Chapter 12

A REPORT CARD FOR EDUCATIONAL COLLECTIVE BARGAINING

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Panelists: **Sara Slinn,** Osgoode Hall Law School, Toronto, ON

Hugh Finlayson, British Columbia Public School Employers' Association, Vancouver, BC

Earl Manners, Trillium Lakelands District School Board, Lindsay, ON

James Dorsey: I have the pleasure of moderating the panel this afternoon on crossroad questions in education. There's considerable turmoil in teacher-school board or teacher and province collective bargaining in various provinces across the country. We're not going to delve into the details of those, but we will attempt to have a look at the larger picture, sum up the trends that we see, and ask some relevant questions about making important policy decisions.

The panel is made up of Sara Slinn, Hugh Finlayson, and Earl Manners. Dr. Slinn is an Associate Professor at Osgoode Hall Law School, specializing in labour, employment, human rights, and the Charter. She's undertaken extensive research into teacher collective bargaining and has recently contributed to and co-edited *Dynamic Negotiations: Teacher Labour Relations in Canadian Elementary and Secondary Education.*[1]

Hugh Finlayson is a certified human resources professional and chief executive officer of the British Columbia Public School Employers' Association, which has the statutory authority to bargain on behalf of the 60 school boards in British Columbia with

[1]Sara Slinn & Arthur Sweetman (eds.), Dynamic Negotiations: Teacher Labour Relations in Canadian Elementary and Secondary Education (McGill-Queen's University Press 2012.)

the teachers' union and the various support unions in the province. Hugh has had extensive experience as the CEO and interim CEO of other multi-employer organizations in BC.

Earl Manners is an educator out of the classroom, who was an activist in the Ontario Secondary School Teachers Federation and then Provincial President in 1995. Those of you who are familiar with the Harris days remember Earl from the teacher protest in that era. He went on eventually to his current position as the human resource administrator with the Trillium Lakelands District School Board, and he is an active educator in the field of collective bargaining in education.

The idea for this session grew out of my personal experience of three or four years as the Provincial Class Size and Composition Arbitrator in British Columbia dealing with thousands of grievances out of all of the schools in the continuous reorganization of the schools each fall and, in February or so, in the secondary level. We had the circumstance in British Columbia where the question of class size and composition, a perennial issue in teacher collective bargaining, was stripped out of the collective agreement and made a matter of legislation. It eventually became a question of interpretation in grievance arbitration. I ended up being the arbitrator with these rights grievances, interpreting and applying the *School Act*. Candidly, I came up with the conclusion that it was really an interest arbitration solution rather than a rights arbitration solution. I am continually reflective about how bizarre all of this was. Can't we do any better than this? How did we get here? Where are we going from here? This is the genesis of some of the questions in today's program.

I invite my panelists to address some of these questions in opening statements to hopefully engage in a dialogue and certainly invite any questions that you have.

Earl Manners: I will begin with some general statements about the current situation and plan to end with thoughts about moving forward. I believe that we are at a crossroads after nine difficult years and not at a dead end.

We all recognize that unions, union rights, and collective bargaining legislation are under attack in almost every jurisdiction in North America and certainly in Canada. Ironically, in Ontario, while unions and bargaining rights are under attack, the teacher unions or education unions in Ontario have been prepared to ignore that very legislation that gives them some status in our province for the last nine years and enter into extralegal approaches

to collective bargaining involving the provincial government in addition to their direct employers—the school boards. The government initiated this extralegal process nine years ago. Both the unions and the school boards became involved as ruling partners on a voluntary basis. It ended up with two four-year agreements that each of the parties signed, agreed to, and participated in the development of. The government described themselves as facilitators, but they certainly had their own agenda as well in all of this. At the end of the day, the traditional parties to collective bargaining—the employer and the union—signed these deals and then they went forward.

In the latest round of collective bargaining, the government initiated this again except that they had on the table a series of significant amendments to some of the traditional aspects of the collective agreements related to sick leave, retirement, gratuities, and other benefits that the teachers had enjoyed over the years. The unions would not wish to be voluntary, willing participants in it. But, as time passed and the political process evolved, the government became very willing to meet with unions independently of the school boards and signed memoranda of understanding (MOU) directly with the union bypassing the employer entirely. There were a couple of unions that felt in the circumstances that they had no choice but to sign—that not to sign would cause a greater threat to them in the long run. What the government did was to take these MOUs signed directly with some of the unions and passed legislation to impose them on the unwilling education unions that did not participate in the process.

Since then, the government has met with the unwilling unions and with a new premier—same government, new premier, and new education minister—and found ways to entice the other unions to sign independent MOUs, bypassing the employers again. The goal, of course, is for the government, defenders of the public education system in Ontario, to control the outcomes. They saw political gain from this through longer collective agreements, fiscal certainty, peace and stability in generic terms, and, in the latest round certainly, the ongoing election support of the unions for their party in an upcoming election.

At the same time, governments now are demanding that school boards attach or ratify these independently negotiated MOUs to the local collective agreements; they do not want to introduce further legislation or regulations to do so. I think that passing legislation and regulations is one thing and decisions about the future of

that legislation and those regulations can be decided unilaterally. If something is appended or ratified in full or part of the local collective agreement, it requires the joint agreement for it to come out, and it has some permanence. Even though these MOUs are supposed to only apply during the fiscal situation that the government currently finds itself in, they will have permanence if attached to a collective agreement.

School board associations are quite unhappy with this development. Obviously, they've been bypassed. But in Ontario, school boards and their school board association had been fairly passive in their response—some would say even acquiescent. But, there is a growing frustration with the situation that the school boards find themselves in because implementation committees are making ongoing decisions about the interpretation of these MOUs that are primarily directed by the unions. Of course, any interpretations usually have a negative impact on traditional management-labour relations objectives on everything from attendance support to sick leave to the application of benefits.

So, the traditional labour relations checks and balances that would be built into a collective bargaining system where both parties are jointly responsible for that collective agreement has fallen into disarray. There is a crisis, I think, with the unintended consequence of a weakened employer in the mix, an empowered and somewhat arrogant union or unions, and a government that is looking at political expediency as the primary objective in these uncertain times.

As such, after nine years of this extralegal process, it has devolved over time rather than evolved. There is a crisis in the structure and function of collective bargaining in the province. There is a recognition that the structure has to be changed; there have to be legislative changes. There will be an ongoing discussion about that. It raises the question about the role of school boards in the future of collective bargaining regime, the role of the government, the role of unions, and how we move forward, especially since the government has introduced a number of items into these MOUs that could have permanence, despite the fiscal situation having perhaps resolved itself by the next round of bargaining.

So that is a brief description of the current situation. Ben Levin, who was the Deputy Minister of Education during a good portion of this time in the McGuinty Liberal Government, wrote a book, *How to Change 5,000 Schools*, which is really self-serving, describing how great a job he and the liberals did in their education

agenda. Quite frankly, I don't think too many people could take issue with their education agenda. But he talked about two important concepts from a collective bargaining perspective: The deprivatization of teaching, a concept that has union appeal, as well as appeal from an education inquiry perspective. He talked about alignment of goals, procedures, and practices from the province through school boards right through to school improvement plans in a collaborative way. He talked about, in that regard, when you think about—and I agree with both of these concepts—that we should be talking about a collaborative, de-privatized teaching model, where professional development is referred to as a collective good and its value determined by the impact on the quality of instruction, that calculating minutes is wrongheaded. Also, according to Ben Levin, the claim that professional development ought to be the purview of each individual teacher flies in the face of effective organizational learning. All of the above statements are, I think, good statements. When it comes to alignment, he talks about the responsibility for good labour relations resting with management. And, I can't disagree with that either. But, when you look at what the liberals were involved in—in terms of their negotiating objectives over the last nine years—there is a very distinct lack of alignment between their actions on the labour relations front and their educational pursuits. There's been more minute-counting, more—not less—privatized teaching model, and certainly the exclusion of the school boards in the last round of bargaining has contributed to a lack of alignment between the province unions and school boards.

James Dorsey: We are told that none of those are problems now in British Columbia! We have a new government, a new Premier, and we're going to have a 10-year collective agreement that's going to give us stability in education. We'll have better graduation rates and improved outcomes in our system for the bright future. The person who is going to negotiate that collection agreement is Hugh.

Hugh Finlayson: The story of collective bargaining between teachers and their employers has followed many paths, and it continues to have many twists and turns. The desired destination remains unclear. The early part of the new century was marked by turbulent labour relations. The re-introduction of education as an essential service (2001), legislatively imposed changes to the scope of bargaining, strikes, and back to work legislation (2002), an illegal strike and legislation (2005), and a successful British

Columbia Teachers' Federation (BCTF) constitutional challenge of the 2002 legislation (2011) framed the times.

But there are also hopeful signs, including negotiated agreements in 1996, 2006, and 2012, and an agreement on an approach to bargaining (2012). The working relationship between the parties has become increasingly constructive. The May 2013 election and the events of the summer set the stage for what could represent profound change to the labour relations practices, processes, and structures that have regulated the sector for the past 20 years. I will come to that later.

Let me begin my detailed remarks by situating myself in context for you. I am the chief executive officer of the British Columbia Public School Employers' Association (BCPSEA), which is a human resource service agency and accredited bargaining agent for BC's 60 public boards of education. Today, I want to take a look at what has happened in BC and ask if the lessons we have learned or could have learned create a path forward.

Collective bargaining between public school teachers and their employers has existed since the late 1980s. In the period between 1987 and 1993, agreements were negotiated under what was known as local bargaining—bargaining occurred between individual boards of education and locally certified teachers' unions. During the local bargaining period, there were 15 strikes and 1 lockout (round 1), 17 strikes (round 2), and 16 strikes and 2 lockouts (round 3). School boards and teacher locals held their respective bargaining certificates and, as a result, bargaining authority.

Local bargaining led to a call for change in some circles. That call set the stage for a new provincial model. The current bargaining model dates back to the passage of the *Public Sector Employers Act* (PSEA) and the *Public Education Labour Relations Act* (PELRA) in 1993. These acts created a form of provincial bargaining, with the BCTF as the certified bargaining agent for all public school teachers and the BCPSEA as the accredited bargaining agent for the province's 75 school boards. (In 1996, after school district amalgamation, the number of boards was reduced to 60).

In Canada, the BC model is unique. In the country, it is more common to have school boards bargain with their local teacher unions, with school trustee associations playing a voluntary coordination role and with the bargaining authority resting with individual boards.

The BCPSEA is not a school board's association. It's a co-governed, multi-employer association with both school board or

employer representatives and government representatives on its board. The model is based on the notion that in order to effectively and efficiently manage human resources in the sector, a balance must be struck—a balance between the interests of school boards as employers with the interests of government as the policy maker.

Policy in education, of course, has financial components and educational program/system components that, taken together, frame the public education endeavour. The employer association is responsible for determining the employment and bargaining implications of a given policy.

It's safe to say that since the advent of the employer association model in the mid-90s, what started out as a government emphasis primarily on controlling compensation costs has evolved to one focused on having influence, if not control, over education outcomes, program delivery, and student achievement initiatives. This has drawn government directly into collective bargaining. The original notion of balancing employer-government interests has eroded. The struggle recently for the employers' association is to obtain sufficient clarity on the specifics of a given education policy to properly inform bargaining. Today, education policies are more general and aspirational than specific and detailed. The central issue for employers will be the role of government. Put simply, if government is the funder and, as required in bargaining disputes, the legislator, will they move to be the bargainer as well? I will return to this question in a moment.

Let me start with the policy-bargaining change at the beginning of the new century. Decisions about school organization are made based on a complicated interplay of government policy imperatives, as well as economic, social, and human resource factors. As a result, class size is seen as a condition of work, a condition of learning, and a condition of spending, necessitating a reconciliation of the three. With the election of a new government in 2001, two broad schools of thought crystallized on the question of whether school organization matters should be determined by legislation or should be items for bargaining. The condition of work was not considered or, if considered, was not dealt with directly in the policy change.

The struggle to reconcile these priorities and factors has coloured labour relations in BC. School organization matters became the subject of legislation, litigation (including the thousands of

grievances Jim referenced), and consequent arbitration proceedings in the new context.

In BC, the 2001 provincial election provided for the formulation of new public policy approaches for K-12 public education focused on what the government characterized as program flexibility and choice. Initial education legislation would address the issue directly.

The justification for limiting the scope of bargaining through the introduction of the *Public Education Flexibility and Choice Act* in January 2002 was put this way:

> We are saying that class size protections are so important that they should be a matter of public policy. They should not be left to be a bargaining chip at the bargaining table, where so few parties have a say in how class protections will look. … We should allow the voices of parents, school trustees, administrators, and, of course, teachers into determining what is best for the children in our classes and in our schools. … They need to make those decisions based on the students themselves. They need to look at each individual student and say, "What does this child need?" because that's what providing a good education is all about. …[2]

What the experiences of the past 10 years have shown is that even if there are limits on what can be bargained, bargaining in some form continues. Disputes arising out of these matters have to be resolved. That resolution mechanism is the traditional grievance-arbitration processes, practices, and systems.

What is required is an approach by policy makers that respects the right to bargain collectively and the consequent dispute resolution processes and good faith efforts to reconcile the learning, working, and spending conditions resident in school organization matters, such as class size.

The BCTF strongly opposed government's approach to limit bargaining. In May 2002, the BCTF filed a petition in the British Columbia Supreme Court alleging that passage of Bill 27, the *Education Services Collective Agreement Act* and Bill 28, the *Public Education Flexibility and Choice Act* (which transferred school organization issues from collective agreement to legislation) violated teachers' constitutional rights.

The case was held over, pending an action by health unions against Bill 29, the *Health and Social Services Delivery Implementation Act*. What became known as the *Health Services* case proceeded

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[2]2001 Legislative Session: 2nd Session, 37th Parliament, HANSARD Vol. 2, No. 30 Jan. 27, 2001.

through the BC Supreme Court, the Court of Appeal and finally, in 2007, to the Supreme Court of Canada.

At the latter level, the country's highest court found that collective bargaining enjoyed a measure of protection under the *Canadian Charter of Rights and Freedoms* (Charter) and that government had erred in failing to consult with the health care unions before introducing new legislation.[3] The BCTF case was not heard in the BC Supreme Court until November 2010. The Court's decision was released in April 2011 and adopted the precedent set by the Supreme Court of Canada in the *Health Services* case by ruling that the freedom of association protected by the Charter included the right to the "process" of collective bargaining.

The decision that certain provisions were unconstitutional was based on the Court's finding that the BCTF was not consulted properly—the "how"—before the legislation was enacted, as opposed to the "what"—the details of the policy approach enshrined in legislation.

The Court observed that if the government prohibited collective bargaining through legislation, but otherwise in the process of implementing the legislation, replaced collective bargaining with an equivalent process of good faith consultation or negotiation, then the legislation might not be an interference with freedom of association. However, if in the process of legislating limits to collective bargaining, the government did not otherwise allow employees to influence the legislative process or outcome in association, then the interference with s.2 (d) rights will be considered substantial.[4]

Altogether, the Court found that only the "working conditions provisions" breached the Charter guarantee of freedom of association. And, although the Court declared those provisions to be invalid, the declaration of invalidity was suspended for a year to afford government time to address the decision's implications.

In early May 2011, the provincial government decided not to appeal the BC Supreme Court ruling. Government concluded that the Court accepted the policy objectives underlying Bills 27 and 28, and that the ruling of unconstitutionality was based on the process it used to achieve those objectives. Government representatives took the position it would pursue these policy objectives

[3] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469, [348] and [375], 88 and 95.

[4] *British Columbia Teachers' Federation v. British Columbia,* 2011 BCSC 469, [339], 297.

through a process consistent with the current case law requiring good faith consultation with the BCTF.

The policy objectives accepted by the Court were described as follows: "to provide greater flexibility to school boards to manage class size and composition issues, to respond to choices of parents and students, and to make their own decisions on better use of facilities and human resources."

The government initiated contact with the BCTF to discuss a consultation and negotiation process in relation to these policy objectives. The consultation did not yield an agreement. On February 28, 2012, the *Education Improvement Act* (Bill 22) was introduced. Receiving Royal Assent on March 15, 2012, the *Education Improvement Act* imposed a "cooling-off" period to end the strike by public school teachers. It also provided for a mediator to facilitate bargaining within defined terms of reference. The Act amended the *Public Education Labour Relations Act* and the *School Act* on a number of matters, including class size limits, and a new Learning Improvement Fund to resolve the issues arising from the April 2011 BC Supreme Court decision that found certain aspects of Bill 28, *Public Education Flexibility and Choice Act* were unconstitutional.

The BCTF rejected the notion that the government properly met its legal obligations and proceeded with its case before the BC Supreme Court. The case was heard in September/October 2013. The events, actions, and reactions have not brought us closer to reconciling the priorities and factors evident in public education workplaces—government policy imperatives and economic, social, and human resource factors.

It has now been over 10 years since school organization matters were removed from the scope of bargaining. What followed were years of litigation, workplace grievances, and arbitration proceedings until in 2013 class size was returned to the scope of bargaining.

Collective bargaining research supports the view that if a matter is sufficiently central to either party, it will be the subject of bargaining, regardless of the statutory restrictions, and often at some considerable damage to the relationship.[5] Where an issue assumes significant importance, the costs of suppressing that issue can be enormous. Rankling problems in the collective bargaining rela-

[5]Kenneth P. Swan, *Safety Belt or Strait-Jacket? Restrictions on the Scope of Public Sector Collective Bargaining,* in ESSAYS IN COLLECTIVE BARGAINING AND INDUSTRIAL DEMOCRACY: PAPERS PRESENTED AT THE CONFERENCE ON COLLECTIVE BARGAINING 21–22 (School of Management, University of Lethbridge, September 9–11, 1982).

tionship, costly legal disputes, and the necessity for side deals and problems with their enforcement are likely to cost much more than would have the costs of maintaining an expanded scope of bargaining.[6]

Also, excluding some issues from the scope of bargaining may actually enhance a union's bargaining power on that issue, if the union feels strongly enough about it to press its concerns to the point of illegality. Given the halo effect often given to acts of civil disobedience, the taint of illegality may mean that some statutory exclusions from bargaining are counterproductive once the issue has become sufficiently important.[7]

When some issues are excluded from bargaining, other bargained issues may be affected. By excluding class size from the scope of bargaining, school district administrators would have the ability to increase class size. However, in doing so, they may find that a higher wage is required to recruit and retain new staff.[8] Administrators are challenged to use their discretion in a manner that supports the education endeavor and those who are central to it.

The issues of bargaining scope, structure, and authority have been much discussed, but never adequately resolved or reconciled to the satisfaction of government, trustees, teachers, unions, employers, and others with an interest in public education. The year 2013 ushers in the next attempt at solving the undefined for a purpose that is unclear. The new education Minister is charged to:

(1) successfully achieve 10 years of educational stability by overseeing negotiations on a long-term agreement with the BC Teachers' Federation;
(2) review the mandate and structure of the BCPSEA and provide options for reform; and
(3) continue the educational reforms contained in the BC Education Plan, including providing teachers with performance assessments, and support and curriculum enhancements.

Employer bargaining authority has taken two forms since the advent of teacher-public school employer-collective bargaining in

[6] *Ibid.*, p. 38.
[7] *Ibid.*
[8] Stephen A. Woodbury, *The Scope of Bargaining and Bargaining Outcomes in the Public Schools*, 38(2) Indus. Lab. Rel. Rev. 196 (Jan. 1985).

1987. During the local bargaining period (1987–1994), bargaining authority rested with each school board. In the early 1990s, bargaining authority moved to BCPSEA when the association became the accredited bargaining agent.

What is the role of the school board and who is the employer? What is the role of government as the policy maker? And what is the role of collective bargaining? And, by extension, how are collective agreement disputes managed? The policy makers over time have never tackled these issues as an interrelated, interconnected set of elements.

In 2013, as we bargain, the central issues remain the same and continue to add a level of complexity:

- Class size and the organization of schools: How are the notions of a condition of work, condition of learning, and condition of spending reconciled? In the event of disputes how are they resolved?
- Bargaining structure revisited, again: What is the problem we are trying to solve? Remember the admonition from John Anderson: "Unfortunately, although policy makers have legislated changes in collective bargaining structure, and labour relations practitioners are painfully aware of the implications of different bargaining structures, very little is actually known about the forces that influence the choice of alternative structures or about the consequences for the relative bargaining power of the parties, the level of industrial conflict, or the functioning of the bargaining process."[9]
- Bargaining authority: Who is responsible and accountable for what in terms of both process and outcome?

British Columbia is again at a crossroads with the re-election of the new government. Much needs to be learned from the public education labour relations journey so far. As we reflect on the lessons learned and begin to chart the path forward, we need to have a healthy dose of coherence: purpose, policy, structure, and authority coherence. With that focus, the future looks bright. Without it, this is just another colorful but not purposeful chapter in our history.

James Dorsey: One of the fascinating things about education, public education, and collective bargaining across the country is

[9]JOHN C. ANDERSON, UNION-MANAGEMENT RELATIONS IN CANADA, 209 (1989).

that most people stand up and say how valued it is, how important it is, how integral it is to the fabric of our society. Most of the people who were engaged in that discussion have very little reflective dialog about making policy and who should make the policy. Instead, we have a lot of *ad hoc* interventionist pieces of legislation that are supposed to set policy. You have everybody else being accountable. Bad legislation comes sporadically, and it sometimes has quite unintended consequences.

Sara Slinn: A recurring challenge in the K-12 public education sector is the problem with intersection and overlap of what is within the scope of collective bargaining and what is within the scope of government policy making. There is a longstanding, fundamental disagreement among interested parties and government about whether certain matters are appropriate subjects of collective bargaining that can be enshrined into enforceable collective agreements or whether these are properly matters of public policy that remain within the government's discretion. Primary among these topics are matters involving the working and learning conditions. In British Columbia, this has most notably involved questions of class size and composition.

Teachers' unions have been determined to retain these matters within the scope of bargaining. While recognizing that these are indeed teachers' working conditions, other stakeholders argue that the bargaining table is not the appropriate forum for deciding these issues as they have effects beyond the collective agreement. They contend that government is accountable to the public, and it is within government's electoral mandate to decide these matters and reconcile these interests as it judges appropriate. So, within this region of overlapping interests and within the traditionally bargained realm, government's approach to policy making often has been to directly intervene when it finds that bargaining outcomes don't produce what it considers to be desirable outcomes or don't appear to be moving in an acceptable direction. Governments have, at times, responded by statutorily removing those matters from the scope of bargaining or legislating the outcome with an imposed collective agreement. Back-to-work legislation—substituting interest arbitration for bargaining or work stoppages—is another commonly employed government intervention.

As previous speakers have mentioned, we do now have this complicating factor of the Charter Freedom of Association protection of collective bargaining which, to a degree that is not yet clear, has

limited governments' freedom to simply remove matters from bargaining.[10] Despite this Charter limitation, governments continue to use legislation to end free collective bargaining—imposing back-to-work legislation, or directly or indirectly imposing collective agreement outcomes—as was recently the case with Ontario's Bill 115, *Putting Students First Act,* 2012.[11]

In recent years, we've also seen governments of two provinces with very different teacher collective-bargaining structures experimenting with non-bargaining policy forums or nonstatutory changes to the structure of bargaining to address these contentious overlap issues.

The first was British Columbia, which employs a province-wide teacher bargaining structure involving negotiations between a provincial employer agent (the BCPSEA) and the provincial teachers' union (the BCTF). The government introduced learning roundtables and annual teachers' conferences. These followed the recommendations of a Commissioner, who had reviewed the province's teacher bargaining structure. Commissioner Wright had recommended against returning working and learning conditions matters to the bargaining table, instead, proposing that a separate policy forum be developed that would operate outside of collective bargaining, but parallel it with the object of achieving cost-effective approaches to working and learning conditions.[12]

The roundtable was to be a permanent forum for stakeholders, including representatives of the BCTF, the Confederation of Parent Advisory Councils, School Trustees' Association, School Superintendents Association, and Principals and Vice Principals Association to discuss class size, class composition, and related issues in a non-bargaining, non-binding forum. The annual teacher's conference would allow teachers and other individuals to communicate directly with government on policy issues. However, these initiatives were unsuccessful. Few meetings were held, and the BCTF soon opted not to participate in the learning roundtable, regarding it as an ineffective forum.

Ontario has also experimented with nonstatutory approaches. It attempted to informally centralize the bargaining structure by

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[10]The January 2014 decision in *British Columbia Teachers' Federation v British Columbia*, 2014 BCBS 121, has subsequently provided some guidance in this area.

[11]2012, S.O. 2012 c.11.

[12]Don Wright, *Voice Accountability and Dialogue: Recommendations for an Improved Collective Bargaining System for Teacher Contract in British Columbia*, Report of the Commission to Review Teacher Collective Bargaining, D. Wright, Commissioner, Victoria, BC, Ministry of Skills Development and Labour, at 45 (2004).

introducing provincial discussion tables (PDTs) in the mid-2000s. The purpose of the PDT was to obtain province-wide frameworks to guide the outcomes of local bargaining. Unlike in BC, Ontario legislation provides for local bargaining at the school district level. The Ontario bargaining structure is further complicated by the existence of multiple teacher bargaining units and agents in each district. PDTs operated reasonably successfully over bargaining rounds in which significant financial incentives and penalties were used to encourage settlement of framework agreements and subsequent local agreements conforming to the framework. However, in the 2010–2012 round of negotiations, for which financial incentives were not available, the PDT discussion broke down. This culminated in the government passing Bill 115, *Putting Students First Act,* which specified the content of collective agreements in K-12 education bargaining units throughout the province. Bill 15 is currently subject to a Charter challenge claiming that it violated the Charter freedom of association protection of collective bargaining

Direct government intervention in teacher bargaining may allow government to realize its objectives of labour peace, desired terms and conditions, and policy goals. However, such intervention destabilizes future bargaining rounds. In such cases, the union generally prioritizes returning the matters and concessions to the bargaining table, sometimes as a pre-condition to bargaining. This is a tremendous impediment to negotiation. Direct government intervention, therefore, hinders the development of a mature bargaining relationship between the bargaining parties and encourages parties to position themselves for intervention, rather than settlement. It also obscures the need for a workable dispute resolution process in the bargaining structure itself.

Nonstatutory government intervention also bypasses the legal and legitimate employer bargaining agent. Circumventing bargaining agents does not foster constructive, mature bargaining relationships. Instead, it may produce protracted, expensive litigation, whether that be thousands of grievances to be arbitrated or a lengthy Charter litigation.

Furthermore, if nonstatutory initiatives rely on financial incentives to purchase agreement and cooperation of the parties while sidestepping statutory bargaining agents, these structures are not likely to be viable in the long term. The recent Ontario experience is instructive about what happens when the money runs out. When financial incentives were no longer available, the forums

quickly collapsed, and the government reverted to coercive, unilateral, statutory intervention to realize its policy agenda, direct legislative intervention that has produced a great deal of unrest and litigation.

Fundamentally, labour conflict can't simply be extinguished. Instead, researchers find that suppressing one form of conflict causes it to reappear in other forms.[13] This concept has been captured well by describing it as akin to squeezing a balloon: suppressing conflict in one place will cause it to appear in another.[14] This diverted conflict may be a subtler, more corrosive type of conflict, perhaps resulting in more grievances and more arbitration.

In the case of BC government intervention to remove working and learning conditions from the scope of bargaining, this produced thousands of grievances. These are best regarded as a protest or pressure strategy by the teachers' union. These grievance arbitrations are probably most accurately viewed as interest rather than rights arbitration arising from a fundamental failure to bargain.

To conclude, in K-12 education, government policy making is quite uncomfortably intertwined with collective bargaining and interest arbitration. Very few provinces have developed a satisfactory balance in pursuing education policies that are actually in harmony with a constructive collective bargaining system.

James Dorsey: In British Columbia, we have an increasing percentage of children being enrolled in education institutions outside the public sector. Parents and others are making decisions about the quality of education their children will get in the public school system.

One of the things I experienced through all those grievance arbitrations—that were managed by unions in terms of selecting the cases they brought forward—was that there were some absolutely horrendous classroom circumstances with the mixture of students in the classes, their abilities, their competencies, their backgrounds, their needs, and so on. I heard testimony from a

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[13] *See, e.g.,* Robert Hebdon, *Toward a Theory of Workplace Conflict: the Case of US Municipal Bargaining,* 14 ADV. INDUS. & LAB. REL. 33 (2005); discussion in John Godard, *What Has Happened to Strikes?* 49 BRIT. J. INDUS. REL. 282, 288–89 (2011).

[14] D. Sapsford & P. Turnbull, *Strikes and Industrial Conflict in Britain's Docks: Balloons or Icebergs?* 59 OXFORD BULL. ECON. & STAT. 249 (1994). Godard notes that this analogy implies that the overall level of conflict remains the same, although manifests in different forms. However, Godard contends that, at least in the context of strike conflict, overall conflict levels may be lower if the alternative forms of conflict employed by workers are not as effective or are more likely to result in employer retaliation. Godard, *supra,* at 300.

wide-ranging, very dedicated, enthusiastic group of teachers whom I would want to teach my child. We have to ask what about the kids and what about education outcomes? Does any of this structural stuff make any difference? How do we get to a place where teacher and employer collective bargaining is somehow in harmony with what we all, as parents and grandparents, want for our kids?

Earl Manners: Collective bargaining is by definition a set of rules governing two parties negotiating terms and conditions of employment, and there has to be a structure. It has to be embedded in law, and it has to be followed. Hopefully, there is a culture that develops with that legislation that all parties buy into and, therefore, there's a commitment to making it work. There may be no magic wand to make it work all the time. There may be disruptions and issues, but the structure in and of itself needs to be strong enough and the powers that be patient enough to allow the process to correct itself and work. If you look across this country you can see any number of different structures. If you try to do something in an extralegal way, you can only do it if you've got sums of money to entice people to make something work. But when the watering hole runs dry, we all start looking at each in a different light.

In any discussion about collective bargaining in the education sector, we have to look at the functional side of things as well. You can't just change the structure and say this is going to work. The more I hear about what the BC model is in law, this probably is in line with where I think Ontario should go. But, if you look at BC history, it does not invite people to come to the conclusion that it's a working model necessarily.

So, we also have to talk about functional responsibilities, and that's why I emphasized in my comments the importance of bargaining objectives. Management has not done a remarkably good job of negotiating. They have not put issues related to student achievement or student success on the bargaining table as legitimate bargaining items. They have operated in the union sandbox where class size, time, money, and resources are the panacea for all educational matters. I call it the TMR (Time, Money, Resources) approach to collective bargaining. There are ways to take what I referred to earlier as a de-privatized teaching model and put that model on the table as for collective bargaining purposes. That would form a counterbalance to all the union demands. You can, for example, still talk about how you're going to utilize things like

preparation time in a collegial way for the benefit of students, and, in the discussion of equals, hopefully come to some conclusion.

Structure matters in law, and it should be followed and respected by all the parties. Secondly, we have to do a better job of bargaining the details at the table if any process is going to work.

Hugh Finlayson: I agree. Framing it as first principles, how do you best determine terms and conditions of employment? There are really only three ways, and each way has the consequences that flow from the choices.

- first is by unilateral determination;
- second is by a process of collective bargaining, including the potential for strikes and lockouts;
- third is by binding third-party intervention—i.e., arbitration.

But where government grows tired of protracted bargaining, makes a political calculation on the advantages of a certain course of action, or is wary of arbitrators and arbitral doctrines, it can effectively result in the loss of the arbitration option—leaving only unilateral employer determination or periodically fixing working conditions.

As a practical matter, that leaves only the first option: unilateral determination, which is effectively what occurs where dispute-ending legislation goes so far as to prescribe the terms of the renewal collective agreement. Unilateral determination is not viable in the long run.

James Dorsey: So, should we be the education decision makers or policy decision makers?

Sara Slinn: Governments are reluctant to turn over these decisions to interest arbitrators because of concern that arbitrated decisions are generally more costly than negotiated or imposed outcomes.

James Dorsey: Let's assume for a moment that we were going to turn class size composition over to a third party to resolve that perpetually and on an ongoing basis. Could you have within your system criteria that an individual who looks at these disputes has to follow through this process to arrive at a decision? It would give the policy maker some comfort on one side that there's some guiding framework, but it would also give a sufficient uncertainty such that the parties would negotiate something if they could. Is that an option?

Earl Manners: And isn't it a problem that there just really is not too much money that you can put in education? There never seems to be a spending point that will achieve whatever is the outcome you're looking for.

Hugh Finlayson: It is a money issue, but it is also an issue of tradition or culture. Anything brought to the table by the employer is labeled by the union as a concession and dismissed on that account, and employers put their issues on the table, not because they think they would get anywhere with them but for strategic reasons (the idea being that they would at least have things to drop or abandon as the bargaining wore on, hopefully, as an enticement to the union to do the same thing). The public and the government grow tired of watching the conflicting demands and the lengthy negotiating process. Three years pass before you have an agreement, and then we go right back at it again. The rhythm is what it is. I go back to the point we ought not to make it so complicated. In late 2012, through outreach to the BCTF, we created a formula for this round. An early start to bargaining, proposals by a certain date, a facilitator as a process mechanic of sorts, and, if there is no deal by the expiration of the agreement, a report from the facilitator on the process to date, the matters at issue, and recommendation for resolution is appropriate.

This model hopefully injects a measure of uncertainty and scrutiny to encourage bargaining. A model like this requires the union, the employers' association/employer, and government commitment to the process. Without this commitment, there is nothing but another failed attempt.

James Dorsey: Are there questions from the audience?

Audience Member: If we value our public education system, then what's the way ahead in terms of getting educational outcomes we want with free collective bargaining?

Earl Manners: If we don't start figuring out how to address our collective bargaining process in this country, the result will be what we're seeing more of in the United States. There will be leakage of the public from public education to private schools.

Right now, our public education system still continues to have strong involvement of the general public in it and varying degrees of confidence by parents' individual schools that they send their kids to, although perhaps not the system as a whole. We're in danger of losing that if we don't get our act together. In this day and age, I'm not sure the public has the patience to allow collective

bargaining in the public sector to work, because inconvenience has become the trump of everything else. Therefore, people are not prepared to tolerate a strike.

Having the patience to allow for negotiations to go on and on and on for an extended period of time seems to be missing out, too. In Ontario, under Bill 100, there were so many checks and balances built into that—it really became a continual process of negotiations and renegotiation of collective agreements that were settled well after the expiration dates. The result of that was that there were no grievances because everything was on the table.

Sara Slinn: Although non-bargaining policy forums were generally unsuccessful, one potentially useful element was input from stakeholders other than the bargaining parties. However, these forums failed to be genuine policy forums. Instead, they were a device for government to avoid collective bargaining on certain issues. So, some modified version of these unsuccessful policy forums might provide the kind of structural input that you're looking for.

It is worth noting that BCPSEA, although a statutory bargaining agent for all school boards in BC, represents more than simply school boards. It has other types of stakeholder representation on its board of directors. Generally speaking, among the jurisdictions in Canada, BC has quite a well-thought-out teacher bargaining structure. However, BC also has a particular history of teacher bargaining that intersects with bargaining structure and produces willingness or unwillingness on the part of parties to make that work.

One aspect of free collective bargaining that has not been permitted to play out is work stoppages. Governments have been unwilling to permit substantial strike or lockout activity, presumably because of inconvenience to the public. However, in 2005, there was a 10-day illegal strike by teachers in British Columbia. Polls indicated a surprising—and growing—level of public support for teachers during the course of this walkout.[15] Fifteen teacher strikes certainly inconvenience the public. But sometimes, clearly, the public thinks that a work stoppage is merited even if it's illegal.

James Dorsey: Public support for the teachers during an illegal strike, in fact, was probably the one factor that resulted in the

[15] *See* Ipsos Reid Corporation, *BC Public Continues To Side With Teachers*, 18 October 2005, *available at* http://www.ipsos-na.com/news/pressrelease.cfm?id=2829 (last visited 10 March 2011).

strike being resolved when it was. But, in BC, we have elected trustees at the local school board level and 60 school boards. We also have parent advisory committees at every school that have legislative responsibilities and authorities.

So, if you've got all that input by the other stakeholders in the system, why are we unclear about where the policy comes from?

Hugh Finlayson: We are clear where it comes from—it's the execution. Nothing appears to be clear because there is no policy—just a big idea or slogan. There is nothing that draws the voices together sufficiently to articulate a clear policy. Each of the parties has their own view, and that is their view on that day. It falls to the government of the day to set the stage. We will see in real terms in this province if that clarity can be achieved given our recent election.

Earl makes an important point in that we are truly at a crossroads in this debate around bargaining and around education policy versus the right to bargain matters that have financial implications like class size. This all takes place when provincial jurisdictions are under financial pressures. We just elected a provincial government that ran on a balanced budget platform and on a fiscally conservative platform. The BCTF, our teachers' union, supported the other party. The people of the province overwhelming reelected a government, which, when one looks at the history of the province, ought not to have been elected. This will be a four-term government when the recent experience has been two terms at the most.

The issue of patience is also an important point to make. We live in a society where people are no longer that interested in putting up with the vagaries of teacher bargaining. That gives rise to a government choosing to run on a platform that includes a 10-year teacher deal. The fact that it became a key feature in an election platform says something about the discomfort the public has with public back-and-forth of public sector negotiations.

Something else to keep in mind is that fewer people now have children in school, so the political pressure that arises from parent lobbies is far different now from what it was 20 years ago. In this province, while we will see enrollment increases in some parts of the province, the contraction of the student population will be the norm. The local political dynamics start to change. Public education as a priority begins to wane. And when the political dynamic starts to change, the conversation starts to change.

Jim made the comment about the independent schools, as we call them. In conversations with the BCTF and the head of independent schools, the BCTF discovered in their polling that they were losing parents' support. The independent schools interview parents coming in and ask why parents chose to come to an independent school. The number one reason was the ban on extracurricular activities during the strike, and the second issue was the ban on report cards. Parents said, "My children are only going be in grade 3 once, and I'm not that interested in who is right or wrong. I have other priorities. I'm going to act."

So under pressure from provincial and local finances and parental or public fatigue, the bargaining parties should be driven to say enough already. We've had 40 years of this. It's time to come up with a coherent approach and restore faith in a system that can get the parties to agreement. It's not a structural issue. It's grounded in our history, and it's held by people of good will who can dispassionately examine the history, understand the operating context, and, with others, craft a way forward. But, we have to get going. This isn't something we need to debate for the rest of our lives; this is just something we need to do.

James Dorsey: One of the statistics we do not have and will have difficulty getting is how many public school teachers send their children to independent schools.

Audience Member: Is the answer more local or two-tier bargaining structures?

Hugh Finlayson: Earl can give the Ontario view, and Sara can give the national view as well. Do I believe that a return to local bargaining would be preferable if it was allowed to run its course? It was allowed to run its course between 1987 and 1993. In the early 1990s, the government of the day established a commission of inquiry into the public sector to examine if human resources with an emphasis on labour relations could be made more efficient. The result of this was the employer association model I spoke of earlier.

In K-12 public education, the commission found that the teachers' union was highly centralized and the funding was highly centralized. School boards were replicating the bargaining event district-by-district. There wasn't any particular advantage in a local bargaining system. It was expensive, it was labour-intensive, and it led to the provincial model. The challenge with the new model

was that the creators of the new system didn't establish a process to get from local to provincial. There were no transitional provisions to move from the 75 local agreements to a form of master agreement. The parties have gradually come to a form of language standardization. We now have a hybrid model of sorts. With our moves to standardize language, and our most recent agreement to try a time-bounded approach to bargaining, I hope we are getting to a better system. Importantly, this is developed by the parties and not imposed by government. Will the move to a 10-year deal set bargaining back? I hope not. That goes back to my coherence comments.

However, two-tier bargaining is not a particularly wise system. But a return to a decentralized bargaining model in this province will not yield any better outcomes than we could get in another system. Ontario has had the same experience there.

Earl Manners: Ontario had an unfettered right to strike. There was legislation that required you to go through various hoops, and it took some time. There were very few strikes in good economic times and in bad economic times alike. It was not a case of the bargaining legislation that was used in an excessive way; often, it was a reflection of bad labour relations at the local level. When there was local bargaining where school boards actually had the right to raise money through the local taxation system, the board could make decisions about policy and about programming independently of the Central Provincial Ministry of Education. There was a good dynamic that allowed for local bargaining and for relationships to culturally develop that made the bargaining process work and strikes more of a right rather than an exercise. I have always believed that going on strike is an example of the failure of your bargaining ability, rather than something that gets you somewhere in the long run over time.

That's disappeared in Ontario. School boards do not have the right to raise money anymore. That means that they have lost some control over what they can and can't do in negotiations. All of those factors have affected the situation we find ourselves in now. In Ontario this year, we had unions engage in strikes when the government pulled the plug on this extralegal process and started to look for contract strips, that is, the elimination of previously negotiated rights. They made some very bad political decisions, unfortunately, which affected the public's perception of education in our province in a negative way.

Audience Member: Why is teacher collective bargaining different? Is there a mismatch between who the employer is and where the bargaining occurs?

Sara Slinn: Although the concept of collective bargaining in the private sector may focus on negotiations between an employee bargaining agent and the employer, that is not necessarily a useful perspective for public sector bargaining. In the public sector, the identity of the employer is a difficult concept. Is the employer of teachers, for bargaining purposes, the school, the school board, or the province?

In many jurisdictions, there is a mismatch between the location of bargaining and the source of funding, which causes tensions in bargaining. The source of funding for education has shifted over time. Although education used to be funded locally in Canada, this is no longer the case. In most jurisdictions, education now tends to be entirely provincially funded. As a result, the provincial government has a different role and different interest in regulating education bargaining than in the past.

This raises different questions about what kind of bargaining structure—local or centralized—is necessary for teachers. Those jurisdictions that continue to have local bargaining within a context of provincial funding face a real difficulty. The consequent mismatch between the location of bargaining and the location of funding is a significant difficulty for bargaining. As a result, we see a general trend in Canadian provinces towards a more centralized, or multi-tier, bargaining structure like we see in BC or Quebec. Centralization of bargaining helps to reconcile the location of bargaining with the provincial funding source.

James Dorsey: They're not that different probably. In my experience, certainly as with so many of the unions that are in the public sector, they can be less interested in talking to their employer than talking to the ultimate government paymaster.

From our discussion today, it appears there is no cohesion in assigning responsibilities for learning, working, spending, and human resource priorities and conditions in K-12 public education. No one is addressing their complex interrelation.

Governments have big ideas and bumper-sticker policy slogans, but they have not clearly thought out education policy with a planned path to attain a defined goal or destination. *Ad hoc* legislation driven by political—not policy—goals is more common than critical analysis, reconciling interests, and building relationships.

In the resulting struggle for control, the continuing good faith required to sustain collective bargaining and its accompanying dispute resolution processes have been abandoned, and no substitute forum has emerged where competing interests can be reconciled and resolved.

Unless this pattern is broken and a clear, consensual education policy emerges, politically expedient legislation will continue to trump collective bargaining in setting working, learning, spending, and human resource priorities in public education.

This most recent decision has as a backdrop the work of the recently re-elected government on the 10-year deal with the BCTF and to achieve collective agreement changes not achieved in the last round. Cross-examination revealed what was known to the principal actors in the story: that government at the senior advisor level was greatly dissatisfied that the employers' association was able to conclude a collective agreement in the last round when the plan was to be legislation in the face of a breakdown in negotiations. As they had done in 2002, collective agreement changes that were not negotiable could be legislated.

In summer 2013, the government removed the BCPSEA board of directors, replacing it with a Public Administrator. His first act was to remove the association's senior staff and appoint a new negotiator, which solved a couple of problems for government. Because the association was now a government-led and controlled effort, the need for education policy clarity/specificity was relieved. The situationally malleable general and aspirational education policy statements were sufficient to be adapted as bargaining takes shape. The need to understand and balance employer and government interests could take on a lesser degree of precision with the lead actors and structures a creation of and responsible to government.

As fate would have it, the Court had something to say regarding the roles of government, a co-governed employers' association, and collective bargaining. The Court reaffirmed the value of the employers' association (referred to as the Korbin model) that was originally crafted in the early 1990s.

Epilogue

On January 27, 2014, the BC Supreme Court released its decision on *British Columbia Teachers' Federation v. British Columbia*

(2014 BCSC 121). The Court determined that the government's latest attempt at legislation to remove school organization matters, such as class size from the collective agreement and the scope of bargaining, remained unconstitutional, as was Bill 22. Specifically, the Court found that the government discussions with the union did not cure the unconstitutionality of the legislation. It concluded that the government did not negotiate in good faith with the union after the Bill 28 Decision.

In addition, the Court found the duplicative legislation in Bill 22 to be unconstitutional, namely s. 8, part of s. 13, and s. 24, set out in Appendix A. The unconstitutional provisions that have not already expired—ss. 8 and 24—were struck down. Importantly for school districts as places of work when legislation is struck down as unconstitutional, it means it was never valid, from the date of its enactment. This means that the legislatively deleted terms in the teachers' collective agreement have been restored retroactively and can also be the subject of future bargaining.

The Court also concluded that it was appropriate and just to award damages against the government pursuant to s. 24(1) of the Charter. This was in order to provide an effective remedy in relation to the government's unlawful action in extending the unconstitutional prohibitions on collective bargaining to the end of June 2013. The government must pay the BCTF damages of $2 million.

The BCTF also challenged other action taken by the government since the Bill 28 Decision: the government's conduct in issuing the provincial collective bargaining mandate—Mandate 2010—to the employers' association for collective bargaining, commonly known as the net zero mandate; the government's legislation appointing a mediator—Dr. Charles Jago—with a narrow mandate at the end of the 2011–2012 round of collective bargaining; and two regulations enacted by the government—the Learning Improvement Fund Regulation, and the Class Size and Compensation Regulation.

The Court concluded that none of this other challenged government conduct was unconstitutional. The government has a role and responsibility in respect of the education system that entitles it to establish some fiscal and policy parameters around the collective bargaining between the teachers' employee association, the BCTF, and that of the employers' association, BCPSEA, so long as there can still be room for movement within those parameters.

It is worth noting that the Court re-affirmed the value of the employers' association.

In early February 2014, the government announced that it intended to appeal the judgement.