IN THE MATTER OF AN ARBITRATION BEFORE
THE HONOURABLE JUSTICE T. R. LEDERER
RESPECTING THE REMEDY FOR THE LIABILITY FINDINGS MADE BY THE
ONTARIO SUPERIOR COURT OF JUSTICE
IN TORONTO COURT FILE NO. CV-12-465306

B E T W E E N:

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and MARGARET SUZANNE GEE, LINDA MAE HACHMER and ANN-MARIE HULSE on their own behalf, and on behalf of all other members of the Elementary Teachers' Federation of Ontario

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the MINISTER OF EDUCATION

Respondent

ARBITRATION AWARD

Counsel:

Howard Goldblatt and Daniel Sheppard, for the applicants.

Robin Basu and Rochelle Fox, for the respondent.

1. On April 20, 2016, the Superior Court released its decision reported as *OPSEU et al v. Ontario*, 2016 ONSC 2197 (the "Liability Decision"). The decision reflected on negotiations and actions taken by the Crown in Right of Ontario as represented by the Minister of Education (the Respondent herein).

2. These negotiations and actions were taken in respect to "various and many contracts for unionized workers in the education sector" which expired during 2012. The process directed to coming to new or refreshed agreements began in February 2012. Some of the represented groups entered into Memoranda of Understanding with the Respondent (the "Crown"). Among those who did so was the Ontario English Catholic Teachers' Association (hereinafter, "OECTA"). Others did not. The province passed the *Putting Students First Act* S.O. 2012. It required that any agreements entered into before August 31, 2012 be "substantially similar" to the Memorandum of Understanding entered into by the OECTA; any agreements made after that date were to be "substantively identical" to that Memorandum. The *Putting Students First Act* allowed that, where such agreements had not been arrived at by December 31, 2012, they could be imposed. As matters transpired, some were. Subsequent to the imposition of these agreements, on January 23, 2013, the *Putting Students First Act* was repealed. The agreements were left in place (*OPSEU et al v. Ontario, supra* at para. 1).

3. Five unions brought an application attacking the process utilized in coming to these new agreements. The Liability Decision is the result. It found that, the Respondent's conduct in the course of the Provincial Discussion Table process in 2012, the *Putting Students First Act,* and Order-in-Council 1/2013 issued under that statute, represented an unjustified breach of s. 2(d) of the *Charter of Rights and Freedoms* which protects the freedom of association.

4. The Liability Decision encouraged the parties to make efforts to resolve the issue of what would be the appropriate remedy before seeking a determination by the Court. Of the five applicant unions four were able to resolve this issue through negotiations with the Respondent. As the judge who heard the application, I was advised that the fifth union, the Elementary Teachers' Federation of Ontario (hereinafter "ETFO") and the Respondent were unable to agree as to an appropriate remedy. In preference to returning to Court, I urged counsel for the parties to consider an alternative dispute resolution mechanism, such as mediation or mediation-arbitration.

5. The Ontario Public School Boards Association had intervened in the application. Its members are, in many cases, the actual employers but they are not the ultimate funder of whatever agreements are made. The provider of the funds is the Respondent. This being so, and the determination having been made that the process the Respondent had adopted in 2012 was

flawed, the Ontario Public School Boards Association advised counsel and the Court that it would not participate further in the process as it related to remedy. It took this position on the understanding that it was without prejudice to any right to intervene in any appeal that might be undertaken. There has been no appeal.

6. The parties herein eventually agreed to proceed by way of mediation-arbitration under s. 84 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, and in accordance with an agreement between the parties (the "Mediation-Arbitration Agreement). It was agreed that I would first act as a mediator to assist the parties to reach a consensual resolution of the issue of remedy. Failing such a resolution, it was agreed by the parties that I would act as arbitrator under s. 84 of the *Courts of Justice Act*, in accordance with the Mediation-Arbitration Agreement and the *Arbitration Act*, S.O. 1991, c. 17. It was understood that, in that circumstance, I would issue a binding determination on remedy. In my capacity as a Justice of the Superior Court seized with the Application made by the five unions to the Court, I issued an Order finding liability in accordance with the Liability Decision and, on consent, ordering that remedy be determined in accordance with the Mediation-Arbitration Agreement attached as Schedule A to the Order. A copy of my Order and its Schedule A is attached hereto as Annex 1 to this Award.

7. Prior to the mediation, in accordance with an agreed timetable, the following materials were filed with me for purposes of the mediation and, if necessary, the arbitration:

- a joint supplementary record containing statements of position on remedy,
- an agreed statement of facts and supporting documents,
- a compendium of extracts from the evidentiary record that was before the Court on the liability hearing in 2015,
- written legal argument (factum) of the Applicants,
- a responding factum from the Respondent,
- a reply factum from the Applicants, and
- a joint set of the authorities referred to by the parties.

8. The mediation proceeded (by video-conference due to the COVID-19 pandemic) with counsel on June 11, 2021, and with counsel and the representatives of the parties on June 16 and 17, 2021. The parties, through counsel and, at times, directly through their representatives, made submissions to me on the merits of their respective positions as to the remedy for the *Charter* breaches identified in the Liability Decision. I had also read the extensive materials filed, including the facta of the parties and the evidentiary record. I am familiar with the evidentiary record filed in the court proceeding and the details of the findings I made in my capacity as the Application Judge hearing the applications that resulted in the Liability Decision.

9. At the conclusion of the mediation phase on June 17, 2021, it was agreed by the parties that an arbitral determination of remedy would be required. The parties indicated through counsel that they were satisfied that the materials filed and arguments made on June 11, 16 and 17, 2021 would be sufficient, in their view, for me to make a determination and award of remedy, and they were prepared to vacate the dates for further argument of the arbitration, which had been tentatively reserved for July 13 and 14, 2021.

10. At the conclusion of the session of June 17, 2021, I was satisfied that based on the materials filed before me, the submissions of counsel and the parties' representatives during the mediation process, and the exchange of positions prior to and during the mediation process, that I would be in a position to make a determination and award of remedy that is just and appropriate in all the circumstances and finally resolves this dispute, without further argument on July 13 and 14, 2021. Accordingly, those hearing dates were vacated.

11. I have been advised by counsel for the parties that, although an arbitral determination of remedy is necessary, agreement has been reached on all issues relating to the formula for and mechanics of the distribution of any monetary entitlement arising from a determination of remedy (the "Agreed Issues") except one. Annex 2 hereto sets out that agreement and forms part of this Award. I have reviewed Annex 2 and I appreciate the complexity associated with distribution of any monetary remedy in these circumstances.

12. The exception is that the parties have not agreed on whether and how much of any of the remedy which I award is to be made available to Occasional Teachers ("OTs"; generally referred to as "daily occasionals"), who were not employed on an FTE ("Full-Time Equivalent") basis

during the relevant years. I was asked by the parties, when they reached impasse on that issue (the "OT issue") during the preparation of Annex 2, to determine this remaining distribution issue. Annex 3 which is attached to and forms part of this Award is my determination of the OT issue.

13. I am further advised by counsel that the Applicants do not seek, and the Respondent opposes, the issuance of a declaration that the *Putting Students First Act, 2012* (the "Act"), and any Orders-in-Council or regulations thereunder or under the *Education Act*, are invalid under s. 52(1) of the *Constitution Act, 1982*. It may be that Tribunals and Commissions charged with deciding legal issues are required to conform to the *Charter of Rights and Freedoms* and thus, may be required to make decisions about the extent and meaning of its provisions; however, whether this extends to the authority of an arbitrator to make a general declaration as to the invalidity of a statute is, I should think, open to serious question. In any event it is clear that the ultimate resolution to such a question would remain with the Courts to which the review or appeal of such a question would inevitably be taken (see *Nova Scotia (Workers' Compensation Board) v. Martin,* 2003 SCC 54, paras 27-32). Leaving aside the question of my jurisdiction *qua* arbitrator, in this instance, to issue a general declaration of invalidity, I am satisfied that such a remedy should not issue in the present unique circumstances. This is confirmed by the parties' concurrence that such relief should not issue. In fact, as counsel have advised, the Act's invalidation could have unintended consequences, namely, that in light of the Act's repeal on January 21, 2013 and the passage of time and many intervening agreements and events between 2012-13 and today, it is, in counsel's words, "impossible to unscramble the egg". To give but two examples of unintended consequences, the invalidation of the Act could result in the invalidation of legal instruments issued under the authority of the Act, including, firstly, the Order-in-Council imposing terms of employment governing the period September 1, 2012 to August 31, 2014, not only for the applicants but also for other employees and employers in the publicly-funded education sector, and, secondly, the invalidation of the regulation that established a new sick leave plan that has governed employers and employees in the sector since its promulgation. Neither party wishes to unwind past transactions nor disturb the new sick leave plan and, indeed, it is difficult to see how this could be done in any event.

14. Accordingly, the question of remedy falls to be determined not under s. 52(1) of the *Charter* but under the authority provided by s. 24(1), which reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

15. The parties are agreed, and the jurisprudence confirms, that I have the jurisdiction as an arbitrator to issue a remedy under s. 24(1) of the *Charter* (*R. v. Conway*, 2010 SCC 22, paras. 27-30, 80-82).

16. By its words, s. 24(1) confers a broad discretion to fashion a remedy for a *Charter* breach. The language of the section mandates that the remedy must be "just and appropriate in the circumstances" (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 270).

17. The Supreme Court has cautioned that *Charter* remedies should be responsive to the *Charter* breach (*Conseil scolaire*, *supra,* para. 270).

18. An available remedy under s. 24(1) is a declaration that the claimants' rights have been breached (*R. v. Gamble*, [1988] 2 SCR 595 at p. 649, *Canada v. Khadr*, [2010] SCC 3, para. 46, *Vancouver (City) v. Ward*, 2010 SCC 27, paras 34, 37, *Mahe v. Alberta*, [1990] 1 SCR 342 at pp. 392-3).

19. Damages are also an available remedy, but the discretion to award damages is not unfettered; "an award of damages must be 'fair not only to the claimant whose rights were breached, but to the state which is required to pay them'" (*Conseil scolaire*, *supra* para. 270, *Ward*, para. 4).

20. The Supreme Court has explained that the following purposes can be served by a monetary award of *Charter* damages under s. 24(1): "compensation, vindication of the right, or deterrence of future breaches." The government may show "countervailing factors [that] defeat the functional considerations that support a damage award and render damages inappropriate or unjust" (*Conseil scolaire*, para. 270, *Ward*, para. 4).

21. The issues I am asked to determine for the purposes of explaining the remedy being imposed are:

> (a) should a declaration be issued that the rights of the individual Applicants under s. 2(d) have been unjustifiably breached?
>
> (b) should a monetary remedy be awarded?
>
> (c) if so, what amount should be awarded (i) to the individuals affected by the *Charter* breach and (ii) in the aggregate?

22. To be clear, I repeat that I am no longer acting as a Justice of the Superior Court in this matter and, accordingly, my decision will have limited, if any, precedential value. My authority arises from the agreement of the parties reflected in the Mediation-Arbitration Agreement. Nonetheless, I am mindful that I have been tasked by the parties with finally resolving a longstanding dispute in a public-sector labour relations context where, first, the parties have a continuing relationship which is important for the delivery of critical public services to Ontario's children, and second, the parties are not the only players in the system. There are other bargaining agents with whom the Respondent and Ontario's school boards also have important relationships. What happens in one relationship can have ramifications in other relationships. Based on the context and the nature of *Charter* remedies, I must also be mindful of the overall public interest in finally resolving this dispute.

Issues (a) and (b)

23. Issues (a) and (b) are considered together. On these issues the Applicants and the Respondent do not agree.

24. The Applicants do not press for a remedy in the form of a s. 24(1) declaration that the rights of the individual applicants under s. 2(d) have been unjustifiably breached. For them, as stressed by their counsel, the issue, at hand, is a damages award. They point to demonstrable losses that the individual applicants (i.e., the individual ETFO members employed in the publicly-funded education system during the relevant school years, 2012-13, 2013-14) have suffered as a result of the breaches of the *Charter* identified in the Liability Decision, specifically

(1) at least one mandatory unpaid day off, (2) a 97-day delay in movement on salary grids in each of the two school years (for those ETFO members still moving along the grids), and (3) the imposed changes to the sick leave plan / retirement gratuity system. The details of these changes are described in the Liability Decision. The applicants also argue that the other purposes of a s. 24(1) damages remedy – vindication and deterrence – would also be served by a monetary award.

25. For its part, the Respondent submits that the only remedy that should issue is a bare declaration that the *Charter* rights of the individual applicants have been unjustifiably breached but that no monetary award should be made. The Respondent argues that the remedy of a s. 24(1) *Charter* declaration adequately serves the purposes of *Charter* remedies and that a monetary award is not appropriate, as compensation should not be in issue.

26. On this latter point, the Respondent points, in particular, to the Liability Decision in which I stated (at para. 273):

> The problem with what took place is with the process, not the end result. It is possible that had the process been one that properly respected the associational rights of the unions, the fiscal and economic impacts of the result would have been the same or similar to those that occurred.

27. The Respondent's argument in this regard is that it is quite possible, or perhaps likely, that even in the absence of the *Charter* breaches, the individual applicants might have found themselves in the same financial position as they found themselves with the *Charter* breaches. The Respondent also argues that s. 2(d) of the *Charter* does not protect outcomes and, as such, compensation is not appropriate.

28. Moreover, the Respondent argues that all the monetary losses to which the Applicants point actually flow not from the government action that breached the *Charter* but from the Act and associated regulations themselves. As a general rule, in the absence of a showing that government action was clearly wrong, in bad faith or an abuse of process, *Charter* damages under s. 24(1) should not be awarded where the harm to the claimants arises from the enactment of unconstitutional legislation (*Mackin v. New Brunswick*, [2002] SCR 405 at paras. 78-81).

29. The Respondent disputes the Applicants' contention that the conduct of the government was clearly wrong, in bad faith or an abuse of process in connection with the *Charter* breaches in question, especially because the state of the s. 2(d) jurisprudence at the time of the breaches was evolving. It argues that there was no intention to breach the *Charter* and that, based on the state of the law at the relevant time, it was not unreasonable for the government to believe that it was in compliance with s. 2(d).

30. Lastly, the Respondent submits that a s. 24(1) declaration as to *Charter* breach would adequately serve the purposes of vindication and deterrence.

31. In reply, the Applicants submit that in the absence of the *Charter* breach, the outcome could also have included improvements to the members' terms and conditions of employment. They point, for example, to the outcome of bargaining during the relevant time with other public sector workers, which they submit shows that the terms imposed by the government in the education sector were more extreme than what would have been reached with an unfettered bargaining process.

32. The Applicants also submit that the enactment of the *Putting Students First Act* was "clearly wrong", that the Act's enactment was not the only *Charter* violation identified in the Liability Decision, and that the *Mackin* principles do not apply to the government's pre-legislation conduct.

Conclusion on issues (a) and (b)

33. I am satisfied that the Respondent did not act in bad faith, or with an absence of good faith, that there was no abuse of process or conduct that, at the time, was clearly wrong. In my view, neither party acted with a lack of good faith. As I made clear in the Liability Decision, the s. 2(d) law was in a state of evolution at the relevant time. Both the government and ETFO were acting in an adversarial context, but both of them in a good faith pursuit of legitimate goals – the government in furtherance of its public policy goals in the context of fiscal constraints, and the union in furtherance of the interests of its members.

34. However, in my view, having heard the submissions made and the discussion that took place over the course of this mediation/arbitration, it would not be an appropriate and just

remedy merely to issue a declaration as to *Charter* breach and deprive the applicants of any monetary remedy.

35. There is more. While I noted in the Liability Decision that the Applicants could well have found themselves in the same financial position had there been no breach of the *Charter*, the fact is that, after the Liability Decision, the Respondent in the 2016-17 period resolved the remedy issue for four of the five applicant unions with substantial monetary payments for the members of those four applicant groups. In addition, in early 2018 the Respondent also entered into agreements with other groups in the publicly-funded education sector who were not participants in the court applications providing monetary benefits, at least in part, due to the impact of the *Putting Students First Act* upon the members of those groups.

36. All of these settlements, their monetary value, and, to some extent, the rationale upon which they were calculated, are in evidence before me and it would not be appropriate and just for me to turn a blind eye to them when considering the situation of the one remaining Applicant.

37. In fact, the Respondent contends, albeit as an alternative argument, that these monetary payments should be taken into account in determining the amount of any monetary award were I to decide to make one. In this regard, the Respondent argues that fairness and equity across groups in the publicly-funded education sector is a principle used in the education sector. The Respondent also argues that the principle of comparability or replication does appear to have role to play in the *Charter* s. 2(d) jurisprudence (for example *Meredith v. Canada*, 2015 SCC 2, para. 28 and *Gordon v. Canada*, 2016 ONCA 625, para. 130). This would be consistent with the already expressed recognition of the involvement and interest of the other unions and concern for the broader public interest.

38. In the present context and having regard to the very particular factual circumstances of this case, I find that fairness and equity as between the different groups should be a factor on the question of whether the Applicants here should also benefit from a monetary award.

39. It is clear from the submissions of the parties that over the years since the Liability Decision, efforts were made by ETFO and the Respondent to come to a monetary resolution. The

stumbling block was not whether the individual applicants should receive any compensation, but rather what the amount should be.

40. In my view, the protracted or recurring impasse between ETFO and the Respondent on the question of amount – regardless of who may or may not have been "responsible" for the impasse (a question which is irrelevant for present purposes) – should not be visited upon the individual applicants. Fairness and equity, in my view, are relevant factors in determining remedy. Fairness and equity support the making of a monetary award.

41. I would add that the *Charter* breaches found in the Liability Decision were not limited to the legislation or actions authorized thereunder. Breaches of s. 2(d) by government action preceded the enactment of legislation. As I stated in the Liability Decision, it is possible that different conduct by the government including that which preceded the enactment of the impugned legislation might have resulted in a different course of events unfolding.

42. In the unique circumstances of this case, it is my determination that an appropriate and just remedy for the *Charter* breaches should include a monetary award.

43. As ETFO is not seeking a s. 24(1) declaration as to breach of the *Charter* rights of the applicants, in my view it is not necessary to make such an order. In fact, the parties agree that the Liability Decision itself, and the Order issued thereunder (which finds a breach of the *Charter*) (Annex 1), amounts to the same thing.

Issue (c) – Amount of an award

44. I come now to the difficult issue that appears to have kept ETFO and the Respondent from coming to an agreement in the years since the Liability Decision, namely, the question of the amount of a monetary payment to be awarded as damages. In this regard, I am governed by the terms of Annex 2 which has been agreed to by the parties and forms part of this Award. As this arbitration process has been framed, and in light of the agreement of the parties contained in Annex 2, the issue of the amount of a remedial payment has two related aspects which need to be decided:

- Firstly, what is the appropriate and just maximum amount of an award for each individual employed in the publicly-funded education sector on a full-time equivalent (FTE) basis during both of the years in question (2012/13, 2013/14)? In Annex 2 this is referred to as the Maximum Per FTE Amount or "MPFA"; and

- Secondly, what is the appropriate and just maximum amount for which the Respondent should be liable in respect of all individuals in the aggregate? In Annex 2, this is referred as the as the Total Remedial Payment or "TRP".

45. In my view, for reasons further detailed below, the appropriate and just maximum amount of damages that should be payable to each individual employed on an FTE basis in both relevant years – the MPFA – is $1,606.00, inclusive of interest.

46. Annex 2, paragraph 4, sets out the formula for determining the entitlement of each individual. Paragraph 4 essentially provides that each individual's entitlement is based on the amount of time worked on an FTE basis during the relevant period. To take the simplest example, a person who worked full-time for only one of the two years in question is to receive a maximum of half the MPFA whereas a person who worked full-time for the two years is to receive a maximum of the MPFA. For those individuals who worked on an FTE basis but less than the full period, the relevant maximum entitlement is adjusted downwards on a pro rata basis. Annex 2, paragraph 4 also provides a minimum agreed individual amount of $200.00. I direct the parties and any interested individuals to Annex 2 for further elaboration of the formula and payment mechanism. It is Annex 2, not this brief summary, that governs.

47. It is not within my authority as arbitrator to depart from the formula or the other terms in Annex 2 to determine individual entitlements except respecting the OT issue, which is addressed in Annex 3. My role is to fix the MPFA against which the formula is to be applied. In so doing, I understand my task is to determine the appropriate and just maximum amount of damages that should be available to an ETFO member who was maximally impacted by the *Charter* breaches, namely a member employed on an FTE basis for the entirety of the relevant two-year period.

48. As for the appropriate and just maximum amount for which the respondent should be liable under this Award in respect of all individuals in the aggregate, namely the TRP, in my

view that amount should be fixed at $103,100,000.00, which represents the maximum number of potential individuals employed on an FTE basis (a figure agreed to be 64,198) who can claim to a share multiplied by the MPFA of $1,606.00.

49. If (as is likely due to the passage of time) there are fewer than 64,198 individuals paid in accordance with the process set out in Annex 2, or if a surplus remains once the formula set out in Annex 2 is applied to each individual's share (reducing the entitlements for some individuals below the $1,606.00 MPFA, as will occur in many cases), Annex 2 provides that the remaining balance from the TRP shall remain the property of the Respondent (in other words, the Crown in right of Ontario) and may be retained by it.

50. I acknowledge that the TRP of $103,100,000.00 is $1,988.00 less than the numerical product of 64,198 and $1,606, but the parties are confident that fewer than 64,198 individuals will claim a payment and, in any event, under the formula in Annex 2, paragraph 4, many individuals will receive a reduced amount. Accordingly, for convenience, it is safe to round down the TRP by $1,988.00 to $103,100,00.00. This figure thus sets the upper ceiling of the Respondent's monetary liability, but in reality, it is more a theoretical upper limit, since practically speaking, the total amount payable or paid in all likelihood will be lower than this maximum once the Annex 2 formula is applied to determine individual entitlements.

Basis for the MPFA

51. The fixing of the amount of damages on an FTE basis is not a science and lies within my discretion as arbitrator. I have considered the evidence and the positions and submissions of the parties before me. In fixing the MPFA at $1,606.00, in addition to the principles and considerations set out above, I have considered and weighed the following factors.

i. I believe, as explained above, that the amount of the award should not be affected by the claims of bad faith, fault or contribution contained in the parties' written submissions. This applies equally to both sides. In the circumstances of this case, the Applicants should not recover an amount exceeding their loss for the sake of vindication or deterrence or due to the conduct of the government, nor should they have their amount reduced on account of ETFO's conduct. Thus, the extra $21,000,000.00 claimed by ETFO which (I understand)

was based on an amount paid to a non-applicant (OECTA) is not factored into my assessment of the MPFA of the award and is, I am advised, the subject of separate proceedings before the Ontario Labour Relations Board. Equally, I exclude from my assessment the Respondent's proposed reductions for ETFO's "fault" or "contribution" and for its recovery in 2014 of a 2% salary differential that arose in 2008 bargaining.

ii. Having removed ETFO's claim for an extra $21,000,000.00 from further consideration, ETFO's maximum claim, essentially for complete compensation, is $195,000,000.00, which, if divided by 64,198, works out to $3,037.00 as the MPFA. ETFO's figure of $195,000,000.00, or $3,037.00 as an MPFA, is comprised of the following elements (a) $15,000,000.00 relating to the 1 unpaid day, valued on an FTE basis at $350 per day; plus (b) $80,000,000.00 for the delay of grid movement based on an average of $4,000.00 per teacher for the approximately 20,000[1] teachers moving through the grid at the relevant time, and (c) $100,000,000.00 representing damages for the changes to the sick leave plan and retirement gratuities system which ETFO values at $2,500.00 for each full-time teacher or long-term occasional teacher on full-year assignment and $1,250.00 for part-time teachers and daily occasional teachers.

iii. For its part, the Respondent, as an alternative to its position that no monetary amount should be awarded at all, proposes a maximum payment of $78,000,000.00 – or $1,215 as the MPFA[2] – subject to a reduction for "fault" and/or an offset for the recovery of the 2% salary differential, reductions which (as I have just explained) I decline to apply. The basis for the Respondent's figure of $78,000,570.00 ($1,215 per FTE multiplied by a maximum number of FTEs of 64,198) is the remedy settlement the Respondent concluded with OSSTF, whose membership the respondent asserts is similarly situated to ETFO's. The OSSTF settlement can be broken into components representing the same categories of loss that ETFO has identified, namely one unpaid day, delay of grid movement and the changes to the sick leave plan and retirement gratuities. However, there are important differences between the OSSTF settlement and the ETFO claim, specifically: (a) whereas the OSSTF settlement provides for a paid day off in 2017-18 (costed at $4,700,000.00 million for the

[1] The actual figure is agreed to be closer to 18,800 teachers.
[2] I.e., $78,000,000.00 divided by 64,198.

respondent) as partial recovery for the unpaid day in 2012-14, ETFO seeks full recovery for the loss occasioned by one unpaid day off in 2012-14; (b) whereas the OSSTF settlement provides recovery for half of the 97-day grid delay, valued at $24.5 million for the OSSTF membership, ETFO seeks full recovery and (c), whereas the OSSTF settlement provided $27,600,00.00 million in connection with the sick leave plan / retirement gratuity system changes (specifically, $604.00 for each employee with vested gratuities and $1,208.00 for each employee with non-vested gratuities), ETFO seeks $2,500.00 per full-time employee and $1,250.00 for part-time employees.

iv. On the issue of compensation for losses, the parties are thus at, respectively, $195,000,000.00 and $78,000,000.00. The gap is exceedingly large. Neither side's position is reasonable.

v. First, with respect to ETFO's claim for full compensation for losses, this is not a case where full recovery of monetary losses is appropriate and just. I repeat the observation I made in the Liability Decision (para. 273) that "[i]t is possible that had the process been one that properly respected the associational rights of the unions, the fiscal and economic impacts of the result would have been the same or similar to those that occurred." In other words, *Charter*-compliance on the part of the government could have left the Applicants in the same financial position as they in fact found themselves after the *Charter* breach. Section 2(d) has been held to protect the process, not the outcomes, of free collective bargaining and strike action (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27, paras. 19, 29, 91; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, paras. 42, 45, 84; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para. 67; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, para. 77). As the Supreme Court has stated, an award of damages must not only be fair to the claimant but also to the government (*Conseil scolaire*, *supra* para. 270, *Ward*, para. 4).

vi. Secondly, full compensation is inconsistent with the settlements reached with other claimant groups in the education sector, none of which provide for full compensation for

losses as sought by ETFO. I am not prepared to provide full compensation redress for ETFO and I believe it would be a departure from fairness and equity to do so.

vii. Thirdly, the figures claimed by ETFO as losses in respect of the changes to the sick leave plan / retirement gratuity arrangements ($2,500.00 per full-time and $1,250.00 per part-time employee), have not been supported by an analysis of the differential between the previous plan and the new one. Besides, ETFO does not seek the restoration of the previous plan. Rather, ETFO has simply ascribed a $2,500.00 per full-time and $1,250.00 part-time value to the claim. There is a good argument, in fact, that due to the younger demographic composition of ETFO's membership (as compared, for example, with OSSTF's membership) the membership has benefits under the new sick leave plan that were not available under the previous plan. A younger member with less service has fewer banked days upon which to draw in the event of illness. In this sense, the new plan can provide greater income security for members experiencing illness.

viii. On the other side, with respect to the Respondent's position that $78,000,570.00 is the appropriate Total Remedial Amount and $1,215.00 the appropriate MPFA,[3] there is a different demographic profile for ETFO members, as compared to the other Applicants, that differentially impacted the effect of delayed grid movement for ETFO members. Also, ETFO members have been without a remedy and the benefit of that remedy for years longer that the other Applicants, a simple fact to which I attribute no fault to either party. It would not be fair to ETFO members as individuals to deprive them of interest as a result of a negotiating impasse between ETFO and the respondent; an award that adjusts upward to account for interest is fair and appropriate here.

52. The Respondent's representatives provided calculations (using the Ministry of Education's existing data) of the adjustments that would account for the different demographic profile of ETFO and for interest (as referred to in para. 51(viii)). ETFO indicated through counsel that it was not in a position to dispute the accuracy of the Respondent's calculations, given that it was based on Ministry data. I am informed by counsel that these adjustments would

[3] I note that the respondent costs the settlement with CUPE at $1,316.00 per FTE and with OPSEU at $1,203.00 per FTE.

yield an MPFA of $1,606.00 (and, given the agreed number of FTEs at 64,198, a TRP of $103,100,000.00).

53. Taking all the above factors into consideration, the exchanges I have had with counsel and the parties themselves, as well as the information, and the calculations referred to in paragraph 52, which I received during the mediation, I find it to be just and appropriate, and in accordance with principles of fairness and equity, to award an MPFA of $1,606.00, and $103,100,000.00 for the TRP. I repeat what I have already explained, not every eligible ETFO individual claimant will receive $1,606.00 because Annex 2 prescribes a formula to pro rate the MPFA for members who worked on an FTE basis but for less than the two years in question. Nor will the Respondent's total payment in fact be $103,100,000.00 as there will be fewer claimants than the maximum FTE number of 64,198.

54. In accordance with Annex 2, and, as I understand it, consistent with the other remedy settlements, payments will be made to individuals through the relevant school boards.

55. During the mediation-arbitration, the parties discussed resolving an unrelated dispute involving a tax issue concerning the Employee Benefits Trusts for ETFO members. During the process I was informed that agreement was reached on this issue. I leave it to the parties to prepare the documentation reflecting the agreement to resolve this dispute. If the parties wish (at the option of either party) to have it included as Annex 4 forming part of this Award, I may be spoken to within 15 days of the date of this Award and I will amend this Award accordingly. Otherwise, I will assume that the dispute is resolved by a stand-alone agreement between the parties.

56. Legal costs are addressed in the Order I issued in the Application (Annex 1).

57. If any other matters arise that need to be addressed by me, I may be spoken to.

February 1, 2022

The Honourable Thomas R. Lederer

ANNEX 1

Court File No.: **CV-12-465306**

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE THOMAS R. LEDERER	)	Tues DAY THE 15 DAY
	)	
	)	JUNE, 2021

B E T W E E N:

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and MARGARET SUZANNE GEE, LINDA MAE HACHMER and ANN-MARIE HULSE on their own behalf, and on behalf of all of the members of the Elementary Teachers' Federation of Ontario

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTER OF EDUCATION

Respondent

- and -

ONTARIO PUBLIC SCHOOL BOARDS ASSOCIATION

Intervener

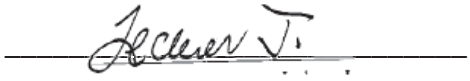
ORDER

THIS APPLICATION was heard on December 14-18 and 21-22, 2015, 2015 at Osgoode Hall, Toronto, Ontario, with judgment on liability being rendered on April 20, 2016 and the issue of remedy adjourned on consent pending discussions between the parties.

ON READING the evidence filed and the facta of the parties, and on hearing the submissions of counsel for the parties and intervener on the issue of liability,

AND ON CONSENT of the parties to this Order in respect of remedy (para. 2 hereof) and costs (para. 3 hereof), counsel advising that no party is under a disability and that the intervener has confirmed that it will not participate in the process to determine remedy,

1. **THIS COURT FINDS** that the rights of the individual applicants, namely, Margaret Suzanne Gee, Linda Mae Hachmer and Ann-Marie Hulse on their own behalf and on behalf of all of the members of the Elementary Teachers' Federation of Ontario who were employed in the publicly funded school system in the 2012-2013 and 2013-2014 school years, under s. 2(d) of the *Canadian Charter of Rights and Freedoms* were unjustifiably breached by the respondent in the Provincial Discussion Table process in 2012, and by the *Putting Students First Act*, 2012, S.O. 2102, c. 11 ("*PSFA*") and Order-in-Council 1/2013 issued under the *PSFA*.
2. **THIS COURT ORDERS** that, on consent of the parties, the remedy for the unjustified breach of s. 2(d) referred to in paragraph 1 hereof shall be determined in a mediation-arbitration process as set out in the Agreement attached hereto as Schedule A.
3. **THIS COURT ORDERS** that the respondent pay to the applicants their costs of the Application and of the mediation-arbitration process on a partial indemnity basis in an amount to be agreed or, failing agreement, in an amount to be fixed by assessment.



THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO et al.	**and**	**THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTER OF EDUCATION**
Applicants		Respondent

Court File No.: CV-12-465306

ONTARIO SUPERIOR COURT OF JUSTICE

PROCEEDINGS COMMENCED AT TORONTO

ORDER

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
4th Floor, 720 Bay Street
Toronto ON M7A 2S(
Fax: 416-326-4015

Robin K Basu - LSO# 32742K
Tel: 416-995-5249

Rochelle S. Fox – LSO# 40836V
Tel: 416-995-3288

Counsel for the Respondent

Schedule 'A'

IN THE MATTER OF AN ARBITRATION BEFORE THE HONOURABLE JUSTICE T. R. LEDERER RESPECTING THE REMEDY FOR THE LIABILITY FINDINGS MADE BY THE ONTARIO SUPERIOR COURT OF JUSTICE IN TORONTO COURT FILE NO. CV-12-465306

B E T W E E N:

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO and MARGARET SUZANNE GEE, LINDA MAE HACHMER and ANN-MARIE HULSE on their own behalf, and on behalf of all other members of the Elementary Teachers' Federation of Ontario

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the MINISTER OF EDUCATION

Respondent

MEDIATION-ARBITRATION AGREEMENT

Whereas by Reasons for Judgment of the Honourable Justice Thomas R. Lederer, dated April 20, 2016, reported as *OPSEU et al v. Ontario*, 2016 ONSC 2197, in Toronto Court File No. CV-12-465306 (the "Liability Decision"), the Superior Court of Justice held that the individual applicants' rights, namely, Margaret Suzanne Gee, Linda Mae Hachmer and Ann-Marie Hulse on their own behalf and on behalf of all of the members of the Elementary Teachers' Federation of Ontario who were employed in the publicly funded school system in the 2012-2013 and 2013-2014 school years, under s. 2(d) of the Charter of Rights and Freedoms were unjustifiably breached by the respondent in the Provincial Discussion Table process in 2012, and by the Putting Students First Act, 2012, S.O. 2102, c. 11 ("PSFA"), and Order-in-Council 1/2013 issued under the PSFA.

And whereas Justice Lederer encouraged the parties to exhaust all reasonable efforts at resolving remedy for the said breaches before seeking a determination by the Court of the issues of remedy,

And whereas, upon being advised by the parties that they had been unable to resolve the issues of remedy and sought a determination of the issue from the Court, Justice Lederer urged the parties to consider an alternative dispute resolution mechanism, such as mediation or mediation-arbitration,

And whereas Justice Lederer has informed the parties that he is prepared to act as a mediator, under s. 84 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, and in accordance with this agreement, to assist the parties to reach a consensual resolution of the issues of remedy; and failing such a resolution, he is prepared to act as arbitrator under s. 84 of the *Courts of Justice Act* and in accordance with this agreement and the *Arbitration Act*, S.O. 1991, c. 17, to hear and determine the issues of remedy and issue an award binding on the parties,

And whereas the parties hereto have now agreed to mediation, followed by binding arbitration before Justice Lederer, for the determination of any outstanding remedy issues arising from the Liability Decision,

And whereas the intervener in the Application, the Ontario Public School Boards Association, has indicated that it will not participate further in the Application, without prejudice to any right to intervene in any appeal(s),

Therefore the parties hereto agree as follows:

1. All issues of remedy arising from the findings of the Court in the Liability Decision shall be the subject of mediation before Justice Lederer, under s. 84 of the *Courts of Justice Act*, to be conducted in June 2021 and on such other dates as Justice Lederer may deem advisable.

2. The mediation process may take place in the presence of and with the participation of authorized principals of the parties or in the presence of counsel only, as directed

from time to time by Justice Lederer who will determine all issues related to the manner in which mediation will be conducted

3. The mediation process, and all communications therein (save and except any agreements reached), shall be confidential and without prejudice.

4. Justice Lederer may meet with the parties and/or their counsel together or separately.

5. Such written materials and oral submissions as may assist in the conduct of the mediation shall be provided by the parties to Justice Lederer in accordance with a mutually convenient schedule or as His Honour may direct.

6. If agreement in the mediation, or in any other negotiations or discussions between the parties, is reached on some or all issues of remedy, a binding arbitral award may be issued by Justice Lederer on the agreed issues. Such agreement may include agreement on issues arising in other disputes between the parties that may not be connected to the Liability Decision.

7. Any issues of remedy that are not agreed to by the parties, in mediation or otherwise, that arise from the Liability Decision shall be subject to arbitration before Justice Lederer, acting as an arbitrator, under s. 84 of the *Courts of Justice Act* and in accordance with this agreement and the *Arbitration Act, 1991*. Any award issued by Justice Lederer as arbitrator shall be binding upon the parties.

8. Such written materials and oral submissions as may assist in the conduct of the arbitration shall be provided by the parties to Justice Lederer in accordance with a mutually convenient schedule or as His Honour may direct.

9. The arbitration hearing shall be held in July 2021 and/or on such other dates as Justice Lederer may deem advisable.

10. The arbitration hearing and all communications therein including materials provided to Justice Lederer (save and except the Joint Supplementary Record), shall be confidential to the arbitrator, counsel and the authorized principals of the parties.

11. The arbitral award shall not be confidential.

12. Any reference herein to a meeting, mediation or hearing means a hearing by video- or tele-conference and will not require in-person attendance unless any individual whose presence is required agrees or is directed by His Honour to attend.

13. The arbitral award shall include provisions, agreed to by the parties, respecting the process for distribution of any payment arising from the award and for the determination of any disputes or entitlements in relation to payments arising from the award. Should the parties be unable to agree on such provisions or process, the matter will be remitted to His Honour for a final and binding determination.

14. The respondent reserves the right to appeal to the Court of Appeal from the Liability Decision and either party has the right to appeal the arbitral award to a court of competent jurisdiction as if the award were a decision of the Superior Court of Justice. The parties hereby consent to the consolidation of any appeal from the Liability Decision with any appeals from the arbitral award. To the extent the arbitral award incorporates agreements between the parties on any issues, no appeal may be taken from the award on the said agreed issues. To the extent that the conduct of any appeal from the arbitral award requires the filing of materials provided to Justice Lederer for the arbitration, the confidentiality provisions in paragraph 10 are hereby waived by the parties.

15. The applicants agree that they will not participate as a party or intervener in any other proceeding, grievance or arbitration that has been or may be brought which challenges the PSFA or steps taken under the PSFA with the exception of any appeal referred to in the preceding paragraph. This paragraph does not affect the ability of ETFO to continue proceedings already brought before the Ontario Labour Relations Board between ETFO, OSSTF and the Crown in connection with a payments to parties that were not applicants in *OPSEU et al v. Ontario*, 2016 ONSC 2197 alleging an unfair labour practice, OLRB file nos. 0145-18-U and 0149-18-U.

16. This agreement may be executed in counterparts which together shall constitute one document.

AGREED BY THE PARTIES AS OF THE ___ DAY OF JUNE, 2021

For the applicants:

_____

I have authority to bind the applicants

For the respondent:

_____

I have authority to bind the respondent

ANNEX 2

ANNEX 2

Agreement on Distribution in the Matter of an Arbitration Before The Honourable Justice T.R. Lederer Respecting the Remedy for Liability Findings Made by the Ontario Superior Court of Justice in Toronto Court File No. CV-12-465306

1. The parties agree that this Annex shall form part of any arbitral award under the Mediation-Arbitration Agreement in the event that the arbitral award requires a payment by the respondent as a remedy arising from the Liability Decision referred to in the Mediation-Arbitration Agreement. The total of such remedy payment shall be referred to herein as "the Total Remedial Payment" ("TRP") and shall mean the total amount of any monetary award arising as a remedy from the Liability Decision. The TRP shall be deemed to be a liability of the Crown in right of Ontario. The parties agree that the TRP by the Crown shall be distributed to Eligible ETFO Members in accordance with the apportionment formula and process set out below.

2. For the purposes of the arbitral award and this Annex, "Eligible ETFO Member" means a person with a full-time equivalency (FTE) greater than zero who was employed by a school board and was a member of ETFO by virtue of that employment who:

(a) performed work covered by an ETFO collective agreement at any point during either or both of the 2012-2013 and 2013-2014 school years, or

(b) was on a paid, or unpaid leave under the provisions of a collective agreement or on a statutory leave such as maternity or parental leave at any point during either or both of those school years and shall include any leaves pursuant to the sick leave and long term disability provisions of the collective agreement or under the *Workers' Compensation Act*; or

(c) was a released local officer for either or both of those school years and whose release time was paid by ETFO and not a local school board.

3. For the purposes of the arbitral award and this Annex, "school year" means the period September 1 to the following August 31.

4. The TRP shall be apportioned among all Eligible ETFO Members as set out in this paragraph and paragraphs 6 to 8. Each Eligible ETFO Member shall be entitled to receive a one-time damages payment representing a share of the TRP not exceeding, in respect of any Member, the Maximum Per FTE Remedial Amount, referred to herein and to be set out in the arbitral award as "the Maximum Per FTE Amount" or "MPFA". For purposes of this Annex, an Eligible ETFO Member's FTE under sub-paragraph 2(b) will be the FTE the Member had when last

working for a school board as an ETFO Member and an Eligible ETFO Member's FTE under sub-paragraph 2 (c) will be the FTE equivalent paid by ETFO for release plus any time actually worked on an FTE basis for the school board. The entitlement for each individual Eligible ETFO Member shall be based on that individual's FTE in the 2012-2013 and 2013-2014 school years. FTE for each year is to be based on the definition in the applicable collective agreement in the 2012-14 school years or existing applicable school board practices or policies in 2012-14. The apportionment formula shall be as follows:

a) A maximum payment fixed by the arbitrator in his award as the Maximum Per FTE Amount ("MPFA") for a full-time (1.0) FTE employee in both school years and who was an Eligible ETFO Member as defined in paragraph 2 above for both 2012-13 and 2013-14 school years;

b) A pro-rated portion of the MPFA based on the FTE for employees who were Eligible ETFO Members as defined in paragraph 2 above and who worked less than full-time (1.0 FTE) in both the 2012-13 and 2013-14 school years. For example,

    i. An employee who worked full-time (1.0 FTE) in the 2012-13 school year and did not work in the 2013-14 school year has an average FTE of 0.5 and would be entitled to an apportionment not exceeding half of the MPFA; and

    ii. An employee who worked half of the 2012-13 school year and one-quarter of the 2013-14 school year has an average FTE of 0.375 (three-eighths) and would be entitled to an apportionment not exceeding three- eighths of the MPFA.

c) Despite sub-paragraph 4(b) hereof, an Eligible ETFO Member who worked less than the full school year(s) on an FTE basis whose apportioned share under sub-paragraph 4(b) would be less than $200.00 would be entitled to $200.00 as their apportioned share of the TRP.

d) For greater certainty, none of sub-paragraphs 4(a),(b) or 4(c) create any entitlement to a share of the TRP for ETFO Members who were solely employed as Occasional Teachers ("OT") during the relevant school years. In respect of any such OT who, as an ETFO Member, worked for more than the threshold number of instructional days for a single school board in the relevant year or years, as determined by the Honourable Justice Lederer and set out by him in Annex 3 to his Award, the entitlement (if any) shall be $200.00 as their apportioned share of the TRP. The entitlement for OTs that is described in this sub-paragraph excludes any person who was, in a capacity other than as an OT, entitled to a payment under sub-paragraphs 4(a), (b) or (c). An OT who meets the requirements set out in this sub-paragraph to be entitled to $200.00 as their apportioned share of the TRP and shall be included in

the definition of Eligible ETFO Member for purposes of paragraph 1, the first two sentences of paragraph 4 and paragraphs 5 to 13 of this Annex.

e) Despite paragraphs 1, 2 and sub-paragraphs 4(a), (b), (c) and (d), no teacher who retired prior to the commencement of the 2012-2013 school year and was re-employed as an occasional teacher on either a daily or long term basis during 2012-13 or 2013-14 is entitled to a remedy, it being acknowledged by the parties that re-employed retirees were not materially adversely impacted by the *Putting Students First Act, 2012*.

5. The parties agree that any payments hereunder (if required by any arbitral award referred to in paragraph 1) are for damages for the breach of the rights of Eligible ETFO Members under s. 2(d) of the *Charter of Rights and Freedoms.* Subject to paragraph 11 hereof, it is understood that the damages payment is not subject to tax, statutory deductions or dues deduction nor are they to be considered pensionable earnings.

6. No Eligible ETFO Member will be entitled to be paid more than the equivalent of 1.0 FTE regardless of whether the Member worked more than the equivalent of 1.0 FTE. If an Eligible ETFO Member was eligible for other remedy payments in connection with the Liability Decision under agreements between or on behalf of the Crown or Ministry of Education and entities other than ETFO, the Eligible ETFO Member's apportioned share of the TRP shall be adjusted accordingly so as not to exceed the highest remedy entitlement in respect of that school year. No individual who would be entitled to $200 as their apportioned share of the TRP under sub-paragraph 4(c), shall, despite paragraph 4 hereof, be entitled to receive any payment under the arbitral award if that individual has received in the aggregate more than $200.00 in other remedy payments in connection with the Liability Decision under agreements between or on behalf of the Crown or Ministry of Education and entities other than ETFO.

7. The death of an Eligible ETFO Member does not disentitle their estate from receiving the share to which the deceased Member would otherwise have been entitled in accordance with the above paragraphs.

8. The amount of each share payable to each Eligible ETFO Member will depend upon the total number of Eligible ETFO Members and their respective apportionment under paragraph 4 subject to the amount required from the TRP to satisfy the payments to individuals receiving the minimum amount of $200.00 under sub-paragraphs 4(c) or 4(d) , it being agreed by the parties that the total amount payable by the Crown is limited to the total amount of the TRP in the arbitral award regardless of the number of Eligible ETFO Members, with the result that individual shares (save and except the $200.00 apportioned share under sub-paragraphs 4(c) and (d)) may need to be reduced pro rata. For greater clarity, the shares described in sub-paragraphs 4(a) and 4(b) above will be reduced if necessary, based on the total number of eligible FTEs and the individuals eligible for the $200.00 apportioned share described in sub-paragraphs 4(c) and

(d) so as to not exceed the TRP. It is further agreed by the parties that the total amount payable to any one individual shall not exceed the MPFA.

9. The amounts required to be paid by the Crown shall be paid by the Crown to Ontario school boards for distribution to Eligible ETFO Members who are, or were in the relevant school years, their respective employees. In the event that an Eligible ETFO Member was employed by more than one school board during the relevant period, the amount shall be provided to the school board in which the Eligible ETFO Member spent the most time cumulatively in the two school years. That school board will pay the Eligible ETFO Member the full amount of their share. If an Eligible ETFO Member is no longer employed with the school board making payment, the school board shall forward the payment to the last known address of the Eligible ETFO Member.

10. The following terms shall govern the process for determining each Eligible ETFO Member's entitlement to a payment from the TRP and the amount thereof in accordance with the apportionment described above in paragraphs 4 and 6 to 8:

(a) The determination of whether an individual is an Eligible ETFO Member and therefore entitled to a payment, and the amount payable to the person, shall, subject to the process set out below in this paragraph, be made by ETFO in good faith and exercising due diligence.

(b) ETFO shall make a general communication to its current and former membership to ensure current and former ETFO members are aware of the arbitral award and can make necessary inquiries if they do not receive a communication of entitlement under the process set out below.

(c) The Crown shall make reasonable efforts to provide the following employment data to facilitate the determination of whether an individual is an Eligible ETFO Member: first name, surname, date of birth, employee number, last 3 digits of Social insurance Number, mailing address on file, status during each of the relevant school years, current status (active or inactive), the estimated dollar amount of the individual's payment subject to the process outlined in sub-paragraph (f) below, amounts received through other remedy payments, and, if applicable, date of death and contact information for the estate representative.

(d) The Crown will not collect or use more personal information than is reasonably necessary to meet these purposes.

(e) The Crown shall make reasonable efforts to complete its disclosure of information to ETFO no later than 90 days following the arbitral award referred to in paragraph 1.

(f) ETFO shall make every reasonable effort to complete its initial determinations of eligibility and quantum of entitlement for each Eligible ETFO Member for purposes of the notices referred to in sub-paragraph (g) within 180 days of the arbitral award referred to in paragraph 1. ETFO is responsible to ensure that Members that have come to its attention as potentially entitled as Eligible ETFO Members, but who may have been omitted from the information supplied by the Crown or school boards, are brought to the Crown's attention forthwith and that those Members are included among recipients of the notices referred to in sub-paragraph (g).

(g) Upon completion of the steps outlined above, ETFO shall endeavour to notify each Eligible ETFO Member of that person's entitlement to a payment (i.e. whether the person is entitled based on their record of employment in the 2012-13 and 2013-14 school years). The notice should include the estimated dollar amount of the individual's payment and the basis for its calculation in accordance with the apportionment formula set out above, minus any adjustment required under paragraph 6. The notice shall also include a caveat that the final dollar amount payable will depend on the final determination of any objections that have been received in accordance with the process set out below. The notice to each Eligible ETFO Member shall stipulate that the recipient has 30 days from the date of delivery of the notice to object to the determinations set out in the notice. The objection shall be provided to ETFO by email to

Bill115Remedy@ETFO.org

and ETFO shall forward a copy of all notices of objection received to the Crown.

(h) An Eligible ETFO Member's entitlement shall be deemed to be conclusively determined, subject to the determination of all objections, including any objections by persons claiming entitlement but who, by reason of error, omission or inadvertence (howsoever caused) were not included in the information supplied by the Crown or school boards in the process described above, unless a notice of objection is received prior to the expiration of the 30-day period referred to in sub-paragraph (g). Neither the Crown, nor the Ministry of Education nor any school board has any liability under the arbitral award or otherwise in connection with any error or omission, howsoever caused, in respect of any Eligible ETFO Member who may come forward (whether directly or through ETFO on their behalf) after the 30-day deadline for notices of objection to assert that they are entitled to a share, or a greater share, of the TRP or any award of damages in connection with the Liability Decision.

(i) Any objection received by ETFO from an Eligible ETFO Member shall be decided by a referee within 60 days of the date the objection was received by ETFO. The referee may request such documents as the referee may require from ETFO and/or the Eligible ETFO Member who has objected, and shall determine the objecting Member's preliminary entitlement on a review of the documents. The referee has no obligation to hold a hearing or conduct an interview of the objecting Member but may do so if the referee deems it necessary. The referee's determination may reduce or increase an objecting Member's preliminary entitlement and is not subject to further review or appeal.

(j) The parties hereto agree to invite Michael Mitchell to act as referee. If he is unwilling or unable to act, the referee (or referees) shall be an individual selected jointly by ETFO and the Crown, and failing agreement, by Justice Lederer. The costs of the referee (or referees), as well as the costs of administering sub-paragraphs (a), (b), (f), (h), (i), (k) clause (A) and (l) shall be borne by ETFO.

(k) (A) After all objections are determined, ETFO shall notify the Crown of the final determination of all objections for the Crown to finalize the list of Eligible ETFO Members, and (B) the Crown shall calculate the final dollar amount of each Eligible ETFO Member's entitlement and the Crown shall inform the applicable school boards of the same (copying ETFO) so that payment may proceed.

(l) In the case of any Eligible ETFO Member no longer employed by a school board, ETFO shall provide the Crown and the applicable school board with that Member's current or last known address in order to facilitate distribution to that Member.

(m) Within 90 days of the completion of the steps outlined above, the Crown shall make reasonable efforts to make the payment to school boards of that portion of the TRP required to satisfy the payment obligations to the Eligible ETFO Members as determined through the process above. The school boards shall make reasonable efforts to distribute to each Eligible ETFO Member in accordance with the determinations as to entitlement and amount in accordance with the process set out above within 60 days of receipt of funding from the Crown.

(n) For greater certainty, it is agreed that the maximum amount of the Crown's obligation is the TRP, regardless of the number of Eligible ETFO Members who are entitled to receive payments and the amounts thereof.

11. The Crown makes no representation and assumes no responsibility or liability with respect to the appropriate tax or pension treatment of any payments made to any person under this settlement. ETFO may obtain, at its own expense, a legal opinion from a reputable firm as to the appropriate tax treatment of the payments to Eligible ETFO Members under this settlement,

which, if obtained, shall be provided to the Crown to be made available to any requesting school board distributing a payment under paragraphs 9-10 hereof, on the understanding that neither the Crown nor ETFO assume responsibility with respect to the accuracy of the said legal opinion, nor do they have any responsibility to endorse the said opinion.

12. It is agreed that any remaining funds from the TRP after payments to all Eligible ETFO Members have been processed and paid, shall be the property of the Crown. The Crown shall allow 90 days to elapse from the time the last payment is completed under sub-paragraph 10(m) above before reclaiming any remaining funds that have been paid to school boards.

13. For greater certainty, it is agreed that the process set out above for determining entitlement to an apportionment or payment is conclusive and not subject to challenge or appeal. Neither the Crown, the Ministry of Education nor any school board shall be liable to any person or entity for any claims in relation to any award referred to in paragraph 1 or in relation to the Liability Decision made after, outside, or inconsistent with the process set out above and the determinations made thereunder or for any alleged errors or omissions once the process set out above is exhausted and completed. ETFO represents and warrants that it has the authority to bind its members in this regard.

14. The parties agree that any dispute concerning the interpretation or implementation of this Annex that is not by this Annex assigned to the referee be referred to Justice Lederer for determination in a mediation-arbitration process.

The parties hereto hereby signify their agreement to the terms of this Annex.

For the applicants:

I have authority to bind the applicants

For the respondent:

Andrew Davis Digitally signed by Andrew Davis
DN: cn=Andrew Davis, o=Educatin Labour and Finance Division, ou=ADMO, email=andrew.davis@ontario.ca, c=CA
Date: 2022.02.01 16:29:31 -05'00'

I have authority to bind the respondent

ANNEX 3

ANNEX 3

(abbreviations herein are as defined in the Award to which this Annex is attached)

This Annex forms part of my Award in the arbitration respecting the remedy for the liability findings made by the Ontario Superior Court of Justice in Toronto Court file no. CV-12-465306.

As noted in paras. 9-10 of my Award, the parties agreed on all but one issue with respect to the formula and procedure for the distribution of any monetary award I might issue. Their agreement is reflected in Annex 2 to the Award.

The remaining outstanding issue (the "OT issue") arose after the initial mediation phase (June 2021). As reflected in Annex 2, paras. 4(c) and (d), the parties agreed on a $200.00 minimum share for eligible individuals (as defined). The parties did not, however, agree on whether ETFO's Occasional Teachers (or "daily occasionals," referred to herein as "OTs"), who, by definition, were not employed on an FTE basis during the relevant school years (2012/13 and 2013/14), should be entitled to a share of the remedy or if there should be a threshold for OT entitlement, such as a minimum number of days worked. Annex 2, at para. 4(d), expressly leaves this issue for me to determine. This Annex 3 is that determination. As set out in para. 4(d), it was agreed that, *if* OTs qualify for a share, that entitlement would be fixed at $200.00.

On December 6, 2021, Counsel returned before me by videoconference to explain the OT issue. The parties were at an impasse. I proceeded to mediate the issue. It was ETFO's position that all OTs employed during the relevant school years should be entitled to a $200.00 share. The Crown's position was that no OTs should be entitled to a share.

However, in the course of the discussions before me on December 6, the Crown formally indicated, through counsel, that it would accept an OT being entitled to $200.00 provided the OT worked for at least 100 days in each of the two relevant school years, i.e., at least 100 days in 2012/13 and at least 100 days in 2013/14. Discussions before me ensued on the appropriate threshold for entitlement. Several options were explored including a threshold of 150 days worked by an OT in the two-year period 2012-2014, with a minimum of 50 days worked in each of 2012/13 and 2013/14. I asked counsel to canvass this suggestion with their respective clients and the mediation was adjourned for that purpose.

Counsel reconvened before me, by videoconference, on December 9, 2021. They indicated that the parties remained at an impasse and it would be necessary for me to render a decision on the OT issue. Counsel further indicated that, as in the prior phase of the mediation, the parties were content for me to decide the OT issue without further formal arbitral proceedings or evidence or submissions as the issue had been fairly canvassed in the December 6 and 9th videoconferences.

It is common ground that OTs would not have suffered material losses as a result of the changes to the sick leave plan nor in connection with the unpaid day off; these are two heads of loss which the remedy discussed in the Award focused upon. It also appears to be the case that OTs did not move up the experience grid year over year. As a result of this, the 97-day delay in grid movement would not, standing alone, have impacted OTs. Thus, this head of loss, which is also reflected in the Award, did not involve OTs.

ETFO's counsel points to the fact that OT rates of pay can (depending on the relevant local collective agreement) be set by reference to a point on the pay grid, and the 0% across-the-board (ATB) increases for 2012/13 and 2013/14 (as prescribed by the *PSFA*) meant that the grid itself did not move upward. In addition, ETFO 's counsel points to the fact that some compensation is warranted due to the interference in collective bargaining rights. The Crown does not contest that OTs enjoy collective bargaining rights, and it accepts that the Liability Decision finds an impairment of those rights. Its counsel argues, however, that ETFO was prepared to accept 0% ATB increases for 2012/13 and 2013/14 during the Provincial Discussion Table that preceded the enactment of the *PSFA*, and thus the OTs cannot claim losses on that account. (I do note, though, that in the 2012 talks, ETFO did seek the elimination of the 2% ATB pay differential that arose in the 2008-12 round of bargaining).

As the Crown has now formally agreed to ETFO's OTs receiving a prescribed $200.00 share provided they meet the threshold of at least 100 days worked in each of the two years, but ETFO rejects that proposed threshold, my task is to determine a fair threshold.

I find that ETFO's formal position that any OT who worked for any amount of time in the relevant years should be entitled to the $200.00 share is not reasonable. The $200.00 share represents approximately 1/8th of the MPFA of $1,606.00, which is the maximum amount to be received by an individual who worked on a full (1.0) FTE basis for the entirety of the two relevant school years. For a person who worked the entirety of the two years to receive a maximum of $1,606.00, whereas an OT who may have worked one, two or only a few days in the relevant years to receive $200.00 would not be fair. This is especially so where the OT has not been negatively impacted in respect of the demonstrable heads of loss identified as components of the $1,606.00 maximum.

In my view, the foregoing suggests that a significantly higher threshold, albeit not one as onerous as that proposed by the Crown, is appropriate for OT entitlement. This is not an exact science but rather an exercise in judgment.

In light of the above, I find, for purposes of the Award and Annex 2 para. 4(d), the appropriate and fair threshold for OT entitlement to the $200.00 share is:

> 150 days worked in the two-year period 2012-2014 with at least 50 days worked in the 2012/13 school year and at least 50 days worked in the 2013/14 school year

This threshold will, in my view, fairly reflect the fact that the claim for loss by OTs is more speculative than that for individuals employed on an FTE basis and the fact that they were much less heavily impacted by the *PSFA*, particularly in relation to the more demonstrable heads of loss which have been identified for FTE individuals. A threshold that establishes a 50 day minimum for both years accounts for the fact that if (as ETFO asserts) the claim for OT losses is based on an imposed 0% ATB for two years, it is those OTs who received a 0% ATB for both years who will have lost the most. The 150 day threshold for OT days worked over the full 2012-2014 period (amounting to approximately 40% of the two school years of 194 days each[1]) appropriately reflects the fact that OTs, even those who worked for a substantial portion of the years in question, were (the parties acknowledge) clearly not as impacted as FTEs, whose heads of loss included changes to the sick leave system, grid delay and an unpaid day off.

The Hon. Thomas R. Lederer

[1] 38.7%, calculated as 150 days divided by 194 instructional days/year times 2 school years.