Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0906-19-M**

Ontario Secondary School Teachers' Federation, Applicant v **The Crown in Right of Ontario**, and Council of Trustees' Association, Responding Parties

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BEFORE: Bernard Fishbein, Chair

APPEARANCES: Susan Ursel, Karen Ensslen, Harvey Bischof, Martha Hradowy, Pierre Coté, Brad Bennett, Kerri Ferguson, Stephen Bloom, Kerry Houlahan, Chris Goodsir, Dave Barrowclough and Vaino Poysa appearing for the applicant; Michael Hines, Penny Mustin and Jennifer Lamarche Schmalz appearing for the Ontario Public School Boards' Association; Ferina Murji, Caroline Brett, Lynda Coulter, Brian Blakeley and Paul Dalfy appearing for The Crown in Right of Ontario

DECISION OF THE BOARD: September 6, 2019

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I. Introduction

1. These are two applications filed under section 28 of the *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5 (“the SBCBA”) brought by the Ontario Secondary School Teachers’ Federation (hereinafter either “the OSSTF” or “the union”). Board File No. 0907-19-M is with respect to secondary school teachers in the English language public school system (“the teachers’ application”). Board File

No. 0906-19-M is with respect to support staff in the various school systems represented by OSSTF ("the support staff" or "educational workers application"). Both applications are for the Board to determine (the parties having failed to agree) whether certain matters fall within the scope of central or local bargaining under the SBCBA. The parties have filed extensive submissions and in accordance with directions and the timetable laid out in the case management decision of July 16, 2019 ("CMH"), a lengthy hearing was held on August 22, 2019.

II. Background Generally

(a) *The Historical Perspective*

2. In my view in order to understand the SBCBA and how it is to be applied and interpreted it is necessary to have an understanding of the legislative history and statutory framework of collective bargaining in the education sector in the Province of Ontario. History has seen dramatic and significant (perhaps even tumultuous) changes over the last 20-25 years. I have been compelled to write in some detail about that history in *Trillium Lakelands District School Board*, [2013] OLRB Rep. Mar./Apr. 427 (in particular paragraphs 59-84) and *Richard Brock*, [2013] OLRB Rep. Jan./Feb. 109 and *Ontario School Teachers Federation*, 2012 CanLII 816 (ON LRB).

3. A relatively brief but useful historical summary is also found in the *Durham District School Board, Rainbow District School Board, and Peel District School Board,* [2015] OLRB Rep. May/June 465 at para 12 and following:

> 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 [the *Education Act*]. 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) Statutory Overview Explained

4. That decision also provides a useful overview of the SBCBA:

> 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")...

...

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.

In the first round of SBCBA bargaining in 2014 only a limited number of section 28 applications were made (approximately six) and with the exception of one decision (*CUPE,* 2015 CanLII 38116 (ON LRB)), in order to be expeditious (an explicit requirement of the SBCBA in section 28) the decisions were, on the agreement of the parties, "bottom line" decisions indicating which matters were central or local bargaining matters without the elaboration of full reasons, although some contained some general discussion of basic principles. When the 2014-2017 collective agreements expired, they (including the ones between these parties) were extended (or "rolled over") until August 31, 2019 with wage increases but no other significant changes or bargaining (other than the bargaining to arrive at the rollover agreements), so effectively this is only the second round of two tier bargaining under the SBCBA. In other words, the jurisprudential background to this new statute is, as one of the parties characterized it, relatively "sparse".

(c) The Exact Relevant Statutory Provisions of the SBCBA

5. It may be most useful and most convenient to set out the relevant statutory provisions here at the outset:

> **Scope of central bargaining**
>
> **24** The matters to be included within the scope of central bargaining at a central table shall be determined by the parties at the table and the Crown in accordance with section 28.
> …
>
> **Scope of local bargaining**
>
> **27** If a matter is not within the scope of central bargaining at a particular central table, it is within the scope of local bargaining.
>
> **Negotiations about scope of central bargaining**
>
> **28** (1) The parties at a central table and the Crown shall meet within 15 days after the notice of desire to bargain has been given under section 59 of the *Labour Relations Act, 1995*, or within such further period as they agree upon, and they shall bargain in good faith and make every

reasonable effort to agree upon the matters to be included within the scope of central bargaining at the central table. 2014, c. 5, s. 28 (1).

Restriction re: impasse

(2) No strike shall be called or lock-out authorized because there is a failure to agree upon whether a matter is within the scope of central or local bargaining. 2014, c. 5, s. 28 (2).

Referral by local parties

(3) A dispute between the parties to local bargaining about whether a matter is within the scope of local bargaining shall be referred to the parties at the central table and the Crown to determine. 2014, c. 5, s. 28 (3).

Application to the Ontario Labour Relations Board

(4) If the parties at a central table and the Crown do not agree upon the matters to be included within the scope of central bargaining at a central table, either party or the Crown may apply to the Ontario Labour Relations Board to decide the issue. 2014, c. 5, s. 28 (4).

Same

(5) If the parties at a central table and the Crown do not agree upon the interpretation or application of an agreement or order determining the matters that are included within the scope of central or local bargaining, either party or the Crown may apply to the Ontario Labour Relations Board to decide the issue. 2014, c. 5, s. 28 (5).

...

Factors

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

> 1. The extent to which the matter could result in a significant impact on the implementation of provincial education policy ["*the first factor*" or "*the education policy factor*"].
>
> 2. The extent to which the matter could result in a significant impact on expenditures for one or more school boards ["*the second factor*" or "*the expenditure factor*"].
>
> 3. Whether the matter raises common issues between the parties to the collective agreements that can more appropriately be addressed in central bargaining than in local bargaining ["*the third factor*" or "*the common issues factor*"].
>
> 4. Such other factors as the Board considers relevant in the circumstances. 2014, c. 5, s. 28 (8) ["*the fourth factor*" or "*the Board considers relevant factor*"]…
>
> **Timing**
>
> (9) The Board shall make a decision in an expeditious manner. 2014, c. 5, s. 28 (9).

(d) Already Established Principles in the Jurisprudence

6. As "sparse" as the jurisprudence may be, I think it is fair to say some general principles have been established with which I agree and endorse:

(i) Locus of Bargaining not Merits of Proposals

7. In *Ontario English Catholic Teachers Association ("OECTA")*, 2015 CanLII 5514 (ON LRB), the Board stated at para 8:

> 8. I wish to make only these brief observations about section 28 and the process involving the Board as envisaged by the SBCBA. **The Board is not called upon to comment on the merits of any proposal, what the outcome of any negotiations ought to be or necessarily even either the tactical wisdom or the practical utility of how and where the issue is pursued. Rather, the only decision the Board is called on to decide is where those proposals ought to be**

> **discussed — at the central table or at local bargaining.** The decision the Board is called upon to make concerns only the locus of the bargaining and nothing about the respective bargaining positions of the parties.
>
> [emphasis added]

8. (*See also Education Workers Alliance of Ontario ("EWAO")*, 2015 CanLII 12061 (ON LRB) at para 4, which was further elaborated upon by the Board in *CUPE, supra, (*after referring to *OECTA)* at paragraphs 11-12:

> 11. Although I agree with the above observations, as a result of the growing number of section 28 applications, and thus greater variety of disputed issues coming before the Board, it becomes apparent that **there is a nuanced difference between, as the Chair stated, not questioning "the tactical wisdom or the practical utility of how and where the issue is pursued", and the Board's obligation to consider, among other factors, "whether the matter raises common issues between the parties to the collective agreements that can more appropriately be addressed in central bargaining". Thus, simply because it may be more "practical" (for tactical reasons) for a party to attempt to negotiate an item at the central table it does not necessarily follow that it is "more appropriate".**
>
> [emphasis added]
>
> 12. If the Board finds that a common item, or items, is "more appropriately" addressed at the central table there may be a "practical aspect", in addition to other reasons, as to why such a conclusion is reached. One practical aspect could be whether the Board is of the opinion that directing that a matter be negotiated centrally (or locally) is likely to cause an impediment to eventual settlement. The "other reasons" could include the basic reality that the proposal by its very nature is intended to apply equally, as in this case to all four Trustee Associations, and could not be effective without the involvement of all four employer associations. In addition, it may further the overriding goal of both the LRA and the SBCBA of facilitating "collective bargaining between employers and trade unions…", (Section 2.1 LRA), rather than on balance impeding the likelihood of

> settlement. However, parties should not conclude that simply because they structure a proposal so that it requires the involvement of all those on the employers', (or union), side it will automatically lead the Board to conclude that it should be addressed at the central table.

(ii) No Factor Necessarily of Greater Weight than Another

9. In, *EWAO, supra*, the Board stated at para 9:

> 9. Although the statute indicates that the **Board "shall consider" these factors, the statute does not indicate what weight, if any, must necessarily be attributed to any of them in any particular set of circumstances. It may be the predominance of one factor is so significant as to outweigh any impact (positive or negative) of the other factors**…
>
> [emphasis added]

See also *L'Association des enseignantes et des enseignants franco-ontariens ("AEFO")*, 2015 CanLII 19071 (ON LRB) at para 5. I might also add that although *the fourth factor* allows the Board to consider other factors that it considers appropriate, and those other factors may be of great influence (or even predominant), it does not allow the Board to ignore the other factors altogether since their consideration is expressed in suggested mandatory terms ("shall consider"). This is noteworthy, since as the other parties pointed out, in initially making these applications the OSSTF made virtually no reference to the first three factors and did not comment on them until replying to the responses of the other parties.

(iii) Section 28(8)(2) Significant Impact on Expenditures – Up or Down

10. "Significant impact on expenditures" within the meaning of this factor includes both extra expenditures and possible savings. See *CUPE, supra,* at para 20.

(iv) Monetary Items at Central Table – Matters Should not Normally be Bifurcated

11. Monetary items generally belong at the central table and should not be bifurcated. See *CUPE, supra,* at paragraphs 64-68:

64. As set out in paragraph 7 herein the Crown, supported by the CTA, is requesting that I direct that the following matters be negotiated at the central bargaining table, namely:

> a) Premiums (including shifts, overtime, weekends, overnights);
>
> b) Allowances (excluding new allowances in response to a singular need that does not apply to an entire class or classes of employee);
>
> c) Paid Vacations and Holidays (including Statutory Holidays); and,
>
> d) Short-term paid leaves not deducted from sick leave.

CUPE objects to the Crown's request and wishes the Board to address each monetary item on its own merits. Thus, when considering, for example, premiums for weekends CUPE urges the Board to consider the four factors in an isolated fashion. Presumably this is suggested so that it "may" result in the Board considering the impact of the potential expenditures to be insignificant.

65. The Crown replied by noting that this is the first occasion where it has encountered a party attempting to split the issue of monetary rates between the central and local tables. To do so, argues the Crown, is wholly illogical as one of the main reasons the Crown is present at the central bargaining table is due to it being the only source of funds required by every school board. To permit a party to negotiate a monetary item at the local table excludes any participation by the MOE. Further, the Crown rhetorically questions how the ratification processes required by the SBCBA could be logically managed.

66. CUPE responds with the argument that the amounts involved, for instance, in work boot allowances, or clothing allowances, do not add up to "significant expenditures". However, even on CUPE's proposed approach negotiating locally, for example, a $10.00 allowance for work boots could still impose a significant

cost on the Crown, if duplicated across the province, namely, over half a million dollars. Further, when one adds up the potential total cost of all the monetary items listed above the amounts clearly present a potentially significant impact upon expenditures.

67. More importantly, it simply makes no sense from the viewpoint of the Legislature's intent in enacting the SBCBA to bi-furcate the collective bargaining concerning financial matters. There exists highly persuasive reasons why all financial matters should be addressed centrally as the school boards have no way of knowing to what extent they could negotiate any meaningful financial expense locally without the presence of the MOE. In this sense the expression "plus ca change" is applicable when one looks back to 1983, and the *Municipality of Metropolitan Toronto Act* R.S.O. 1980 as amended. At that time the government of the day enacted that all "financial benefits" had to be negotiated by the six Metro Toronto school boards together with the Metropolitan Toronto School Board as one party, on the one side, and each local of the teacher federations/associations had to negotiate jointly as one party on the other side. "Financial Benefits" were defined as:

> 130a (4) (a) compensation other than salary payable or provided directly or indirectly except money paid in reimbursement of expenses incurred in the performance of duties;
>
> (b) a benefit that, at the date the agreement under which the benefit is provided is ratified, has a value that is required to be included in income under the *Income Tax Act* (Canada); and
>
> (c) an insured benefit.

Thus, although the legislative scheme described above was narrower in its application than the SBCBA, it is telling that the Legislature recognized that all financial benefits needed to be negotiated centrally so that the entity dispersing the necessary funds is present at the negotiating table. **In the present context, theoretically, the SBCBA does not mandate bargaining at the central table for financial benefits. However, that is an illusory observation, as**

> **clearly factors 1 and 2 of section 28(8) will effectively dictate a centralized result.**
>
> 68. For all of these reasons I direct that the items listed in paragraph 7, and also 64, be negotiated at the central collective bargaining table.
>
> [emphasis added]

Moreover, in my view, it is almost trite to observe that in general avoiding bifurcating issues (not just restricted to financial matters, although particularly true for them) is more efficient in that it reduces unnecessary complications, reduces duplications and probably most significantly reduces or avoids disputes about the scope of bargaining.

III. Some General Observations and Principles about these Applications

12. Since, the OSSTF and the responding parties, the Crown in Right of Ontario ("the Crown") and the Council of Trustees' Association ("the CTA") and the Ontario Public School Boards' Association ("OPSBA") (collectively referred to as "the employers") approached and argued the application of the SBCBA from such fundamentally different if not diametrically opposed viewpoints, in my view, it would be helpful to set out at the outset some general observations and conclusions which I have made about the arguments of the parties and which guide my determination of these applications.

13. I would also note, at the outset, that no party disputed that the modern approach to statutory interpretation requires "…that 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." See *Rizzo & Rizzo Shoes Ltd.* [1988] 1 S.C.R. 27 at para 21. I have attempted to do just that.

(a) Limited Utility of Pre-SBCBA Bargaining

14. The SBCBA represents a sort of "new dawn" in educational bargaining in Ontario. Prior to the SBCBA the only bargaining that existed was local (between local school boards and the respective unions and since the late 90's their provincial bodies). The Crown was never a party to it. That is the very reason the SBCBA was enacted – to create a provincial or central table in which the Crown, the funder – since the late 1990's – and formulator of education policy in Ontario could

participate. It was to end the "ghost in the room" phenomenon about which all stakeholders complained. Counsel for the employers characterized it as remedial legislation in this regard and therefore should be given a broad and liberal interpretation. I do not think I need to go that far but I must recognize what was the very purpose of the statute – or as put by the Board in *CUPE, supra,* at para 17:

> ...Phrased more bluntly the Crown is present at the central table to protect its educational policy and control funding.

15. Several things flow from that. First of all how bargaining was previously conducted before the SBCBA is of very limited (if any) use in determining how bargaining should be conducted under the SBCBA. In other words, how matters were treated or bargained before is of a very limited use in determining whether something is a central or local matter. Prior to the SBCBA there simply was no central option.

16. I recognize that in 2004 (for teachers) and 2008 (for both teachers and educational workers) the parties developed and participated in their own voluntary provincial discussions (described in the cases referred to in paragraphs 2 and 3, *supra,* and at *Durham School Board, supra,* at paragraphs 12-13) which were referred to as Provincial Discussion Tables ("PDT's"). But the PDT's were purely voluntary and would not necessarily bind local school boards (in fact not all local school boards were required to be members of or were in fact members of either the CTA or OPSBA at the time - something the SBCBA remedies by creating for the first time two employer bargaining agencies with their consequential powers to bind, duties and obligations). That was clearly demonstrated by their collapse in 2012 leading to the enactment of the PSFA (more particularly described in *Ontario Secondary School Teachers' Federation,* 2012 CanLII 80016 (ON LRB)). Accordingly they are equally of little assistance to me in the central vs. local bargaining determinations I must make here.

(b) No Bias in Favour of Local Bargaining and Onus

17. At various times, the OSSTF argued to me that, notwithstanding the introduction of the SBCBA, local bargaining was protected or somehow presumptively favoured (or there was a bias in favour of local bargaining) or some variation of that theme. I completely reject the union's premise. The clear legislative history and statutory purpose is to the contrary. The SBCBA thrust into and imposed over local bargaining, for the first time, provincial bargaining. The resulting provincial agreement must be incorporated into and become part of any

local agreement. That is not to necessarily diminish the importance of local bargaining. The OSSTF went so far as to characterize the Crown's and the employers' position as tantamount to saying that local school boards cannot be trusted or charged with the administration of the *Education Act*. That is neither fair nor accurate. What the OSSTF position fails or refuses to recognize is how the SBCBA so clearly and fundamentally alters the prior world of local school board bargaining.

18. As the OSSTF repeatedly pointed out, it is true that local school boards and local bargaining continue to exist. It is true that local school boards can determine local priorities in local bargaining. But all of that must now be done in a new world that includes provincial bargaining – involving the Crown. Most significantly, what is decided in provincial bargaining cannot be altered in local bargaining – it must be included in all local agreements. The "world view" of the OSSTF seemed to suggest that the educational bargaining is to continue largely as it was before the SBCBA, dealing primarily and most importantly with local needs and local priorities with only the minor "tweaking" that provincial bargaining might impose. Again I reject that world view. The SBCBA not only "upsets the apple cart" of what went before it, but section 28 now explicitly lists the factors that the Board should consider if the parties fail to agree on a central-local split. The importance of local bargaining which the OSSTF so clearly (and initially almost exclusively) relied on is not one of them.

19. It is true that section 27 of the SCBCA provides that if a matter is not within the scope of central bargaining, it is within the scope of local bargaining - frequently described as the "default" provision. The OSSTF suggested (or the jargon in some jurisprudence where the issue was not contested or as fully argued as it was here, also perhaps suggested) this amounts to or is the equivalent of an onus on the party asserting that something should be the subject matter of central bargaining. I do not think that is a correct, let alone a helpful, way of characterizing anything.

20. The concept of onus in normal litigation is ordinarily with respect to proving something that has already occurred. But that is the very opposite of the assessment that the Board is called upon to make to determine whether something should be at the central or local table. Section 28(8) makes clear that the Board is to assess certain factors prospectively, specifically the extent to which the matter **could result** in significant impacts either on the implementation of provincial educational policy or expenditures for one or more school boards. Not

only does the language make explicitly clear that by definition the exercise is speculative, the structure of the SBCBA makes that even more apparent. Collective bargaining cannot commence until the central-local split is finalized whether by agreement or by Board order. In other words, actual proposals cannot and are not exchanged until after the determination of the central-local split. In this type of exercise, this notion of onus is of little, if any, assistance.

21. Rather section 28 makes clear, it is the parties at the **central table** who must bargain in good faith and make every reasonable effort to agree upon the matters that are to be in the scope of central bargaining (not the parties at the local table). If they do not agree, any central party (not a local party) may apply to the Board to decide the issue under section 28(4). There is no way for parties at the local table to have a dispute whether something is central or local referred to the Board. Under section 28(3) if the local parties have such a dispute they refer it to the central table to determine.

22. Section 28(8) lists the factors that the Board must consider in determining whether a matter is within the scope of central bargaining when one of the central parties refers the question to the Board under section 28(4). Either the parties agree on something being a matter of central bargaining or the Board decides if it should be. It is only for matters that are omitted or not discussed that the "default provision" (section 27) applies. In other words where neither the Crown nor any of the parties to the central table do not assert that the matter has or should be a central interest (where the Crown is a participant), then the matter is within the scope of local bargaining. None of this suggests to me an onus or burden on the party asserting something should be within central bargaining. None of this suggests, as OSSTF argued, that a party "must argue its way out of local bargaining" and into central bargaining. Either the parties agree or the Board orders it to be a matter for central bargaining. There is no equivalent for disputes about scope of bargaining raised at the local table.

23. These applications in fact demonstrate the limited utility of such a notion of onus. The applications were made by the OSSTF (as any party at the central table may make an application – section 28(4)) which asserted that the matters should be bargained at the local tables even as it asserted that the onus was on the responding parties to establish that they should be at the central table. It was not until the responding parties filed their responses that there was any fulsome discussion of the factors in section 28. This situation was not cured or

resolved by any notion of or application of onus, but by providing (as directed at the CMH) an opportunity for OSSTF to file further reply materials and then providing the other parties another opportunity to provide replies to the further submissions of the OSSTF.

24. OSSTF argued that such an approach ultimately squeezes everything into central bargaining to the detriment of local bargaining. However, that ignores the actual language of both the first and second factors in section 27(8) that the Board must consider. In other words, if the impact on either of these two criteria is less than "significant" the Board need not find it to be a matter of central bargaining. Not only does the statute suggest this but so does real life practicality. The participants at the central table (as the employers repeatedly asserted), have no interest in burdening the central bargaining table with "*de minimis* issues" that do not have significant impact on either the implementation of education policies or expenditures. That is the real protection against the fear (imagined or real) of the union.

25. However I wish to be clear here as well. OSSTF argued that "significant impact" should be interpreted to be a "subversive" or "negative effect" – whether on provincial educational policy or expenditures. I am not persuaded. Not only is that not the language of the statute (which could easily have been used by the legislature), but it invites the Board to evaluate the merits of either the proposal or the policy or the expenditure – which I think is beyond the purview of the Board in a section 28(8) exercise (see *OECTA, supra,* already quoted at para 7) (leaving aside whether the Board is arguably equipped to make such an evaluation). Equally OSSTF argued that "significant impact" meant "probable". Again I am not persuaded. Those again are not the words of the statute – which easily could have been used if the legislature so intended. Equally the OSSTF said the use of the words "the extent to which" in the first and second factors also meant that the "significant impact" had to be probable. Again I am not persuaded. I agree that the words suggest that I must engage in some assessment (which I have done) but that does mean the end point of that assessment is probability. Again not only are those not the words used (or can fairly be said to be the ordinary meaning of the words used), it seems an unduly onerous standard to achieve in what is clearly a highly speculative exercise which the legislature explicitly intends to be done expeditiously in order to allow bargaining to proceed. The OSSTF offered me no authority for these propositions – other than perhaps its argument of the bias in favour of local bargaining in the SBCBA, which I have already rejected.

26. Moreover, the approach that OSSTF urged upon me could equally be said as squeezing everything into (or swallowing up everything in) local bargaining merely by the refusal of one of the central bargaining table participants to agree to it being a central issue (and therefore bargained locally without the participation of the Crown). I was not persuaded by such flood-gates arguments no matter from which side they were made.

27. Certainly, and in any event, even if onus applied here in the most literal sense (as OSSTF urged), I have not made any determination on the basis strictly of onus but rather have regarded the outcomes as relatively clear cut.

(c) Section 28(8)(2) – Expenditures vs. Budgets, Funding or Allocations

28. In dealing with *the second factor*, expenditures, the union sought to draw various distinctions between expenditures and allocations, funding and budgets. To the extent that I understand the union argument, it was that many of the matters that it wished dealt with at local tables were not about the amounts of budgets of local school boards (which largely are determined by the Crown in accordance with various funding formulas – some restricting their use, some not – which the parties referred to either as "enveloped" or "sweatered" funds) and which budgets both the union and the local school boards were bound by and required to follow. Rather they were only matters or proposals about how those budgets should be allocated. How those budgets were actually spent or allocated, the OSSTF argued, was best left to local bargaining. Rhetorically, OSSTF asked what would the Crown or the employers add to these questions at the provincial table when they were essentially questions of local needs, different at each local level. They were best left to local bargaining by the parties who knew and understood those local needs. The OSSTF sought to characterize this as gross micro-management by the parties to the central table, if these issues were the subject of central bargaining.

29. Regardless of whether there was some truth or not to this characterization by OSSTF (and regardless of the fact that in making a section 28 determination the Board "is not called upon to comment on the merits of any proposal, what the outcome of any negotiations ought to be or necessarily even either the factual wisdom or practical utility of how and where the issue is pursued" – see *OECTA, supra,* previously

quoted at para 4, *supra*), the simple answer is that those are not the words of the statute. The statute speaks of "expenditures" not "allocations", "funding" or "budgets". Expenditures are an explicitly listed mandatory criterion for the Board to consider under section 28. The union's assertion that those "local allocation issues" would not significantly impact expenditures because both local school boards and the union are following budgets determined elsewhere and to which they are confined, not only defies credulity and any sense of reality, but belies the very existence of this explicitly enumerated factor in the SBCBA. It would be unnecessary if the union's argument was correct.

30. Lastly, even if I accepted the union's view that this is only a question of allocation of budgets (and I do not), there is no dispute that "the significant impact on expenditures" can be up and down (*CUPE, supra,* at para 20). Allocation of budgets are unfortunately a "zero sum" game. There is a limited "pot of money" or budget – something allocated to one item means something not allocated to another. Accordingly, there will inevitably be an impact on all expenditures by even allocation decisions.

31. Moreover, the unions argument is premised, as it suggested orally, that "expenditures" within the meaning of section 128(8).2 must somehow be considered in the aggregate (as opposed to a single expenditure which even if significant in its impact, could be potentially offset by savings or reductions elsewhere so that the total or aggregate expenditures were not affected). There is nothing in the wording of the statute (it neither speaks of "aggregate" or "total" expenditures) or its purpose that supports such an interpretation. The union's argument that this approach again swallows up all local bargaining because everything has a cost (even if that were actually always true – which it is not) is again answered by the fact that the impact on expenditures must be "significant".

(d) Status Quo Agreements

32. Also for many of the "matters" the union argued should be subjects of local bargaining, it pointed me to the fact that when they were last the subject matter of central bargaining in 2014 (the parties having themselves eventually voluntarily agreed to extend or "rollover" the central agreement in 2017 for a further two year agreement with a wage increase and no bargaining or changes to the other terms), the parties had simply agreed to what was referred to as "status quo" agreements leaving in place the many local arrangements in existence

before the imposition of central bargaining for the first time with the enactment of SBCBA. As a result these matters had not really been bargained since 2008 or 2009 (the bargaining in 2012, at least for the OSSTF, having largely been illusory with the collapse of the PDT's, a flawed bargaining process discussed in great detail in *OPSEU v. Ontario,* 2016 ONSC 2197 and ultimately found to have violated the *Charter of Rights and Freedoms,* and then the enactment of the PSFA). The union pointed to that as evidence that central bargaining had failed on these matters either because of the number and the diversity of the union's local arrangements or their complexity and therefore they should be dealt with at the local tables. I reject that assertion.

33. Leaving aside the argument of both the employer and the Crown that this is not a factor specifically enumerated in section 28(8) (an argument not particularly compelling since section 28(8).4 allows the Board to consider "such other factors as" the Board considers relevant in the circumstances), the Crown strongly objected to the use of this argument by the union in view of the specific agreement between the parties in their Memorandum of Agreement, dated December 9, 2014, establishing the central-local split in 2014:

> 3. The agreement of a party to the inclusion of a matter within the scope of central bargaining or to not include a matter within the scope of central bargaining for the round of bargaining commencing in 2014 **is without prejudice to the party's position on the scope of central bargaining** in any future round of central bargaining, and without prejudice to the party's positions at other tables in this round of bargaining. **The parties will not rely on or refer to this MOS in any application to the OLRB to determine the matters to be within the scope of central bargaining in any future round of collective bargaining.**
>
> [emphasis added]

There is some attraction to this argument (although once OSSTF raised this argument, the other parties occasionally also referred to the 2014 central-local split in support of some of their positions saying that the union had opened the door). In any event, and regardless, I consider this argument by the union fundamentally fatally flawed for other reasons.

34. Regardless of how the previous status quo agreements may now viewed by some of the parties, nothing changes the fact that they

actually were agreements. The Board is not and should not be prepared to go behind them to ascertain the motives (and particularly those of one party) for that agreement. The fact of agreement could as easily reflect an acceptance of the parties that the existing local arrangements were satisfactory at that time, or that the agenda for the very first round of central bargaining was very crowded and enough had been achieved, or perhaps was one of the inevitable "trade offs" made in collective bargaining, or any number of other things, as any failure of central bargaining that OSSTF asserted. The fact that the parties (including the union) reached agreement reflects, in my view, the success of collective bargaining not its failure. This is neither a guarantee nor predictor of how or whether the parties will be able to deal with any issue at central bargaining this round – and the repetition of some status quo agreements may be the same practical solution the parties again choose to reach for a number of those issues (if the matters are as difficult as the union suggests).

35. In fact, as the employers point out, just because the matter is at the central table, does not mean that the outcome either sought or achieved at the central table will be complete harmonization of such matters across the province (in a "one size fits all" manner). The proposals have not yet been made (so therefore certainly not knowable at this time). The determination of the central-local split should not really attempt to consider outcomes. But leaving both these points aside, uniformity could be achieved without harmonization (e.g. salaries remain varied across the different local school boards, but everyone receives the same percentage increase). In other words, the variability or diversity of existing local arrangements, does not necessarily dictate issues being local matters, as OSSTF argues. If that makes the bargaining challenging, it is no more daunting than many issues in collective bargaining.

(e) Section 28(8)1 – Provincial Educational Policy – Specific vs. General

36. As well OSSTF argued that *the first factor* required, in order to assess whether the matter could result in a significant impact on the implementation provincial education policy, that a specific education policy (or regulation or statute) had to be identified. The failure of the Crown or the employers to do so, the union argued meant that they had failed to meet the onus on them to establish that the matter should be at the central table. By way of example, the union said if the Crown or the employers pointed to student safety or full day kindergarten as

matters of provincial education policy (as they did), that was far too remote or speculative to justify central bargaining. Again without repeating what I have said elsewhere about onus or speculative being the "nature of the beast" in a section 28(8) determination, I am not persuaded by this argument either. Again there is nothing in the wording of the statute, or the history and purpose of the statute that demands this degree of specificity or particularity that the union says is required. The Minister of Education has a broad right to make educational policy for the province – some will be in legislation, some in SB (School Business) memo's, some in PPM (Policy and Programs Memoranda) but all of that may still not make up the totality of provincial educational policy. There is no need to read the statute so prescriptively – unless of course one assumes that the SBCBA somehow favours local bargaining which I do not.

37. Moreover it is difficult to see how this could actually work if the union was correct. Without specific formal proposals (not yet tabled) but only the general and somewhat amorphous matters (such as "working conditions" or "class size provisions") the union says should be the subject of local bargaining, how could anyone necessarily know the specific policy or portion of educational policy that might be impacted? The union on different issues said that without specific policies, I did not have enough information to know if there was a significant impact – but I regard this as a sort of "chicken and egg" argument. With the broad amorphous nature of the matters the union said should be at local bargaining, I practically do not see where the Crown or the employers could actually provide the particularity the union asserted was required of them.

38. To me, the important constraint is that the impact be significant and be on the "implementation of provincial educational policy". Of course that does not mean that a party wishing to have a matter dealt with at the central table can glibly espouse a trite generality, such as the provincial education policy is that all students receive a "good education" – but that is not what I believe to be happening here. For example, school safety and full day kindergarten are real concerns of educational policy – and it is not unfair for the Crown or the employers to suggest the matters OSSTF wishes to be bargained locally could have an impact on their implementation.

(f) Bifurcating Already Agreed Central Issues

39. The Crown pointed out that virtually every local matter that OSSTF wished to have bargained locally either overlapped (partially or completely) or was related in a significant way to a matter that the parties (including obviously OSSTF) had already agreed to be the subject matter of central bargaining:

OSSTF seeks to bargain locally	**Already agreed to be bargained centrally**
TEACHERS	
Class size provisions	i. Compensation ii. Job security
E-learning (except mandatory e-learning credits)	Mandatory e-learning credits
New forms of compensation	Compensation
Sick leave strictly as it relates to benefits other than what is covered by Article C.9 and Appendix B	i. Article C.9 and Appendix B ii. Benefits
Short term paid leave	i. Compensation ii. Benefits iii. Statutory leave iv. Unpaid days
Additional professional assignments (“APA’s”), supervision and unassigned teacher time	i. Job security ii. Compensation
EDUCATION WORKERS	
Working conditions (except as it relates to staffing generator for Early Childhood Educators (“ECE’s”)	i. Staff generator for ECE’s ii. Compensation iii. Job security
New forms of compensation	i. Compensation ii. Funding for local needs and priorities
Sick leave	i. Central sick leave plan ii. Benefits

Short term leaves	i. Compensation ii. Benefits iii. Statutory leave iv. Unpaid leave
Designated Early Childhood Educators ("DECE's") professional judgment and reporting (in the context of student evaluation)	ECE working group
ECE prep time	i. Compensation ii. Job security
LTD except issue of premium wages	LTD premium wages

For all the reasons, outlined in *CUPE, supra*, under the heading of *Monetary Items at Central Table – Matters Should not Normally be Bifurcated, supra,* this bifurcation militates against these matters being at local tables. Otherwise this appears to be a recipe for disputes about the scope of bargaining. It is difficult to see how the line can be drawn between what will be bargained centrally and what OSSTF wishes to be bargained locally for virtually all of these issues - just by way of example, compensation vs. new forms of compensation, e-learning vs. mandatory e-learning credits, etc. OSSTF did not make that clear at all.

(g) An aside about Expedition in these Applications – Section 28(9)

40. As an aside, I note section 28(9) of the statute provides:

> (9) The Board shall make a decision in an expeditious manner. 2014, c. 5, s. 28 (9).

41. Much of the OSSTF's argument in connection with onus and its argument that the various factors in section 28 should be interpreted in such a way to add additional criteria or restrictions not readily apparent from (or not required by the ordinary meaning) of the words in the statute - whether expenditures meant "aggregate expenditures", the meaning of "common" in the third factor, specific policy in the first factor, etc. - led to the union's assertion that the other parties had therefore failed to meet their onus to establish that the factor favoured central bargaining. These applications involved many rounds of extensive pleadings, a CMH hearing, and then a lengthy hearing beyond the normal hours the Board customarily sits, with time limits imposed (that no party actually met but rather frequently just referred to their previously filed written materials for me to consider). The union's

approach would have led to arguably days of evidence. In fact prior to reaching their 2014 memorandum of agreement on the central-local split, after three days of failed mediation, these very parties had scheduled many days of hearings before the Board in what appeared to be pursuant to such an approach. See para 19 of *Durham District School Board, supra,* already quoted at para 3, *supra*. This would make it extremely difficult, if not impossible, for the Board to meet the legislated direction for expedition. Again no actual bargaining can commence (and is delayed) until the determination of the central-local split (as is the case here). That in my view is one of the reasons the Board is called on to conclude only the factors "could" have an impact – not that they will with any degree of certainty. It also militates against the approach of the OSSTF.

IV. The Specific Proposals or Matters in these Applications

42. With these general principles as discussed above, I will now deal with the specific "matters" (to use the words of section 28) that the parties are disputing. I do not purport to deal with every single argument made to me – not only were they numerous but section 28(9) requires the Board to make a decision "in an expeditious manner" (in fact the Crown and the employers argued that I issue a "bottom line" decision with reasons to follow. The union objected.) I have dealt only with those arguments I find relevant or material to the conclusions I have reached.

(a) Teacher Bargaining

(i) Class size provisions as distinct from average class sizes as governed by regulation.

43. These range from guaranteed staffing, class size caps, flex factor, class size guidelines, pupil teacher contacts, pupil teacher ratio, class size limits, class size maximums, maximum teacher workload and class size divisors – all of which the Crown and the employers say should be bargained centrally.

44. OSSTF argues that these are "allocation" issues not "expenditure" issues. Even if an arguably accurate characterization, for the reasons outlined above I find this neither salient nor helpful for the purposes of a section 28 determination. There was no dispute that these matters will relate to individual class size, whether differentiated by subject matter, or geographic criteria (rural vs. urban school, suburban vs. inner city school) or any other criteria, recognizing that any school

board could still have to comply with average class size as provided by the regulation. All students must be educated and placed in a class (a local school board cannot turn them away or compel them to attend a school of another school board). As a result, to the extent an individual class size maximum is locally negotiated that is lower than the average class size and there are more students than individual class size locally negotiated can accommodate, it inevitably means additional teachers will be required. It is indisputable that the hiring of additional teachers has an impact on the expenditures of local school boards. Even one teacher (and there could be more depending on the scope and breadth of individual class size restrictions negotiated) involves minimally an additional approximately $80,000 - $100,000 annual expense (that is likely low as it does not factor in all benefit costs). I cannot characterize this as not significant particularly if it occurs in many school boards (and section 28(8).2 explicitly says expenditures "for one or more school boards"). OSSTF called this speculative – but as I have elaborated above that is inevitably the "nature of the beast" here.

45. Secondly, in my view, it is inconceivable either how many teachers there are or where they are (regardless of the nature of the different form of proposals – class size caps or pupil teacher ratios etc.) does not have a significant impact on the implementation of provincial educational policy – whether it be policies about student success, student engagement or student safety. Leaving aside my earlier conclusion that the statute does not require specific policies as OSSTF urged, OPSBA and CTA pointed me to the Ontario School Kindergarten to Grade 12 Policy and Program Requirements, itself a 107 page document, which deals with many policies, *inter alia*, the Learning Environment (including such things as Bullying Prevention and Interventions), Learning Programs, and Supporting Diverse Learners (including many policies dealing with Students Deemed to be at Risk) – all of which seem to me to be potentially significantly impacted by provisions dealing with how teachers are to be deployed, or limits on what they are required to do (even if not as arguably strongly as the second factor – expenditures). Again to the extent this is speculative, that is the nature of this exercise.

46. Moreover it is not hard to imagine that this is likely to be an "issue" that could arise in many local school board negotiations (in fact it is hard to imagine otherwise) so it is a "common issue" more appropriately addressed in central bargaining than local bargaining within the meaning of section 28(8).3, the third or common issues factor.

47. Accordingly I determine these matters should be dealt with in central bargaining.

(ii) The Other Matters:

(a) Compensation as it related to new forms of compensation

(b) Sick leave strictly as it relates to issues other than those covered by Article c.9 and Appendix B – Abilities Form of the Collective Agreement (the scope of this issue would include but not limited to timing and manner of provision of medical documents and payment for medical documents for short term disability leave.

(c) Short term paid leaves.

(d) Additional professional assignments ("APA's") (and supervision) and unassigned teacher time.

(e) E-learning except issues relating to mandatory e-learning credits.

48. Again, these are all issues that OSSTF wished to have bargained locally (and their description here is essentially in the words of OSSTF) but the Crown and the employers asserted should be bargained provincially. I have determined that all should be bargained centrally. I have grouped them together, not only because of the statutory direction for expedition and to make this already too long decision shorter and easier to read, but because the basis for my reasoning is essentially the same – covering the same themes and factors as set out above and in section 28(8).

49. It is difficult to see for example how new forms of compensation could not have a significant impact on expenditures. OSSTF says that this would only relate to allowances or premiums for Positions of Added Responsibility (e.g. Department Heads, Curriculum Leaders, Coordinators, etc.) or additional qualifications (e.g. Post Graduate Masters or PhD degrees). Of course that is not how narrowly the matter is described by the OSSTF in the application. Notwithstanding the

assurances made in oral argument, OSSTF is not legally bound to restrict its proposals to just these examples of "new forms of compensation." OSSTF says these allowances, where they exist, are "annually less than $6,000 per person". Again leaving aside that in no way legally limits OSSTF in the proposals it will actually make (and again no formal proposals have yet been exchanged), I still believe that likely to be a "significant impact" for the very same reasons explained by the Board in *CUPE, supra*, at paragraphs 64-68 (already quoted at para 11, *supra*.)

50. Equally there is no dispute that compensation has already agreed to be a matter for actual bargaining. For the same reasons, explained in the same portion of *CUPE, supra* (in particular in para 67), it appears illogical and counterintuitive to bifurcate a monetary item like this. In a SBCBA regime that deliberately introduced a central tier of bargaining involving the Crown who could impact (if not control) funding, this seems to invite central bargaining to only create monetary minimums or floors, that can then be sought to be surpassed in local bargaining where the Crown is not present. In the words of *CUPE, supra,* that "simply makes no sense".

51. Equally it seems to me that this raises common issues, *the third factor*. The union sought to distinguish common issues from local issues – again because there were so many local school boards; so many possibilities; so many possible different outcomes (whether distinguishing by eligibility, amounts, or purpose), this could not be "common" within the meaning of the statute. I disagree. I see no reason to interpret "common" to be the equivalent of "identical". OSSTF referred me to various dictionary definitions of common. They do not assist it. Simply by way of example, the Cambridge Dictionary definition I was referred to was "the same in a lot of places or for a lot of people". Again no formal proposals have been exchanged and I do not know exactly what the union will propose, but if it will seek, using only its example, Department Head premiums of approximately the same amount wherever they do not exist (or to increase them to the approximately the same amount) that seems to me to be more than sufficiently common to satisfy *the third factor* more appropriately dealt with in central as opposed to local bargaining.

52. Perhaps if the union had earlier discussed what it wished to actually propose and obtained some agreement of the parties, or more particularly refined or confined the nature of the matter it wished to be bargained locally, my application of the factors in section 28(8) might

have been different – but that is not what has happened here. The matter is very generally described in an unlimited way and that obviously shapes the conclusions I made.

53. The very same can be said of virtually all of these matters. For example, teachers are required to provide so much time at school in a day. Some of it is with students, some of it is unassigned. To some extent schools are permitted under current arrangements to use or assign some of that unassigned time (whether it be to perform some form of yard, hall or lunch duties). No matter what somebody has to perform those duties. If the amount of time of the teacher to perform these duties is reduced or constrained, somebody has to replace the now absent teacher, somebody has to be the hall monitor, provide yard or lunch room supervision. To the extent less unassigned teachers' time (those teachers are already in the school and therefore already being paid and already within the expenditures of the school board) is permitted to be used for those needs, additional people whether it be occasional teachers or non professional staff (lunch room supervisors, etc.) will need to be hired or paid to do it. To the extent the union negotiates to impose further limitations on the use of such unassigned time (which it is perfectly entitled to do), and therefore other resources have to be used (and paid for) to perform duties previously done by teachers in their unassigned time, how can anyone reasonably say that will not have a significant impact on school board expenditures? The employers pointed to what is spent on occasional teachers annually. By any measure that is significant. It is difficult to believe that a reduction of the availability of teachers whether in restrictions on APA's or unassigned time could not have a serious impact on school board expenditures.

54. Moreover the province has policies with respect to student safety. It is not difficult to see how changes in the use of teachers for some of these items could have a significant impact on the implementation of provincial educational policy (without determining whether that would be a good or bad impact, without determining who could be more effective performing these duties, teachers or non professional staff, without determining which is a more cost effective method, or whether that is the sole or best way of gauging the public interest in how these tasks are performed).

55. Equally these are issues that arise in every collective agreement, so it is hard to see how it is not a common issue more appropriately dealt with at the provincial table.

(b) Education Worker Bargaining

(i) Generally

56. Here the union, similarly sought to have:

> (a) working conditions except as it relates to the staffing generator for Early Childhood Educators ("ECEs")
>
> (b) compensation strictly as it relates to the potential creation of new forms of compensation
>
> (c) sick leave, strictly as it relates to issues other than those covered under Article c.12 of the Collective Agreements and Appendix B – Abilities Form. The scope of the issues the union wished to be subject to local bargaining would include, **but not be limited to**, timing and manner of provision of medical documents and payment for medical documents for short-term disability leave.
>
> (d) short term paid leave
>
> (e) Designated Early Childhood Educator ("DECE") professional judgment and reporting (in the context of student evaluation)
>
> (f) preparation time for ECEs
>
> (g) Long Term disability matters excluding the issue of the premium payer

all bargained locally. The Crown and the employers opposed this and asserted that these matters should be bargained centrally.

57. For essentially the same reasons (and the same analysis) as outlined above, I have determined that these matters should be bargained centrally. As above, in my view, it is self evident that many of these matters cannot help but have a significant impact on school board expenditures. Even with respect to those issues that the OSSTF says now are limited to relatively minor matters that will not have significant impact on expenditures, like the timing and manner of

provision of medical documents or payment for medical documents, not only is the OSSTF not legally bound to so confine its actual proposals to be tabled later, but it carefully says the matters are "not limited to" these union proposals or "minor matters".

58. Many, if not all, school board collective agreements have these provisions and it is hard to see how or why they could not be common issues more appropriately dealt with at central bargaining, particularly when so many of them seek to bifurcate issues already agreed to be subject matter of central bargaining (i.e. compensation; benefits; LTD administration; sick leave as it relates to those matters in Article c.9 and Appendix B; occasional teachers and PA days and occasional teacher training and PA days; Workplace Safety and Insurance benefits top up benefits; unpaid leave days and provincial election release days (method of tracking); job security).

59. Simply by way of example, it is hard to imagine that working conditions which is so general as to include almost anything ranging from hours in a work week to staffing levels not having a significant impact on expenditures of school boards. If this is too speculative as the union complains (and leaving aside all my previous comments about speculative being the nature of the beast), the union could have either discussed and possibly agreed or at least refined this sweeping matter for local bargaining so it would not so readily trigger the second (expenditure) factor. Moreover even if the matter did not clearly or directly affect the implementation of provincial educational policy, it is a matter that every collective agreement either does or will address, so again it is virtually impossible to say, particularly when so broadly described, it is not a common issue triggering the third factor.

60. Again by way of example, the same could be said for ECE prep time – which would require ECE's to be relieved from otherwise working (even if not classroom) time to receive such prep time. For sure the current Technical Paper for Education Funding, although providing funding for preparation time for teachers in the Pupil Foundation grant, does not do so for ECEs – the money would have to be found somewhere. The OSSTF said I could not really say that this was "significant" without data about how many actual people it affected. Some school boards might not have many ECE's at all. However again this is a bit of a "chicken and egg" argument, because no formal proposals have yet been made so the extent of this matter is at best difficult to gauge – which again the OSSTF argues means that since the "onus" must be on those asserting the matter be central, I must say it

is subject of local bargaining. Without repeating everything I have already said about applying onus in this way, this seems just too glib and superficial an analysis. In any event on this matter, the employers did say that the first factor was triggered, a significant impact on provincial educational policy and pointed me not only to section 264.1 of the *Education Act* about the relationship between teachers and DECE's and how they were to work collaboratively as a team but also the Kindergarten Program and various portions such as thinking about resources, supporting transitions, the roles of "educator" (which includes both the teacher and the DECE) and the expectation charts – the implementation all of which could be significantly impacted by how the prep time was implemented – whether it would be during class time, whether the DECE would be replaced, how and by whom etc.

61. Essentially reviewing every argument on every matter in great detail, which would fundamentally only repeat the same arguments as already outlined in this decision, merely changing one issue for another or one factor for another, would come to the same end but add greater length to this already too long decision. More importantly it would take even more time and only further delay bargaining which cannot commence until this decision is released which the parties await. It seems to be the fundamental theme of the union's position that these matters would all be "better" dealt with locally than centrally. That is a largely a highly subjective assessment, largely shaped by the self interested position one starts from (or perhaps wishes to end at), and it is difficult to see how the Board could fairly assess such characterization. In any event, it is not what I consider to be the appropriate (or arguably achievable) purpose in a section 28(8) determination. I appreciate that section 28(8)(4) allows the Board to consider other factors it considers "relevant" – but none of these matters have been made sufficiently concrete for me to yet consider them "relevant" within the meaning of section 28(8).

(ii) The One Exception – Staffing Committees

62. Here on this issue the parties have reversed their positions. The union wishes this matter to be bargained centrally and the Crown and the employers say it should be bargained locally. The irony that for this issue the parties virtually adopt the others' position on all other issues is not lost upon me. My conclusions outlined above about many of these arguments does not change merely because the opposite party is now advancing it – for example the argument that staffing committees are inherently local and better dealt with locally is no more compelling

because it now comes from the mouths of the Crown or the employers (as opposed to the OSSTF on other issues).

63. OSSTF says that staffing committees (which it seeks to have convened by local school boards to consistently communicate information and opportunities for discussion about *inter alia* staffing levels, redundancies, bumping, etc.) is more appropriately bargained centrally because it is so intimately related to job security already agreed by the parties to be a central issue (because it has a significant impact on expenditures and raises common issues). The employers and the Crown say there is no evidence that staffing committees will involve any significant impact on expenditures or the implementation of provincial education policy. They say that it is not a common issue because there is no education worker staffing committee provision presently existing in any OSSTF education worker collective agreement. In light of what I have previously elaborated about pre-SBCBA bargaining, the latter point is not a particularly compelling argument. A matter can become a matter for central bargaining for the first time simply because a party wishes it to be and the other parties either agree or the Board orders it. The fact that the union now proposes the creation of staffing committees on a consistent and provincial basis seems to strongly suggest that it is a common issue – otherwise the union's option is simply propose it at all local tables making it a sort of self fulfilling prophecy of a common issue. The employers' argument that treating this as a central bargaining item would give the union "the right to bargain centrally over any committee that can be thought of that related to a central matter" is also not compelling. No such other committees are before me in these applications. In any event, each round of central bargaining may be different. There is no requirement that something not previously dealt with centrally cannot be dealt with centrally in the next round (or vice versa). It depends on the parties' agreement (which may change over time depending on their assessment of whether treating it at a particular table was effective previously or not) or ultimately what the Board orders in the event a future section 28(8) application is made.

64. Ultimately not only do I consider this a common issue but it is as intertwined with job security as many of the other issues that the OSSTF wished to have bargained locally and the Crown and the employers said should be bargained centrally with issues already agreed to be bargained centrally. I direct this matter be dealt with at the central table.

V. Disposition and Concluding Observations

65. Accordingly I direct that all the matters in dispute (including staffing committees) be bargained centrally. I do not wish to be anything but optimistic about the parties' ability to successfully conclude collective agreements, nor do I wish to offer them any incentive not to do so, but section 28(5) clearly allows the parties to return to the Board if difficulties arise from the interpretation or application of this decision. Accordingly I remain seized.

"Bernard Fishbein"
for the Board