ONTARIO LABOUR RELATIONS BOARD

3042-12-U Trillium Lakelands District School Board and Upper Canada District School Board, Applicants v. Elementary Teachers' Federation of Ontario**,** Responding Party v. Minister of Education, Intervenor.

BEFORE: Bernard Fishbein, Chair.

APPEARANCES: Michael A. Hines, J.P. Alexandrowicz, Dolores M. Barbini, Paul Broad, Andrew Zabrowsky, Larry Hope, and David Thomas for the Applicants; H. Goldblatt, Steven Barrett, and Ethan Poskanzer for the Responding Party; Robin K. Basu, and Rochelle S. Fox for the Intervenor.

DECISION OF THE BOARD: April 11, 2013

Summary

The Board finds the following:

- notwithstanding that ETFO, on March 26, 2013 (well after the hearing had concluded), withdrew its "advice" to members not to participate in voluntary/extracurricular activities, there was still a labour relations purpose to issuing this decision – it was not clearly moot;

- although the Government has repealed the *Putting Students First Act* (Bill 115), the collective agreements imposed by that legislation continue to exist and operate;

- the withdrawal in combination or in concert of participation in voluntary co-instructional (or extracurricular) activities as listed in Appendix A and B in paragraph 27 of this decision constitutes a "strike" within the meaning of the *Education Act*;

- no final orders are issued because ETFO's *Charter* challenge to the definition of strike in the *Education Act* remains to be litigated – but a direction to post a Notice to Employees is issued clarifying the stage that this litigation has reached and the position of ETFO (at least up until it withdrew its "advice" to members on March 26, 2013) with respect to the participation of its members in the withdrawal of these activities.

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I. Introduction

1. This is an application under section 100 of the *Labour Relations Act*, *1995*, S.O. 1995, c. 1, as amended (hereinafter referred to as either the "*LRA*" or the "*Labour Relations Act*"), and Part X.1 of the *Education Act*, R.S.O. 1990, c. E.2, (the "*Education Act*") that was filed by the applicant school boards with the Board on January 18, 2013. The Minister of Education (hereinafter referred to as either "the Minister" or "the Government") has intervened, if only limited to the question of the effect of the repeal of the *Putting Students First Act 2012*, S.O. 2012, c. 11 (the "*Putting Students First*" or "*PSFA*" or "Bill 115").

2. The applicant school boards have alleged that the responding party, Elementary Teachers' Federation of Ontario ("ETFO"), has engaged in unlawful activity by calling, authorizing, counselling and encouraging an unlawful strike through its coordinated efforts by, among other methods, advising its "members not to participate in voluntary/extra-curricular activities outside the 300 minute instructional day."

II. Adjournment Request

3. ETFO requested an adjournment at the beginning of these proceedings. I heard the parties' submissions and issued the following oral ruling:

> At the commencement of the hearing of this application, the responding party ETFO requested this application be adjourned, if only to next Wednesday, January 30, 2013 to allow at least an opportunity to see if the election of a new Premier, which is imminent, will change the contentious political landscape in which the alleged activities of ETFO that are the subject of these proceedings arose. The applicants did not consent. The Minister of Education, attending because of ETFO's position that the repeal of Bill 115 has ended all of the collective agreements imposed under it, took no position. After questioning, ETFO offered that during the period of the adjournment, without prejudice to its position, it would maintain the status quo, and take no further action. While I certainly appreciate ETFO's offer, and take it to be *bona fide*, it was insufficient to induce the consent of the applicants, who are of the view that ETFO is already counselling unlawful strikes in what ETFO describes as maintaining the status quo. While the Board always wishes to encourage and promote parties to resolve labour relations problems without the necessity of litigation before the Board, I am not of the view that I should force an adjournment on an unwilling applicant particularly when it raises serious allegations before the Board of sufficient magnitude that the Board has determined to deal with them on an expedited basis, and those serious issues and their impact will continue unabated or unresolved during the interim. For those reasons the adjournment is denied.

With the unerring wisdom that only hindsight provides, an adjournment would obviously have not in any event been effective. To be fair, equally, as events unfolded, denying the adjournment likely did not significantly hasten the outcome of this application.

4. Because of what appeared to be the "urgency" of the application at the time of filing, the Board attempted to deal with this application as expeditiously as possible. The time for filing a response was abridged and a quick hearing scheduled. But as the parties' submissions became more lengthy, complex, and ultimately more time-consuming, and the proceedings occasionally became more fractious and contentious, the hearings dragged on. The Board continued to attempt to deal with this application on an urgent basis rearranging its schedule and offering more hearing dates. Ultimately, this hearing took some nine days. This decision does not attempt to address every detail or every single argument raised – only those that I consider salient or necessary to issue this decision in some appropriate timeframe. For this, I do not apologize.

5. I also will not repeat the background and the context of teacher collective bargaining in Ontario or the enactment of Bill 115 or the *Putting Students First Act* (except as it becomes relevant to specific arguments outlined later in this decision). They have been set out in some detail in recent decisions of the Board in *The Crown in Right of Ontario, the Honourable Mr. Dalton McGuinty, Premier of Ontario et al*, 2012 CanLII 80016 (ON LRB), and *Richard Brock et al*, 2013 CanLII 9950 (ON LRB), [2013] O.L.R.D. No. 768. Certainly, they are familiar to these parties.

III. Events Subsequent to the Hearing – ETFO Withdraws its Advice to Members

6. Late in the evening of March 26, 2013, as the Board was on the verge of issuing this decision, ETFO confirmed to its members, as had widely been reported, that it had been in discussions with the Government, and announced:

> "In light of the progress made during these discussions and a commitment that talks to address outstanding issues will continue, **ETFO is suspending its advice to members regarding voluntary/extracurricular activities**.
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> **Members should be aware that any agreement reached by ETFO will be subject to an all-member vote.**"

7. As a result, the Board held a number of conference calls with counsel for the parties to deal with whether, in these circumstances, the parties still wished this decision to be released. Perhaps not surprisingly, the parties did not agree. Accordingly, a further hearing was held in the afternoon of April 2, 2013 (as soon as practicable in view of the intervening Easter weekend), where the parties were given a (time-limited) opportunity to make submissions to the Board.

(a) The Position of ETFO

8. As a result of the ETFO announcement, it argued that, practically speaking, the applicants were now in a better position than if they had been successful, since the applicants' success would not mean that the hearing would have concluded but rather would continue onward to deal with ETFO's arguments pursuant to the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), as the parties had agreed and as explained later in this decision. In effect, by returning the situation to the *status quo* prior to the application, ETFO submitted that it was as if the applicants had been granted the interim relief which the applicants had repeatedly threatened to seek when frustrated with the length and pace of these proceedings. In these circumstances, ETFO submitted that there was no longer any labour relations purpose or "imperative" in issuing a decision either because:

(a) the matter was moot;

(b) any decision would be at best incomplete;

(c) it could have an adverse or "destabilizing" impact on the ongoing negotiations between ETFO and the Government (over the intervening Easter weekend it was announced that the Ontario Secondary School Teachers' Federation had successfully concluded an agreement with the Government although the contents were not yet made public);

(d) it would lead to unnecessary confusion and have an adverse impact on whether teachers would voluntarily resume extracurricular activities – whether in finding that the activity complained of did not constitute a strike in which case individual teachers might not resume extracurriculars, or alternately, in finding that the activity did constitute a strike when undertaken collectively in which case disappointed teachers might still individually refuse to perform extracurriculars; or

(e) it was contrary to the Board's jurisprudence both about the Board exercising its discretion not to engage in unnecessary litigation or decision making, or wasting its limited resources, and when it served no labour relations purpose.

9. I was referred by ETFO to the Board's cases about refusing to issue a strike declaration even though an unlawful strike may have occurred but had already concluded by the time of the hearing – see *Northfield Metal Products Ltd.*, [1990] OLRB Rep. September 939; *Acme Building & Construction Ltd.*, [1975] OLRB Rep. November 810; and *Steinberg Inc.*, [1983] OLRB Rep. February 253, which are usefully summarized at Jeffrey Sack, Q.C., C. Michael Mitchell & Sandy Price, *Ontario Labour Relations Board Law and Practice* (3rd ed.)(Vol.I) (a text to which I was also referred), at para. 8.527:

> §8.527 Notwithstanding that unlawful conduct may have occurred, the Board has a discretion under ss. 100 and 144 as to whether to grant a declaration or direction. Since the purpose of these remedies is not to punish, but to inform and guide the parties as to their legal rights and to bring unlawful conduct to an end, the Board will not grant a declaration or direction if the employees are back at work and the strike is settled by the time of the hearing, unless there has been a pattern of unlawful strikes in defiance of the law, or the employer has reason to fear a recurrence, or the purpose of the strike is to compel the employer to bargain with the union that is not the bargaining agent of the employees, or the unlawful strike has implications extending beyond the parties.
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> [citations omitted]

10. I was also referred to the Supreme Court of Canada decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, for its often quoted discussions of mootness at pg. 353:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. **If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.** The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
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> 16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[emphasis added]

and *Renfrew Country District School Board v. Elementary Teachers' Federation of Ontario*, 2008 CanLII 19021 (ON LA), an arbitration award (and the cases cited therein) where the doctrine of mootness was applied to refuse to issue declaratory relief, ironically, also against ETFO, for an alleged unlawful strike concerning ETFO's actions and instructions to teachers about work assignments prior to a lawful strike by educational assistants (also represented by ETFO) since a collective agreement for the educational assistants was reached on the eve of the strike and any arguably illegal strike by the teachers never occurred.

11. ETFO conceded this Board has expressed reservations about the direct applicability of *Borowski*, *supra*, and "mootness" to labour relations – see *Brant Haldimand-Norfolk Catholic District School Board*, [2001] OLRB Rep. March/April 292, at paras. 40-42:

> 40. I have read with interest the Supreme Court of Canada's decision in *Borowski v. Attorney General of Canada* (1989), 57 D.L.R. (4th) 231 - a case which involved abortion, "foetal rights" and the application of the Charter of Rights to the Criminal Code. In *Borowski* the Court took the opportunity to discuss when contentious legal issues might be considered "moot", as well as some of the factors to be considered in making that assessment. However, it seems to me that the approach adopted by the Civil or Criminal Courts to the question of "mootness" does not provide much guidance as to how the Labour Relations Board should exercise its discretion under section 96 of the *Labour Relations Act*. That discretion is a uniquely *labour relations judgement* [sic], that is informed by the Board's own expertise and experience and should be exercised in light of the purposes of the statute itself:
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> 1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
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> 2. To recognize the importance of workplace parties adapting to change.
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> 3. To promote flexibility, productivity and employee involvement in the workplace.
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> 4. To encourage communication between employers and employees in the workplace.
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> 5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
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> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.

> 7. To promote the expeditious resolution of workplace disputes.
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> 41. As will be seen: those purposes all involve the relationship of the **work place parties** - the relationship between the employer, the employees, and the trade union. It is those individual and collective bargaining relationships that are the primary focus of the *Labour Relations Act*.
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> 42. Under the *Labour Relations Act*, the Board often deals with questions that arise between parties in a long-term collective bargaining relationship. That relationship is quite unlike that of the typical civil or criminal litigant, who may never see each other again after the case is over. Accordingly, in a collective bargaining setting, it may well be appropriate to entertain litigation, in the nature of a "reference", even though the result may be purely declaratory. Such declaration may clarify the parties' relationship and avoid a recurrence of work place disputes.

12. However, as ETFO pointed out, even in that case, an education sector case, the Board exercised its discretion and refused to enquire further into the unfair labour practice complaint because it served no labour relations purpose (a collective agreement having been reached and the complaint having been withdrawn against the relevant school board employer but the union still wishing to continue the litigation against the Ministry of Education and its Assistant Deputy Minister), at paragraphs 43-46:

> 43. On the other hand, where there is no dispute between the work place parties and no reasonable likelihood of a recurrence of the problem, it seems to me that there must be a pretty compelling public policy reason to launch into litigation that could exacerbate the local relationship and undermine one or more of the statutory objectives set out above.
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> 44. The shifting legislative framework (especially recently) always raises "interesting legal questions" that someone would like answered; and that is especially so when they involve the scope of, or limits to, "government action" that impinges upon collective bargaining - especially collective bargaining in the public sector. Public sector collective bargaining is conducted within a legislative and political context, so that there can sometimes be a tension between the government's role as paymaster or provider of public services, and its role as legislator and regulator in the collective bargaining arena. In this context, the "ghost at the bargaining table issue" is real - as the Board noted in the *St. Joseph's Hospital* case, mentioned above. Nor is there any doubt about the potential conflict between collective bargaining processes, and other public policy concerns (the continuation of essential services, the wage/price stability, etc.). So in this setting, bargaining or litigation over those limits may have a "political" as well as a legal dimension.

> 45. However, it seems to me that, from a labour relations perspective, the Board must be exceedingly careful about proceeding with litigation raising "interesting" "third party issues", where the concrete collective bargaining dispute has disappeared, and where the issues have become academic as between the immediate collective bargaining parties. The mere fact that a case raising the same point **may** arise in the future, or would serve some collateral political interest, should not, by itself, be a reason for hearing a matter which has otherwise become moot as between the employer and the trade union and the employees. It is preferable to wait and determine the question in a genuine adversarial context - unless the circumstances suggest that the dispute will have always disappeared by the time that the matter can be brought on for hearing (which is not the case here). And in my view, such reluctance to leap into litigation is particularly appropriate when the shifting legislative framework or a different mix of facts may materially affect the outcome, so that a "declaration" in one set of circumstances will not necessarily govern the result in another, or even provide clear guidelines.
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> 46. This reluctance on the part of the Board is nothing new. For example, the Board has always been disinclined to deal with strike or picketing questions when the underlying work stoppage has been resolved. Nor has the Board been keen to proceed with bad faith bargaining complaints, if the parties have settled their differences and entered into a collective agreement. Similarly, in *Board of Education for the City of Toronto*, [1995] OLRB Rep. May 579, the Board declined to interpret the then recent strike replacement legislation once the prospect of a strike had disappeared - even though the union argued (as OECTA does here) that it might be useful for **other** school boards and **other** teacher organizations engaged in **other** rounds of bargaining to have some "answers" about what the new legislation meant. (As it turned out, the Board was right; because there was no subsequent litigation in that setting and the legislative framework later changed.)

See also *Board of Education for the City of Toronto*, [1995] OLRB Rep. May 579, another education sector case, at paras. 31-33:

> 31. When called upon to exercise its discretion under section 91 of the Act, we do not think that the Board is obliged to adopt the approach of the courts in civil matters. The Board deals with ongoing collective bargaining relationships and a provincial regulatory scheme. In particular circumstances, it might well be appropriate to entertain litigation, in the nature of a reference, even though the result may be purely declaratory, and may have no immediate operational significance for the parties involved.
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> 32. On the other hand, the recent amendments to the statute raise quite a number of interesting legal questions; and the Board must be exceedingly careful when asked to expend its limited hearing resources, where the concrete dispute has disappeared, and the issues

have become academic for the immediate parties. The mere fact that a case raising the same point may recur in the future, should not by itself be a reason for hearing a matter which is otherwise become moot. It is preferable to wait and determine the point in a genuine adversarial context, unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved. And that is particularly so when the shifting factual pattern may affect the outcome, so that a decision in one set of circumstances will not necessarily govern the result in another. There is no doubt for example, that if similar circumstances arise with another Board of Education, the matter may be dealt with by the Board on an expedited basis either under section 91, section 92.1, or otherwise. The union parties in this matter are not without remedy should such concrete situation arise.

33. The "mootness" problem posed by this case is not entirely novel. Where an allegedly unlawful strike has ended, the Board has often declined to review the situation, and in *Ontario Hydro*, [1994] OLRB Rep. June 765 the Board refused to consider an alleged violation of section 41.1 of the Act because no practical relief would be ordered. The Board observed: "although this is the first case concerning section 41.1 which the Board has considered, that in itself is not a sufficient reason to decide the matter". Finally, we might note that in *Dayne's Health Care Limited*, [1983] OLRB Rep. May 632, **both parties** urged the Board to declare whether certain facts would trigger a sale of a business and collateral relief under section 64 of the Act - a matter of considerable interest to them so that they could plan their future relationships. However, the Board refused to give an advisory opinion:

> 13. We are not unsympathetic to the parties' concerns, but we have concluded that we should not express any opinion or make any determination about the application of section 63 [now 64] until the transactions said to constitute a transfer of a business have been completed. Any desire to provide guidance to the labour relations community in a difficult area of the law must be tempered by a recognition that preliminary opinions based on hypothetical facts could create as much mischief as they resolve, if not more. Not only would such opinions encourage a recision or restructuring of transactions to which section 63 might otherwise apply but, in addition, there could be litigation about the effect of the opinion itself and whether the transaction was actually consummated in the form upon which the Board's opinion was based. Since close cases will often turn on subtle shadings of fact, in our view, it would be unwise to render opinions on what will inevitably be less than complete information. In today's volatile business climate there is a real likelihood that various components of "the deal" will change (for example, to accommodate financing or licencing requirements) between its initial conception and its completion, and we are by no means

> convinced that the injection of a preliminary Board opinion at one stage or another in this process would really facilitate the promotion of orderly collective bargaining or the interests which section 63 was designed to protect. Finally, we are constrained to note that section 63 is not the only provision of the Act which occasionally gives rise to interpretive difficulties. The same could be said of the duty to bargain in good faith, the so-called statutory freeze (see section 79), and certain of the unfair labour practice provisions. It is an unfortunate fact that, like other areas of the law, the law regulating employer-employee relations has become increasingly complex and in many cases there is room for argument about how the law should be interpreted or applied. However, we do not think that the answer to this complexity or to the business planning problems faced by the labour relations community lies in this Board giving preliminary opinions on hypothetical fact situations.

ETFO says the comments of former Chair MacDowell in both of these cases involving applications (one of them also concerning an alleged unlawful strike) in the education sector are particularly apposite here.

13. I was also referred to the frequently quoted case of *Stock Transportation Limited*, 2006 CanLII 21287 (ON LRB), about labour relations purpose, at para. 13:

> 13. The question of whether there is a labour relations purpose to be served by the litigation exercise has typically been determined by a comparison of the labour relations reality that prompted the complaint in the first place, as compared to its reality at the time that the question of exercising the discretion arises. An examination of the cases suggests that the Board asks itself two questions: does the situation that prompted the application still exist; and/or does the relief requested still make sense? In assessing these matters, the Board does not concern itself quite so much with the length of time that has elapsed, but focuses instead on what has occurred in the meantime. Here are some examples:
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> - In *Brant Haldimand-Norfolk Catholic District School Board*, the applicant union initially complained that the conduct of the responding school board and of the Ministry of Education in relation to the negotiation of a renewal collective agreement contravened the *Act*.. The union subsequently concluded a collective agreement with the school board and withdrew its complaint against it. The Board declined to continue any inquiry into the part played by the Crown in the negotiations on the basis that there was no labour relations purpose in doing so.
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> - In *Marriott Management Services*, [1994] OLRB Rep. July 957, a bargaining unit member sought to complain about the conduct of a strike vote. The vote had been held eight weeks before the application was filed, and in the meantime a strike had

commenced and had been ongoing for three weeks. The Board declined to deal with the matter, not because of the delay, but because the commencement of the strike made the inquiry into the propriety of the strike vote a somewhat academic exercise.

- In *William A. Curtis*, [1993] OLRB Rep. Dec. 1260, the Board declined to inquire into a duty of fair representation complaint filed by a former president of a local union. Partly, the Board took the view that the application was abusive because its substance was the same as an earlier one that the applicant had withdrawn when the Board refused to hold a hearing in Thunder Bay. The Board also noted, however, that the employer in respect of whom the local held bargaining rights had closed shop, the local was moribund, the national union had been succeeded by another, and the applicant had settled the underlying employment issue and taken the benefit of that settlement.

- In *Ontario Hydro*, the applicant union complained about the employer's failure to negotiate an adjustment plan for surplus employees. After the hearing had concluded, the union and the employer entered into a new collective agreement, which addressed certain issues relating to surplus employees. The Board then declined to inquire further and did not determine whether the *Act* had been breached.

- In *Roberts Smart Centre*, the complaint related to the employer's treatment of a pregnant employee. While not conceding that it had contravened the *Act*, the employer apologized to the employee, rectified her personnel file, and undertook to train its supervisory employees in the areas of concern raised by the union. The Board declined to inquire into the complaint and concluded that to do so would not advance labour relations in the workplace and that a declaration from the Board would be no more useful than the undertaking that the employer had given.

14. I was also referred to my own decisions in *Wal-Mart Canada Corp.*, [2011] OLRB Rep. July/August 490, at paras. 76-77, and *Toronto Hydro*, [2011] OLRB Rep. November/December 867, at para. 51, not only for their discussion of labour relations purpose, but, in particular, about not unduly wasting limited resources – not only the private resources of the parties but the public resources of the Board. ETFO urged that since any decision issued at this point in time would necessarily be incomplete – it would not deal with the *Charter* issues as already agreed by the parties and accepted by the Board, – to return to the Board to argue the *Charter* issues (which would be complex both on a legal and evidentiary basis) would unnecessarily consume resources, when the conduct of ETFO complained of by the applicants had ceased – the applicants' objective in the first place.

(b) The Position of the Applicants

15. The applicants took the diametrically opposed position to ETFO.

16. Without putting too fine an edge on it, the applicants bluntly argue that since the last day of hearings in this matter (after the nine days of hearings), ETFO has had a "free ride" of approximately sixty days to continue its unlawful conduct – counselling an illegal strike under the *Education Act* in the applicants' view – and now on the verge of perhaps having its "ticket punched", ETFO unilaterally ends its action and says there should be no consequences. There should be no decision on whether its actions were proper or not. The Board should not condone such activity, the applicants say, because it will bring the administration of labour relations in this province, and the Board, into disrepute.

17. The applicants say ETFO has given no undertaking or assurance that its conduct will not be repeated. ETFO has not acknowledged that its conduct was improper or illegal in any way. There is no assurance that there will even be a "deal" reached with the Government – only that talks are "progressing". There is no assurance that even if a deal is reached, it will be ratified by the ETFO membership. And then what? ETFO's advice will be reissued and the urging of its members to collectively refuse extracurriculars will be reimplemented? And if not on this issue – on the next about which ETFO and the Government disagree, perhaps about provincial bargaining?

18. Moreover, unlike the cases that ETFO cites, there is no resolution of the underlying issue here. In fact, as argued by the applicants on the merits (see the discussions, *infra*), there was never an issue between the applicants and ETFO, like in any ordinary strike. Rather, there was an issue – the legitimacy of Bill 115 – between ETFO and the Government – not with the employer, who are obviously the applicants. In fact, as the applicants characterize it, the only issue actually between the applicants and ETFO is whether urging a refusal in concert to perform voluntary extracurricular activities constitutes a strike under the *Education Act* – and that issue continues to be a "live" issue and unresolved.

19. Moreover, ETFO's discussions with the Government (and not the employers) are by their very nature political and not labour relations – some place this Board ought not go. There is a public interest in having the "strike" issue and the law clarified, and that is certainly what these applicants want – in fact, it was their primary purpose (or so they say) in bringing this application. The applicants say there is no real risk that the release of the decision would be contrary to the public interest, or destabilizing, or else where was the Government to argue that potential adverse impact? – unlike during other portions of the hearing of this application when the Government intervened and actually argued, they did not do so on this question.

20. The applicants say none of the cases referred to me by ETFO are applicable, because here, there remains a continuing unresolved issue. Rather, they refer me to *Norfolk Hospital Assn.*, [1974] OLRB Rep. September 581, at para. 25:

> 25. It is not our function to comment upon the economic dilemmas faced, respectively, by the hospital employees and by the hospitals that both sides were faced with difficult problems of an economic nature not entirely within their own control. **However that may be, it is our duty, as we see it, as the tribunal seized with the primary responsibility for administering the *Labour Relations Act* and portions of the *Hospital labour Disputes Arbitration Act*, to re-affirm the law as laid down in those two statutes.** The criteria for exercising our discretion in applications of this sort, as set out in the *National Refractories Ltd.* case *supra* will no doubt continue to be appropriate in most circumstances. However, where, as here, there is a deliberate and sustained effort to flout the law, not only at the Norfolk hospital, but elsewhere across the province, we believe it to be our responsibility to so declare. **To fail to do so might be construed, at worst, as a condonation of illegal conduct, or at the very least, as an abdication of our public responsibility**.
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> [emphasis added]

See also *Bechtel Canada Ltd.*, [1977] OLRB Rep. May 209, where the declaration of an unlawful strike was refused, because the strike had ended and as the Board stated at para. 24:

> ... As the work stoppage did not appear to be a part of a larger strategy supported by entities beyond the immediate parties, the Board is in agreement with counsel's assessment and thus declines to give a general advisory opinion on the legality of the instant work stoppage.

which the applicants say is clearly not the case here.

See also *Ontario Hydro*, [1985] OLRB Rep. April 577; *Empress Graphics Inc.*, [1989] OLRB Rep. June 587, at para. 26; *Ontario(Management Board of Cabinet)*, [2002] O.L.R.D. No. 921, at para. 25; *Enwin Utilities Ltd.*, [2008] OLRB Rep. May/June 38; all cases where the strike activity had ceased but declarations still issued either in the public interest or for educational purposes. The applicants say so should the decision issue here – otherwise, in the words of *Norfolk Hospital*, *supra*, the Board's conduct "might be construed, at worst, as a condonation of illegal conduct, or at the very least, as an abdication of our public responsibility". Whatever the outcome of the decision, it would go some way to end what the applicants described as the "corrosive uncertainty" in the education sector about the legality of the tactics that ETFO has resorted to in these circumstances.

(c) ETFO's Reply

21. In its response, ETFO disputed there was any public interest in issuing this decision – otherwise where was anyone else (other school boards, trustee associations, parent bodies) either making a similar application, or intervening in this application, or at least intervening in this part of the application, to have the decision released. There were only these two applicant school boards which were certainly not the largest in the

Province (and whom ETFO characterized as "rogue") asserting this alleged "public interest" – when ETFO's advice to its members applied throughout the Province.

22. Moreover, ETFO asserted that its argument about the lack of a labour relations purpose in issuing a decision, neither required ETFO to admit that it had acted illegally, nor guarantee that such conduct would never recur. Leaving aside what should be the appropriate time frame for any such assurance in any event, ETFO took the position and continued to take the position that what it had done did not constitute a strike under the *Education Act* – a position which was not only *bona fide* but a position which it was entitled to take and legally defend.

(d) Analysis, Discussion, and Conclusion

23. Like virtually every aspect of this decision, I have struggled with whether the reasons for this decision should issue now. Although initially attracted by ETFO's arguments, upon further reflection and analysis, I feel these arguments unravel. Ultimately, I have decided that this decision should issue for the following reasons.

24. I do not disagree with the Board jurisprudence cited to me by ETFO that the Board will not generally issue a declaration when the strike activity has ceased by the time of the hearing. However, in the unique circumstances of this application, it does not really apply. The Board has always recognized exceptions to that general jurisprudence, as the cases and the quote from Sack, Mitchell & Price, *supra,* demonstrate, and this application appears to fall well within several of those exceptions.

25. First, all that has happened, is that ETFO has withdrawn its advice to members while its negotiations with the Government (not the applicants) continue. Although those negotiations certainly appear promising at the time of my writing this decision, it is not unreasonable for the applicants to have "reason to fear a recurrence". Although ETFO says there is no evidence before me of any recurrence, or possibility of recurrence, that is to ignore the long history of the use of withdrawal of voluntary extracurricular activities as a tactic by teacher unions (discussed at greater length, *infra*). Certainly, the applicants' concern about a recurrence is no less warranted than the employer's concern in *Ontario Hydro*, *supra*, where:

> "...the unlawful strike resulted from the frustration that the employees felt at the amount of time that the collective bargaining process often takes. However, that process is still ongoing, and may not reach a definitive result for some time to come."

(at page 579) which was, *inter alia*, enough to justify a declaration issuing, even though the strike actually had ceased. ETFO has continually and repeatedly asserted its and its members' frustration at the Government for the enactment of the PSFA (see discussion, *infra*).

26. Second, it is simply not credible to deny that ETFO's conduct and any decision about it, in the words of Sack, Mitchell, & Price, "has implications extending beyond the

parties". Certainly, these recent education sector proceedings, including this one, have attracted public attention like virtually no others before the Board. The implication to others, or in the words of the cases, "the public interest", of a ruling about whether withdrawal of voluntary activities in concert constitutes a strike under the *Education Act*, is not so simply measured or dismissed by the mere fact that the applicants are only two smaller school boards, or the only school boards who have made such an application. Again, as discussed, *infra*, the legality of this tactic has bedevilled teacher labour relations in this province and others for decades. Again, as ETFO itself conceded while asserting there were no "public interest" issues at stake, there is no dispute that ETFO's advice to members applied, and was intended to apply, not just to members employed by these applicants, but throughout the Province. The Board found there was sufficient public interest to warrant issuing a decision in *Norfolk Hospital Association*, *supra* (an illegal 10-day strike by hospital workers contrary to the *Hospital Labour Disputes Arbitration Act* – see paras. 24-25 of that decision); or in *Ontario Hydro* , *supra*, at page 580:

> Additionally, I am satisfied that this particular work stoppage does have implications beyond the immediate parties to the dispute. The evidence makes it clear that an illegal work stoppage at a nuclear generating facility can raise grave concerns about the safety of persons at work on the site, and the environment as well as creating significant risks to the electrical grid of this province. The actual and potential consequences of an illegal strike in these circumstances are not simply borne by the immediate parties to the dispute. Those consequences may adversely affect a large number of persons and industries through the Province of Ontario.;

or *Empress Graphics Inc.*, *supra* (a refusal to handle "struck" work at a printing plant pursuant to a collective agreement provision permitting such conduct), where the Board issued a declaration for "its educational effect" in arguably not completely dissimilar circumstances, at para. 26:

> 26. The labour dispute involving the sister local is still ongoing. There has already been one Board order concerning unlawful sympathetic action in respect of that dispute. The union letter urging employees to engage in such sympathetic action has not been repudiated. There is a reasonable basis for the employer's concern that, without a Board declaration and direction, there will be a repetition of the illegal job action which has already interfered with its business. Finally, it was drawn to my attention that clauses similar to Article 34 are common in collective agreements between the respondent union and printing establishments throughout Ontario. The issuance of a declaration and a direction may therefore have some educational effect foreclosing future illegal employee action and further proceedings before the Board.;

or *Ontario (Management Board of Cabinet)*, *supra*, at para. 25:

> 25. In this case there is no past practice of strike activity. There is also no evidence that the unlawful activity is likely to recur. However, the unlawful strike on which the application is based does have implications which extend beyond the immediate parties. There is a public interest to ensure the service of the attendants at the hospital continues uninterruptedly. Oak Ridge is a maximum security facility. An essential service there is necessary. The inmates of the facility, other employees who work there and the general public are potentially at risk if there is a repetition of any unlawful action. (See *Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 581; *Ontario Hydro*, [1985] OLRB Rep. Apr. 577, particularly 580).;

or *Enwin Utilities*, *supra*, at para. 38:

> 38. The applicant has also pleaded facts that could permit a panel of the Board to conclude that the third exception to its general practice applies. I agree with counsel for the responding parties that the consequences of an illegal strike in the instant situation are certainly not as severe as those which could result from an unlawful strike involving the nuclear generating stations at the Bruce and Pickering. However, no matter how high the bar should be set for the third exception to apply, the bar does not necessarily have to be set as high as that reflected by *Ontario Hydro* for the Board to conclude that the third exception to its general practice will apply. The applicant has pleaded that it is responsible for providing electrical services to approximately 80,000 customers in Windsor, Ontario, and that the services that it provides to its customers are critical. It states that even the limited interruptions that it experienced in May, 2006 and November and December, 2007 significantly jeopardized its ability to provide electrical services to its customers in a safe and efficient manner and its ability to restore power to affected areas in a timely manner. A larger power interruption that was not attended to quickly could be devastating to a significant portion of the Windsor area. Similar to the situation reflected by *Ontario Hydro*, the potential consequences of an unlawful strike in these circumstances would be borne by a large number of persons and industries in the Windsor area.

Accordingly, it seems to me that a decision about ETFO's advice to its over 70,000 members across the Province theoretically affecting every elementary school in the Province is at least of equal, if not greater, public interest or educational value than in these cases.

27. Third, even if I accept that the issue of mootness can arise at any time – and I share the Board's concerns as expressed in *Brant Haldimand-Norfolk Catholic District School Board*, *supra*, and *Board of Education for the City of Toronto*, *supra*, about how directly the mootness analogy applies to the Board – I am not satisfied, as I said before, that the issues between the parties have become academic. As Chair MacDowell (as he then was) explained in *Brant Haldimand-Norfolk Catholic District School Board*, *supra*, the focus of the *LRA* is the relationship of the "work place parties" (described as the

"immediate parties" in *Board of Education for the City of Toronto*, *supra*). What has complicated this application from the outset was ETFO's dispute was with the Government – not its employers. The mechanism that ETFO chose to express its displeasure with the Government about Bill 115 was through the workplace parties – so that to the extent there was any dispute between the workplace parties, ETFO, and the applicant school boards, it was over that mechanism that ETFO has used (not necessarily the dispute with the Government over Bill 115 with which the applicants may not have been pleased either). I do not regard that issue as academic just because ETFO has now called a perhaps only temporary halt to its use. I have the same concern expressed by then Chair MacDowell that to characterize the dispute and whether it is academic, as ETFO suggests, may insure "the dispute will have always disappeared by the time the matter can be brought on for hearing", or in the more eloquent words of the British Columbia Court of Appeal, repeated by the Supreme Court of Canada in *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326 – the impugned conduct is "capable of repetition, yet evasive of review". Could there be a more clear example than this case? ETFO began its campaign in January of this year, continued it throughout the hearing in January and February and for weeks longer, only to end it on the eve of a decision being released – and now asserts that the issue is academic or moot. In this regard, ETFO says its conduct is not evasive of review – that I could just adjourn the hearing and simply issue the decision if and when the complained-of conduct resumes. I am not comfortable with such a solution, nor do I believe it is so simple. For how long? What if it happens at another school board motivating that school board to file its own application? Does the Board apply those 9 days of hearing to that application, or does it start afresh? I believe ETFO's solution of simply adjourning raises more problems than it solves.

28. Fourth, concerns that may have motivated the Board in other decisions not to issue a declaration, namely a disinclination to venture into hypothetical situations that were not fully argued in an adversarial context, seem inapplicable here. This case consumed some nine days of hearings and was comprehensively, extensively, and passionately argued. I do not think that the issuing of this decision, again in the words of Sack, Mitchell, & Price, can be said to "punish" the parties but, rather, is "to inform and guide the parties of their legal rights". In some ways, not to issue a decision in this case actually seems to cater to those very same "third party issues" or "collateral political interests" that the Board in *Brant Haldimand-Norfolk Catholic District School Board*, *supra*, or *Board of Education for the City of Toronto*, *supra*, cautioned against in venturing into cases that were moot, academic, or no longer contained any live issue in the first place.

29. Fifth, I am not convinced that no labour relations purpose is served by issuing this decision. What particularly was argued before me in this regard was the waste of resources, both those of the Board and the parties, now that there is no longer any advice to ETFO members to refrain from volunteering for extracurricular activities. Since this decision would not be any final determination because of the outstanding *Charter* issues raised by ETFO, why invite a potentially complex (both in terms of the law and what evidence was required and how it should be adduced) further hearing, particularly when

the impugned conduct of ETFO had ceased? That ETFO argued would be not an insignificant waste of resources.

30. However, that is a double edged argument. First, what of the previous nine days of hearings – are they simply to be "thrown away" now? That is hardly an argument for the prevention of waste of resources. Both *Wal-Mart Canada Corp.*, *supra*, and *Toronto Hydro*, *supra*, cases cited to me were examples where the Board was about to **commence** its hearings and therefore concerned about the use of resources – not where the Board had completed nine days of hearings and was on the verge of issuing its reasons. In fact, the only case that either of the parties referred me to where no labour relations purpose (including waste of resources) was the basis for the Board not to issue its decision after the hearing had already concluded is *Ontario Hydro,* [1994] OLRB Rep. June 765 – referred to in *Stock Transportation Limited*, *supra*. However, in that case, a complaint about the employer's failure to negotiate an "adjustment plan" when terminating more than 50 employees (a provision no longer in the *Act*), there was absolutely no question that the matter in dispute was "moot", as since the completion of the hearing, a collective agreement had been negotiated that clearly addressed "the very issues which would have been the subject of adjustment plan negotiations" (at para. 16) thus rendering any relief sought equally academic "since to the extent that the remedy sought is a direction to compel the employer to negotiate, this end has already been achieved" (at para. 21).

31. Again, for the reasons set out before, it is not clear to me that here, unlike *Ontario Hydro*, *supra*, the "parties have resolved the issues which underlie the application" (at para. 18). ETFO's dispute with the Government is continuing to be negotiated and "progressing". If ETFO had any dispute with the applicants, the actual employer of the members, it was only about the manner in which ETFO was asserting its displeasure with the Government – urging or advising its members not to participate in voluntary extracurricular activities. All that has happened in that regard is ETFO has now withdrawn that "advice" – it has not conceded that such advice was improper or illegal (rather it has vehemently asserted and continues to assert that such conduct is proper and legal) and it has not asserted that it will not resort to this conduct again (whether in this dispute with the Government, or any other dispute with the Government or any of its actual employers, for that matter). Accordingly, I am not convinced that there is no labour relations purpose to issuing this decision.

32. Furthermore, to the extent ETFO (or the applicants, for that matter) assert that in these circumstances there is no labour relations purpose, or a waste of resources to argue the next part, the *Charter* questions, of this application, either may still argue that at the outset of that next portion of this application. In fact, the release of the reasons on this portion of the decision may very well prompt such an argument by either party (or even more hopefully an agreement between the two of them about this).

33. Lastly and ultimately, how far can a party go before the Board, not only in defending its conduct, but vigorously asserting its lawful right to engage in such conduct (and again, I do not in any way question ETFO's entitlement to do so) before it is simply too late to avoid or escape a decision about such conduct? Again, despite repeating

myself, the hearing on this portion of the application consumed nine days. It was fully and passionately argued by both sides. Had the Board been able to issue its decision mere days (if not hours) before the ETFO announcement of March 26 (and it was virtually about to do so), it is ETFO's argument about "mootness" that would be incontrovertibly moot, academic, and could serve no labour relations purpose. Moreover, this issue is not about to disappear or go away. At best, it may not reappear in these negotiations between ETFO and the Government (and that is certainly not guaranteed). I am simply not convinced that there is no labour relations purpose in issuing this decision – particularly at this point of these proceedings. Rather, in the circumstances of this case, I am concerned that, in the words of *Norfolk Hospital Association Assn.*, *supra*, to "fail to do so might be construed … as an abdication of our public responsibility".

IV. The Impact of the Repeal of the *Putting Students First Act 2012,* S.O. 2012, c. 11 (the "*PSFA*" or "Bill 115")

34. ETFO argued that since the Government's announced intention and purpose of the repeal of Bill 115 (which even the Government characterized as the "lightning rod" for the current tumult in the education sector in the Province) is to assuage the opposition to the *PSFA*, the repeal must be meaningful. In order to have such meaningful effect the repeal cannot mean that the landscape has not changed at all from before the repeal to after the repeal. Either:

> (a) the collective agreements imposed under Bill 115 no longer exist after the repeal; or
>
> (b) even if the terms and conditions imposed by Bill 115 continue or survive the repeal, they do not legally amount to a "collective agreement" either under Bill 115, the *Labour Relations Act* or the *Education Act*.

35. The obvious significance of this is that without a collective agreement (legally or otherwise) there is no bar to any action undertaken by ETFO (whether or not it amounts to a strike under the *LRA* or the *Education Act*). ETFO argued the parties would then revert to their pre-Bill 115 situation – ETFO and all English language public school boards, including these applicants, had exhausted conciliation and were in possession of a "No-Board" report, so if any of ETFO's activity amounted to counselling or encouraging a strike, such a strike would be lawful.

36. First, contrary to ETFO's assertions, it is simply not correct to say the repeal of Bill 115 is without any meaning if the collective agreements survive its repeal (or the terms and conditions amount to a collective agreement). However one characterizes the repeal of a bill that only weeks before imposed collective agreements across the Province (and how charitable such a characterization would be is obviously dependent on the parties' differing positions and interests), Bill 115 still had some forward-looking provisions that are now no longer the law. As both the Government and the applicants point out there is conduct that would have been unlawful prior to the repeal that is now lawful. Merely by way of example, the authority to extend the restraint period for a third

year that was granted under Bill 115 no longer exists. Also, the prohibition on negotiating changes to the imposed collective agreements (mid-contract) that are inconsistent with the Memorandum of Understanding ("MOU") specified in the Bill no longer exists – no matter how hard or unlikely that might be now. There are other examples. It cannot be fairly said the repeal is completely meaningless even if it only has a much more limited effect than ETFO wishes – and that assumes that this is in any way a relevant criterion to this determination (which to be candid I remain unsure).

37. Second, for purposes of this decision I need not analyze the common law or its alleged shortcomings (which was the subject matter of much comment during these proceedings). The answer is found either in section 51(1) of the *Legislation Act, 2006* S.O. 2006 c. 21, Sched. F (the "*Legislation Act*") or not at all – that is what the Government and the applicants have relied on.

38. Section 51(1) provides:

> **51.** (1) The repeal of an Act or the revocation of a regulation does not,
>
> (a) affect the previous operation of the repealed or revoked Act or regulation;
>
> (b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;
>
> …

39. At first blush, both sections 51(1)(a) and (b) would appear to provide a complete answer to ETFO's argument. Section 51(1)(a) protects the "previous operation" of the repealed Act and section 51(1)(b) protects a "right, privilege, obligation or liability that came into existence" under the repealed *PSFA*.

40. ETFO asserts that there is a distinction between contractual rights and purely statutory rights – the former may continue after the repeal, the latter do not. I accept ETFO's characterization of these rights, etc., as purely statutory, but see no basis for the different impact that ETFO says should follow, either in the plain wording of section 51 of the *Legislation Act* or any of the texts or cases ETFO referred me to. It may be that some of the cases indicate that contractual rights may survive after repeal of a statute independent of the applicability of section 51 of the *Legislation Act* (see *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530, at paras. 49 and 51), but that does not mean that there is grafted onto section 51 some unwritten restriction against statutory rights. In fact, I accept, as the Government argued, that the whole purpose of the *Legislation Act* (or the *Interpretation Act,* R.S.O. 1990, c. I.11 (the "*Interpretation Act*") before it) (and section 51) was to deal with legislation and the effect of "legislative changes" – including repeal of statutes.

41. It may be, as ETFO argued, that the language of the analogous federal legislation uses the words "…accrued, accruing or incurred after the enactment is repealed" to make it explicitly clear that issues in the future are still governed by the

rights acquired under the repealed legislation – and those words are now missing in the *Legislation Act*. But that argument ignores both the words "that came into existence under the repealed Act" and the legislative history of the *Legislation Act* – that the predecessor provision in the *Interpretation Act* tracked the words of the federal legislation. I accept the Government's argument that the legislation was changed merely to adopt the easier formulation "rights that came into existence" rather than "accruing". I certainly do not accept that the legislative change was intended to have the major impact that ETFO argues – that rights already created under a repealed Act could never be enforced after the repeal.

42. In fact, I do not disagree with the results of any of the cases ETFO referred me to: *Dikranian*, *supra*; *Gustavson Drilling (1964) Ltd. v. MNR*, [1977] 1 S.C.R. 271; *Apple Meadows Ltd. v. Manitoba*, [1985] 18 D.L.R. (4th) 58; or *Canada (Attorney General) v. Kowalchuk*, [1990] 114 N.R. 275 – where tax rates, conditions for benefit entitlements, etc., were legislatively changed and plaintiffs could no longer claim or qualify for entitlement to them as they existed before the legislative change. See for example *Gustavson Drilling*, *supra*, at pages 282-283:

> … The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the *Income Tax Act* of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the *Income Tax Acts* of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.
>
> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands* [1895] A.C. 425, at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue* [1961] C.T.C. 490 (Exch.); *Director of Public Works v. Ho Po Sang* [1961] 2 All E.R. 721 (P.C.).

or *Kowalchuk*, *supra*, at page 4:

> … Indeed, it is now well established that a claimant has no vested right that the rules under which benefits will be paid to him on a weekly basis will remain fixed and immutable after the moment he makes his claim; any change in those rules will be applicable to him (cf. *Côté v. Canada Employment and Immigration Commission* (1986), 69 N.R. 126).

or *Apple Meadows*, *supra*, at paras. 16-17:

> 16 … I am not certain that these exemptions are either vested interests or property as the words are used in either statutes or binding authorities. These exemptions are more in the nature of privileges granted for a limited time to encourage the construction of residential units in the province. The legislature at one stage granted them. Surely these exemptions are not carved in stone and need not exist forever. That the same legislature, or its successor, in its supremacy can withdraw them seems to be the rule. …
>
> 17 Consequently, the legislature being supreme and having clearly expressed itself, I am bound to say that it is free to withdraw that which its predecessor gave.

43. But that is not what ETFO advances here – rather that all the collective agreements established under the repealed Bill 115 now cease to exist. In my view, that is not remotely similar to the cases ETFO points me to. ETFO says there is no case exactly like this one but the Government points to what appears to me to be more conceptually analogous cases. See *Metcalfe Realty Co.*, [2001] OLRB Rep. May/June 843; *Government of Ontario (Ministry of Community Safety and Correctional Services)*, [2008] OLRB Rep. May/June 395; *Niagara Escarpment Commission v. Paletta International Corp.*, [2007] O.J. No. 3308 (Ont. Div. Ct.); *Township of Nepean v. Leiken*, [1971] 1 O.R. 567 (C.A.); *Beechwood Cemetery Co. v. Graham*, [1996] O.J. No. 2364. In fact, in the *Ministry of Community Safety and Correctional Services* case this Board determined, relying on the *Legislation Act*, that it had jurisdiction to determine whether old provisions of the *Crown Employees Collective Bargaining Act* ("*CECBA*") had been contravened even though "old" *CECBA* had been repealed and "new" *CECBA* had been enacted:

> 12. In my view, the application of these provisions to the case at hand requires that three questions be answered:
>
> i. Had the rights, privileges, obligations or liabilities which the applicants seek to assert come into existence under the old-CECBA, with the result, pursuant to section 51(1)(b) of the *Legislation Act*, that the repeal of the old-CECBA does not affect those rights, privileges, obligations, or liabilities?
>
> …
>
> 20. I do not find it necessary to enter into the debate about when rights are "accruing" because the rights which the applicants seek to assert are not accruing rights. They were simply conferred by old-CECBA on those subject to that Act, a precondition which is not in dispute. For example, during the life of old-CECBA potential witnesses had a right, pursuant to section 37(1), not to be subject to intimidation, coercion and/or imposition of penalties by an employer …

> 21. Nor are the rights which the applicants seek to assert abstract or intangible. They allege that as a result of specific violations of rights conferred by old-CECBA they experienced specific, tangible harm: the responding party terminated their employment. There can be no question that the applicants were, to use another term used in some of the cases, in a "distinctive legal position": the rights conferred generally on the public sector by old-CECBA were no longer an abstraction for them.
>
> 22. In summary, I conclude with respect to the first question that the rights, privileges, obligations or liabilities which the applicants seek to assert "came into existence" under the old-CECBA, with the result, pursuant to section 51(1)(b) of the *Legislation Act*, that the repeal of the old-CECBA does not affect those rights, privileges, obligations, or liabilities.

44. Similarly, the applicants point me to the Board's decisions in *Tom Jones & Sons Ltd.*, [2012] OLRB Rep. March/April 391, where the Board rejected a union argument that the repeal of section 160.1 of the *LRA* (and the regulations enacted thereunder which deemed certain construction industry bargaining rights of certain employers to be abandoned) was insufficient for the unions either to argue those bargaining rights were now re-established or those consequences (and that repealed legislation) could now be challenged and reviewed under more recent Supreme Court of Canada *Charter* jurisprudence, at para. 45:

> … Rather, this statutory language very clearly terminates specific bargaining rights and ends the applicability of collective agreements (with respect to certain employees of certain employers in the ICI sector of the construction industry in all, or certain areas, of the Province, as set out in any regulations made pursuant to section 160.1) on the day a section 160.1 (deemed abandonment) regulation comes into force. Providing any such regulation came into force during the period when section 160.1 formed part of the Act, as is the case with respect to O.Reg. 105/1, **neither the section of the Act itself nor any of its regulations are required to stay in effect, pursuant to section 59 of the *Legislation Act* or otherwise, in order to maintain the statutorily mandated consequences set out in subsection 160.1(3)**.
>
> [emphasis added]

45. I cannot extend, either as a matter of principle or logic (from those cases ETFO cited), and reach the result ETFO asserts before me.

46. Equally I do not find the jurisprudence that ETFO pointed to about what constitutes a "vested right" (as only those survive repeal of a statute) as particularly helpful here. See *Dikranian*, *supra*, at paras. 37, 39 and 40. Whatever the test to determine vested rights, there is no lack of clarity or ambiguity about the collective

agreements or their contents. There is no question whether they were "constituted". There are no "indefinite" rights here – in the words of some of the cases.

47. ETFO seems to suggest that because statutory rights are ephemeral (they come and go with the statute) they can never or rarely be vested. I do not read any of the cases as going that far nor do I see it as logically or necessarily required. With all due respect to the ingenuity of ETFO's arguments, it seems clear to me what has happened here. Collective agreements were imposed. Shortly after (and arguably unseemingly shortly after), the statute that empowered and enabled the imposing of those collective agreements was repealed. But any "right, privilege, obligation, or liability that came into existence", i.e. those set forth in the collective agreements, were not affected. That is what section 51(1)(b) of the *Legislation Act* says – and that is what I think is its purpose.

48. Therefore, I reject ETFO's arguments that the collective agreements do not survive the repeal of Bill 115.

49. Having come to the conclusion that the collective agreements survive the repeal of Bill 115, I need not deal at great length with ETFO's second argument. However, I wish to make clear that, equally, I reject the argument that even if the terms and conditions (or in the words of the *Legislation Act* – any "right, privilege, obligation or liability") survive, they do not constitute a collective agreement for purposes of the *Education Act* or the *LRA*. Essentially ETFO's argument is that the definitions of collective agreement, whether in the *LRA* or Bill 115, by requiring an agreement in writing between the employer and the union, also required that the agreement be "freely negotiated" – and there are none that were freely negotiated by ETFO (or these applicants for that matter) – only ones that were imposed under Bill 115. Without wishing to be either simplistic or glib and merely say that the "agreement in writing" required in the statutory definitions is satisfied by the Order in Council ("OIC") promulgated under section 9 of Bill 115 together with the predecessor collective agreements, and the changes incorporated into them both from the MOU and the regulations – the essence of ETFO's argument is to graft onto the statutory definitions of collective agreement the words "freely or voluntarily negotiated" – words that are not there. Leaving aside the metaphysical question of how freely or voluntarily negotiated any collective agreement is in a regime that provides for some binding impasse resolution mechanism (whether the economic sanction of strike or lock-out, or compulsory interest arbitration), this is additional interpretive weight that I do not believe the existing statutory definition of collective agreements can bear, was ever intended to bear, or does in fact bear.

50. First, ETFO pointed to the provisions of Bill 115 in support of its argument, and specifically the differing wording of sections 9(4) and 9(5):

> (4) A strike or lock-out in contravention of an order made under paragraph 2 of subsection (2) is **deemed to be** an unlawful strike or lock-out for the purposes of the *Labour Relations Act, 1995.*
>
> (5) For greater certainty, the *Labour Relations Act, 1995*, as modified by Part X.1 of the *Education Act* in the case of Part X.1

> teachers, **applies** to a collective agreement imposed under subparagraph 2 i of subsection (2).
>
> [emphasis added]

ETFO ascribes great significance to the fact that section 9(4) "deems" conduct to be a strike under the *LRA* but section 9(5) does not do so for the collective agreements imposed under Bill 115 – it merely asserts the *LRA* (and the *Education Act*) applies to them. I do not read section 9(5) to imply that, but for it, the collective agreements imposed by Bill 115 would not be collective agreements for purposes of the *LRA*, as ETFO suggested. That is certainly not "for greater certainty", the opening words of section 9(5).

51. Leaving aside that section 9(5) opens with the words "for greater certainty" – and something must exist in the first place in order to make it more certain – and leaving aside if Bill 115 is now repealed, what really is the significance of slightly different words in those repealed sections – it is simply too divorced from any sense of reality to characterize these as anything else but collective agreements. As counsel for the applicants pointed out, if they are not collective agreements but just an "orphan" collection of terms and conditions of employment, where or how are they to be enforced?

52. More importantly, as both the Government and the applicants noted, there are many situations where the end result is not "freely negotiated" as ETFO would characterize it, but that end result is still a collective agreement, or many situations where the statute mandates a provision of the collective agreement, regardless of the parties' agreement. The latter examples are almost too numerous to mention – whether in Part X.1 of the *Education Act* (such as the term of the agreement in section 277.11) or in the *Labour Relations Act* (such as the "no strikes" during the life of a collective agreement provision in section 46 or the mandatory arbitration provision in section 48). However, the most obvious example is a first contract agreement that is arbitrated under section 43 of the *Labour Relations Act* – which is not "freely negotiated" and there is no explicit statutory language "deeming" it a collective agreement for purposes of the *LRA*. Similarly are the various statutes where impasse resolution is achieved by imposing collective agreements by interest arbitration: *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14, etc. ETFO pointed me to specific language in some of these statutes providing in the specific situations where a nominee or party, etc., refused to either execute an interest award or the collective agreement it imposed, it was still a collective agreement for purposes of the *LRA*. However, ETFO did not point me to any general blanket statutory provision "deeming" the ordinary result of such interest arbitration (as opposed to where an unhappy party was refusing to sign) a collective agreement for purposes of the *LRA* – which it suggested was necessary for collective agreements imposed by Bill 115. I do not agree.

V. Is ETFO Encouraging a "Strike"

(a) Factual Background

53. Notwithstanding the lengthy complex legal submissions, neither party made extensive factual allegations. The application was factually relatively straight forward. ETFO's response, at least factually, was scanty.

54. Teachers perform many functions in their interactions with students, parents, and principals or other supervisors. Notwithstanding the length and complexity of the *Education Act* and the regulations under it, there is no complete exhaustive job description of what a teacher does (assuming that it would not necessarily change by virtue of the ages of any group of students or even assuming that it would be legally conclusive to the issues in this application). In the original sense of urgency (if subsequently frustrated by later events and the length of these proceedings), I was very concerned that the application could be bogged down by limitless *viva voce* evidence of what particular teachers were doing, were refusing to do, what and how they had done it in the past, and across many different schools (even if the applicants are not amongst the largest district school boards in the Province).

55. Accordingly, after much urging and debate (some of it cantankerous), the parties commendably agreed ultimately to the scope of activities that would be dealt with in this application. It was reduced to the following decision at the third day of hearing on Tuesday, January 29, 2013:

> This application concerns communications of the responding party, ETFO, encouraging certain conduct by its members in support of ETFO's opposition and to protest the passage of Bill 115. The applicants allege that the communications, at a minimum, encourage the withdrawal of, or the cessation of performing, certain activities that in concert, amount to an unlawful strike under the *Education Act*. These activities, the applicants concede, range from what they characterize as mandatory teacher duties (the refusal to perform could be the subject of discipline) to purely voluntary activities (the refusal to perform by an individual teacher could not be the subject of discipline even though someone has volunteered to perform that activity in the past), and activities in between.
>
> ETFO does not necessarily agree with this characterization or categorization or that there are necessarily any activities within any or all of these categories. However, the applicants are prepared at this point to argue this application on their maximum position that all of the activities (and agree that those) listed in Appendix "A" are purely voluntary. With respect to the activities listed in Appendix "B", both parties are prepared to argue this application on the basis that these are also voluntary – even if that is not the position of the Applicant. If successful, then any relief to which they are entitled (and the exact scope, format and wording of that relief will be argued later) would apply to all activities being encouraged to be withdrawn and there is

no need to categorize each of the activities. If I find that the withdrawal of purely voluntary activities in concert does not constitute an illegal strike under the *Education Act*, the applicants reserve their right to argue later that the withdrawal of the other categories of activities, such as those they argue are mandatory (for which the refusal to perform discipline could be imposed), could constitute an illegal strike. As this seems an expeditious way of reaching a decision on a fundamental (if not necessarily the only) issue in dispute between the parties, the hearing will proceed on this basis. Of course this does not preclude ETFO from arguing the relevant material before the Board does not establish that it has "encouraged" etc. any withdrawal or cessation of the activities in either Appendix "A" or "B".

Appendix A

Trillium Lakelands District School Board ("TLDSB")

1. There is a wide variety of organized team sports at TLDSB schools. For years, many teachers, past and present, have volunteered to organize and supervise sports practices and games before and after the instructional day. Team practices usually begin at 3:30 p.m., i.e., after the end of the instructional day. In 38 of TLDSB's 41 elementary schools, students sports teams were organized and supervised by teachers during the 2011-2012 school year on a volunteer basis and this has occurred for at least the past five school years. Teachers are involved in all aspects of these team sports including tryouts, selections, playoffs and tournaments. The successful implementation of these efforts require and are a collaborative effort between the schools and teachers involved.

2. Teachers and students have also participated in a very active chess program at many of its elementary schools. The chess program culminates in a weekend chess tournament that is administered by teachers. This program has taken place outside regular instructional hours for many years. The successful implementation of these efforts require and are a collaborative effort between the schools and teachers involved.

Upper Canada District School Board ("UCDSB")

3. There is at least one inter-school team at each of the elementary schools in UCDSB. This has been a consistent feature of the school experience in our schools for many years. Most schools, through volunteer teachers, have also consistently provided their students with an intramural sports program, which gives students the opportunity to play different sports and active games throughout the school year. UCDSB has provided its students with intramural and inter-school programs for decades. These intramural sports and inter-school sports programs have been supported by the consistent voluntary participation of UCDSB's elementary teachers. Team practices

> usually begin after the end of the students' instructional day. Teachers are involved in all aspects of these team sports including tryouts, selections, playoffs and tournaments. The successful implementation of these efforts require and are a collaborative effort between the schools and teachers involved.
>
> 4. For years, there have been many different clubs that are organized and supervised by teachers on a volunteer basis at UCDSB connected to the arts. There are, for example, art clubs organized and supervised by teachers during nutrition breaks or at a time after the instructional day has ended at several of the elementary schools within UCDSB. In the same way, there are bands and/or choirs organized and supervised by teachers at more than one half of UCDSB's elementary schools. Teachers are also active in creating and supervising dramatic arts clubs in several schools throughout UCDSB. The successful implementation of these efforts require and are a collaborative effort between the schools and teachers involved.
>
> 5. Teachers do not receive any additional remuneration for participation in any of these activities.
>
> **Appendix B**
>
> Applicable to both Trillium Lakelands District School Board and Upper Canada District School Board:
>
> Teachers have routinely, at the request of school administration, distributed class, school and school board communications to the parents of students. These communications include newsletters, permission slips for field trips and class outings, enrolment forms and issue-specific communications (for example, regarding H1N1). The distribution of such materials is a common method of communication with the parents of our elementary school students. Depending on the age of the student, the teacher will either place the communication in the student agendas or hand them to the student.

56. There were other matters that were also agreed upon (sometimes begrudgingly and only after contentious arguments but ultimately still commendably) to avoid the necessity of having *viva voce* evidence and in the hope of not prolonging the hearing of the application:

> (a) ETFO did not dispute the authenticity (and did not require proof) of the union's bulletins ETFO distributed to all of its members with respect to "Withdrawal of Voluntary Extra-curricular Activities" (the ironically titled "Provincial Takeover Bulletins") which were attached to the application;
>
> (b) ETFO also did not require strict proof of those e-mails sent from various ETFO local officials (e.g. president of the local, steward, etc.) either to members of a particular school or the teachers at the applicants' school boards setting out instructions from

ETFO's head office (which were also filed with the application) ─ although ETFO asserted that I should not make too much of them, either because of their limited reach or scope or because in allegedly repeating instructions from ETFO's head office they were hearsay. The latter objection, to be blunt, was of little significance to me not only because of the Board's ability to accept evidence not necessarily admissible in a court of law (see section 111(2)(e) of the *LRA*), but because even if hearsay it would seem to amount to admissions(s) against interest by ETFO officials and most importantly, if misstating ETFO positions there was absolutely no evidence of ETFO making any attempt to correct such alleged misstatements (even after this application was filed);

(c) The ETFO Constitution was ultimately filed (after reversing positions by the parties whether it ought to be) and agreed to. It was not disputed that the Constitution contained provisions for the discipline of ETFO members, that such discipline could be for failure to follow ETFO directives and the disciplinary penalties included fines; and

(d) It was not disputed that the motion of ETFO's provincial executive about the "Withdrawal of Voluntary / Extra-Curricular Activities" (referred to in the Provincial Takeover Bulletins that "ETFO members not participate in voluntary/extra-curricular activities outside the 300 minute instructional day") did not constitute a "Directive", as that is defined in the ETFO Constitution because it had not been approved at a general meeting (which had not yet occurred). Furthermore, in the past, if ETFO intended internal union discipline for failure to comply with some document, ETFO would explicitly advise its members of that and attach a copy of the ETFO internal disciplinary procedure – although none of this was set forth in the Provincial Takeover Bulletins (and certainly not with the exactitude that ETFO spelled out this position at the hearing).

(b) The Issue

57. The question raised in this application is whether this conduct falls within the definition of strike (there is no real dispute that at a minimum ETFO "has encouraged" this conduct). The current definition of strike for these purposes is found in section 277.2 of Part X.1 of the *Education Act*:

> **277.2** (1) The *Labour Relations Act, 1995* applies with necessary modifications with respect to boards, designated bargaining agents and Part X.1 teachers, except where otherwise provided or required by this Part.
>
> ...
>
> (4) For the purposes of subsection (1),

> (a) the definition of "strike" in section 1 of the *Labour Relations Act, 1995* does not apply; and
>
> (b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed or may reasonably be expected to have the effect of curtailing, restricting, limiting or interfering with,
>
> (i) the normal activities of a board or its employees,
>
> (ii) the operation or functioning of one or more of a board's schools or of one or more of the programs in one or more schools of a board, or
>
> (iii) the performance of the duties of teachers set out in the Act or the regulations under it,
>
> including any withdrawal of services or work to rule by teachers acting in combination or in concert or in accordance with a common understanding.

58. However, a number of days of argument were devoted to the long and rather convoluted legislative history of this definition – and it was crucial to the position of the parties (and in particular ETFO) – so it is necessary to review it in some detail.

(c) Statutory History and Evolution

(i) *School Boards and Teachers Collective Negotiations Act,* R.S.O. 1990, c. S.2 (Bill 100)

59. The parties used this as the baseline for their recounting of the legislative history or evolution. Bill 100 first introduced what the parties referred to as an education-specific definition of strike (as opposed to the general industrial definition contained in the *Labour Relations Act*):

> "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed to curtail, restrict, limit or interfere with the operation or functioning of a school program or school programs or of a school or schools including, without limiting the foregoing,
>
> (a) withdrawal of services,
>
> (b) work to rule,
>
> (c) the giving of notice to terminate contracts of employment;

(ii) *Education Quality Improvement Act*, S.O. 1997, c. 31 (Bill 160)

60. This act repealed the *School Boards and Teachers Collective Negotiations Act* (Bill 100). In addition to many other changes (such as the elimination of individual local school boards and the creation of district school boards and the designation of the statutory bargaining agents) in section 277.2, it specifically applied the *Labour Relations Act* to boards, designated bargaining agents and Part X.1 teachers. Since Bill 100 had been repealed, this meant that the *Labour Relations Act* definition of strike (the traditional industrial non-educational definition of strike) applied.

(iii) *Education Accountability Act 2000*, S.O. 2000, c. 11 (Bill 74)

61. The applicants describe this as the most significant amendments to the *Education Act*. The applicants characterize it as essentially having three components:

> (a) creation of a whole statutory regime with respect to "co-instructional" activities;
>
> (b) workload issues including restrictions on class size and stipulating instructional time;
>
> (c) increase in ministerial oversight and control of district school boards and their finances.

62. In terms of the new regime for "co-instructional activities", the *Education Act* was amended to include for the first time the following definition:

> "co-instructional activities" means activities other than providing instruction that,
>
> (a) support the operation of schools,
>
> (b) enrich pupils' school-related experience, whether within or beyond the instructional program, or
>
> (c) advance pupils' education and education-related goals,
>
> and includes but is not limited to activities having to do with school-related sports, arts and cultural activities, parent-teacher and pupil-teacher interviews, letters of support for pupils, staff meetings and school functions but does not include activities specified in a regulation made under subsection (1.2).

(This definition has been referred to by one commentator as the Government's "controversial term for extracurricular activities". See para. 75, *infra*.)

63. Subsection 1(2) dealt with the authority of Cabinet to make regulations specifying activities that were not co-instructional and it is not material for these purposes.

64. As well, section 277.2 of the *Education Act* was amended by adding subsection (4):

> "(a) the definition of "strike" in section 1 of the *Labour Relations Act, 1995* does not apply; and
>
> (b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed to curtail, restrict, limit or interfere with the operation or functioning of one or more school programs, **including but not limited to programs involving co-instructional activities**, or of one or more schools including, without limiting the foregoing
>
> (i) withdrawal of services,
>
> (ii) work to rule,
>
> (iii) the giving of notice to terminate contracts of employment."
>
> [emphasis added]

65. In other words, the use of the industrial definition of strike in the *LRA* was short-lived and Bill 74 again introduced an education-specific definition of strike. It expanded the definition beyond what had existed in Bill 100 and specifically included co-instructional activities as part (or a subset) of "interfering with the operation or functioning of one or more school programs".

66. These sections were not only included in Bill 74 but actually proclaimed in force. The balance of those sections of Bill 74 providing the actual operational provisions or the mechanism for the regulation, assignment and supervision of co-instructional activities, though passed, were never proclaimed. Those unproclaimed amendments were quite extensive. They included multiple amendments to section 170 (the duties of school boards), section 264 (the duties of teachers), and section 265 (the duties of principals). The oversight contemplated in these amendments was quite extensive requiring the development of "plans", "frameworks", and "guidelines" for co-instructional activities by the various players and all with ministerial oversight – either through the Minister issuing guidelines for the plans that school boards were required to develop or requiring the filing of any school board plan and the authority of the Minister to direct any changes in the plans with which directions the school board had to comply. In the specific words of section 170(2.2) a school board's framework:

> **In a manner that is consistent with the manner in which co-instructional activities have traditionally been provided to pupils in Ontario**, in terms of when and where such activities take place, the framework **shall address** the assignment of duties,
>
> (a) on school days and on days during the school year that are not school days;
>
> (b) during any part of any day during the school year;
>
> (c) on school premises and elsewhere.

[emphasis added]

67. Further amendments to section 170(2.3) made it clear that:

> "It is the exclusive function of the employer to determine how co-instructional activities will be provided by elementary school teachers and elementary school temporary teachers and no matter relating to the provision of co-instructional activities by elementary school teachers and elementary school temporary teachers shall be the subject of collective bargaining nor come within the jurisdiction of an arbitrator or arbitration board."

Section 170(2.4) contained the mirror provision for secondary school teachers.

68. Equally, the duties of teachers were amended in section 264 to make it clear that it was the duty of a teacher "to participate in co-instructional activities, in such manner and at such times as the principal directs under clause 265(2)(b)".

69. Again, other than the definition of co-instructional activities and the definition of a strike, none of these operational sections were ever proclaimed.

70. EFTO says this demonstrates a clear legislative intent at this time to require teachers to participate in co-instructional activities regardless of collective agreements (subsequently to be abandoned as discussed below). The applicants argue that this was part of a broader theme of the Government to both centralize and regularize educational standards (including co-instructional activities) across the Province, so that the education a student received (and the quality of it) would not vary whether the school board was in northern or southern Ontario, whether it was rural or urban or whether it was Catholic as opposed to non-Catholic. In order to do that, a definition of co-instructional activities had to be included in the Act.

(iv) *Report of the Minister's Advisory Group on the Provision of Co-instructional Activities* – April 2001 (the "Report")

71. Needless to say, *inter alia*, the proposed regulation of co-instructional activities under Bill 74 was controversial among the various stakeholders in the education sector – school boards, unions and parents. As a result, in January of 2001 the Minister of Education established a five-member Minister's Advisory Group on the provision of co-instructional activities "to ensure that all students in Ontario have access to a full range of co-instructional activities". The Advisory Group issued its Report in April 2001. That report was introduced at this hearing without objection. It is useful to quote from the Report to put much of this legislative upheaval in context:

> The Current Situation in Ontario
>
> In the past few years, teachers' unions and some of Ontario's district school boards have withdrawn from leading and participating in co-instructional activities as a bargaining tactic, to influence the outcome

of collective negotiations. At present, most boards do not offer their students a full range of co-instructional activities. In June 2000, the Government introduced the *Educational Accountability Act* (Bill 74), which included provisions for accountability at school boards, limitations on average class sizes and the minimum teaching assignments of classroom teachers in secondary schools. After introduction of Bill 74, the levels of co-instructional activity dropped in most schools. In some schools, co-instructional activities had ceased completely. All boards and schools report that the quality of the co-instructional activities that are offered have suffered significantly.

Participation by teachers in such activities as conducting parent-teacher interviews, providing extra assistance to students, and attending staff meetings and student graduations is considered voluntary by teachers' unions. Teachers have therefore withdrawn from these activities, as well as from co-instructional sports and cultural activities.

72. The Report considered six options:

1. Do nothing;

2. Community delivery of co-instructional activities for students;

3. Pay teachers to provide co-instructional leadership;

4. Enhance co-instructional activities in the key areas of respect, time, resources, and community involvement;

5. Determine the activities that should be considered part of the mandatory duties of a teacher, to ensure that all of Ontario's students have access to a full and well-rounded educational experience;

6. Credit teacher participation in co-instructional activities.

73. The Report made 16 recommendations, some of which ought to be highlighted:

1. That the Ministry of Education, district school boards, and teachers' unions immediately and collaboratively undertake to define the professional duties and responsibilities of teachers.

2. That schools and boards recognize, in assigning a secondary school teacher's workload, that teachers need time to participate in co-instructional activities.

4. That participation in co-instructional activities remain voluntary for teachers, and that the Ministry of Education withdraw the unproclaimed sections of the *Education Accountability Act, 2000*

> (Bill 74), that are related to making co-instructional activities a mandatory part of teachers' responsibilities.
>
> 5. That teachers' unions recognize the negative impact on students when they consider using withdrawal of services from co-instructional activities as a bargaining tactic.
>
> 6. That, given that teachers' unions believe that teachers' participation in co-instructional activities is voluntary, and given that those teachers who do participate in co-instructional activities voluntarily choose to do so, teachers' unions urge their members not to place pressure on fellow members who choose to participate in co-instructional activities.

74. In the end, the Report urged the Minister of Education, trustee associations and teachers' unions to meet as soon as possible to discuss the Report and its recommendations:

> "There is an urgency to begin implementing solutions now, so that another school year does not go by in which students are deprived of some of the most rewarding experiences of their educational careers."

75. Needless to say, that Report was almost 12 years ago. Sadly, the passage of time not only does not appear to have seen the resolution of the problem but it is unclear how many of the recommendations of the Advisory Group have actually been implemented. Regardless of each party pointing to portions of the Report to buttress its argument, it is difficult to discern from the Report alone, which recommendations the Government chose to accept and those it did not.

(v) *Stability and Excellence in Education Act, 2001,* S.O. 2001, c. 14 (Bill 80)

76. This Bill began to dismantle some, but not all, of the operational mechanisms for the regulation, assignment and oversight of co-instructional activities. In particular, it repealed the unproclaimed provisions in sections 170(2.1) to 170(2.4) (duties of school boards), 264(1.2) and (1.3) (duties of teachers) and 265(2) (duties of principals). Section 265(2) was replaced with:

> **265.** (2) In addition, it is the duty of a principal, in accordance with the board plan to provide for co-instructional activities under subsection 170 (1), to develop and implement a school plan providing for co-instructional activities.

77. Notwithstanding the repeal of many of the operational mechanisms for their regulation and assignment, the definition of co-instructional activities and its inclusion in the definition of strike remained in the *Education Act* unchanged.

(vi) Ontario Regulation 209/03 under the *Education Act* (amending Regulation 298 of R.R.O. 1990) – May 2003

78. Whatever the Government made out of the Report of the Minister's Advisory Group in April 2001, this regulation amended section 20 of Regulation 298 (which deals with the duties of teachers) to add:

> "(i) ensure that report cards are fully and properly completed and processed in accordance with the guides …;
>
> (j) co-operate and assist in the administration of tests under the *Education Quality and Accountability Office Act, 1996*;
>
> (k) participate in regular meetings with pupils' parents or guardians;
>
> (l) perform duties as assigned by the principal in relation to co-operative placements of pupils; and
>
> (m) perform duties normally associated with the graduation of pupils."

79. Clearly, at least some elements of the definition of co-instructional activities in the statute were now made mandatory through the regulations.

(vii) *Back to School (Toronto Catholic Elementary) and Education and Provincial Schools Negotiations Amendment Act, 2003,* S.O. 2003, c. 2 (Bill 28)

80. This statute ended a strike by the Ontario English Catholic Teachers' Association at the Toronto Catholic District School Board. It also made amendments to the *Education Act*. In particular, it again changed the definition of strike in section 277.2(4)(b):

> "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed **or may reasonably be expected to have the effect of** curtailing, restricting, limiting or interfering with,
>
> (i) the normal activities of a board or its employees,
>
> (ii) the operation or functioning of one or more of a board's schools or of one or more of the programs in one or more schools of a board, including but not limited to programs involving co-instructional activities, or
>
> (iii) **the performance of the duties of teachers set out in the Act or the regulations under it,**

> including any withdrawal of services or work to rule **by teachers acting in combination or in concert or in accordance with a common understanding**.
>
> [changes bolded]

81. Although still keeping co-instructional activities in the definition of strike, included as part of "the operation or functioning of one or more of a board's schools or one or more programs in one or more schools of a board", Bill 28 added new elements and expanded the definition by:

> (a) making it clear that the activity in combination or in concert in accordance with a common understanding was "effects" based rather than only "intention" based by adding the words "may reasonably be expected to have the effect"; and
>
> (b) adding a new apparently separate and freestanding component:
>
> "the normal activities of a board or its employees"

82. I was also referred to an exchange (reported in Hansard) in Question Period [on Wednesday, May 23, 2003] about Bill 28 between Dalton McGuinty, then Leader of the Opposition and then Premier Ernie Eves. In the exchange, the Leader of the Opposition accuses Premier Eves of trying to "sneak in" (without an election) a fundamental change to provincial education policy in Bill 28 amendments to the *Education Act*. The Leader of the Opposition alleged Bill 28 changed the law by including co-instructional activities as mandatory. However, co-instructional activities had been included in the definition of strike since Bill 74 in 2000. Notwithstanding the assertions of ETFO, it is difficult to discern what can be made of this exchange.

(viii) *Student Achievement and School Board Governance Act, 2009*, S.O. 2009, c. 25 (Bill 177)

83. The definition of co-instructional activities was repealed and deleted from the *Education Act* by Bill 177. Section 265(2) which had been introduced by Bill 80 in 2001 and was the last remaining operational provision with respect to co-instructional activities was repealed. Lastly, the definition of strike was amended to delete "including but not limited to programs involving co-instructional activities" in section 277.2. That is the definition of strike in the statute now.

84. I was also referred to, as reported in Hansard, part of the Committee transcript in November 2009 dealing with Bill 177. It involved a brief exchange between Elizabeth Witmer, the former Minister of Education and at that time the education critic of the Progressive Conservative Party and Liz Sandals, then parliamentary assistant to the Minister of Education, about the deletion of "co-instructional activities" from the

definition of strike in the *Education Act*. Ms. Witmer proposed an amendment that such deletion not be made and asserted that it was an amendment proposed by the Ontario Public Schools Boards' Association "to address their concerns relating to labour relations". Ms. Sandals indicated that the Government (now led by Premier Dalton McGuinty who as Leader of the Opposition had been part of the exchange with then Premier Eves in 2003 about Bill 28) did not:

> "want to re-open the whole debate on mandatory co-instructional activities and co-instructional activities as part of striking and so forth. We don't want to replay that debate: we did that about 8 or 10 years ago".

Although again referred to by ETFO, I am unclear about the significance of those remarks.

(d) The Argument and the Significance of Statutory History and Evolution

85. ETFO argues that the legislative history demonstrates a clear and conclusive legislative intent that the definition of strike in the *Education Act* not include these types of voluntary activities (or as counsel put it is a "complete answer" to the applicants' assertion that they were encompassed within the present definition of strike). When Bill 24 returned an education sector specific definition of strike to the *Education Act*, the definition specifically included "co-instructional activities" which were broadly defined, for the first time in the statute, to include non-instructional activities ranging from school related sports to arts and cultural activities. Although virtually all of the statute's operational mechanisms for implementation and assignment of "co-instructional activities" were never proclaimed (and certainly never brought into practise), the statutory definition of both co-instructional activities and strike (which included them) were. When there was controversy over this in particular, an Advisory Group to the Minister of Education was appointed and reported on the provision of co-instructional activities in April 2001. The Report reviewed a number of options and made recommendations. Although there is no evidence of any direct or explicit line between the Report and the Government's action, there is no dispute that the Report recommended both participation in co-instructional remain voluntary for teachers and that the Government withdraw the unproclaimed sections of Bill 74 related to making co-instructional activities a mandatory part of teachers' responsibilities. Then, in Bill 80, only months later, the Government repealed those unproclaimed sections of Bill 74, but still left the definition of co-instructional activities in the *Education Act* and their inclusion in the statutory definition of strike – as well as enacting section 265(2) of the *Education Act* which would require principals to develop and implement a school plan providing for co-instructional activities. In 2003, section 20 of Regulation 298 under the *Education Act* (dealing with duties of teachers) was amended to include only certain activities that arguably were already encompassed by the definition of co-instructional activities (e.g. parent-teacher interviews) as mandatory teacher duties. Amendments to the *Education Act* in Bill 28 which were either contemporaneous (or immediately afterward) still left the definition of co-instructional activities in the *Education Act* and in its definition of strike – even though that strike definition itself was amended and

arguably broadened. Then, finally in 2009, in Bill 177, the definition of co-instructional activities was deleted from the *Education Act* and the references to it deleted from the definition of strike – by the new Liberal government that had opposed the legislation in 2003, and I am pointed to references in Hansard arguably to support this interpretation of events and statutory history.

86. At first glance, there is much in this argument that is attractive. However, upon closer scrutiny, I do not believe the statutory history conveys as clear or unequivocal message as ETFO asserts. First, although ETFO has highlighted those legislative changes to the definition of strike and "co-instructional" activities, that was not only what was happening in the extensive "sea change" of legislative activity in the education sector in the last two decades. Although withdrawal of voluntary or extracurricular (or co-instructional) activities is certainly not a new negotiating or protest tactic by teacher unions, and some of the legislative change can accurately and fairly be said to be directed to this, there were many other legislative changes being made to the structure and the way the education sector operated – and even the legislative changes with respect to co-instructional activities (no matter how short-lived) were not exclusively preoccupied with their use as an alleged strike or protest tactic by teacher unions.

87. For example, it is also clear that with the introduction of a definition of co-instructional activities in Bill 74 (the felicitously named "*Education Accountability Act*") and the extensive statutory operational mechanism for implementation and oversight of co-instructional activities that the Government was also concerned with centralizing, regularizing, standardizing, and oversight of the provision of co-instructional activities so that they would not wildly differ across the Province depending on geography (north vs. south, urban vs. rural), denomination (Catholic vs. non-Catholic) or resources of the district school boards. That obviously required a definition of co-instructional activities. Equally, the concern about keeping co-instructional activities voluntary was not just directed at whether they would fall within the prohibited collective activity of a strike, but also with the quality and effectiveness of the wide array of co-instructional activities offered – i.e. whether they would be more successfully delivered by teachers who were obviously interested and wanted to do them and therefore individually volunteered, as opposed to unwilling, uninterested, and perhaps resentful teachers who were doing them only because they had been assigned to them. In fact, the basis of the Minister's Advisory Group recommending that co-instructional activities remain voluntary and the Government withdraw the unproclaimed sections of Bill 74 related to making co-instructional activities a mandatory part of teachers' responsibilities was explained at page 23 of the Report:

> In our travels across Ontario, we heard from all groups that participation in co-instructional activities should be voluntary on the part of teachers. People believe that making co-instructional activities mandatory for teachers is not workable, and would not result in satisfying co-instructional programs for students. They also believe that such a move would diminish the spirit of volunteerism that is such a positive part of our culture.

88. Ultimately in Bill 80, the Government repealed its intrusive mechanism for regulation, supervision and assignment of extracurricular activities in the unproclaimed portions of Bill 74, yet still kept the definition in the *Education Act* and the reference to it in the definition of strike (but only after amending section 20 of Regulation 298 to specifically list as mandatory duties of teachers some of the things arguably already included in the definition of co-instructional activities). What am I to make of that? What is clear about that statutory intention?

89. Moreover, in 2003, in Bill 28, the Government specifically dealt with the statutory definition of strike in the *Education Act* – and amended it to clearly broaden its scope by adding the apparently separate and free-standing element of "the normal activities of a board and its employees" (and ensuring that there was an "effects based" test for the activity by teachers in combination or in concert) but still left untouched both the definition of co-instructional activities and the reference to it in the definition of a strike. Again, what am I to make of that or what does that convey to me about legislative intention?

90. I pause to note that ETFO referred me to the Hansard exchange between then Leader of the Opposition McGuinty and then Premier Eves about this amendment. Leaving aside the limited assistance that Hansard quotes generally are able to provide, and leaving aside that not surprisingly it reads more of political posturing than any clear expression of government policy, it also seems that neither participant addresses what the other is saying – the statements appear to be almost ships passing in the night. What is crucial however is that the exchange, although it is suggested to be over fundamental change in government policy as the Leader of the Opposition charges, appears to be based on an incorrect assumption – the definition of co-instructional activities and the reference to it in the definition of strike had not been introduced or changed by Bill 28, but rather has been in the *Education Act* since Bill 74, several years (and at least one *Education Act* amendment) before. What it is not, is any clear enunciation of government policy on whether the withdrawal of voluntary activities in combination or in concert continued to be or ceased to be a strike. The exchange was not helpful to me.

91. Then ultimately in 2009, six years and a government later, Bill 177 repealed section 265 of the *Education Act* (the last remaining duty of a principal with respect to co-instructional activities thereby completing the deconstruction of the elaborate statutory model to regulate, supervise and assign them), repealed the definition of co-instructional activities and removed any reference to it from the definition of strike. Again, what am I to make of that or what does it convey to me about legislative intention?

92. Can I conclusively deduce, as ETFO argues, that this reveals that these voluntary activities are not covered by the definition of strike? Or, as the applicants argue, that Bill 177 was no more than legislative "tidying up" – that after the dismantling of what the applicants characterized as the "legislative edifice" of administering, regulating, supervising and assigning co-instructional activities, these last amendments only eliminated redundancy in the statutes – that the definition of strike in the *Education Act* was broad enough, both on its face (and particularly after the amendments in Bill 28)

and on the jurisprudence (which need not be discussed at this point but will be *infra*) to capture this type of activity so that specific language was not necessary?

93. I pause again to note that the brief exchange between Ms. Witmer and Ms. Sandals, pointed out to me by ETFO, was also unhelpful. Can Ms. Sandals, indicating that the Government's desire not to "want to reopen the whole debate on mandatory co-instructional activities as part of striking and so forth", be read as a clear indication of Government policy that the refusal of teachers in concert to perform voluntary activities does not constitute a strike, or merely that the Government did not wish to be drawn back into the quagmire of trying to make extracurricular activities etc., mandatory which had ended in such an abysmal failure? The kindest that can be said of this terse political exchange is that it is unclear.

94. Certainly there is some jurisprudence to support the applicants' view or interpretation of statutory changes. As cited by the applicants, see *CP Canadian Pacific Ry. Co. v. The King*, [1906] XXXVIII S.C.R. 137, at pages 142-143:

> It is, therefore, argued that the change of language indicates a change of intention and that the dropping of these words shews Parliament intended their cost should be added to the cost of the line in estimating the subsidy payable.
>
> I am utterly unable to adopt the argument. The rule invoked respecting the construction of statutes is only invoked where the language to be construed is ambiguous and doubtful. As said by Mr. Hardcastle in his third edition, at page 119:
>
> > Sometimes if an enactment is not plain, light may be thrown upon it by observing that certain words "have been" as Brett L.J. said in *Union Bank of London v. Ingram* (1882) 20 Ch. D. 465 "designedly omitted."
>
> Just so, but here it cannot be successfully contended that the language of the Act is not plain; it does not require any light to be thrown upon it in order to understand its meaning. The words may have been designedly omitted by the draftsman, but it was probably because they were unnecessary. If they had not been inserted and, as I venture to think, *ex abundanti cautelâ*, in the earlier statutes and then dropped out in this one I would say that no one would have had the boldness to claim to add the cost of rolling stock and equipment to the cost of the road so as to obtain the larger subsidy.
>
> The language of the "Subsidy Act of 1903" is, to my mind, plain and clear, and the language of the agreement entered into between the Crown and the company if possible still more clear. Their construction cannot be radically changed because certain unnecessary words inserted in former Acts by certain draftsmen are omitted in the Act under consideration. The reason for their omission is to my mind

> obvious, namely, that they were unnecessary, and the meaning of the statute without them is not doubtful or uncertain.

See also *Abbott v. R*, [2001] 3 F.C. 342, at para. 60.

95. In fact, the applicants assert the statutory history of the "strike" definition already has a clear example of this – the deletion of "giving of notice to terminate contracts of employment" which was in the Bill 100, Bill 74, and Bill 80 definitions of strike (even though by then it was effectively redundant) but finally removed in the Bill 28 version in 2003 because that notion had become practically irrelevant.

96. ETFO strongly disagreed with these authorities and referred me to *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305, where legislative history was reviewed and relied on to discern Parliament's intention in interpreting a statute, at para. 42:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders.

See also *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6, at para. 155, the most recent example of the Supreme Court of Canada utilizing legislative evolution and history in interpreting a statute, in that case the *Pensions Benefits Act*, as well as many other cases referred to me.

97. In fact, much (almost countless) argument from both parties was devoted to various leading texts on statutory interpretations (or parsing very many Supreme Court of Canada pronouncements on statutory interpretation), the distinction between legislative evolution and legislative history, how either or both are properly used in interpreting statutes (or discerning the intent of the lawmaker), various interpretative presumptions (that change is purposeful, that substantive change is intended), how strong or weak such presumptions are in Canada as opposed to Britain where there are no periodic statute revisions, etc., the methodology of how and when such presumption can properly be utilized (is there ambiguity and what constitutes ambiguity; do I start with the legislative history first or do I start with the existing statute first and only resort to legislative history if I find ambiguity?) or how they can be rebutted – to say nothing of the effect on the common law of section 56 of the *Legislation Act* which provides:

> **56.** (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force.
>
> (2) The amendment of an Act or regulation does not imply that the previous state of the law was different.

In fact, I was referred to the decision of this Board in *TESC Contracting Company Ltd.*, 2007 CanLII 35644 (ON LRB), at para. 38 where this very section of the *Legislation Act* was simply used in circumstances such as these:

> 38. Although the current Act does not explicitly state that the Board may make orders that would bind parties in respect of work undertaken in the future, the remedial power conferred on the Board by section 99(5) is, in my view, broad enough to encompass any order that the Board could have made under section 93(2) of the prior Acts. Section 99(5) permits the Board to make any order it considers appropriate. **In any event, the repeal or amendment of what was section 93(2) or 91(2) in earlier Acts is not relevant to the interpretation of section 99(5) in the current Act.** See the *Legislation Act, 2006,* S.O. 2006, c. 21, Sch. F which repealed the *Interpretation Act*, R.S.O 1990, c. I-11, and provides in section 56(1) and (2):
>
> > (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force.
> >
> > (2) The amendment of an Act or regulation does not imply that the previous state of the law was different.
>
> [emphasis added]

98. However, ETFO also referred me to the decision of the Board in *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. September/October 826, and in particular paragraphs 13-15:

> 13. I note that sections 16, 17 and 18 of the Ontario *Interpretation Act* were not referred to in argument. Nevertheless they deserve some attention. These sections could be taken to mean that a court or tribunal can not consider the content of previous versions of legislation as an aid to interpreting the current legislation. They have been in the *Interpretation Act* since at least 1950. They provide that:
>
> > **16.** The repeal of an Act shall be deemed not to be or to involve a declaration that the Act was or was considered by the Legislature to have been previously in force.
> >
> > **17**. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.
> >
> > **18**. The amendment of an Act shall be deemed not to be or to involve a declaration that the law under the Act was or was considered by the Legislature to have been different from the law as it has become under the Act as so amended.

> (I note that the *Federal Interpretation Act* contains similar provisions.)
>
> 14. The rule that the legislative *history* of an enactment is not admissible as an aid to interpretation has been significantly eroded, particularly in constitutional or Charter cases. It is well established that the *evolution* of legislation; that is, the finished statutory product as it has been from time to time, can be referred to as an aid to interpreting legislation in its current form *(Gravel v. City of St. Leonard* 1977 CanLII 9 (SCC), [1978] 1 SCR 660 (Supreme Court of Canada); *Hill v. Canada (A.G.)* 1988 CanLII 67 (SCC), (1988) 48 D.L.R. (4th) 193 (Supreme Court of Canada)). And that is as it should be. After all, it is consistent with many other "rules" of statutory interpretation, including the presumption against tautology, to consider the nature and purpose of changes to a piece of legislation, one of which purposes may be to change the law. It would not be possible to do so without referring to the evolution of the statute or the particular provision in question.
>
> 15. Further, sections 17 to 19 of the *Interpretation Act* cannot mean that a legislative amendment does not change the law. It is readily apparent that that is sometimes precisely what the Legislature intends to do. What these provisions mean is that one cannot *automatically assume* that a change to legislation was intended to change the law (see, for example, *Crupi v. Canada Unemployment and Immigration Commission* reflex, [1986] 3 F.C. 3 (Federal Court of Appeal); *McGuigan v. R* 1982 CanLII 41 (SCC), [1982] 134 D.L.R. (3rd) 625 (Supreme Court of Canada); *R. v. Potvin* 1989 CanLII 130 (SCC), [1989] 68 C.R. (3rd) 193 (Supreme Court of Canada)). These provisions do not mean that one must or should ignore the past. It is patently obvious that the Legislature does change the law from time to time and it is quite appropriate to examine prior versions of legislation for the purpose of ascertaining whether the law has changed, and if so, how it has changed. Indeed, it is quite appropriate to look at successive changes in legislation to determine whether these reveal a direction, or possibly a reversal in direction, in the evolution of the legislation. This is why courts and tribunals can say that changes or lack of changes to legislation codify or reverse jurisprudence on a point, and why the re-enactment of legislation is considered to mean that the Legislature has confirmed or adopted the existing interpretation. Accordingly, when faced with a question of interpretation, courts and tribunals, including this Board, have long considered it appropriate to consider the evolution of the legislation. This comes to form part of the adjudicative "expertise" which courts and tribunals bring to bear on matters which come before them.

ETFO argued that no case held because of section 56 of the *Legislation Act* (or the *Interpretation Act* before it), legislative history, and context was no longer admissible or to be just ignored. I do not disagree.

99. However, having said that, I have no intention (or desire) to restate, let alone reconcile, all the nuances and subtleties of these various statutory interpretation issues put to me, let alone am I capable of enunciating a terse, simple and comprehensive statement of all these pedagogical debates. Suffice it to say, regardless of their outcome, for all the reasons I have outlined above, after hearing and considering extensive argument, I do not discern any clear (let alone conclusive) message of legislative intent from the long and complicated history or evolution of these amendments to the *Education Act*.

100. I do not quarrel with any of the fundamental propositions put to me which are summarized at pgs. 577-8 of Sullivan on the *Construction of Statutes* (Fifth Edition, 2008):

> It is well established that the legislative evolution of provisions may be relied on by the courts to assist interpretation. As Pigeon J. wrote in *Gravel v. St. Léonard (City)*:
>
> > Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.
>
> In *Hills v. Canada (Attorney General)*, L'Heureux-Dubé J. wrote:
>
> > A good starting point to interpret a statute properly is to examine, however briefly, its legislative history.
>
> In *R. v. Ulybel Enterprises Ltd.*, Iacobucci J. wrote:
>
> > To understand the scope of [a provision], it is useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute.
>
> In *Pacific National Investments Ltd. v. Victoria (City)*, LeBel J. wrote:
>
> > As Rand J. once stated, "That we may look at the history of legislation to ascertain its present meaning is undoubted" … Looking at the legislation in place preceding and following the events at issue in this appeal provides at least a context for comparison and might even shed light on the meaning of the statutory framework as it existed at the relevant time.
>
> In *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers*, Binnie J. noted that legislative evolution is part of Driedger's entire context.
>
> [citations omitted]

I appreciate that I must pay attention to the entire "context" of the *Education Act* in interpreting it. However clear the statutory history may have been to the courts in

Tele-Mobile, supra, or *Indalex, supra*, in this application, the legislative history does not clearly point me either to the interpretation of it urged by ETFO or the applicants.

101. What is clear to me is a legislative intention to have a definition of strike unique to the education sector (not concerned with industrial or manufacturing concepts like limiting output but addressed to the different outcomes and concepts of education). What is also clear to me is a half-hearted and ultimately unsuccessful legislative intention to attempt to centralize, regularize and control the performance of co-instructional activities as mandatory duties assigned to individual teachers, supervised by individual principals, supervised by individual school boards, and all supervised by the Ministry of Education. That appears never to have really gotten off the ground (other than the passage of some statutory provisions most of which were never proclaimed and repealed piece-meal over time). Since then there has been a retreat again to a system of individual voluntary participation of teachers. No one disputes that even today (as apparently it has always – or for a considerable period of time – been) these activities are purely voluntary on the part of individual teachers – they cannot be compelled to volunteer to do them, they cannot be disciplined for not doing them and they are not paid any more for doing them. But what is not clear to me is that this history of failed "stop and go" legislation clearly addressed whether the collective action of many teachers in concert refusing to volunteer is prohibited as an unlawful strike if not timely. Yes, co-instructional activities were included in the definition of strike for a short period of time but apparently based (or at least introduced parallel with) a whole statutory regime of assignment and supervision to support and enable those voluntary activities being mandatory – which was never enacted. Obviously their inclusion in a strike definition was necessary to deal with pre-lawful strike situations (as during a lawful strike any activities could be withdrawn), but was their statutory removal from the definition of strike in 2009 a clear revelation of statutory intention that collectively, in concert, teachers could now all refuse to volunteer for all of these activities as ETFO urges? Or was it just legislative cleaning up of what was a failed legislative attempt to deal with co-instructional activities in an unattainable mandatory world – particularly when not only is the remaining statutory definition of strike arguably broad enough to encompass such a refusal in combination or in concert but has been arguably legislatively expanded during the same time frame to make it even more encompassing? Again, the legislative history or evolution is not clear to me. Legislative history or evolution is intended to assist interpretation – to, in the words of the cases, shed "light" either on the intention of the legislature or the context. Here, in my view, it only confuses – it raises more questions than it answers (perhaps about politics as well).

102. As the applicants pointed out, there was no case referred to me where it could be said that legislative history or evolution was used to defeat what the statute otherwise clearly provided for – or put more starkly, because of an amendment alone (and the fact that the statute no longer looked the same as before), the statute did not mean what it clearly and plainly stated.

103. I do not regard any of this to be a surprising conclusion. Elizabeth Shilton, a former leading education sector labour practitioner in this province, and now Senior Fellow at the Centre for Law in the Contemporary Workplace at the Faculty of Law at

Queen's University, wrote in Chapter Eight, *Collective Bargaining for Teachers in Ontario: Central Power, Local Responsibility* in *Dynamic Negotiations: Teacher Labour Relations in Canadian Elementary and Secondary Education*, edited by Sara Slinn And Arthur Sweetman (McGill-Queen's University Press, 2012), at pages 228-229:

> While teachers are now subject to the ordinary mechanics of the *Labour Relations Act* strike-lockout regime, they are governed by their own unique definition of "strike," found in section 277.2(3) of Part X.1:
>
> [quotation of section omitted]
>
> This definition has undergone considerable reconstruction since the days of Bill 100. That earlier statute contained a definition of strike tailored to the education sector, in that it explicitly encompassed such historic teacher bargaining tactics as work-to-rule and mass resignation. When Bill 100 was repealed, no special definition of strike was substituted in Part X.1, resulting in the application of the generic definition in the *Labour Relations Act*. In the course of the struggles between the teachers and the government over workload and extracurricular activities (described in detail in the subsection "The Harris Government and the Era of Regulatory Micromanagement" below), the government introduced a definition of strike into Part X.1 which, like the old Bill 100 definition, made it clear that work-to-rule strategies were strikes. It also went one step further by explicitly including "co-instructional activities" (its controversial term for extracurricular activities) within the scope of the strike definition. **While the successor Liberal government repealed the reference to co-instructional activities in the strike definition, it has not repealed the new definition of strike entirely, leaving intact the explicit references to disruption of school programs and work-to-rule tactics.**
>
> [emphasis added]

In the footnote to this passage, Ms. Shilton states:

> It is not clear that any of these amendments were necessary in light of the OLRB's historically comprehensive approach to interpreting its generic strike definition to include such tactics as collective refusals to work voluntary overtime.

As a result, I conclude that I must take the existing definition of strike in section 277.2 of the *Education Act* as I find it. The section "speaks to me" as of now – and I must interpret its present wording, other than to note and be aware of its long and convoluted legislative evolution and history.

(e) The Interpretation of the Statute – Does the Definition of Strike Reach this Conduct?

(i) Some Introductory Remarks

104. At the outset, I must note that frequently throughout these proceedings both parties accused the other of "grandstanding" on a "soapbox" in asserting their positions before the Board – then immediately proceeded to do the same themselves. A theme repeated in ETFO's arguments was that its conduct must be permissible because there is little left that teachers can do to protest the Government's "stripping away their free collective bargaining rights", particularly after my earlier decision in *Elementary Teachers' Federation of Ontario and Sam Hammond*, 2013 CanLII 1235 (ON LRB), [2013] O.L.R.D. No. 19, finding that the planned day of political protest for Friday, January 11, 2013 would constitute an illegal strike. Regardless of whether that is an accurate characterization or not – and I categorically reject it: see *General Motors of Canada Limited*, [1996] OLRB Rep. May/June 409, where in rejecting the legality of political strikes, then Chair MacDowell wrote at paras. 90-91:

> 90. Another factor that may explain why there are so few overtly political strikes in Canada is that in an open society, there are plenty of alternative means of political expression, which do not involve disregarding the law, which do not impose an economic cost on third party employers, and which do not inconvenience the public.
>
> 91. The union and the employees it represents are free to hold any political view they choose and express it freely. They can support a political candidate or lobby elected members of the Legislature. They can protest against the government by demonstrating (individually or collectively) on their own time. They can assemble in public places and carry placards. They can take out advertisements promoting their cause, or identifying their concerns. They can devote money to political causes -including funds derived from compulsory union dues that dissenting employees are still obliged to pay (see: *Lavigne v. SEFPO*, [1991] 2 S.C.R. 211). They can provide financial or other support for political parties (subject to election spending laws). They can canvass door to door, or by telephone for a political objective, party, or candidate. They can post signs in public places, organize political rallies, distribute literature to union members and the public, write letters to the press, hold press conferences, or wear political buttons. They may even have a right to promote boycotts of the products sold by companies who appear to support the government. In fact trade unions have done most of these things over the years, and no one suggests that they should not.

– it only highlights the problem of this case. Unlike a normal strike where the striking employees' dispute is with their employer, ETFO's dispute is not with the applicants, their employers, but with the Government for enacting Bill 115 and imposing collective agreements on them pursuant to its provisions (something the applicants were also not necessarily pleased with). What ETFO has chosen to do is encourage their members to

express their dissatisfaction with those political decisions of the Government through their relationship with their employer by refusing to do activities (albeit voluntary but activities that they have previously performed) for their employer – in the obvious hope that those employers, or more likely, the parents of students attending the schools of their employer, will pressure the Government. In order for this choice by ETFO to be effective, it must necessarily disrupt activities of school boards that were previously not disrupted. However, because it is activity directed at or through the operations of its employers during the currency of a collective agreement – is it an illegal strike – or for purposes of this application, a strike at all?

105. Equally, the applicants repeatedly asserted that they were here only for the students who were, like the applicants themselves, the innocent "meat in the sandwich" in ETFO's disputes with the Government. Leaving aside that the uncertain legal status of refusing extracurricular activities is old; that the tactic of refusing to perform them arguably even older; that no evidence was presented how extensive the actual disruptions to their activities were or whether such disruptions could be easily abated; or that ETFO's position has been clear since the fall of 2012 (albeit prior to December 31, 2012 would have been legal); and this application was not filed until January 18, 2013; such a position by the applicants and those sentiments ignores (or at least diminishes) that teachers and the unions that represent them are legitimate stakeholders in the education system with their own rights and interests. Having said that, I will attempt to refrain from the hyperbole that frequently marked these hearings.

106. Also, there was quibbling about the actual magnitude of the significance or impact of the provision of these extracurricular activities (those listed in Appendix A) and especially in elementary as opposed to secondary schools – and the evidentiary basis for any such assertions. Ultimately neither ETFO nor the applicants disputed that, at least, the provision of extracurricular activities was important and a valuable component of a child's education (or as counsel for ETFO put it, this application was not a debate between ETFO and the applicants about whether extracurriculars are good or bad).

107. There was also much argument and debate about the content of ETFO's Takeover Bulletins – the means by which ETFO officially communicated its position about "Withdrawal of Voluntary / Extra-curricular Activities" and the motion (effective immediately) passed by the provincial executive:

> That ETFO members not participate in voluntary / extra-curricular activities outside the 300 minute instructional day.

108. The Bulletins were scrutinized whether they compelled or directed ETFO members to do anything (to some extent they were expressed in such a manner – "ETFO members will withdraw from participation in voluntary/extra-curricular activities") as opposed to mere guidelines to help members discern what activities were voluntary or not (and there was much argument whether even on that basis much of the advice was legally correct). Certainly the e-mails from the various local officials (either the local president to the members of the local or a steward to members at an individual school) were far more explicit (e.g. "In accordance with the ETFO Executive motion, members should not

participate in voluntary / extra-curricular activities"; "Field Trips / Excursions / Clubs / Teams / Program Enhancements such as electives: – These are voluntary activities and members should not participate in them - full stop"; "I have spoken with Marg Merpaw from ETFO [local vice president] about the e-mail which we received about not doing extra curricular or volunteer activities as there was confusion about whether this was just a continuation of the "take a pause" from activities or whether we were being told to withdraw from these activities altogether. The e-mail we received was a directive from the Provincial ETFO office. The ETFO constitution allows them to send directives to their members. We as ETFO members are obligated to follow these directives. Therefore we are no longer allowed to participate in any extra curricular or volunteer activities. So no clubs, sports etc. This would also include things like SST meetings and Parent Council meetings and Ecole de Neige. I have been told by ETFO that we are to follow their directive …"). As noted earlier, ETFO objects to the e-mails as either an unrepresentative sampling, hearsay or simply wrong. Also as noted before, it was agreed (or not disputed) that none of this constituted a Directive within the meaning of the ETFO Constitution, and ETFO had not announced it would discipline non-complying members nor sent them a copy of its internal discipline proceedings as it had customarily done in the past.

109. Notwithstanding the exhaustive submissions made to me, in my view, none of this matters much (or needs to be resolved in every detail) to what I must decide. Section 81 of the *LRA* provides:

> No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

110. However these ETFO communications are characterized, no one can credibly maintain or dispute that, at a minimum, that ETFO, its officers, officials or agents "supported" or "encouraged" this activity. The question is whether the activity amounts to a strike.

(ii) The Interpretation Question and the Cases

111. It would be convenient at this stage to again repeat the current definition of strike in section 277.2(4) of the *Education Act*:

> (4) For the purposes of subsection (1),
>
> (a) the definition of "strike" in section 1 of the *Labour Relations Act, 1995* does not apply; and
>
> (b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed or may reasonably be expected to have the effect of curtailing, restricting, limiting or interfering with,

> (i) the normal activities of a board or its employees,
>
> (ii) the operation or functioning of one or more of a board's schools or of one or more of the programs in one or more schools of a board, or
>
> (iii) the performance of the duties of teachers set out in the Act or the regulations under it,
>
> including any withdrawal of services or work to rule by teachers acting in combination or in concert or in accordance with a common understanding.

112. The applicants argue that the definition is not exhaustive but inclusive – it is very broad. The applicants assert the activity ETFO encourages either:

> (a) interferes with the operation or functioning of one or more of the programs at one or more of the schools of a board;
>
> (b) interferes with the normal activities of a board or its employees; or
>
> (c) falls within prohibition of "work to rule";

all within the meaning of strike in the statutory definition.

113. In the applicants' view, the definition is indifferent to whether on an individual basis participation in the activities would be voluntary. The statute now on an effects-based basis bans activities that interfere with a school's normal activities or its operation of any of its programs – otherwise how could work to rule, for example, be included as prohibited activity.

114. The plain wording of the statute appears to support the position of the applicants. Appendix A refers to either inter-school or intramural sports teams that have routinely occurred for many years at most, if not virtually all, of the applicants' schools – as well as chess clubs and a tournament (at Trillium Lakes) and art clubs and bands/or choir (at Upper Canada). All have been organized by teacher volunteers for no extra remuneration, much of it outside instructional hours. Equally, Appendix B refers to communications to parents of students that teachers have routinely and historically performed either by handing them to students or placing them in student agendas – whether newsletters, permission slips for field trips or class outings, enrolment forms or issue-specific communications.

115. It is, in my view, not difficult at all to say that by encouraging its members to no longer perform any of these activities, ETFO is, at a minimum, "interfering" with either the operation of a school or a program in a school (and this is the part of the definition where co-instructional activities were formerly placed in the *Education Act*). So even were I to place significance on the removal of co-instructional activities from the

definition, it would only be to this portion of the definition within which they were "included" and which is now apparently unrestricted.

116. Moreover, and independent of that conclusion, it is equally not difficult at all to say ETFO is interfering in the normal activities of a Board – these activities have been routinely offered for long periods of time – and this part of the definition is not only separate and free-standing but was added to the statute to expand the definition of strike (well after the insertion of co-instructional activities elsewhere into the statutory definition).

117. It may be that the interference is not enormous – or as ETFO put it, only with the convenience of the applicants. But that is not the test – the quantity or quality of the interference. How would that be measured in any event? What level would the interference have to reach to be significant? All the statute appears to require is that the interference be to the "normal activities" or the operation or functioning of a program. That threshold is met here.

118. Lastly, there is the prohibition (as there is in the *LRA*) on "work to rule".

119. Notwithstanding ETFO's assertion that there are a dearth of authorities about this, I was referred to a number of authorities by the applicants. First was an arbitration award in *OSSTF v. Hamilton Board of Education*, April 8, 1986 (Shime). That award had to deal with the definition of work to rule. In fact, it was the union that was arguing that the activity involved constituted a work to rule as opposed to a strike (which at the time would have allowed teachers to arguably be paid as the statute explicitly prohibited payment when engaging in a strike). Although Arbitrator Shime concluded that the grieving teachers were not entitled to payment because they were engaged in a strike, in rejecting the OSSTF argument that their conduct amounted "only" to a work to rule, he made many useful statements about work to rule, commencing at page 11:

> … In addition to the agreed facts, evidence was given by Mr. J. Forester, Associate General Secretary of the Ontario Secondary School Teachers Federation, outlining other situations in Ontario where teachers had engaged in what were considered to be work to rule sanctions. He confirmed that there had never been a work to rule where the timetables were unilaterally altered or the length of instructional time shortened. Mr. Forester was also asked whether the term "work to rule" had a common usage. **He responded that a withdrawal of voluntary services had been the more usual sanction and that such withdrawal was used synonymously with the term "work to rule".**
>
> [emphasis added]

and at pages 13-15:

> At the outset I am of the view that the term "work to rule" is a term of art which must be construed in a technical or legal sense. The term is not new to this statute; it is a tactic that is not foreign in an industrial

> relations context or in collective bargaining. Thus, in *Labour Law Terms*: J. Sack and E. Poskanzer a work to rule is defined as a "form of slowdown in which all work rules are scrupulously observed". Similarly, in *England, in Secretary of State for Employment v. ASLEF* (No. 2) [1972] 2 A11 ER 949 Lord Denning MR in discussing certain instructions by a union to the employees to work to rule stated at p. 966:
>
> > "…but the principal discussion before us (and it is the most important discussion for this case) was as to the general instruction to the men to "work to rule" or, as it is put more fully in the instructions, "strictly observe all B.R.B. rules". The meaning of that instruction is not in doubt. It is well known to everyone in the land. The instruction was intended to mean, and it was understood to mean, "keep the rules of your employment to the very letter, but, whilst doing so, do your very utmost to disrupt the undertaking".
>
> Also in *Roberts Dictionary of Industrial Relations* a work to rule is defined as a "British form of slowdown in which all rules are scrupulously observed and work on days off and Sundays and outside regular shifts is refused".
>
> In summary it is my view that a work to rule is a term of art with a meaning that is well understood in collective bargaining or in an industrial relations context and the term means that employees are to strictly observe the rules with a view to disrupting the employer's operation. But the term does not mean that employees may set their own rules or unilaterally alter the employer's rules.
>
> The rules that must be observed are the employer's rules. **In a strict sense, Mr. Forester's understanding and assessment comports with the common understanding of the meaning of the term. He stated that originally in education the term was synonymous with a refusal to perform voluntary services**.
>
> **That type of sanction meant that the teachers would only perform those duties required of them and no others, or to put it another way – they performed according to the rules of their employment and no more**.
>
> [emphasis added]

120. Equally in *Education Labour and Employment Law in Ontario* (2d ed), Réaume and Turkington, Canada Law Book 2012, the authors state in section 3:100:20, Work to Rule and Partial Strikes, at pages 3-34 - 3-35:

> One of the time-honoured collective bargaining tactics employed by teachers in Ontario and elsewhere in Canada is "work to rule". This is a term with no precise legal definition but its meaning, as Lord Denning observed in *Secretary of State for Employment v. Associated*

> *Society of Locomotive Engineers and Firemen (No. 2)*, is "well known to everyone in the land":
>
> > The instruction [to work to rule] was intended to mean, and it is understood to mean, "Keep the rules of your employment to the very letter, but, whilst doing so, do your very utmost to disrupt the undertaking".
>
> **In the education sector, the term is normally understood to mean the withdrawal of services outside the instructional day and services with respect to extra-curricular activities, although its meaning may be broader than that and the form work to rule may take in any particular bargaining dispute is highly variable**.
>
> [emphasis added]

Accordingly, refusing to volunteer for the activities listed in Appendix A and B would seem to clearly fall within this definition of work to rule, but ETFO argues to the contrary.

121. Leaving aside that *Hamilton Board of Education*, *supra*, actually is an education sector case and specifically states that a withdrawal of voluntary services is synonymous with and well within the common understanding of work to rule in the education sector, ETFO argues that I have no evidence of any employer rules about voluntary activities so therefore I cannot find it to be a work to rule. In fact, since they are voluntary activities and the employer cannot compel any individual teacher to perform them – it cannot even be the subject of a rule, or so ETFO argues. That argument, however, seems to avoid the whole point of work to rule – employees are only strictly complying with employer rules so if there are none, employees do not have to do it. That of course leaves aside what is already agreed to in Appendix A and B – namely, teachers routinely and consistently performing these activities in the past (which I would have thought determinative in any event). I do not find anything Lord Denning or Buckley J. said in *Secretary of State for Employment*, *supra*, to be inconsistent with finding that encouraging members to refuse to perform voluntary activities (even if there is no rule, or precisely because there is no rule) can be characterized as a work to rule. If anything turns on the portion of Lord Denning's quote "...do your very most to disrupt the undertaking", I see no real distinction in what ETFO is asking its members to do. I can see no reason (legal or policy) to draw distinctions between what parts, or how essential are those parts, of the employer's undertaking that a work to rule targets – otherwise a work to rule has to "go nuclear" or not be a work to rule. There is no readily apparent reason why activity that is strategically targeted or progressively increasing in scope or effect (initially just seeking to inconvenience or marginally hamper an employer's operations as opposed to shutting it down altogether) – such as affecting only voluntary activities – cannot fall within the scope of "work to rule".

122. But it is not just the *Hamilton Board of Education* arbitration, *supra*, that deals with the withdrawal of voluntary activities. Equally, teacher unions' campaigns to encourage their members not to apply (and what can be more voluntary than whether a

teacher will apply or not?) for positions of responsibility ("POR"s) (e.g. Department Heads, Assistant Department Heads, etc.) have in the past been found to amount to an unlawful strike if done before a strike would otherwise be lawful. See *Halton Board of Education*, (1978) 17 L.A.C. (2d) 279 (Swan); *Toronto District School Board*, [2003] OLRB Rep. January/February 138, where the Board after reviewing the *Halton* arbitration stated at paras. 21-25:

> 21. I am not persuaded that the legislature intended a narrower test to be applied by the Board when determining a strike under the *Education Act* as against the Act. The use of a different description of the conduct -- concerted activity designed to restrict output (in the Act), and concerted activity designed to interfere with the operation of a school program or school (in the *Education Act*) -- does not warrant the application of a different standard. **The proper reading of the *Education Act* provision is, like that under the Act, purposive: it is intended to prohibit strikes and lockouts during the currency of a collective agreement. The wording of the "strike" definition in the *Education Act* is inclusive, and plainly not exhaustive. It "includes" any action or activity by teachers designed to affect schools or school programs.** The social trade-off concerning the right to strike applies equally under both Acts: employees may strike lawfully once impasse is reached in bargaining (on the time limits stipulated in the Act) and they are protected from court or Board injunctions, from civil damages or criminal charges and from discipline and discharge from employment for participating in the lawful strike activity ...
>
> 22. **The Federation points out that the Board should be wary of concluding that what is lawful to do individually is unlawful when done collectively. Teachers may individually decline to apply for the POR postings. The Federation says, unless there is clear language to the contrary, that right can equally be exercised collectively, as the Federation has done in this instance. The Board has addressed this issue in overtime ban and mass resignation cases. The Board has held that activity which may be lawful when done individually may constitute a strike when done concertedly: *Cambridge (City)*, [1989] OLRB Rep. Nov. 1095; *The Board of Education for the Borough of Scarborough*, [1983] OLRB Rep. Nov. 1889, at 1892.**
>
> 23. The question in this case is whether the Federation's act of calling upon its members to embargo the appointments process for the new POR positions amounts to a strike. What was that call designed to accomplish? Is it designed to curtail, restrict, limit or interfere with the operation or functioning of a school or a school program? That is not its primary purpose: the primary purpose is to compel the board to bargain with the Federation over its proposed changes to the POR positions. But the embargo has a secondary purpose, it is designed to cause hardship to the board so that it bargains on the matter. The boycott call is intended to prevent the board from introducing its new

> POR system until its implementation has been agreed with the Federation.
>
> 24. The collective agreement between the parties has provisions dealing with POR's. The collective agreement provides that disputes concerning the interpretation or application of the collective agreement are to be referred to grievance arbitration for resolution.
>
> 25. What is the impact of the boycott? It is preventing the board from taking the steps which it considers necessary to have the new system in place by the beginning of September 2003. **Does this amount to interference with a school program or with a school? A school is a body of students organized for the purpose of their education. A POR is a feature of the organization and administration of a school; it is linked, organizationally, to the delivery of school programs. The incumbent of a POR has an influence on the arrangements under which the curriculum and courses of study are given to the students, and the presence of a POR therefore constitutes a part of the operation or functioning of school programs and of schools. The board sees the absence of a functioning POR system, in the manner which it has determine will best serve its organizational and the students' pedagogical interests, as disruptive of its school and school program organization. The Federation points out that classes will still be taught and programs will continue uninterrupted even if the board is unable to commence its new POR system. That may be so, but the classes will not be taught and the programs will not continue in exactly the manner envisaged by the board. A failure by the board to put in place its new POR system will have some, albeit limited, impact on the manner in which school programs are delivered, and on the manner in which schools are organized. Leaving aside any question of the board's entitlement to introduce the new POR system in the manner it has, for the purposes of disposing of the limited question I am asked to determine whether, any interference, however partial, with the operation of the school programs is contemplated in the definition of "strike" in the *Education Act.* By requiring its members not to apply for the new POR positions which have been posted, I find that the Federation intends to limit or interfere with the functioning of the board's school programs and schools.**
>
> [emphasis added]

123. It cannot help but be observed, even at this point, that at least some of these cases (e.g. *Hamilton* and *Halton*, *supra*) are decided well before any concept or definition of co-instructional or extracurricular activities was introduced into the *Education Act* – or as the applicants put it, when the definition of strike at the relevant time (either similar to or arguably narrower than the present one) was sufficiently "robust" to encompass these types of activities.

124. ETFO says these cases are decided under differently worded statutes than the current *Education Act*. That is true. ETFO says that in fact, the definition at the time of the *Toronto District School Board*, *supra*, case still included co-instructional activities. That is true – but no one there attempted to argue (nor could they realistically) that co-instructional activities somehow included PORs. ETFO says they are all factually distinguishable from this application. That also may be true – but as a matter of principle or logic they do not appear to be different to me. What they appear to clearly demonstrate is, even in the education sector (let alone other sectors), the fact that activities are voluntary does not preclude them from falling within the definition of strike – or in other words, activity that may lawfully be done individually may still constitute a strike when done collectively or in concert. See *Halton*, *supra*, at page 287, or *The Board of Education for the Borough of Scarborough*, [1983] OLRB Rep. November 1889, at paras. 39, 44 and 45 (mass resignations from summer school).

125. In fact, I was also referred to the Manitoba arbitration award in *River East School Division No. 9*, [1996] M.G.A.D. No. 101, specifically dealing with grievances whether participation in "extracurricular" activities was voluntary or mandatory – when they were beyond their regular hours of work and outside the school day and the collective agreements contained no specific provision dealing with them. In an extensive and lengthy review of Manitoba jurisprudence (including the Supreme Court decision in *Winnipeg Teachers' Association, infra*), at paras. 10-11 and 66, the position of the teacher unions was rejected:

> 10 The three Associations, in their respective grievances (Exhibits 2, 10 and 14), submit that all activities or work carried out by or assigned to teachers outside of the School Day are not part of the contractual duties for which teachers are paid, but are services provided by teachers gratuitously and voluntarily.
>
> 11 *Prima facie*, this position is not justified at law. Several decisions, both judicial and by way of arbitration, have clearly established that School Divisions do have the right to expect teachers to do certain things outside the instructional School Day …
>
> 66 **We are not prepared, therefore, to hold that teachers are not required to work outside the School Day, nor that they are not required to participate in extra-curricular activities *per se*. Rather, as aforementioned, we believe that there are many activities which require teachers' participation outside the so-called School Day. By virtue of their participation in such activities in the past over many, many years and the importance of such activities in fulfilling the overall mandate of the public school system, we believe there are grounds for holding that teachers are required to do so as part of their contractual professional obligations.** At the same time, however, we also believe that those implied contractual obligations on the part of teachers do not entitle School Divisions to require teachers to work unlimited hours and participate in unlimited activities which are regarded as "extra-curricular". In this regard, the Associations and Grievors have

> established valid issues which directly affect the employer/employee relationship and workplace conditions. To this end, their grievances do have merit.
>
> [emphasis added]

ETFO argues that the case is of no assistance to me since it arises under a different statutory regime and obviously no consideration could be given to the legislative history of the definition of strike in section 277.2(4) of the *Education Act.* That fact is true. But again, the decision is still illustrative that the simple and definite approach that ETFO urges before me about these kinds of voluntary activities has not found favour elsewhere – to say nothing of the fact that the Arbitration Board (and more about this later) was:

> "…unable to determine the number of hours or the specific activities to which teachers should be expected to devote themselves outside the normal School Day as part of their professional and contractual obligations." (at para. 61).

126. To be fair, I was also referred to the very recent decision of the British Columbia Labour Relations Board ("the BC Board") in *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, Case No. 63467/12, decision June 15, 2012, where in a "bottom-line" letter decision of a few paragraphs the BC Board found that the union had:

> "... not declared or authorized an unlawful strike by directing its members to refrain from participating in activities which occur outside of class time/instructional hours and are truly voluntary and extra-curricular. These include coaching, instructing or supervising student performances, sports teams, clubs or field trips, or attending graduation or awards ceremonies, where those activities are not related to a course or undertaken for marks."

The BC Board also found that directing its members to withdraw from some other activities:

> "... which, although they occur outside of instructional hours, may nonetheless be part of their work duties. These include participating in School Based Team meetings, Individual Education Program meetings, parent-teacher interview meetings, district committee meetings, and BC Ministry of Education initiatives such as Ready Set Go and kindergarten orientation"

did amount to authorizing an unlawful strike by the union. However, other than these conclusions (and these quotes repeat close to the entirety of the decision), the decision says nothing more. It provides no explanation or analysis and describes itself as just a "bottom-line" decision – although it offers to provide written reasons if requested by any party – an offer which appears never to have been taken up. Accordingly, other than its existence and result, I can glean nothing further from this decision (nor did the parties

pretend to be able to offer any further explanation of it) and it was of little assistance to me.

127. Not only do I think that the wording of the statute is more than broad enough to catch these voluntary activities in the definition of a strike but I think there are sound labour relations reasons for doing so. As Vice-Chair MacDowell (as he then was) observed in *The Board of Education for the Borough of Scarborough*, *supra*, at para. 46:

> 46. ... Of course, the Board does not have carte blanche to rewrite the statute, but, by the same token, it has a responsibility to give an interpretation to section l(l)(o) [the *LRA* definition of strike which was then applicable in the education sector] which will best accommodate the statutory objective of promoting orderly collective bargaining and industrial peace.

128. To find an exception for voluntary activities from the definition of strike will lead, I believe, to what former Chair MacDowell described as "a definitional quagmire"– albeit in another different but still analogous context, determining whether a strike is "political" or not (one of the reasons an order issued in *Elementary Teachers' Federation of Ontario and Sam Hammond*, *supra*). In *General Motors of Canada Limited*, *supra*, after extensively quoting from (and explaining) *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569 (the seminal Board decision on political strikes – see paragraphs 59-61 of *General Motors, supra*), he observed at paras. 102-103:

> 102. It is of course a matter of degree. But if (as the union suggests) all strikes can be considered as a mode of expression "delivering a message" to the employer, the public, and the government, a whole range of behaviour formerly thought to be unlawful may now become subject to *Charter* protection and scrutiny – and perhaps "section 1 justification" on a case-by-case basis by labour boards, Courts and arbitrators. That is quite a change to the current system. It is also a recipe for uncertainty, as well as litigation of the kind that has bedevilled the American courts when they were trying to distinguish union expenditures that were or were not "related to collective bargaining", or the English courts when they were trying to distinguish between strikes which were or were not "in connection with a trade dispute" (and thus lawful), or "political" (and thus unlawful).
>
> 103. I will not belabour the point. Whatever else may be said about the current state of the law, it is clear that the no-strike obligation is a fundamental pillar of the statutory scheme and at least has the virtue of simplicity: there can be no strikes during the currency of a collective agreement – for any reason. The current statute provides both certainty and a guarantee of industrial peace. By contrast, the "political protest exception" proposed by the union is not nearly as narrow or as clear as counsel suggests it is, and opens the door to both industrial conflict and layers of litigation that the Board (and the Courts) have heretofore avoided.

129. Again, on a principled or logical basis, I see no difference for "a voluntary activities" exception *per se* from the definition of strike – and in particular in the education sector. The line between mandatory and voluntary duties would not be a bright line test – there could be no better illustration of this point than disputes in the education sector like this one – frequently to be determined in always expedited unlawful strike applications with their concomitant pressures and urgency, which is not the best context for any thoughtful or deliberate analysis of the difference. Although for the purposes of arguing this application only, the applicants agreed that all of the activities in Appendix A and B are voluntary, the applicants explicitly reserved their rights to come back and argue that some portions (particularly with respect to Appendix B) are mandatory. What about a notice to parents warning about a lice epidemic that teachers were asked to distribute to students (the example that was much debated at the hearing)? Would it be required of the Government to list every non-voluntary duty in a regulation? See for example the amendment to the Duties of Teachers in section 20 of Regulation 298 made by Regulation 209/03 (referred to above) – prior to the enactment of that regulation and the disputes that preceded it, for example, would a reasonable objective observer (as opposed perhaps to combatants in educational sector disputes) have thought it necessary for a regulation to specify "perform duties normally associated with the graduation of pupils" as a required duty of a teacher? Section 20 of Regulation 298 dealing with duties of teachers is already a page long, listing some 13 different duties. Section 264 of the *Education Act* which also deals with the Duties of Teachers is also more than a page long with many sections and subsections. Necessarily, much of both are written in general and broad non-specific language. Teachers often and frequently justifiably complain that they are not accorded the professional status to which they are entitled and deserve – but like any professional, it is impossible to imagine, let alone exhaustively list every conceivable specific duty or activity a teacher may be called upon to perform. If not specifically listed somewhere (statute, regulation or collective agreement), will it be said that the teacher's duty is voluntary and then can be refused by teachers in combination (whether or not encouraged by their union)? See for example the discussion and difficulty of defining the scope of extracurricular activities in *River East School Division*, *supra*, at paras. 60-64. I do not see this as any recipe for labour relations stability in the education sector.

130. ETFO says there is no evidence of any quagmire of litigation – there have only been a handful of cases and no other school board (certainly none of the larger ones in the Province) has made a similar application to this one. That is not necessarily the test – see *General Motors*, *supra*, at paras. 86-90 and in particular at paragraph 88:

> 88. It is true that political strikes have been relatively rare in Canada. However, it is less clear what one should make of that fact for present purposes, because it is reasonable to infer that one of the reasons why such work stoppages have been uncommon is that, by and large they are apt to be, and are known to be, *illegal.* Even where there are strikes that have a "political flavour" or have an element of protest about them (the Alberta nurses' strike for example see [1988] Alberta LRBR 129 and 115) it is the "unlawfulness" of the strike rather than its "political" element that has been the primary focus of attention.

131. There may be many interpretations why that has been – or this case (particularly if ETFO is successful) may be a precursor of things to come, as the applicants argue. The fact that there have been few litigated cases (and again the number is not as insignificant as ETFO says, as this review demonstrates) does not mean that teacher boycotts of voluntary duties have not been a longstanding problem (or the labour relations problem of actually drawing the line between voluntary and non-voluntary duties is not equally problematic) – see the Report of the Minister's Advisory Group at paras 43-47, *supra*. The logistical difficulties in litigating just this case may be one explanation. The preference for the parties to resolve (or work around) the problem outside of this Board may be another. Certainly in the non-teacher world, the notion of voluntary duties (as part of what is expected of an employee) would arise less frequently, if not rarely. In the world of teachers who are not paid by the hour but by an annual salary (and for whom there could never be a precise exhaustive job description) and there is a longstanding history of activities such as those listed in Appendix A and B being delivered in this fashion – the potential of these disputes arising is much greater, or is "fertile ground", as characterized by counsel for the applicants. Teacher duties are not simply the aggregate of their instructional time, preparation time or supervisory duties – but involve a myriad of other duties (and at least on this latter point, ETFO did not disagree).

132. In fact, the difficulty of defining voluntary activities is further exacerbated by the observations of the Supreme Court of Canada, and in particular the often quoted words of Chief Justice Laskin in *Winnipeg Teachers' Association No. 1* of *Manitoba Teachers' Society v. Winnipeg School Division No. 1*, [1976] 2 S.C.R. 695, 59 D.L.R. (3d) 228. That was a civil claim for damages by the employer school board when the teachers' union counselled its members to withdraw lunch time supervision duties. Although Laskin C.J. ultimately dissented from the majority on whether a civil action for damages was appropriate, he wrote at pages 234-235:

> … I am satisfied that there is nothing in the collective agreement, nor in any of the documents or legislation which are made part thereof or to which it is subject, that expressly puts upon the teachers a duty of noon-hour supervision. That, however, is not the end of the matter, as the trial judge appears to have thought. I can agree with him that if services were voluntarily performed, they cannot on that ground alone become terms of a teacher's contract of employment by implication of fact. It follows, of course, that advice to or request of teachers that they work to contract or work to rule does not involve the teachers in any breach of contract if they cease to perform the voluntary services.
>
> **It is, however, a different matter if services, originally voluntary, become, by course of conduct and of renewal of relationships over a period of time, recognized as part of the obligations of service upon which the relationship has developed.** I do not say that this is reflected in the present case. What is, however, evident to me, under the collective agreement relations between the parties here, is that the agreement, as extended by the referential documents, contemplates the assignment of duties to carry out the principal objects of the

> enterprise in which the parties are engaged and which they have agreed to promote under terms both general and specific.
>
> **Almost any contract of service or collective agreement which envisages service, especially in a professional enterprise, can be frustrated by insistence on "work to rule" if it be the case that nothing that has not been expressed can be asked of the employee.** Before such a position can be taken, I would expect that an express provision to that effect would be included in the contract or in the collective agreement. Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.
>
> On this view of the matter, and having regard to the provision quoted above from the Code of Rules and Regulations, I find it entirely consistent with the duties of principals and of teachers that the latter should carry out reasonable directions of the former to provide on a rotation basis noon-hour supervision of students who stay on school premises during the noon-hour, so long as the school premises are kept open at such time for the convenience of students who bring their lunches, or who purchase food at a school canteen, if there be one. …
>
> [emphasis added]

133. Clearly, this envisages a possibility of activities originally voluntary, by course of conduct and renewal of relationships over a period of time, losing their voluntary status based upon the relationship as developed and becoming mandatory. Certainly, the teachers have routinely performed the duties in Appendix A and B over a long period of time.

134. This notion is reinforced by a more recent Ontario Divisional Court decision in *Halton Catholic District School Board and OECTA et al*, 2009 CanLII 7086 (ON SCDC), where an arbitrator's decision about the proper crediting of certain scheduled assignments for certain teachers was quashed. The court while referring to *Winnipeg Teachers' Association*, *supra*, observed at para. 29:

> [29] In our view, it is not a reasonable construction of the collective agreement, which is a contract of service, to treat it as a statement of the totality of a teacher's activities and obligations. It is not within the reasonable expectation of the parties that all of the functions and tasks encompassed within the teaching profession will be articulated in the collective agreement. The reasonable expectation of the parties under the collective agreement is that the board will manage and that teachers will teach, performing all of the activities and functions that the profession entails from time to time within the particular

> environment subject only to the express constraints which the parties have bargained and incorporated into the agreement.

135. ETFO argues that the applicants' collective agreements here explicitly make these duties (or some of them) voluntary – so these cases do not apply. Again, that may be true – but the point simply is that the demarcation of what the mandatory duties of teachers are is at best fuzzy. Moreover, as this Board has repeatedly observed in other contexts, what the parties may agree in their collective agreements will not preclude the Board from finding what may be contractually permissible conduct to still amount to an unlawful strike since unlawful strikes are prohibited conduct under the *LRA* which parties cannot contract out of. (See for example, the right to honour picket lines or voluntary overtime.)

136. I was also referred to a number of other cases where there were disputes about whether teacher activities were mandatory or not (albeit not in the context of an alleged unlawful strike). See *St. Clair Catholic District School Board* (2004), L.A.C. (4th) 191 (Watters) (whether asbestos awareness safety meetings after school hours or during lunch were mandatory or attracted additional compensation); *Avon Maitland District School Board*, [2007] 91 C.L.A.S. 146 (Brent) (whether Divisional meetings outside of the instructive day were mandatory); *Durham Catholic District School Board* (1999), 80 L.A.C. (4th) 278 (Bendel) (whether evening parent-teacher interviews, notwithstanding the collective agreement was silent and the legislation unclear, had become mandatory).

137. ETFO argues that these cases are all immaterial because there is no dispute here that the activities in Appendix A and B are voluntary. That is again true, but with all due respect, I think misses the point. As noted before, it was not easy in this case for the parties to agree what was voluntary, and as the agreement (and decision) referred to earlier makes clear, the applicants agreed for purposes of allowing this application to move forward but reserved their rights to later argue that some of these activities were in fact mandatory. The point is that (even if agreed to for limited purposes in this application) interpreting the definition of strike not to cover voluntary activities invites (if not virtually guarantees) future disputes and future uncertainty, as parties for their own tactical advantage at the relevant time attempt to characterize duties as voluntary or mandatory. In fact, that was essentially the very criticism of the Takeover Bulletins by the applicants – in purporting to offer guidelines to members about what activity was voluntary or not, the Bulletins were misleading (intentionally or otherwise) or just plain wrong. ETFO strongly disagreed with both of these characterizations of the Takeover Bulletins. Again, in my view, I need not actually resolve that for purposes of this decision, but the existence of such disagreement only drives home the point that the line between voluntary and mandatory will inevitably not always be easy to draw.

(iii) Is this Work?

138. ETFO also argued that these activities, regardless of whether they are voluntary or not, are simply not work – teachers could not be compelled to perform them and were paid no extra for performing them. Since they were not work, the refusal to perform them could not be a strike. Moreover, this was important because those POR

cases that explicitly found refusals to participate in voluntary activities to fall within the definition of strike analogized to the voluntary overtime cases (where the Board has held that a refusal to work overtime, even if expressly made voluntary in the collective agreement, if in combination or in concert could still amount to a strike). See *Halton*, *supra*, at page 286:

> There is no evidence, and our perusal of the collective agreement does not disclose any contractual reason that teachers were or any individual teacher employed by the board was under any obligation to apply for any position of responsibility which might be made available. It is not, in short, a duty of any teacher to apply for a posted position. Does that absence of obligation constitute an excuse for the concerted activity which was here clearly directed at the board, and which had an obvious collective bargaining object?
>
> Perhaps the closest parallel from the large body of arbitral jurisprudence developed in the industrial sector is in the cases involving an "overtime ban": a refusal of employees, in concert, to work overtime which is clearly voluntary on an individual basis.
>
> There are a number of cases in which this situation is discussed, including *Harding Carpets Ltd. v. Canadian Textile Council, Local No. 501* (501) (1956), 56 C.L.L.C. 1564, para. 18,031 (Finkelman, O.L.R.B.); *Re Associated Clothing Manufacturers and Amalgamated Clothing Workers of America* (1951), 2 L.A.C. 701 (Finkelman); *Re Canadian Westinghouse Co. Ltd. and United Electrical, Radio & Machine Workers of America (U.E.) Local 504* (1953), 4 L.A.C. 1410 (Gale); *Re E.S. & A. Robinson (Canada) Ltd. And Printing Specialties & Paper Products Union, 466* (1970), 21 L.A.C. 354 (Brown); *Re Greening Industries Ltd. and U.S.W., Local 2950* (1971), 22 L.A.C. 165 (Weatherill). All of these cases make if clear that, although individuals might well be entitled to refuse to do overtime work, a concerted refusal carries the justifiable individual action across the line into the scope of the prohibition against strikes.

See also *Toronto District School Board*, *supra*, at para. 22. Accordingly, even if all the Board jurisprudence about voluntary overtime is correct (and ETFO did not question it), ETFO says it is not applicable here. Overtime (or PORs for that matter), even if voluntarily undertaken, is clearly work – voluntary activities are not. ETFO referred me to *City of Vancouver and Vancouver Firefighters' Union, Local 18* (Police Records Checks Grievance) (2010 CanLII 81705 (BC LA)), where an arbitrator awarded compensation for the time needed to obtain repeated police record checks required by the employer in a new policy even though the collective agreement was silent on this issue. The arbitrator awarded compensation on:

> "…the basic principle that where employees are required by the Employer to carry out tasks, for a reasonably significant period of time outside of normal working hours, they should be compensated for the time that they spend doing so".

This is of little help to me. Leaving aside that a new policy requiring further police checks is not remotely comparable to the historically well established practise of teachers providing extracurricular activities – this case is not a question of whether teachers ought to be compensated for performing such voluntary duties, an arguably legitimate question but one which is for another forum at another time.

139. I was also referred by ETFO to *Teamsters Local 880 v. Tecumseh (Town)*, [2004] O.L.A.A. No. 505 (MacDowell), an arbitration over discipline which was imposed on a volunteer firefighter, *inter alia*, for encouraging other employees not to participate in or boycott voluntary public education events and in particular the town's annual "Cornfest" summer festival for which they were not paid. Arbitrator MacDowell extensively reviewed the strike jurisprudence and in particular with respect to voluntary activities (in fact noting with approval the Board decision in *Toronto District School Board*, *supra*), and stated at paras. 197-201:

> 197 However, we do not think that it is necessary to burden these reasons with further references to the general law respecting "strikes". A concerted refusal to do work which employees customarily perform (a "boycott"), meets the definition of "strike", even if the performance of those duties is "voluntary" on an individual basis.
>
> 198 It follows therefore that when the employees in the instant case were "boycotting" ancillary paid duties, they were engaging in an unlawful "strike"; and when the grievor was encouraging that activity (by words or example), he was both supporting and participating in that unlawful activity (although the grievor's disciplinary letter seems to focus on the Cornfest and like events, rather than the general boycott of all ancillary paid duties that had been going on for some time, and in which quite a number of employees had been engaged).
>
> 199 That said, what all the cases cited above have in common, is some sort of group refusal to engage in paid work; and we are unable to find any authority (nor was any cited to us) for the proposition that a boycott of truly voluntary unpaid activities constitutes a "strike". Indeed, it is difficult to characterize such entirely voluntary, unpaid activities as "work" at all, in the normal sense; and it is interesting to note that the employees themselves did not consider the Cornfest to be either "obligatory" or "work".
>
> 200 It is also interesting to note that the Cornfest was unlike other ancillary (non-firefighting) duties in that it was unpaid. Accordingly, we think that a distinction must be made between the collective refusal/boycott of the employees' regular paid education duty, training, etc. (which in our view meets the definition of "strike"), and boycotting the Cornfest parade, which is not only voluntary and unpaid, but much more legally ambiguous.
>
> 201 However, we do not think that we need reach any final conclusion about whether the collective boycott of the Cornfest (i.e. by itself) is a "strike". Nor is it necessary to try to disentangle the

> various elements of the grievor's behaviour: discouraging participation in the Cornfest vs. discouraging employees from doing non-firefighting but paid duties; or persuasion vs. inappropriate pressure. Because, as we have already mentioned: the real question before us is not whether there was a "strike", but rather, whether the grievor engaged in some form of "misconduct" that warrants a disciplinary response. And we have concluded that he did.

140. Although ETFO referred me to only paragraphs 197-198 (and not paragraphs 200-201) of Arbitrator MacDowell's decision, I have struggled with this portion of ETFO's argument. Ultimately, I have rejected it for a number of reasons.

141. First, as paragraph 201 makes clear, the decision clearly does not conclude that boycott of unpaid voluntary duties does not fall within the definition of strike and therefore this decision cannot be authority for that proposition.

142. Second, the wildly differing contexts of voluntary unpaid attendance at the Town of Tecumseh's Cornfest and the long historical context of teachers providing voluntary activities and extracurricular activities (even as limited in Appendix A and B) seems too precarious an analogy to put great weight on.

143. Third, as the applicants argue, the definition of strike in section 277.2(4) of the *Education Act* makes no reference to "work" whatsoever. It focuses solely on the impact of the activities in combination or in concert – and here no one disputed the impact or that the withdrawal was intended to have an impact. The definition does not restrict itself to compensated activity. In fact, the only mention of work is in "work to rule" which the applicants say, paraphrasing the earlier quotations, simply means if you are not paid for it, do not do it. That is the whole point of including "work to rule" in the definition. I agree.

144. Fourth, at least in the education sector in Ontario with its long tradition of providing extracurricular activities in this way – unpaid and voluntary by teachers and is certainly the case here for the activities listed in Appendix A and B – ETFO's argument seems to me to be somewhat circular. The performance of all work (whether paid or not) is in some sense always voluntary – even if only on as fundamental a level as whether to attend or not (let alone whether to volunteer for overtime, PORs or whatever). Teachers (unlike the volunteer firefighters in the *Town of Tecumseh*, *supra*, case and as ETFO itself noted in its arguments) are not paid hourly but by an annual salary – at least one of the reasons is that certainly some teacher functions will surely be done outside of school hours (whether marking, some class preparation, etc.). For example, the teacher who takes several hours longer in the evening to mark tests is not paid any more than the teacher who does not. The system in Ontario (notwithstanding all of the legislative tinkering with it over the last decades) still seems to expect and to depend on volunteerism (at least in the aggregate if not on an individual basis) to deliver some expected components of it – like those activities listed in Appendix A and B. These are not activities so remote or unconnected to the employer's main purpose (I would say business if this were not the education sector) – like the example of teachers selling cookies after school that ETFO cited. In these circumstances, to conclude that a refusal

in concert to perform voluntary activities is not a strike simply because they are unpaid, seems to me to achieve indirectly what cannot be achieved directly – i.e. strike action. It is still concerted collective action by teachers to pressure their employer and, in the words of the *Education Act*, "interfere with the normal activities of a board … or the operation or functioning … of one or more of the programs in one or more schools" (albeit in this case as a means to pressure the Government). I say this appreciating that in this application, and for purposes of this application, the activities in Appendix A and B are agreed to be purely voluntary – but speaking from either a general labour relations or policy purpose that may not always be the case or the line differentiating the two so easy to draw.

(iv) The Part X.1 Teacher Argument

145. ETFO also argued that since the opening words of section 277.2(4) which ousts the *LRA* definition of strike replacing it with the *Education Act* definition are:

> "For the purposes of subsection (1)"

and subsection (1) of section 277.2 (which otherwise makes the *LRA* applicable) explicitly refers not to "teachers" but to "Part X.1 teachers", the definition of strike contained in section 277.2(4)(b) must refer to teachers employed to teach – not perform voluntary activities – since that is the definition of Part X.1 teachers in section 277.1(1):

> "Part X.1 teacher" means a teacher employed by a board to teach but does not include a supervisory officer, a principal, a vice-principal or an instructor in a teacher-training institution;

as opposed to the definition of teacher elsewhere in the *Education Act* which just refers to a member of the Ontario College of Teachers.

146. However, I find the applicants' argument on this point far more compelling. First the actual definition of strike in section 277.2(4) nowhere mentions the words "to teach". If ETFO were correct, this would be an extremely odd and improbable way to incorporate such a limitation into what was covered by the definition of strike, particularly when the definition is so explicitly broad elsewhere – interfering with the "normal activities of a board or its employees" or "the operations or functioning … of one or more of the programs in one or more schools of a board". This would be more than enough to dispose of ETFO's argument.

147. But what to make of the opening words of section 277.2(1) Part X.1 of the *Education Act* which deals with collective bargaining contains many other provisions other than the definition of a strike, including the designation of statutory bargaining agents – different teacher unions for different bargaining units (see sections 277.3 and 277.4). Not every employee of a school board falls into one of those teacher bargaining units. More importantly, since "teacher" is defined as a member of the Ontario College of Teachers elsewhere in the statute, there may be "teachers", i.e. members of the College, who are not employed to teach – e.g. principals who maintain their College

membership, or a psychologist who in addition to those professional qualifications has maintained or additionally has membership in the College. Such "teachers" would not be in any teacher bargaining unit and not covered by Part X.1 of the *Education Act* – hence the need to specify Part X.1 teachers in section 277.2(1).

148. Lastly, even if anything in the definition of strike has anything to do with "employed to teach", I was referred to *Ottawa-Carleton District School Board* [2008] O.L.A.A. No. 500 (Albertyn), an arbitration dealing with grievances concerning "educational technology leaders" and "integrators" (and the termination of one of them) who were not teachers but were retained to help introduce technology into the classrooms and to assist teachers with integrating technology into the curriculum. In the course of dealing with the grievances, the arbitrator had to determine whether the grievors were in the teachers' statutory bargaining unit, or in other words, were "employed to teach". In reviewing the jurisprudence on that point, the arbitrator noted the test was a broad one – did the teacher perform functions that were part of, or related to, or integral or vital to, the teaching program or in furtherance of education – and that it did not necessarily involve or require classroom teaching – and concluded that some of the grievors were therefore employed to teach. The applicants argue similarly, co-instructional activities (or those listed in Appendix A and B) could easily be said to be related to, vital to or integral to education and therefore the performance of them could easily fall within the words "employed to teach" in the definition of Part X.1 teacher. Although there may be much to be said for this argument, and leaving aside that the arbitration award was quashed by Divisional Court [2010] O.J. No. 4142, on arguably other grounds, since the parties were unable to agree upon the magnitude of the significance or impact of these extracurricular activities (whether evidence was required to establish that or how such evidence was to be presented) other than, as noted in paragraph 77, *supra*, not disputing that the provision of extracurricular activities could be said to be important and valuable to a child's education, I choose not to say much more about this part of the applicants' argument. Suffice it to say that I find the first two grounds more than sufficient to reject ETFO's argument that the strike definition in section 277.2(4) of the *Education Act* applies only to teaching activities.

(v) Summary

149. To summarize, I have concluded that activities such as those listed in Appendix A and B come within the definition of strike in section 277.2(4) of the *Education Act* notwithstanding that the activities are unpaid and voluntary. Not only does the plain and clear wording of the statute easily include these activities, but I think, if only from both the labour relations purpose and perspective, this is the far better interpretation, particularly in the education sector with its long history and expectations about the delivery of these types of activities. To the extent the cases have dealt with situations of the collective withdrawal of similar types of voluntary activities (and I do not dispute that there has been no decided case (with reasons) exactly like this), I believe they support or at least are not inconsistent with such a conclusion.

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

150. ETFO asserted that the *Charter* could (and did) impact on the result of this application on three different levels:

> (a) I must apply *Charter* values in interpreting the statute – the strike definition in the *Education Act*. ETFO conceded that if I could clearly interpret the statute (there was no ambiguity), I need not resort to *Charter* values – in fact, I could not because that would effectively pre-empt any section 1 defence that could be made to a *Charter* violation – since if every statute was interpreted always to be consistent with the *Charter*, the Government (or anybody responding to a *Charter* challenge) would be deprived of the opportunity of establishing that the *Charter* violation was demonstrably justified in a free and democratic society – a section 1 defence.
>
> (b) If I found that there was a clear interpretation of the statute (and therefore need not resort to *Charter* values), did the statute actually infringe on *Charter* protected freedoms – here freedom of expression and freedom of association. If so, can such infringement be demonstrably justified in a free and democratic society – the section 1 defence. The onus of establishing a section 1 defence would either be on the Government or those supporting the statute notwithstanding its contraventions of the *Charter* – here the applicants.
>
> (c) Even if I did not find any *Charter* violation or I found that such a *Charter* violation was justified under section 1, in applying the discretion I have under the *LRA* about what relief (if any) to grant (and there was no dispute that the relief sought here concerning declarations with respect to an unlawful strike, etc., was discretionary – the Board had the discretion to refuse such declarations even in the face of finding the existence of an unlawful strike, and had often done so in the past), I must again consider *Charter* values, albeit on a different test than under section 1.

151. The applicants did not necessarily agree with the structure of this analysis and in particular the repeated levels of *Charter* scrutiny, and in particular ETFO's proposed third level (How many bites of the *Charter* "apple" could ETFO take?).

152. Unfortunately, during the submissions on the *Charter*, and in particular with respect to any section 1 defence, it became apparent that the parties could not agree either on whether evidence was required to be heard or the manner in which such evidence should be adduced before the Board. Rather than have the proceedings break down at that point or be delayed even further, the parties agreed that I issue this decision on those issues already fully canvassed – the impact of the repeal of Bill 115, whether the activity of ETFO could fall within the definition of strike in the *Education Act* – the preceding

portions of this decision. Only if ETFO was unsuccessful on both of those issues (as it now has been), need I deal with the *Charter* issues. Even then I need only deal with the *Charter* values insofar as I find the interpretation of the strike definition ambiguous or unclear, or to the extent possible at this stage (if at all) with respect to my discretion in granting relief. It was expressly agreed that I not deal with either whether the infringement of any *Charter* freedom had occurred, or, if so, whether a section 1 defence had been established to such infringements. If that became necessary, the hearing would be reconvened to deal with those issues.

153. ETFO extensively reviewed in great detail many cases before me, elaborating the *Charter* values at stake – too numerous to list at this point. At this stage of the proceedings and with respect to ETFO's proposed structure of *Charter* analysis, it is sufficient to refer to *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paras. 62-67:

> 62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not" (*Sullivan*, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.
>
> 63 This Court has striven to make this point clear on many occasions: see, e.g., *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 558, per L'Heureux-Dubé J.; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, per Lamer J. (as he then was); *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771, per McLachlin J. (as she then was); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *Mossop*, *supra*, at pp. 581-82, per Lamer C.J.; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66, per Cory J.; *Mills*, *supra*, at paras. 22 and 56; *Sharpe*, *supra*, at para. 33.
>
> 64 These cases recognize that a blanket presumption of Charter consistency could sometimes frustrate true legislative intent, contrary to what is mandated by the preferred approach to statutory construction. Moreover, another rationale for restricting the "Charter values" rule was expressed in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 752:
>
> > [T]o consult the Charter in the absence of such ambiguity is to deprive the Charter of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory

> meanings must be made congruent with the Charter even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the Charter. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the Charter, since the interpretive process would preclude one from finding infringements in the first place. [Emphasis in original.]

(See also *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 679-80, per Sopinka J.)

65 This last point touches, fundamentally, upon the proper function of the courts within the Canadian democracy. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 136-42, the Court described the relationship among the legislative, executive, and judicial branches of governance as being one of dialogue and mutual respect. As was stated, judicial review on Charter grounds brings a certain measure of vitality to the democratic process, in that it fosters both dynamic interaction and accountability amongst the various branches. "The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter)" (*Vriend*, *supra*, at para. 139).

66 To reiterate what was stated in *Symes*, *supra*, and *Willick*, *supra*, if courts were to interpret all statutes such that they conformed to the Charter, this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on Charter grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on Charter rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the Charter right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of Charter principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the Charter to achieve a different result.

67 It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(c) of the *Radiocommunication Act* declared unconstitutional for violating the Charter. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(c), and, if they are, whether they are justified under s. 1.

154. Although I have some doubts about ETFO's distinctions and repeated filtering through the *Charter* screen, and some sympathy for the applicants' argument about when enough is enough, since the parties explicitly have agreed that I not deal with whether there is a violation of any *Charter* freedom or whether those violations are demonstrably justified in a free and democratic society, I shall not discuss this issue any further at this point in time. The parties will have an opportunity to fully argue the *Charter* and all its implications at the next stage, as they have previously agreed.

155. What I wish to make clear however, as I have attempted to express at some length previously, is notwithstanding the fact that this specific issue has (apparently almost assiduously) never been litigated before, I find the interpretation of the strike provisions of the *Education Act*, at least from the labour relations (if not the *Charter*) perspective, relatively straightforward and clear – activities such as those listed in Appendix A and B can fall within the definition of strike. Much argument before me was devoted and very many cases cited (too numerous to list here) as to precisely what level of, or how to exactly measure the level of ambiguity before I am required to resort to *Charter* values to interpret the statute (at least in ETFO's view). I need not resolve all the nuances (real or imagined) of that debate. Regardless of whether the test is "susceptible of two or more plausible interpretations" or "equally plausible" or some other formulation, I am comfortable that section 277.2(4)(b), properly interpreted (without any consideration of the *Charter*), clearly includes a refusal in combination or in concert to perform the duties listed in Appendix A and B. The words of the statute are clearly broad enough to do so and it is the desirable result from a labour relations perspective.

VII. Disposition – Where Are We Now?

156. Obviously, no final order for relief can be made at this stage because the *Charter* issues remain outstanding. To the extent either party at this stage still desires (or thinks there is a need) for this case to continue further, those *Charter* issues must be determined. Although I have found there to be a labour relations purpose to issuing this decision, I have invited either party to renew their submissions, if they so choose, whether there is a labour relations purpose to continue litigating this application now and in particular, the *Charter* issues, at this time. Accordingly, either party may write to the Board within **ten days** of the date of this decision to so indicate otherwise the Board will consider this application adjourned *sine die*. If any party so writes to the Board, it is expected that they will first communicate with the other party so they may at least attempt to propose agreed upon dates. Those dates will be for a Case Management Hearing as outlined below. Before concluding, I wish to address two further issues.

(a) Any Further Evidence?

157. If the parties choose to proceed and litigate the *Charter* issues (including any section 1 defence), they are directed to provide each other with any articles, literature, studies, etc., and a summary of any evidence they rely on, and if they cannot agree on their contents, at least agree on whether they are properly before the Board without the need of any further evidence. Much argument before me was devoted to this – whether

evidence was required and how it should be adduced. I was referred to a number of cases how what ETFO characterized as "social science evidence" as part of a section 1 defence was properly before the Courts (as opposed to what ETFO introduced (without objection) as background material to deal with the interpretation of a statute (e.g. *Report of the Minister's Advisory Group on the Provision of Co-instructional Activities*, *supra*). See *Canada (Canadian Human Rights Commission) v. Taylor*, [1987] 3 F.C. 593, at paras. 29-30; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, at page 41; *R. v. Powley*, (2001) 53 O.R. (3d) 35, at paras. 57-65; *R. v. Spence*, [2005] 3 S.C.R. 458, at paras. 53-68. While I do not wish to derogate from the significance of notions of adjudicative facts vs. social or legislative facts, nor the concern of the courts over "bootlegging evidence in the guise of authorities" (*Powley*, *supra*) or the preference of courts for social science evidence to be presented through an expert witness who will be cross-examined on the value and weight to be given to such studies and reports (*Spence*, *supra*, at para. 68), the Board is not a court – in fact, the Board was created specifically not to be a court. It is an oft repeated truism that labour relations delayed is labour relations denied – nowhere is this more true than how the Board tries to deal with unlawful strike or lock-out applications. Sometimes the Board is unable to meet and falls short of that standard of expedition – this case unfortunately appears to be an example – nine days of hearings (notwithstanding they were arranged on relatively short notice and continued by the Board rearranging other scheduled hearings to provide these parties additional hearing dates to complete the application and still accommodate the schedule of the parties when possible) and the length of time it has taken to issue these somewhat lengthy reasons. Although I appreciate that fundamental principles of justice cannot be either ignored or obliterated in any such rush for expedition, neither can parties expect the Board to mimic court-like procedures in applications like this – where suspicions of tactical or strategic delay are always high. I was advised that the court case initiated by ETFO and others to challenge the validity (constitutional or otherwise) of Bill 115 is proceeding in the Courts (as was required under Bill 115) with a schedule of affidavits and cross-examinations over several months to be completed in the fall of 2013 (hopefully) – a schedule which simply flies in the face and is inconsistent with how the Board deals (and is expected to deal) with unlawful strike applications. Although the Board carefully sifts through unlawful strike applications in order to schedule them appropriately (and is equally concerned about parties trying to "jump the queue" to a more expeditious hearing or process by inaccurately characterizing conduct, either as a strike or lock-out, or continuing, or urgent, when it may not be), it still must be concerned about adopting procedures which in the end, because of the time they take, render any effective relief meaningless or academic. That is why, if either party wishes this application to be rescheduled for hearing on the *Charter* issues, in view of the fact that ETFO has now withdrawn its "advice" and is no longer urging members to withdraw from voluntary extracurricular activities, it will first be scheduled for a Case Management Hearing to deal with these issues. As contentious as those issues may be, I expect and direct the parties to exchange all of their materials in support of their submissions (and in particular anything with respect to "social facts") prior to the hearing, attempt to agree how disputes about them can be resolved, and if not, raise and elaborate those disputes, preferably in writing, at least **ten days** prior to any Case Management Hearing.

(b) Remedy at This Point in Time

158. Equally, at this point I am also reluctant to say too much about remedy and how I would exercise my discretion with respect to any relief. Obviously ETFO has argued there are *Charter* implications and requirements and I have chosen to leave the *Charter* issues to be argued later as the parties agreed and invited me to do. Both parties submitted draft orders to me and proposed notices that I should issue were I not to dismiss this application. At this point, I have determined that the repeal of Bill 115 did not bring to an end the collective agreements the *PSFA* imposed (and that they amounted to collective agreements) and that the definition of strike in the *Education Act*, at least from the point of view of a plain reading of the statute and labour relations policy, is broad enough to include the withdrawal in concert of the activities listed in Appendix A and B. The impact of the *Charter* awaits to be determined, whether there are violations of any fundamental freedoms, whether they are justified in a free and democratic society and how the *Charter* affects my discretion in formulating relief. However, the applicants asserted that everyone would benefit from having the state of the law clarified (and this decision may purportedly bring some clarity to it) and ETFO strongly asserted that whatever order and declaration I issue:

> "…must include a declaration and affirmation that ETFO members at the Applicant Boards are entitled to determine on an individual basis whether to engage in voluntary activities including volunteer extracurricular activities…"

159. The applicants asserted at various times that ETFO was essentially, at least, directing, if not coercing or compelling its members to withdraw from participating in these voluntary activities – which ETFO vehemently disputed. ETFO very carefully set out its position (sometimes only after prompting) at the hearing – but if judging by the e-mails from local officials at the applicant school boards, was not so clearly set out in the Takeover Bulletins. In view of the publicity these applications have received, particularly at the applicant school boards, I have determined that I should issue an interim notice indicating what has been determined in the application so far and clearly indicating ETFO's position that teachers are entitled to determine on an individual basis whether or not to engage in voluntary activities – that any withdrawal is not "directed" by ETFO and participation in any extracurricular activities will not be subject to any discipline by ETFO. Notwithstanding ETFO's withdrawal now of its "advice" to its members urging them not to participate in voluntary extracurricular activities, I still regard this as useful. Whether any or how much of this survives in any final order or notice after hearing the *Charter* arguments remains to be seen. A copy of the "NOTICE TO EMPLOYEES" is attached. It should be posted for 60 days (together with a copy of this decision) at all relevant bulletin boards of the applicants' schools as well as on the applicants' and ETFO's websites.

"Bernard Fishbein"
for the Board

Board File No. 3042-12-U

Schedule

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

The applicants, Trillium Lakelands District School Board and Upper Canada District School Board, have applied to the Ontario Labour Relations Board ("the Board") for declarations that the Elementary Teachers' Federation of Ontario ("ETFO") has called or authorized an unlawful strike contrary to the *Labour Relations Act* and the *Education Act*. ETFO has argued that its actions are protected by the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Because (on the agreement of the parties) no decision on the *Charter* issues has yet issued, no final order can be issued at this point. However, at this point, the Board has determined and declares:

(a) Notwithstanding the repeal of the *Putting Students First Act* ("Bill 115"), the teacher collective agreements imposed by Bill 115 between ETFO and the applicants continue to exist and be in force;

(b) The withdrawal in combination or in concert of voluntary services and in particular those listed in "Appendix A" and "Appendix B" (set out in paragraph 55 of this decision) falls within the definition of strike contained in the *Education Act* and given the finding in paragraph (a) that the collective agreements are in force, are untimely and therefore unlawful – whether that will be affected by any decision on the *Charter* remains to be seen;

(c) As ETFO made clear in this hearing, the withdrawal of voluntary services passed by the ETFO provincial executive as announced in ETFO's Provincial Takeover Bulletins was not a "Directive" of ETFO within the meaning of ETFO's Constitution and Bylaws and accordingly, no ETFO discipline will be imposed on members whether they participate or not in such withdrawal. Subject to any future order of the Board, it is an individual choice. At this point in time, ETFO has withdrawn its advice to members not to participate in voluntary extracurricular activities.

This is an official notice of the Board and must not be removed or defaced.
This notice must remain posted for 60 consecutive days.
DATED this 11th day of April, 2013.