IN THE MATTER OF AN INTEREST ARBITRATION

Between:

The Crown in Right of Ontario

(Treasury Board)

and

The Ontario Secondary School Teachers' Federation

and

The Elementary Teachers' Federation of Ontario

Before:	William Kaplan, Chair Bob Bass, Crown Nominee David Wright, OSSTF & ETFO Nominee
Appearances	
For the Crown:	Sunil Kapur Kate McNeill-Keller Jessical Wuergler Aya Schechner McCarthy Tetrault Barristers & Solicitors
For OSSTF:	Susan Ursel Karen Ensslen Emily Home Ursel Phillips Barristers & Solicitors
For ETFO:	Howard Goldblatt Colleen Bauman Goldblatt Partners Barristers & Solicitors

The matters in dispute proceeded to a hearing held in Toronto on January 16, 2024. The Board met in Executive Session on January 19, 2024.

Background

On November 7, 2019, Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, received Royal Assent. Bill 124 introduced a three-year moderation period during which annual compensation increases were limited to 1%. Both the Ontario Secondary School Teachers' Federation (OSSTF) and the Elementary Teachers' Federation of Ontario (ETFO) were impacted by the legislation and their three-year collective agreements – September 1, 2019, to August 31, 2022 – were subject to its terms (the Moderated Collective Agreements). Both OSSTF and ETFO initiated constitutional challenges. On November 29, 2022, Mr. Justice Markus Koehnen of the Ontario Superior Court declared Bill 124 contrary to section 2(d) of the *Charter of Rights and Freedoms* and not justified under Section 1. The judgment of the court deferred remedy to a further hearing. An appeal was filed and heard in June 2023. It remains under reserve. However, as no stay was sought, Bill 124 is of no force and effect.

This interest arbitration arises out of settlements reached between the parties – the Crown in Right of Ontario and OSSTF and the Crown in Right of Ontario and ETFO – resolving the remedy portion of litigation, the litigation brought by each federation, and several individual applicants, challenging the constitutionality of Bill 124 (the Remedy MOS's). Under the Remedy MOS's (and one is applicable to OSSTF and two to ETFO), the parties agreed on the amount of compensation increases for the first two years of their Moderated Collective Agreements – which otherwise remained unchanged – but referred the quantum for the third year (Year 3) – September 1, 2021, to August 31, 2022 – to interest arbitration with set parameters: it could not be below 1.5% or above 3.25% (in addition to the 1% previously prescribed under Bill 124).

Accordingly, the sole issue before us is the determination of the amount within this agreed-upon range.

The parties agreed that in determining this sole outstanding issue, the Board could take into consideration any factors that it considered relevant, including the criteria set out in section 38 of the *School Boards Collective Bargaining Act* (SBCBA) set out below. Detailed briefs and reply briefs were filed, and the single issue proceeded to a hearing in Toronto on January 16, 2024. The Board met in Executive Session on January 19, 2024.

Legislative Framework

By and large, labour relations in the education sector have, since 2014, been governed by SBCBA (with some limited application of the *Labour Relations Act* (LRA)). Under SBCBA, collective bargaining is two-tiered: central bargaining at the central table with the participation of the Crown, and local bargaining at local tables between various unions, including OSSTF and ETFO, and individual school boards.

The Parties

The Crown

The Crown in Right of Ontario (Crown), represented in these proceedings by the President of the Treasury Board, is not the employer. However, it funds the public education system and participates in central bargaining with OSSTF and ETFO by negotiating all central terms, including compensation. The school board employers – represented by the Ontario Public School Boards' Association (OPSBA) for teachers and occasional teachers and the Council of Trustees

Association (CTA) for education worker bargaining units – did not participate in these proceedings as they were not parties to the Bill 124 litigation and are not parties to the Remedy MOS's.

OSSTF

OSSTF represents secondary school teachers and occasional teachers employed by Ontario's public district school boards. It also represents education workers, including educational assistants, who often work with students with special education needs (EAs), early childhood educators (ECEs), professional student services personnel – psychologists, social workers, speech language pathologists – office, technical and clerical staff, custodial, maintenance, plant support personnel, continuing education teachers and instructors, and noon hour assistants.

ETFO

ETFO – the largest teaching federation in Canada – represents elementary teachers/occasional teachers and education workers, such as EAs, Early Childhood Educators (ECEs), Educational Support Personnel (ESPs), and Professional Support Personnel (PSPs).

OSSTF Submissions

In the OSSTF's submission, an additional 3.25% should be awarded for six reasons:

1. Teacher and education worker wages have been significantly eroded by inflation and below-market wage increases, a situation contributed to and exacerbated by Bill 124, which limited compensation to 1%, and substantially interfered with free collective bargaining, and deprived the OSSTF of its right to strike. Bill 124 compounded earlier

unconstitutional legislation – Bill 115: *Putting Students First Act* – which, among other things, imposed a two-year wage freeze.

2. There was a true recruitment and retention crisis in public education with demand for teachers far outstripping supply. This crisis, and that is what it was, showed no sign of abating. The problem was real, and worsening, with school boards across the province left with no option other than to hire unqualified staff to fill pressing vacancies.
3. Economic and labour market conditions were positive and supported a general improvement in wages.
4. Ontario's fiscal outlook was strong. Budgetary deficits did not reflect an inability to pay (and inability to pay was not raised by the Crown). In fact, Ontario's debt to GDP ratio was improving and debt service cost to revenues was favourable and also improving. There were many other positive economic indicators, meaning no economic impediment to awarding an additional 3.25%.
5. Replication of free collective bargaining and awarded settlements justified the full 3.25% increase. The fact of the matter was that freely negotiated settlement and interest arbitration awards – especially in the Bill 124 re-opener context – established a normative range of between 3 and 3.75% over and above the original 1% in the Moderated Collective Agreements.
6. A 3.25% initial increase in Year 3 would compensate OSSTF and its members for working conditions that could not be bargained because of the imposition of unconstitutional legislation.

Each of these arguments was expanded upon by OSSTF in its brief, and at the hearing.

Inflation

OSSTF pointed out that teacher, occasional teacher, and education worker wages have been significantly eroded by inflation over the past decade: falling 17.5% behind from 2012 to 2022. This was especially problematic in Year 3, when OSSTF members received 1% when inflation soared to 6.8%. Even if the full 3.25% were awarded, OSSTF members would still lag inflation on a compound cumulative basis. Consideration of this issue alone, the OSSTF argued, fully justified awarding the full 3.25%.

That conclusion was reinforced when actual teacher, occasional teacher and education worker compensation was carefully examined. While approximately 77% of Ontario teachers were at the highest level of their respective salary grid, a sizeable number were at or near the bottom. Many occasional teachers were denied the suite of benefits full-time teachers enjoyed and were paid at the lowest category on the permanent teacher grid.

The situation was even worse for education workers, most of whom were only employed for ten months of the year, with recurring summer layoffs. A large proportion of these education workers met the definition of low wage employees, earning less than $30 an hour. For ten-month employees, that meant annual incomes below $46,000 (far below the average Ontario income). But this notional annual income was, in many respects, misleading. Many of the education workers were working in part-time or casual positions and earned nothing close to that annualized amount. Their employment was precarious. Notably, women were over-represented in the education worker group.

Recruitment and Retention

Also justifying the full 3.25% increase in the OSSTF submission was recruitment and retention. School boards across the province were struggling to find qualified individuals to fill teacher, occasional teacher and education worker positions, a situation that could only be described, in the OSSTF's view, as a crisis. According to the Ontario College of Teachers (College), there was a general teacher shortage with demand far outstripping supply and no relief expected any time soon. The occasional teacher supply was also dire; it had reached problematic lows. This led the government in 2021 to introduce a temporary certificate program as an emergency measure, allowing thousands of Ontario teacher candidates to be hired on daily occasional rosters and for short-term teaching contracts (a measure made necessary by the anticipated shortfall of 7000 occasional teachers across the province). Notably, this temporary measure has been renewed every year since, reflecting the depth of the recruitment and retention crisis.

Another measure – also renewed – and reflecting the growing gap between supply and demand, was the government's decision to increase the number of days that retired teachers were permitted to work while still receiving their pension. Likewise, Letters of Permission – allowing unqualified individuals to teach in Ontario schools – were on the upswing, as the data which the OSSTF pointed to clearly established. Other data, from the College and from the Ontario Teachers' Pension Plan, demonstrated that large numbers of qualified teachers were leaving the public education system early. Notably, there were some 37,000 teaching certificate holders in Ontario who were not employed in public education. Undoubtedly, OSSTF argued, there were many reasons for this, but inadequate compensation was surely at the top of the list. Recruitment and retention of EAs and ECEs was especially problematic, and the OSSTF reviewed the data on

point. In the OSSTF's submission, recruitment and retention were among the most important factors to be considered in determining compensation. Demand far exceeded supply and application of well-accepted principles directed that this key fact inform the arbitration award amount. For all these reasons, and others, OSSTF urged that the full 3.25% be awarded.

Economic Conditions

Another reason, the OSSTF argued, in favour of awarding 3.25% was the state of the Ontario economy: it was strong in 2022 and has remained so since with real economic growth, reflected, for example, by falling unemployment rolls which, in turn, led to a measurable increase in wages, except for teachers, occasional teachers and education workers. Ontario's credit rating was positive, interest on debt as a share of revenue was decreasing, the debt-to-GDP ratio illustrated fiscal health and the sustainability of government finances (also demonstrated by $2 billion over four years in direct education transfers to families). All in all, a robust recovery has been underway since 2022. Notably, the OSSTF emphasized, at no point did the government assert that there was an inability to pay; the Crown's proposal reflected an unwillingness to pay justified wage increases.

The Impact of Unconstitutional Legislation

Finally, the OSSTF made some submissions about the need to address Bill 124's impact on bargaining: it precluded the OSSTF from pursuing its many legitimate bargaining proposals including job security, class size, improved hiring processes, addressing workplace violence, and benefit improvements. Instead, teachers, occasional teachers and other education workers fell behind inflation while left to grapple with increased class sizes, all the while working under

stressful and challenging conditions of the pandemic. There had been a constitutional breach, and there was, therefore, an entitlement to a constitutional remedy. In fact, there was no dispute about that: the parties in the Remedy MOS's said as much and then went on to identify that remedy – an across-the-board increase – but leaving to the Board the responsibility for determining the amount.

Application of the Criteria

The Remedy MOS's were clear: in determining the appropriate result for Year 3, the Board was, the OSSTF argued, to consider any factor it considered relevant, together with the statutory SBCBA criteria (below). Of all the governing criteria, replication was perhaps the most important: to replicate the results that the parties would have reached had they freely negotiated their collective agreements. What would have happened if Bill 124 had not unconstitutionally prevented the parties from bargaining and reaching a collective agreement? This question could be answered by asking another one: What did free collective bargaining results and interest arbitration awards indicate? Re-opener after re-opener award convincingly demonstrated – and the relevant awards were canvassed in the OSSTF brief and at the hearing – that for the period in question, additional across-the-board increases – over and above the prescribed 1% – ranged from 3% to 3.75%. These awards were ubiquitous (and often contained other economic improvements beyond across-the-board increases).

Arbitrators, the OSSTF pointed out – and quoting from awards which were characterized as governing – reached these compensation results for numerous reasons. Addressing inflation clearly played a large part, but so too did recruitment and retention. Both were factors present

here. And both inflation and recruitment and retention led to one conclusion: the award of an additional 3.25%. The OSSTF concluded by asking that the Board award an additional 3.25%.

ETFO Submissions

The Context

This interest arbitration, ETFO observed, did not occur in a vacuum. There was a context that needed to be considered, and it included Bill 124, imposing an unconstitutional outcome on collective bargaining. ETFO served notice to bargain in June 2019. Bargaining priorities included negotiating additional special education supports and achieving real increases in all forms of compensation for all members, reduction of class sizes, reforming occasional teacher hiring practices and addressing pressing health and safety challenges, particularly classroom violence, among a number of other key demands.

To be sure, OPSBA and CTA also had bargaining priorities (described by ETFO as concessions). Neither party could, however, engage in free collective bargaining because the government introduced and then proclaimed Bill 124, imposing the three-year moderation period and limiting compensation in each of the three years to 1%. At the same time, as bargaining progressed through the fall of 2019 and into early 2020, ETFO was told that the government bargaining team had no authority to negotiate some of its non-monetary proposals, for example, those addressing classroom violence.

The declaration of the pandemic in early March 2020 was another important part of the overall context. It created unprecedented challenges for educators, students, and the education system as

a whole. When schools were closed, and when they were open, ETFO members quickly pivoted to ensure that students could continue to learn – for example, they moved to distance learning modes when the schools were shut down and they ensured that health and safety guidelines were followed when schools were reopened. The objective was straightforward: putting the interests of students first so that public education continued with as little disruption as possible, notwithstanding the enormous increases in workload that followed.

Bargaining ended on March 20, 2020, when tentative collective agreements were reached. The Moderated Collective Agreements made it crystal clear that they were reached without prejudice to ETFO's rights to challenge the provisions of Bill 124 and to seek an appropriate remedy in the event the challenge was successful, which it was on November 29, 2022, when Bill 124 was struck down. The Moderated Collective Agreements explicitly provided for ETFO's right to pursue remedies if Bill 124 was ruled unconstitutional, which it was, leading to the Remedy MOS's and this proceeding.

Criteria

The Remedy MOS's directed the Board to take into account any factor it considered relevant, along with the statutory criteria set out in the SBCBA (below). In ETFO's view, replication, the economy and inflation, and recruitment and retention were of particular relevance to this proceeding. ETFO pointed out that the government had not argued any inability to pay, and the reason for that was obvious: Ontario was and remains in an excellent fiscal situation and there was no question as to its ability to fully fund an additional 3.25% increase.

Replication

The overarching goal of interest arbitration, ETFO observed, was to replicate free collective bargaining. In doing so, it was now well established that boards of interest arbitration must examine all relevant information from all sectors, not just information that was available at some specific point in time, such as when negotiations were underway or an agreement reached. This approach was not only now normative, it was necessary as there were no directly applicable bargaining patterns or re-opener awards for teacher and education bargaining units to refer to. Various authorities setting out these principles were canvassed by ETFO in its brief and at the hearing.

The Economy and Inflation

The economic situation in Ontario was both important and relevant. Economic conditions in 2021-2022 were not, ETFO observed, a matter of prediction – as they would have been had bargaining not been fettered by unconstitutional legislation (assuming for the sake of argument it had been completed in a timely way, which was not the norm for bargaining in this sector). In any event, the prevailing economic circumstances in Year 3 could now be identified with precision. On the one hand, in Year 3, the provincial fiscal situation was excellent, employment was up, all the generally relied upon economic indicators were good, while on the other, inflation was ravaging employee pay (and the particulars of these submissions mirrored in many respects those advanced by OSSTF).

Inflation – especially on non-discretionary essentials – had, and continues to have, a real impact on employees, particularly those who are less well paid. ETFO estimated that coming out of the

Moderated Collective Agreements, real wages for teachers and occasional teachers were effectively cut by 15.6%, and for education workers by 13.8%. Even if the maximum 3.25% was awarded, wages would still trail inflation and not come close to remedying the losses suffered by ETFO members over the past decade. In these circumstances – namely, a robust economy, not a recession, positive economic indicators and a compelling and established need to address inflation –the full 3.25% should be awarded (an outcome that was also completely consistent with the weight of Bill 124 re-opener awards, which ETFO reviewed in detail).

Recruitment and Retention

Recruitment and retention were among the statutory criteria to be considered, and when the evidence was objectively assessed it convincingly established that there were growing shortages of teachers, occasional teachers and education workers (and here too, ETFO's submissions and data mirrored that found in the OSSTF submissions). The number of new teachers was plummeting and enrolment in teacher colleges was declining. At the same time, demand was increasing, a not surprising situation considering the rapidly growing Canadian population. The result was inevitable: schools cannot meet their staffing requirements. The evidence of this was dispositive and set out in the ETFO brief. The College predicted that an additional 32,000 educators would be needed within the next five years. Recruitment in some classifications was particularly challenging, but this was a problem that affected all job groupings. The Ontario Principals' Council was categorical: the "Ministry of Education [needed] to step in immediately to deal with this crisis…." The first step, ETFO argued, was awarding an additional 3.25%.

Crown Submissions

The Remedy MOS's are not Wage Re-openers

In the Crown's view, this proceeding did not arise from a negotiated Bill 124 wage re-opener, and that was legally and factually material. Unlike negotiated collective agreement re-openers, the Remedy MOS's were entered into by it and the OSSTF and ETFO to fully and finally settle any and all claims arising out of their constitutional challenges to Bill 124.

Elaborating on this submission, the Crown pointed out that the Remedy MOS's were completely different from negotiated collective agreement wage re-opener provisions. Instead of negotiating re-opener provisions, OSSTF and ETFO negotiated provisions in their Moderated Collective Agreements indicating that agreement to the prescribed 1% was without prejudice to their rights to seek an appropriate remedy should their constitutional challenges of Bill 124 prove successful. At no time did the parties agree to a collective agreement re-opener.

Another distinguishing feature of this case – with its unique purpose-driven Remedy MOS's, compared to standard negotiated re-opener provisions – was the nature of collective bargaining: collective bargaining in the Ontario educational sector is two-tiered. The legislative framework provides for central and local bargaining. The Crown must agree to compensation before a central agreement can come into effect. In re-opener clauses under collective agreements that were invoked after Bill 124 was held to be unconstitutional, the Crown was not at the table.

The Remedy MOS's, the Crown continued, were straightforward: the OSSTF and ETFO gave up their rights to seek relief from the court, and the Crown gave up its appeal of the court's decision

as it applied to OSSTF and ETFO. The Remedy MOS's set out the quantum increase in Years 1 and 2 – .75% – and remitted to the Board the amount for Year 3 within the agreed-upon range. The Remedy MOS's made this arbitration completely different, therefore, from a classic Bill 124 collective agreement re-opener. Its architecture was completely different: deliberately designed to put the parties back back in the position they would have been in but for Bill 124.

Given this legal framework, the central question that needed to be asked is what would the parties have agreed upon but for Bill 124? That question could only be answered by adopting a point in time approach, meaning looking at the outstanding proposals when bargaining commenced and when the Moderated Collective Agreements were reached. The monetary asks for Year 3, at that time, were significantly less than the 3.25% being sought now, but demonstrated in a legally and factually governing manner what each of these parties' thought was the appropriate outcome. In these circumstances, given the remedial nature of the proceeding, and application of accepted remedial principles, the Board should award no more than what would have been freely negotiated but for Bill 124, and that meant an additional 1.5%.

The Remedy MOS's provided that the Board could consider any factor it considered relevant together with those set out in statute. The Crown did not dispute that but asserted that in considering those factors the Board had to restrict its analysis to the circumstances that prevailed in early 2020 when the parties were bargaining, leading up to them executing the Moderated Collective Agreements. Damages, the authorities indicate, are assessed at the time of the wrong, not at the time of adjudication. The Remedy MOS's stood in place of a court-ordered remedy and must therefore, and to the extent possible, place the unions and their members in the position

they would have otherwise been in, no more and no less. And that meant awarding an across-the-board increase that would have been agreed to at the time; or in other words, what the Crown had on offer.

Accordingly, the Crown urged the Board not to consider any subsequent economic or other evidence. It would improperly skew the result in a process where the parties deliberately did not choose a collective agreement re-opener process when they reserved their rights. In the re-opener cases, the parties (or as directed by boards of arbitration) agreed to re-open their collective agreement on a triggering event: Bill 124 being declared unconstitutional (for the most part). In marked contrast, when they signed off on the Moderated Collective Agreements, the parties intended to preserve litigation related rights, not to re-open those collective agreements in a re-opener proceeding where current economic events could be considered years after the fact. Current economic information was undoubtedly relevant, but to future proceedings, not this one.

The Factors

Replication/Bargaining History

In the Crown's submission, replication was important, and the starting point was bargaining history. Both OSSTF and ETFO voluntarily agreed on an additional .75% in each of Year 1 and 2. That decision was determinative: if they agreed on .75% in each of the first two years, awarding more than 1.5% in Year 3 would be a radical departure from the pattern the parties themselves set. This conclusion was reinforced by a review of bargaining over time. For the past fifteen years, these parties have a pattern of bargaining outcomes between 1.5 and 3% (excluding net zero and Bill 124 years) with – generally speaking – lower across-the-board increases at the

start of the term and a higher one at the end, just as was being proposed by the Crown here. Deviating from this pattern – in other words, not replicating what the parties have done for a very long time – would constitute a breakthrough and it would be one without established demonstrated need.

Comparators

Even assuming, for the sake of argument, that it was appropriate to turn to other comparators – and away from this established bargaining pattern – the comparators to look to first were teachers and other education workers elsewhere in Canada. Ontario's teachers were the highest paid in the country both when Bill 124 was in effect and today (and the Crown contested wage results relied by OSSTF and ETFO as misleading, methodologically suspect, incomplete, inaccurate and failing to reflect total compensation in complete contrast to the apples to apples data it presented). Even within Ontario, education worker classifications were largely among the very best paid when similar positions in other sectors were examined.

ECE's, for example, working in Ontario's public education system, were paid substantially more than those in the childcare sector outside of education. When the data was reviewed, it was clear that wage settlements outside and inside Ontario for comparable employees did not, the Crown pointed out, support the OSSTF and ETFO case. Comparability was a factor and appropriately applied supported the Crown's 1.5% offer. (The notion that many classifications of education workers were precariously employed was rejected for reasons set out in the written materials and at the hearing.)

Recruitment and Retention

While recruitment and retention as a factor were often considered in interest arbitration proceedings, this interest arbitration, the Crown argued, was not the appropriate forum to do so. In the Crown's view, issues around labour supply and demand in the education sector are complex and multi-faceted. There was certainly no basis to conclude that any of the challenges were either wage-driven or wage-sensitive, a conclusion that was reinforced by the fact that Ontario's teachers, occasional teachers and education workers were already the highest paid.

Demonstrating the complexity and multi-faceted nature of the problem, other factors were clearly at play, for example, high employee absenteeism explained many of the staffing challenges. The Crown and the parties were not unaware of or indifferent to these issues. A Sick Leave Utilization Task Force had been launched, as well as the Teacher Supply and Demand Action Table to consider how to best address these issues with the participation of multiple stakeholders. These, and other initiatives, were the preferred method of addressing recruitment and retention. There was no reason to believe that a non-normative wage increase to the highest paid teachers, occasional teachers and education workers in the country, as requested by both OSSTF and ETFO, would change the staffing picture in any respect.

The State of the Economy

Likewise, the state of the Ontario economy did not justify the OSSTF and ETFO ask. In late 2019 and early 2020 – the relevant time period as required by the point in time analysis – the Province was facing a $15 billion deficit (with substantially larger deficits predicted on the horizon) and the largest subnational debt in the world. Other economic indicators, for example,

the high level of net debt-to-GDP ratios, were similarly negative, with credit rating agencies taking notice of Ontario's deteriorating fiscal situation. The OSSTF and ETFO demands for 3.25% had to be considered in that context, and when they were it was inconceivable that the Crown – the participant in central bargaining for compensation purposes – would ever have agreed to anything other than the most modest of wage increases. That being the case, 3.25% should not be awarded now.

This same conclusion was readily reached when current economic indicators were reviewed – the situation was at worst deteriorating and economic growth was projected to slow; at best, little near-term improvement was predicted. On the other hand, inflation had begun to abate. In any event, both OSSTF and ETFO exaggerated the impact of inflation on wages. In all these circumstances, available public monies – separate and apart from an appropriate wage increase for teachers, occasional teachers and education workers – were needed to pay down debt, not fund unaffordable and unjustifiable collective bargaining demands, especially in circumstances where Ontario's teachers, occasional teachers and educational workers were already the best paid in the country.

Re-opener Outcomes

The Crown also urged caution, again assuming for the sake of argument that it was appropriate to look at re-opener outcomes – which for reasons already set out, it was not – in focusing on cherry-picked results from sectors that were simply not comparable such as energy and hospitals. The evidence established that overall the wage re-opener processes across all sectors yielded in 2021 an average total increase of 1.82% (including the original 1%). The average wage increase

awarded in respect of the 2021-2022 period, regardless of sector, was 1.75% (including the original 1%). The Moderated Collective Agreements commenced in 2021, and there were no wage re-opener results for 2021 of an aggregate 4.25% for that year, or even close. An additional increase of 3.25% would not have been the outcome then and cannot be the outcome now. The Crown asked that its quantum amount of 1.5% be awarded.

Discussion

It is appropriate to begin by quoting from the Crown brief: "The Crown respects and values the importance of public education and the critical work performed by … bargaining unit members represented by OSSTF and ETFO." It is also appropriate to acknowledge that teachers, occasional teachers, and education workers made an extraordinary contribution to our students and society during the pandemic, often in very trying, stressful and demanding circumstances.

According to the Remedy MOS's, in determining the outstanding issues we are to take into account any factors we consider relevant, together with the statutory criteria found in section 38 of SBCBA:

1. The school boards' ability to pay in light of their fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or award, if current funding and taxation levels are not increased.
3. The economic situation in Ontario.
4. A comparison, as between the employees and other comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of work performed.
5. The school boards' ability to attract and retain qualified employees.

This is a Re-opener

Notwithstanding the Crown's submissions on point, it is our view that this proceeding is a re-opener. It is quite correct that the parties, in the Moderated Collective Agreements, did not include a classic collective agreement re-opener provision. What they did do was agree to the Moderated Collective Agreements – in a matter of weeks after the worldwide health emergency was declared – and did so without prejudice to their right to challenge Bill 124 before the courts and to seek appropriate relief if their constitutional challenge was successful. In its April 20, 2020, media release, the OSSTF observed, "these are extraordinary times…while this tentative agreement does not satisfy all our concerns, we recognize the current environment we are in and the need for students to have stability…."

After Bill 124 was declared of no force and effect, the parties met and negotiated the Remedy MOS's. They agreed on Years 1 and 2 and referred to this Board determination of the quantum for Year 3. There is nothing in the language of those Remedy MOS's that has persuaded us that in our task of determining the number for Year 3 we should adopt an approach that is in any way different than if this were a regular Bill 124 collective agreement re-opener.

In this case, and in the re-opener cases, the Board is charged with determining the appropriate level of compensation for one or more years where Bill 124 applied. The jurisdiction in the re-opener cases and this one is the same: to consider any factor we consider relevant, together, if applicable, with the statutory ones, and come up with a result. The process is the same, albeit the scope is slightly different: in most re-openers the re-opening of compensation was not limited to across-the-board increases as it is here. In the present context the terms "re-opener" and

"remedy" are identical. In re-openers, and in this remedy case, the mechanism chosen to resolve the dispute is also identical: interest arbitration, an interest arbitration where the parties agreed that the Board could consider any factors that it considered relevant, together with the statutory factors, and then come up with a quantum for Year 3. There is really no need, in these circumstances, for us to delve deeply into otherwise applicable *Charter* remedial principles. The remedy for the *Charter* breach has been conclusively and finally addressed by agreement between the parties.

Point in Time Analysis

There is nothing about this process that could lead one to conclude that we should apply a point in time analysis, as urged by the Crown. It would also be contrary to the weight of authority in almost all the re-opener cases where all relevant information – up to the date of hearing and sometimes even beyond (and there were post-hearing filings by the Crown of relevant authorities) – is considered. Bluntly put, to rely only on economic data – mostly projections – from 2019 and 2020, when actual data is available about what happened in 2022 and following – high and then persistent inflation – would constitute wilful blindness. Stated somewhat differently, bargaining began in 2019, and continued in 2020 when the Moderated Collective Agreements were reached. It is now 2024 and we are deciding the re-opener quantum for 2022.

We know that inflation was 6.8% in 2022. We know that many of the fiscal projections when bargaining commenced were inaccurate. To restrict ourselves to out-of-date and incorrect data in deciding the 2022 increase would be a triumph of form over substance. It would also be completely unfair: not in a values-driven sense but as a matter of due process. And that is why

this broader approach is now normative and generally followed (other than one early outlier award that has been generally rejected).

Bargaining Pattern not Dispositive

Likewise, we are not persuaded that there is some governing bargaining pattern. There is a pattern of results – between 1.5% and 3% over time (except when Bill 115 imposed zeros and the annual 1%'s mandated by Bill 124). There is a pattern where larger increases appear at the end of the term rather than the beginning. And there is a pattern of bargaining in this sector taking forever. These parties almost always bargain in arrears. There is no reason to believe that but for Bill 124 and the pandemic, bargaining would have concluded in early 2020. To apply a point in time analysis anchored to the date when the Moderated Collective Agreements were reached, apart from other expressed concerns about this approach, is not persuasive given how long these parties take to bargain.

To be sure, in some cases, bargaining patterns are governing – the Crown cited one such case – but this is not that case. Bargaining patterns can be and often are important, but even if there was one here, the situation dramatically changed in 2022 when inflation peaked at 6.8%. (Year 3 of the Moderated Collective Agreements began on September 1, 2021, and ran until August 31, 2022. For all intents and purposes, the year at issue is 2022). To hold the parties to a bargaining pattern, even one that was long standing, or bargaining positions tabled in 2019, by adopting a point in time analysis, in the face of dramatically changed economic circumstances, would require us to completely ignore the impact of actual inflation on wages and serious issues in

recruitment and retention. It would require us to rely on economic projections that never materialized and to ignore the emergence of recruitment and retention challenges.

Inflation

The onset of high inflation in 2022 broke any pattern (the existence of which was, in any event, contested by both OSSTF and ETFO). Another distinguishing feature is that the bargaining pattern relied on by the Crown arose when inflation was at normative levels and there was a teacher surplus. This is the exact opposite of the situation in 2022 and following. The bargaining patterns relied on by the Crown simply do not account for material changes in circumstances that occurred after the Moderated Collective Agreements were ratified.

In considering inflation, it has been both dramatic and persistent; its effects are now baked into prices, especially necessities – increased prices that are more profoundly impactful on lower paid workers. Even if inflation may have now begun to slow, for Year 3 it was 6.8%. Economists are not predicting a return to historical norms – 2% – any time soon. Significant and sustained inflation is normatively addressed by the parties and by interest arbitrators. Addressing inflation replicates free collective bargaining and replicates the overwhelming weight of relevant re-opener cases and voluntary settlements (discussed further below).

Recruitment and Retention

There is, for example, an anticipated shortfall of approximately 7000 occasional teachers. This is just but one aspect of the recruitment and retention challenges in education.

The College reported in 2021 that:

Ontario's decade-long teacher surplus is over, and a new teacher shortage is underway … this situation warrants early action to increase the province's annual supply of new teachers … unemployment is now at levels not seen in 15 years. Province-wide unemployment among Ontario education graduates in their first five years after licensing is now just two per cent. There is no longer any reserve pool … to staff daily occasional rosters and future LTO and permanent job vacancies.

There is also more demand than supply in other classifications, notably EA's. Ontario's population is growing at a rapid rate. Schools cannot meet their staffing needs, and the Crown has had no choice but to resort to ad hoc temporary but then renewed measures to fill vacancies. A comprehensive staffing strategy is obviously called for (perhaps revisiting an earlier policy decision to increase the time required to obtain the qualifying degree put into place when there was a teacher surplus). Recruitment and retention is one of the statutory factors to be considered in assessing compensation, and by any metric there is a staffing shortage, and it is expected to continue.

Application of Relevant Criteria

No one seriously believes that compensation alone will turn the recruitment and retention situation around. Increases to compensation are not a panacea because recruitment and retention issues are complicated and demand a curated and targeted approach. However, there is no question but that compensation is a driver in attracting employees to a field and retaining them once they are there. We must point out that the Remedy MOS's require us to arrive at a specific across-the-board percentage, depriving us of the ability to target increases to, for example, the lower (start) end of the teacher grid, or the daily stipend for occasional teachers, or rates for

certain classifications of education workers. Perhaps these are matters that can be addressed in subsequent rounds.

In these circumstances, of high 2022 inflation and an established recruitment and retention problem, one is hard pressed to see how the Crown's offer of 1.5% as the additional quantum for Year 3 comes even close to giving effect to the factors that must be considered in arriving at a result. An additional award of 1.5% would not in any way account for 2022 inflation; nor does it reflect the serious recruitment and retention issues identified in the briefs and at the hearing, a situation described by both OSSTF and ETFO as a crisis, and an issue not persuasively refuted by the Crown given the deployment of temporary measures to promote staffing and other initiatives. This does not mean, however, that the award should come in at the very top of the agreed-upon range in the Remedy MOS's because inflation and recruitment and retention are not the only factors to address.

Obviously, the state of provincial finances must be carefully considered, and has been. Public funds are not unlimited even if there is no inability to pay. We need to be prudent, not profligate, and fiscally responsible, but we must do so in a context, one in which normative and statutory criteria are considered, as they have been, and one where other relevant factors are also taken into account.

The Crown pointed out that compensation for teachers and education workers in Ontario is already at or near the Canadian top and this should lead to the conclusion that any increase must be modest. Justice Koehnen, in his decision invalidating Bill 124, found that "77% of teachers

are at the top step of their salary grid" (2022 ONSC 6658, para. 76). Ontario's teachers are the best paid, or close to best paid, in Canada. OSSTF and ETFO submit this is not even relevant to the determination of quantum in this re-opener proceeding as Ontario has the highest cost of living in Canada and Ontario education wages have never been set by looking to teacher wages in other Canadian jurisdictions.

To be sure, comparability is one of the statutory criteria and one interest arbitrators always examine. These parties have not generally looked to teachers elsewhere in the country as a relevant comparator (although it certainly is relevant – at least to us – to consider how teachers are paid across Canada). Rarely, however, is comparability singularly dispositive; it cannot be applied in the abstract, or without consideration of other criteria. Likewise, higher incomes do not, in our view, necessarily lead to the conclusion that a sub-normative across-the-board increase should follow in a re-opener or in the general course of bargaining. There is no general agreement with the proposition that just because a group of employees is already the best or well-paid that they should not receive an economic increase, or that they should receive a much smaller one than everyone else, in circumstances where there is widespread agreement that inflation and recruitment and retention necessarily drive higher wage increases.

Seventy-seven percent of the teachers are already at the top of the grid, and so there is no grid movement for them. The only increase they receive are the general wage increases. There is no reason to segregate one factor – highest paid teachers in the country – and conclude from that that Ontario's teachers and education workers should get less than everyone else, in the re-opener context and otherwise, in circumstances where inflation and recruitment and retention have led to

higher results in many different sectors. Adopting this approach would be without any rational justification. Inflation, no matter where one lives, or how much one is paid, is relevant and has been considered by parties across the broad swath of the Canadian economy in their voluntary settlements and as imposed in interest arbitration. The same is true about recruitment and retention. These factors have led to re-opener and other collective bargaining outcomes well beyond what is proposed by the Crown.

OSSTF and ETFO relied on a number of Bill 124 re-opener awards and urged that those results be replicated here. For example, in *The Participating Hospitals and ONA* (unreported award dated April 25, 2023), additional across-the-board increases and grid adjustments for a total value of 3.85% (1% + 2.85%) were awarded for 2022. In *The Participating Hospitals & CUPE/SEIU* (unreported award dated June 13, 2023), an additional 3.75% was awarded for 2021-2022 (along with many other economic improvements for a year that is almost identical to Year 3). In *The Participating Hospitals & OPSEU* (unreported award dated August 3, 2023), an additional 3.75% was awarded (along with many other economic improvements). In *OHA & PARO* (unreported award dated September 14, 2023), an additional 3.75% was awarded in 2022 (along with many other economic improvements) In *The Crown & OPSEU* (Corrections) (unreported award dated December 4, 2023), which was technically not a re-opener because, as a result of timing, Bill 124 had not applied, 3% was awarded for 2022, along with an additional 1% as a special adjustment that applied to most of the bargaining unit (along with other economic improvements).

Free collective bargaining results are also instructive, for example between OPG and PWU – 4.75% effective April 1, 2022 (although an outcome influenced in part by private sector comparators) – and 4.75% also for 2022 agreed to by the Government of Canada & PSAC (a settlement that set the pattern for hundreds of thousands of employees federally). In neither of these outcomes was there any recruitment or retention issue.

Also relevant are results from the post-secondary sector. In August 2023, the College Employer Council and OPSEU, representing Ontario's community college academic employees (immediately followed by support workers represented in a different bargaining unit), voluntarily settled their Bill 124 re-opener with an additional 2% in the first and second year of the moderation period, and 2.5% in in the third (total 3%, 3% and 3.5%). The number for 2022 was an additional 2%. Other results mirror these community colleges results, for example, University of Toronto (10% over three years) and Metropolitan Toronto University (8.25% over three years). Queen's University faculty settled their 2022-2025 collective agreement with 3.5% in 2022, and 3% in each of the successive years. There are no recruitment and retention issues with community college and university professors.

Accepting that the parties never previously considered teacher, occasional teacher and education worker outcomes in other jurisdictions, it is also most certainly the case that they have never previously looked to central hospital settlements either. The health care cases are, however, extremely relevant because of inflation and because of recruitment and retention. There is no question whatsoever – the awards are categorical – that the results in those cases arose in large

part in recognition of the impact of inflation and because of serious problems in recruitment and retention.

After these proceedings were concluded, the Crown forwarded two consent awards settling the re-opener issues between the Crown and the OPSEU unified bargaining unit and with AMAPCEO. In *The Crown & OPSEU* (unreported award dated January 21, 2022), covering the Ontario Public Service, re-opener amounts of 3%, 3.5% and 3% (inclusive of the Bill 124 1%) were awarded for 2022, 2023 and 2024, along with a relatively small number of classification adjustments of varying value (covering 8.18% of the bargaining unit) and significant increases for government nurses. The same across-the-board pattern was followed in AMAPCEO (although the classification adjustments in that award are irrelevant). Inexplicably, as inflation was substantially higher in 2022 than in 2023, these awards provided for 3.5% in the second year (2023).

A few observations are in order. There are no recruitment and retention issues in either of these bargaining units (other than what is presumably reflected by the small number of individual classification adjustments). While the Crown submits that these consent awards are highly relevant, and should be followed, we both agree and disagree. We agree to the extent that they are important from a replication perspective as they indicate what the Crown has agreed to with other large bargaining units with which it collectively bargains. That is surely relevant when it comes to replicating free collective bargaining. The fact that they are consent awards amplifies this point. But the overall impact of these awards is also diminished by the absence of

recruitment and retention as a factor (other than as reflected by the small number of classification adjustments) as is also the case with the awards from the post-secondary sector.

If there had been comparable recruitment and retention issues with the unified bargaining unit, with AMAPCEO, with post-secondary, all circumstances where the government was either the party in collective bargaining or the principal funder, that would have been extremely compelling. There are serious recruitment and retention challenges in the publicly funded elementary and secondary education sector. Serious recruitment and retention challenges have been taken into account in other sectors and we are of the view that that must occur here. To adopt the outcomes of these recent consent awards without adjusting for recruitment and retention would be to ignore several of the most relevant factors considered by interest arbitrators. Accordingly, these awards assist only somewhat.

Definitely not instructive are the average re-opener results for 2021 and 2022. Averages can be distorting, and relying on re-opener averages drawn largely from the long-term sector is not compelling. There is no comparison for present purposes between employees working in long-term care facilities and teachers, occasional teachers and education workers in our schools, and their re-opener results are factually distinguishable in every respect.

Taking all the evidence into account, the application of criteria and the overall weight of re-opener awards and settlements – especially those where inflation and recruitment and retention were addressed as they must be here – we have concluded that we should award an increase at the higher end of the agreed-upon range.

Conclusion

Accordingly, and for the foregoing reasons, we award an additional 2.75%, for a total of 3.75% (inclusive of the 1% already paid), for teachers, occasional teachers and education workers in the applicable OSSTF and ETFO Teacher/Occasional Teacher/Education Workers Moderated Collective Agreements. This amount is somewhat less than the outcomes in the energy sector (which have private sector comparators), and in the health care sector – where the recruitment and retention challenges are more severe – but somewhat more than the trend in the OPS, and post-secondary sectors where there are no real recruitment and retention issues.

The Remedy MOS's detail the process for implementation of our award and other steps to be taken by the parties. As provided in the Remedy MOS's, and as is normative, we remain seized with respect to the implementation of our award.

DATED at Toronto this 9th day of February 2024.

"William Kaplan"

William Kaplan, Chair

I dissent. Dissent attached.

Bob Bass, Employer Nominee

I dissent. Dissent attached.

David Wright, OSSTF & ETFO Nominee

Dissent of the Crown Nominee

I must strenuously dissent from the decision of the Chair.

In my respectful submission, the Year 3 ATB awarded is not supported by the replication principle (in particular in relation to the OPS awards received by the Board), over-emphasizes the impact of inflation, and fails to address key evidence on the question of recruitment and retention.
The Replication Principle is widely accepted as the principal criterion referenced and utilized when resolving disputes at interest arbitration. In reviewing the various Bill 124 outcomes that were presented by the parties, the two key ones are he awards for OPSEU Unified and AMAPCEO. No better examples can be found to apply the Replication Principle. The Crown is the Employer in both cases, both Unions are strong and the bargaining units are amongst the largest in Ontario, representing tens of thousands of Ontario Public Service employees in diverse job classifications. Notwithstanding the Crown's submissions, if the Chair accepts the Unions' position that these are consent awards, that would mean that they represent an agreement of the parties and as such, are much stronger examples for replication than a contested award.

While it is factually accurate that inflation peaked at 6.8% for the period in question, this does not justify the result. The OPSEU Unified and AMAPCEO awards with the OPS were issued in January 2024, with full knowledge of the inflation level during the period (with both awards covering a term that commences on January 1, 2022). The Chair has determined that the "point in time" to be considered must be the present, not the past. In each of the OPSEU Unified and AMAPCEO awards, that is exactly the case - these awards were determined in January 2024, with a full view to the period from January 2022 forward (including the impact of inflation through that period) – as such, they are fully reflective of the present, not the past, arriving at results which have the full benefit of that perspective and information, taking inflation into account. In my view, the application of the Replication Principle "trumps", particularly where inflation was obviously taken into account in such comparator awards. To use inflation to go beyond those comparators is not justified.

The other factor that clearly influenced the award here to a higher level is the Chair's view of issues of recruitment and retention. A number of facts before the Board lead me to a completely different conclusion. First, the extremely significant percentage of the bargaining unit members who are at the top rate of a very long grid. This datapoint alone confirms for me that there are no "retention" issues. Second, the artificial restriction on the supply of teachers created by the requirement of a second year of teacher's college, which reflects that there are clearly issues in the system that may be impacting recruitment that are not wage-driven. And third, and most significantly, there is no dispute that these Ontario employees are the highest paid in Canada. If one accepts that wages are a motivator for recruitment (and the chair must hold that view if the higher increase in this award is based on a view to enhance recruitment), then paying the highest incomes in Canada solves that concern alone and no special further adjustment above the base increase proposed by the Crown is required. There were additional explanations in the evidence before us for current staffing challenges (e.g. extraordinary (and increasing) absenteeism and sick leave usage) and the Crown highlighted the fact that the various sector stakeholders are actively

engaged in an ongoing committee trying to understand the reasons for any staffing shortages (which are complex, multi-faceted and not, in the Crown's view, wage-driven), but from my perspective the three primary reasons I identified make it clear that unlike other cases cited at the hearing, this is not a case where an extra adjustment is justified to address issues of retention and recruitment.

In summary, on the basis of the principle of replication and on a close review of the evidence before this Board, a 3% increase in total (the Bill 124 1% plus an additional 2%), would have been the more appropriate outcome, justified by the OPSEU Unified and AMAPCEO awards, reflective of the impact of inflation on the settlement trends for the year in question, and giving due consideration to all of the evidence presented on recruitment and retention.

Respectfully submitted,

Bob Bass

DISSENT OF DAVID WRIGHT
OSSTF & ETFO NOMINEE

I respectfully dissent from the award of the Chair.

While I concur with much of the Chair's reasoning, it is my view that his reasoning does not support the result the Chair ultimately reaches – that it is sufficient to award an additional 2.75% increase (for a total of 3.75%) for year 3 of the applicable OSSTF and ETFO Teacher/Occasional Teacher/Education Workers Moderated Collective Agreements.

It is my conclusion that the reasoning of the Chair, and the arguments and evidence advanced by each of the OSSTF and ETFO, clearly support an award of an additional 3.25% (for a total of 4.25%) for year 3 of each of the applicable collective agreements and I would have awarded that amount.

In my view the Chair correctly concludes that this is in fact a Re-opener; that a Point in Time Analysis is not proper or normative; and that there is no pattern of bargaining between these parties in the circumstances at hand that can be relied on to determine the appropriate increase to be awarded.

I also concur with the Chair's findings that in order to replicate free collective bargaining we must consider the dramatic and persistent increase in inflation experienced in 2022 and the significant recruitment and retention issues in the education sector.

Further, I share his conclusion that the fact that compensation for teachers and education workers in Ontario may already be at or near the top in the country does not warrant awarding these workers a lower economic increase than that obtained by others, particularly in the circumstances of high inflation and recruitment and retention issues.

The evidence before us demonstrated that other highly paid workers received large economic increases, even where recruitment and retention were not at issue (for example in the energy, federal, and post-secondary sectors). As the Chair notes, inflation is a highly relevant factor for our consideration, no matter where one lives or how much one is paid.

I also join with the Chair in his acceptance of the relevance of the awards and settlements in the health care, energy, post-secondary and federal public service sectors advanced by the Unions as being highly relevant in our efforts to replicate free collective bargaining.

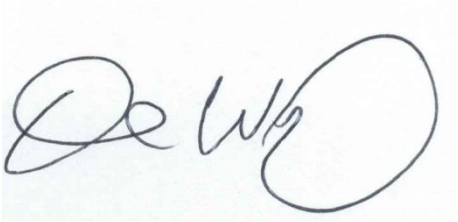
For the reasons given by the Chair, I share his rejection of the awards and settlements in the long-term care sector, the OPSEU unified and AMAPCEO consent awards and the alleged "average" re-opener results for 2021 and 2022 advanced by the Crown. These are not instructive for us in seeking to replicate free collective bargaining.

I would add to the reasons given by the Chair for the rejection of the alleged "average" re-opener results advanced by the Crown the fact that, as demonstrated by the OSSTF and ETFO, those alleged "average" results were skewed and incomplete. The alleged "average" was simply not something that can be relied on.

Where I dissent from the Chair's award is with respect to his conclusion that the application of the various factors he has identified as relevant warrants only an additional 2.75 increase in year 3 of the applicable collective agreements.

Rather, given the reopener increases negotiated where recruitment and retention has, as is the case here, been a material factor, and given the increases in the energy and federal sectors where retention and recruitment was not a factor at all, it is my view that the application of the relevant criteria and factors leads to the conclusion that an award of 3.25% for year 3, the reasonable and fair position advanced by the OSSTF and ETFO, is more than warranted.

As a result, I would have awarded an increase of 3.25% (in addition to the 1% already paid, for a total of 4.25%) for year 3 of each of the applicable OSSTF and ETFO Teacher/Occasional Teacher/Education Workers Moderated Collective Agreements.



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David Wright
OSSTF and ETFO Nominee