations Board to deal with scope disputes expeditiously – the implication being the objective of this section, at least in part, is to ensure that matters of scope do not unnecessarily delay the bargaining process which was to follow. We also note that section 28 includes four factors which are to be considered by the Board when determining whether a matter is within the scope of central bargaining. The first two of these factors being whether the disputed items impacts the implementation of education policy or if they will have a significant and broad impact on spending – another objective then being to ensure that certain issues are dealt with at the central table. The remaining two factors are much more open ended however, allowing the Board to consider whether a proposal is simply more appropriately dealt with at the central table or the local table – the objective here then being to leave room for other issues to be addressed centrally where appropriate.

The objectives of this aspect of the legislation then are expeditiousness, and ensuring that certain topics find their way to the central table without foreclosing on the possibility of having other items discussed.

Arguably one further objective of this aspect of the SBCBA, not alluded to in the legislation itself, is to avoid unnecessary disruption of public services.

As noted above, the threshold for establishing that these objects are pressing and substantial, is a low and therefore easily met. In fact, in *Saskatchewan Labour* avoiding unnecessary disruptions as an objective was specifically dealt with and explicitly found to meet this test.

In terms of a rational connection between the first objective and the means, it has recently been born out (as you will see below) that using the OLRB to determine scope issues is anything but efficient – those issues having taken 6 months (or more in some instances) to be decided, which in labour relations, and especially during bargaining is a very long time.

In fact, Chairman Fishbein, of the Ontario Labour Relations Board, in the first ever decision related to a scope dispute under the SBCBA, acknowledged the particular importance to the parties and in general that such an issue be dealt with expeditiously stating:

As bargaining may be impeded by disputes over the locus of such bargaining, the SBCBA, not surprisingly, statutorily directs the Board to section 28(9) to make its decision in an expeditious manner. In view of the importance of expediency, not only generally, but in particular with respect to these negotiations (there are 29 district school board negotiations and the most recent collective agreements expired on August 31, 2014), in order to enable the parties to return to the bargaining table as soon as possible, the parties consented to an expedited determination in this matter with my “bottom line” conclusions without anything further being issued as soon as possible⁷².

That is, Chairman Fishbein acknowledges that scope disputes under the SBCBA require such expeditious resolution that parties are justified in bypassing a full judgement of their disputes -

⁷² see *R v Ontario English Catholic Teachers' Association*, 2015 CanLII 5514 (ON LRB at para. 9).

implies that the alternative dispute resolution process contemplated under the SBCBA (that is that the OLRB hear the dispute and issue a decision with reasons) is simply too slow.

This is to say that with respect to the expeditiousness objective, the alternative dispute resolution mechanism created for achieving this end was not successful. As such, there appears to be no meaningful connection between that objective of the legislation (expeditious resolution of scope) and the means by which that is achieved (denying the right to strike over scope issues).

In terms of a rational connection between the second objective; ensuring that certain topics find their way to the central table while leaving room for others to do so as well, the legislation may pass muster; the rational connection being that taking away the parties right to strike over scope issues would allow some rational force to control the central agenda.

In terms of a rational connection between the means and third objective, avoiding unnecessary disruption to public services, the connection is obvious. Restricting the right to strike clearly accomplishes that goal.

In terms of minimal impairment, this is where, in the authors view, the latter two objectives fail.

With respect to managing the central table agenda, if the government wanted to ensure only certain items made it on, it could have done so without removing the right to strike altogether – by simply prescribing which issues must be bargained centrally while leaving it open to negotiate or even strike over the inclusion of other issues. Instead the government opted to create a mechanism for determining the appropriateness of including other items – which we will see below, had the effect of compounding the impairment rather than minimizing it.

With respect to avoiding unnecessary disruption to public services, the court in *Saskatchewan Labour* held that denying the right to strike cannot be found to be minimally impairing without a corresponding provision of a *meaningful* alternative dispute resolution mechanism. Here the court made reference to an earlier decision as to how meaningful was to be defined, stating:

[94] Not surprisingly, Dickson C.J. was alive to the profound bargaining imbalance the union inherits when the removal of the right to strike is not accompanied by a meaningful mechanism for resolving collective bargaining disputes:

Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22 of its factum that “It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn”. The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

Thus, according to the court, for an alternative dispute mechanism to be meaningful it must be fair, effective and expeditious. With respect to scope disputes, that mechanism available is the process under the SBCBA for referring such disputes to the OLRB for resolution. What is most interesting however is that, in the author’s view, this process has not been meaningful and has had the actual effect of compounding the inequality between parties, rather than minimizing it due to the fact that recent decisions at the OLRB on this very subject have been very conservative and did not protect workers rights to a meaningful bargaining process; the issue at the heart of strike rights.

Five recent cases before the OLRB demonstrate this development⁷³: *R v Ontario English Catholic Teachers' Association*⁷⁴ (hereinafter R v. OECTA), *Education Workers' Alliance of Ontario — Alliance des Travailleuses et Travailleurs en Education de l'Ontario (EWAO - ATEO) v Council of Trustees' Associations*⁷⁵ (hereinafter EWAO v. CTA), *L'Association des enseignantes et des enseignants franco-ontariens (« l'AEFO ») v Le Conseil d'associations d'employeurs (le « Conseil »)*⁷⁶ (hereinafter AEFO v. the council), *Elementary Teachers' Federation of Ontario v Council of Trustees' Associations (CTA)*⁷⁷ (hereinafter ETFO v. CTA), *Canadian Union of Employees (CUPE) v Council of Trustees Associations (CTA) and The Crown in Right of Ontario*⁷⁸ (hereinafter CUPE v. CTA).

As in all of these cases, R v. OECTA involved an application to OLRB pursuant to section 28 of the SBCBA to resolve a dispute over whether or not certain topics or matters were within the scope of central bargaining. Specifically,

- a) attendance management/support programs;
- b) seniority as the basis for all teacher transfers;
- c) teacher working conditions and workload as they relate to Individual Education Plans
- d) provisions relating to harassment in schools including: reporting provisions, investigations and access to grievance arbitration provisions; and

⁷³ These cases also constitute all of the decisions which exist on this issue.

⁷⁴ 2015 CanLII 5514 (ON LRB)

⁷⁵ 2015 CanLII 12061 (ON LRB)

⁷⁶ 2015 CanLII 19071 (ON LRB)

⁷⁷ 2015 CanLII 29203 (ON LRB)

⁷⁸ 2015 CanLII 38116 (ON LRB)

e) all matters related to changes in employment status resulting from enrolment fluctuations, school amalgamations/closures excluding teacher redundancy.

The union's position was that these matters were all within the scope of central bargaining. The position of the employer and the government was that these matters were not within said scope.

Here the board held that having regard for the four factors for determining this issue as set out in the SBCBA, those being; i) the extent to which the matter could result in a significant impact on the implementation of provincial education policy; ii) the extent to which the matter could result in a significant impact on expenditures for one or more school boards; iii) whether the matter raises common issues between the parties to the collective agreements that can more appropriately be addressed in central bargaining than in local bargaining; and, iv) such other factors as the Board considers relevant in the circumstances,

All five of the items disputed were found to be excluded from central bargaining except for part of item d). That is, access to grievance arbitration provisions relating to harassment in schools was held to be properly central in scope.

One important aspect of this decision was that it included no reasons. That is, the parties agreed to a "bottom line" decision, which meant the Chair of the Board would not have to include reasons, in order to expedite the process – a process which was already supposed to be expedient without the need for such concession.

In *EWAO v. CTA* two matters were in dispute; contracting out, and supervision duties as performed by Educational Assistants. The union's view was that these matters ought to be included in central bargaining. The employer and the government disagreed.

Ultimately the issue of contracting out was resolved prior the hearing with the parties agreeing to some complicated language on how the matter would be dealt with centrally and locally. Thus the only matter heard was that relating to supervision duties – which the Board held was not within the scope of central bargaining.

Again the parties agreed to a bottom line decision in this case. That notwithstanding, a few reasons were given for the decision:

The Chair noted that the SBCBA only allowed the board to consider whether a matter impacted “the implementation of provincial education policy” rather than policy itself when determining whether a matter properly falls within the scope of central bargaining- which is to say that the legislation appears to have been construed as narrowly as possible given that it also gives the Board the discretion to consider other factors as it sees fit. There was no consideration of whether or not the proposed items needed to be at the central table in order to have a meaningful bargaining process.

In *AEFO v. the Council*, another bottom line decision, five matters were in dispute; hiring practices as they relate to job postings and short term supply teachers; sick leave as it relates to accommodation, medical information, and attendance management.

In another bottom line decision the board held that only job postings and representational rights of the union in the accommodation process were held to be matters properly addressed at the central table. The remaining items were set aside for local negotiations.

In *ETFO v. CTA* the dispute centred around whether or not the issue of Designated Early Childhood Educators providing supervision outside the instructional day was properly central in

scope – the union taking the position that it was. In its decision, the board considered each of the factors listed in the legislation finding this issue did not properly fit within the first three factors set out in the legislation. With respect to the fourth factor, the only factor wherein the board could legitimately consider its role as a strike alternative it failed to do so stating that despite agreeing that the issue better fit at the central table, consideration of the other three factors supported the opposite view and held thusly.

Finally, in *CUPE v. CTA*, nine issues were put forward by the union as properly central including;

- a) Limits on Attendance Management/Support Program;
- b) Violence in the Workplace – Policies, Procedures, Preventative Measures and Training;
- c) Non-Instructional Supervision of Students;
- d) Employees Performing Medical Interventions;
- e) Standardization of Job Descriptions and Classifications;
- f) Absence Replacement in Connection with Workload;
- g) Contracting In/Out and Sharing of Trades Services;
- h) Creation of a Preventative Maintenance Program; and
- i) Creation of a Provincial Pay Equity Maintenance Joint Committee.

Here the board held that eight of these issues were no within the scope of central bargaining. The remaining item, employees performing medical interventions, was split such that the monetary aspects of this issue could be negotiated centrally and the remaining issues related to this topic (such as health and safety standards) would have to be negotiated locally.

In addition, the employer and crown also put forward four of their own issues which they wanted included within the scope of central bargaining – most relating to wages and expenditures. Here the board held that all four items were indeed central in scope.

Most interestingly, this was the first decision which included reasons – which may be why this dispute took even more than six months to be resolved. As such we are able to see that in rejecting all nine of the unions arguments, the Board based its decision on considerations of the first two factors only – virtually ignoring its obligation to consider such other factors as may have been presented or its role as a strike alternative.

In the author's view, these cases support an argument that by taking away the right to strike over scope issues in favour of referring such disputes to the Board, the government has not only failed to meet its objective in terms of allowing other issues to be dealt with centrally, but they have also compounded the degree of interference in the bargaining process rather than diminished it because that process is not protecting workers rights to a meaningful negotiation process – these decisions having demonstrated a clear pattern of denying unions' interests in addressing a matter at the central table whenever it is not shared with the Government/School Boards regardless of considerations of meaningful bargaining⁷⁹.

⁷⁹ I draw this conclusion even though the legislation gives the OLRB the option to consider other factors as it deems appropriate when determining scope disputes. This is because consideration of other factors was absent in

Indeed one need only look to the case law above to find examples of issues which unions wanted to discuss at the central bargaining table in order to have meaningful dialogue but which were rejected by the OLRB. Take for example the issue of Educational Assistants performing medical procedures.⁸⁰ CUPE wanted to discuss having consistent expectation over which medical procedures their workers should be expected perform⁸¹ - an issue which impacts of student and worker safety in a similar way in all school boards across the province and for that reason should be dealt with centrally. Nevertheless this issue, like so many others was rejected from the scope of central bargaining by the Ontario Labour Relations Board.

Similarly, the issue of DECE supervision duties outside the instructional day, which was sought as a central table item by ETFO, as noted above, clearly should be addressed centrally given that this class of workers and all of their duties were created at the provincial level when Premier Dalton McGuinty created Full Day Kindergarten in 2010. Further, their initial contracts were also negotiated at the provincial level via the PDT process described in Chapter 1. In fact, the legislation and policies developed at that time to support this new program, and which is still in effect to this day, clearly contemplate that a DECE and a teacher work as a team in all aspects of the Full Day Kindergarten program – which has been interpreted in arbitration as requiring the teacher and DECE to work side by side the entire school day⁸². The issue of DECE supervision outside the instructional day then is about whether such duties are appropriate for this class of

all of the decisions except one: In ETFO v. CTA, where the board decided that the first three factors outweighed any consideration of other factors – the implication being that consideration of factors (such as whether meaningful bargaining is more likely to occur at one particular table) is secondary to considerations the other factors).

⁸⁰ As dealt with in CUPE v. CTA, 2015 CanLII 38116 (ON LRB)

⁸¹ This is an issue which I have dealt with personally in my practice – as medical services provided by outside agencies are withdrawn school boards are looking to their own workers to perform these services. Concern arises where workers do not have sufficient training to perform these procedures safely or simply do not feel comfortable doing so. As a result, expectations vary from school board to school board.

⁸² Windsor-Essex Catholic District School Board v Ontario English Catholic Teachers' Association, 2014 CanLII 3570 (ON LA)

worker in light of the above noted arbitration decision⁸³. It is an issue which is faced by all of the school boards across the province and which strikes at the core of the legislation and provincial policies which currently support the Full Day Kindergarten program. For this reason it should have been dealt with centrally. Again however, this issue was rejected from the scope of central bargaining by the Ontario Labour Relations Board.

One final example is the issue of non-instructional supervision as proposed by CUPE. As noted above this issue impacts DECEs (which are also represented by CUPE), but it also impacts other classes of workers, in particular Educational Assistants. The role of Educational Assistants has transitioned over the last two decades from being an unskilled helper in the classroom, to that of a skilled special needs worker. To this end, these workers are now paid primarily from funds earmarked for special education. The issue then is whether or not it is proper to use these workers for non-special education purposes – such as supervision of non special needs students during non-instructional time (i.e. during recess). Clearly this issue is linked to issues of policy implementation and funding implementation on a provincial scale. Again however as noted above, this was rejected from the scope of central bargaining by the Ontario Labour Relations Board.

As noted by the trial judge in Saskatchewan labour and endorsed by the Supreme Court in its decisions:

There is a pragmatic reason why “no strike” legislation almost always provides for access to independent, effective dispute resolution processes: mechanisms of that kind can operate as a safety valve against an explosive buildup of unresolved labour relations tensions.

⁸³ Ibid

Simply put, referring scope disputes to the board has proven to be a poor safety valve.

In terms of proportionality, given the recognition in *Saskatchewan Labour* that the right to strike as an essential component under section 2(d) and that taking away that right constitutes a substantial interference in collective bargaining, and given that the objectives of the SBCBA with respect to this aspect (expediency, and ensuring certain topics are discussed centrally) and the demonstrated ineffectiveness of the legislation in achieving these objectives, it is apparent that the degree of interference is not proportional to the means. Therefore in the author's view, the legislation is not likely to be saved under section 1(d) on this point.

Chapter 9: Conclusion

The recent decisions in the *Mounted Police Association*, *Meredith*, and *Saskatchewan Labour* have completely redrawn the landscape of labour relations in Canada – in particular for public sector employers who could previously rely on strong government intervention where necessary to ensure that labour costs remain manageable.

Specifically, these three decisions have significantly limited the government's options when intervening in public sector bargaining. Suffice to say that in post *Saskatchewan Labour* Canada, utilizing legislation to resolve or avoid a bargaining impasse will almost always violate section 2(d) – hence the focus of legislators will less likely be with respect to avoiding that issue. Rather, legislators will have to consider whether or not such legislation can be justified having regard for the factors in *Oakes* in order to ensure constitutionality.

As it stands, it seems that a government can only interfere in bargaining either by modestly adjusting bargaining outcomes (as in *Meredith*) or by moving the parties to a meaningful interest arbitration process in the event of an impasse (or some other form of alternative dispute resolution) - the outcome of which is difficult to control and could lead to unwanted cost increases.

In terms of tailoring the resulting arbitration process to better predict the outcome, the government may still be able to take certain actions in this regard – provided of course that it does so in a way that is rational, proportional, and only minimally impairing.

Thus for example the actions of the federal government vis a vis the postal workers after they went on strike in 2011 wherein they passed legislation which, inter alia; ordered postal workers back to work and sent the labour dispute between the parties to binding arbitration; set

parameters on the outcomes of that process such that arbitrator was limited to selecting the best of the parties final offers to one another; and, further restricted the arbitrator such that her/his decision in this regard was to be ...

“guided by the need for terms and conditions of employment that are consistent with those in comparable postal industries and that will provide the necessary degree of flexibility to ensure the short- and long-term economic viability and competitiveness of the Canada Post Corporation, maintain the health and safety of its workers and ensure the sustainability of its pension plan”⁸⁴,

may very well be constitutionally valid - depending on how pressing and substantial their objectives are deemed to be, whether these actions were rationally connected to those objectives, whether a less intrusive means of achieving the same ends could have been conceived, and whether the actions were proportional to the objects.

To wit, these considerations will no doubt be especially important for our federal government which, as in the above example, has adopted a culture of swift intervention in federal labour disputes.⁸⁵⁸⁶

It would seem that the governments’ tool box for managing labour disputes has now been reduced to a tool belt. As such, governments will have to fine tune their legislation, or alternatively, empower public employers to negotiate more creatively, and better utilize the options available to them under traditional labour relations models.

⁸⁴ *Restoring Mail Delivery for Canadians Act* S.C. 2011, c. 17

⁸⁵ Ian Lee, *Striking Out: The New Normal in Canadian Labour Relations?*, [5 J.P.P.L.] at 213, arguably intervening too quickly could undermine the constitutionality of the intervention if public pressure did not have time to build up sufficiently so as to ensure the governments objects were pressing and substantial.

⁸⁶ This may no longer be true with the recent change in government (now the Liberals under Trudeau). Time will tell.

In the education sector we have seen the provincial government move from bold intervention in labour disputes in 2012, to a more proactive approach in 2014 which respects the various roles of education stakeholders and which is certainly more consistent with Charter values. Though it is still far from perfect, the bargaining regime contemplated under the SBCBA is certainly orderly and is allowing the parties to move toward an agreement – albeit slowly.⁸⁷

⁸⁷ In the past months all education sector unions have announced tentative deals at the central negotiation table. See for example: <http://www.thestar.com/yourtoronto/education/2015/08/25/ontario-makes-deal-with-english-catholic-teachers.html>, and <http://www.thestar.com/news/gta/2015/08/20/ontario-public-high-school-teachers-and-province-reach-deal.html>.

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Appendix A

WORDING OF ORDER IN COUNCIL

WHEREAS pursuant to clause 9 (1) (c) of the Putting Students First Act, 2012 (the “Act”) the Minister of Education advises that the Boards and Bargaining Agents in respect of the Bargaining Units identified in Schedule “A” and those referred to in paragraphs 2 and 3 have not been able to settle a collective agreement that is consistent with the terms of the Act;

PURSUANT to subparagraph 2 i of subsection 9 (2) of the Act it is ordered that: 1. For the 2012-13 and 2013-14 school years, the Collective Agreement between a Board in Column 1 of Schedule “A” and the Bargaining Agent in Column 2 opposite the Board in respect of the Bargaining Unit in Column 3 opposite the Bargaining Agent shall be the Collective Agreement between the parties in operation for the 2008-12 school years (“Incorporated Agreement”), as modified or replaced by the corresponding Memorandum of Understanding (the “MOU”) in Column 4 opposite the Bargaining Unit, O. Reg 313/12 (Sick Leave Provisions, 2012-2013), the regulation titled “General” as amended, made under the Act and the regulation titled “Sick Leave Credits and Sick Leave Credit Gratuities” as amended, made under the Education Act (“Regulation”). 2. For the 2012-13 school year, the Collective Agreements between the Elementary Teachers’ Federation of Ontario on behalf of early childhood educators and the Durham Catholic District and the Waterloo Region District School Board, respectively, are the Collective Agreements in operation between the parties for the 2010-12 school years, as modified by the Memorandum of Understanding between the Ministry of Education and the Ontario English Catholic Teachers’ Association, dated July 5, 2012, and the Regulation.

3. For the 2012-13 school year, the Collective Agreements between the Elementary Teachers’ Federation of Ontario on behalf of early childhood educators and the Durham District School Board and the Trillium Lakelands District School Board, respectively, are the terms and conditions of employment in effect on August 31, 2012, as modified by the Memorandum of Understanding between the Ministry of Education and the Ontario English Catholic Teachers’ Association, dated July 5, 2012, and the Regulation.

4. The Collective Agreement between the Canadian Union of Public Employees on behalf of Employees employed by the Durham District School Board in its Continuing Education Department and the Durham District School Board shall have a term of operation commencing May 28, 2012 until August 31, 2014 inclusive, and the terms and conditions of employment are those in effect on May 27, 2012, as modified by the Memorandum of Understanding between the Ministry of Education and the Ontario English Catholic Teachers’ Association, dated July 5, 2012, and the Regulation.

5. If a provision of the Incorporated Agreement or the Collective Agreements referred to in paragraphs 2, 3 or 4 is inconsistent with any of the terms or conditions set out in the relevant MOU and the Regulation such provision is deemed to be inoperative to the extent of the inconsistency.

6. A provision of the Incorporated Agreement or the Collective Agreements referred to in paragraphs 2, 3 or 4 is inconsistent with the terms or conditions set out in the relevant MOU and Regulation if the provision changes, nullifies or limits the operation of a provision of the respective MOU and Regulation.

7. A Board and Bargaining Agent cannot by mutual consent revise the Collective Agreement referred to in paragraph 1 to make it inconsistent with the terms of the applicable MOU in Column 4 and Regulation. A Board and Bargaining Agent cannot by mutual consent revise the Collective Agreement referred to in paragraphs 2, 3 or 4 to make it inconsistent with the terms of the MOU mentioned in those paragraphs and the Regulation.

Appendix B

Excerpts of the Putting Students First Act

Preamble

The Assembly recognizes the importance of publicly funded education as a cornerstone for the success of Ontario's young people and our future prosperity. The Government's recent initiatives include investments in smaller class sizes, bringing more teachers and support staff into schools, and implementing full-day kindergarten. The Government believes that, as a result, test scores are higher and more students are graduating. Ontario's education system is recognized as one of the best in the English-speaking world.

The Government intends to protect the gains made in the education system by stabilizing funding to school boards and increasing funding to support the full implementation of full-day kindergarten by 2014.

The Government has outlined a fiscal plan to address the Province's significant fiscal challenges by containing costs and balancing the budget by 2017-2018.

Public sector compensation costs, which include compensation costs in the publicly funded school system, comprise a substantial portion of government spending. The Government believes that without effective management of these costs, the Province's ability to continue to invest in high-quality public education will be threatened.

Compensation for most employees in the publicly funded school system is determined through the collective bargaining process. In the course of consultations with school boards and employee bargaining agents at the 2012 Provincial Discussion Tables, the Government proposed compensation restraints that it indicates would, if adopted, achieve outcomes consistent with the fiscal plan while continuing to protect full-day kindergarten, smaller class sizes, and the classroom experience. The Government believes that continuing its investment in full-day kindergarten and smaller class sizes will preserve 20,000 teaching and support staff positions. The Government and some employee bargaining agents have signed Memoranda of Understanding setting out a framework that, when reflected in collective agreements and other employment contracts, would secure compensation restraints consistent with these goals. The Government is concerned that without the measures set out in this Act, school boards and employee bargaining agents may not be able to achieve collective bargaining outcomes that protect the Government's initiatives for students and preserve jobs.

The Government believes that the public interest requires the adoption, on an exceptional and temporary basis, of the measures set out in this Act, as well as the making of amendments to the Education Act, both of which seek to respect the collective bargaining process, to encourage responsible bargaining and to ensure that collective agreements and individual employment contracts contain appropriate restraints on compensation.

Board's mandate re inclusion of terms

4. (1) when engaging in collective bargaining for a collective agreement that would apply during the restraint period, each board has a mandate to negotiate for collective agreements that include the following terms and are not inconsistent with those terms:

1. In respect of a collective agreement between a board and a designated bargaining agent for a teachers' bargaining unit, as those terms are defined in subsection 277.1 (1) of the Education Act, represented by the Ontario English Catholic Teachers' Association, the terms set out in the "Memorandum of Understanding between the Ministry of Education and the Ontario English Catholic Teachers' Association (OECTA)", dated July 5th, 2012, subject to any prescribed modifications and replacements.

2. In respect of a collective agreement between a board and any other employee bargaining agent,

i. if the employee bargaining agent enters into a Memorandum of Understanding with the Ministry of Education on or before August 31, 2012 that is substantially similar in all relevant aspects to the Memorandum of Understanding referred to in paragraph 1,

A. terms that are substantially similar in all relevant aspects to the terms set out in its Memorandum of Understanding, subject to any prescribed modifications and replacements, and

B. any prescribed terms, or

ii. if the employee bargaining agent does not enter into a Memorandum of Understanding described in subparagraph i,

A. terms that are substantively identical in all relevant aspects to the terms set out in the Memorandum of Understanding referred to in paragraph 1, subject to any prescribed modifications and replacements, and

B. any prescribed terms.

3. Any terms that may be prescribed as terms that are to be included in every collective agreement.

Prescribed terms, modifications, replacements

(2) If a term, or a modification to or replacement of a term, is prescribed for the purposes of subsection (1), the term, modification or replacement applies, as of the day specified in the regulation, to,

(a) any requirement under this Act respecting whether a collective agreement includes the terms described in subsection (1) or is inconsistent with those terms; and

(b) any requirement under this Act respecting whether a term or condition of employment is inconsistent with the terms described in subsection (1).

Same

(3) A collective agreement is inconsistent with the terms described in subsection (1) if it includes terms that change, nullify or limit the operation of a term that is applicable under subsection (1) to the collective agreement.

Same

(4) A term or condition of employment applicable to an employee who is represented by an employee bargaining agent is inconsistent with the terms described in subsection (1) if it changes, nullifies or limits the operation of a term that is applicable under subsection (1) to a collective agreement that applies or would apply to the employees represented by the employee bargaining agent.

Terms re collective bargaining

(5) The collective bargaining process for a collective agreement that would apply during the restraint period shall be subject to the terms respecting the process, if any, that are contained in the applicable Memorandum of Understanding.

Unlawful strike or lock-out

(6) If a Memorandum of Understanding includes terms prohibiting strikes or lock-outs, any strike or lock-out in contravention of those terms is deemed to be an unlawful strike or lock-out for the purposes of the Labour Relations Act, 1995.

Restrictions when no collective agreement in operation

5. (1) A board and an employee bargaining agent shall not, at any time during the restraint period when no collective agreement is in operation, apply, agree to or implement any terms or conditions of employment that are inconsistent with the terms described in subsection 4 (1), and any such terms or conditions that are applied, agreed to or implemented are deemed to be inoperative to the extent of the inconsistency.

Same

(2) If the restraint period for an employee began before the day this subsection comes into force, any terms and conditions of employment that applied or were agreed to or implemented before that day and during any period after the first day of the restraint period for which no collective agreement was in operation are deemed to have been inoperative to the extent of any inconsistency with the terms described in subsection 4 (1), as of the later of the first day of the restraint period and the day the terms or conditions were first applied, agreed to or implemented.

