CITATION: OPSEU v. Ontario, 2016 ONSC 2197
COURT FILE NO.: CV-12-465269
DATE: 20160420

ONTARIO

SUPERIOR COURT OF JUSTICE

Application under Rule 14.05 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, ss. 2(b), 2(d), 7, 15 and 24(1) of the *Charter of Rights and Freedoms* and s. 52 of the *Constitution Act, 1982*

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LORIE ST. AMAND and ROBYN LAMBE

Applicants

– and –

The Crown in Right of Ontario as represented by the MINISTER OF EDUCATION and the ATTORNEY GENERAL OF ONTARIO

Respondents

-and –

ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

Intervenor

Howard Goldblatt, Steven Barrett & Charlene Wiseman, for ETFO, Applicant

David Wright, Jane Letton & Rebecca Stulberg, for the Ontario Public Service Employees Union, Applicant

Susan Ursel & Karen Enssien, for OSSTF, Applicant

Katie Rowen & Kristen Allen, for Unifor, Applicant

Andrew Lokan & Tina H. Lie, for CUPE, Applicant

Robin K. Basu, Rochelle Fox & Michael Dunn, for the Crown in Right of Ontario, Respondent

Michael A. Hines, for the Ontario Public School Boards' Association, Intervenor

HEARD: December 14, 16-18, 21-22, 2015

LEDERER J.:

INTRODUCTION

[1] In 2012, various and many contracts for unionized workers in the education sector expired. Her Majesty the Queen in Right of Ontario (hereinafter, "Ontario"), the funder of public education sought to, and considered how to proceed to resolve the issues between it, school boards as the employers, and the employees (teachers, other professionals and support staff) and renew the contracts involved. The substantive process began during February 2012. Some progress was made. While several of the represented groups entered into Memoranda of Understanding with Ontario, which were ratified by the applicable school boards, many did not. Among those that did was the Ontario English Catholic Teachers' Association (hereinafter, "OECTA"). The majority of the remaining agreements were set to expire on August 31, 2012. As that date approached, Ontario became concerned that if it left these matters unresolved, a statutory freeze would take hold; that is, the current contracts would continue and their provisions bind the parties.[1] As Ontario saw it, this had serious fiscal implications. Pursuant to those agreements, each year on September 1, teachers would move through the salary grid that governed their earnings. Those qualified to move up and earn more would do so. Without new agreements and with the statutory freeze in place, this movement would occur at a cost to Ontario of many tens of millions of dollars; expenditures which would continue into the future. Ontario passed and proclaimed Bill 115, referred to as the *Putting Students First Act.*[2] It purported to set parameters for the process through which, and by which, the remaining contracts would be resolved. In short, it required that any agreements entered into before August 31, 2012 be "substantially similar"[3] to the Memorandum of Understanding entered into by the OECTA; any agreements made after that date were to be "substantively identical"[4] to that Memorandum. The *Putting Students First Act* allowed that, where such agreements had not been arrived at by December 31, 2012, they could be imposed.[5] As matters transpired, some were. Subsequent to the imposition of these agreements, on January 23, 2013, the *Putting Students First Act* was repealed. The agreements were left in place. There was some further discussion and some additional changes made during 2013, but any ability on the part of the unions to strike or use the leverage that threat provided was lost. There was little, if any, impetus for school boards to accept any changes since agreements had been imposed and were in place.

[2] The principal applicants are five unions.[6] Each of them take the position that the process and procedure adopted by Ontario to put in place the requisite collective agreements has resulted in the breach of s. 2(d) of the *Charter of Rights and Freedoms.* It provides for the

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[1] *Labour Relations Act, 1995,* S.O. 1995, c. 1, Sched. A at s. 86(1).
[2] S.O. 2012, Ch. 11.
[3] *Ibid*, at s. 4(1), para. 2 (i).
[4] *Ibid*, at s. 4(1), para. 2 (ii).
[5] *Ibid* ,at s. 9(1)(c) and s. 9(2), para. 2(i).
[6] Elementary Teachers' Federation of Ontario, Ontario Public Service Employees Union, Canadian Union of Public Employees, Unifor (formerly Canadian Auto Workers, which merged with Communications, Energy and Paperworkers) and Ontario Secondary School Teachers' Federation.

freedom of association.[7] At the outset, the parties advised the court of their agreement that, for the time being, the court would be asked to consider only whether there has been a breach of s. 2(d) and, if so, whether it was justified pursuant to the provision of s. 1 of the *Charter.*[8] The question of remedy, if there is to be any, would be subject to discussion between the parties after a decision has been rendered and, if required, after further submissions to this court.

[3] Labour law and labour relations, at least as they operate in this province, are founded on the understanding that the relationship between employers and unionized employees is essentially oppositional, adversarial and based on confrontational processes. At its root, the relationship is a power struggle which is imbued with the understanding that the employer has power and the employee does not. The general thrust of the evolution of this area of our law is an effort to equalize the gap in power. This remains the case today whether the employer is a private corporation or a public agency. I will return to this idea. For the moment, I observe only that the narrowing of the division begins with the acceptance that there is power in the ability of employees to act collectively.

BACKGROUND

[4] In or around 1998, funding for public education became a provincial responsibility. In prior years, funding had rested primarily with local school boards which had the authority to levy property taxes in furtherance of this responsibility. This authority to tax was withdrawn.[9] As described by counsel for Ontario, the province has, since 1998, been "accommodating" this change. He referred to this as a "dynamic process". Not surprisingly, as part of that process, Ontario has taken a greater interest in the negotiation of the collective agreements that cover unionized workers engaged in the education sector.

[5] Little was said about the negotiations which took place in 2004.[10] By 2008, a system was established which allowed negotiations to take place at two levels. General, broader, provincial-wide issues were dealt with in a central process referred to as Provincial Discussion

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[7] Section 2(d) of the *Charter of Rights and Freedoms* says:

> Everyone has the following fundamental freedoms:
> …
> (*d*) freedom of association.

[8] Section 1 of the *Charter of Rights and Freedoms* says:

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

[9] *Affidavit of Gene Lewis,* sworn March 7, 2013, at para. 28, referring to the *Education Quality Improvement Act, 1997*, S.O. 1997 c. 31 (otherwise referred to as Bill 160).

[10] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 77, there is reference to the 2004 process which is said to have been successful in producing framework (upper tier) agreements under which 470 negotiated local agreements were reached.

Tables (hereinafter, "PDT"). Local issues were relegated to separate negotiations between the unions and school boards. Agreements were entered into between the unions and school boards who were and remain the applicable employers. In 2008, the province was not a party to the negotiations at either the PDT or at the local discussions. The central process (PDT) was voluntary. The agreements arrived at as a result of the central negotiations were implemented through their adoption by school boards and their inclusion in local agreements. This two-tier scheme was formalized in 2014 through the passage of legislation: the *School Boards Collective Bargaining Act*, *2014*.[11] Participation at the PDT is no longer voluntary. Ontario is now a party to the negotiations and the school boards are represented by overarching or collective groupings. There has been a round of negotiations subsequent to the events that have given rise to these applications. They have resulted in agreements that supersede those which are at issue in this proceeding.

[6] The issues in this proceeding consider what happened in 2012. It represents a step in the evolution that begins with the process as it existed up to 1998 and ends with the approach dictated by the passage of the legislation in 2014. The issue is whether in attempting, during 2012, to move through the next step in this progression, Ontario acted precipitously in its treatment of the applicants and breached the *Charter of Rights and Freedoms.* The understanding that 2012 is a step in an evolution is part of the context that explains what happened and why. The context is further demonstrated by the acceptance that, in 2012 for the first time, the negotiations were affected by fiscal restraint. In its budget process, Ontario could not or did not provide the Ministry of Education with the funding it requested. Labour costs are a significant part of the expenditures dedicated to education. As Ontario saw it, restraint had to be applied to the negotiations that were to take place during 2012.

FACTS

[7] The history that led to this proceeding can be divided into six sections: (a) Budget Considerations: the Government Prepares; (b) PDT Process: February 2012 to July 5, 2012; (c) The OECTA MOU: July 5, to August 31, 2012; (d) Bill 115: the *Putting Students First Act*; (e) After the Bill: September 1, 2012 to December 31, 2012; and, (f) Conclusion: Further Discussion and Repeal of the *Putting Students First Act*.

(a) Budget Considerations: the Government Prepares

[8] It is generally understood and accepted that, in 2007-2008, there was a global financial crisis. In response, Ontario, like other governments, provided stimulus through fiscal means. It injected billions of dollars into the economy. Ontario entered a recession.[12] Program-spending grew faster than revenues.[13] "Based on the Ontario public accounts, the share of compensation in total production costs would be about 68% for the total of ministries, hospitals, school boards

[11] S.O. 2014 c. 5.
[12] *Affidavit of David Dodge*, sworn April 24, 2013, at para. 38.
[13] *Ibid*, at para. 23.

and colleges/universities….Furthermore, compensation has taken a much larger share of the net revenues available to the Ontario government for spending on programs since 2007.”[14] “The total provincial government portion of compensation for bargaining and non-bargaining employees in the [Broader Public Service] is over $55 billion annually. This represents more than half of government program spending”.[15] For the fiscal year 2007-2008, Ontario had a budgetary surplus of $600 million. In the years that followed, it incurred large deficits.[16] “By September 2012, Ontario’s borrowing requirement to finance the deficit and maturing debt was projected at $35 billion for 2012-13. This made Ontario the world’s largest sub-national borrower in absolute terms and a high borrower per capita. As of 2012, if the growth of net debt relative to GDP continued without a credible plan to address it, Ontario was vulnerable to significant adverse risks economically and fiscally. Continued large annual deficits, with the resultant growth in net debt and erosion of the debt to GDP ratio, would become fiscally unsustainable.”[17]

[9] In mid-February 2012, the Commission on the Reform of Ontario’s Public Services (known colloquially as the “Drummond Commission”) released its report. It projected that without changes to government policies, programs or practices, Ontario would face an increased deficit and net public debt. The report recommended substantial cuts to existing and planned programs, including some in the education sector.[18]

[10] In the fall of any given year, as part of Ontario’s business cycle, the Ministry of Finance indicates expense limits that have been established for each ministry of the government. The ministries each prepare a submission that outlines its major programs, risks and strategies to align spending with expense limits. These submissions make up the expense side of the budget process. The process involves trade-offs and competition for limited resources between the ministries and the sectors they represent.[19]

[11] In the 2010 budget, the Minister of Finance outlined a plan to reduce and eventually eliminate the provincial deficit that had resulted from the global recession which had started in 2008. The Minister advised Ontario’s broader public sector partners, including the elementary and secondary education sector, that the government would act to preserve and enhance public services while managing the deficit. This would require no net increases in public sector

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[14] *Ibid*, at paras. 85 and 88 .
[15] *Affidavit of Michael Uhlmann*, sworn April 25, 2013, at para.10.
[16] *Affidavit of David Dodge,* sworn April 24, 2013, at para. 56, Table 2: Fiscal Developments in Ontario: 2007-2008 surplus of $600 million and for the years that followed deficits of (2008-2009) $6,409 million, (2009-2010) $19,262 million, (2010-2011) $14,011, (2011-2012) $12,929 million and (2012-2013 $14,370 million. The actuals in 2012-2013 were lower at $9,200 million. For the explanation of this, see: *Factum of the Respondents* at fn. 24 referring to Reply Affidavit of David Dodge, sworn July 12, 2013, at para. 7 .
[17] *Factum of the Respondents*, at paras. 32 and 33, referring to *Affidavit of David Dodge*, sworn April 24, 2013, at Exhibit F and para. 78.
[18] *Affidavit of Dale Leckie*, sworn March 7, 2013, at Exhibit 6 (Drummond Report at pp. 2, 6, 74-75 and 213-217). The deficit for 2017-2018 was projected at $30.2 billion and the accumulated debt at $411.4 billion.
[19] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 50-54.

compensation for at least two years.[20] For non-bargaining, "Broader Public Service" employees "compensation structures" were frozen for two years from April 1, 2010 to March 31, 2012.[21] In the late summer and fall of 2010, Ontario convened meetings of bargaining agents for the members of the public service. Unions were invited to forego increases that were the subject of existing contracts and agree to a two-year freeze on compensation. Only three did. None of them represented those employed in the education sector. Evidently at these meetings, two of the applicants, the Ontario Secondary School Teachers' Federation (hereinafter, "OSSTF") and the Elementary Teachers' Federation of Ontario (hereinafter, "ETFO") called for improved terms and conditions of employment including further compensation increases.[22]

[12] In the fall of 2011, Ontario began to consider and prepare for the budget of 2012-2013. Initially, discussions between the Ministry of Finance and the Ministry of Education centred on a preliminary multi-year expense allocation that would have provided for growth of 1% in each of the three years 2012-2013 to 2014-2015. On this basis, the projected gap between the funding allocation and the anticipated expenses was $0.8 billion in 2012-2013, $1.1 billion in 2013-2014 and 1.7 billion in 2014-2015. The Ministry of Education expressed its concerns with respect to the proposed funding envelope. The Ministry of Finance provided an updated funding envelope which assumed the growth of 2% in 2012-2013 while maintaining the 1% growth projections for 2013-2014 and 2014-2015. The fiscal gap was reduced to $0.5 billion in 2012-2013, $0.9 billion in 2013-2014 and $1.4 billion in 2014-2015.

[13] The Ministry of Education assessed a range of options that would meet and not exceed its expense allocation. Among the actions considered were:

(1) the freezing of experience-based movement on the salary grid for a two-year period so that teachers who were not at the top of the grid would not generate salary increases for their additional years of experience;
(2) increasing class sizes;
(3) delaying the implementation of Full-Day Kindergarten from five years to six years to facilitate completion of the required capital construction; and,
(4) options to address the increasing employee future benefits liability – specifically, the retirement gratuity liability (sick day plan) and post-employment liability (non-vested sick days) – and replace it with a short-term sick plan.

[14] For the 2012 central-tier negotiations, Ontario developed what it referred to as "parameters" that it would table at the outset of the discussions. The Ministry of Education estimated that the parameters, if implemented, would achieve the savings required while allowing it to meet its other policy objectives. In particular, it was decided that, in furtherance

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[20] *Ibid,* at para. 54.
[21] *Affidavit of Michael Uhlmann*, sworn April 25, 2013, at para. 28.
[22] *Ibid*, at paras. 13-22. The compensation increase proposed by ETFO was reflected in a request to eliminate a 2% wage gap between it and other teacher groups that had arisen in earlier PDT negotiations. The compensation increase proposed by OSSTF was reflected in a request for a cost of living adjustment clause.

of goals for the education to be provided, the implementation of Full-Day Kindergarten would continue as planned and there would be no reduction in class sizes.

[15] The "parameters", as developed, were summarized as:

(1) Term-2 years (September 1, 2012-August 31, 2014);
(2) Salary Increases - 0% increases for the two-year period;
(3) Retirement Gratuity and Sick Leave – replace retirement gratuity with a short-term sick plan by:
   (i) freezing banked sick days accumulated as of August 31, 2012;
   (ii) introducing a short-term sick leave plan which would offer 6 sick days paid at 100% of salary and 24 weeks at 66.66%; and,
   (iii) eliminate all accumulated non-vested sick days.
(4) Pensions – resume negotiations with the Ontario Teachers' Federation to ensure solvency of the Ontario Teachers' Pension Plan without increasing government contributions and without negatively affecting the Government fiscal plan. This would require negotiated reductions in plan benefits.
(5) Salary Grids – review school board employee salary grids during the term of the agreements with a view to future sustainability. Freeze current teachers and staff who are paid based on their position on a salary grid (either based on experience or qualifications) for two years as of August 31, 2012. During negotiations over the next PDT agreements, placement on and future movement on a grid would not be retroactive, and there would not be future adjustments to recognize missed grid steps.

[16] In the meantime, the unions recognized that the time for the next set of negotiations was at hand. In the fall of 2011, OSSTF requested that the Ministry of Education schedule initial PDT discussions where, as in the 2008 process, the "labour relations parties could identify issues and priorities, with the government [as it had in the past] providing facilitation." There was not much enthusiasm for the idea and certainly no commitment to proceed in this fashion. "[T]here was no plan to have these types of discussions in this round of bargaining."[23] On or about December 5, 2011, the Ministry of Education recommended to Cabinet that a PDT process similar to the ones that had succeeded in the past be adopted with respect to the negotiation of school board collective agreements in 2012.[24] The recommendation was not accepted. Subsequently, on February 22, 2012, Cabinet did provide the Ministry of Education with a mandate directing that it "initiate central Provincial Discussion Table (PDT) processes with the trustee associations (on behalf of school boards) and the teacher and support staff unions in the education sector…"[25]

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[23] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 49.
[24] School Board Negotiations 2012 (Undated Slide Deck) Answers to Undertakings made at the cross-examination of Gabriel Sékaly.
[25] Cabinet Minute No. 5-11/2012 (Cabinet Meeting of: February 22, 2012).

(b) PDT Process: February 2012 to August 31, 2012

[17] I start this part of these reasons by noting that counsel for Ontario was candid in his acknowledgment that the process that followed was improvised and imperfect. It was also different from those that preceded it. Ontario, no longer content to be a facilitator, became the *de facto* negotiator on the side of the employer. While at the outset the process was said to be voluntary as its predecessors had been, that status did not last. When it became apparent that agreements could be imposed, the choice was plain: either take part or risk the imposition of an agreement without having had any input into its terms.

[18] The process began on February 15, 2012. On that day, the Minister of Education issued a memorandum to all education sector unions and Board Associations setting out a timetable for the upcoming PDT meetings. On February 21, 2012, there was to be a conference call with the Minister who was to provide "… an overview of the next steps" without the opportunity for questions. The next day, a series of meetings with the "Ministry's PDT table team" were scheduled for the respective unions. This was to share the government's financial framework intended to support the negotiation of the school board collective agreements. Beginning on February 28, 2012 and through the days that followed, various meetings were scheduled involving representatives of the unions, employers and Ontario.[26]

[19] The telephone call took place on February 21, 2012, as scheduled. The Minister gave way to the Premier who made some introductory comments. While there is a document which refers to what the Minister of Education was to say, so far as I am aware, there is no record of what the Premier contributed to the call. The Minister of Education returned to the notes that had been prepared. She identified that Ontario faced significant fiscal challenges and pointed out that these realities should not be a surprise to those taking part in the call. She referred to the success of the past two rounds of collective bargaining, but acknowledged that the process being undertaken was "very different" from that which took place in 2008. During the call, the Minister explained that the Ministry had retained a retired justice to assist it in meeting the "formidable challenge", advised that the judge would share Ontario's proposal at the meetings set for the following day (February 22, 2012), suggested that it would be helpful if financial parameters were agreed to quickly and generally outlined the schedule for the meetings that were to take place.[27] The Minister was looking for and expected that the unions would "take up this economic fight"[28] and "share some of the load".[29]

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[26] *Affidavit of Dale Leckie,* sworn March 7, 2013, at Exhibit 7, also found at *Affidavit of Gabriel Sékaly*, sworn April 25, 2013 at Exhibit 15 (Memorandum dated: February 15, 2012).
[27] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 92, and see Exhibit 16 (Notes: PDT Discussion Remarks for the Minister's Teleconference Call February 21, 2102).
[28] *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at para. 43.
[29] *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at Exhibit 16 (PDT Discussions Remarks for the Minister's Teleconference Call February 21, 2012 at p. 5).

[20] On February 22, 2012, Ontario's negotiating team met with representatives of a number of bargaining agents (among them, the applicants in this proceeding). The judge made introductory remarks. Ontario provided a document which outlined the parameters it had defined.[30] Ontario is clear in its assertion that it was open to discussion and prepared to consider alternatives to the parameters that had been identified so long as they met the government's fiscal objectives.[31] It emphasized its role as a facilitator[32] and suggested it would welcome ways in which the PDT process could be made more effective.[33]

[21] Rather than understanding the parameters as a reasoned answer to a broad fiscal concern, the applicants saw them as "an unprecedented demand…for centrally imposed and very significant reductions, erosions and concessions in salary and benefit levels and protections which had been negotiated…through free collective bargaining over many decades".[34] The parameters dealt with fundamental terms and conditions of employment central to any collective bargaining negotiations. They were developed prior to any discussion with any PDT participants.[35] As perceived by the applicants, Ontario did not set out to and did not act as a facilitator. It set the schedule and dictated who would attend the various meetings that were set. It set the terms to which it sought agreement. Ontario's introduction of the parameters was seen as an intrusion into the collective bargaining relationship between the unions and the school boards.[36]

[22] The introduction of the process and the parameters was undertaken without prior consultation. The unions' response was predictable. The adversarial and confrontational tone was set.

[23] The process did not develop as Ontario had hoped. Representatives of ETFO asked questions about the process. They asked for clarification as to how the negotiations were to proceed (what were the ground rules), whether additional issues could be raised in the discussions and whether Ontario was prepared to consider other cost-saving measures.[37] Ontario's team was "unable or unwilling to answer". The ETFO representatives found the tone and content of the parameters to amount to "…deep and mean spirited strips to [its] collective agreements that would negatively affect every member at every stage of their career".[38] The PDT process was outside of the collective bargaining process set out in the *Ontario Labour*

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[30] *Ibid,* at para. 93, and see Exhibit 17 (Welcome Remarks and Government of Ontario Parameters for the 2012 PDT Discussions- February 22, 2012). The parameters are generally as identified at para. [15], above.
[31] *Ibid,* at paras. 96, 98 and 104.
[32] *Ibid,* at paras. 99 and 102.
[33] *Ibid,* at para. 102.
[34] *Affidavit of Gene Lewis*, sworn March 7, 2013, at para. 67, and see, as well: *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 69.
[35] *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at paras. 41 and 46.
[36] *Ibid,* at para. 19.
[37] *Affidavit of Gene Lewis*, sworn March 7, 2103, at paras. 68 and 69.
[38] *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at para. 97, and see Exhibit 18, and see *Ibid,* at para. 69.

Relations Act.[39] There were significant concerns about participating in a voluntary process.[40] ETFO decided it would not take part.[41]

[24] At its February 22, 2012 meeting with Ontario's negotiating team, OSSTF was advised that Ontario was not bound by the parameters as set and would consider alternative terms to meet its fiscal goals. In response, OSSTF requested the financial target that any alternative proposals it made would have to meet. The answer was to be provided later. The request was repeated on April 18-19, 2012; May 10, 2012; and, July 12, 2012.[42] These cost-saving targets were never provided. In an affidavit filed on behalf of Ontario, an Assistant Deputy Minister of Education indicated that Ontario does not collect financial information that is organized by bargaining unit. This is because the funding provided through grants from the Ministry is allocated by school board and is not based on the bargaining agents that represent the employees at a particular board.[43] Why this was not pointed out in answer to the requests made by OSSTF is not apparent.

[25] I point out that this is an early indication of a structural problem with the process Ontario put in place. Ontario sought to undertake its central negotiations in meetings that separated the unions. It said it was prepared to consider alternatives brought forward by each of those bargaining agents to the parameters it had put in place. It was unable to provide them with the targets they would each have to meet to satisfy the fiscal objectives Ontario had set. Without that information, the unions were in a position where they were unable to prepare or propose alternatives knowing they would meet the standard Ontario was looking for. Even at this early stage, any discussion could do nothing other than work from the parameters that were proposed.

[26] On February 22, 2012, at its initial meeting with Ontario's negotiating team, the Ontario Public Service Employees Union (hereinafter, "OPSEU") was advised, following the presentation of the parameters, there was to be no further discussion. Parties were told to raise any questions at the meetings to follow; the ones which had been set out in the memorandum that had been issued by the Ministry of Education on February 15, 2012 (see: para [18], above).[44]

[27] On February 22, 2012, the Canadian Union of Public Employees (hereinafter, "CUPE") also met with the Ontario negotiating team. As perceived by the representatives of CUPE, Ontario was not interested in any concerns with the PDT process. CUPE raised issues with the process that it wished to be considered. Rather than respond and engage in "meaningful discussion" respecting those issues, Ontario "…focussed on the state of the economy and the

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[39] *Ibid,* (Sékaly) at Exhibit 18 and the citation: S.O. 1995, c 1, Sch. A.
[40] *Affidavit of Gene Lewis,* sworn March 7, 2103, at para. 70.
[41] *Ibid,* at para. 78.
[42] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 70-71.
[43] *Ibid,* at para. 89.
[44] *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at para. 47, and see *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 105.

Ontario deficit". The parameters were reviewed on the understanding that they were to "…serve as the basis for the 2012-2104 PDT agreements". CUPE believed that, "from the very outset of the process…the Ministry sought to circumscribe the PDT process by imposing these 'parameters' on any PDT agreement that CUPE could reach with the Employer Associations".[45]

[28] The negotiating team reported to the members: the session opened "…with a lengthy rehash of the state of the world economy" and proceeded to a presentation of "…a list of takeaways to deal with this so-called deficit". The meeting "…came across as a pre-budget consultation for government projected cuts rather than engaging in real talks with unions. This was not a Provincial Discussion Table".[46]

[29] CUPE asserts that the process was significantly different from what had taken place in the past. Ontario had never before defined "parameters" for the PDT agreements that were to be entered into between the union and the employers. Instead of facilitating the discussions between the parties to the agreements by letting them discuss the items that mattered to them and then advising on whether funding was available (as it had apparently done in the past), Ontario started the process by telling the parties what the central terms would be. CUPE was left to attempt to negotiate with Ontario on the items outlined in the parameters. CUPE represents support staff, not teachers. The bargaining team representing CUPE pointed out that the "parameters" were not directed to its bargaining needs; they dealt with the concerns and interests of teachers. The Ontario negotiating team was not responsive to these concerns.[47]

[30] What seems apparent with hindsight is that Ontario was attempting to manage the process to the end it desired. For their part, the unions did not concern themselves with the issues so much as they identified problems and concentrated on them. Neither side made it a priority to move on to meaningful, constructive and bi-lateral discussion.[48] The process followed the adversarial model to which the parties were, seemingly, accustomed.

[31] On February 29, 2012, a letter signed by the presidents of the five unions that are the applicants in this proceeding was sent to the Premier. It sought an "emergency meeting" with the Premier to discuss the process, time lines and table team composition of the "current PDT".[49] At first, the Premier chose not to respond directly. Instead, he posted a speech on the internet.[50] The speech makes clear that the parameters were the product of trade-offs Ontario

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[45] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at paras. 53 and 55.
[46] *Ibid*, at Exhibit I.
[47] *Ibid,* at paras. 50-59.
[48] Of the five unions, one refused to take part (ETFO) (see para. 23 above), another followed suit shortly thereafter (OSSTF) (see para. [34], below), a third did not take part (Unifor) (see para. [33], below), all five signed the subsequent letter, dated February 29, 2012, complaining to the Premier about the process and the players (see para. [31], above).
[49] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 73, and see Exhibit 13.
[50] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at Exhibit O.

had determined ought to be made. It had decided to keep class sizes small and to move forward and implement Full-Day Kindergarten.[51] The Premier noted:

> To make that happen, we're asking teachers for a real two-year wage freeze. We're asking for an end to a generous sick leave plan that allows some teachers to get paid upon retirement for two hundred unused sick days.[52]

[32] This was followed by a letter, dated March 2, 2012, from the president of OSSTF to the Premier. It expresses "extreme disappointment" and describes the internet posting as pointed at the members of the five unions "reinforcing the confrontational demands made during our initial meeting with government representatives on February 22".[53] On March 6, 2012, the Premier answered the letter from the five presidents. He did not agree to meet. His only response was to acknowledge that the parameters proposed "ask a lot of you and your members", to state that "we must stay within the fiscal parameters of the proposal…" that had been outlined and to repeat that "we welcome suggestions on alternative ways of achieving those goals provided they do not compromise student success".[54]

[33] I have yet to make reference to the last of the applicants and its response to the initial discussions and meetings. Unifor was formed at a founding convention on August 31, 2013, which is to say, after the events which led to this application. One of its predecessors, the Canadian Auto Workers (hereinafter, "CAW"), was the certified bargaining agent for two bargaining units of non-teaching employees at the Windsor-Essex District School Board (hereinafter, "WEDSB"): the Office, Clerical and Technician Bargaining Unit and the Custodians and Maintenance Bargaining Unit.[55] The applicable collective agreements were among those set to expire on August 31, 2012.[56] During June 2012, CAW began bargaining a local agreement with the WEDSB (the employer). CAW issued notices to bargain on June 5, 2012. On June 25, 2012, CAW and the WEDSB held their first local bargaining meeting. The WEDSB wished to begin local bargaining, apparently in anticipation of a provincial framework agreement. At that time, CAW was not participating in the provincial discussions as commenced in February 2012 and did not take part as they continued through June 2012. It should be said, and counsel for Unifor was candid to confirm, that Unifor was not fully aware of the progress of the PDT process.

[34] Ontario says that, over the next few weeks, its negotiating team met with individual bargaining agents to answer questions and discuss its position.[57] It did not meet with ETFO

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[51] This was contrary to the recommendation made in the Drummond Report.
[52] *Affidavit of Brian Blakely,* affirmed March 8, 2013, at Exhibit O.
[53] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 80, and see Exhibit 14.
[54] *Affidavit of Gene Lewis*, sworn March 7, 2013, at para. 76, and see Exhibit N; *Affidavit of Dale Leckie,* at para. 80, and *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 72, and see Exhibit P.

[55] *Affidavit of Aaron Neaves,* sworn March 3, 2014, at paras. 4 and 5.
[56] *Affidavit of Ron Riberdy,* sworn March 3, 2014, at para. 4.
[57] *Ibid,* at para. 95.

which had withdrawn. It did not meet with CAW which was engaged in local negotiations. On March 1, 2012, OSSTF and the Ontario Public School Board's Association (hereinafter, "OPSBA") met with Ontario's team in what was to be the beginning of the formal PDT discussions. Representatives of OSSTF and OPSBA provided an initial view of the PDT process. In particular, they observed that the approach selected was inconsistent with the voluntary process of facilitated discussions between the unions and the board associations that had been successful in 2008. Ontario was negotiating as the employer in place of the school boards. The parameters that were the substance of the mandate set by Ontario were not a set of values (fiscal targets) to be met through negotiation with the employers, but specific terms the province required be incorporated into the collective agreements. In the absence of a response to these concerns, OSSTF indicated it was "stepping back" from the PDT process. If Ontario responded to the concerns that were raised, OSSTF would return.[58]

[35] OPSEU was one of a group of unions which met together with Ontario: the Collaborative Education Support Staff Group (hereinafter, "CESSG"). At a meeting held on March 3, 2012, the spokesman for CESSG raised concerns about "the parameters being imposed by the Government". Ontario indicated that it was seeking to prevent a "budgetary crisis". It was "…open to considering suggestions as to alternatives to generate revenue". On March 6, 2012, a letter was sent to Ontario setting out the questions and requests for information posed at the meeting. An answer was received on March 14, 2012. The exhibited copy appears to be incomplete. The unions were not satisfied with the answers.[59] In particular, it seems the leader of the Ontario negotiating team (the retired judge that had been retained for the purpose) had undertaken to collaborate with the school boards to the extent required to fully address the questions that had been asked. On March 13, 2012 and, again, on March 15, 2012, the CESSG spokesman wrote, observed that this had not happened and asked for confirmation that "…the Ministry's responses will include all the requisite information from the School Board's [*sic*] as well?"[60] It is the view of the unions that they never received a direct response to the requests that had been made.[61] This contributes to the recurring difficulty. How could the unions bring forward alternatives that met Ontario's fiscal requirements in the absence of understanding their individual contribution to its fiscal concerns?

[36] CUPE representatives (the Ontario School Board Co-Ordinating Committee (hereinafter, "OSBCC") which "…unites CUPE members in the school board sector"[62]) wrote to the Minister of Education on February 25, 2012 outlining its concerns. The letter attached a memo requesting certain information including some that was specific to the bargaining units it represented. It wished to understand the value of 1% of the CUPE payroll for all boards of education, both the total and by individual bargaining unit. It asked for the anticipated cost of the movement of CUPE members through the existing wage grids for the following 6 years. It is

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[58] *Affidavit of Dale Leckie*, sworn March 7, 2013, at paras. 74-79.
[59] *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at paras. 48-50, and see Exhibits 10 and 11.
[60] *Ibid,* at Exhibit 11 (e-mails of Sam J. Marino to Margot Trevelyan, March 13 and 15, 2012).
[61] *Ibid,* at para. 50.
[62] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 61.

apparent that this data would have been helpful in understanding the fiscal impact of CUPE members on the parameters that affected wages and grid movement in the context of a 1% increase in the funding of education.[63] On February 27, 2012, the Minister responded. Her letter was conciliatory.[64] The accompanying response to the questions that had been asked did not provide the information concerning the 1% contribution to payroll[65] or the impact of grid movement.[66] CUPE and Ontario met on February 28 and 29, 2012. Concerns were again articulated. At the meeting, Ontario indicated that it had no way of providing numbers that indicated the value of unfunded liabilities, such as sick leave benefits, held to the credit of CUPE members. Without this information, it was not possible to identify the amount of savings to be achieved if the Ontario parameters respecting wages, grid movement and sick leave were agreed to. It was not possible to determine whether the parameters were reasonable in the circumstances or whether alternatives might be negotiated that would meet Ontario's funding objectives.[67] Ontario left it to CUPE to obtain this information from the applicable school boards.[68]

[37] It does not seem out of place to observe that, at this point after an initial set of meetings, the "parameters" had been provided with an invitation that they were open to discussion, but without information allowing for their assessment or any indication of the nature of any variation or amendment that could be considered. The general indication, by action, as opposed to what was expressed in the invitation was that the parameters would have to be adhered to.

[38] On March 8, 2012, the retired judge sent an e-mail to the participants in the PDT. It is clear that Ontario intended that the process continue on the basis that it had begun. The e-mail indicated:

> …We have endeavored to facilitate a meaningful discussion amongst the various stakeholders in the Education system for how to best address the fiscal situation. I would stress that the role of the Government and its table team is to act as facilitator…
>
> …There are real challenges ahead for all of us, I am hopeful that together we can meet those challenges through continuing to engage in a cooperative and substantial dialogue through the PDT process. We encourage all of you to come up with proposals as to how to come to agreements which would be in everyone's mutual interests, including the public interest. We would welcome those initiatives and we would reaffirm our willingness to digest, analyse and comment thereon, all in a thoughtful manner including providing reasonable

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[63] *Ibid,* at Exhibit J.
[64] *Ibid,* at Exhibit K ("…your honest feedback will help ensure a more refined dialogue moving forward").
[65] *Ibid,* at paragraph 63 and Exhibit L ("The Ministry does not collect information by bargaining unit…").
[66] *Ibid,* at paragraph 63 and Exhibit L ("The Ministry only collects grid information for teachers and ECEs".).
[67] *Ibid,* at para. 64.
[68] *Ibid,* at para. 65.

> information on their fiscal impact on closing the gap. To that end we will be scheduling further PDT dates with stakeholders to express an interest in doing so.…
>
> In our PDT discussions to date, some of you expressed concerns about improving the PDT process and the enforceability of any understanding that might be reached in Provincial discussions. We would encourage each of you to consider how best to address these concerns and suggest what kind of procedural and enforcement mechanisms would be desirable. If you do have any such suggestions, please feel free to forward them to us in advance of any subsequent PDT dates that we schedule.[69]

[39] On March 22, 2012, the CUPE bargaining team attended a "technical briefing". Ontario's representatives gave a presentation on their proposed sick leave plan. The CUPE representatives asked a number of questions about the operational elements of the plan and how it would work for their members. As the CUPE representative saw it, Ontario's negotiating team was unable to answer.[70]

[40] Ontario released its 2012 Budget on March 27, 2012. It set out the need to achieve labour agreements that supported the objectives of a balanced budget while protecting important gains made in education. In the Budget, the government announced its plan to continue to fully implement Full-Day Kindergarten by 2014 and to keep a cap on class sizes at the primary school level. The Budget listed the parameters; introduced as "… proposed parameters for an agreement with education employees and school boards…".[71]

[41] Their inclusion in the Budget could be taken as demonstrating a level of commitment to the parameters that was inconsistent with what Ontario says was good faith bargaining. For their part, the applicants suggest that this is not all that was said in the Budget that reflects on the ongoing difficulties with the relationship between them and Ontario. The following comment appeared in the Budget:

> The government fully expects employers and bargaining agents to reach responsible settlements that are respectful of fiscal realities and also maintain vital public services. Where agreements cannot be reached that are consistent with the government's plan to eliminate the deficit and protect priority public

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[69] *Ibid,* at Exhibit Q.
[70] *Ibid,* at para. 76.
[71] *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at paras. 106-109; *Affidavit of Dale Leckie*, sworn March 7, 2013, at paras. 82-83, and see Exhibit 15(2012 Ontario Budget at p. 11), at p. 11; *Affidavit of Brian Blakely*, affirmed March 8, 2013 2012, at paras 77-80, and see Exhibit S (2012 Ontario Budget), at p. 11; *Affidavit of Gene Lewis,* sworn March 7, 2013.

> services, or in the face of significant disruption, the government is prepared to propose necessary administrative and legislative measures.[72]

[42] The applicants saw this as a demonstration that Ontario had no intention of negotiating. Rather, this was "… a threat to legislate if the parameters were not implemented".[73] This is, at best, an overreaction and, at worst, a misleading interpretation. The comment was not made, as suggested by CUPE, "with respect to" the parameters Ontario had proposed "for an agreement with education employees and school boards".[74] It was not directed to the education sector or the process that was then underway. The education sector was referred to only as an example. The comment was made in the context of the Ontario public sector as a whole and the need for all parties to negotiate in a responsible manner, recognizing that there were fiscal constraints.

[43] I pause to return to the comment made at the outset of these reasons. The process, as it had evolved, was not a cooperative response to the continued responsibility to provide the best public education in the presence of a high level of fiscal uncertainty. It was oppositional and adversarial. The government unilaterally amended a process that all the parties acknowledge had been successful in the past. It did not consult or ask for input. For all its insistence that it was acting as a facilitator, it was in no sense standing back ready to assist the negotiations if needed.[75] It set the issues and limited the discussion. For their part, two of the unions responded by refusing to take part (ETFO and OSSTF). The president of another signed the letter requesting an emergency meeting, but did not appear or send a representative to the meetings that did take place (Unifor). What Ontario referred to as "parameters" did not set goals or objectives; they did not set a range or boundaries within which negotiation were to take place. The "parameters" represented fixed terms to be imposed into the contracts. There was no indication how or the manner in which they could be varied. The unions asked questions. What is clear is that while Ontario was attempting to narrow the debate, the unions sought to broaden them into all manner of concerns and areas of policy (listing of all cooperative purchasing and services arrangements involving school boards, current status of international trade negotiations that affect or could affect operations of school boards, personal and employment data for all

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[72] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at Exhibit S, (p. 74).
[73] *Affidavit of Gene Lewis*, sworn march 7, 2013, at para. 80.
[74] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 78.
[75] Black's Law Dictionary, Tenth Edition, 2009 Thomson Reuters defines "facilitator" as 1. Something helps a process take place. 2. Someone who helps a group of people engage in discussions or work together; esp., one who interacts with parties in negotiations, exchanging information and trying to further the process.

The dictionary goes on to quote the following:

> The term "facilitator" is often used interchangeably with the term "mediator", but a facilitator does not typically become as involved in the substantive issues as does a mediator. The facilitator focuses more on the process involved in resolving a matter.

(U. S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide* 8-9 92001).

CUPE members at all District School Boards bound to CUPE collective agreements,[76]production of any studies or other types of information that consider the impact of Ontario's sick plan on employee health[77]). Ontario arranged meetings with individual unions but was unprepared or unable to provide data that would allow the unions to understand their contribution to whatever fiscal concerns needed to be dealt with or consider how they could best respond to Ontario's requirements. In one case, the principal negotiator said that Ontario would collaborate with school boards to generate union or unit specific data (see: para. [35], above). In another, the union was told to obtain the data from the applicable school boards (see: para. [36], above). It would seem that one of the unions was unprepared even to concede that there was a fiscal problem.[78] Whether or how any of this reflects on any possible breach of s. 2(d) of the *Charter of Rights and Freedoms* will have to come later in these reason. For the moment, I say only that it is clear that the need to find a solution to the fiscal problems while fostering policies that would sustain a high level of education was not assisted by the oppositional approach and adversarial attitude of the parties.

[44] Quite apart from their inclusion in the budget, Ontario's commitment to the implementation of the parameters was demonstrated in other ways. The Ministry of Education provides operating and capital funding to school boards through a system of legislative grants as set out in the "Grants for Student Needs Regulation". The Grants for Student Needs (hereinafter, "GSN") uses a series of formulas to calculate grants based on student enrollment, number of schools and local factors. The GSN is calculated and released annually along with projections which indicate an estimate of the funding to be provided to each school board. The GSN contributes the greatest part of school board revenues: 92% for the 2011-2012 school year. On March 29, 2012, Ontario released a memorandum concerning the 2012-2013 GSN.[79] It began by advising that this was to be a year of transition from a time of large annual increases in education to a more constrained fiscal environment. The parameters were incorporated into the GSN:[80]

> The government is currently facilitating a Provincial Discussion Table (PDT) process with the goal of establishing a framework for negotiating local collective agreements in the education sector. As the basis for this process, on February 22, 2012 the government tabled parameters for PDT agreements.

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[76] *Affidavit of Brian Blakely,* affirmed March 8, 2013, at para. 61, and see Exhibit J (Second Document: Memorandum, February 25, 2102). The personal and employment data included Members' full and proper names, Social Insurance Numbers, Dates of Birth, Names of Employers and CUPE Bargaining Unit, Dates of Hire, Seniority Dates, Security Credits, Current Classifications, Classification maximum rates of pay, Members current rate of pay per hour/week, Classification Full Time Equivalent hours of work per week, Members current hours worked per day, Members current hours worked per week, Sick leave entitlements under current Collective Agreement or Policy, Number of vested sick leave credits, Present value of vested sick leave credits, Present value of non-vested sick leave credits.

[77] *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at Exhibit 10 (Sick Days: Question 5).

[78] See para. [28], above: CUPE in reporting to its members referred to "this so-called deficit".

[79] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 22-25.

[80] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 85, and see Exhibit 16.

> These parameters have been incorporated into the 2012-2013 GSN. The measures described below could be changed or modified based on the PDT discussions. When PDT agreements are reached that are acceptable to the government and stakeholders and within the funding constraints in the Budget, the Ministry will, if necessary, seek the approval of the Lieutenant Governor in Council for further amendments to the GSN regulations.[81]

[45] It should not be forgotten that, to this point, the PDT process had been described as voluntary. OSSTF, having withdrawn, determined to proceed to negotiate with the actual employers, the school boards. It issued Notices to Bargain across the province.[82] On April 11, 2012, the Minister of Education issued a written directive to all 72 school boards (addressed to "Dear Chair") discouraging them from engaging in local bargaining. She indicated that it was her "expectation" that any local bargaining that might occur in the absence of a PDT agreement would take place within the Ministry's "parameters".[83] On the same day, the Deputy Minister sent essentially the same letter to Directors of Education of the school boards ("Dear Director"). The Deputy Minister asked to be "informed immediately" if any union issued a notice to begin local bargaining and requested that school boards contact the Ministry prior to finalizing any collective agreements "to ensure that they are compliant with the fiscal parameters".[84] The Deputy Minister's letter expressed the expectation that the terms and conditions contained in the 2012 PDT Mandates and the Ontario budget be incorporated into every education sector collective agreement:

> In the budget, we outlined a proposed salary freeze, including a freeze to the salary grid, changes to retirement gratuity and sick day plans, and the intent to improve the sustainability of public-sector pension plans….
>
> These proposed measures are intended to apply to all unionized and non-unionized staff, including teachers, support staff, principals, vice-principals, supervisory officers, directors and Board staff at all levels. We expect you to apply these measures consistently to all throughout your board.[85]

[46] On the following day, April 12, 2012, the Assistant Deputy Minister issued a Memorandum entitled, "Implementing Ontario's Balanced Budget", to all Directors of Education confirming Ontario would use its regulatory powers to impose these terms if the

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[81] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 80, and see Exhibit T; and *Affidavit of Dale Leckie,* sworn March 7, at Exhibit 16; and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 110-111.
[82] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 88.
[83] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 85 and see Exhibit V; and *Affidavit of Gabriel Sékaly* at Exhibit 22.
[84] *Affidavit of Dale Leckie,* sworn March 7, 2013, at para. 91, and see Exhibit 18; and *Affidavit of Gabriel Sékaly* at Exhibit 23.
[85] *Ibid ,* at para. 92, and Exhibit 18; and *Affidavit of Gabriel Sékaly*, at Exhibit 23.

school boards did not abide by them voluntarily. After referring to the PDT process that was underway, the Memorandum states:

> As the basis for this process, on February 22, 2012, the government tabled fiscal parameters for PDT agreements. These parameters have subsequently been incorporated into the document outlining the 2012-2013 grant for student needs (GSN), which was released on March 29, 2012…
>
> The initiatives and investments described herein must be implemented by, and are conditional upon, the making of… a regulation by the Lieutenant-Governor in Council.
>
> The Ministry intends to seek such a regulation and will advise you if it is made.
>
> …
>
> We have every confidence that school boards understand the government's expectations with respect to compensation constraints, and that further administrative or regulatory compliance mechanisms will not be necessary.
>
> The goal of the PDT process is to ensure that all local agreements are within the fiscal parameters as set out in the Budget. We would ask that you notify the Ministry if local bargaining begins in the absence of such a framework being in place. Where such local bargaining does occur, it is important for school boards to be mindful of their responsibility to taxpayers to negotiate agreements that are within the board's funding envelope, as determined by the GSN, and therefore sustainable over the life of the agreement and, that do not have a negative impact on student achievement and classroom experience.[86]

[47] Ontario's commitment to the parameters was again confirmed when, on April 16, 2012, the Director of Financial Analysis and Accountability Branch at the Ministry of Education sent a memorandum to the school boards. It provided the Estimates for 2012-2013. The document described the financial liabilities currently existing in the education sector. The accounting assumptions for these projections included the pre-determined PDT mandates.[87]

[48] Meetings continued after the release of the budget.

[49] On April 2, 2012, the CUPE representatives (OSBCC) met with Ontario's negotiating team and the school board representatives.[88] They met again on April 11, 12 and 13, 2012.

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[86] *Ibid,* at para. 93, and see Exhibit 19, *Affidavit of Gabriel Sékaly,* at para. 115; and see Exhibit 24 and *Affidavit of Brian Blakely,* affirmed March 8, 2013, at para. 86, and see Exhibit W.
[87] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 94; and see Exhibit 20 and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 116 and see Exhibit 25.
[88] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 130.

CUPE tabled proposals respecting employment equity, job security, scope of work, professional development, technological change, violence, medical intervention, supervision and colleges.[89] It raised issues regarding the Ministry's role in the PDT process.[90] They met again on May 2, 2012 and May 17, 2012. On the first of those two days, CUPE tabled a proposal with respect to province-wide education sector benefits trusts.[91] On the second of those days, Ontario repeated that if the parties agreed to a proposal that would meet the parameters, "it would be considered".[92]

[50] On April 18, 2012, OSSTF (in its role as representative of secondary school teachers) returned to the PDT process. On that day, it met with the OPSBA and Ontario's negotiating team. OSSTF tabled a proposal. OSSTF acknowledges that the proposal differed from the parameters. OSSTF proposed a four-year agreement, with 0% increases in the first two years. It proposed cost-of-living increases in the final two years of the agreement as well as a financial incentive or teachers to retire early.[93]

[51] OSSTF says this proposal included terms and conditions which would result in reduced costs associated with the collective agreements of its teachers. OSSTF believes the concessions it made met Ontario's objectives. It says it was unable to confirm this because of the refusal of Ontario to provide dollar-figure estimates or the percentage cost-savings required.[94] The OSSTF proposal reintroduced the idea that the union would take over responsibility for the provincial benefits plan.[95] According to OSSTF, this proposal would eliminate approximately $417 million in unfunded school board liabilities. Moreover, it projected possible ongoing efficiencies and savings of approximately $661 million.[96]

[52] At a meeting which took place on April 19, 2012, the Assistant Deputy Minister suggested that the OSSTF teacher proposal would cost Ontario $470 million in the first year and $900 million in 2014-2015 if it was applied across the education sector (sector-wide).[97] On this basis, Ontario did not view the OSSTF proposal as a reasonable substitute for the parameters. Ontario understood that OSSTF did not feel compelled to meet the government fiscal targets.[98] For its part, OSSTF says that despite repeated requests, the Assistant Deputy Minister did not provide any detail as to how the government arrived at this projected cost. There was never any meaningful discussion regarding the impact of the OSSTF teacher proposal. Ontario did not

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[89] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 87 and see Exhibits X and Y; and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 131-133, and see Exhibits X and Y.
[90] *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at para. 131.
[91] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 88, and see Exhibit Z.
[92] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 134-135.
[93] *Ibid,* at para. 119 and *Affidavit of Dale Leckie*, sworn March 7, 2013, at paras. 95-99, and see Exhibit 21.
[94] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 98.
[95] *Ibid,* at para. 100: The OSSTF had provided the details of this plan on January 25, 2012 before the PDT process had begun.
[96] *Ibid,* at paras. 100-101.
[97] *Ibid,* at paras. 106-107, and see *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at para. 123.
[98] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 124.

request the calculation of the savings that OSSTF understood its proposal to represent and did not provide any explanation of its own findings that it would result in a significant cost.[99] When asked by OSSTF why Ontario assumed a sector-wide application of the terms of its proposal, the retired judge explained that Ontario would view conversations between the bargaining agents within the sector as beneficial. In his view, this would potentially allow the development of a proposal that applied fairly and consistently across the sector.[100]

[53] OPSBA was receptive to discussing the OSSTF proposal. However, it was the view of the OPSBA representatives that they were unable to bargain on the terms contained in that proposal unless Ontario's negotiating team agreed with it. The OPSBA negotiating team took the position that OSSTF required advance approval from Ontario before the school boards could consider bargaining proposals different from the parameters.[101] OPSBA had a proposal of its own. It was unable to say whether its proposal would comply with the parameters apparently because, like the unions, it did not have clear information concerning the substance or data that provided a rationale for them. OSSTF saw the situation as problematic. It was being asked to respond to two separate, distinct and mutually-exclusive proposals, in addition to bringing forward its own. It did not make sense to bargain in the absence of confirmation from Ontario that the alternatives being proposed could form the foundation for viable and funded collective agreements.[102]

[54] With the failure of Ontario to engage in what OSSTF perceived as meaningful discussion or to provide the information it had requested, OSSTF determined not to participate further in the teacher PDT discussions.[103] OSSTF was still prepared to return to the PDT process on behalf of its members who are support workers. It did so on May 10, 2012.[104] OSSTF tabled a proposal which, while there were some differences, was similar to the proposal tabled on behalf of the teachers on April 18, 2012.[105] The response of Ontario was essentially the same. The proposal represented an additional cost of $400 million above the fiscal targets in the first year; over $600 million extra in the second year; and over $900 million extra in the third year.[106] Again, the OPSBA would not conclude an agreement unless it was approved by Ontario.[107]

[55] It is at this point that the problem of union specific negotiations, relying on sector-wide data, came to a head. OSSTF asked why the projections outlined by Ontario as representing that the costs of the OSSTF proposal could be as high as suggested ($400 million, $600 million and

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[99] *Affidavit of Dale Leckie*, sworn March 7, 2013, at paras. 108-109.
[100] *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at para. 127.

[101] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 102.
[102] *Ibid,* at para. 105.
[103] *Ibid,* at para. 109 and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013 at para. 127.
[104] *Ibid,* at para. 125 and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013 at paras. 110-111.
[105] *Ibid,* at paras. 112-113, and see Exhibit 23; and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 125.
[106] *Ibid,* at para. 107 and 117 and *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at para. 126.
[107] *Ibid,* at para. 115.

$900 million) when the total cost of all OSSTF support staff collective agreements amounted to "little more than $400 million". The answer provided was that the savings required from OSSTF were "sector wide savings".[108] In other words, the impact of the negotiations with OSSTF was being measured against the savings being sought from (or costs attributed to) the sector as a whole. OSSTF could not provide those savings (and does not represent such costs) on its own. Nor could it bargain the contribution to be made to the prospective savings (or costs) by other bargaining units.[109]

[56] OSSTF asked again for information indicating the cost savings expected from its support staff membership. Ontario's negotiating team advised that it was only interested in looking at sector-wide savings. No figures for particular bargaining agents or bargaining units were provided.[110] Ontario was unprepared to organize a sector-wide or "all union meeting". Ontario left it to the bargaining agents to meet and "come back with a comprehensive proposal".[111] This refusal to take part in re-orienting a process it set in place so that it could achieve results it wanted, needs to be assessed against its stated willingness to listen to concerns about and consider amendments to that process. OSSTF concluded that the PDT process was not being conducted in good faith; it did not provide an opportunity for meaningful dialogue that could achieve a framework agreement.[112]

[57] OPSEU, as part of the CESSG, met with Ontario's negotiating team and the applicable school boards on May 9, 2012. The union representatives began to put forward their proposals. Job security was raised. The school boards were not content. They requested a full package of proposals for the next scheduled meeting and indicated that the next meeting would be the last. Ontario advised that if the proposal did not fit within the mandated parameters, it could not be tabled and would not be considered.[113]

[58] Over this period, ETFO did not meet with Ontario. The Minister of Education held a press conference on April 9, 2012. She commented on ETFO's failure to take part:

> …And I am happy to report that all of our partners are at the table working productively with us…
>
> …all except one.
>
> It is very unfortunate that the Elementary Teachers Federation of Ontario has refused to participate in these discussions.

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[108] *Ibid* ,at para. 118.
[109] *Ibid,* at paras. 119-120.
[110] *Ibid,* at para. 121.
[111] *Ibid,* at paras. 123-124.
[112] *Ibid,* at para. 125.
[113] *Affidavit of Anastasios Zafiriadis,* sworn March 8, 2013, at paras. 51-52; and see *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at para. 139.

> ETFO's delegation led by President Sam Hammond attended the preliminary briefing for just one hour…
>
> And has not participated in discussions.
>
> We have repeatedly invited ETFO back, but they have refused.
>
> In my opinion, one hour of effort on behalf of elementary teachers, students and parents simply isn't good enough.
>
> In our schools and in our homes, we teach our children to work through their differences.
>
> But ETFO walked away without even trying.[114]

[59] It would have been better if ETFO had attempted to take part. Having said this, it must have been understood that the language used was patronizing and that making these comments in a public way would be provocative. It must have been known that to make these statements in this way would demand a response. There was one of the same manner and kind. It is a criticism of the actions of Ontario in respect of the negotiations:

> First, as I said to the Minister prior to her press conference, and as ETFO has repeatedly told Government officials, the narrow parameters tabled by the Government for provincial discussions--which involve not only wage freezes but substantial compensation rollbacks and reductions--are destructive, ask too much of teachers and single them out.
>
> Real negotiations are about sitting down at the table to jointly solve problems, to meet the needs of students and teachers and maintain peace and stability.
>
> We need to be able to explore all options to find efficiencies and ensure peace and stability. If we are restricted to discussing only the government's proposal, that is not true negotiations.
>
> Second, we expect the government to include on its team representatives who are experienced in the education sector; who understand what happens in today's classrooms and schools, and who have experience in teacher negotiations. Bankruptcy lawyers are expensive. They know how to slash budgets but they don't necessarily understand the impact on kids, teachers and the education system. Just from that initial meeting, it is clear that they do not understand the education sector nor the complexities involved in teacher bargaining.

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[114] *Affidavit of Gene Lewis*, sworn March 7, 2013, at para. 81, and see Exhibit O.

> Third, there are no established ground rules for these proposed provincial discussions. It's pretty basic really. The OLRA sets out the rules for teacher bargaining. If the government wants to engage in a provincial discussion instead of bargaining as the law provides, we need to know the rules before we start.
>
> Our experience to date is a good example. We were invited to a voluntary process. We have said that we prefer to exercise our right under the Labour Relations Act, now as of Monday; the Minister is chastising us for not participating in provincial discussions. So, is the process voluntary or is it mandatory? Which is it?
>
> …
>
> When introducing the budget – the Minister of Finance spoke of the government's respect for the collective bargaining process – that respect is lacking in the current provincial discussion structure, the parameters imposed by the government, and most certainly in the comments made by the Minister of Education on Monday.
>
> For teachers as a matter of law and practice, collective bargaining has always taken place with local school boards, with each party free to assess and determine the priorities and trade-offs that make most sense to them. This centrally imposed process with rigid predetermined parameters is no substitute for collective bargaining.
>
> Bullying behaviour and threats to legislate are no way to demonstrate respect for teachers or the collective bargaining process.[115]

[60] Like OSSTF, ETFO requested board-by-board financial targets in order to facilitate the ability to engage in negotiations. As with the other unions, this data was not forthcoming.[116]

[61] Like OSSTF, ETFO gave notice to bargain for the renewal of collective agreements in accordance with the provisions of those agreements and the *Labour Relations Act.* Several district school boards were reluctant to begin the process of collective bargaining in light of the stated position of the provincial government. None were prepared to engage in bargaining about any of the issues relating to Ontario's parameters, or to discuss alternatives to those parameters.[117]

[62] Unifor was not involved in any meetings with Ontario over this period

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[115] *Ibid,* at para. 82 and see Exhibit P.
[116] *Ibid,* at para. 83.
[117] *Ibid,* at para. 84.

[63] I pause again. This time to point out that through the course of these meetings and over the course of the time period they were held, the oppositional approach continued. The "exchange" between the Minister of Education and the President of ETFO is a clear demonstration. As for the meetings, the unions made proposals. No direct reply was made. Only general responses were given (non-compliance with the parameters) and sector-wide conclusions provided. These parties were unable to come to a common understanding of what various proposals would save or cost. They could not find a common ground on which to proceed. Was it to be sector-wide or unit specific? There does not appear to have been any attempt by any party or any discussion between the two sides to determine if, or how, these two perspectives could have been co-ordinated into a common approach. Consistent with the submissions of its counsel, in time Ontario altered the process, that is, it "improvised" in order to step around the problem.

[64] Before that, on May 23, 2012, Ontario notified the participants that the "parameters" had been "revised".[118] The revised parameters were identical to the original parameters with three exceptions which were introduced and explained in an e-mail from the retired judge:

> (a) a restructured short-term sick leave plan with 10 sick days at 100% salary. This is a move up from the six days currently offered but down from the existing 20. Moving to 10 days better reflects the average number of days off that employees take for illness. But those days will no longer be bankable.
>
> (b) the government will establish a committee with our partners in education to look at 'provincial' benefit plans with a view to greater consolidation and consistency. This could be a real 'win-win' for everyone and ensure the sustainability of benefit plans.
>
> (c) The government will start consultation to review the merits of a more centralized approach to collective bargaining. We need to improve the present process in a realistic way and take the next step to review and recommend appropriate structures for provincial tables to guide local bargaining.[119]

[65] Following the release of these new parameters. two of the five applicants had more meetings with Ontario.

[66] CUPE (OSBCC) met with representatives of the Ministry and the employer associations on May 30 and May 31, 2012. Those discussions focused on job security, a provincial benefits trust, grid movement and sick leave. It was the position of the CUPE representatives that the

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[118] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 91, and see Exhibit AA.

[119] *Ibid,* at Exhibit AA (A copy of the parameters, as revised, part of the same Exhibit.); and see *Affidavit of Dale Leckie* on March 7, 2013, at paras. 127-128, and see Exhibit 24.

latter two (grid movement and sick leave) had a disproportionate effect on its members. Ontario gave no indication that it was prepared to make any changes to reflect this concern.[120]

[67] On May 25, 2012, OPSEU (CESSG), Ontario and the applicable school boards met again. At the outset of the meeting, the unions tabled a proposal which they had developed subsequent to the meeting of May 9, 2012 (see: para. [57], above).[121] The proposal accepted terms demanded by Ontario as part of its parameters. It accepted that there would be a two-year freeze on wages; that retirement gratuities would be frozen as of August 31, 2012; and that sick leave banks would be eliminated. The proposal did step outside the precise terms of the parameters. It accepted the move to a short-term sick leave plan model but indicated different terms for that model. It proposed a four-year term for collective agreements (rather than two-year terms) and added provisions respecting job security, educational assistants and professional development.[122] Ontario advised that, in its view, the proposal did not fit in with the parameters and, thus, would not be considered. Ontario would not engage in any bargaining and did not present any counter proposal.[123] OPSEU decided to cease its participation in the PDT process.[124] Instead, it turned its attention to bargaining with the individual school boards and, like OSSTF and ETFO, served notices to bargain.[125]

[68] At this point, of the five applicants, only CUPE was continuing to talk to the Ontario negotiating team. Unifor had not taken part at all. ETFO had withdrawn following the introductory meetings. OSSTF had left and returned. It withdrew again from discussions on behalf of the teachers it represented and reached an impasse in respect of its support workers.

(c) The OECTA MOU: July 5, to August 31, 2012

[69] In the meantime, negotiations with other bargaining units and school boards did take place. In particular, Ontario was negotiating with OECTA and Ontario Catholic School Trustees Association (hereinafter, “OCSTA”). These negotiations began in late February 2012 and continued until July 5, 2012.

[70] On July 4, 2012, OCSTA announced that it was withdrawing from the PDT process over concerns relating to the hiring of occasional teachers.[126] On July 5, 2012, Ontario and OECTA entered into a memorandum of understanding. In other words, Ontario entered into an agreement with teachers that did not include the affected employers.

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[120] *Ibid,* at para. 94.
[121] *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013 at para. 53, and see Exhibit 13 (the proposal).

[122] *Ibid,* at para. 54.
[123] *Ibid,* at paras. 56-57.
[124] *Ibid,* at para. 58.
[125] *Ibid,* at paras. 62-63.
[126] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 161.

[71] Over the course of the negotiations, many issues were touched on. Among them was the treatment of sick days. As a result of these discussions, the offer of a short-term sick leave plan that comprised 6 sick days, paid at 100% salary, was increased to 10 days. This change was included in the "revised" parameters released on May 23, 2012 (see: para. [64(a)], above). It appears that the negotiations with OECTA were the catalyst for this amendment. There were further changes. Under the new sick leave plan, instead of an additional 24 weeks at 66.66% salary, as projected in the parameters set by Ontario at the outset of the negotiations, the agreement called for an additional 120 days at 66.67% or 90% if approved through third-party adjudication.

[72] The parties agreed that those teachers and other school board staff whose salaries were determined based on their placement on a grid would not have their income frozen as proposed by the parameters. Rather, the movement on the salary grid would be delayed from September 1 to the 97th day of the school year. In return, OECTA members would take three unpaid professional development days in the second year of the agreement (2013-2014). This represented a 1.5% pay cut which would fund the necessary savings to permit the earlier grid movement called for by the agreement.[127]

[73] The agreement also provided for non-monetary issues, including the development of a fair and transparent hiring process for long-term occasional teachers.[128]

[74] As part of the agreement, Ontario achieved a one-time savings of $1.4 billion as a result of a reduction in its employee future benefits liability. This would be achieved by freezing retirement gratuities, eliminating non-vested sick days and implementing a self-funded post-retirement health, life and dental benefits plan for those retiring after September 1, 2013.[129] The agreement eliminated benefits for retirees provided under collective agreements, and required that those benefits now be 100% paid for by the retirees in a group segregated from active employees. It reduced other leave entitlements contained in the collective agreement and cut funding for elementary teachers' professional development.[130]

[75] Other provisions addressed a procedure for filling long-term occasional teacher positions and regular teacher vacancies from an established roster, proposed changes to the Ontario Teachers' Pension Plan, raised the prospect of provincial benefit plans, and referenced a move to province-wide negotiations for future collective agreements.[131] The agreement contained a "me too" clause, meaning that it would be amended to account for any clause in any other

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[127] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 162.
[128] *Ibid,* at para. 163.
[129] *Ibid,* at para. 163 (A copy of the Memorandum of Agreement entered into between the Ministry of Education and OECTA is found at Exhibit 32 of the *Affidavit of Gabriel Sékaly* and Exhibit 28 of the *Affidavit of Dale Leckie*, sworn March 7, 2013.)
[130] *Affidavit of Gene Lewis,* sworn March 7, 2013, at para. 89.
[131] *Ibid,* at para. 90.

collective agreement applicable to the education sector that benefited the members of the union.[132]

[76] It should go without saying that the agreement involved only OECTA and no other union or bargaining agent. In coming to this agreement, OECTA did not represent any group of employees other than its own members.

[77] It is at this point that the foundation for what I referred to earlier as improvisation (the altering of the process), was laid (see para. [63], above). In a news release that announced the agreement, Ontario declared that the agreement was to be “a roadmap” for local bargaining and “encouraged” other teacher and staff unions and trustee associations to meet and discuss “this understanding so that additional agreements can be reached”.[133] The Minister of Finance put it somewhat differently in a statement he released the day after the agreement was made known (July 6, 2012):

> The deal outlined in the MOU provides a roadmap that will help us deliver on our shared objective of eliminating the deficit[134]

[78] What was meant by this? What seems apparent is that Ontario anticipated that the substance of the agreement arrived at between OECTA and Ontario would provide a level of guidance to those that had yet to agree. But what level?

[79] On July 12, 2012, the OSSTF bargaining team met with Ontario’s team to discuss the impact of the OECTA agreement.[135] Ontario advised that it would now only consider proposals containing the essential terms of the OECTA deal. Its representatives advised that it was Ontario’s intent that the substantive terms and conditions in the OECTA deal would be applied in all education sector collective agreements. The substantive parameters set out in the OECTA agreement were to be non-negotiable.[136] The agreement was made without Ontario being able to identify the savings to be achieved in respect of its individual components. Its representatives indicated that Ontario believed that applying the OECTA agreement across the entire sector would achieve the financial targets it had set.[137]

[80] This is where the “improvisation” takes shape. Rather than developing an understanding of the impact of each union (or collective agreement) on the savings to be accomplished or holding sector-wide discussions, OECTA was to become a surrogate for all the remaining bargaining units. There was no need to understand the impact of a prospective collective

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[132] *Ibid,* at para. 91.
[133] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 163, and see Exhibit 31.
[134] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para.105, and see Exhibit EE.
[135] *Affidavit of Dale Leckie,* sworn March 7, 2013, at para. 147.
[136] *Ibid,* at para. 149.
[137] *Ibid,* at para. 151; and *Affidavit of Brian Blakely,* affirmed March 8, 2013, at para. 109.

agreement. If all the unions and bargaining agents came to the same agreement (the OECTA agreement), the goals would be met.

[81] On July 23, 2012, the Minister of Education wrote to the chairs of the boards of education. She asked that any meetings that were to take place between then and September 1, 2012 "be undertaken with a real intent to reach a PDT agreement". Ontario was prepared to "facilitate" such meetings. The Minister noted that the OECTA MOU "should serve as a roadmap for local bargaining through the summer months".[138]

[82] On July 24, 2012, the Assistant Deputy Minister wrote to all Directors of Education in both public and Catholic school boards:

> For the 2102-13 and 2013-14 school years, we also expect that all school boards will bargain within the negotiating framework articulated in the MOU between OECTA and the government.[139]

[83] On July 25, 2012, the Minister of Education issued a Memorandum to Directors of Education and Secretary – Treasurers of School Authorities indicating the "belief" that the OECTA deal would serve as a roadmap for local bargaining.[140]

[84] This description of the OECTA agreement as a "roadmap" was repeated by the Premier on August 2, 2012. He advised that consideration was being given to recalling the legislature, which was not in session at the time, to deal with collective agreements with unions that had not reached an agreement. The Premier noted that the OECTA Memorandum would provide a "roadmap" for school boards.[141]

[85] Why were these memoranda and comments all directed to local boards when so many of these bargaining units had yet to arrive at central (or upper tier) agreements? As Ontario saw it, there was no need for any further central discussions. An agreement (the OECTA MOU) that provided the necessary direction for the required local agreements was in place.

[86] In the weeks after the OECTA MOU was entered into, two further agreements were made.

[87] On July 30, 2012, the Government reached an agreement with the Association of Professional Student Service Personnel (hereinafter, "APSSP")[142]. APSSP is a small union that represents 750 student services professionals in 8 Catholic and 2 public school boards. As

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[138] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 181, and Exhibit 39.
[139] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 155, and see Exhibit 29; *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 182, and see Exhibit 40; and *Affidavit of Brian Blakely*, affirmed March 8, 2013, at para. 110.
[140] *Affidavit of Dale Leckie,* sworn March 7, 2013, at para. 156, and see Exhibit 30.
[141] *Ibid,* at para. 113, and see Exhibit HH.
[142] *Ibid* at Exhibit 34

Ontario sees it, the agreement “followed the roadmap established by the OECTA MOU”.[143] According to OSSTF, the APPSP deal “almost mirrored” the OECTA deal[144]

[88] In announcing this agreement, Ontario noted that if agreements were not reached before August 31, 2012, many teachers would receive an automatic salary increase of 5.5% on September 1, 2012, as a result of movement through the grid system. Ontario indicated that such increases would be inconsistent with its fiscal parameters. This was the introduction of the statutory freeze (see para. [1], above). Ontario went on to advise that if the school boards were unable to sign agreements before August 31, 2012 that would prevent these automatic increases, it would introduce legislation that did so.[145]

[89] The problem should be self-evident. In arriving at its arrangement, OECTA did not represent any other bargaining unit. In particular, it did not represent any education workers other than teachers. The OECTA agreement does not contemplate the circumstances of other education workers and how their interests may differ from those of teachers. The OECTA agreement would have different financial impacts depending on the demographics of different school board work forces. [146]

[90] On August 9, 2012, Ontario entered into a memorandum of understanding with Association des enseignantes et des enseignants franco-ontariens (hereinafter, “AEFO”).[147] Ontario, AEFO and the applicable French language trustee associations had met on 11 occasions through the months of February to May 2012. In the summer of 2012, these discussions were renewed. The features of the OECTA agreement were reviewed.[148] On August 1, 2012, AEFO provided the Ministry of Education with a draft Memorandum of Understanding that would not include the school boards.[149] This was the foundation of the agreement that was made. Again, it is said that in coming to this agreement, Ontario and AEFO used the OECTA MOU as a "roadmap" and that its provisions “mirrored” the OECTA deal.[150]

[91] As with the APSSP deal, in announcing this agreement, Ontario indicated that it was prepared to introduce legislation if school boards were not able to negotiate local agreements by September 1, 2012 that complied with the provinces fiscal parameters.[151]

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[143] *Ibid,* at para. 165, Exhibit 33 (A news release, dated July 23, 2012, entitled, “Ontario Reaches Another Education Deal”).
[144] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 159.
[145] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 165, and Exhibit 33 (A news release, dated July 23, 2012, entitled, “Ontario Reaches Another Education Deal”).
[146] *Ibid,* at paras. 146 and 176.
[147] *Ibid,* at para. 173, and Exhibit 36; and *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 164, and see Exhibit 32.
[148] *Ibid,* at paras.166 -167.
[149] *Ibid,* at para. 172.
[150] *Ibid,* at Exhibit 35, and *Affidavit of Dale Leckie,* sworn March 7, 2013, at para. 164.
[151] *Ibid,* at para. 173, and Exhibit 35.

[92] In drawing the line at August 31, 2012 (the APPSP announcement) and September 1, 2012 (the AEFO announcement) and raising the spectre of legislation if agreements were not forthcoming by those dates, Ontario was travelling further down its path of arbitrary improvisation. The unions were being told: either make a deal that conforms to the OECTA agreement or legislation would be brought forward.

[93] On August 7, 2012, representatives of OSSTF met with the Minister of Education. The Minister indicated that Ontario would no longer entertain bargaining at the provincial (the upper tier) level and that any local collective agreements would need to be "pretty close" to the OECTA deal.[152] This was confirmed by the advice Ontario gave to the actual employers, the school boards. On behalf of its Office and Clerical and Maintenance Units, CAW (now Unifor) had entered negotiations with "the Employer" during June 2012.[153] On July 12, 2012, the employer requested that a conciliation officer be appointed. A conciliation meeting was convened on August 9, 2012. The representative of the employer indicated that the school boards were under direction from Ontario and could not negotiate anything outside the framework of the OECTA deal.[154].

[94] On August 10, 2012, the Premier and the Minister of Education stated publicly that if school board trustees were unwilling or unable to negotiate and sign local agreements before August 31, 2012, Ontario would introduce legislation mandating terms and conditions to be included in all education sector collective agreements across the province.[155]

[95] There are other outcomes which Ontario relies on as confirming the wider utility, and justifying the broad application of the OECTA agreement. On August 13, 2012, the government announced its intention to make a regulation that would ensure fair hiring practices were followed in every school board. This had been a key concern of OECTA at the bargaining table. Fair hiring practices, as well as greater autonomy for teachers in determining which assessment tool should be used were components of the agreements reached with OECTA and AEFO. Ontario noted that it would assist in providing greater opportunities for young teachers by protecting 10,000 teaching positions in Full-Day Kindergarten, as well as limiting the number of days retired teachers could continue to teach.[156]

[96] Also on August 13, 2012, Ontario provided further details regarding the proposal to encourage fair hiring practices and give teachers more flexibility in diagnostic assessments. With respect to hiring practices, Ontario emphasized that the new regulation would result in a hiring process based on fairness and transparency. With respect to flexibility for teachers on diagnostic assessments, again Ontario emphasized the teachers would have greater autonomy

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[152] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 175.
[153] *Affidavit of Aaron Neaves*, affirmed March 3, 2014, at para. 7.
[154] *Ibid* ,at paras. 23-24.
[155] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 180.
[156] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at para. 185, and see Exhibit 43 (a copy of a news release entitled, "More Opportunities, Better Supports for Young Teachers", dated August 13, 2012).

with respect to the selection and use of diagnostic assessments to properly meet the needs of students. In his affidavit, the Assistant Deputy Minister indicates that both of these changes flowed from requests in the OECTA PDT process and from the terms of the agreements entered into with OECTA and AEFO.[157]

(d) Bill 115: the *Putting Students First Act*

[97] Concerned with the approach of August 31, 2012 and the statutory freeze that would take effect, on August 16, 2012, Ontario announced that it would introduce legislation that would, if passed, require school boards and local bargaining units of teachers and support staff to accept agreements consistent with Ontario's fiscal and policy priorities. The draft Bill115 (the *Putting Students First Act*) was released on the same day. On August 27, 2012, Bill 115 was placed before the legislature. It passed first reading on that day and second reading the next day (August 28, 2012). On September 5, 2012, the Standing Committee on Social Policy met to review the Bill. There were 4 ½ hours of public hearings. On September 10, Bill 115 received third reading. The *Putting Students First Act* was passed, received royal assent and came into force on September 11, 2012.[158]

[98] The *Putting Students First Act* imposed a two-year restraint period on education sector employees during which its provisions would apply.[159] This legislation required that any collective agreement between a board of education and a teachers' bargaining unit was required to be consistent with the Memorandum of Understanding entered into between the Ministry of Education and OECTA.[160] Any collective agreement between a board and "any other bargaining agent" (that is other than those acting for teachers) concluded before August 31, 2012 must be "substantially similar in all relevant aspects" to the OECTA agreement.[161] Any collective agreement between a board and "any other bargaining agent" concluded after August 31, 2012 had to be "substantively identical in all relevant aspects" to the OECTA agreement.[162] In the event that agreements of the type described were not completed by December 31, 2012, upon the advice of the Minister that this was so, the Lieutenant Governor in Council could, by

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[157] *Ibid,* at para. 186, and see Exhibit 44 (a copy of a "backgrounder" entitled, "Ensuring Fair Hiring Practices in Every School Board", dated August 13, 2012) and Exhibit 45 (a copy of a "backgrounder" entitled, "Giving Teachers More Flexibility on Diagnostic Assessments", dated August 13, 2012).

[158] *Ibid,* at paras. 195-197, and see Exhibits 50 and 51; *Affidavit of Dale Leckie,* sworn March 7, 2013, at paras. 181 and 188, and see Exhibit 34; *Affidavit of Brian Blakely*, affirmed March 8, 2013, at paras. 123 and 139-143; *Affidavit of Gene Lewis,* sworn March 7, 2013, at paras. 94 and 97; *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at para. 64, and *Affidavit of Aaron Neaves*, affirmed March 3, 2014, at paras. 26 and 31.

[159] *Putting Students First Act, supra,* (fn. 2) - Bill 115 ss. 1(1) and (2).

[160] *Ibid,* at s. 4(1), para. 1.

[161] *Ibid,* at s. 4(1) para. 2(i).

[162] *Ibid,* at s. 4(1) para. 2(ii).

regulation, impose a collective agreement on the board, the bargaining agent and the employees.[163]

[99] The *Putting Students First Act* put in place restrictions that ensured compliance with these directives. If an applicable term was left out, it was deemed to be included.[164] If a collective agreement was inconsistent with the applicable terms, that agreement was inoperative to the extent of the inconsistency.[165] Any arbitration award made with respect to the terms and conditions of employment that applied during the restraint period was required to include the applicable terms and not to be inconsistent with them. If such terms were not included, they were deemed to be; if the collective agreement was inconsistent with those terms, it was inoperative to the extent of the inconsistency.[166] The parties were not permitted to revise the agreement such that it would not include or be inconsistent with the applicable terms.[167] The *Putting Students First Act* forbid any compensation lost or not received, as a result of its passage, from being provided before, during or after the restraint period it put in place.[168] The rights to lock out and strike were limited, if not removed.[169]

[100] With the passage of the *Putting Students First Act*, the improvising of the process developed by Ontario, in the absence of any consultation with the other parties, was complete. At this point, the unions were compelled to accept the parameters as they had found their way into the OECTA agreement, either by way of including its terms, agreeing to provisions that were substantially similar to them, substantively identical to them or as they were imposed by regulation. It cemented OECTA as a surrogate for all the other bargaining units. It forced each of the applicants to accept the provisions OECTA had agreed to without any understanding of the impact the terms of the agreements they were each obliged to accept would have on Ontario's fiscal goals and objectives. The process, which counsel for Ontario acknowledges was improvised, was being taken, with some small exceptions, to a fixed conclusion. Any idea that it was or remained "voluntary" was jettisoned. The adversarial and oppositional nature of the relationship was confirmed.

(e) After the Bill: September 1, 2012 to December 31, 2102

[101] On August 31, 2012, that is to say, two weeks after the release of the draft of Bill 115 and three days after it had received second reading, Ontario reached an agreement with four groups representing 3000 educational assistants: the Halton District Educational Assistants Association; the Dufferin-Peel Educational Assistants Resource Workers' Association; the Educational Assistants Association of the Waterloo Region District School Board; and support

[163] *Ibid,* at ss. 9(1)(c) and 9(2)(i).
[164] *Ibid,* at s. 7(2).
[165] *Ibid* at s. 7(3).
[166] *Ibid,* at ss. 7(4), (5) and (6).
[167] *Ibid,* at s. 7(7).
[168] *Ibid,* at s. 7(8).
[169] *Ibid,* at s. 8(4), (5) and (6).

staff represented by AEFO. This agreement was modelled on the OECTA agreement. In this case, the education assistants agreed to a pay cut of 0.5% in the form of one unpaid professional development day in the second year (as opposed to OECTA, the first AEFO agreement and APSSP, each of which took three unpaid professional development days). This was in recognition of the fact that the grid movement was of less concern fiscally with respect to the educational assistants, so only one unpaid professional development day was required in order to fund their grid movement.[170]

[102] Following the designation of the OECTA agreement as a roadmap and after the announcement and release of the draft of Bill 115, CUPE met with school boards (Employer Associations) on August 20, and 23, 2012, and held conference calls with representatives of the Ministry of Education on August 21 and 24, 2012. In the end, no agreement was reached. From CUPE's perspective, it was not clear what was negotiable and what was not. Its representatives did not understand the reach of the terms "substantially similar to" or "substantively identical to". The Ministry's approach was to say they would receive any proposals and advise whether they complied or not.[171] As the CUPE representatives saw it:

> ....Bill 115 had given us a target (i.e. to reach an agreement on terms that are 'substantially similar' or 'substantially identical' to the OECTA Memorandum) but it was a target only the Ministry could see.[172]

[103] In its principal affidavit, CUPE observes that in a Memorandum, dated September 13, 2012, from the Assistant Deputy Minister to the Directors of Education, Secretary/Treasurers of School Authorities, it was noted that "one unpaid day will be required to offset movement through the grid" rather than the three days referred to in the *Putting Students First Act*. Presumably, this reflects the agreement arrived at with the educational assistants, on August 31, 2012, three days after Bill 115 received second reading. As understood by CUPE, this only confirmed the confusion:

> ....despite the passage of the [*Putting Students First Act*], which required that collective agreements in the school board sector be on terms 'substantially similar' or 'substantially identical' to the OECTA Memorandum (which provided for 3 days of unpaid leave), it appeared to be Ministry policy that education support staff would be required to take only 1 day of unpaid leave. As a result, it became clear to us that compliance with Bill 115 was not only an invisible target, it appeared to be a moving one as well.[173]

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[170] *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at paras. 176-177, and see Exhibit 37 (a news release announcing the agreement of August 31, 2012) and Exhibit 38 (a copy of the Memorandum of Understanding of August 31, 2012).
[171] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at paras. 128-130.
[172] *Ibid,* at para. 131.
[173] *Ibid,* at para. 147.

[104] This does nothing other than demonstrate that the oppositional nature of these negotiations works in both directions. If the educational assistants' agreement was not known to CUPE, had its representatives asked Ontario, rather than assume this was part of some inconsistency in the parameters, presumably, they would have been told about it and the "me too" clause that is part of the OECTA MOU (see: para. [75], above).

[105] Concerned that its collective agreements were about to expire, CUPE met again with the Ministry on August 28, 2012. During a telephone conference the day before, CUPE asked for a summary of the cost savings that would be generated by the OECTA MOU. At the meeting, Ontario responded. It provided the savings if the OECTA MOU was applied across the education sector as a whole. The discussions continued on the evening of August 24, 2012, on August 29, 2012 and by conference call on August 30, 2012. CUPE delivered a proposal. It was reviewed by the parties. Ontario indicated that it would impose significant costs that would move the proposal outside of the fiscal parameters that have been set. It would be very costly. No agreement was reached.[174]

[106] By the end of November 2012, representatives of 75 bargaining units had at least one meeting with their respective school board in an attempt to reach local agreements. They were unsuccessful. [175] From late October to November 2012, CUPE bargaining units were in a position to and took strike votes. All units that did voted to strike.[176]

[107] CUPE determined that it would bring an application challenging the constitutionality of the *Putting Students First Act.* It concluded that, in the meantime, it would be as well to make whatever agreement was possible in order to obtain whatever benefit was still available.[177] On December 5 and 6, 2012, CUPE re-engaged with Ontario's bargaining team and representatives of the Employer Associations. The composition and process of further substantive meetings were reviewed. Ontario, CUPE and of the local boards of education met on December 7, 8 and 9, 2012. CUPE tabled another proposal. The parties were unable to reach an agreement. To CUPE, it became clear there was no option but to accept that the central terms of the OECTA agreement would have to act as a framework. As it had in August 2012, CUPE accepted that a number of items were no longer open for discussion.[178] A number of CUPE bargaining units met with school boards in an attempt to arrive at local agreements. By December 24, 2012, it became apparent that, in the face of the *Putting Students First Act,* the employers were not prepared to entertain any proposal in the absence of the Ministry.[179]

[108] On December 27, 2012, the OSBCC bargaining team, which represented CUPE, met with the Ontario bargaining team. There was a conference call the following day. The OECTA

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[174] *Ibid* ,at paras. 134 and 135, and *Affidavit of Gabriel Sékaly,* sworn April 25, 2013, at paras. 189-193.
[175] *Ibid,* at para. 152.
[176] *Ibid,* at paras. 153-155 and see Exhibit UU.
[177] *Ibid,* at para. 156.
[178] *Ibid,* at para 158.
[179] *Ibid,* at paras. 159-160.

agreement was used as a template. On December 31, 2012, a Memorandum of Understanding was signed. There are two changes of note when compared to the agreements that preceded it. The number of sick days for which an employee would receive 100% pay was increased to 11 from 10. The compensation for maintaining movement on the salary grid 97 days into the school year (half-way through the year) was amended such that only if the benefit to the employer of voluntary unpaid days was insufficient to fully set off the increased cost, would CUPE members be required to take off unpaid days and, then, it would only be one day off during the 2013-2014 school year.[180] CUPE was clear to say it entered this arrangement, not in acceptance of the process that led to it but because the alternative would have led to the imposition of an agreement that would not include the changes it did obtain.[181]

[109] For its part, OSSTF had, beginning in late July 2012, been negotiating with several school boards.[182]After the introduction of Bill 115, the school boards stopped bargaining. They advised OSSTF that they required approval from Ontario before any collective agreement could be reached.[183] Starting on October 1, 2012, OSSTF tried again. It opened discussions with 5 school boards.[184] The idea was that, if OSSTF could achieve local collective agreements with these five school boards that would satisfy the requirements of the *Putting Students First Act,* they could be a foundation for agreements across the province. OSSTF approached the problem in this way because Ontario had stated it would no longer entertain a central memorandum with OSSTF as a signatory.[185] At this point, Ontario wanted local agreements signed by the individual school boards.[186] This underscores the nature of the structural problem with Ontario's approach. It wished to contract locally while relying on an education sector-wide assessment of the cost savings to be achieved by those agreements. The discussions did not succeed. School boards that were not involved objected. They were unhappy with the idea that they would not be involved in the setting of agreements that would provide a precedent that would impact on their own negotiations. This is a confirmation of the larger problem of expecting all the bargaining agents, for teachers and support staff alike, to accept a process which required them to acknowledge, as fundamental, terms agreed to by only one of them, in this case, OECTA. Certainly, OSSTF saw it this way. In its principal affidavit, the deponent states:

> OSSTF's attempts at both coordinated and local collective bargaining were hampered because neither OSSTF nor the School Boards knew what level of cost reduction would be required in order for a collective agreement to be approved by the Minister. Thus it was impossible for either side to gauge

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[180] *Ibid,* at paras. 162-165 and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 203-208.
[181] *Ibid,* at para. 167.
[182] These included Durham, Thames Valley, Windsor, Waterloo, Ottawa, Upper Grand, Greater Essex, Upper Canada, Trillium Lakelands, and the Rainbow District School Boards.
[183] *Affidavit of Dale Leckie*, sworn March 7, 2013, at paras. 183-187.
[184] The five were: Upper Grand, Thames Valley, York, Avon-Maitland and Durham District School Boards.
[185] *Affidavit of Dale Leckie*, sworn March 7, 2013, at para. 193.
[186] *Ibid,* at para. 201.

> whether their tentative agreement might be approved by the Government under the provisions of Bill 115. We were all bargaining in the dark.[187]

[110] Representatives of OSSTF met again with Ontario during November 2012. The parties discussed the design of a sick leave plan and retirement gratuities. Movement on the salary grid was a contentious issue. OSSTF was trying to negotiate measures that would off-set the cost of allowing younger teachers to move up along the salary grid earlier in the school year than provided for under the OECTA agreement. The goal of these off-setting measures was a net payroll increase of zero. OSSTF met with the Minister of Education on November 11, 2012. She refused to consider OSSTF's proposal regarding movement on the salary grid. As Ontario saw it, the cost was prohibitive. The Minister indicated that the meaning of "substantially identical" did not require that any proposal be the same as the OECTA deal in its structure, merely its financial impact. All collective agreements would have to have the same timing for movement on the salary grid. OSSTF made three proposals for a provincial benefits plan. Again, as Ontario understood it, the cost was too high. The talks broke off.[188]

[111] On that day (November 12, 2012), OSSTF membership commenced strike action by withdrawing administrative support in 20 school boards across the province as part of a "work to rule" sanction. A week later, OSSTF's members at all other school boards across the province were in a legal strike position and commenced similar strike action at that time.[189] On or about December 10, 2012, all OSSTF bargaining units in public school boards were in a strike position. On that day, all of its members began to take additional strike action. They began work and left work promptly at the start and finish of the school day rather than being available outside of their regular work hours.[190]

[112] As a result of being approached by five school boards, on or about November 16, 17 and 18, OSSTF met with a number of school boards. Initially, agreements for its teacher bargaining units with the York Region and Upper Grand District School Boards were reached. Shortly thereafter, OSSTF was able to reach similar agreements with 6 other school boards.[191] Only the teachers' bargaining unit at the Upper Grand District School Board ratified the agreement that had been arrived at. It was approved by the Minister. A further five tentative agreements were submitted to the Minister for approval in accordance with the *Putting Students First Act.* The Minister amended the five agreements and indicated she would only approve them as amended. OSSTF refused to take the collective agreements that had been amended by the Minister forward for ratification. As OSSTF saw it, these agreements did not fairly or actively represent

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[187] *Ibid,* at para. 196.
[188] *Ibid,* at paras. 197-206, and *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 209-2013.
[189] *Ibid,* at paras. 207-208.
[190] *Ibid,* at para. 219, and *Affidavit of Gabriel Sékaly,* sworn April 25, 2013 at para. 215.
[191] Hamilton, Avon-Maitland, Kawartha Pine Ridge, Ottawa-Carleton, Durham and Thames Valley District School Boards.

the bargain reached by the parties. On November 28, 2012, OSSTF suspended all negotiations with school boards.[192]

[113] In its main affidavit, OSSTF expressed consternation at what it perceived as treatment of CUPE that differed from what OSSTF was told, by Ontario, would be on offer. Ontario had advised that following the passage of the *Putting Students First Act,* it would not negotiate at a provincial level. Yet it did so with CUPE while it continued to refuse to carry out such discussions with OSSTF. Not only did Ontario talk to CUPE at this level, it entered an arrangement that was "significantly different" from those made with other bargaining agents.[193]

[114] There were no direct negotiations between CAW (now Unifor) and Ontario. On August 28, 2012, the union met with the employer (the school board). As it developed, the school board was being placed under supervision by the Ministry of Education. The parties were unable to resolve the outstanding local bargaining issues. The CAW and the employer did not meet again until October 10, 2012. The meeting took place with the supervisor who had, by then, been appointed. This was the only meeting with the supervisor who, from that point forward, was not involved in the negotiations. The parties did not meet again until December 10, 2012. The CAW made a proposal but the employer indicated that it could not agree to any term that differed from the OECTA deal. This remained the position of the employer. In fact, when the parties met on December 18, 2012, as part of a proposal it made, the employer included a preamble stating that any collective agreement would be subject to the terms and conditions of employment found in the OECTA deal. Among the changes sought by the employer was the elimination of post-retirement benefits. There was not going to be an agreement. No further bargaining was scheduled.[194]

(f) Conclusion: Further Discussion and Repeal of the *Putting Students First Act*

[115] On January 2, 2013, Ontario imposed collective agreements on:

- OSSTF (all of its bargaining units);
- CAW (local 2458 had two agreements imposed on its bargaining units);
- OPSEU (all of the 7 bargaining units it represented); and,
- ETFO (every school board bargaining unit). [195]

[116] Although CUPE locals ratified the CUPE MOU, a number of school boards did not. Accordingly, on January 21, 2013, the Lieutenant Governor in Council issued an Order-in-

[192] *Affidavit of Dale Leckie*, sworn March 7, 2013, at paras. 209-218.
[193] *Ibid,* at paras. 221-226.
[194] *Affidavit of Aaron Neaves,* affirmed March 3, 2014, at paras. 29-43, and see Exhibit F (a copy of the proposal made by the employer).
[195] *Ibid,* at para. 44 and 46; *Affidavit of Dale Leckie,* sworn March 7, 2013, at para. 237, and see Exhibit 39 (Order-in-Council 1/2013); *Affidavit of Anastasios Zafiriadis*, sworn March 8, 2013, at paras.73-74, and see Exhibit 16; and *Affidavit of Gene Lewis,* sworn March 7, 2013, at para. 123, and see Exhibit W and X (Order-in-Council 1/2013 and Schedule A thereto).

Council imposing collective agreements on 39 CUPE bargaining units associated with 30 school boards.[196]

[117] Generally, the terms and conditions imposed consisted of the terms and conditions of the expired 2008-2012 collective agreements, the terms of the OECTA MOU, as modified by a number of Regulations, namely: Regulation 313/12 (Sick Leave Provisions 2012-13), Regulations 1/13, 2/13 and 3/13 addressing, among other things, sick leave, sick leave gratuities, sick leave top up and transitional items, and Regulation 274/12, addressing the hiring of Occasional Teachers.[197]

[118] On January 22, 2013, by Order-in-Council, the Lieutenant Governor in Council proclaimed s. 20 of the *Putting Students First Act* thereby repealing the legislation.[198]

[119] Ontario resumed discussions with ETFO and OSSTF in February to April 2013. On April 18, 2013, OSSTF members ratified an agreement. On June 23, 2013, ETFO did the same. Other agreements were updated and ratified by CUPE on May 10, 2013: the CESSG agreement, updated as of June 27, 2013 and signed by OPSEU on July 26, 2013; and by Unifor on October 3, 2013. A number of School Boards did not agree to these updated or amended agreements. [199]

THE LAW

[120] The *Charter of Rights and Freedoms* protects as fundamental the freedom of association. Our understanding of the application of the right has evolved. Initially, as expressed in three cases released in 1987 (the first trilogy), it was understood that the freedom was limited to the right of people to gather together to pursue their individual rights.[200] The association itself was not thought to have any rights separate from the individual rights to which the *Charter* refers. At the outset, Chief Justice Dickson demurred:

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights…. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render

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[196] *Affidavit of Brian Blakely,* affirmed March 8, 2013, at para. 175, and Exhibit BBB.
[197] *Affidavit of Gene Lewis*, sworn March 7, 2013, at para. 123.
[198] *Ibid,* at para. 124.
[199] *Supplemental Affidavit of Gabriel Sékaly*, sworn May 1, 2013 at, respectively, Ex. 3, Ex 4, Ex 2, Ex 5 and Ex 6.
[200] *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada,* [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

> legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.[201]

[121] In the intervening years, much has changed. The idea expressed by Chief Justice Dickson is now fundamental to an appreciation of the freedom. The association has rights. The Supreme Court of Canada has recognized that the freedom of association encompasses the right of an association to pursue its own rather than only individual goals. These rights extend to the applicant, trade unions. It is now recognized that s. 2(d) of the *Charter of Rights and Freedoms* protects the fundamental right of employees to a meaningful process of collective bargaining. In *Mounted Police Association of Ontario v. Canada (Attorney General),*[202] the Court of Appeal of Ontario considered this right to be derivative:

> ...[I]t is clear that a derivative right to disclosure of information is not a 'stand alone' right. Instead, the right arises only in circumstances where it is a 'necessary precondition' to the exercise of the fundamental freedom itself. McLachlin C.J.C. and Abella J. describe the derivative right, in para. 30, as one that 'may arise'. [203]

[122] The Court concluded that:

> …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.[204]

[123] This, too, has changed. In 2015, the Supreme Court of Canada released three decisions, including its consideration of *Mounted Police Association of Ontario v. Canada (Attorney General)* (the second trilogy), all of which dictate that the right to a meaningful process of collective bargaining is not derivative but immediate and direct:[205]

> To the extent the term 'derivative right' suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2(d) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a *Charter* right may somehow be secondary or

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[201] *Ibid,* (*Alberta Reference*), at para 89, quoted in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 16; and, in *The Professional Institute of the Public Service of Canada v. Canada (Attorney General),* 2014 ONSC 965, at para. 29.

[202] [2012] O.J. No. 2420 (C.A.).

[203] *Ibid,* at para. 108, quoted in *The Professional Institute of the Public Service of Canada v. Canada (Attorney General), supra,* (fn. 198), at para. 118.

[204] *Ibid,* at para. 111, and referred to in *Mounted Police Association of Ontario v. Canada (Attorney General),* [2015] 1 S.C.R. 3, 2015 S.C.C. 1, at para. 27.

[205] *Mounted Police Association of Ontario v. Canada (Attorney General)*) (S.C.C.), *Ibid,* (fn. 204), at para. 67; *Meredith v. Canada (Attorney General),* [2015] 1 S.C.R. 125, 2015 S.C.C. 2, at para. 24, (Justice Rothstein, in a concurring judgment, continued to refer to this as a derivative right (at para. 40).); and, *Saskatchewan Federation of Labour v. Saskatchewan,* [2015] 1 S.C.R. 245, 2015 S.C.C. 4, at paras. 1 and 28.

> subservient to other aspects of that right is out of keeping with the purposive approach to s. 2(d).[206]

It is their right to collectively bargain that the applicants say has been breached.

[124] The right has been subject to further definition. The right was recognized in *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*.[207] Faced with what it characterized as a "crisis of sustainability" in the health care system, British Columbia passed the *Health and Social Services Delivery Improvement Act*[208]. It restructured the relationship between the employers and the employees.[209]

[125] Confronted with this situation, the Supreme Court of Canada concluded that s. 2(d) of the *Charter* "… should be understood as protecting the rights of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining".[210] The Court went on to explain that "…as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method."[211] This was confirmed in *Fraser v. Ontario (Attorney General)*[212] and in *Mounted Police Association of Ontario v. Canada (Attorney General)* where the Court reaffirmed that s. 2(d) protects a "process rather than an outcome or access to a particular model of labour relations".[213] Employees have the right "to join together, to make collective representations to the employer, and to have those representations considered in good faith".[214]

[126] In short, "… a meaningful process includes employees' rights to join together to pursue workplace goals, 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." [215]

[127] In this case, Ontario has submitted that the standard was met. "What matters is that there [was] an opportunity to make collective representations and have them considered in good faith."[216] In its submissions, Ontario relied on the assertion that it consulted with a broad array

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[206] *Ibid,* (*Mounted Police Association of* Ontario), at para. 79.
[207] 2007 S.C.C. 27, [2007] 2 S.C.R. 391.
[208] S.B.C. 2002, c. 2.
[209] *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, supra,* (fn. 207), at para. 11.
[210] *Ibid,* at para. 87.
[211] *Ibid,* at para. 91.
[212] 2011 S.C.C. 20, at para. 45.
[213] *Mounted Police Association of Ontario v. Canada (Attorney General), supra,* (S.C.C.), (fn. 204), at para. 67; and, see also *Meredith v. Canada (Attorney General), supra,* (fn. 205) at para. 25.
[214] *Ibid,* (*Mounted Police*), at para. 45; and, (*Meredith*), at paras. 40-42.
[215] *Saskatchewan Federation of Labour v. Saskatchewan,* (fn. 205), (the third case in the second trilogy), at para. 1.
[216] *Factum of the Respondents,* at para. 243.

of education sector stakeholders, including the five applicants. Ontario says that from the beginning and throughout the process, it made clear that additional meetings could be scheduled. It goes on to observe that there were regular and lengthy meetings with education-sector stakeholders. The presence of good faith collective bargaining, as Ontario sees it, was confirmed by the results.

[128] Changes were made in response to the negotiations that took place. The parameters sought to put in place a plan that called for 6 sick days paid at 100%. This was increased to 10 in the May 23, 2012 revision to the parameters in the OECTA agreement and subsequently increased again, this time to 11 days, in the agreement with CUPE. As a result of the inclusion of the "me too" clause in the earlier agreements, this change would apply across the education sector. Where more sick days were taken, the original scheme contained in the parameters allowed for a further 24 weeks at 66.66% of salary. The OECTA agreement provided for an additional 120 days at 66.67% or 90% if approved through third-party adjudication. The discussions with CUPE refined this further. Payment for the additional 120 days would be "…at a rate of 66.67% of the employee's regular salary and be eligible for 90% of regular salary in accordance with the Short-Term Leave and Disability Plan (STLDP)….Where evidence or medical documentation exists, the employee will be upgraded to 90% of regular salary…".[217]

[129] Rather than no movement on the salary grid, in entering into the OECTA agreement, Ontario accepted that this change would be deferred for 97 days (half a school year) in exchange for a 1.5% cut in pay in the form of 3 unpaid days off in the second year of the agreement. This, too, was subject to further change. In reaching the agreement with the Educational Assistants, Ontario accepted that the pay reduction taken in exchange for the deferring of movement on the grid would be 0.5% taken in the form of 1 unpaid day off. The CUPE Memorandum of Understanding revised this concession such that if the savings generated by its members taking voluntary days off, without pay, proved insufficient to offset the remaining cost of movement on the grid, its members would be required to take 1 day off without pay during the 2013-2014 school year.[218]

[130] Ontario summarized its position as follows:

> The government's unwillingness to move from its overall fiscal position is not evidence of bad faith, and cannot establish a breach of s. 2(d).[219] As pointed out in *Health Services*, the Constitution does not prohibit hard bargaining or

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[217] *Affidavit of Brian Blakely,* affirmed March 8, 2013, Ex. VV (CUPE Memorandum of Understanding, see: (ii) Short Term Leave and Disability Plan, para. 2); and, at para. 165, where the 90% payment was said to be "…based on evidence or medical documentation. In rare circumstances, the additional days may be paid at 66.67% pending a review of their evidence or medical documentation."

[218] *Ibid.*

[219] In referring to this submission, Ontario relies on *British Columbia Teachers' Federation v. British Columbia* 2015 BCCA 184, at paras. 149 and 183.

> insistence on a particular position. Overall, the government showed a willingness to meet, to listen to representations, and to change its position on matters of significance. This was sufficient to discharge any constitutional obligation to consult with the Applicants.[220]

[131] I do not agree.

[132] I begin with a consideration of the test to be applied in determining whether, in the context of collective bargaining, the trade unions' right to a freedom of association has been breached:

> …Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d), seeks to achieve, so as to substantially interfere with meaningful collective bargaining.[221]

[133] The issue at hand is whether the actions of Ontario substantially interfered with "a meaningful process of collective bargaining". What is required for appropriate collective bargaining "… varies with the industry, culture and workplace in question…"[222] What is required is a fact-based inquiry into "… whether the process of voluntary, good faith collective bargaining between employees and the employer has been…significantly and adversely impacted."[223]

[134] I find that between the fall of 2011 and the passage of the *Putting Students First Act*, Ontario infringed on the applicants' right, under the *Charter of Rights and Freedoms*, to meaningful collective bargaining.

[135] When reviewed in the context of the *Charter* and the rights it provides, it becomes apparent that the process engaged in was fundamentally flawed. It could not, by its design, provide meaningful collective bargaining. Ontario, on its own, devised a process. It set the

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[220] *Factum of the Respondents,* at para. 252.

[221] *Mounted Police Association of Ontario v. Canada (Attorney General), supra,* (S.C.C.) (fn. 204), at para. 72, referring to *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, supra* (fn. 207), at para. 90.

[222] *Ibid,* (*Mounted Police*), at para. 93.

[223] *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, supra,* (fn. 207), at para. 92; *British Columbia Teachers' Federation v. British Columbia,* 2014 BCSC 121, at paras. 176-178. (This is the Superior Court decision. For the Court of Appeal citation see fn. 216); and, *Mounted Police Association of Ontario v. Canada (Attorney General), supra,* (S.C.C.) (fn. 204), at paras. 71 and 75.

parameters which would allow it to meet fiscal restraints it determined and then set a program which limited the ability of the others parties to take part in a meaningful way.

[136] From the outset, there was a structural problem.

[137] Ontario sought to undertake the central negotiations in meetings that separated the unions. In the substantive meetings, it met with the unions individually and not collectively. Ontario told the unions that it was prepared to consider alternatives brought forward by each of them to the parameters it had put in place. It did this, and said this, in circumstances where it was either unwilling or unable to provide them with the individual targets each of them would have to meet to satisfy the fiscal objectives it had set. OSSTF asked to be informed of the financial targets any proposal it made would have to meet. None was forthcoming. The explanation for this was provided to the court. The funding is allocated to school boards as a whole and not on account of the bargaining agents that represented the employees. The only demonstrated standard was the parameters which were directed to the education sector as a whole. If there is any doubt as to the approach that Ontario was taking, it was revealed in answers provided in the cross-examination of the Assistant Deputy Minister of Education:

> Q. So it's fair to say, isn't it, that up to August 16th - I'll say August 27th, 2012, which is the formal introduction of Bill 115 into the House - position you take with all of the unions is we'll consider alternatives to the parameters, but they have to be across the board. Isn't that fair?
>
> A. We were costing things across the board. That's correct.
>
> Q. And you could have a substitution within the limited areas as happened in the OECTA deal, but the substitution had to apply across the board, across the sector.
>
> A. At that point, that's correct.
>
> Q. Okay. You understand, then, that in order for the unions to agree to a substitution, they would have to have had a common position, because it affected all of them? Isn't that the case?
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> A. I presume that could be the case, yes.[224]

[138] Nonetheless, Ontario was unwilling or unable to meet with the unions as a group. When asked, it suggested that the unions arrange this for themselves and bring forward a joint proposal. The problem is that this approach assumes the unions are generally of like interest. They were not. This point was made by representatives of CUPE when they first met with their counterparts from Ontario. The parameters were responsive to the interests of teachers and not

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[224] Cross-examination of Gabriel Sékaly, Q. 1152-1155 .

to those of the support workers CUPE represented. In retrospect, it is telling that Ontario demonstrated no interest in this expressed concern (see para. [29], above). CUPE asked for specific information. It wished to understand the implications for its members of a 1% increase in the budget of the Ministry of Education. Ontario was unable to provide information directed to the cost of CUPE members' movement through the applicable salary grid or the value of outstanding sick leave benefits (see para. [36], above). CUPE asked to be advised of the impact of the new sick leave plan on its members. Ontario could not provide an answer. OPSEU, through its participation with the CESSG, was part of similar requests. Despite assurances that information would be provided, the unions did not get the information they felt was needed (see para. [35], above). Without information that was pertinent to each bargaining unit, it was impossible for each unit to bargain on its own or in a fashion that separated it from a forum in which the information that was available could be applied:

> The cases in which the Board has upheld a duty to disclose, however, have dealt with information with respect to *existing* terms and conditions of employment, (such as, wages, benefit costs, classification structures). It is not difficult to understand that the absence of access to that sort of information, particularly in first contract negotiations, would entirely emasculate the duty to bargain in good faith...The full and rational discussion aspect of the duty to bargain also may result in the imposition on one party of a duty to disclose information where that information is needed to adequately comprehend a proposal or response of that same party.[225]

[139] It may be a cliché but it fits here: "the proof of the pudding is in the eating". The results are demonstrative of the problem. It was understood that had the statutory freeze gone into effect on September 1, 2012, that is to say, had the compensation increases provided for by the salary grid been implemented, the cost to Ontario for increases to teachers' salaries, would have been $187 million across the province. When the revised parameters were published on May 23, 2012, the implementation of the increased salaries the grid provided for was to be delayed by 97 days (half the school year) and the additional cost represented by the shortening of the delay from two years balanced by the provision for three unpaid days off work. CUPE does not represent teachers. It represents support workers. There were no comparable numbers for CUPE members produced by the government. Consistent with its reliance on province-wide numbers and its province-wide approach to negotiations, Ontario was unable to advise CUPE of the additional costs associated with salary increases for its members that would have resulted from delaying the implementation of the salary grid for 97days rather than 2 years. Similarly, Ontario could not provide any figures that would demonstrate the relative effect of the savings that would result from each of the support workers taking three unpaid days off. As counsel for CUPE explained, reliance on a salary grid was much less a contributor to salary increases for

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[225] *Royal Conservatory of Music Faculty Association v. University of Toronto (Royal Conservatory of Music)*, 1985 CanLII 1085 (ON LRB), at para. 37, referring to *Radio Shack,* [1979] OLRB Rep. Dec. 1220*; Globe Spring and Cushion Co. Ltd.,* [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.,* 83 CLLC 16,055; *Windsor Star,* [1983] OLRB Rep. Dec. 2147; *DeVilbiss (Canada) Limited,* [1976] OLRB Rep. March 49, 76 CLLC 16,009.

support workers than in the case of teachers. "It was a significant feature for teachers' compensations, but not CUPE members."[226] Many of the support workers (50%) were not on a grid and the majority (70%) were already at the top level. For teachers, grid movement occurs on September 1 (hence the statutory freeze on August 31 was important). There was no significance to September 1, 2012 for the CUPE members. The date for grid movement could be the date of hire, January 1st or some other date unconnected with the school year.

[140] CUPE was able, on its own (or with the assistance of the school boards), to provide what counsel referred to as a "guesstimate" of comparable numbers. The cost of the applicable grid movement would have been $5 million. Thus, the delay of 97 days (half of the school year) would have reduced the cost from $5 million to $2.5 million for the year. The pay cut imposed by the unpaid three days would have saved $31 million. This is far from the balance associated with the teachers retaining the benefit of grid movement for salaries, subject to a 97-day delay, in exchange for the three unpaid days off. For support workers, unlike teachers, there was no balance. Rather, this was a retraction of a benefit (the salary represented by the three unpaid days) previously given as a result of an earlier collectively bargained agreement. It was not a change that resulted from meaningful bargaining. It was the result of Ontario's bargaining with a teachers' union, OECTA. It was to be arbitrarily imposed on other workers with different concerns and different interests. It was the result of trying to treat those with different perspectives as a single province-wide group.

[141] It is not that CUPE did not raise the concern that its members were treated inequitably by these provisions. It did. Ontario displayed no interest (see para. [66], above).

[142] The fact that subsequent to the OECTA MOU further adjustments were made does not change the dynamic (using province-wide data to negotiate on a bargain-unit basis) or cure the problem. The reduction to one day off as compensation for continued, albeit delayed, movement on the grid was the result of negotiations with educational assistants; another group with different interests. CUPE was not involved in those discussions. The final change, where CUPE members and, given the "me too" clause, all other unions affected by these negotiations were permitted to wait to see whether days without pay taken voluntarily were sufficient to balance the cost of movement on the grid was agreed to on December 31, 2012. Counsel for CUPE was clear; this was not accepted as the result of bargaining but because the only remaining option was to have a contract imposed on it. This was more capitulation than negotiation. CUPE had already decided to proceed with an application to have the process declared unconstitutional. A contract that was imposed was required to comply with the *Putting Students First Act,* which is to say, that it was to be "substantively identical" with the OECTA MOU. The legislation continued to require three days unpaid leave in return for the movement on the grid.

[143] In any case, it is not as if movement on the grid was the only issue where the interests and concerns of CUPE members differed from those of teachers or other education employees

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[226] *Factum of the Canadian Union of Public Employees et al.,* at para. 120.

represented by other bargaining agents. For example: CUPE members had no interest in and are not part of the teachers' pension plan. It simply cannot be that requiring individual or small groups of bargaining units to respond to province-wide goals and objectives without providing any appreciation of their particular contribution to any aspect of the problem (the cost) or any part of the solution (the saving) can be said to be meaningful collective bargaining. This would be so with respect to the provisions of a prospective solution (in this case, the parameters).

[144] CUPE was not the only bargaining agent through which the problem became apparent. From the beginning of its interaction with Ontario, OSSTF attempted to obtain information that was specific to the role and contribution of its membership to the issues that concerned Ontario. On February 22, 2012, at its first meeting with OSSTF, Ontario's bargaining team indicated its mandate was to achieve cost savings, but that it was unable to identify the financial target it required OSSFT to meet through collective bargaining.[227] The request for this financial target was repeated on four occasions. It was never provided (see para. [24], above). The Assistant Deputy Minister acknowledged that Ontario did not attempt to find and articulate a target for a specific union to achieve:

> Q. Yes, but you didn't attempt to gather anything to find and articulate a specific target that a specific union could try to achieve, did you?
>
> A. And again, we were looking at this on a system wide basis—
>
> Q. So the answer is no, isn't it--
>
> A.--by the--because of the -- we do something at one table, it would have impacts on other tables.
>
> Q. So the answer is no, that you didn't do that, correct?
>
> A. We did not have the information available to us.[228]

[145] OSSTF made its proposal. OSSTF calculated that it represented substantial savings ($417 million in unfunded school board liabilities and $661 million in ongoing efficiencies) (see para. [51], above). Ontario rejected the proposal. Ontario understood that the proposal would cost $470 million in the first year and $900 million in 2014-2015 (see para. [52], above. Ontario did not produce any details as to how it arrived at this projected cost. Whatever its calculations, Ontario was assessing the impact of the proposal on the basis that it was to be applied across the education sector as a whole.

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[227] *Affidavit of Dale Leckie,* sworn March 7, 2013, at para. 70.

[228] Cross-examination of Gabriel Sékaly, at Q.972-974 (pp.273 l.15 – 274 l.3).

[146] The approach taken by Ontario required that the unions bargain individually but on a province-wide foundation. Ontario presented no other option and permitted none. When asked to convene a meeting with all the bargaining units, Ontario refused. Its representatives advised those involved only that it would consider any joint proposal they brought forward (see para. [56], above). It declined to act as a facilitator, the very role it identified for itself at the outset of the process. It left the unions, with their disparate interests, to bargain among themselves to find a position, common to them all that would satisfy Ontario's pre-determined but undefined fiscal requirements. The parameters were a means to that end, without an explanation of what the desired end actually was. As part of its budget process, Ontario had decided that its educational component would increase by 2% in the next year and 1% for each of the two years thereafter. There was no indication of the value of the accommodations sought from the unions that were involved and that could be measured in the context of the available funding.

[147] In *Royal Oak Mines v. Canada (Labour Relations Board),*[229] as part of a lengthy and contentious strike, the company set pre-conditions to be met before it was prepared to negotiate. The Canadian Labour Relations Board ruled that the employer had failed to bargain in good faith. The Board ordered that, subject to four issues that were unresolved, the employer tender a tentative agreement which it had put forward earlier and gave the parties 30 days to settle the four issues. The question was whether the Board had the jurisdiction to impose such an order, the standard to be imposed in reviewing the order (was it patently unreasonable?) and whether the order should be interfered with.

[148] In examining the circumstances, the Board found that the employer had breached the duty to act in good faith. Among its reasons was the employer's refusal to agree to a provision for any type of arbitration or consideration of questions arising from its discharge of several employees. The refusal to discuss this issue blocked the bargaining process. In refusing to discuss the issue, the company failed to consider a grievance procedure, a matter that was of fundamental importance for any association of employees. It was denying the employees a "fundamental right". The position of the company was "inflexible and intransigent to the point of endangering the very existence of collective bargaining."[230] The circumstances were different than they are here, but the underlying principle still applies. By insisting that the unions respond on a sector-wide basis to sector-wide "parameters" it had set, without any indication as to what was required of them individually, Ontario was being both inflexible and intransigent. It created a situation which made meaningful collective bargaining impossible.

[149] This was and remained an underlying problem from which the process could not and did not recover.

[150] From the beginning, the unions asked for data specific to each of them, the costs attributed to them and the savings needed to be accomplished by them. Ontario refused. It had

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[229] [1996] 1 S.C.R. 369.
[230] *Ibid,* at paras.45 and 46, quoting from *Iberia Airlines of Spain* (1990), 80 di 165, at p. 203.

set it goals on a province-wide basis. Ontario said it was open to discussion and alternatives, but alternatives proposed by individual bargaining units could not respond to sector-wide issues. Each bargaining agent represented its members and their particular interests and concerns. They were neither permitted nor able to speak on behalf of other employees represented by other bargaining agents.

[151] What Ontario referred to as parameters were not goals to be achieved. They did not demonstrate boundaries, limits or a range within which meaningful bargaining could take place. They were specific changes to specific benefits and programs intended to be implemented across the education sector as a whole. Ontario said these changes would achieve its goals. The parameters were brought forward without any prior consultation, discussion or negotiation. They were terms Ontario wanted included in all collective agreements across the education sector. Where other options were proposed, they were dispensed with on the basis that they did not satisfy Ontario's sector-wide goals but without explanation as to why that was the case.

[152] There were some changes. They are all closely related to the initial proposals (11 sick days paid at 100% rather than 6 or grid movement delayed for ½ a school year instead of for 2 years, with a compensating salary reduction through unpaid leave). They were so close that, without information as to their costs and benefits, it is difficult to accept them as the product of meaningful collective bargaining. The area left for bargaining was further constrained by the recognition of class size and the implementation of Full Day Kindergarten as fixed policies. The confirmation of class sizes and the introduction of Full-Day Kindergarten represented substantial cost in a period driven by fiscal restraint. It is one thing, in the context of negotiations, to insist on such programs and positions being left untouched but subject to balancing through other concessions. It is quite another to remove them from the process entirely and, thus, narrow the range of the negotiations. At some point, the range becomes so narrow as to render what is left something less than meaningful collective bargaining. The narrowing of the areas available for negotiations can represent substantial interference with the process of collective bargaining.

[153] Counsel for Ontario may see the process as "improvised and imperfect". To my mind, it was ill-conceived. The approach taken by Ontario requiring a sector-wide response from individual bargaining agents, especially in the absence of their particular impact on the costs involved or their prospective contribution to the solution being proposed, was a structural problem. The proof of this is in how the OECTA MOU was used. This was a demonstration that the process Ontario had arranged on its own had failed. What I referred to earlier as improvisation was much more than that. It was a tangent undertaken by Ontario, without consultation, to side step a problem with the process it had created.

[154] Ontario negotiated an agreement with OECTA, a teacher's union that represented one particular group of teachers, English Catholic teachers. They had their own concerns separate from other workers and, quite possibly, other teachers. Among the concessions made were some that applied only to teachers. The OECTA MOU dealt with "filling long-term occasional teacher positions and regular teacher vacancies and proposed changes to the teachers' pension plan" (see: para. [75], above). This was of no interest to support workers or other professionals employed by boards of education. It is impossible to know with certainty what concessions

were made by OECTA in areas that were of concern to these other workers in exchange for results that were more beneficial to its members. There is no assurance that other teachers' unions (say OSSTF) would have been content to make the same sacrifices for the same benefits.

[155] By dictating that the OECTA MOU would be a roadmap for all other agreements in the education sector, Ontario did away with the need for any central negotiations. Typically, a roadmap provides guidance and direction. Presumably, this foresees at least the possibility of a different route being taken, perhaps to a different destination or result. That is not the way the idea of the roadmap was implemented by Ontario. OSSTF was told that Ontario would only consider "proposals containing the essential terms of the OECTA deal". The substantive terms and conditions of the OECTA agreement would be applied "in all education sector collective agreements". The parameters, as set out in the OECTA agreement, "…were to be non-negotiable." (see para. [79], above). It was expected that "…all school boards would…bargain within the negotiating framework articulated in the MOU between OECTA and the government" (see para. [82], above).

[156] Ontario, by its actions and statements, dictated that the OECTA agreement would act as a central agreement regardless of the fact that only one union representing one type of employee had been involved in its negotiation. The OECTA agreement was not a roadmap. It was a surrogate, a stand-in, for a centrally negotiated agreement. The fact that there were three other agreements that "mirrored" the OECTA MOU does not assist Ontario. All it means is that those unions fell in line with a change to the process as originally structured; a change made by Ontario to arrive at the result it sought. The Minister advised OSSTF that "…Ontario would no longer entertain bargaining at the provincial (the upper tier) level and that any local collective agreements would need to be 'pretty close' to the OECTA deal." (see para. [93], above). CUPE asked for a summary of the cost savings that would be generated by the OECTA agreement. The response provided calculations that were done on the basis of savings that would be realised if the OECTA MOU was applied across the education sector.[231] During the second week of August, 2012, the Minister sent a letter to school board trustees across the province. The Minister told the trustees that any failure to secure local collective agreements that fell in line with the "roadmap" provided by the OECTA deal would threaten local school boards' abilities to avoid deficits while meeting the educational expectations of constituents. The Minister "…told trustees that terms and conditions that do not comply with [Ontario's] parameters would not be funded under the GSN".[232] The sub-text was: "If you do not do as we wish you may not be funded".

[157] Ontario no longer saw the need for, or utility in, carrying out any further central negotiations. It was content that the terms of the OECTA deal, if adopted or imposed on all the other unions, would result in its fiscal objectives being met. Ontario was intent on using the OECTA agreement to define the provisions to be applied across the education sector as a whole.

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[231] *Affidavit of Gabriel Sékaly*, sworn April 25, 2013, at paras. 189-190, and see Exhibit 49.
[232] *Affidavit of Dale Leckie,* sworn March 7, 2013, at paras. 178-179.

[158] If any further confirmation of this is required, it is found in the *Putting Students First Act.* Counsel for Ontario was candid to say that, read on its own, this legislation was in breach of s. 2(d) of the *Charter of Rights and Freedoms*. The problem, he suggested, was that the *Putting Students First Act* should not be read on its own. It must be read in context. Over the course of the months beginning in February, 2012 and ending with the its passage, the applicants had been given ample opportunity to make representations to Ontario. These representations, to the extent they were made, had been considered by Ontario. As a result, changes were made to the parameters that had been set. Accordingly, Ontario had discharged its constitutional responsibility and was free to pass the required legislation. Counsel pointed out that the case law recognizes that, in some circumstances, legislation may be required and available without causing a breach of the *Charter.*

[159] In particular, he referred to *Meredith v. Canada (Attorney General)* one of the "second trilogy" (see: para. [123], above). In that case, the issue was the constitutionality of the *Expenditure Restraint* Act.[233] This was legislation passed by the federal government in response to the 2007-2008 global financial crisis, the same circumstance that had led Ontario to inject capital into the economy as a stimulus which, in turn, was a cause of the deficits from which it was attempting to recover as it undertook the negotiations which are at issue here. The *Expenditure Restraint Act* imposed limits on wages in the public sector. These limits were imposed on federal employees, both unionized and not. At the time, a number of bargaining units representing affected employees were in the process of collective bargaining. There were other units where agreements had been reached but, as a result of the passage of the legislation, wage increases that had been agreed to were "rolled back" such that they complied with its provisions. There were two applicants, both were RCMP officers, and had been elected to its Staff Relations Representative Program. The Program played a role in the process through which the salaries of members of the RCMP were determined. In *Mounted Police Association of Ontario v. Canada (Attorney General),* a case heard with *Meredith,* both part of the "second trilogy", the Supreme Court found that that process breached s. 2(d) of the *Charter.* In *Meredith*, the majority concluded that though the process breached the *Charter of Rights and Freedoms,* nonetheless the actions taken "...constituted associational activity and attracted *Charter* protection". The issue to be determined was whether the *Expenditure Restraint Act* "...amounted to a substantial interference with that activity despite its constitutional deficiencies."[234] The Supreme Court of Canada found that the *Expenditure Restraint Act* did not breach s. 2(d) of the *Charter* at least insofar as it applied to the applicants in that case. This was not, as counsel for Ontario would have it, because as a result of its conduct to that point, the government had discharged its constitutional responsibilities and was, thus, free to pass legislation that breached those protections. Rather, the process as a whole was to be judged against the question of whether it substantially interfered with the freedom of association. In *Meredith*, it did not. There were three reasons:

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[233] S. C. 2009, c. 2.
[234] *Meredith v. Canada (Attorney General),* supra (fn. 205), at para. 4.

- First, s. 62 of the *Expenditure Restraint Act* provided the RCMP with the opportunity for further negotiation and discussion. Negotiation of additional allowances was permitted as part of "transformation[al] initiatives" within the RCMP.[235]

- Second, the level at which the *Expenditure Restraint Act* capped wage increases for the RCMP was consistent with the going rate reached in other collective agreements concluded with other bargaining agents both inside and outside of the core public administration. In other words, the increases were consistent with the results of the "actual bargaining processes".[236]

- Third, while recognizing that the outcome of any associational activity is not determinative of any allegation that the freedom of association has been breached, such evidence may be of assistance in determining the nature of the impact of the impugned actions on the associational activity. The members of the RCMP had been able to obtain significant benefits as a result of subsequent proposals brought forward through the existing process. The impact on the associational activity was minor.[237]

[160] The majority summarized its conclusion by noting that the RCMP continued to have a process of consultation on compensation-related issues, albeit within a constitutionally inadequate framework:

> The [*Expenditure Restraint Act*] and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of the RCMP members.[238]

[161] None of the three rationales has application to this case.

[162] It may be true that following the passage of the *Putting Students First Act*, its repeal and the subsequent imposition of agreements, Ontario was prepared to take up further negotiations. Agreements were made (OSSTF and ETFO) and others amended (CUPE, OPSEU and Unifor). Any such discussions were not carried out, as they were in *Meredith,* subject to a statutory exception and free of any of the limitations imposed by the legislation. There is no suggestion that the agreements did not have to continue to be "substantively identical" to the OECTA MOU. To the contrary, Ontario relies on the fact that these agreements "reflect the agreement with OECTA".[239] As it is, there was a reticence on the part of school boards, the actual employers, to agree to changes. There was no reason for them to do so. There were approved agreements in place. The changes are not outcomes that stand to demonstrate that the impact on the freedom of association was minimal.

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[235] *Ibid,* at paras. 26 and 29.
[236] *Ibid,* at para. 28.
[237] *Ibid* ,at para. 29.
[238] *Ibid,* at para. 30.
[239] *Factum of the Respondents,* at para. 255.

[163] The wages and terms imposed were not shown to be consistent with the going rate reached in other collective agreements inside and outside of the core public administration. Ontario submitted that the agreements imposed by the *Putting Students First Act* were consistent with the "going rate" in the "education sector". I point out that the "education sector" is a different and more restricted comparator than the "core public administration" which represents a wider array of employees, professions and areas of responsibility. The problem becomes obvious when one realizes that the contracts relied on as being consistent with those that were imposed pursuant to the *Putting Students First Act* are the OECTA MOU, the two subsequent agreements that are based on it and the CUPE deal made on December 31, 2012.[240] The idea that consistency with other agreements can be taken as a demonstration that the freedom of association was not breached pre-supposes that those prior agreements were fairly and freely negotiated through collective bargaining.

[164] The two agreements entered into in the weeks after the OECTA deal, the APSPP and the AEFO contracts, were both said to "almost mirror" or "mirror" the OECTA deal (see: paras. [87], and [90], above). Both were followed by an announcement by Ontario that unless agreements were signed by the end of August, it would introduce legislation to deal with the situation. These results confirm what was made clear when Ontario announced that the OECTA deal was to act as a roadmap. Thereafter, Ontario would only consider proposals containing the essential terms of the OECTA deal, that the substantive terms and conditions of that deal would be applied in all education sector collective agreements and that the parameters it set out were non-negotiable. These two contracts were not the result of fair and open collective bargaining.

[165] Counsel for CUPE was clear in his submissions. His client made its agreement at the last moment because of the realization that if it did not, it would be compelled to accept the terms of an agreement that would be subsequently imposed. The agreement was not driven by the reasonableness of the OECTA MOU but out of fear of the agreement that was to be imposed:

> [T]he CUPE Memorandum did not reflect a freely bargained for agreement between CUPE and of the Ministry. We were forced to, and did, use the OECTA Memorandum as the basis for our discussions. In other words, even then, our discussions were confined to the 'parameters' (now reflected in the OECTA Memorandum) that the Ministry had given to us at the outset of the process 10 months earlier.
>
> Ultimately, we executed the CUPE Memorandum because we believed that it was the best deal we could get for our members in the circumstances...[241]

[166] In particular, counsel noted that while the May 23, 2012 adjustment to the parameters and the OECTA deal had reduced, from 3 to 1, the days of unpaid leave to be taken in return for movement on the salary grid being delayed for 97 days rather than 2 years, the *Putting Students*

[240] *Ibid,* at paras. 255-256.
[241] *Affidavit of Brian Blakely*, affirmed March 8, 2013, at paras. 166-167.

First Act continued to refer to 3 days. CUPE sought to ensure its members got the advantage of the change:

> ... The alternative, in our view, was worse: without an agreement by December 31, 2012, the Government could simply impose the terms of the OECTA Memorandum (including the term that provided for 3 days of unpaid leave-that is, a 1.5% pay cut) on our membership without regard for whether and to what extent those terms applied to education support staff. Signing the agreement was the lesser of two evils. [242]

[167] On this basis, the OECTA deal is the only remaining comparator on which the justification for the terms of the imposed agreements is said to be founded. A single agreement does not stand in for the comparison on which the determination in *Meredith* was made. A single agreement is not the same as: “collective agreements inside and outside of the core public administration”. It is not demonstrative of the “going rate” in the “education sector”. It is one agreement dealing with one small component of that sector.

[168] Moreover, it is not clear the basis upon which the OECTA agreement was negotiated or whether and to what extent those negotiating on behalf of the union involved felt limited by the parameters. Did free and open bargaining take place? What is demonstrated is that Ontario foreclosed the possibility of free bargaining for the rest of the education sector. In a submission to Cabinet made on August 8, 2012 in support of the *Putting Students First Act* (Bill 115), the Minister stated that “...[t]he government table team also committed to recommend that the OECTA MOU be embedded in legislation”.[243] It was the evidence of the Assistant Deputy Minister that OECTA requested that its agreement with Ontario be embedded in legislation and “...the [Ontario] table team consistently committed to make this recommendation”[244]. This was done without advice to or consultation with any of the remaining bargaining agents. OSSTF submits that this was a secret agreement.[245] It does not matter. By agreeing to put the terms of the agreement into legislation, Ontario compromised the possibility of fair and open bargaining with the remaining parts of the education sector.

[169] Finally, with respect to the reliance by Ontario on *Meredith v. Canada (Attorney General),* it cannot be said that the impact of the process adopted by Ontario, as demonstrated by the outcome, was minor. From the beginning, the approach taken by Ontario impinged on free and open bargaining and interfered with the process of collective bargaining. The parameters limited the substance of the negotiations. The process required that the negotiations reflect sector-wide impacts, but the discussions involved only individual bargaining units (or

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[242] *Ibid,* at para. 167.
[243] Proposed legislation to deal with Labour Bargaining in the Education Sector for 2012, Ministry of Education, Priorities and Planning Committee, August 8, 2012.
[244] Letter from Robert Charney, dated December 10, 2013, and enclosing Answers of Gabrielle Sékaly to Written Interrogatories, Q. 25.
[245] *Factum of Ontario Secondary School Teachers' Federation,* at para. 144.

groups of bargaining units, such as CESSG). In the absence of data showing the contribution to the costs and potential savings of those units or groups, it was impossible for true collective bargaining to take place. The jettisoning of central bargaining in favour of using the OECTA agreement as a substitute was not just improvisation but a structural change. It took what had been identified as a voluntary process and made it obligatory. If a union did not take part, an agreement would be imposed. The change required the "volunteers" and those who had not taken part to conform to an arrangement they had no part in negotiating and no opportunity to take part in after the choice of voluntarily taking part was, effectively, removed.

[170] Given the facts of this case, *Meredith v. Canada (Attorney General)* does not assist Ontario in its submission that it had discharged its constitutional responsibilities and was free to pass the *Putting Students First Act* without concern for whether it interfered with the right to freedom of association as enunciated in s. 2(d) of the *Charter of Rights and Freedoms.* I repeat the acknowledgement of counsel for Ontario: taken on its own, the legislation interfered with the right.

[171] The *Putting Students First Act* completed the actions of Ontario which interfered with the freedom of association that was apparent and part of the process it adopted from the outset. When the central negotiations, as set up by Ontario, did not succeed, they were set aside and replaced by one agreement entered into by one bargaining agent. That bargaining agent had responsibility for the concerns of only its members but became, by arbitrary decision of Ontario, the after-the-fact representative of all members of all bargaining agents in the education sector; a group whose concerns and priorities would have differed, one from the others. When the *Putting Students First Act* is understood in the context of the process as a whole, it becomes apparent that it did nothing other than sustain and confirm the interference with collective bargaining. By requiring that agreements entered into before August 31, 2012 be "substantially similar" and that those made after that date be "substantively identical" to the OECTA agreement, Ontario made it clear that there would be no bargaining that diverted in any meaningful way from the terms of the OECTA deal.

[172] I find that considering the overall process undertaken, the actions of Ontario substantially interfered with meaningful collective bargaining.

[173] I return to the question of outcomes. Far from detracting from the idea that the interference was substantial, they confirm it.

[174] ETFO withdrew at the outset. It understood the central negotiations to be a voluntary process; that is to say, it believed it had a choice as to whether to participate. It chose not to. Part-way through, the process changed. If an agreement was not entered into which adhered to the OECTA MOU, one would be imposed. Once the OECTA deal had been made and was declared to be a roadmap, there was no longer any opportunity for ETFO to conduct bargaining that was not limited by the terms of the OECTA deal. This fixed the principal terms of any arrangement that could have been made.

[175] OSSTF withdrew, returned and insofar as it represented teachers, withdrew again, all before the making of the OECTA deal and the effective change from voluntary to required

participation. On April 18, 2012, OSSTF made a proposal on behalf of the teachers it represented. It outlined the savings its proposal projected. Ontario disagreed. It suggested the proposal would cost Ontario $470 million in the first year and $900 million in 2014-2015. Ontario assumed a sector-wide application but provided no explanation of its findings. On May 10, 2012, OSSTF made a similar proposal on behalf of the support workers it acted for and received a similar response. Ontario declared these proposals unacceptable and provided sector-wide figures in response, figures it refused to explain or justify (see paras. [52] to [54], above). There was no "actual bargaining"; there was no bargaining at all.

[176] Like OSSTF and ETFO, OPSEU withdrew. On January 2, 2013, along with others, the 7 bargaining units it represented had agreements imposed on them (see para. [115], above). One of them had no role to play in the negotiations. It had entered into its first collective agreement which was not set to expire until August 31, 2013. Nonetheless, a new agreement was imposed. Counsel for Ontario offered that this was a mistake. Doubtless it was, but in company with the overall conduct of the process, this points to its flaws. Driven by a general concern for meeting the parameters it had set, Ontario was unconcerned with the impact of its actions on the individual bargaining units. Its interest was only sector-wide.

[177] Counsel for CUPE was clear to distinguish the actions of his client from the other applicants. It did not withdraw; it continued to meet with Ontario, beginning in February and ending on December 31, 2012 when, under threat of an agreement being imposed, it made a deal with Ontario. It had no choice. The agreement between Ontario and OECTA provided for a shortening of the delay in movement on the grid to 97 days in return for each member of the union accepting 3 days unpaid leave during the 2013-2014 school year. Ontario could not provide any analysis of the impact of this on the affected members of CUPE. As calculated by CUPE, the benefit to its members would be a $2.5 million increase in salary as against a cost of $31 million attributed to the unpaid leave (see: para. [140], above). This was not freezing salaries as outlined in the parameters released by Ontario. This was an arbitrarily imposed pay cut and outside the parameters Ontario had set. CUPE made the agreement. It did so, not because it was content, but because it could not risk accepting the imposition of 3 days unpaid leave in the face of being able to reduce it to 1. The fact that after the repeal of the legislation the 1 day of leave was withdrawn does not change the reality that CUPE was offered no opportunity to discuss the issue outside of the terms as agreed to by OECTA. It was required to accept what was on offer.

[178] Unifor did not take part in the process until late. The parameters did not refer to post-retirement benefits. The members of Unifor (and, before it, CAW) continued to receive health and welfare benefits until death. This benefit had been in place for 40 years. The OECTA MOU provided that after September 1, 2013, no new retirees in the education sector would be eligible for any employer contributions to any post-retirement benefits.[246] The members of

[246] Memorandum of Understanding: Between The Ministry of Education and Ontario English Catholic Teachers' Association, July 5th, 2012, at para. F, (Benefits After Retirement).

OECTA did not have such rights. Their removal was no concern to them. The benefit was removed by the OECTA deal without warning and without any opportunity for the affected members of the affected union (Unifor) to take part in the negotiations that led to this result.

[179] It is not that these outcomes necessarily demonstrate substantial interference with collective bargaining. Rather, it is inherent in the process that was adopted and confirmed by these results. The defining of the parameters and the limited nature of the discussions concerning their application, the narrowing of discussions that followed the OECTA agreement and the enforcement of those limits through the threat and passage of the *Putting Students First Act* serve to show that there was substantial interference with the process of collective bargaining such that there was a breach of the freedom of association. The outcomes to which I have referred are examples of the results of this flawed process and serve to substantiate this breach.

[180] I have not, as yet, mentioned the assertion that the *Putting Students First Act* withdrew the right to strike and that this, on its own, represented a substantial interference with collective bargaining.

[181] Under the terms of the legislation, the Minister of Education could advise the Lieutenant Governor in Council where, in his or her opinion, a board and an employee bargaining agent appeared unable to, or by December 31, 2012 had not, settled an agreement that had the applicable relationship to the terms from the OECTA MOU ("substantially similar" or "substantively identical" to those terms) and was not inconsistent with them. With this advice in hand, the Lieutenant Governor in Council was empowered to make orders prohibiting the calling, threatening or holding of a strike.[247]

[182] It was argued that this stood as a further breach of the freedom of association as protected by s. 2(d) of the *Charter of Rights and Freedoms.* None of CUPE, OPSEU or Unifor, through the process that took place, were ever in a position where they could legally strike. This was not the case for either ETFO or OSSTF. Neither proposed nor entered into a long-term, complete work stoppage.

[183] On December 3, 2012, ETFO began a work-to-rule campaign. Its members also refused to engage in extracurricular activities. ETFO announced, on November 28, 2012, that it would give parents 72 hours of notice prior to commencing a full withdrawal of service. On December 4, 2012, ETFO indicated its intention to engage in a one-day withdrawal of services during the

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[247] *Putting Students First Act, supra,* (fn. 2) at ss. 4(1), 9(1) and 9(2), para. 2. Where the Minister had received an agreement entered into between a board and a bargaining agent, strikes were prohibited from the day the section requiring its delivery to the Minister became effective or the day the agreement was "settled", whichever was earlier, until the day before an order was made requiring the negotiation of a new agreement or, where no such order was made, the day the agreement became operative (see: ss. 8(2) and 8(4)). This second limitation had no immediate application in this case.

regular school day in boards across the province, and indicated that it would provide details later that week. ETFO did engage in lawful one-day strike actions on a rotating basis, throughout the province in December 2012. A total of 41 ETFO locals participated in one-day strikes in 21 school boards across Ontario during December 2012.

[184] OSSTF engaged in strike action in November and December 2012. This involved the refusal to participate in certain employer meetings, professional development, Ministry of Education initiatives, administrative activities, coverage and supervision in replacement of absent colleagues. Its members refused to provide extracurricular activities and, during the December strike action, included not being available outside of regular work hours. OSSTF called for this strike action to commence on November 7, 2012, but its implementation was subsequently delayed until later in November and December 2012.

[185] Subsequently, on January 9, 2013, ETFO announced its intention to have its members engage in a "day of protest" on Friday, January 11, 2013, a regular school day. Similarly, on January 9, 2013, OSSTF announced its intention that its workers not report to work on January 16, 2013. Two days later (January 11, 2013) following an application by the Minister, the Ontario Labour Relations Board ruled that the ETFO strike was unlawful. The *Labour Relations Act* prohibition on strikes during the term of a collective agreement applied to collective agreements imposed by Order-in-Council under the *Putting Students First Act*.

[186] Counsel for Ontario submitted that the impediments to a strike imposed by the *Putting Students First Act* cannot, in the circumstances, be taken as a breach of the freedom of association. The authority to make an order prohibiting a strike was not acted on. "[T]he right to strike was not prohibited by the [*Putting Students First* Act]".[248] Thus, there was no limitation on this form of collective action and no breach of the freedom.

[187] As I see it, any consideration of the limitation on the right to strike cannot be separated from the impact of the *Putting Students First Act,* as a whole, on the freedom of association. The legislation required that agreements adhere to the provisions of the OECTA deal. There was no true collective bargaining for the applicants once Ontario declared it a "roadmap" for all remaining agreements. The passage of the *Putting Students First Act* made clear that such bargaining would not occur: deals had to be "substantially similar to" the terms of the OECTA MOU; they had to be "substantively identical to" it if not entered into by August 31, 2012; and, if not entered into by December 31, 2012, agreements could be and were imposed. The ability of Ontario (the Lieutenant Governor in Council) to prohibit a strike did nothing other than close the final door on the ability of the applicants to act against the actions of the government and to use their association to forward their goals for their contracts. If it "appeared" that they were not able to arrive at an arrangement with their respective employers (the school boards) that fulfilled the direction to comply with the OECTA deal or if they had not settled, consistent with that direction, by December 31, 2012, Ontario could remove the only remaining arrow in their

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[248] *Factum of the Respondents,* at para. 267.

collective bargaining quiver, the right to strike. As it turned out, once an agreement was imposed, the *Labour Relations Act* would take over. With an agreement in place, the prohibition on a strike while a collective agreement remained in place would govern. The fact that no order prohibiting a strike was made does not change this. The breadth of the prohibition order made by the Lieutenant Governor in Council would put in place could extend well beyond an actual work stoppage to "threatening" or "encouraging" a strike.[249] This was an obvious constraint to doing anything in support of a strike. Why do it when Ontario possessed this extraordinary and arbitrary power to stop anything that might lead to a strike, quite apart from actually being on strike? Why would a school board (an employer) respond to such a threat knowing the goals and authority of the funder (Ontario):

> Bill 115 effectively eliminated parties' access to (or ability to credibly threaten) strikes, lockouts and post-freeze unilateral change of terms and conditions as bargaining mechanisms. As explained above, these mechanisms serve critical and essential functions in the bargaining process and in promoting settlement: generating information, adjusting expectations, and motivating parties to adjust their bargaining positions. Removing these essential bargaining mechanisms from the bargaining process seriously undermines meaningful and effective collective bargaining on all issues. Of course, once collective agreements are imposed on 3 January, resort to these mechanisms was legally prohibited.[250]

[188] It is not surprising that there was no order in response to the strike actions taken before the imposition of agreements. Those actions did not threaten what had become the ultimate goal of Ontario, agreements that were the same as or generally mirrored the OECTA deal. It is telling that, on December 6, 2012, the Minister announced that she was prepared to let a one-day legal strike action occur, but went on to say that Ontario would not hesitate to step in to prohibit strike activity if it lasted longer than one day, and that the necessary documents had been drafted.[251] With the threat of an order, what would be accomplished by moving forward with a broader or more comprehensive work stoppage?

[189] The authority of the Minister of Education to provide the requisite advice and the Lieutenant Governor in Council to step in and prohibit or end any strike, as provided for in the *Putting Students First Act,* furthered the breach of s. 2(d) of the *Charter of Rights and Freedoms.* Together with the requirement that any negotiated agreement be first "substantially similar to" and subsequently "substantively identical to" the OECTA Memorandum and the authority of the Lieutenant Governor in Council to impose such an agreement, the power to prohibit a strike had the effect of furthering the substantial interference with the freedom of association.

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[249] *Putting Students First Act, supra,* (fn. 2) at s. 9(2), Para. 2.
[250] *Affidavit of Sara Slinn*, sworn March 8, 2013, at para. 97.
[251] *Affidavit of Gene Lewis,* sworn March 7, 2013, at para. 113.

[190] The applicants went further. Particularly, ETFO submitted that any infringement of the ability to strike, quite apart from the specific facts, would stand as a breach of s. 2(d) of the *Charter of Rights and Freedoms*. In every case, such an infringement should require a response under s. 1 of the *Charter*. Was the breach justified in a free and democratic society? This position is founded on the third of the three cases that make up the second trilogy: *Saskatchewan Federation of Labour v. Saskatchewan.*

[191] The government of Saskatchewan introduced two statutes. One was the *Public Service Essential Services Act* (hereinafter, the *PSESA*).[252] Prior to its enactment, public sector strikes were regulated on an *ad hoc* basis. This legislation was the first statutory scheme in Saskatchewan to regulate and limit the ability of public service employees who perform "essential services" to strike. The *PSESA* applied to every "public employer" in Saskatchewan and to every "employee" of a public employer who was represented by a union. Under the *PSESA*, designated "essential services employees" were prohibited from participating in any work stoppage against their public employer. In the event of a strike, those employees were required to continue to work in accordance with the terms and conditions of their last collective agreement. They were prohibited from refusing to continue those duties "without lawful excuse". Contravention of any provision of the *PSESA* was a summary conviction offence that could result in an increasing fine for every day the offence continued.[253]

[192] The Saskatchewan Federation of Labour and other unions challenged the constitutionality of the *PSESA*. The trial judge concluded that "the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter*".[254] He found that the prohibition on the right to strike, in the *PSESA,* substantially interfered with the freedom of association of the affected public sector employees. The *PSESA* was neither minimally impairing nor proportionate, which is to say that the interference was not justified pursuant to s. 1 of the *Charter of Rights and Freedoms*. [255] The Saskatchewan Court of Appeal disagreed. While the jurisprudence regarding the freedom of association had evolved, it had not shifted so far as to support a ruling that the right to strike was protected by s. 2 (d) of the *Charter.*[256]

[193] The Supreme Court of Canada granted the further appeal returning the case to the view expressed by the trial judge:

> I agree with the trial judge. Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2 (d). As the

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[252] S.S. 2008, c. P-42.2.
[253] *Saskatchewan Federation of Labour v. Saskatchewan, supra,* (fn. 202) at paras. 5, 6, 7 and 8.
[254] *Ibid,* at para. 18.
[255] *Ibid,* at para. 19.
[256] *Ibid,* at para. 23.

> trial judge observed, without the right to strike, 'a constitutionalized right to bargain collectively is meaningless'.[257]

[194] The Court reviewed the change to the understanding of the extent of the protection granted by s. 2(d) of the *Charter* from a narrow restrictive approach, gradually to a generous purposive approach.[258] It found that, in the context of that evolution, we should move another step:

> 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.[259]

[195] It discussed the historical significance of strike activity and its role in modern labour relations as well as its acceptance internationally. The court concluded that:

> 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. [260]

[196] By referring to an earlier case, it identified the role played by the ability to strike as a sanction used to convince employers to recognize workers' representatives and to bargain effectively with them:[261]

> ... If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the *raison d'être* for workers to organize themselves into a union is gone. Thus I think that *the removal of the freedom to strike renders the freedom to organize a hollow thing*.
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> [Emphasis added by the S.C.C.][262]

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[257] *Ibid,* at para. 24.
[258] *Ibid,*at para. 30, quoting from *Mounted Police Association of Ontario v. Canada (Attorney General), supra* (S.C.C., fn. 201), at para. 30.
[259] *Ibid,* at para. 3.
[260] *Saskatchewan Federation of Labour v. Saskatchewan, supra,* (fn. 205), at para. 51.
[261] *Ibid,* at para. 52, quoting from *Re: Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. H.C.J.), at p. 29.

[197] The Supreme Court of Canada referred to other cases that are part of the evolution of our understanding of the breadth of the protection offered by the freedom of association as applied in the labour relations context. It related its reasoning to *Health Services and Support-Facilities, Subsector Bargaining Assn. v. British Columbia*[263] where values such as human dignity, equality and respect for individual autonomy were said to support the right to meaningful collective bargaining and to *Mounted Police Association of Ontario v. Canada (Attorney General)* (S.C.C.)[264], where it was confirmed that the right requires employees to have the ability to pursue their goals under the auspices of s. 2(d) of the *Charter of Rights and Freedoms.* The Court found that "[t]he right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse."[265]

[198] Does this decision support the idea that any impingement on the right to strike is inexorably a breach of s. 2(d) of the *Charter*? The idea that it does come from the dissent to it. The majority found that it is when a prohibition to strike action amounts to a substantial interference with the right to a meaningful process that it stands as a violation of s. 2(d) of the *Charter of Rights and Freedoms.* The two dissenting judges acknowledged this, but suggested that a more careful examination revealed the true ambit of the majority's decision:

> [T]hey have created a stand-alone constitutional right to strike.[266]

[199] The test, as expressed by the judgment of the majority, is tied to the specific facts of the particular case rather than to a generally applicable rule:

> 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*.[267]
>
> [Emphasis added]

[200] The idea that the application of the test was associated with the particular facts was repeated:

> *In this case*, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.

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[262] *Ibid,* at para. 52, also quoting from *Re: Service Employees' International Union, Local 204 and Broadway Manor Nursing Home, supra,* (fn. 260), at p. 29.
[263] 2007 S.C.C. 27, [2007] 2 S.C.R. 391.
[264] *Supra*, (fn. 204).
[265] *Saskatchewan Federation of Labour v. Saskatchewan, supra* (fn. 205), at para. 54.
[266] *Ibid,* at paras. 2 and 108.
[267] *Ibid,* at para. 78.

[Emphasis added][268]

[201] The dissent does not accept these words as the true meaning of the decision of the majority. After noting that the majority refers to the right to strike as "essential", "crucial" and "indispensable" to meaningful collective bargaining, the dissent concludes that "[i]f the right to strike is a necessary element of meaningful collective bargaining, it will not only apply on a case-by-case basis; logically any limitation on the right to strike will infringe s. 2(d) of the *Charter*...[T]o accept this decision [of the majority] as simply an espousal of the right to meaningful collective bargaining disregards the substance of the majority's reasons."[269]

[202] The importance of this difference is that if the determination of whether a limitation or prohibition on the right to strike substantially interferes with meaningful collective bargaining depends on the specific facts, then, that determination will demonstrate whether an analysis pursuant to s. 1 of the *Charter of Rights and Freedoms* is required. Only when the interference is substantial, as it was in the case of the *PSESA*, must it be justified pursuant to s. 1 of the *Charter.* On the other hand if any limitation or breach of the right to strike is itself a breach of the freedom of association then, as counsel for ETFO submitted they must all be subjected to an analysis under s. 1.

[203] Given that I have found that on the particular facts of this case the right to strike is a constituent of a process that, as a whole, substantially interfered with the right to collectively bargain, there is no need for me to determine the effect of the decision of the majority. Nonetheless, I repeat the observation of the dissenting justices to the effect that there have been many limitations to the right to strike which have been accepted as part of labour relations in Ontario and Canada. There are no longer strikes in support of any effort by a union to gain recognition as the representative of any particular group of workers. Such strikes have been replaced with a democratic certification process. The ability to strike during the life of a collective agreement has been replaced with a process of binding arbitration through which the terms of the agreement are to be enforced.[270] In fact, the ability to strike is highly regulated. Under the *Canadian Labour Code*[271], strikes are "generally only permitted where the term of a collective agreement has elapsed, the union has given notice to the employer, there has been a failure to negotiate or a failure to reach a collective agreement, the Minister of Labour has received a notice of dispute or taken certain prescribed actions, the prescribed time period has elapsed, and the union has held a vote by secret strike ballot with a majority of the employees voting to approve the strike."[272] The dissenting justices are concerned that if any and all limitations to the right to strike represent a breach of the freedom of association, even these

[268] *Ibid,* at para. 75.
[269] *Ibid,* at para. 109.
[270] *Ibid,* at para. 121.
[271] R.S.C. 1985, c. L-2.
[272] *Saskatchewan Federation of Labour v. Saskatchewan, supra,* (fn. 205), at para. 122.

accepted constraints will be subject to justification pursuant to s. 1 of the *Charter of Rights and Freedoms.*[273]

[204] In its Reply Factum, ETFO acknowledges that context does have a role to play in considering whether there has been a beach of s. 2(d) of the *Charter.* It is said that these considerations are limited to factors applicable to the process of bargaining. In this case, it would be appropriate to take into account the provisions "targeted" by the *Putting Students First Act* (for example: the sick leave plan and the retirement gratuity) that were the product of earlier collective bargaining. On this basis, other relevant considerations would be the statutory framework which governed collective bargaining at the time the *Putting Students First Act* was passed and the approach to collective bargaining that took place in the years since 1998, when the approach to funding education was changed. Presumably, this would include a consideration of the evolution in the approach to collective bargaining that followed that change and ended with the passage of the *School Boards Collective Bargaining Act*, *2014* (see: paras. [4] to [6], above). Whether an accounting of the context is limited in this way is not for me to decide, but it does suggest something more than an automatic acceptance of a breach and the concomitant requirement for an analysis under s. 1 of the *Charter of Rights and Freedoms.*

[205] In the end, it is a question of finding the appropriate balance between the economic power of the employer and the collective power association provides to unions. The view of the majority is that the historic gap between the two, that is, the pre-eminence of the employer, continues to govern. They found that confirming the right to strike as constitutional was overdue as a means of further ensuring a proper balance between these competing interests. The dissenting justices see the relationship as dynamic and subject to change. They repeat the words of McIntyre J. in the *Alberta Reference*:

> There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken [then] in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to social pressures of the day.[274]

[206] As the dissenting justices see it, providing a constitutional right to strike restricts the flexibility needed to ensure that the balance of interests can be maintained.

[207] The question of whether every limitation on the right to strike is subject to an analysis under s. 1 of the *Charter of Rights and Freedoms* affects this debate. On the one hand, always requiring the analysis under s. 1 would limit the flexibility the dissenting justices believe should

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[273] *Ibid,* at para. 123.
[274] *Reference Re Public Service Employee Relations Act (Alta.), supra,* (fn. 200,) at para. 182, quoted in *Saskatchewan Federation of Labour v. Saskatchewan, supra,* (fn. 205), at para. 126.

be maintained. On the other hand, the need for the analysis would insure the availability of the right to strike as a tool to be used, by unions, in the ongoing struggle of labour relations.

[208] I review this because the impact of how this issue is resolved may be reflected in what has taken place in these negotiations. Presumably, the goal of any calculation of the balance is to do what we can to ensure good faith bargaining. This is the one thing that, in this case, did not happen. I refer back to the points in these reasons where I have noted the adversarial nature of the process. Ontario set out to ensure a certain result and devised a process directed to that end. When the results it desired were not forthcoming, it changed the process. The unions essentially walked away. ETFO never took part. OSSTF withdrew, came back and withdrew again. In late April or early May, OPSEU withdrew. Unifor did not take part until well into the process. CUPE continued to meet but was never satisfied and, in the end, gave up and took what it could get. The adversarial or confrontational aspect of the relationship came to and stayed at the fore.

[209] Whatever develops from this point forward; whether the right to strike is absolute unless justified under s. 1 or whether the question of the presence of a breach of s. 2(d) is subject to the facts of each case, one can only hope it will result in good faith bargaining and not the kind tactical engagement and non-engagement that took place here.

[210] As it is, I find there was a breach of s. 2(d) of the *Charter of Rights and Freedoms.*

SECTION 1 ANALYSIS: WAS THE BREACH JUSTIFIED?

[211] Section 1 of the *Charter of Rights and Freedoms* states:

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

[212] In this case, Ontario says that if there was a breach of the freedom of association it was justified and satisfied the requirements of s. 1.

[213] Ontario produced and relied on an affidavit sworn by David Dodge, a former governor of the Bank of Canada, former federal Deputy Minister of Finance and Professor of Economics. His expertise was not challenged. As part of his opinion, he offered the following:

> …[E]liminating the annual budgetary deficit over the next five years [under the fiscal plan laid out in the 2012/13 Budget] is a prudent and responsible plan to return Ontario to a sustainable fiscal position.... [F]iscal austerity imposes some initial costs on the Ontario residents, but the costs over the long term would be far

> greater if the current fiscal plan were sidetracked and the public debt allowed to grow much further relative to the fiscal capacity of the province.[275]

[214] David Dodge expressed the view that measures to restrain the growth of compensation costs were essential to the fiscal plan. This was especially so in light of the pace of growth of public sector compensation (3.9% per year) relative to the private sector (2.3% per year) in the years 2001 to 2011. The growth of compensation costs was claiming an increasing share of diminished provincial revenues post 2007.[276] There was risk in not taking steps to reduce the Ontario's annual deficits. There could be an increase in the ratio of debt to GDP (Gross Domestic Product). This could result in higher interest costs as a share of revenue and, it would follow, larger deficits. Severe cuts to spending would become unavoidable. Large cuts to government spending would drag down GDP causing a decrease in revenue, compounding the fiscal problem. It was the opinion of David Dodge that deep cuts to public spending and services could be avoided by taking steps to bring the debt to GDP ratio under control sooner rather than later:[277]

> Ultra low interest rates might continue much longer than expected, or growth could turn out to be much stronger due to unexpectedly favourable global conditions. Nonetheless, it would be highly imprudent for today's government to count on such developments.[278]

and

> [I]t's very dangerous when things are not so bad or so impossible, you can always say let's put it off and let's not take any difficult measures today, we can do it out in the future. The point being that you really don't want to let yourself get to the stage where you're in trouble.… The problem is that things can go wrong and when you're getting up into the danger zone if things do go wrong then you have real troubles.[279]

[215] The debt problem can be resolved when the economy grows faster than the debt, causing the debt to GDP ratio to fall, restoring fiscal stability. David Dodge was of the view that it would be unwise to rely on this as the solution for Ontario. Action should be taken to address Ontario's fiscal concerns. In short, he recommended prudence over optimism.

[216] David Dodge observed that, in the absence of higher GDP growth and without control over monetary policy or the currency, a sub-sovereign borrower like Ontario "…can only tackle

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[275] *Affidavit of David A. Dodge*, sworn April 24, 2013, at para. 97.
[276] *Ibid,* at paras. 86-88.
[277] *Ibid,* at paras. 8-13 and 65-74.
[278] *Ibid,* at para. 71.
[279] Cross-examination of David Dodge, Q. 154.

a debt problem the hard way, through fiscal consolidation". [280] Fiscal consolidation would mean restraining program spending or adopting measures to raise additional revenue, or a combination of the two.[281]

[217] David Dodge indicated a need to be "very careful" in considering revenue-boosting measures. There are concerns; tax competitiveness can impact economic growth. Restraint of spending can be achieved through cuts to services (and, thereby, to employment and total compensation), improvements to productivity and constraining compensation rates.[282] As part of the budget process for 2012-2013, the Ministry of Education considered and assessed a wide range of options. As referred to at the outset of these reasons: "Based on the Ontario public accounts, the share of compensation in total production costs would be about 68% for the total of ministries, hospitals, school boards and colleges/universities."[283] (see para. [8], above) Compensation costs can be constrained without service cuts by increasing labour productivity (and reducing the workforce accordingly) or constraining wages and benefits. "Realizing true productivity gains is difficult; such gains cannot be counted on to manage-down unit labour costs in the public sector in the short run."[284] It is with this understanding in mind that Ontario turned to constraining wages and benefits. David Dodge expressed the opinion that "…restraining compensation per hour in the public sector was 'essential' ". [285]

[218] Despite the associated costs, Ontario chose to continue with the implementation of its plans for Full-Day Kindergarten and to continue its commitment to smaller class sizes. In doing so, it rejected the recommendations of the Drummond Report and accepted the observation of David Dodge pointing to the value of early childhood education.[286] This perspective was confirmed by the Affidavit of Mary Jean Gallagher, at the time the Assistant Deputy and Chief Student Achievement Officer with the Ministry of Education. Numerous studies indicate that early learning experiences are crucial to the future well-being of children.[287] This supported the continued implementation of Full-Day Kindergarten on the schedule already in place. There is some support for the view that smaller class sizes in kindergarten to grade 3 make a material difference in learning outcomes, particularly for children with socio-economic disadvantages. The research is mixed. The Ministry of Education's student achievement initiatives depend on a more personalized approach to teaching. Limited class sizes supports these initiatives.[288]

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[280] *Affidavit of David Dodge,* sworn April 24, 2013, at para. 66.
[281] *Ibid,* at para. 10.
[282] *Ibid,* at para. 24.
[283] *Ibid,* at para. 85 and Exhibit J: The Share of Labour Compensation in Total Cost of Government Output (First page).
[284] *Ibid,* at para. 26.
[285] *Ibid,* at para. 27.
[286] Cross-examination of David Dodge, Q. 248 and Answer to Undertakings No. 3: David Dodge, "Human Capital, Early Childhood Development and Economic Growth: An Economist's Perspective".
[287] *Affidavit of Mary Jean Gallagher*, sworn April 25, 2013, at paras. 5-10.
[288] *Ibid,* at paras. 33-45.

[219] OSSTF produced the Affidavit of Hugh Mackenzie. He has been a public economist for over 40 years. He has prepared reports dealing with the state of the provincial economy in Ontario, provincial budgetary and fiscal policy, and the financing of public and secondary education in Ontario since the 1970's.[289] In his affidavit, Hugh Mackenzie agreed that following the "world-wide crisis in financial markets" of 2008-2009, the budget surplus of 2007-2008 of $600 million became a deficit of $19.3 Billion in 2009-2010. Nonetheless, Hugh Mackenzie believed there was reason for optimism. He pointed out that, in the years that followed the recession that came after the infusion of money to stimulate the economy, the actual deficits were less than those that had been forecast. (The deficit of $19.4 Billion in 2009-2010 had been forecast, half-way through that fiscal year, to be $24.7 Billion.) In each successive fiscal year, the forecast budgetary deficit was reduced from the forecast debt the year before. "In other words, in the three fiscal years following the year of the recession, the fiscal situation in Ontario improved significantly …." Hugh Mackenzie swore his affidavit on March 7, 2013. It noted that the pattern was "…continuing in the current fiscal year, 2012-2013".[290]

[220] Hugh Mackenzie acknowledged that Ontario faced important policy choices. It is unlikely that Ontario will enjoy the same rate of growth over the next 25 years that it has experienced in the last 25 years. There are challenges but not emergencies.[291] Hugh Mackenzie suggested that while the perspective of David Dodge emphasized "the downward risk of being overly optimistic", he (Hugh Mackenzie) would attach more weight to "the potential benefits of being less conservative".[292]

[221] Hugh Mackenzie agreed that the "rolling out" of Full-Day Kindergarten and the investment in the "reduction or capping of class size" were "positives"; they were "very important to the future of the Ontario public."[293]

[222] Ontario accepted and followed the advice of David Dodge. It concluded that the best strategy was to restrain wages and benefits. At the same time, it chose to limit class size and continue its program of introducing Full-Day Kindergarten.

[223] It is not for the courts to look behind the policy and strategies made and adopted by Government. I repeat what was noted in *The Professional Institute of the Public Service of Canada v. Canada (Attorney General)*.[294] As far back as the first trilogy, in considering a statute limiting wages with the objective of reducing inflation, Chief Justice Dickson observed:

> ….courts must exercise considerable caution when confronted with difficult questions of economic policy. It is not our judicial role to assess the

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[289] *Affidavit of Hugh Mackenzie*, sworn March 7, 2013, at para. 1 .
[290] *Ibid,* at paras. 15, 18, 19, 20.
[291] *Ibid,* at para. 48.
[292] Cross-examination of Hugh Mackenzie at Q. 273.
[293] *Ibid* ,at Q.1050 to Q. 1062.
[294] 2014 ONSC 965, at paras. 219-222.

> effectiveness or wisdom of various government strategies for solving pressing economic problems. The question how best to combat inflation has perplexed economists for several generations. It would be highly undesirable for the courts to attempt to pronounce on the relative importance of various suggested causes of inflation, such as the expansion of the money supply, fiscal deficits, foreign inflation, or the built-in inflationary expectations of individual economic actors. *A high degree of deference ought properly to be accorded to the government's choice of strategy in combatting this complex problem…*[295]
>
> [Emphasis added]

[224] Ontario was at some pains to suggest that the import of this quotation (and others) is to extend deference in the area of labour relations beyond the policy choices made to the analysis of the justification for any breach of the freedom of association undertaken pursuant to s. 1 of the *Charter of Rights and Freedoms.* The issue remains whether, in the circumstances, any breach of the freedom falls within such reasonable limits as can be demonstrably justified in a free and democratic society. In the economic sphere, there are complex choices to be made and difficult decisions to be taken. Nonetheless, in the quotation referred to, the Chief Justice went on to say:

> ……The role of the judiciary in such situations lies primarily in ensuring that the selected legislative strategy is fairly implemented with as little interference as is reasonably possible with the rights and freedoms guaranteed by the *Charter*.[296]

A similar distinction was made in *Dunmore v. Ontario (Attorney General)*:[297]

> Policy choices are based on value judgments. This Court will only interfere with such choices *where a more fundamental value is at stake* and where it is apparent that a free and democratic society cannot permit the policy to interfere with the right in the circumstances of the case.[298]
>
> [Emphasis added]

[225] These words further our understanding of s. 1 of the *Charter.* They outline the protection it offers in the circumstances they apply to. In *Dunmore v. Ontario (Attorney General)*, farm workers complained because they were specifically exempted from the labour relations regime in Ontario. The repeal of legislation granting them trade union and collective bargaining rights returned them to the pre-existing situation. They had no such rights. The court found there was a

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[295] *P.S.A.C. v. Canada, supra*, (fn. 200), at para. 36.
[296] *Ibid*, at para. 36.
[297] 2001 S.C.C. 94.
[298] *Ibid*, at para. 57.

breach of s. 2 (d) of the *Charter of Rights and Freedoms* and went on to consider the application of s. 1. The wholesale exclusion of agricultural workers from Ontario's labour relations scheme was more than a minimal impairment of their right to freedom of association. The categorical exclusion of agricultural workers was unjustified where no satisfactory effort has been made to protect their basic right to form associations. The exclusion was overly broad. It denied the right of association to every sector of agriculture without distinction. Thus, the requirements of s. 1 were not satisfied. There was no special deference recognized as applicable to labour relations concerns that were set aside because of the complete exclusion of farm workers from labour relations associations. The case was straightforward. There was no justification for the exclusion that satisfied the requirements of the s. 1 of the *Charter*.

[226] The prospect of a broader deference begins with the understanding that, at its root, labour relations speaks to a compromise between the two powerful socio-economic forces: unions on the one hand and employers on the other. The proposition is that the legislature is better equipped to strike the proper balance between them. The problem is that this insight originates with the perspective of the majority in the first trilogy (*Reference Re Public Service Employee Relations Act (Alta)*).[299] Parts of the balance have now been given constitutional standing by decisions of the Supreme Court of Canada on the basis that the position of the employer is inherently dominant. For the right of freedom of association to be protected (for the appropriate balance to be established), employees have a fundamental right to meaningful collective bargaining, including the right to strike. The balance may be struck by the legislature, but it is monitored by the courts to ensure the freedom of association is protected. The concerns expressed in the first trilogy mirror those in the dissent in *Saskatchewan Federation of Labour v. Saskatchewan.* The concern may be warranted but, if it is, it will have to be dealt with in the context of the right to meaningful collective bargaining, including the right to strike, having been justified as a necessary element in a correct balancing of the rights of employees in their relationship with their employers and, on that basis, constitutionally protected.

[227] Ontario seeks to draw a more definitive line. It says the analysis conducted pursuant to s. 1 of the *Charter of Rights and Freedoms*, in both *Saskatchewan Federation of Labour v. Saskatchewan* and *Mounted Police Association of Ontario v. Canada (Attorney General)*, "is not relevant here" because those cases consider permanent collective bargaining structures and remedies and not temporary compensation restraints. It may or may not be that the nature of the restraints will impact on any analysis of whether the breach is minimal, but they are not irrelevant. No hard line has been or is to be drawn between permanent and temporary restraints. Each case is to be analysed on its own facts. The test in *R. v. Oakes*[300], which outlines the

[299] *Supra*, (fn. 200), at para. 181.
[300] *R. v. Oakes* , 26 D.L.R. (4th) 200; 24 C.C.C. (3d) 321; 50 C.R. (3d) 1; 19 C.R.R. 308; 14 O.A.C. 335.

analytical approach to s. 1 of the *Charter*, can be applied in all these cases. It has been utilized in cases considering the *Charter of Rights and Freedoms* in the context of labour relations.[301]

[228] The *Oakes* test has two criteria:

- First, the objective of the government action at issue must be "…of sufficient importance to warrant overriding a constitutionally protected right or freedom".[302] Before it can be characterized as sufficiently important the objective, must, at a minimum, "…relate to concerns which are pressing and substantial in a free and democratic society".[303]

- Second, once it has been determined that the objective is sufficiently important, it must be shown that the means chosen are reasonable and demonstrably justified. This has been referred to as "…a form of proportionality test". It is generally recognized that there are three components to the test: (a) the measures adopted must be rationally connected to the objective ("They must not be arbitrary, unfair or based on irrational considerations."); (b) the measures should impair "as little as possible" the right or freedom in question; and (c) there must be a proportionality between the effects of the measures and the identified objective.[304] "Although the nature of the proportionality test will vary depending on the circumstances, in each case, courts will be required to balance the interests of society with those of individuals and groups."[305]

[229] The two aspects of the *Oakes* test play distinct and separate roles in an enquiry that considers the application of s. 1 of the *Charter of Rights and Freedoms*. The first examines the objective the government (in this case, Ontario) is attempting to accomplish (restrain wages and benefits). It deals with the substance of what is being undertaken.

[230] The second tests the relationship between the objectives and the process utilized to achieve them. It reflects on the process and whether it was an appropriate and justifiable means of furthering the objectives of the government.

[231] In examining the objective and whether it warrants interference with the freedom of association, counsel for Ontario set the economic goal of wage restraint against the right to meaningful collective bargaining. This was accomplished first by reducing labour relations to a vehicle for economic advancement:

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[301] *Mounted Police Association of Ontario v. Canada (Attorney General), supra,* (fn 204: SCC), *Saskatchewan Federation of Labour v. Saskatchewan, supra,* (fn. 205); and, *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, supra,* (fn. 207).
[302] *Ibid,* at para 69, quoting from *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 352.
[303] *Ibid,* at para. 69.
[304] *Ibid,* at para. 70, quoting from *R. v. Big M Drug Mart Ltd.*, *supra,* (fn. 301), at p. 352.
[305] *Ibid,* at para. 70.

> In the labour context, freedom to associate is primarily exercised for economic goals and is subject to economic realities.[306]

[232] And, then, adopting the quotation from *Dunmore v. Ontario (Attorney General)* noted above (see: para. [224], above), by observing:

> Deference in labour relations remains appropriate except where a '*more fundamental value is at stake'*.[307]

[233] And, concluding, there is no such more fundamental value in the economic circumstances of union members:

> …Advancing workers' economic interests through collective bargaining is not, with respect, a *more fundamental* societal value than pursuing a policy that seeks to preserve the economic well-being and viability of the Province. In a wage restraint context, *government is mediating competing considerations* in the public interest. The interest asserted by the Applicants is freedom to bargain (or strike) for a wage increase or avoidance of a reduction in benefits in the collective agreement that has expired or is about to. This interest has no greater societal value than the public sector compensation policy that attempts to restore fiscal stability….[308]
>
> [Emphasis added]

[234] This misses the point. From the perspective of the unions, the societal value at issue is not the economic interests of their members. It is the protection of the fundamental and constitutionally protected right to freedom of association. The reduction of the latter, such that it is, rendered synonymous with the former, misrepresents the value involved. Ontario is not "mediating" between this value and the desire to preserve the economic well-being of the province. In the circumstances of this case, Ontario had a direct and stated interest to further the latter in preference to the former. If we measure the degree to which we are prepared to protect the fundamental values referred to in the *Charter of Rights and Freedom* based on the substance of the particular concern (teachers' wages and benefits), we are no longer protecting the value. Instead, we are protecting the benefit sought through reliance on that value and, in each case, evaluating how far our society is prepared to go to do so. This is not what the *Oakes* test directs.

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[306] *Factum of the Respondents,* at para. 299.
[307] *Ibid,* at para. 506, and note the quotation, at para. 224, above.
[308] *Ibid,* at para. 300.

[235] This is not a contest between two values. It is not the setting-off of the constitutional right to meaningful collective bargaining (the freedom of association) against the perceived need to put Ontario's fiscal house in order. The question is whether the effort to accomplish one (fiscal order) has been undertaken without impinging on the other in a fashion that is inconsistent with the underlying premises of our society (free and democratic).

[236] The Supreme Court of Canada has dealt with the role the economics of government play where there is a breach of the *Charter of Rights and Freedoms.* In *Newfoundland (Treasury Board) v. Nape*[309], the province signed a pay equity agreement in favour of female employees in the health care sector. Less than three years later, before any money had actually flowed to the intended recipients, the same government introduced legislation to defer the commencement of the promised increase for three years. The justification was that the government's budgetary deficit had unexpectedly ballooned to the point where the provincial credit rating on international money markets was at risk.[310] The change continued a breach of s. 15(1) of the *Charter of Rights and Freedoms*. The Supreme Court of Canada noted that:

> …[C]ourts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter* because there are always budgetary constraints and there are always other pressing government priorities. Nevertheless, the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.[311]

[237] The court recognized that the issue arose in the midst of an exceptional financial crisis. It called for an exceptional response. The crisis was such that had the provincial government been required to make the payments necessary to provide pay equity, other significant programs such as those involving education and health care, could have been impaired:

> It cannot be said that in weighing a delay in the timetable for implementing pay equity against the closing of hundreds of hospital beds, as here, the government is engaged in an exercise 'whose sole purpose is financial'. The weighing exercise has as much to do with social values as it has to do with dollars. In the present case, the 'potential impact' is $24 million, amounting to more than 10% of the projected budgetary deficit for 1991-92.[312]

[238] It is only in exceptional circumstances that a breach of rights under the *Charter* will be justified based on economic concerns. In this case, there is no suggestion that any social program was in any proximate peril. To the contrary, the government was intent on continuing

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[309] 2004 S.C.C. 66, [2004] S.C.R. 381, 244 D.L.R. (4th) 294.
[310] *Newfoundland (Treasury Board) v. Nape, supra,* (fn. 308), at para. 3.
[311] *Ibid,* at para. 72.
[312] *Ibid,* at para. 72.

the introduction of a new program, Full-Day Kindergarten. The impetus for restraint in wages and benefits was prudence and not any immediate fiscal emergency.

[239] The circumstances present in *Newfoundland (Treasury Board) v. Nape* are not present here. Nonetheless, as required to satisfy the first part of the *Oakes* test, I find that there are "…concerns that are pressing and substantial in a free and democratic society".[313] At the time, Ontario was responding to the aftermath of a global financial crisis. Its debt to GDP ratio was high. There were cyclical and structural obstacles to economic growth. Based on the evidence of David Dodge, Ontario concluded that it was important to act before these fiscal concerns became a crisis:

> [I]t is unnecessary… to determine whether the inflation which led to the enactment of the legislation under review amounted to an economic crisis or emergency. … A 'pressing and substantial concern' need not amount to an emergency.[314]

[240] In its Reply Factum, Unifor points to *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia.* In that case, the Supreme Court of Canada rejected cost as a justification for restricting job-security provisions in the collective agreements of health care workers, even as it acknowledged that health care costs had been growing at a rate of three times that of the provincial economy for the previous 10 years, creating a "health care crisis".[315] The court observed:

> …To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin* indicating that 'courts will continue to look with strong scepticism at attempts to justify infringement of *Charter* rights on the basis of budgetary constraints'.[316]

[241] It is worthwhile to consider the context in which this was said. In *Health Services*, the appellants argued that the objectives behind the legislation at issue were not pressing and substantial on two bases: first, that the objective was framed too broadly; and second, that, in part, the true objective was to save costs which was not pressing and substantial. The Supreme Court of Canada accepted both submissions. It is on this basis that *N.A.P.E.* was cited. These findings were not determinative of the issue. The two objections did not "…detract from the fact that the government had established other pressing and substantial objectives:"[317]

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[313] See para. [211], above.
[314] *P.S.A.C. v. Canada, supra,* (fn. 200), at para. 30.
[315] *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, supra,* (fn. 207), at paras. 3, 144, 210 and 240.
[316] *Ibid,* at para. 147.
[317] *Ibid,* at para. 147.

> The objective of the *Act* is to improve the delivery of health services by enabling health authorities to focus resources on the delivery of clinical services, by enhancing the ability of health employers and authorities to respond quickly and effectively to changing circumstances, and by enhancing the accountability of decision-makers in public health care.[318]

[242] The finding that was made was that these were pressing and substantial objectives.[319]

[243] It bears noting that the circumstances in *Health Services* were substantially different than in this case. What was at issue there was a wholesale undermining of the labour relations in the health care sector in British Columbia:

> Only Part 2 of the Act is at issue in the current appeal (see Appendix). It introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of employees under contracting-arrangements (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s.9).
>
> Part 2 gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. In the words of the Act, s. 10: 'Part [2]'s prevails over collective agreements'…[320]

[244] In *Health Services*, the targeted activity was not directed at wages and benefits but the full spectrum of associational activities of the unions involved.[321] While it may overlap with the first criteria applicable to Part 2 of the *Oakes* test (rational connection of the process to the objective of the government), the breadth of the infringement on meaningful collective bargaining could impact on a determination as to whether the objective is pressing and substantial (Is the objective so pressing and substantial that it warrants the wholesale taking apart of the relationship between the employees and their employers?). Be that as it may, the question of whether economic considerations are demonstrative of a pressing and substantial objective is a matter to be determined in each case. In part, these decisions require an analysis of

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[318] *Ibid,* at para. 143, (quoting from the *Respondent's Factum* in *Health Services,* at para. 144).
[319] *Ibid,* at para. 144.
[320] *Ibid,* at paras. 10-11.
[321] *Professional Institute of the Public Service of Canada v. Canada (Attorney General), supra,* (fn. 201), at para. 116.

the available evidence. In this case, David Dodge has explained and opined that the fiscal circumstances warranted, if not required, an immediate response. In accepting this, I am mindful of the admonition Chief Justice Dickson, that it is not for the Court to look behind, interpret and attempt to resolve different perspectives on complex economic concerns (see: para. [223], above). Hugh Mackenzie may disagree. The government chose to act on the advice of David Dodge. Deference is owed to this decision.

[245] This takes me to the second part of the *Oakes* test and the three consideration it raises: rational connection; minimal impairment and overall proportionality.

(a) Rational Connection

[246] The rational connection component of the second part of the *Oakes* test (the proportionality test) requires that the government measures limiting the right or freedom in question be rationally connected to the objectives. Ontario submits that "[t]here can be little doubt that the impugned measures are rationally connected to the pressing and substantial objective of achieving compensation restraint in order to restore fiscal sustainability, while protecting services and jobs."[322] I am not so sure. In making this assertion, Ontario referred to a series of cases, each of which it submits, refers to and accepts the presence of a "rational connection" in the absence of definitive proof, essentially based on "reason and logic", to establish the requisite causal link[323] and calling for deference when such findings are made.[324]

[247] In taking this position, Ontario made note of the following:

> …[A]s long as the challenged provision can be said to further in a general way an important government aim it cannot be seen as irrational…[325]

[248] This phrase should be read with the words that precede it:

> …As for the 'rational connection' aspect of proportionality, the presence in an impugned measure of care of design and lack of arbitrariness – the hallmarks of a rational connection – allows the government to pass a sort of preliminary hurdle…[326]

[249] These words demonstrate that there is a limit to the circumstances where inferences based on reason and logic can be accepted as demonstrating the requisite rational connection. The measures which limit the right (in this case, to freedom of association) should not be

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[322] *Respondents Factum*, at para.306.
[323] *R. v. Sharpe* 2001 S.C.C. 2, [2001] 1 S.C.R. 45, at para. 89; *Harper v. Canada (Attorney General),* [2004] 1 S.C.R. 827, at para. 29; *RJR Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at paras. 82 and 157-158; and, *Canada (Attorney General) v. JTI-Macdonald Corp.* 2007 S.C.C. 30, at paras. 40-41.
[324] *Mounted Police Association of Ontario v. Canada (Attorney General), supra,* (fn. 204), at para. 143.
[325] *Canada (Human Rights Commission) v. Taylor,* [1990] 3 S.C.R. 892, at pp. 925-926.
[326] *Ibid,* at p. 925**.**

arbitrary and should be based on care of design. In this case, they were not. The process was arbitrary because it was unilateral. Even though, as the Minister noted at the outset, it was "very different" from past sector-wide negotiations (see para. [19], above), the process was put in place by the government without consultation or discussion. Ontario's representatives professed to be open to review of the process, but introduced it during a conference call the day before substantive discussions were to begin as "… an overview of the next steps" without the opportunity for questions (see para. [18], above). When ETFO asked questions about the process, Ontario's team either could not or would not answer. The questions asked were basic to the process: how would the negotiations proceed, could additional issues be raised and would other cost saving measures be considered (see para. [23], above). OSSTF, having been told Ontario would consider alternative terms to meet its fiscal goals, asked for the financial target that any alternative proposals it made would have to satisfy. OSSTF was told the information would be provided. It was not. Evidently, this sort of information was not available. In other words, Ontario devised a new and different process on its own. It failed to or was unable to answer questions as to how that process was to be conducted and professed to be open to changes in circumstances where it could not provide information that would be central to any alternative the unions sought to develop and bring forward.

[250] OPSEU and CUPE met with Ontario's negotiating team. At both meetings, Ontario did not discuss concerns with the process. Following the outline of Ontario's position (the parameters), OPSEU was told there was to be no discussion. Questions could be asked at the next meeting, presumably, when Ontario wanted to start tying down agreements. For its part, CUPE pointed out that the parameters were directed to the interests of teachers, not those of the support workers it represented. Ontario expressed no interest in this concern.

[251] When the Premier received the letter from the five presidents of the five applicants expressing concern for the process, he responded with a posting on the internet explaining what was being asked of teachers. It was only after a second letter was written that he responded directly and then essentially to repeat Ontario's commitment to the goals it had set.

[252] "Arbitrary" is an adjective. It can describe a thing which is based on chance or is unfair. Cambridge Dictionaries Online explains the latter as follows: "using unlimited personal power without considering other people's wishes". In this vein, "arbitrary" can also mean "despotic"[327].

[253] The putting in place of the means by which the Ontario's goals were to be met was arbitrary.

[254] Was there "care of design" of the process? It is one thing to take care in designing a process. It is another to promulgate a "careful design". The former refers to the preparation of the design, the latter to the result. Preparation may be directed to taking care to design a process

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[327] Little Oxford Dictionary, Revised Seventh Edition 1998.

that will come to a particular and desired result. Here, what was required was a careful design, one that would result in meaningful collective bargaining.

[255] The process produced by Ontario did not achieve that goal. It failed entirely. It was designed to be voluntary. At the outset, three of the unions withdrew. Little, if any, progress was made. One agreement was signed with one bargaining agent. It was unilaterally declared to be a “roadmap” for the agreements that remained to be made. It became clear that “roadmap” was not meant to point in a direction or down a path. Essentially, it meant adoption of the terms of the single agreement that was in place. The practical difference between “substantially similar to” and “substantively identical to” is not apparent. This resulted in three more agreements. They were not, as suggested by counsel for Ontario, the product of an incremental system to encourage collective bargaining. (If a “substantially similar” agreement was not in place by August 31, 2012, you could still enter an agreement so long as it was “substantively identical” to the roadmap contract.) The limitations that were imposed added pressure to make whatever agreement was available and, as such, detracted from meaningful collective bargaining. The process continued to fail. In response, the *Putting Students First Act* was passed. That was the end of any possibility of collective bargaining. CUPE did sign on at the end of December but its counsel was clear it did this, not because of meaningful collective bargaining, but because of the risk in not doing so. A large number of agreements were imposed by Order-in-Council. With the limitation, if not the loss of the ability to strike, the process was effectively over. Any subsequent negotiations were carried out under the shadow of the agreements that had been imposed.

[256] I find the means used to accomplish Ontario’s goals were arbitrary and not based on care of design. It follows that the means adopted were not rationally connected to Ontario’s objectives. In understanding this conclusion, it is useful to consider the following statements made in *Meredith v. Canada (Attorney General)* albeit in dissent:

> The fact that there are fiscal concerns does not give the government an unrestricted license on how it deals with the economic interests of its employees.[328]

and

> While wage rollbacks are technically seen to be rationally connected to fiscal stability and responsibility, the refusal to engage in any meaningful form of consultation is not.[329]

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[328] *Meredith v. Canada (Attorney General), supra,* (fn. 202), at para. 65.
[329] *Ibid,* at para. 69.

(b) Minimal Impairment

[257] This takes me to the second question asked in the second part of the *Oakes* test (the proportionality test). The question is whether Ontario had a reasonable basis, on the evidence tendered, for concluding that the impugned breach of the *Charter of Rights and Freedoms* interfered as little as possible with the protected right (in this case, the freedom of association), given Ontario's objectives. Ontario was careful to explain the limits applicable in determining the answer to this question. What is it that demonstrates minimal impairment? In its factum, Ontario observed that the Supreme Court of Canada has emphasized that the government "is not required to search out and adopt the absolutely least intrusive means of attaining its objective":[330]

> It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account[331]

and

> [I]t only requires [the government] to demonstrate that the measures employed were the least intrusive, in light of both the legislative objective and the infringed right".[332]

[258] The test is met if the government has selected a "reasonable alternative":

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. [333]

[259] In doing so, government is granted a "margin of appreciation":

> It is rarely self-evident that a law limiting a *Charter* right does so by the least drastic means. Indeed, 'a judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down'. This is especially so if judges are unaware of the practicalities of designing and administering a regulatory regime, and are indifferent to

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[330] *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 104-105.
[331] *R. v. Sharpe, supra,* (fn. 320), at para. 96.
[332] *Harvey v. New Brunswick,* [1996] 2 S.C.R. 876, at para. 44, quoting from *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra,* (fn. 322), at p. 305.
[333] *Ibid,* at para. 47, quoting from *RJR-MacDonald Inc. v. Canada (Attorney General)*, *supra,* (fn. 322), at p. 342.

> considerations of cost. If s. 1 is to offer any real prospect of justification, the judges have to pay some degree of deference to legislative choices.[334]

[260] Ontario went on to point out another feature it says limits the test of minimal impairment. A less drastic measure may not serve all of the government's policy goals. The government may have a number of goals and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another.[335] In this case, any suggestion that Ontario could have ceased its implementation of Full-Day Kindergarten, ensuring that the education budget met the fiscal plan and leaving the parties free to reach more generous bargaining outcomes, would do nothing to see the goal of early childhood education served. "Straightened fiscal circumstances should not automatically mean that governments must abandon their public policy goals simply to ensure the collective-bargaining results and outcomes satisfactory to bargaining agents."[336]

[261] With these constraints and limitations in mind, Ontario submitted that the impugned measures were minimally impairing of the *Charter* right to a general process of collective bargaining.

[262] I do not agree.

[263] It is necessary to take a closer look at the nature of, and the relationship between, the various "objectives" of Ontario. The overarching concern, not just for the education sector, but across the provincial government was its deteriorating fiscal position. In this situation, Ontario sought not only to limit wages but to set aside benefits (the banking of sick days, their payment at retirement and the delay of movement on the salary grid) which were the result of free and uninhibited collective bargaining. These benefits had been in place for some years. At the same time, in furtherance of servicing its goal of early childhood education, Ontario determined to continue with the "roll-out" of Full-Day Kindergarten and the capping of class sizes. Clearly, there was tension between these various goals. Setting aside benefits and limiting movement on the grid were dedicated to saving money. Full-Day Kindergarten would increase costs. The savings would come not just from a temporary two-year freeze on wages, but from a fundamental restructuring of benefits the employees were bound to see as significant. Finding a balance through collective bargaining was always going to be difficult. Ontario confronted the situation, not by relying on the central processes that had succeeded in the past (PDT), but by developing an *ad hoc* process without any consultation with the unions about how the parties could navigate through the apparent tensions. Ontario presented it to the unions as a process that was a *fait accompli.* The initial approach was established before the employees who were affected had heard anything about it. They were told when they were to meet. The discussions were governed by an agenda set by Ontario. Questions asked were not answered. In the end, the

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[334]Peter W. Hogg: *Constitutional Law of Canada, Fifth Edition Supplemented, Vol. 2,* © 207, Thomson Reuters Canada Limited at pp. 38-38 to 38-39.
[335] *Canada (Attorney General) v. JTI-Macdonald Corp., supra,* (fn. 322), at para 43.
[336] *Respondents Factum*, at para. 311.

employees had no option but to accept. If they did not, agreements were imposed. A time line was set according to the needs of Ontario. If the *Putting Students First Act* had not been enacted by August 31, 2012, there would have been a $473 million fiscal impact (on account of teachers' salaries) as existing agreements would have expired and the "freeze" on terms and conditions under s. 86 of the *Labour Relation Act* would have triggered movement on the grid and the addition of bankable sick days.[337]

[264] The impact of this was significant. It undermined the collective bargaining process as a whole. Did this approach fall within the range of reasonable solutions that were available? In avoiding the statutory freeze on terms and conditions in the existing collective agreements, Ontario was acting to escape the impact of its own labour relations regime. Why was it necessary to do this through a limitation on collective bargaining and to accompany it with all the other provisions found in the legislation, provisions which had the impact of forcing employees to accept the general preferences of the government (the parameters). Rather than use legislation in an attempt to force an overall solution, Ontario could have met its own legislative restriction (the freeze) by passing legislation that was limited to forestalling its effect until a fixed date or until the ongoing round of collective bargaining was completed.

[265] This would not have dealt with the early education policies Ontario was determined to implement. There is no suggestion that the unions opposed these programs. Hugh Mackenzie accepted the value of smaller class sizes.[338] ETFO and OSSTF supported smaller class sizes[339] and the introduction of Full-Day Kindergarten.[340] In the absence of opposition, there is no demonstrated reason why the acceptance of these programs had to be attached to the broader negotiations of collective agreements. ETFO submits that these policies could have been confirmed by the promulgation and enforcement of regulations to protect class size limits and staffing ratios for Full-Day Kindergarten.[341] The Assistant Deputy Minister acknowledged that another way to achieve Ontario's stated objectives would have been to craft a regulation to the GSN that would have set aside specific funds to protect the classroom experience.[342]

[266] With the freeze put on hold and the early learning policies confirmed, there would have been no need to press the abbreviated process on the unions. The parties would have been free to fully bargain the significant changes to the benefits that, as it is, were the result of the narrow process Ontario compelled the unions to follow. In such circumstances, it would have been possible to examine other means of reducing costs in the education sector rather than the limited set of parameters Ontario insisted on. The negotiations could have considered more than the number of fully paid sick days (6 to 10 then 11), the length of time that movement on the grid

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[337] *Respondents Factum*, at para. 312.
[338] Cross-examination of Hugh Mackenzie at Q. 1079-1087.
[339] *Affidavit of Mary Jean Gallagher,* sworn April 25, 2013, at para. 33, and see Exhibit U and Exhibit V.
[340] *Ibid,* at para. 30.
[341] *Reply Factum of the ETFO Applicants*, at para. 60 (b).
[342] Cross-examination of Gabriel Sékaly Q. 566; see also the *Education Act,* R.S.O. 1990 c E.2 at ss. 234(4) and (5) which allow for regulations providing grants to set various conditions on funding.

would be delayed (2 years down to half a school year) or the number of unpaid days that would be required to compensate for the reduced delay in that movement on the grid (3 to 1 to 0). Ontario could have taken the time to look more closely at the proposals of the unions, provided detailed explanations for their rejection and considered if, with the amendments that true negotiations can produce, it could come up with other, perhaps better solutions.

[267] It is telling that although all sectors were experiencing the same fiscal concerns, Ontario allowed for free negotiations and did not interfere with collective bargaining in any other sector.[343] The outcome of these negotiations was a number of voluntary agreements with bargaining agents in the broader public sector.[344] Ontario was able to reach agreements with Crown lawyers and Crown attorneys, the Ontario Provincial Police, the Ontario Medical Association, OPSEU and AMAPCEO (The Association of Management, Administrative and Professional Crown Employees of Ontario).[345]

[268] This conclusion is not one that relies on hindsight. It was apparent from the outset that these negotiations would be difficult and presented a "formidable challenge". Nonetheless, Ontario decided to move forward with a process that was "very different" than those which had taken place in the past. It should have been obvious that connecting new, early education programs with a wage freeze and the restructuring of longstanding benefits would add to the complications. Ontario chose to rely on the premise that it was free to bring forward policies in combination rather than determine if there was an easier way.

[269] I find that the means selected were not the least impairing. The alternative selected was not reasonable and fell outside of any applicable "margin of appreciation".

(c) Overall Proportionality

[270] This takes me to the third question asked in the second part of the *Oakes* test: overall proportionality. This analysis requires the court to weigh the benefits sought through the carrying out of the impugned measures against their deleterious effects. In its desire to reach an end it had defined, Ontario over ran the rights of the employees. The end sought by Ontario could have been achieved through more targeted legislative or administrative action and fairer, meaningful collective bargaining. The impact was not just on the economic circumstances of education workers but on their associational rights and the dignity, autonomy and equality that comes with the exercise of that fundamental freedom. These are the sort of values that attracted

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[343] *Factum of the Canadian Union of Public Employees et al.,* at para. 165, and see fn. 212 therein which refers to Cross-examination of Michael Uhlmann Q. 339, Q 359-360 and Q 440 and noted: "Even in the health sector, where the Province provides direct funding but is not the employer (like in the school board sector), the Province allowed collective bargaining to take place freely, and did not seek to interfere by using 'parameters' or legislation": Cross-examination of Michael Uhlmann Q. 370-376. "In addition, although the Province released a draft *Protecting Public Services Act...*which would have applied to public sector employees, it was never introduced": Affidavit of Michael Uhlmann, Sworn April 25, 2013, at para. 31, and Cross-Examination of Michael Uhlmann Q. 444-454.

[344] *Ibid,* (*Factum of the Canadian Union of Public Employees et al.*), at para. 165).

[345] *Ibid*.

the dissent of Chief Justice Dickson at the time of the first trilogy, dissents which are now celebrated as the opening insight to the full breadth of the freedom.

[271] I find that violation of the freedom of association of the applicants has not been demonstrably justified in accordance with s. 1 of the *Charter of Rights and Freedoms*.

CONCLUSION

[272] The applications are granted.

REMEDY

[273] As indicated at the outset of these reasons, I am not, as yet, asked to determine any remedy. Nonetheless, I should like to make the following observations. These applications dealt with a difficult and continuously evolving area of our law. These motions were argued less than a year after the Supreme Court of Canada concluded that the right to meaningful collective bargaining was not derivative but direct and immediate.[346] Everyone involved is searching for the right answers to difficult questions. The fact remains that Ontario was and may still be in a difficult fiscal circumstance. If so, we are all affected. Ontario accepted that it should act. The problem with what took place is with the process, not the end result. It is possible that had the process been one that properly respected the associational rights of the unions, the fiscal and economic impacts of the result would have been the same or similar to those that occurred.

[274] As the case law suggests and as I noted at the outset of these reasons, we are looking to balance the power in the relationship between employers and employees. While the decision in this case has turned on the actions of Ontario, the search for the balance runs in both directions. In *Saskatchewan Federation of Labour v. Saskatchewan*, the dissent referred to an earlier observation of Mr. Justice Binnie:

> Care must be taken . . . not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually.[347]

[275] In the context of this case, counsel for the Ontario Public School Boards' Association pointed out that while the his client spoke for the actual employers, many of those school boards were comparatively small organizations without any ability to attract individual or independent funding. Counsel submitted that, in their relationship, it was the unions, some with large

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[346] The decision in *Mounted Police Association of Ontario v. Canada (Attorney General), supra,* (fn. 204) was released on January 16, 2015.

[347] *Saskatchewan Federation of Labour v. Saskatchewan, supra,* (fn. 205), at para. 126, quoting from *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465, at para. 57.

memberships and direct funding through those members, that start from a stronger position with more immediate power to be weighed in the balance.

[276] The mark of success in finding the proper balance is positive, fair and meaningful collective bargaining. The adversarial and confrontational conduct which governed the process in this case fell short. Both sides contributed. Ontario and the applicants have a continuing and ongoing relationship. At the moment (without having heard any submissions), it is not clear to me what would be accomplished by any substantial or overly aggressive remedy. Could it reward one side to the detriment of the process as a whole? We are all still learning.

[277] I ask counsel to consider these perspectives in whatever discussions they may have. If the matter is resolved, I ask that the court be advised in order that the file may be closed. I am grateful to all counsel for what was a long, complex, thorough and sometimes energetic set of submissions.

COSTS

[278] No submissions were made as to costs. It is not clear to me whether they are to be dealt with now or once the question of remedy has been determined. I assume it is the latter. At the appropriate time, if the parties are unable to agree as to costs, I may be spoken to.

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LEDERER J.

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CITATION: OPSEU v. Ontario, 2016 ONSC 2197
COURT FILE NO.: CV-12-465269
DATE: 20160420

Application under Rule 14.05 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990,ss. 2(b), 2(d), 7, 15 and 24(1) of the *Charter of Rights and Freedoms* and s. 52 of the *Constitution Act, 1982*

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LORIE ST. AMAND and ROBYN LAMBE

Applicants

– and –

The Crown in Right of Ontario as represented by the MINISTER OF EDUCATION and the ATTORNEY GENERAL OF ONTARIO

Respondents

-and –

ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

Intervenor

JUDGMENT

LEDERER J.

Released: 20160420