ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0376-15-U**

Durham District School Board, Rainbow District School Board and Peel District School Board, Applicants v Ontario Secondary School Teachers’ Federation, Responding Party v Ontario Public School Boards’ Association, Her Majesty the Queen in right of Ontario as represented by the Ministry of Education (the “Crown”), and Canadian Union of Public Employees, Intervenors

BEFORE: Bernard Fishbein, Chair

APPEARANCES: Michael Hines, Janet Edwards, Dawn Beckett-Morton, Beverley Webb and Amanda Lawrence for the applicants; Heather Alden, Pierre Côté, Andy Simpson, Brad Bennett and Susan Luft for the responding party; John-Paul Alexandrowicz, Carolyn L. McKenna and Debra McFadden for Ontario Public School Boards’ Association; Robert Fredericks, David Strang, Ferina Murji and Robin Basu for the Crown; Gavin Leeb, Alycia Shaw and Paul O’Ryan for Canadian Union of Public Employees; Tim Gleason and Chris Donovan for CUPE Local 4400

DECISION OF THE BOARD: May 26, 2015

Table of Contents

Para.

I. Introduction 1-3

II. Interventions 4-9

III. Background Generally 10

IV. Legislative Background
(a) Education and School Board Collective Bargaining Generally 11-15
(b) The *SBCBA* – Generally 16-25

V. The Issues 26-28

VI. Something about Statutory Interpretation 29-31

VII. The Interpretation of the *SBCBA* in this Case
(a) Generally 32-59
(b) How Far Does the Evidence Need to Go – is it enough if the strike is, in part, "in respect of central bargaining"? 60-65

VIII. The Evidence 66-86

IX. The Impact of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") 87-92

X. Relief 93-96

XI. Orders 97

XII. Schedules (a) Notice to Employees
(b) Schedule 1 (Agreed Facts)
(c) Schedule 2 (Agreed Facts)

I. Introduction

1. This is an application pursuant to section 100 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "*LRA*") by the Durham District School Board ("Durham"), the Rainbow District School Board ("Rainbow") and the Peel District School Board ("Peel") (also hereinafter collectively referred to as the "School Boards") for a declaration that the Ontario Secondary School Teachers' Federation ("OSSTF") has called, authorized, counselled, procured, supported and encouraged three unlawful strikes.

2. Each School Board is an English-language public district school board within the meaning of section 1 of the *Education Act*, R.S.O. 1990, c. E.2 (the "*EA*"). OSSTF is the bargaining agent for the bargaining units composed of every regular and occasional secondary school teacher in each English-language public district school board in Ontario including the School Boards. There is no dispute that OSSTF called or authorized timely "local" strikes under the *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5 (the "*SBCBA*" in the relevant districts (how OSSTF refers to its component units or "locals") – in Durham, commencing April 20, 2015, in Rainbow commencing April 27, 2015 and in Peel commencing May 4, 2015. At the time of the hearing, there were approximately 74,000 secondary school students "out of class" as a result of these strikes.

3. The application was filed on May 12, 2015. OSSTF filed its response on May 13, 2015 and the matter was heard on May 14, 15, 19, 20 and 21, 2015. Due to the urgency of releasing this decision as soon as possible, it is somewhat more abbreviated than I might have otherwise wished. It does not refer to every fact asserted or argument made by the parties – only those necessary for this decision.

II. Interventions

4. At the outset, both the Canadian Union of Public Employees ("CUPE") and CUPE Local 4400 sought to intervene. Their intervention was opposed by the School Boards but supported by OSSTF. Neither of the other intervenors, the Crown (for ease of convenience, the Crown may also be referred to as "the government" or "the province" in this Decision) nor the Ontario Public School Boards' Association ("OPSBA"), took any position on this.

5. CUPE represents some 55,000 educational support workers in 63 of the 72 school boards whose collective bargaining is also governed by the *SBCBA*, if in a slightly different fashion than teacher collective bargaining such as those teachers represented by OSSTF. In fact, CUPE Local 4400 is the largest non-teacher bargaining unit in Ontario. Neither asserted what the Ontario Labour Relations Board (either "the Board" or "the OLRB" throughout this Decision) has characterized as "direct legal" interest in its jurisprudence dealing with the requirements of standing to intervene. Neither could they. Neither would be bound by any order that the OLRB might issue in these proceedings. Neither was involved in the activities which led to these proceedings and, in fact, neither had even reached the point of a "central/local bargaining issue split" under the *SBCBA* in their own non-teacher bargaining – the necessary first step before their own bargaining could commence under the *SBCBA*.

6. Rather, they submitted that the Board should permit them to intervene pursuant to the OLRB's discretion to do so. In particular, they pointed to the fact that OSSTF had served Notice of Constitutional Question on the Attorney General and since the case would deal with rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*") with respect to strike activity under the *SBCBA*, their participation ought to be permitted and would be of assistance to the OLRB. In particular, CUPE noted that they represented non-teacher bargaining units which had acquired their bargaining rights under the *LRA* and were not statutorily-mandated teacher bargaining rights under the *SBCBA* and therefore could offer the Board a different perspective. Both undertook not to call any evidence and not to repeat submissions made by the other parties.

7. After some questioning by the Board, the School Boards amended the relief that they were seeking in this application by deleting in its entirety the request for:

> "(i) A direction that all communications of any kind, whether written, verbal or otherwise, used by OSSTF, its officers, officials or agents, anyone acting on their behalf and/or any member of OSSTF employed by any of the Applicant district school boards that are intended to persuade or may have the effect of persuading any member of OSSTF employed by any of the Applicant district school boards to strike against any of those boards make no reference of any kind to the central issues established in the Memorandum of

> Settlement between OSSTF, OPSBA and the Crown dated December 9, 2015."

8. After hearing the submissions of all the parties, I ruled orally at the hearing that I would not permit either CUPE or CUPE Local 4400 to intervene. I referred to my earlier decision in *Ontario English Catholic Teachers' Association* (OLRB File No. 2465-14-M dated January 14, 2015), 2015 CanLII 2104 (ON LRB), where I had rejected a similar application by CUPE to intervene in an application under section 28(4) of the *SBCBA* to determine whether matters were to be subject of local or provincial bargaining in OECTA's bargaining.

9. Essentially, I found CUPE and CUPE Local 4400 to be in no different a position here and rely on the cases and legal analysis in the *OECTA* decision. Neither CUPE nor CUPE Local 4400 has any direct or legal interest and they will not be affected by any order made with respect to OSSTF in this case. They are not anywhere close to lawful strike position in their own bargaining under the *SBCBA* because a central/local bargaining issue split has not been yet agreed upon there. Although I do not dispute their "interest" in what will be the first decision dealing with a strike under the *SBCBA*, it is no greater than the interest of any party involved in the *SBCBA*, to say nothing of students or parents in Ontario. That "interest" in this decision as a precedent has never been sufficient for intervenor status under the OLRB jurisprudence. Moreover, as an exercise of my discretion, it is not clear to me that CUPE or CUPE Local 4400 could add anything to the particular facts of this case which involved only the OSSTF and how it has conducted these three local strikes. Equally, even assuming that a lesser standard for intervention may be applicable in *Charter* cases, as CUPE asserted, in view of the School Boards amending their prayer for relief, it was not yet clear to me how the *Charter* would interplay with this decision. Moreover, should there be some general *Charter* challenge of the *SBCBA*, it would likely proceed, if not immediately, certainly ultimately, to a higher level where both CUPE and CUPE 4400 could seek to intervene.

III. Background Generally

10. On the first day of hearing, with the assistance of the Board, the parties ultimately agreed to some of the facts which were, for the most part, incontrovertible and certainly did not require evidence. They are attached as Schedule 1 and Schedule 2. However, the parties (or at least some of them) resisted any suggestion that the case be argued on assumed facts or on the School Boards' best case,

but rather insisted on calling *viva voce* evidence which occupied some days. Again, because of the need of releasing this decision as soon as possible, I will not review all of that evidence and refer only to those portions necessary for this Decision.

IV. Legislative Background

(a) Education and School Board Collective Bargaining Generally

11. To understand this case and in particular to understand how the *SBCBA* came to be enacted, it is necessary to understand, at least in an overview manner, the history of the statutory framework of collective bargaining in the education sector in the Province of Ontario. It has been reviewed recently in some great detail in *Trillium Lakelands District School Board*, [2013] OLRB Rep. March/April 427 (and in particular at paras. 59-84), and *Richard Brock v. OECTA*, [2013] OLRB Rep. January/February 109, 2013 and *Ontario Secondary School Teachers' Federation*, 2012 CanLII 80016 (ON LRB).

12. For purposes of this decision, I need only briefly summarize it. Prior to the passage of the *SBCBA*, school board collective bargaining was governed by Part X.1 of the *EA.* Notwithstanding that in 1998, the provincial federations replaced the individual locals or districts respectively as the holder of local bargaining rights, the collective agreements continued to be between individual school boards (who still remained the employers) but now with the provincial teaching federations such as OSSTF. As well, since 1998, local school boards lost their ability to independently raise taxes, education has been funded from the Province's general revenues. This often raised complaints about the ability of individual school boards to actually or effectively bargain collective agreements since the funding was dependent upon the Province (which was not party to any negotiations and referred to in many of the earlier cases as "the ghost at the table"). As a result, an informal structure was developed without any applicable statutory framework whereby the Ministry of Education ("MOE") involved provincial teacher federations and associations of school boards in centralized discussions about the more significant issues with their collective bargaining negotiations. In the case of English-language public district school boards, such as the applicant School Boards, that was OPSBA.

13. Those central discussions led to template agreements (not collective agreements) that could be (and inevitably were) incorporated into the locally-bargained collective agreements – between individual teacher federations (like OSSTF) and individual school boards (like the applicant School Boards).

14. This system, after some initial success, collapsed in 2012 when, in more dire economic times, the government was seeking to control its expenditures and in particular with respect to education. Not surprisingly, without any legal requirement or any statutory framework, some of the teacher federations (and some of the trustee associations) withdrew from the process. Ultimately, in September 2012, the government enacted the *Putting Students First Act 2012*, S.O. 2012, c. 11 (the "*PSFA*"). Although the *PSFA* also sought in some ways to procure government-coordinated central discussions and templates (through the Ministry of Education), that also was largely unsuccessful and collective agreements were largely imposed pursuant to the *PSFA*, particularly with respect to the OSSTF and these applicant School Boards. Those collective agreements were effective from September 1, 2012 to August 31, 2014 and are the immediate predecessor collective agreements (all of which have obviously now expired) to the strike activity in question here.

15. After the rancor and the criticism from almost all quarters of the *PSFA* (which was repealed almost immediately after the individual collective agreements had been imposed), the government enacted the *SBCBA* in 2014. The *SBCBA* fundamentally altered the structure and process of school board collective bargaining. The government consulted widely with stakeholders with respect to the passage of the *SBCBA* and as the *Hansard* records of the Committee meetings indicate, it was widely supported, including by the OSSTF, as an improvement over what had gone before, and in particular, the tumultuous collective bargaining (or perhaps more accurately non collective bargaining) in 2012 that had led to the *PSFA*.

(b) The *SBCBA* – Generally

16. For the first time, the *SBCBA* makes collective bargaining in the province in the education sector two-tiered. There will be central bargaining at central tables and local bargaining at local tables. However, the collective agreement will still be between the local school board (which remains the employer) and the relevant union, in this case, the OSSTF. Issues that are resolved at the central table will

become part of each local collective agreement, in addition to whatever is bargained at the local table.

17. To facilitate such central bargaining (since there had been no formal structure for it prior to the *SBCBA*), the *SBCBA* created employer bargaining agencies ("EBAs") – here OPSBA – which statutorily represent all the local school boards in negotiating with their provincial union counterpart such as the OSSTF. As well, for the first time, the *SBCBA* introduced the government, the Crown in right of Ontario ("the Crown") into the bargaining in a formal and real but limited sense. The Crown is a participant in the central bargaining – but only the central bargaining. It is not a participant in the local bargaining.

18. Whether something is to be bargained locally or centrally is left to the parties at the central table to agree (here, the Crown, OPSBA and OSSTF). Issues that are not agreed (or ordered) to be central table issues are local table issues. In the event that the parties are unable to agree, section 28 of the SBCBA permits an application to the OLRB to determine any such issue and section 28(8) lists factors that the OLRB should consider.

19. In fact, the very first section 28 application under the *SBCBA* involved these three parties in the Fall of 2014. The parties agreed to mediation before the OLRB in an attempt to resolve the central/local split. After some three days of mediation completely failed, the parties agreed on a schedule to litigate what should be in the central/local split which involved the preparation (and the time for the preparation) of extensive briefs and would have, ironically, only been concluding (at least in terms of the hearings before the OLRB) shortly before this application was filed. Shortly after that schedule to litigate the central/local split was established, the parties, on their own, perhaps surprisingly, entered into a Memorandum of Settlement resolving that central/local split on December 9, 2014 ("the MOS"). That MOS provided:

> "4. The parties acknowledge that the items set out in paragraphs 5-20 relate to broad issues that are the subject of **complete** agreement between them insofar as their status as central matters is concerned and that this document is intended to reflect the extent to which agreement has been reached within those broad issues."

20. For purposes of this application, it is important to note the following items:

> "13. **Professional Practice/Responsibility**/Learning/Development-scheduling of professional learning/development/training, Student, Supervision, **Unassigned time**.
>
> 14. Ministry of Education/**School Board Initiatives** – Management, implementation and parameters, Reporting/**Professional Judgement**; for example: diagnostic assessment (PPM 155).
>
> 16. **Class Size and Staffing Levels** – all matters concerning guaranteed generation, access to employment/increase to FTE entitlement, equivalent learning, secondary programming enhancement, e-learning, dual credit, contracting out, guarantees concerning job security, **class size caps**, flex factor, **class size guidelines**, pupil teacher contacts (PTC), **pupil teacher ratio (PTR)**, **class size limits**, **class size maxima**, maximum teacher workload, and class size divisors."
>
> [emphasis added]

21. Under the *SBCBA*, once notice to bargain has been given, and only after the parties have agreed on the central/local issue split, bargaining with respect to central and local bargaining proceeds separately. Bargaining in respect of central items takes place only at the central tables and bargaining over local terms takes place only at local tables. Those issues that are not agreed to be central issues, by default, become local issues. This separate bargaining contemplates the appointment of conciliation officers, mediators, industrial inquiry commissions, special auditors and dispute advisory committees, etc., separately locally and centrally. The Crown participates in those processes centrally but does not participate locally. Equally, the *LRA* processes concerning altering working conditions, termination of the section 79 "statutory freeze", the necessity of holding a strike vote, the prohibitions against threatening unlawful strikes, the procedures to be followed conducting strike votes and the rules regarding eligibility to participate in strike votes apply separately with respect to central bargaining and local bargaining. In fact, there is a new and distinct ratification procedure for central bargaining established by the *SBCBA*.

There is also a new notice requirement of a strike created by the *SBCBA* in section 34 that is to be given separately locally and centrally (and obviously to the different parties at the different tables).

22. Significantly, the *SBCBA* does not dictate the timing of the bargaining – there is no statutory requirement that central bargaining be concluded before local bargaining. The separate bargaining can proceed contemporaneously and, there is similarly no restriction on the timing of any consequential economic sanctions – lock-out or strike – with respect to it. There is no statutory prohibition from it occurring contemporaneously, or before, or after, the other.

23. With respect to the three applicant School Boards, there is no dispute that all of the statutory requirements for a timely local strike have been met. Local conciliation officers were appointed, notice of local strikes were given, local "no-board reports" were issued – all separately, and the strikes are therefore "timely".

24. Similarly, there is no dispute that none of these procedures have yet taken place with respect to the central bargaining. No central conciliation officer has been appointed, no central "no-board" report has been obtained and no notice of a central strike has been given. None of the statutory pre-conditions to make a central strike timely have yet been fulfilled.

25. There is no dispute with respect to all of this.

V. The Issues

26. What is in dispute is the intersection of central and local bargaining when a local strike occurs. The School Boards and the Crown say the scheme of the *SBCBA* requires a local strike to be "pure". It must not relate to any issues that are the subject of central bargaining. They point, *inter alia*, to section 34(3) of the *SBCBA* which provides:

> 34. (3) **No employee shall strike in respect of central bargaining** unless, at least five days before the strike begins, the employee bargaining agency for the employee gives written notice of the strike to the employer bargaining agency at the central table and to the Crown, indicating the date on which the strike will begin.
>
> [emphasis added]

27. The School Boards say the evidence supports a conclusion that the strikes at Durham, Rainbow and Peel are, if not completely, in some respects, strikes "in respect of central bargaining" and therefore illegal since a central strike is not yet legal.

28. OSSTF disagrees with their interpretation of the Act and in particular, section 34(3). Its position is that once the local strike begins, it may also support other positions, including most importantly, at the still outstanding central table – the *SBCBA* does not prohibit that. OSSTF disagrees with the interpretation placed upon section 34(3) by the School Boards and the Crown and it also says, on the facts, there is no basis here to conclude that the strikes are anything other than "in respect of local bargaining".

VI. Something about Statutory Interpretation

29. Both parties referred me to various authorities with respect to the principles of statutory interpretation. Let me say that at the outset, I do not disagree with any of them. The Crown referred me to what is now the "modern approach" to statutory interpretation as expressed by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at paras. 26 and 27:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> Today there is only one principle or approach, namely, **the words of an Act are to be read in their entire context** and in their grammatical and ordinary sense **harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament**.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and*

> *Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> 27 The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "*Statute Interpretation in a Nutshell*" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like [page581] people, take their colour from their surroundings". **This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive**. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as **"the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter"**. (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)
>
> [emphasis added]

See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] S.C.J. No. 2 at paras. 20 and 21:

> "20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
>
> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan,

> *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103. …
>
> 27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. **It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences**. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, **or if it is incompatible with other provisions or with the object of the legislative enactment** (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88)."
>
> [emphasis added]

30. Equally, OSSTF pointed me to the decision of this Board in *Ontario Hydro*, [1996] OLRB Rep. September/October 826 where the

Board also adopted the "modern" rule of statutory interpretation but also referred to further presumptions:

> "21. In this case, the parties concentrated on two "rules" of statutory interpretation: the presumption against tautology; and the principle that words must be read in the context of the provision and legislation as a whole. There are many other such "rules" as well.
>
> 22. The "modern" rule of statutory interpretation can be simply stated as follows:
>
>> One must determine the meaning of legislation in its total context, having regard to the purpose of legislation, the consequences of the proposed interpretation(s), the presumptions and special rules of interpretation, and the admissible extensive aids.
>>
>> (see Sullivan, Ruth; *Driedger on the Construction of Statutes*, 3rd Edition, Toronto, Butterworths, 1995, at page 427).
>
> The interpretation **given to a legislative provision must be plausible, consistent with the apparent legislative purpose, and reasonable and just**.
>
> 23. Perhaps the best place to start in this case is with the modern presumptions of statutory interpretation. These presumptions, which, as the label itself suggests, are no more than assumptions which are rebutable [sic], and which may or may not apply depending on the circumstances, are:
>
>> 1. *The Presumption of Knowledge and Competence.* That is, the Legislature is presumed to know the existing statutory law and jurisprudence, and how courts and tribunals function.
>>
>> 2. *The Presumption Against Tautology.* That is, it is assumed that the Legislature avoids superfluous or meaningless words, and does not *pointlessly* repeat itself. Every word is presumed to advance the legislature purpose. This does not mean that the Legislature cannot repeat itself, it means only that repetition is not

> to be assumed (see *Hill v. William (Park Lane) Ltd.* [1949] AC 530 at 546 (House of Lords)). Pursuant to this presumption, interpretations which render portions of a statute meaningless, pointless or redundant are to be avoided. However, this presumption is easily rebutted by suggesting cogent reasons for the redundant or superfluous words; perhaps, for example, in an "of caution" approach. Indeed, as McLachlin J. pointed out (albeit in dissent) in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* [1992] 2 SCR 394 (Supreme Court of Canada), Legislatures often use superfluous words.
>
> 3. *The Presumption of Consistent Expression.* That is, that within the same statute, the same words have the same meaning and different words have different meanings. Statutes are not novels, and legislators are presumed to adopt a fixed pattern of expression.
>
> 4. *The Presumption of Implied Exclusion.* That is, to express one thing is to exclude another, and a failure to mention something indicates an intent to exclude it. This presumption is rebutable [sic] by alternative explanations, competing considerations and drafting errors.
>
> 5. *The Presumption of Coherence.* That is, internal conflict is to be avoided by presuming that the parts of a statute fit together to form a rational and internally consistent framework which accomplishes the intended goal."
>
> [emphasis added]

31. I do not think any of these cases necessarily conflict with the other and I have been guided in my interpretation of the *SBCBA* by all of them.

VII. The Interpretation of the *SBCBA* in this Case

(a) Generally

32. Both the Crown and the applicant School Boards argue that to allow a local strike to, at a minimum, "bleed into" a central strike, so

that it may actually be a strike "in respect of central bargaining" is not consistent with the scheme of the *SBCBA.* The *SBCBA* is designed (and it is essential to its integrity) that the two bargaining tiers, central and local bargaining, be separate and maintained independent of one another. As the School Boards frequently characterized it, it would be fatal to any effective implementation of the *SBCBA* if strikes could "cross borders" or "jump fences". It is impossible for the same items to be bargained at two different tables – not only are the parties not the same (the Crown is at the central table and the applicant School Boards are not whereas the applicant School Boards are at the local table and the Crown is not), but the results would be impossible to mesh and it is fundamentally contrary to any rational system of labour relations.

33. They take me to the *SBCBA* to show me how carefully the Act keeps the two bargaining tiers separate. Other than providing that when notice to bargain is given at the central table it is deemed to also be notice to each of the parties at their local tables by section 31(3), the bargaining tiers then completely diverge. Bargaining cannot even commence until after central/local bargaining split has been determined (pursuant to section 32). The determination of the issues at the central table is left to the central parties (which does not include local school boards) and if they fail to agree, the matter is adjudicated by the OLRB. Only issues that are not agreed central issues can become local issues. The system depends on the separation of these issues into their local and separate tables. It is a dividing line that must be respected throughout the separate bargaining (subject to the provisions of section 28 of the *SBCBA* to return to the OLRB if disputes arise over the interpretation or application of an agreement or order determining the central/local split, or the provision in the MOS that allows the parties themselves to agree to that – neither of those possibilities, either under the MOS or section 28 of the *SBCBA*, has been invoked here by OSSTF).

34. Moreover, in section 15, the *SBCBA* lays out the exclusive bargaining agency of the EBA, here, OPSBA. For that exclusivity to be meaningful, issues which OPSBA is to bargain at the central table cannot be dealt with at the local level where OPSBA is not present.

35. Moreover, the unique role of the Crown (now for the first time formally and legally involved in bargaining) supports the complete separation of the two processes. The Crown is forbidden to participate in local bargaining but it is involved in central bargaining. Central

bargaining is confined only to issues the parties (including the Crown) agree on. If there is a dispute over that the OLRB must then determine under section 28(4). The factors that the OLRB shall consider under section 28(8) (*inter alia*, whether the matter could result in the significant impact on the implementation of Provincial education policy or could result in significant impact on expenditures for one or more school boards, or raises common issues between the parties to collective bargaining that can more appropriately be addressed in central bargaining than in local bargaining) all point to the fact that central bargaining is different and separate from local bargaining. In fact, they argue that the Crown is the better barometer than the OSSTF about how the two separate bargaining tiers should function – in the sense that although OSSTF may be a party to both local and central bargaining, here it is the only such party. In other words, the mere fact that the OSSTF is a party to both ought not to confuse the fact that the two tiers are intended and must be separate and distinct processes for the Act to operate in any comprehensible way. Put more starkly (as it was by counsel for the School Boards), if the situation was somehow reversed, there would be no doubt that the Crown could not refuse to enter into a central agreement unless OSSTF withdrew some proposal from some local tables.

36. The School Boards and the Crown note the scheme of the Act maintains the separation between the two tiers, not only in negotiations but even post-negotiations. Section 34 makes clear that the provisions of section 79 of the *LRA* dealing with strikes and lock-outs, their timing, mandatory strike votes or ratification and notes their timing and rules with respect to them) are all applied separately. The right to alter working conditions under section 86 of the *LRA* for each tier is dealt with separately under section 36. Additional requirements in order for the EBA, here OPSBA, to request a separate final offer vote under section 42 of the *LRA* are imposed by section 37. The ratification of both the central and local agreements is separate pursuant to section 39 of the *SBCBA* and in fact, specifically provides, in 39(2)(c):

> "39. (2) If both central and local bargaining occur, …
>
> (c) the parties at the central table and the Crown are not entitled to ratify local terms, and the parties to the local bargaining are not entitled to ratify the central terms."

37. In fact, it is necessary for section 39(3) of the *SBCBA* to explicitly make an exception to allow parties at both tables (like OSSTF or other teacher federations or employee bargaining agencies), to ratify both central and local terms. Section 38 of the *SBCBA* creates a special kind of interest arbitration for its central bargaining, different than the normal interest arbitration that would apply over and above those that apply to local bargaining under section 40 of the *LRA*. Moreover, section 42 of the *SBCBA* is necessary to make additional rules with respect to the modification to the central terms whereas similar modifications to the local terms need only comply with the *LRA*. Equally, section 43 makes additional rules with respect to grievances and arbitrations with respect to central terms, other than sections 48 and 49 of the *LRA* – which are all that is necessary for local grievances and arbitration.

38. In the midst of such a scheme, what sense would it make to allow local strikes to "bleed into" central strikes? The Crown and the applicant School Boards say none, and moreover, it would be destructive of the entire scheme that the *SBCBA* has established. I am persuaded they are correct.

39. Both the Crown and local School Boards point me to the clear opening words of section 34(3) of the Act:

> "34. (3) **No employee shall strike in respect of central bargaining** unless, at least five days before the strike begins, the employee bargaining agency for the employee gives written notice of the strike to the employer bargaining agency at the central table and to the Crown, indicating the date on which the strike will begin."
>
> [emphasis added]

40. Although they say it is unnecessary, given the overall pervasive scheme of the *SBCBA*, this section explicitly prohibits any employee from striking "in respect of central bargaining" until at least notice of the central strike has been given.

41. OSSTF says that section 34(3) is just a notice requirement which the *SBCBA* imposes (and the *LRA* does not) and not a prohibition in any way – that is how the heading describes the subsection and I am entitled to look at that heading for interpretive purposes. I am not sure how that argument in any way helps OSSTF

because, in any event, there is no dispute that notice required by section 34(3) has not yet been given by OSSTF.

42. The fundamental question remains whether "employees are striking in respect of central bargaining". I also note that there was some suggestion from OSSTF that whatever the prohibition might be in section 34(3), it related to "central bargaining" and that was different from "central issues". That distinction was, no doubt, urged upon me because much of the evidence related, *inter alia*, to local strike picketing and statements made by OSSTF or its leaders, concerning what were clearly central issues such as class size. I think that is a distinction without a difference. "Central bargaining" is defined in section 2(3) of the *SBCBA*:

> 2. (3) In this Act, central bargaining refers to collective bargaining between an employer bargaining agency and an employee bargaining agency for **central terms to be included in a collective agreement between a school board and a bargaining agent**.
>
> [emphasis added]

Moreover, the Act is replete with references to either central or local "matters" (sections 24, 28) and "central terms" (sections 2, 15, 17, 29, 32, 37, 38, 39, 40, 42, 43, 46). I do not understand what "central bargaining" could be other than with respect to "central terms" or "central matters".

43. OSSTF attempted to contrast section 34(3) of the *SBCBA* with the prohibition in section 28(2):

> "28. (2) No strike shall be called or lock-out authorized because there is a failure to agree upon whether a matter is within the scope of central or local bargaining."

44. OSSTF says that this is what an explicit prohibition looks like and section 34(3) is not one. Again, I cannot see this difference either. It is hard to conceive of any significant difference between section 28(2) and a provision providing that "no employee shall strike in respect of central bargaining" until certain conditions are met.

45. The thrust of the OSSTF submission was that it was the School Boards' and the Crown's interpretation (not theirs) that would make the *SBCBA* unworkable or, more specifically, make the right to local

strike meaningless. The OSSTF submitted that, since all the statutory preconditions of a local strike had indisputably been met, there was no clear language in the *SBCBA* that restricted or limited the purpose, objects or interests that could be pursued in a local strike. Once a strike starts, there could be picket signs and messages about many things – particularly in a system where two-tiered bargaining was going on and employees are necessarily impacted by the results of both tiers of bargaining. OSSTF says that not only would this essentially render local strikes nugatory, but it will demand an inquiry into the "hearts and minds" of the strikers which is inconsistent with the OLRB's jurisprudence about strikes. This "purity of motive" that the School Boards and the Crown were insisting on is something that the OLRB has never required with respect to a strike (even before the right to strike was found to be constitutionally protected). In accordance with the presumptions the statutory interpretations~~,~~ listed in *Ontario Hydro*, *supra*, at para. 19:

> "… the Legislature is presumed to know the existing statutory law and jurisprudence …"

this should be factored into any interpretation of the *SBCBA.*

46. OSSTF, in support of this proposition, points me to *Monarch Fine Foods Company Limited*, [1986] OLRB Rep. May 661, where, after referring to the definition of strike, the Board stated at para. 3:

> "It is not necessary to engage in any extensive review of the law. The section speaks for itself. It prohibits *any form of collective action* until the collective agreement is no longer in operation and the conciliation process has been concluded (see section 72). **The strike definition covers "ordinary strikes", boycotts, slowdowns, study sessions, calling-in sick, or any other type of concerted employee refusal - including a boycott of overtime. Employee motive is irrelevant as the Board held, and the Supreme Court of Ontario confirmed more than ten years ago, in *Doing/as Ltd.*, [1976] OLRB Rep. Oct. 569 upheld 78 CLLC ¶14,135. It does not matter whether the employees are seeking any benefit for themselves, are protesting some employer action, or are simply acting out of a sense of solidarity. In Ontario, such conduct is illegal.** Any concerns which employees may have, must be addressed at the bargaining table or through the grievance procedure."

[emphasis added]

47. The Board also referred to *Monarch Fine Foods* for this same proposition in *Ontario Hospital Assn.*, [2003] OLRB Rep. July/August 622 at paras. 44-45, explicitly stating:

> "As the excerpt from *Monarch Foods* makes clear, a strike includes any form of collective action designed to limit "output". **Further, the motivation for the conduct or the "reasons" behind the collective action are irrelevant to the question of whether or not a strike is called or has occurred.**"

[emphasis added]

48. Although not cited by OSSTF, all of the political action or day of protest cases are to the same effect. See most recently *Ontario v. ETFO*, 2013 CanLII 481 (ON LRB), [2013] 221 C.L.R.B.R. (2d) 1.

49. The difficulty with this analogy is it is not without exception. As reluctant as the OLRB is to inquire into motive with respect to a strike, it has on occasion been compelled to do so in the context of demands or proposals that are improper or illegal. Presumably the Legislature is as aware of this Board jurisprudence as OSSTF asserts it is of the jurisprudence they pointed me to. The School Boards pointed me to a number of examples of this.

50. In *Toronto Star Newspapers Limited*, [1979] OLRB Rep. August 811, 1979 CanLII 795 (ON LRB), in dealing with an unfair labour practice complaint, alleging that in bargaining between another union and the Toronto Star, those parties encroached upon the established bargaining rights of the complaining union. The Board stated, at paras. 22 and 23:

> "22. In view of the express provisions in section 81 [now 91], respecting the resolution of jurisdictional disputes, are the parties free to resort to economic conflict to settle these matters, and **can a party be bargaining in good faith if it presses the issue to an impasse and precipitates a strike? The answer must be no. It is inconceivable that the Act would contemplate resort to strike or lockout in support of a work assignment objective which could properly be made the subject matter of a section 81 complaint upon the actual**

assignment of the work. … In a general sense then it can be seen that bargaining issues relating to work jurisdiction which could be made the subject of a section 81 application do not easily fit within the process of free collective bargaining and enforceability as established under the Act. …

23. In *United Brotherhood of Carpenters and Joiners, supra,* the Board found that while the parties could discuss the issue of recognition at the bargaining table it could not become the subject matter of a strike. The Act provides a means for the acquisition of bargaining rights and **it is inconsistent with the scheme of the Act to take a demand for "voluntary" recognition to an impasse**. Accordingly, the party pressing the demand to an impasse was held to have breached the duty to bargain in good faith. Similarly, the Board is of the view, having regard to the scope of section 8 1(1) of the Act, that it would not be consistent **with the overall scheme of the Act** to take a demand for work assignments which could form the subject matter of a section 81 complaint (either at the time or upon the actual assignment of work) to a bargaining impasse. …”

[emphasis added]

51. Earlier, at para. 17, the Board also referred to the *Carpenters*’ case:

“… The Board held in *United Brotherhood of Carpenters and Joiners* [1978] OLRB Rep. Aug. 776 that a trade union could not seek to acquire a voluntary extension of its bargaining rights by threat of economic sanction. The Board found that while the parties may raise the matter in bargaining it is not an issue which could force bargaining to an impasse. **The Board reasoned that any attempt to make such a demand the subject matter of a strike was contrary to the scheme of the Act** and hence in violation of the duty to bargain in good faith imposed under section 14 of the Act. The Board concluded in that case that:

> "Just as an employer cannot use its economic leverage to bargain out of established bargaining rights a trade union cannot use its economic leverage to attempt to extend bargaining rights."… ”

[emphasis added]

52. Equally, the School Boards referred me to *Burns Meats Ltd.*, [1984] OLRB Rep. August 1049, where an employer complained about the union's refusal to bargain unless the employer agreed to continue to participate in national bargaining across Canada as it had done previously. There, the Board stated:

> "27. The scheme of the Act is that collective bargaining shall take place with respect to employees for whom a trade union has the exclusive representational rights in collective bargaining. In order to be in a position to bargain for employees, a trade union must hold bargaining rights under a collective agreement within the meaning of section 1(1)(c) of the Act, a certificate issued to it under the Act or voluntary recognition as contemplated by the Act. It is possible that the International, by one or more of these means, holds bargaining rights for all six of the employer's plants covered by the Agreement. As noted above, it is unnecessary for the purpose of this complaint and the Board's jurisdiction for the Board to determine whether in fact that is the case. Even if the International has the exclusive rights to represent in collective bargaining all of the employer's employees in those plants, the legal limit of those rights with respect to this complaint and the Board's jurisdiction is the Province of Ontario, and hence in this fact situation, the employer's Kitchener plant. What the respondents are seeking to do with their demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which traditionally have been covered by the Agreement, **is bargain beyond the legal limits of the exclusive rights attaching to the Kitchener plant. For the respondents to pursue that objective to impasse is inconsistent with the scheme of the Act that bargaining shall be in respect of a bargaining unit of employees for which a trade union has exclusive bargaining rights**. In the Board's decision in *United Brotherhood of Carpenters and Joiners of America,* [1978] OLRB Rep. 776, particularly paragraph 18 on page 784, it was because the Board found it inconsistent with the scheme of the Act for the United Brotherhood to pursue to impasse the objective of expanding its exclusive bargaining rights by voluntary recognition on a province-wide basis that the Board found the United Brotherhood in breach of section 15 of the Act. **While the specific objectives of the respondents and the United Brotherhood differ,**

the result is the same; an attempt to bargain beyond the legal scope of their exclusive bargaining rights contrary to the scheme of the Act. In this respect, see also the Board's decision in *Northwest Merchants Ltd. Canada,* [1983] OLRB Rep. July 1138 at paragraph 29. For these reasons, it is inconsistent with the scheme of the Act and unlawful for the respondents to take to impasse their bargaining objective of a single nation-wide set of negotiations and a single national collective agreement."

"28. It may well be that the respondents have pursued their impugned course of conduct for the objective of preserving for the Kitchener Plant employees the uniform wages and working conditions which they have in common with employees in the other plants covered by the Agreement. While that objective is not itself illegal, for the reasons set forth above, the means by which the respondents are attempting to achieve it are contrary to the Act. It is not unlawful for a union to bargain for wages and working conditions paralleling those at other plants operated by the employer. The Board's approach to enforcing the section 15 duty has allowed parties to collective bargaining broad freedom to determine the subjects about which they will bargain and the contents of their collective agreements. See *United Brotherhood of Carpenters, supra,* paragraph 9, and the authorities referred to therein. That freedom flows from the premise that "... the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment.". *De Vilbiss (Canada) Ltd.,* [1976] OLRB Rep. Mar. 49. **The freedom of parties to fashion the terms of agreements is not without limits, however. For example, it does not extend to being able with impugnity to insist upon a demand which would give rise to an illegality *(T. Barlisen & Sons,* [1960] OLRB Rep. May 80); to resort to economic sanctions in pursuit of unlawful or illegal demands** *(Croven Limited,* [1977] OLRB Rep. Mar. 162); or to **press to impasse a demand inconsistent with the scheme of the Act (*United Brotherhood of Carpenters, supra).* It is not possible to delineate in the abstract the totality of the limits on that freedom. Any further delineation of the limits must be on a case by case basis in the context of an actual fact situation**."

> "29. It is clear from the facts respecting the meetings between the employer and the respondents on April 18th, May 24th and July 3rd, 1984, the rejection of the employer's last offer and the circumstances surrounding the strike which commenced on June 17th, **that a major factor in the strike is the respondents' demand that there be a single set of nation-wide negotiations and a single national collective agreement executed respecting all plants which had been traditionally covered by the Agreement**. Thus the respondents have already pursued to impasse a bargaining objective which can be raised and discussed but, for the reasons set forth above, cannot legally be pressed to impasse in the exercise of the exclusive bargaining rights with respect to the Kitchener Plant."
>
> [emphasis added]

See also *Abitibi Consolidated Inc.*, [1998] OLRB Rep. July/August 525 at paras. 25-29.

53. Similarly, the applicant School Boards and the Crown say that to allow local strikes to be "in respect of central bargaining" or central bargaining issues would also undermine the effectiveness of the *SBCBA*, which goes to great and explicit length to separate the two tiers of bargaining. In their submission, it undermines the exclusive bargaining agency status of OPSBA and the limited and unique role of the Crown by allowing central issues to be addressed, if only in strikes, over which neither has any control. I find these arguments persuasive and compelling and accept them.

54. OSSTF sought to distinguish these cases relied upon by the School Boards. OSSTF pointed out that none of them were unlawful strike cases but rather bargaining in bad faith cases. That is true, but I do not see what difference that makes in these circumstances. It may be simply as a matter of propitious timing – the complaints in those cases may have been made and decided before actual strikes were underway. However, in light of the OLRB's remarks in all of these cases, it is hard to believe that if a strike had actually commenced on the basis of the demands that were found to be illegal or improper, the Board would have somehow declined to declare such strikes unlawful because at that point, the Board was somehow precluded from looking at the motive for that strike. Let me be clear – I am not saying that any bargaining in bad faith always or necessarily makes a resultant strike unlawful – but if the demands that continue to

be the subject of the strike are improper (because, for example, they are inconsistent with the scheme of the Act), then that strike may be unlawful.

55. OSSTF says that the applicant School Boards' cases involve parties putting forward improper or unlawful demands and that is not what is happening here. With all due respect, that is a chicken and egg argument. In those cases, those demands were not necessarily determined to be unlawful until the OLRB actually decided them to be so. More significantly, the argument implicitly recognizes (and OSSTF seems to concede) that unlawful demands cannot properly or lawfully be made the subject of a strike. Can anyone doubt that today, were a strike to occur "in respect of" a demand that any class of employees protected by the *Ontario Human Rights Code* not be hired or continued in employment, such a strike would be declared unlawful by the OLRB – that the Board would have no difficulty in dealing with the "motives" of such a strike?

56. What we have here is a brand new statute that creates, for the first time, two-tiered bargaining in the educational sector in school boards collective bargaining in Ontario. It is this new Act – *SBCBA* – that creates clearly separate and distinct tiers of bargaining and processes for each of them. It is this scheme of the *SBCBA* that dictates that strikes on one of the paths are unlawful "in respect of" bargaining on the other. No one could doubt that a demand for increased wages is, *per se*, not unlawful. However, wages have been clearly defined in the MOS to be a central matter. Were there to be local strikes in respect of wages, they would be unlawful, not because a demand for increased wages is unlawful, but because it is improperly taking place in the wrong tier as dictated by the *SBCBA* and the agreement of the parties in their central and local issues split. Were it otherwise, the scheme of the Act – central bargaining (and if necessary, strikes) over central issues and local bargaining (and if necessary, local strikes) over local issues would make no sense. Again, I want to be clear – this is written in the specific context of the *SBCBA* and strikes under that statute. How it could apply to the *LRA* (if at all) is best left to an actual case under the *LRA*. The question of the meaning of "in respect of central bargaining" may have no obviously apparent or direct applicability in an *LRA* context.

57. The OSSTF advanced five arguments why the interpretation of the *SBCBA* urged by the Crown and the School Boards should not be accepted:

(a) It would encourage litigation. According to the OSSTF, to allow local strikes that have otherwise met the statutory pre-conditions to be subjected to attack as being "in respect of central bargaining" would encourage employers to challenge otherwise lawful local strikes by scrutinizing picket signs or statements made by strike leaders. The potential "payoff" for such employers would be huge – not only potentially ending otherwise lawful strikes, but also in the course of litigating, having access to otherwise confidential union documents. The obvious difficulty with this argument is to ignore local strikes that are really "in respect of central bargaining" is to condone a violation of the *SBCBA*. The Legislature has spoken and made a choice about the separate two-tier bargaining in *SBCBA*. If enforcement of that legislative choice brings about litigation (particularly in the first years of *SBCBA*), then it is the inevitable consequence of that legislative choice. Certainly the answer cannot be to ignore the legislative choice for fear of litigation. Even if there were a number of early cases, one would hope (if not expect) that as cases were decided, the law would be elaborated and parties would understand and comply with the limits of (as elaborated) lawful conduct under *SBCBA*.

(b) It would lengthen litigation thereby increasing the cost to parties and the public. Unlike a typical unlawful strike application that might be completed in a day or less, examinations of the "hearts and minds" of local strikers could take days of evidence, as this application has. It would be simpler just to avoid the "messy" matter of intention. Again, this is not persuasive. Again, this case is the first case under the *SBCBA* dealing with two-tiered bargaining it creates in Ontario. That it has been fiercely contested and taken a number of days is perhaps not surprising. Again, however, as the law evolves and becomes

more settled, it will be easier for the OLRB to deal with such cases. In this regard, in my view, it is not much different than the now seldom-raised defense frequently raised in earlier unlawful strike applications that individuals who did not cross a picket line were not acting in concert, but making individual choices.

(c) It would encourage adversarial behaviour, poison labour relations and harm a collective bargaining environment. Quite frankly, that is an argument that is difficult to find persuasive in the middle of local strikes (if not central bargaining) where all of those attributes already exist. Concerns that it will "move the action from the bargaining table to the Labour Board" are not compelling. Without trying to be glib, that will not occur unless illegal or improper conduct occurs. It certainly has not been the experience of the OLRB in dealing with other unlawful strike applications and bargaining in other sectors.

(d) It will increase the potential for improper employer interference. The OSSTF argues that school boards will obtain evidence for such applications by cross-examination of local Presidents, requests for production, taking pictures on picket lines and cross-examining picketers. In the OSSTF's submission, this approach would encourage employers to get involved in activities they ought not be involved in.

To some extent, this is an argument that has arisen after a production order made in this application at the request of the School Boards for the OSSTF to produce documents that may have been harmful to any initial suggestion OSSTF made of little involvement in the local picketing or the local strike activity. I would simply say, as noted by counsel for the School Boards, that OSSTF did not object to that production order then and did produce the documents (and in trying circumstances for which

it should be complimented). Were OSSTF of the view that production order was improper, it could have made those objections at that point in time. The Board, as it does in all cases, deals with and polices production order requests so that they may not be used as a “fishing expedition”.

Secondly, the OSSTF argument assumes that the gathering of evidence by school boards will be unlawful. The Board cannot make such an assumption. Although the Board is not so naive not to realize there are differences, just as unions are entitled to gather evidence of employer unlawful conduct, so are employers entitled to gather evidence of union improper conduct. If the school boards themselves engage in conduct that is unlawful, in pursuit of an unlawful strike application, the OSSTF has remedies including the filing of various complaints and applications of its own. None were filed here.

(e) The OSSTF argues that the interpretation reached by the School Boards and the Crown will increase and encourage interference and violations of section 70 of the LRA. It points me to the Board decision in *Hamilton-Wentworth District School Board*, [2002] OLRB Rep. July/August 652, 2002 CanLII 26879 (ON LRB), where the Board struck down an employer ban of teachers wearing a button (“Fair deal or No deal”) during school hours, shortly before a strike vote, as a violation of section 70:

> 9. Subject to the other terms of s. 70, an employer may not interfere with the administration of a trade union or with a trade union’s representation of employees. Wearing a button critical of an employer’s stance in bargaining does not, I think, fall within the administration of a trade union. But it does, arguably, fall within the union’s representation of the employees. Unions need to communicate with their members, and the members need to communicate

> with each other, in order to carry out collective bargaining, and to organize collective action. Communication is an integral part of what the union does, and what employees do with each other when they must make decisions affecting the collective bargaining undertaken on their behalf. The communication between teachers, at the instance of the union, of a message issued by the union in the context of bargaining is part of the union's representation of the employees. Hence the wearing of a union button at impasse in collective bargaining, at the instance of a union, falls within the protected union activity of representing employees described in s. 70 of the Act.
>
> 10. The implication of a right to communicate in s. 70—union to members, and members among themselves—is borne out by the proviso which appears at the end of the section: the employer is itself not precluded from communicating its own message. The union's and the employees' rights to communicate under s. 70 are counterbalanced by the employer's right of expression. Hence, a right to communicate—which includes wearing a button to convey a message—is clearly envisaged by s. 70. The ability of employees to freely communicate with each other about their lawful objectives is implicit in the right to self organization and collective action.

I have no difficulty with either the result or what was said by the Board in *Hamilton-Wentworth*. However, section 70 presumes lawful communication. It certainly would not protect communication encouraging a clearly unlawful strike (e.g., pleas for a mass refusal to work overtime in the midst of a collective agreement). That is the question before the OLRB here – whether the employees engaged in local strikes sanctioned and authorized by the OSSTF are

> striking "in respect of central bargaining" contrary to the *SBCBA.*

58. In the end, I am left with a choice between the view of OSSTF to interpret *SBCBA* to not inquire into anything further with a local strike once the statutory pre-requisites have been met because it would be too difficult and encumber the OLRB in potentially difficult litigation, or the view advanced by the School Boards and the Crown that not to inquire (and in effect permit a local strike that might be "in respect of central bargaining") would be an interpretation that would undermine and destroy the scheme of *SBCBA*. Consistent with what has been referred to as the "modern theory" of statutory interpretation, I think the latter interpretation (that of the School Boards and the Crown) is far clearer and to be preferred. I do not think this much different than what the Supreme Court concluded in *Rizzo*, *supra*, at para. 23:

> 23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. …

59. Accordingly, I am of the view that the scheme of the *SBCBA* and the specific wording of section 34(3) of the *SBCBA* prohibits employees striking "in respect of central bargaining", even if all the statutory prerequisites for strike with respect to local bargaining have been met. If the evidence supports that is what is really occurring, then that constitutes a violation of the *SBCBA*.

(b) How Far Does the Evidence Need to Go – is it enough if the strike is, in part, "in respect of central bargaining"?

60. The School Boards argued that they do not need to show that the local strike was solely "in respect of central bargaining" to make it unlawful – it was enough if it was so in part.

61. The School Boards point me to what, in Board jurisprudence, is often referred to as "the taint theory". Put another way, it is simply the proposition that even where a party may have *bona fide* purposes for its conduct, if there are other purposes which contravene the Act, there will still be a contravention of the Act. This is not necessarily a

notion that is unique to the *LRA*. The *Ontario Human Rights Code* uses a form of it in determining whether discrimination has occurred even where legitimate reasons for the impugned conduct are asserted.

62. The taint theory has been applied both to employers and to unions. The taint theory is not in any way dependent upon the reverse onus provisions found in the *LRA* (e.g., 96(5)) which of course have no applicability here. This was explained at some length in *The International Association of Bridge, Structural and Ornamental Ironworkers*, *Structural Iron Workers, L721*,[1982] OLRB Rep. October 1487, 1982 CanLII 1026 (ON LRB):

> "67. Counsel for the complainants readily conceded that the "reverse onus" imposed by section 89(5) of the Act has no application in the circumstances of this case. Thus, the complainants have the burden of proving their case on the balance of probabilities. However, counsel submitted that in determining what the complainants must prove concerning the respondents' motivation for imposing the "penalty" of trusteeship, the Board should apply the "taint" theory which it has traditionally applied in the context of employer unfair labour practices, including section 89 complaints in which it is alleged that an employer or person acting on behalf of an employer has contravened section 80 of the Act. (See *Westinghouse Canada Limited,* [1980] OLRB Rep. April 577, at paragraphs 44 to 57, for a thorough discussion of the legal and policy considerations which underlie that approach.) Counsel for the respondents, on the other hand, argued that the taint theory should not be applied in a case alleging a breach of section 80 by a union or person acting on behalf of a union. In support of that position, he submitted that the taint theory finds its justification in the "reverse onus" provisions of section 89(5**). However, we agree with counsel for the complainants that the taint theory is conceptually quite distinct from the matter of burden of proof (or "onus" as it is sometimes rather loosely described)**. The legal burden of proof is "the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved [or disproved] either by a preponderance of evidence or beyond reasonable doubt as the case may be" (see *I. C.B. Warehousing Division of Alar-Anson,*[1976] OLRB Rep. Oct. 621, at paragraph 8). Thus, it determines which party has the burden of establishing the essential elements of the case. **The taint theory, on the other hand, defines**

one of those elements, namely, what the party who bears the legal burden must prove in order to establish the requisite motivation. The distinctness of these concepts is confirmed by the fact that the Board applied the taint theory long before the enactment in 1975 of what is now section 89(5). (For a review of the Board's jurisprudence, see *Delhi Metal Products Ltd.,* [1974] OLRB Rep. July 450, at paragraphs 14 and 15.)

68. Under the "taint" theory, if any of the reasons for the discharge, lay-off, or other penalization of an employee by an employer was the fact that he was a member of a union or was exercising any other rights under the Act, the employer's action will be found to be a contravention of the Act. Similarly, in the context of section 80(1), if any of the reasons for an employer's imposition of a pecuniary or other penalty on a person is the fact that the person has made an application or filed a complaint under the Act, or has participated in or is about to participate in a proceeding under the Act, the employer will be found to have contravened the Act, notwithstanding the co-existence of a "bona fide" reason (or reasons) for the imposition of that penalty.

...

70. The statutory language contained in the *Labour Relations Act* supports the application of the taint theory not only in relation to alleged employer unfair labour practices under provisions such as sections 66 and 80(1), but also in the context of alleged union unfair labour practices under the provisions such as section 80(2).

> "No employer, employers' organization or person acting on behalf or an employer or an employers' organization,
>
> > (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act"."

(emphasis added)

"The use of the word "because" in this context is quite significant. To paraphrase the judgment of Hughes J. in *R. v. Bushnell Communications et al.* (1973), 1973 CanLII 475 (ON SC), 45 D.L.R. (3d) 218 (in which the Ontario High Court was dealing with the provision of the *Canada Labour Code* substantially similar to section 66 of the *Labour Relations Act,* in considering an enactment such as section 80(2) **which is devoid of the words "sole reason" or "for the reason only" and resting only on the word "because", the Board may legitimately take an expanded view of its application. If the evidence satisfies it that the fact that the penalized person (or persons) filed a complaint under the Act, or participated in or was about to participate in a proceeding under the Act, was present in the mind of the union, or person(s) acting on behalf of the union, as a motivating factor in reaching the decision to impose a pecuniary or other penalty on that person, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, section 80(2) of the Act has been transgressed**. The decision of the High Court was upheld "in substance" on appeal by the Ontario Court of Appeal (1974 CanLII 559 (ON CA), 47 D.L.R. (3d) 668). In delivering the judgment of the Court, Evans J.A. indicated that if the proscribed motivation was a "proximate cause" of the impugned action, there would be a contravention of the provision in question even though other proximate causes were also present."

"71. **There are sound labour relations policy reasons for applying the taint theory** in determining whether section 80(2) has been breached. **As in the case of dismissals from employment or imposition of pecuniary or other penalties by an employer, the reasons for the imposition of a "pecuniary or other penalty" by a union, or persons acting on behalf of a union, are generally known only by the union officials who decide to impose it. Furthermore, as in the case of employer actions, there exists the distinct possibility that "legitimate" reasons for imposing a "pecuniary or other penalty" such as a trusteeship will co-exist with "illegitimate reasons" and will present the Board with the perplexing and rather artificial task of attempting to determine which of those constituted the "true" or "predominant" motivation for the impugned action,**

> **unless the taint theory is applied.** Moreover, unimpeded access to the Board's processes through freedom to file and pursue complaints without fear of recrimination by an employer, union, or person acting on behalf of an employer or union, is essential to the preservation of the rights and freedoms enshrined in the Act, and is also essential to the effective administration of the Act by this Board. …"
>
> [emphasis added]

The School Boards say that this ought to apply equally in determining whether the strike is "in respect of central bargaining". They say that the words "in respect of" are not in any way significantly different than the words "because of" referred to in the *Iron Workers* case and *Bushnell* cited in it. They are just as unrestricted.

63. I think this is correct. If the reason for the local strike is "in respect of central bargaining", then the prohibition against striking in respect of central bargaining until all the necessary legal prerequisites have been established is engaged. I wish to be careful here. I am not saying a scintilla or a whiff of evidence will necessarily be a sufficient basis for the strike to be "in respect of central bargaining". I am not suggesting that a single picket sign addressing central bargaining issues would necessarily fatally contaminate an otherwise proper lawful local strike. The required quantum and significance of the evidence will have to be left to assess on a case-by-case basis. What I am saying is that if the OLRB is satisfied that some part of what employees are striking about is "in respect of central bargaining", the prohibition will be engaged.

64. This is not so startling or innovative and need not be as "messy" or as difficult as OSSTF asserts. As long ago as *Pop Shoppe (Toronto) Ltd.*, [1976] OLRB Rep. June 299, the Board said, at para. 5:

> 5. In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical

> conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities". (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). ...

65. In fact, one of the leading texts, *Canadian Labour Law* (2nd Edition), G.W. Adams, in Volume 2, puts it this way at para. 10.130:

> **10.130** Canadian statutory provisions, barring discharge or other discriminatory treatment "because" or "for the reason that" employees are engaged in legitimate union activities, have been interpreted by courts as requiring scrutiny to see if "membership in a trade union was present to the mind of the employer in his decision to dismiss, **either as a main reason or one incidental to it, or as one of many reasons regardless of priority" for the dismissal. Improper motive does not have to be the dominant motive. Since employers are not likely to confess to an anti-union animus, tribunals have to rely on circumstantial evidence to draw inferences about employer motivation**. These considerations may include evidence of the manner of the discharge and the credibility of witnesses, as well as "the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti-union conduct and any other 'peculiarities'", such as discipline disproportionate to the offence alleged.
>
> [emphasis added]

Accordingly, even if there are local strikes with local issues and the statutory prerequisite for local strikes have been met, if I am convinced that the evidence discloses in some significant way that the employees are striking “in respect of central bargaining”, then I believe the *SBCBA* will have been violated.

VIII. The Evidence

66. Again, I heard several days of evidence. I do not intend to repeat the minutiae of all of it, both because of the need to release this Decision and because not all of it is relevant for purposes of this Decision.

67. Notices to bargain that applied to all three School Boards were given by OSSTF early in 2014. All of the School Boards had conducted strike votes in the Fall of 2014, well before the central/local bargaining split had been determined. That date is important because bargaining (both central and local) cannot commence until 15 days after the split has been determined. OSSTF says that there is nothing improper about an early strike vote well before negotiations commence. Many unions do it to display a strong mandate before commencing negotiations. That may be true. However, as with much of the other evidence, the question is not whether the acts, *per se*, are unlawful acts on their own (they frequently are not), but what is the cumulative effect of all of those acts as evidence in determining what is really happening – the inferential process the OLRB must conduct in many circumstances and must necessarily be applied in answering whether the employees are striking "in respect of central bargaining".

68. In the manner in which the OSSTF organizes itself and operates, in order to even commence local bargaining, control of the bargaining process must be ceded from the local districts to the OSSTF. The OSSTF must assume what is referred to as Provincial Responsibility for Negotiation "(PRN)". The OSSTF did that for all three of the School Board negotiations at a provincial council meeting on February 17, 2015. The only evidence before me is that this was at the initiation of the local leadership at each of the three School Boards. However, once PRN has been granted, it is clear that final control lies with the OSSTF. It is the OSSTF that applies for conciliation for each of the three School Boards. All of the local proposals must be approved by the OSSTF before they can be tabled. It is the OSSTF that gives the notice of strike required under section 34 of the *SBCBA*. Although some of the local Presidents who testified tried to characterize that as OSSTF lending its support and resources to the assistance of the districts, one candidly conceded in cross-examination, if there was a dispute about anything, then the final decision would be made by OSSTF, not the district.

69. I heard much testimony and saw many photographs of the picket signs involved in all three of the strikes. By far, to the extent that the picket signs related to any substantive issue, most related to "class size"(e.g., "Class Size Matters", "40 is a speed limit, not a class size" "Increasing Class Sizes Decreases Student Learning", "one teacher divided by more students equals less learning"). There is no dispute that class size is an agreed-upon central issue to be bargained at the central table.

70. I would note that, in the midst of argument of this proceeding, it arose that the President of OSSTF had publicly indicated that he wished class size to be moved from central bargaining to local bargaining. OSSTF commendably stipulated that, in fact, was true, and further stipulated that moving class size from the central table to the local tables had been discussed a number of times throughout central bargaining. However, that had neither been agreed to under the provisions of the MOS that would allow it, nor has it been the subject of any subsequent application to the OLRB under section 28 of the *SBCBA*. What I take from this, at a minimum, is uncertainty, particularly with respect to class size, at least in the view of OSSTF, whether it can be more appropriately dealt with at the central or the local tables. The difficulty obviously is, that this is while at least three local strikes are already ongoing and where class size is certainly an issue on the picket line.

71. To a lesser extent, there were many picket signs that said "professional status equals respect for professional judgment". Again, there is no dispute that professional practice/responsibility and professional judgment is an issue for central bargaining. What is somewhat startling is that, among all the photographs of picketing presented to me, there were no picket signs that identified any substantive local issues.

72. Notwithstanding suggestions in its response that "individual OSSTF members may have expressed an opinion on, or expressed general frustration about central issues or central bargaining" with respect to the picket signs used, during the evidence it became clear that all placards and pickets were pre-approved by OSSTF. In fact, at Peel (if not also at the other School Boards), the strike coordinator requested "… a list of the pre-approved sign slogans that we could pass along to the membership if they want to make their own signs …". That request was met with a response from OSSTF referring to "… signs that Durham and Sudbury are using that are effective …" including "Increasing class sizes decreases student learning" and "Increase class size. Decrease student learning" (see Exhibit 21).

73. Although it might be argued that perhaps the Board is paying disproportionate attention to the content of picket signs, the OSSTF evidence was that the picket lines were supervised and that any offensive picket signs (or signs "contrary" to the strike) would be removed.

74. The School Boards called witnesses from each School Board who testified that when they engaged picketers about what the local issues that were causing the strike, they were either met by answers that listed provincial issues (e.g., class size), or could obtain no specific answers. In fact, in response to specific questions from members asking how to respond to questions about bargaining, OSSTF Communications and Political Action Department created a fact sheet for members, to be used when speaking to the public. It was posted to the members-only section of the OSSTF and various district websites including those striking districts (or the members were advised of it). It is worth reproducing:

NOT for distribution to the public—for OSSTF/FEESO member use only.

TALKING TO FRIENDS AND FAMILY ABOUT BARGAINING
Teachers and Occasional Teachers

A FACT SHEET

This is a general summary of some of the key issues for OSSTF/FEESO Teacher/Occasional Teacher members during this round of bargaining **both at the local and provincial levels**. If you find yourself in a conversation with friends, family, or neighbours, these are some key points that you may want to talk to them about to explain the reasons for the actions that we have taken.

Issue 1—The Bargaining Process

- We have been without a contract since August 2014.
- Our last "contract" was imposed by legislation in the fall of 2012 (Bill 115); collective bargaining did not take place during that time.
- There has not been a secondary school strike in over 16 years in Ontario.

Issue 2—Local-specific Issues

- Bargaining with school boards has been slow or non-existent. School boards continue to put forward strips that undermine the teachers' ability to teach.

Issue 3—Class Size

- Boards want to remove class size caps for all secondary courses.
- More students in a classroom would mean less time for individual attention for each student.
- Larger class sizes have been shown to have a direct negative impact on student achievement.

Issue 4—Let Teachers Teach

- Teachers use their time flexibly before school, at lunch and after school to help students. Boards want to take that flexibility away.
- Boards want more control over how teachers use their preparation time and this would give principals total freedom to assign teachers to duties that are unrelated to their classroom work; this would further take time away from teachers to support students and to volunteer for extra-curricular activities.

Issue 5—Ministry and Board Initiatives

- Teachers already spend too much time on multiple Ministry of Education and Board initiatives. This takes valuable time away from working with students.

(see Exhibit 18)

There can be no dispute that pursuant to the MOS, Issues 3, 4 and 5 are central bargaining issues.

75. To the same effect would be Exhibit #29 which was “speaking notes” forwarded by OSSTF to Rainbow that had been adapted from Durham and included as the second speaking point:

> “We know that larger class sizes and fewer teachers working in schools is destructive for teachers and the students with whom we work who will receive less individual attention.”

76. Certainly, the public statements from OSSTF leaders about the purposes of the local strikes have been, to put it kindly, either ambiguous or in the grey area. I was pointed to several by counsel for the School Boards. For example, an OSSTF press release of April 17,

2015, just days before the first local strike commenced at Durham quoted OSSTF President Paul Elliott as saying:

> "The last thing our teachers want is to be outside of their classrooms. But we've been left no choice. **An impasse at the central table pushes us closer to additional strike action at boards across the province."**
>
> [emphasis added]

Equally, in a Global interview on April 28, 2015 (just after the Rainbow local strike commenced, Durham had been arguing for over a week) when asked,

> "… why you guys are on strike in the first place. Is the cap [on class sizes] in that the main reason?",

President Elliott replied:

> "I think it's one of the main reasons"

I don't wish to appear to be taking quotes out of context, yet these are another of the pieces of evidence that I must cumulatively assess.

77. The evidence disclosed little or no communication between the districts on strike and their members about the actual local issues in dispute in bargaining. No set of local proposals was disseminated to the members in any striking district. OSSTF said that it did not wish to breach any bargaining protocols or "ground rules" about bargaining in the media or releasing to members incomplete views of what was happening at the bargaining table. If this is correct, it is to be starkly contrasted to the bargaining bulletins issued by OSSTF (and available to or distributed to the members on the local strikes) about the central table. In painstaking detail, OSSTF reviewed all of the issues at the central table and the positions of the Crown, OPSBA and OSSTF in response (see Exhibit 3). Not surprisingly (and not improperly), it was highly partisan – however, what is significant is that it related to the issues that surfaced on very many of the local picket signs or in many of the OSSTF's public comments about the local strikes. In fact, one of the few negotiation updates (Exhibit 12) to the Peel bargaining unit described the central issues as "far-reaching and leave little of importance to be discussed at the local level". One of the few bulletins to striking local members at Rainbow had drawings of picket signs on it only about class size.

78. What is clear is that in the local bargaining at the three School Boards, the OSSTF rushed to be in a lawful strike position. OSSTF said this was not surprising since each of these districts had no opportunity to bargain their local agreements for several years – their agreements had expired on August 31, 2014 and the predecessor agreements had been imposed by the *PSFA* without any ability to bargain them. I do not doubt the sincerity of those statements, however they are difficult to reconcile with conduct that rushed not to extensive bargaining, but rather to local strikes. OSSTF asserted that the School Boards were not responsive to the request for timely bargaining dates. It certainly is true that the local School Boards did not immediately agree to dates for negotiating in the quantity and with the alacrity that the OSSTF, at the three striking School Boards, wished. However, at none of the School Boards did the OSSTF appear to be willing to recognize (or perhaps care) that the local School Board bargaining teams, generally, consisted of a number of people, making mutually convenient dates difficult to secure (some of whom were away on planned absences – not surprisingly since the disputed central/local split and the section 28 application was scheduled to be litigated well into April of 2015, before the surprise resolution of the MOS on December 9, 2014), the local School Boards had other negotiations with other bargaining units covered by the *SBCBA* and some of the same School Board leaders were also involved in central bargaining. In fact, in at least one School Board (Rainbow), conciliation was applied for even before the first local bargaining meeting had taken place.

79. Again, I wish to be clear. I am not saying that there is anything unlawful or improper about trade unions rushing to be in a lawful strike position. In fact, all of the District Presidents indicated they wanted to be in a lawful strike position as soon as possible to increase the pressure on the local School Boards (some expressing the view that their relationships were so poor that without such pressure nothing would be achieved). Equally, an employer that is unwilling to meet the timetable that a trade union insists upon for bargaining runs the risk that the trade union will accelerate and expedite bargaining (and conciliation) to quickly reach a lawful strike position. There is nothing, *per se*, unlawful about that. However, all of this conduct, whether individually lawful or not, is evidence that I can and must take into account in assessing what is happening with the local strikes and whether they are actually “in respect of central bargaining”.

80. Each of the set of local proposals made by OSSTF at the School Boards was, to put it mildly, extensive (warranting what one might assume, in normal circumstances, extensive discussions). In fact, in contrast, central bargaining (where certainly class size, professional responsibility, etc., are central issues), by the date of these hearings, had taken place on March 30, 31, April 1, 13, 14, 15, 16, 17, 19, 22, 23, May 1, 2, 3, 7 and 8 (approximately 16 dates) and a central conciliation officer had not yet even been applied for. None of the local proposals appear to have been ever extensively discussed other than being reviewed/presented before the strikes began.

81. In fact, some of them appear to be very close to bordering on or overlapping central issues. For example, at Rainbow, the District President characterized many of the issues in terms of teachers' "professional judgment", something that is specifically listed in Item 14 of the MOS. In any event, the District Presidents testified that if any of the School Boards objected to issues being central as opposed to local, they would have simply put them aside and moved on to what were indisputably local issues. They observe that no such objections were made by any of the School Boards. However, no School Board negotiations progressed long enough before strike action commenced to actually, or seriously, test that assertion. At some of the other School Boards (e.g., Peel), while the "big" issues (as described by Mr. Bettiol, one of the OSSTF Peel leaders) certainly seem more local (e.g., specific marking days in the spring similar to the winter, a "sunset clause" for letters of discipline), they seem (without denigrating from the importance of these items to local members) disproportionate to the haste and urgency that the OSSTF rushed to be in a lawful strike position, particularly compared to the major issues being so lengthily (if without progress) being discussed at the central table.

82. OSSTF argued that it was the School Boards that were really delaying local negotiations. They did not want to bargain until the central table had concluded or did not believe that local agreements could be achieved until a central agreement had been reached. OSSTF pointed me to many public statements and newspaper articles and interviews from the School Boards' representatives or leaders to that effect. Again, I do not doubt that that was probably a widely-held view in the School Boards. However, I am not sure that that is particularly relevant to me. Certainly, the OSSTF never filed any bargaining in bad faith complaint about any of that – asserting that by not meeting or refusing to provide dates, the School Boards were

bargaining in bad faith – for that matter, neither did any of the School Boards with respect to the OSSTF's conduct. Rather, at these three School Boards, the OSSTF chose to strike locally, and the question before me at this point is whether those strikes are "in respect of central bargaining".

83. OSSTF also questions the legitimacy of these applications in the sense that the School Boards waited for some period of time before even filing them. In the case of Durham, the application was not filed until four weeks after the strike commenced. If the School Boards legitimately believe that these were strikes "in respect of central bargaining", OSSTF argues that would have been apparent from the outset. I do not know why the School Boards (and in particular Durham) waited this long to file their application. Nor was I offered any particularly compelling explanation. Perhaps Durham was unduly optimistic that some progress could be made at local bargaining and either resolve or temporarily halt the strike? Perhaps, more cynically, it took Durham some time to formulate its legal strategy to bring this application? But in the end, OSSTF did not argue that the application should be dismissed because of the delay and referred me to no authority to do so. In the end, the strikes were ongoing and this application was made.

84. Why would OSSTF be doing this – having employees striking in respect of central bargaining in three local strikes, at least in part, due to clearly central issues, in particular, class size? Certainly, if central issues such as class size (or other central issues) were serious "hot flashpoints", and issues in dispute, as they no doubt seem to be, why would OSSTF not have put itself in a lawful position to engage in a central strike? Certainly, there would then be no uncertainty, when central issues seem to play so key an issue in the local strikes, about whether the strike was central or local. Judging by the haste with which OSSTF, under PRN, led (or allowed) the employees of these three district School Boards to engage in local strikes, it could have arguably done the same with respect to central bargaining (or at least not actually engage in the local strikes – after all, the local strikes were under PRN – until it was in a position to engage in the central strike also?). Certainly, this is the strategy that the Elementary Teachers' Federation of Ontario (ETFO) has adopted (even if its central strike at this point is limited only to administrative duties – a partial work-to-rule).

85. Counsel for the School Boards suggested alternative explanations. In 2014, OSSTF enhanced its "strike pay" and authorized a "supplemental fee" so that those not striking would be able to fund and support those striking. OSSTF pays not insignificant strike pay to all teachers provided they put in 20 hours per week picketing (10 hours for occasional teachers). Certainly, funding only three local strikes is significantly less a drain on finances than funding a central strike. Moreover, were OSSTF to put itself in a lawful strike position centrally, counsel argued, a consequence would be that without needing to lock out teachers, OPSBA, with the end of the separate statutory freeze period, could alter some central terms and working conditions, thereby leaving OSSTF with little choice but either to accept such changes, or engage in a full, very costly (considering the strike pay obligations) central strike? I cannot say that I have full or complete evidence to substantiate either of these strategies ("no smoking gun"). However, in the view of the expertise of the OLRB, they seem more plausible explanations than the explanations and evidence of OSSTF to justify or explain these local strikes. Again, the OLRB does not wish to involve itself too much in the strategy of unions in conducting their own strikes – but in a new statutory framework of separate tiers of bargaining that restricts in which tier and when strikes in respect of that bargaining may be conducted, a union (and the OSSTF) cannot escape reasonable inferences about the motive or real purposes of its conduct – or what these local strikes were really "in respect of".

86. Again, because of the need of releasing this Decision, as soon as possible, I have not reviewed the minutiae of several days of evidence. With the review that I have engaged in so far, I think it is sufficient to say there is enough evidence for me to conclude, on the balance of probabilities, that at least in some part, these local strikes are "in respect of central bargaining". There has been no "smoking gun" in that sense, but engaging in the inferential reasoning from all of the circumstances, that seems a fair conclusion for me to draw on the balance of probabilities. I do so.

87. Yet again, I wish to be careful about what I am deciding here and what this case stands for. I do not say that any particular individual item of conduct that the OSSTF engaged in is necessarily unlawful – most was not. The *SBCBA* does not prohibit OSSTF, or any union, from engaging in local strikes before the central bargaining is complete, even if that is not the choice that apparently all the other unions covered by the *SBCBA* have made so far. However, in view of

the prohibition of the *SBCBA* that no employee should engage in a strike in respect of central bargaining – before, at a minimum, the central bargaining prerequisites and notice of a strike have been given – I do not believe it too onerous a burden on trade unions that choose to engage in local strikes while central bargaining is ongoing, to say they should be vigilant in ensuring their local strikes cannot be construed as being "in respect of central bargaining". This is particularly so when the lines between central and local bargaining, even if they may not be so clear, were agreed upon. Striking, or economic sanctions, is a choice left to the parties in pursuit of their own interests. However, if the *SBCBA* and its two-tier bargaining is to have any meaning, the parties must respect the central/local split (particularly when they themselves have agreed to it), and take some responsibility to ensure that the *SBCBA* is complied with – and in particular, the prohibition against employees striking "in respect of central bargaining" before they are permitted to do so. This is not to be construed as imposing any reverse onus on OSSTF or striking unions engaged in local bargaining under *SBCBA*. Rather, in this case, on the balance of probabilities, deducing from all the circumstances, I conclude that employees were, at least in part, striking "in respect of central bargaining" before it was lawful to do so.

IX. The Impact of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")

88. OSSTF served a Notice of Constitutional Question. In the course of the hearing, it became unclear how the *Charter* could be litigated in an orderly or expeditious fashion in the context of this application, particularly when there was some urgency to complete it. Rather than have the proceedings break down or be delayed even further, the parties agreed that the *Charter* issue could be bifurcated.

89. In other words, aside from the question of the issue interpreting the *SBCBA* in accordance with the *Charter* values, questions whether there was any actual infringement to the *Charter* or whether there was a section 1 defense to such infringement and whether any evidence would be necessary, would be left until after I had made my rulings on the interpretation of the *SBCBA* and whether I concluded, on the evidence, that employees had been striking "in respect of central bargaining". I have done so.

90. The only question was whether I needed to rely on *Charter* values with respect to the interpretation of the *SBCBA*.

91. The jurisprudence has now evolved to the point of where it is clear that *Charter* values may be invoked in statutory interpretation only in the cases of genuine ambiguity. Prior to consideration of the *Charter*, the statute must be construed in the ordinary manner (according to the modern approach to statutory construction as set out in all of those decisions referred to in paras. 29-31, *supra)*. Only if ambiguity remains and there is more than one interpretation of the statute, equally supported by the modern approach, may *Charter* values be invoked to give preference to the interpretation or consistent with those *Charter* values. This has been most recently summarized by the Supreme Court in *Regina v. Clarke*, 2014 SCC 28 at paras. 12-15:

> [12] **The absence of ambiguity also precludes the application of the interpretive assistance of *Charter* values, which only play a role if there is genuine ambiguity as to the meaning of a provision** (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, and *R. v. Rodgers*, [2006] 1 S.C.R. 554). **If the statute is unambiguous, the court must give effect to the clearly expressed legislative intent.**
>
> [13] The role of *Charter* values in interpreting statutes was explained by Iacobucci J. in *Bell ExpressVu* as follows:
>
>> [62]... **to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.** [Emphasis in original.]
>> ...
>> [64]... a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction... .
>> ...
>> [66]... if courts were to interpret all statutes such that they conformed to the *Charter*, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn

> of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret *this* sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. *As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.* [Emphasis added.]

[14] In *Rodgers*, Charron J. confirmed these interpretive borders in the criminal law context:

> [18] It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*... . **However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, *it is appropriate to prefer the interpretation that accords with Charter principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the Charter to achieve a different result...* . [Emphasis added.]**
>
> [19] If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the

> provision. Moreover, it would deprive the *Charter* of its more powerful purpose -- the determination of the constitutional validity of the legislation ... .

> [15] The requirement of statutory ambiguity as a prerequisite to the application of *Charter* values was most recently acknowledged in *R. v. Mabior*, [2012] 2 S.C.R. 584, where the Chief Justice stated that *Charter* values are "always relevant" to the interpretation of a "disputed" provision of the *Criminal Code* (para. 44). The two cases relied on by the Chief Justice for this proposition -- *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 33 and *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, at para. 35 -- both assert that where more than one interpretation of a provision is equally plausible, *Charter* values should be used to determine which interpretation is constitutionally compliant.
>
> [emphasis added]

92. I note that it was unnecessary here for me to resort to *Charter* values in the interpretation of the *SBCBA*. I have, above, found its interpretation to be relatively clear. The entire scheme of the *SBCBA*, two tiers of bargaining with different parties at each tier, with agreed upon (or ordered by the OLRB) central issues, in my view, would be frustrated and defeated if, even a timely local strike could be "in respect of central bargaining". Moreover, I believe that alternatively, section 34(3) is a relatively clear prohibition upon employees to striking "in respect of central bargaining" until certain conditions are met, namely the notice to strike. Even if section 34(3) is only a notice requirement, as OSSTF argued, there is no dispute that the notice requirement has not been complied with here. Again, I reach these conclusions based on the scheme of the *SBCBA* statute and a "modern approach to interpretation" as summarized in all the cases referred to me, whether they be *Bell ExpressVu*, *R. v. Clarke*, or the OLRB's decision in *Ontario Hydro*, *supra.* Therefore, there is no need to resort to *Charter* values for the interpretation I have reached.

93. I would also very briefly observe that it is not clear to me that *Charter* values would necessarily have assisted me here. It is not a case where the right to strike, *per se*, is prohibited. Rather, the *SBCBA* creates two tiers of bargaining and as Crown counsel referred to it, "two zones" where strikes may occur. It separates the path to reach the two zones of lawful strikes but ultimately allows them, as long as they have proceeded along and in accordance those separate

paths, and are kept separate. It is not clear to me whether that can be said to violate any *Charter* values. However, since the parties explicitly agreed not to deal with breaches of the *Charter* at this stage of the proceeding, I will say no more about this issue at this point in time.

X. Relief

94. As I concluded that these local strikes are, at least in some part, "in respect of central bargaining", the question is – what is the appropriate remedy. I could simply make cease and desist directions and end those strikes, but that seems disproportionate when all of the statutory conditions for local strikes have been met. Were the strikes not tainted by the portions of them that were in respect of central bargaining, they would be permitted to continue.

95. The strikes have continued now in this unlawful fashion for a number of weeks, starting with Durham and ultimately reaching Peel. To merely now declare that because some aspects of the local strikes have, "in respect of central bargaining", to be unlawful yet let them continue also seems inadequate or, in the words of counsel for the School Boards – "trying to put the toothpaste back in the tube after it has been squeezed" – to say nothing of inviting further disputes and, likely, litigation about how to draw that line. As a result, I have adopted the suggestion of counsel for the School Boards and would direct that the strikes be put on a "moratorium" on the local strikes. Since I have found these strikes to be unlawful in that they are "in respect of central bargaining" and section 100 of the *LRA* authorizes the Board to direct "what action, if any, a person, employee, … trade union … and their officers, officials or agents shall do or refrain from doing", I direct that these strikes cease at least for two (2) weeks from the date of this decision. After this two-week moratorium has elapsed, the local strike may continue (obviously subject to proceedings or outcomes elsewhere which have been initiated during the course of these proceedings). This moratorium will give the OSSTF an opportunity to "purify" or "cleanse" the local strikes of those portions that are "in respect of central bargaining" and permit local bargaining to continue and clarify those purely local issues that cannot be resolved and are still in dispute – or if the parties choose not to negotiate any further, allow them to clearly limit and ensure economic sanction to be only in respect of local bargaining and not in respect of central bargaining. It does not permanently prohibit local strikes since the statutory prerequisites for them have been met (other than the

manner which I have discussed in this Decision), and the *SBCBA* does not dictate the timing or order of local strikes or bargaining vs. central strikes or bargaining, and does not prohibit one before or after (or contemporaneously with) the other (again, other than the manner outlined in this Decision).

96. Since my authority pursuant to section 100 of the *LRA* is intended to be remedial and not punitive, I have rejected the suggestions of counsel for the School Boards that the moratorium be different at each School Board, equal to the length of the strike at that School Board.

97. I also appreciate that my orders cannot be "final" in the sense that it is still prior to the OSSTF to make its *Charter* arguments. However, this was an unlawful strike application (in which the applicant School Boards, in essence, have been successful (so far). It consumed five days of hearing and this Decision a number of days to write. There are approximately 74,000 students not in class. The strike which I have found to be unlawful (subject to the *Charter* arguments) has therefore continued almost two weeks longer from when this application was filed. In these circumstances, for now, I will assume the constitutional validity of the *SBCBA* (as I believe I am entitled to do) and make the following Orders. If OSSTF wishes to pursue its *Charter* arguments, it should notify the OLRB in writing immediately and a hearing will be scheduled as soon as possible. If the OLRB does not hear from OSSTF within three (3) days of the date of this decision, the OLRB will conclude that OSSTF does not wish to pursue its *Charter* arguments in this case.

XI. Orders

98. The OLRB hereby:

(1) declares that the local strikes at Durham District School Board, Rainbow District School Board and Peel District School Board are presently undertaken in contravention of the *School Boards Collective Bargaining Act, 2014*;

(2) orders that Ontario Secondary School Teachers' Federation (OSSTF/FEESO), its officers, officials and agents and striking employees at Durham District School Board, Rainbow District School Board and Peel District School Board cease and desist their unlawful strike, from the date of this Decision, and not resume it until the two (2) week moratorium described in this Decision has expired;

(3) directs that Ontario Secondary School Teachers' Federation (OSSTF/FEESO) advise its members of this Decision and these declarations and orders immediately, including posting this Decision and the attached Notice on its provincial website, and that OSSTF/FEESO Districts at each of Durham District School Board, Rainbow District School Board and Peel District School Board post them on their websites and advise all of their members accordingly.

"Bernard Fishbein"
for the Board

XII. OLRB File No. 0376-15-U

School Boards Collective Bargaining Act, 2014

NOTICE TO EMPLOYEES

Posted by order of the

Ontario Labour Relations Board

The applicants, Durham District School Board, Rainbow District School Board and Peel District School Board have applied to the Ontario Labour Relations Board ("the Board") for declarations that the Ontario Secondary Teachers' Federation ("OSSTF") has called or authorized an unlawful strike contrary to the *Labour Relations Act, 1995* and the *School Boards Collective Bargaining Act, 2014*. At this point, the Board has determined and:

(1) declares that the local strikes at Durham District School Board, Rainbow District School Board and Peel District School Board are presently undertaken in contravention of the *School Boards Collective Bargaining Act, 2014*;

(2) orders that Ontario Secondary School Teachers' Federation (OSSTF/FEESO), its officers, officials and agents and striking employees at Durham District School Board, Rainbow District School Board and Peel District School Board cease and desist their unlawful strike, from the date of this Decision (May 26, 2015), and not resume it until at least a two-week moratorium from the date of this Decision has expired;

(3) directs that Ontario Secondary School Teachers' Federation (OSSTF/FEESO) advise its members of this Decision and these declarations and orders immediately, including posting this Decision on its provincial website, and that OSSTF/FEESO Districts at each of Durham District School Board, Rainbow District School Board and Peel District School Board post them on their websites and advise all of their members accordingly.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive days.
DATED this 26th day of May, 2015.