

Two steps forward, one step back:
Legislating labour relations in the Ontario Public Service

By

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The views in this paper are those of the author and are not necessarily reflective of those of AMAPCEO.

Abbreviations

AMAPCEO	The Association of Management, Administrative and Professional Crown Employees of Ontario
CECBA	<i>Crown Employees Collective Bargaining Act</i>
GSB	Grievance Settlement Board
LRA	<i>Labour Relations Act</i>
MBS	Management Board Secretariat
MGS	Ministry of Government Services
OPS	Ontario Public Service
OPPA	Ontario Provincial Police Association
OPSEU	Ontario Public Service Employees' Union
OPSLRT	Ontario Public Service Labour Relations Tribunal
PEGO	Professional Engineers Government of Ontario
PSA	<i>Public Service Act</i>

1. Introduction

Recent history events have provided cause for both optimism and concern for Canadian public sector unions. From the union perspective, the single most positive development was the Supreme Court of Canada's decision in the case commonly known as *BC Health*.¹ There, the Supreme Court reversed its prior jurisprudence on the meaning of s. 2(d) of the *Charter of Rights and Freedoms*,² finding that section "protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues."³

While this finding is applicable to all workers, the *BC Health* decision was specifically valuable for public sector workers as it invalidated as unconstitutional several sections of BC's *Health and Social Services Delivery Improvement Act*.⁴ That Act had sought to ease costs in the health sector by unilaterally invalidating freely bargained collective agreement provisions. In striking down several sections of the *HSSDIA*, the *BC Health* decision found that, while s. 2(d) of the *Charter* did not protect any particular outcomes of the collective bargaining process, it did guarantee

the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining....⁵

Even in the fresh light of *BC Health*, there have, however, recently been several negative developments for public sector unions. At the federal level, the Harper government has used the financial crisis as a rationale for legislatively capping wage increases and overhauling the federal public service's pay equity regime.⁶ Given the Supreme Court's ruling in *BC Health*, the constitutionality of this legislation could best be called questionable.⁷

Also at the federal level, the management of the House of Commons made an unsuccessful bid to amalgamate the House's seven bargaining units in order to simplify the bargaining scheme.⁸ To the unions, this attempt at amalgamation was both a "fiasco" and an "attempt at union busting."⁹ In any

¹ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 [*BC Health*].

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

³ *BC Health*, *supra* note 1 ¶19.

⁴ Bill 29, *Health and Social Services Delivery Improvement Act*, 2d Sess., 37th Parl., 2002 (as assented to 27 January 2002) [*HSSDIA*].

⁵ *BC Health*, *supra* note 1 ¶89.

⁶ Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., 2009, Parts 10 & 11 (*Expenditure Restraint Act* and *Equitable Compensation Act*).

⁷ See e.g. The Professional Institute of the Public Service of Canada, *Submission to the House of Commons Standing Committee on Finance*, February 23, 2009; Public Service Alliance of Canada, *Submission to the House of Commons Standing Committee on Finance (Bill C-10)*, February 23, 2009 (¶20: "On behalf of its 135,000 members who work for the federal government and its many departments, agencies and corporations covered by the Act, the PSAC submits that the *Expenditure Restraint Act* ... will, if passed into law result in protracted litigation.").

⁸ *House of Commons v. Professional Institute of the Public Service of Canada et al.* 2009 PSLRB 23 [*House of Commons*].

⁹ Cynthia Münster, "House spent more than \$200,000 on legal fees to try to amalgamate Commons unions" *The Hill Times* (2 March 2009). (Quoting Thomas Hall of PIPSC.)

event, the Public Service Labour Relations Board found that there was insufficient evidence to warrant a change to the bargaining structure of the House.¹⁰

In Ontario, an attempt was recently made to amalgamate bargaining units within its public service. This aborted attempt largely inspired this paper which seeks to trace the development of public sector labour relations law in Ontario and to determine the drivers of this development. It will be shown that the development of public service labour relations in Ontario has been one of a consistent trend towards normalization vis-à-vis private sector labour relations legislation. Though this development has been of a ‘two steps forward, one step back’ variety, the overall trend to normalization has persisted. Although persistent, the drivers of change have altered across time.

2. What drives changes in public sector labour relations law?

André Blais, Donald E. Blake and Stéphane Dion are the authors of a major comparative study of the relationship between parties, governments and public sector employees.¹¹ Focussing on the federal level in Canada, they test the hypothesis that “parties and governments of the left would be more generous to public sector employees than parties of the right.”¹² ‘Generosity’ is operationalized by Blais, *et al.* along four dimensions: (1) the size of the public sector, (2) wages of public sector employees, (3) labour rights, and (4) political rights.¹³

Within Canada, a distinct correlation between party and generosity was evident:

Evidence from the Canadian case is on the whole consistent with the general proposition that parties of the left are more generous than those of the right toward public sector employees. There are some exceptions, but the overall pattern is indisputable. Throughout the period considered we have found many instances where Liberal governments were more generous than their Conservative counterparts, and no instance where party positions are reversed.¹⁴

In terms of Ontario, we should expect the same general trend to operate, as essentially the same party system operates there as at the federal level. There is, however, one key wrinkle in Ontario: the New Democratic Party has formed the government there. If Blais *et al.*'s hypothesis holds, we should expect to see the highest generosity afforded to public sector employees under that regime.

As this paper is focussed on bargaining rights, it is important to note that this is the indicator of generosity in which Blais *et al.* found the weakest linkage between party and behaviour. For instance, bargaining rights at the federal level have been legislatively curtailed by both Liberal (in 1982) and Conservative (in 1991) governments. Such actions may, however, only be artefacts of broader economic factors and not wholly indicative of the role of party ideology, i.e. the Liberals of 1982 may have been in a difficult position in which they could do nothing else. Thus Blais, *et al.* also examine how parties voted on legislation affecting bargaining rights while in opposition. Taking this into account, Blais *et al.* are able to conclude that between the Liberals and Conservatives “the differences are small, but, to the

¹⁰ *House of Commons, supra* note 8 ¶643 (“The House of Commons has enjoyed good labour relations for a number of years, and the evidence has not revealed any significant change that would render the bargaining unit structure unsatisfactory.”).

¹¹ André Blais, Donald E. Blake & Stéphane Dion, *Governments, Parties, and Public Sector Employees: Canada, United States, Britain, and France*, (Pittsburgh: University of Pittsburgh Press, 1997).

¹² *Ibid.* at 3.

¹³ *Ibid.* at 11.

¹⁴ *Ibid.* at 44.

extent that there are differences, the Liberals would have to be counted as more generous than the Conservatives.”¹⁵

Blais *et al.*'s finding that parties matter – and the consequent primacy such a view puts on politics – squares with Gene Swimmer and Mark Thompson, who argue that “[p]ublic sector collective bargaining is basically an exercise in political, not economic, power. The public employer’s primary focus is public opinion and the prospect of re-election, rather than long-term profit maximization.”¹⁶ Thus, to the extent that we believe that parties vary ideologically, they will vary in their approach to labour relations.

Moving beyond party ideology, we can focus on Swimmer and Thompson’s highlighting of public opinion as a concern. A focus upon what the public thinks can lead to two distinct, directly opposed behaviours: (1) the government may seek to immunize itself from political fall-out – thus ducking public opinion altogether, and (2) the government may selectively ingratiate itself into labour relations in order to pander to public opinion. The key to Swimmer and Thompson’s analysis is their understanding of the difference between public and private sector labour relations: “the state changes from the informal umpire to a party of direct interest, with the ultimate power to modify the rules in the middle of the game.”¹⁷

Beyond political considerations, there are the broader ebbs and flows of fashion in public management. New Public Management (NPM) emerged in the 1970s, and it has been gaining currency since. Under NPM, what was perceived to have been an inflexible bureaucracy was replaced with a public service structure more concerned with expenditure reduction, consumer (i.e. public) demands for quality, and with political pressures to reduce the size of government. In practice, NPM’s

principal themes included a shift away from an emphasis on policy towards an emphasis on measurable performance; a shift away from reliance on traditional bureaucracies toward loosely coupled, quasi-autonomous units and competitively tendered services; a shift away from an emphasis on development and investment toward cost-cutting; allowing public managers greater ‘freedom to manage’ accord to private sector corporate practice; and a shift away from classic command-and-control regulation toward self-regulation.¹⁸

With this move towards private sector imperatives, NPM fundamentally alters labour relations within the public sector as the fundamental ‘rules’ of the system are called into question. Specifically, as Peter Warrian warns, the ‘Wagnerist’ model of labour relations in the public service would appear to be jeopardized.¹⁹ As Warrian has it, the NPM model renders the application of the private sector labour relations model “outmoded.”²⁰ The rise of contracting out and of the disaggregation of services from policy and financing is altering the core factors of labour relations in the public sector. In short, “[t]he combination of financial pressure and new organizational approaches is generating huge stresses on the

¹⁵ *Ibid.* at 41.

¹⁶ Gene Swimmer & Mark Thompson, “Collective Bargaining in the Public Sector: An Introduction” in Gene Swimmer and Mark Thompson, eds. *Public Sector Collective Bargaining in Canada: Beginning of the End or End of the Beginning?* (Kingston: IRC Press, 1995) at 2.

¹⁷ *Ibid.* at 1.

¹⁸ Laurence E. Lynn, *Public Management: Old and New* (New York: Routledge, 2006) at 107.

¹⁹ Wagnerism refers to the labour relations model developed by the American *Wagner Act* with an eye to use in private sector manufacturing, and imported into Canada following the Second World War. Wagnerism is marked by job control unionism, job classifications, and an adversarial relationship between management and labour.

²⁰ Peter Warrian, *Hard Bargain: Transforming Public Sector Labour-Management Relations* (Toronto: McGilligan Books, 1996) at 12.

public sector industrial relations system.” Warrian argues that these factors necessitate “rethinking the labour labour-management model itself.”²¹

Warrian has it that Wagnerism is problematic in the contemporary public sector for three reasons: (1) Wagnerism “has produced a multiplicity of fragmented, separate bargaining units even among employees with the same employer.”²² This fragmentation “in addition to creating a duplication of organizational resources” engenders “unique difficulties dealing effectively with workplace restructuring.”²³ (2) The “radical separation of employer and employee interests” makes cooperation on workplace issues difficult.²⁴ This is a difficulty, Warrian argues (writing in the mid-1990s) as financial pressures on the state force the sort of quick action that only cooperation can achieve.²⁵ (3) The system of job classifications inherent in Wagnerism creates barriers to groupwork and to changes in service delivery.²⁶

In short, Warrian is arguing that the twin arrival of NPM and “fundamental economic constraint”²⁷ alter the public service so as to make Wagnerism unappealing. Unappealing, that is, to management. Barriers to restructuring or difficulties in dealing with more than one bargaining agent are much more significant issues for management than for labour. Thus, Warrian’s analysis is suggestive of the labour relations steps that the government as employer ought to undertake in the context of NPM and economic constraint. On this view, then, it is the alteration in the character of the public service which acts as the fundamental driver of changes to the labour relations framework.

3. The history of public sector labour relations law in Ontario

A. Pre-History: 1878 to 1972

The first regulation of Ontario public service employment came in 1878 with the first *Public Service Act*. This Act designated Cabinet “as the controlling agency in the service, with authority to classify the civil service and to hire, promote, and dismiss employees.”²⁸ The beginning of organized labour in the Ontario Public Service came in 1911, when some 200 government employees met “to discuss ‘the necessity of a Civil Service Association, pointing out its possibilities in the way of improving the Service, promoting social togetherness, urging healthy athletics and co-operating with one another in the purchasing of supplies.’”²⁹ The Civil Service Association of Ontario (CSAO – which eventually became OPSEU) grew swiftly. Though labour relations were not its original focus, it was not long before the CSAO began to pressure on this front. Appeals were made directly to the Premier, and this condition – of the government and the employer being fused – persisted for some decades.

The first moves towards a normalized labour relations structure came with the election of George Drew, who led a minority government following the 1943 election. The left brought intense pressure for new labour standards in the OPS. Responding, the Tory Drew’s first throne speech stated that “the Ontario

²¹ *Ibid.* at 19.

²² *Ibid.* at 24.

²³ *Ibid.* at 25.

²⁴ *Ibid.* at 24.

²⁵ *Ibid.* at 27.

²⁶ *Ibid.* at 24.

²⁷ *Ibid.* at 27.

²⁸ H.W. Arthurs, *Collective Bargaining by Public Employees in Canada: Five Models* (Ann Arbor: Institute of Labor and Industrial Relations, 1971) at 104.

²⁹ Wayne Roberts, *Don’t Call Me Servant: Government Work and Unions in Ontario 1911-1984* (Toronto: Ontario Public Service Employees Union, 1994) at 12.

Civil Service will be assured of greatly improved conditions of employment, under a sound civil service system.”³⁰ In 1944 Drew created the Joint Advisory Council (JAC). With both CSAO and management members, the JAC played a purely advisory role, charged with looking only at general principles, rather than the particulars, of workplace issues.³¹ Even with these reforms, the labour relations format in the OPS remained a relationship of a government and its employees, with, for example, the CSAO still presenting its requests as briefs to the Premier.³²

The JAC system began to break down in the early 1960s, the catalyst being an incident at the Don Jail. Brendan Keatinge, a guard whose hair had – owing to a shock – turned prematurely white, dyed his hair black.³³ Mocked for his vanity by both fellow guards and prisoners, Keatinge was suspended for 10 days for creating disorder. The media was informed of this, and the whistleblower (who had originally suggested a trip to the salon to Keatinge) was fired for violating his oath of secrecy. Subsequently, the CSAO local president was fired for refusing to answer questions about the incident. As a recourse, the fired men were granted only an appeal by grace to the Minister, which the CSAO refused to utilize, demanding instead their reinstatement. The government held firm in its position and the CSAO ceased attending the JAC, refusing to meet until bargaining was in place.³⁴

As Wayne Roberts puts it, “direct responsibility for civil service matters increasingly brought public discredit on the government. Once a source of political strength, direct responsibility increasingly made politicians vulnerable to pressure.”³⁵ Indeed, with the media giving the story prominent play, opposition parties seized the issue, rounding on the government. In the Legislature, a New Democrat member, lambasted the dismissals as “a very old union-busting device”.³⁶ Attacks of this character continued through the month of March, 1962.³⁷ The direct employer-employee relationship between the government and public servants was clearly causing political headaches.

To shield itself from such embarrassments, the government brought forth the *Public Service Act, 1961-62* which eliminated the JAC, replacing it with the Ontario Joint Council (OJC), which consisted of four appointees each for the government and the CSAO. Described (in 1974) by the CSAO as a “rudimentary form of collective bargaining”³⁸ the *PSA 1961-62* (and its subsequent amendments in 1966) allowed for the negotiation of “matters concerning terms of employment of Crown employees, including working conditions, remuneration, leaves and hours of work, other than those excluded by the Regulation” by being placed on the agenda of OJC.³⁹

The onset of a degree of collective bargaining led to the government requesting a report from Judge Walter Little on the determination of appropriate bargaining units, the scope of bargaining, the forms

³⁰ *Ibid.* at 37.

³¹ *Ibid.* at 39.

³² *Ibid.* at 69.

³³ “White-Haired Jail Guard Told To Remove Dark Dye” *Toronto Daily Star* (15 December 1961), A1.

³⁴ Roberts, *supra* note 29 at 74.

³⁵ *Ibid.* at 75.

³⁶ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31 (6 March 1962) at 870 (Kenneth Bryden).

³⁷ See e.g. Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 43 (20 March 1962) at 1364ff (Kenneth Bryden); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 43 (20 March 1962) at 1366ff (Vernon Singer); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 46 (23 March 1962) at 1463ff (Vernon Singer).

³⁸ Civil Service Association of Ontario, *Full and Free Collective Bargaining for Crown Employees* (May 1974) at 6.

³⁹ Ontario, Staff Relations Branch, Treasury Board, *Collective Bargaining in the Ontario Government Service: Brief Review*, (Toronto: 1967) at 1.

agreements should take, and the “methods and procedures of negotiation within the bargaining system in which compulsory arbitration is the final means of resolving disputes.”⁴⁰ In brief, Judge Little recommended – with some notable exceptions (e.g. no right to strike, a list of non-bargainable matters) – “a collective bargaining regime modelled on the *Ontario Labour Relations Act*.”⁴¹ Although his terms of reference set out compulsory arbitration as the final means of dispute resolution, Judge Little did speak to the right of public servants to strike in order to put the (as he saw them) “similar” views of the CSAO and the government into the public record.⁴²

While Judge Little believed that the strike/lockout model was effective in the private sector, he argued that it was wrong for the public sector. Essentially, his reasons boiled down to democracy. Judge Little:

I cannot accept the proposition that anyone who joins the public service, should have the right, in conjunction with others, to withdraw his services with the sole objective of compelling a duly-elected government to meet their demands, no matter how meritorious they may be. To admit such a proposition, is to imply that our processes of government, and the services which are provided by law for the benefit of all citizens when required, can legally be rendered ineffectual if a critical segment of public servants or Crown employees should engage in strike action.⁴³

Though arguing against a right of public servants to strike, Judge Little asserted “that governments have a duty to ensure that those who are not accorded the right to strike are rewarded for their services on a basis at least as favourable as those who have such a right.”⁴⁴

B. CECBA, 1972

In the lead-up to the Little Report, relations between the CSAO and the government/employer were, perhaps, “a little incestuous.”⁴⁵ On the heels of the Little Report, however, the government moved to ‘professionalize’ labour relations by bringing in a new face from the private sector to head its bargaining team and by relying more on management-side law firms.⁴⁶ This marked a shift from paternalism to adversarial, formalized labour relations.

*CECBA 1972*⁴⁷ was introduced in May of 1972. The *CECBA 1972* provisions pertaining to the negotiation of collective agreements were “relatively standard *LRA*-type provisions.”⁴⁸ Thus, the Act called for notice to bargain to be served, the obligation to bargain in good faith, and the direction that the parties make every reasonable effort to make a collective agreement.⁴⁹ However, *CECBA 1972* differed significantly from the *LRA* in terms of a ban on strikes and in the scope of positions it excluded from collective bargaining.

The opposition parties attacked the government primarily on the strike ban. In particular, attention was called to the immediate backdrop of the Bill’s introduction: a garbage strike in Toronto. Robert Nixon,

⁴⁰ *Report of the Special Advisor His Honour Judge Walter Little, on Collective Bargaining in the Ontario Government Service* (Toronto: Queen’s Printer, 1969) at 1 [Little Report].

⁴¹ Timothy Hadwen *et al.*, *Ontario Public Service Employment and Labour Law*, (Toronto: Irwin Law, 2005) at 71.

⁴² Little Report, *supra* note 40 at 40.

⁴³ *Ibid.* at 42.

⁴⁴ *Ibid.* at 43.

⁴⁵ Roberts, *supra* note 29 at 125.

⁴⁶ *Ibid.* at 127.

⁴⁷ *Crown Employees Collective Bargaining Act*, R.S.O. 1980 c. 108, s. 8(1) [*CECBA 1972*]

⁴⁸ Hadwen *et al.*, *supra* note 41 at 72.

⁴⁹ *Ibid.* s. 8(2).

the Liberal Leader of the Opposition, noted that the Bill was “presented at a time when public opinion, expressed editorially and certainly personally, seems to be for the time being much more in support of the government’s position than it was 18 months ago” when Bill 217 was introduced.⁵⁰ Nixon continued, stating that “blanket legislation of this type [i.e. banning all strikes by civil servants] is bad legislation and I cannot lead my party in support of it.”⁵¹ Picking up where Nixon left off, Ian Deans of the NDP saw “in this legislation the minister bowing, kowtowing if you like, to pressures of the day.”⁵² In the face of opposition attacks, the proposed legislation sailed through the Legislature in less than one month.

In his report, Judge Little had found that “in most instances the level of exclusions in the public service should be higher than in the private sector.”⁵³ In other words, the cut-off point for exclusions from union membership in the public service should be at a higher rank than one would normally find in the private sector. In finding the appropriate level, Judge Little “agreed in general” with the government’s brief to him, which suggested that those who spent “a significant portion of their time supervising other employees” ought to be excluded.⁵⁴ *CECBA 1972* adopted that language, but went further. Excluded employees were defined as a “person employed in a managerial or confidential capacity” if he or she (among other tasks) spent “a significant portion of his time in the supervision of employees,”⁵⁵ or “is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee.”⁵⁶ This language was objected to in the Legislature during debate.⁵⁷

Additionally, architects, dentists, engineers, lawyers and medical professionals employed in their professional capacity were all excluded.⁵⁸ As well, casual and temporary employees (unless continuously employed for 6 months) were excluded. So too were persons engaged by contract for professional or special work, a non-recurring project, and temporary work assignments.

CECBA 1972 designated the employer for the purposes of the public service as being the Management Board of Cabinet. This marked a distinct turn from the direct responsibility that the government had previously borne as employer. Along with designating the employer, the regulations of *CECBA 1972* designated bargaining agents and specified that the “bargaining units designated in the regulations are appropriate units for collective bargaining purposes under this Act.”⁵⁹ This was in keeping with Judge Little’s recommendations, as he believed that the public interest was best served by not fragmenting the public service into multiple bargaining units. This aspect of *CECBA 1972* was criticized by the opposition during debate, where it was argued that there could be more appropriate bargaining units than one large one.⁶⁰

⁵⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 56 (9 May 1972) at 2219 (Robert Nixon).

⁵¹ *Ibid.* at 2221.

⁵² *Ibid.* at 2222 (Ian Deans).

⁵³ Little Report, *supra* note 40 at 11.

⁵⁴ *Ibid.* at 12-13.

⁵⁵ *CECBA 1972*, *supra* note 47, s. 1(1)(l)(iii).

⁵⁶ *Ibid.*, s. 1(1)(l)(iv).

⁵⁷ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 56 (9 May 1972) at 2224 (Ian Deans) (Deans queried “what it means when it says a person shall be excluded if he spends a significant portion of his time in the supervision of employees? What in heaven’s name is a significant portion of his time and who is going to decide?”).

⁵⁸ *CECBA 1972*, *supra* note 47, s. 1(1)(f).

⁵⁹ *Ibid.*, s. 3(2).

⁶⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 73 (29 May 1972) at 2894 (James Renwick).

As noted above, Judge Little vigorously argued against the right to strike for public servants. Here, the government agreed with his plain meaning, stressing that the public was owed the right to uninterrupted public services. *CECBA 1972* barred both strikes and lockouts,⁶¹ and declared that all disputes emerging in collective bargaining should be decided at arbitration. The prohibition on strikes, in turn, informed the scope of bargainable issues. Judge Little had recommended that the following issues not be bargainable: departmental organization, complement, classification, job evaluation, the merit system, and superannuation.⁶² The government accepted this recommendation, adopting it in what Stephen Lewis called “a heinous section” of *CECBA 1972*.⁶³ Ian Deans, for his part, wondered “why there are any areas that are not subject to negotiation?”⁶⁴

In answer to Deans’ query, the government linked the legislative exclusion of certain matter from bargaining to the denial of the right to strike. The Minister responsible, Charles MacNaughton:

In agreeing to the principle of binding arbitration when agreement cannot be reached, the Crown and its agencies are accepting that an important element in their responsibilities to the public is being handed over to the judgement of a third party. There obviously must be limits to what may be so handed over if the government of the day is to remain responsible for managing public programmes in the public interest.⁶⁵

Alas, according to the government, the lack of a right to strike necessarily entailed a truncated scope of bargaining.

C. Amending *CECBA*, 1972

A polite description of *CECBA 1972* would be that it “provided only a limited collective bargaining regime form employees in the public service.”⁶⁶ The CSAO’s verdict was somewhat less restrained: *CECBA 1972* “is a reactionary, discriminatory piece of legislation that surpasses all other public and private jurisdictions in Canada in its repressiveness, and should make Ontario, the GO province, hang its head in shame.”⁶⁷ Not content with keeping its opinion to itself, the CSAO pressed for changes to *CECBA 1972* via a high profile “Free the Servants” campaign.⁶⁸ The CSAO formally made their case against *CECBA 1972* in a brief presented in May of 1974. Therein, the CSAO called for 24 changes to *CECBA 1972*.⁶⁹

A key concern of the CSAO centred on *CECBA 1972*’s restrictions on the scope of bargaining (“Where else but under *CECBA* would one have to spend day after day debating with government negotiators whether score of Union proposal are negotiable or not, as has now happened in three different sets of

⁶¹ *CECBA 1972*, *supra* note 47, s. 27.

⁶² Little Report, *supra* note 40 at 32.

⁶³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 56 (9 May 1972) at 2225 (Stephen Lewis).

⁶⁴ *Ibid.* (Ian Deans).

⁶⁵ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 51 (4 May 1972) at 1994-95 (Hon. Charles MacNaughton).

⁶⁶ Jeffrey Sack, C. Michael Mitchell & Sandy Price, *Ontario Labour Relations Board Law and Practice*, looseleaf (Markham: LexisNexis, 2006) at §9.167.

⁶⁷ CSAO, *supra* note 38 at 55.

⁶⁸ Roberts, *supra* note 29 at 152-53 (The campaign, priced at \$600,000, was replete with “billboards, bumper stickers and buttons, featuring handcuffed trilliums. There were Davis Dollars, issued by the Bank of the Big Blue Machine, which paid civil servants 63 cents on the dollar. Activists carried a safety kit, with deodorant and Clorets to ward off the government’s stench, and Alka-Seltzer and Tums for indigestion caused by management.”).

⁶⁹ CSAO, *supra* note 38 at 58-64.

bargaining?”).⁷⁰ Thus, the CSAO called for an unlimited scope of bargaining.⁷¹ On the matter of the right to strike, the CSAO made the case for employees having a “choice of routes to finality” – either binding arbitration (along with a reconstitution of the arbitration board) or the strike model.⁷² Additionally, the CSAO variously called for casual and temporary workers to be included in the bargaining unit,⁷³ for exclusion language similar to that of the *LRA*,⁷⁴ and for successor rights.⁷⁵ Essentially, the CSAO was lobbying for *CECBA* 1972 to become a whole lot more like the *LRA*.

The government abided some of the CSAO’s requests, introducing in December, 1974, amendments to *CECBA* 1972 that were intended to be “a temporary interim response to the pressing reform agenda of the CSAO.”⁷⁶ The exclusion of casual and temporary employees was repealed. As well, the scope of bargaining was increased. Promotions, demotions, transfers, layoffs and/or reappointments of employees, the classification system, and the job evaluation system were all added to the list of bargainable items. The employer, however, maintained the exclusive right to determine the classification system. Though the merit system, training and development, performance appraisal, and superannuation remained in the exclusive domain of management, *CECBA* 1974 made the governing principles of each of those areas subject to review by the employer and bargaining agent. *CECBA* 1974 also stated that the OPSLRT would determine if a specific proposal was bargainable.

Significantly, successor rights made its first appearance in *CECBA* with these amendments. The Act granted an employee organization the ability to make an application to the OPSLRT for recognition as a successor bargaining agent in cases of a merger or transfer of jurisdictions. The provisions differed from those in the *LRA* in that they required a membership ratification vote. In recognizing this difference in the two pieces of legislation, the government stated that any *CECBA* union should willingly demonstrate its support “beyond a shadow of a doubt.”⁷⁷

Between 1974 and 1993, there were no substantial amendments to *CECBA*. Those amendments that did occur were concerned, in the main, with addressing specific incidences that the government found discomfiting; again, demonstrating the role of politics in public service labour relations. One incident stemmed from the GSB’s reinstatement of an employee to a position of responsibility at a facility for the developmentally handicapped. The employee in question had been convicted of common assault under the *Criminal Code* for an incident described by the GSB as “a case of horseplay.”⁷⁸ As there was no intent animating the assault, the GSB directed reinstatement. Though the employer did reinstate, it was to a position with manifestly different (and lower) responsibilities.⁷⁹ Following this failure to comply, the union proceeded with a successful contempt motion against the Deputy Minister. The government then moved to amend *CECBA* to prohibit GSB reinstatements to positions of responsibility for those

⁷⁰ *Ibid.* at 10.

⁷¹ *Ibid.* at 26.

⁷² *Ibid.* at 34.

⁷³ *Ibid.* at 17.

⁷⁴ *Ibid.* at 20.

⁷⁵ *Ibid.* at 23.

⁷⁶ Hadwen *et al.*, *supra* note 41 at 83.

⁷⁷ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 180 (13 February 1975) at 7654 (Eric Winkler) (Subsequently, the government brought forth the *Successor Rights (Crown Transfers) Act*, which worked reciprocally. Employee organizations would have successor rights under the *CECBA* amendments when moving into the OPS, and rights under the *LRA* when moving out of the OPS on a divestment.)

⁷⁸ *OPSEU (Johnston) and Ministry of Community and Social Services*, GSB #7/78, March 17, 1978 (Adams), cited in *Johnston v. Carman*, [1978] O.J. No. 1299 ¶10.

⁷⁹ *Ibid.* ¶11.

employees that had been found to have applied unnecessary force to residents of children's mental health centres, developmental services institutions, the Ontario School for the Deaf and Blind, psychiatric facilities, correctional institutions and young offenders observation and detention homes, and training schools.⁸⁰ Notes Hadwen: "There exists no such provision for equally vulnerable residents of provincially-funded facilities covered by the *LRA*."⁸¹

In 1984, new premises were added to the list of facilities noted above, namely premises where services were provided under the *Child and Family Services Act* and places of temporary detention under the *Young Offenders Act*. This stemmed from a washroom sexual encounter between a welfare worker and a juvenile client. Upon that employee's reinstatement to the OPS, Minister Fran Drea commented that "he would not reinstate the employee to his job level but would demote him 'so far down into the basement that he's gonna need a miner's lamp to get upstairs.'"⁸²

D. CECBA, 1993

The NDP government, soon after its election "indicated its intent to bring forward labour law reform in both the public and private sectors."⁸³ In April of 1991, the government began bilateral consultation with those parties affected by *CECBA* reform.⁸⁴ This consultation proceeded against the background of the government's stated belief

that the opportunity to bargain collectively is a fundamental right of all employees that should only be limited if a conflict of interest would be created. The Government supports extending the right to strike and the scope of collective bargaining for crown employees.⁸⁵

To underline the government's perspective, former OPSEU employee Frances Lankin, then Chair of Management Board, described *CECBA* as "old and draconian" at the outset of the consultation period.⁸⁶

This round of amendments to *CECBA* came about due to longstanding concerns on both sides of the table. While the bargaining agents complained about exclusions, the lack of a right to strike, and the constrained scope of collective bargaining, the employer found fault with arbitration decisions which worked to "erode statutory management rights."⁸⁷ The employer, thus, approached *CECBA* reform with five guiding principles:

- 1) Free and balanced collective bargaining
- 2) Continued provision of quality services to the public
- 3) Fiscal accountability
- 4) Ownership of the process and the product by the parties
- 5) Enhanced resolution of disputes between the parties.⁸⁸

⁸⁰ Hadwen *et al.*, *supra* note 41 at 86.

⁸¹ *Ibid.* at 87.

⁸² *Ibid.*

⁸³ Ontario, Management Board Secretariat, *Employer Report on the Reform of the Crown Employees Collective Bargaining Act*, (Toronto: Management Board Secretariat, 1992) at 1.

⁸⁴ *Ibid.* at 4.

⁸⁵ *Ibid.* at 1.

⁸⁶ Matt Maychak "Ontario Civil Servants May Get Right to Strike" *Toronto Star* (16 April 1991), A22.

⁸⁷ *Employer Report*, *supra* note 83 at 2.

⁸⁸ *Ibid.* at 6.

These five principles, and the report in which they are found, “formed the basis of the new Act.”⁸⁹

The Act was introduced (in its first iteration as Bill 49⁹⁰) on June 14, 1993 – the same day as the acrimonious Social Contract legislation. In introducing the two Acts on the same day, Labour Minister Bob Mackenzie was left to deny to reporters that, with the *CECBA* changes, the government was merely offering a sop to unions upset by the Social Contract changes. The Bill had been a long time in coming, stressed the Minister, and was meant to address the fact that, from a labour relations perspective, Ontario was in “the backwoods when it comes to the public sector.”⁹¹ While this is true, the congruence of dates does indicate the primacy of political concerns.

Upon introducing the Bill, the Minister extolled the proposed *CECBA* reforms as the “positive results from consultations with a number of government employees, bargaining agents and staff associations dating back to 1991.”⁹² The Bill was intended to reduce exclusions, expand the scope of collective bargaining (including classifications), lessen the reliance on binding arbitration, remove (subject to further consultation) agencies from *CECBA*’s jurisdiction, allow for new bargaining unit structures, and to permit strikes.

Opposition to the Bill was pronounced within the Legislature. Elinor Caplan, the Liberal Management Board critic, called it “ironic” and “ill-timed,” arguing that the government’s treatment of public servants had been “disgraceful” and that the reform of *CECBA* was “not going to be enough to restore good labour relations in Ontario.”⁹³ For his part, Mike Harris offered this:

Let me just say this very clearly, so that all understand, union leaders, union employees, public sector, private sector: Just as Bill 40 can and will be scrapped, this legislation as well can and will be scrapped, so don’t get too comfortable with it. If you think this sop while the social contract gutting and ripping out of agreements is being brought in by the Treasurer has a longer shelf-life than September 6, 1995, which is as long as you can hang on, you’ve got another thing coming. I want that to be very clear.⁹⁴

The Bill in question was abandoned by the government. Subsequently, it was re-introduced as Bill 117, this time packaged with amendments to the *PSA* pertaining to whistleblowing.⁹⁵ At second reading, Mike Cooper underlined the agreement of stakeholders that *CECBA* required reforms, stressing that the government’s “reform proposals are grounded in a process of consensus between all parties that began about two years ago.”⁹⁶ This Bill passed third reading on December 14, 1993.

⁸⁹ Hadwen *et al.*, *supra* note 41 at 88.

⁹⁰ Bill 49, *An Act respecting the Collective Bargaining of Employees of the Crown and other matters related to Collective Bargaining*, 3rd Sess., 35th Leg., Ontario, 1993.

⁹¹ Kelly Toughill “NDP unveils right-to-strike legislation” *Toronto Star* (15 June 1993), A2.

⁹² Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31 (14 June 1993) at 1338 (Hon. Bob Mackenzie).

⁹³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31 (14 June 1993) at 1340 (Elinor Caplan).

⁹⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31 (14 June 1993) at 1340 (Mike Harris).

⁹⁵ Bill 117, *An Act to revise the Crown Employees Collective Bargaining Act, to amend the Public Service Act and the Labour Relations Act and to make related amendments to other Acts*, 3rd Sess., 35th Leg., Ontario, 1993 (Note: The Whistleblowing provisions were never proclaimed).

⁹⁶ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 84 (18 November 1993) at 4145 (Mike Cooper) (These 7,000 subsequently organized as AMAPCEO).

CECBA's structure of exclusions was substantially altered by Bill 117. The *LRA* exclusion criteria, as it pertains to managerial personnel and persons employed in confidential labour relations positions, was adopted. Second, the number of exclusions unique to government service were substantially reduced. Third, the unionization of professional groups (in separate bargaining units) was permitted. Stated Mike Cooper

[a]bout 9,000 public servants who were previously excluded will be given the right to bargain collectively. That will reduce the level of exclusion from collective bargaining among Ontario public servants from its current 25% down to 12%. Of those 9,000 workers I referred to, about 2,000 share a community of interest with an existing bargaining unit represented by OPSEU. These employees will be assigned to that bargaining unit and will retain full seniority. The other 7,000 of the previously excluded will be free to unionize and choose their own bargaining agent, if it is their desire to do so.⁹⁷

The placement of the 2,000 into OPSEU raised the hackles of the Opposition. Elinor Caplan argued that this was "a payoff" to OPSEU, as, coming out of the Social Contract, the government was trying to "smooth the feathers of its friends by giving them more money in the union coffers."⁹⁸ David Turnbull made much the same point on behalf of the Tories, talking about "the payback to OPSEU in this bill. ... [W]ith 2,000 employees, \$1.8 million goes into the coffers of OPSEU."⁹⁹

While *CECBA 1993* did provide a right to strike, this was premised on the continued withholding of that right from essential services. The scope of essential services was left to be bargained, as opposed to being defined within the legislation. The inclusion of the right to strike was subject to criticism from the opposition parties. Coming as it did on the heels of the Social Contract, Elinor Caplan suggested that the unions would use their new weapon to win back those wage concessions the Social Contract had brought them. Caplan:

[T]he public sector unions, I believe, will attempt and be able – and I hope not successfully – to blackmail the province into catch-up and giving the kinds of wage increases that have been suppressed through the time of the social contract. I think the threat of blackmail will be the threat of widespread public sector, public service, strikes.¹⁰⁰

Cutting against the threat of blackmail (as Caplan saw it), is the assessment of the threat of strikes which the government made internally at the outset of the *CECBA* reform consultation process:

It would be very unlikely that OPSEU would ever be able to mount an effective strike by the current 50,000 member OPS bargaining unit. It could be argued that giving the right to strike under the structure of one bargaining unit is tantamount to giving OPSEU a right it could never use. Assuming the normal standards for strike votes in the private sector, OPSEU may very well get 50% plus one of

⁹⁷ *Ibid.*

⁹⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 84 (18 November 1993) at 4158 (Elinor Caplan).

⁹⁹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 84 (18 November 1993) at 4163 (David Turnbull).

¹⁰⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 84 (18 November 1993) at 4158 (Elinor Caplan).

employees actually voting to vote in favour strike, however getting 50,000 employees to join in the actual strike would clearly be a different matter.¹⁰¹

Regardless, OPSEU played down the significance of the right to strike. Stated then-President Fred Upshaw: “The right to strike is not a basic right for us, when we’ve been asking for choice.”¹⁰² Indeed, OPSEU’s preferred option was to obtain the right to strike, but only as part of “a choice between voluntary arbitration and the right to strike as the ultimate means of resolving contract disputes.”¹⁰³

While *CECBA* 1993 did not statutorily reserve management rights, as seen in previous versions of the legislation. However, as Hadwen *et al.* note, “certain management rights did remain reserved.”¹⁰⁴ One of those reserved rights held that in voluntary interest and first contract arbitration, an arbitrator could not include any term which would, directly or indirectly, require the enactment or amendment of legislation.¹⁰⁵ Additionally, though employee classifications were made a bargainable term, they were not grievable.¹⁰⁶

Finally, *CECBA* 1993 provided the same successor rights as seen in the *LRA*, repealing the earlier *SR(CT)A*. As well, restrictions on political activity which had been enforced on unions representing public employees were removed.

E. *CECBA*, 1995

Although he had promised to tear up *CECBA* 1993 when he became Premier, Mike Harris ultimately settled for mere amendments, leaving some of the key substantive changes made by the NDP administration in place. That said, the 1995 amendments to *CECBA* were significant. The driving force for the 1995 round of amendments (introduced as part of the Bill 7¹⁰⁷ omnibus labour legislation) was to help the government achieve its “stated commitment to a smaller, more efficient public service.”¹⁰⁸ The opposition seized upon this, with Dwight Duncan (then the Liberal labour critic) stating that the

changes to *CECBA* are far-reaching. The amendments proposed for *CECBA* expand the categories of employees to whom the Act does not apply. These amendments are the first step in a massive privatization that could see a reduction in government revenues and certainly a decline in the services that all of us have come to expect.¹⁰⁹

Against this, the government countered that the

¹⁰¹ Ontario, Human Resources Secretariat/Ministry of Labour, *Cabinet Submission: CECBA Reform Consultation: Discussion Paper* (March 20, 1991) at 21.

¹⁰² Martin Mittelstaedt, “Bill gives civil servants right to strike: Not enough options in Ontario labour law proposals, union leader says” *The Globe and Mail* (15 June 1993), A7.

¹⁰³ OPSEU, *Agenda for Change: A Brief to the Minister of Labour by the Ontario Public Service Employees Union*, (April 12, 1983) at 8.

¹⁰⁴ Hadwen, *et al.*, *supra* note 41 at 93.

¹⁰⁵ *Crown Employees Collective Bargaining Act, 1993*, R.S.O. 1993, c. 38, ss. 4(11) and 16(2).

¹⁰⁶ *Ibid.* ss. 51.

¹⁰⁷ Bill 7, *Labour Relations and Employment Statute Law Amendment Act, 1995*, 1st Sess., 36th Leg., Ontario, 1995.

¹⁰⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 6 (4 October 1995) at 100 (Dave Johnson, Chair, Management Board of Cabinet).

¹⁰⁹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 12 (18 October 1995) at 330 (Dwight Duncan).

amendments proposed to *CECBA* are needed to ensure that the public service sector environment parallels the changes that will occur with the repeal of Bill 40. In addition, the proposed amendments will give government the flexibility it needs to proceed with the major restructuring of the Ontario public service, one that will result in a more efficient and smaller organization.¹¹⁰

Moreover, added Johnson, “nothing in the amendments to *CECBA* fundamentally alters the collective bargaining rights of the vast majority of Ontario government employees.”¹¹¹ Against opposition which questioned the lack of consultation on these changes, the employer replied that the “Bill 40 repeal was discussed with the electorate during the election campaign.”¹¹²

The most significant change in *CECBA 1995* were additions to the category of excluded positions. Pre-1993 exclusions of professionals, persons employed in the Office of the Premier or in Cabinet Office, persons providing advice on Treasury Board matters, persons employed in the borrowing or investing of money for the province, and all persons with duties which, in the opinion of the OLRB constitute a conflict of interest with being in a bargaining unit, found themselves excluded. All those now excluded who had been included were protected from reprisals stemming from past union membership. Nevertheless, the government maintained that “[m]ore than 80% of the public servants will continue to have full collective bargaining rights.”¹¹³

The successorship provisions of the *LRA* were made to no longer apply to the Crown. Stated Johnson:

These proposed changes recognize the difference between the application of successor rights in the public sector and the private sector. ... In the case of transferring government work to the private sector, if successor rights applied, the private sector employer would have to assume the public sector employment terms, which may be considered too onerous for many private sector employers.¹¹⁴

CECBA 1995 stated that a bargaining unit established under the Act was an appropriate bargaining unit for the purposes of the Act “until the description of the bargaining unit is altered under the Act.”¹¹⁵ Such an alteration could not take place until after the first post-*CECBA 1995* collective agreement was concluded. At that point, the parties could amend the bargaining unit descriptions.

In 2001, several further amendments were made to *CECBA*. Among these changes, civilian employees of the Ontario Provincial Police were given the opportunity to be represented by the Ontario Provincial Police Association. Additionally, the scope of the legislation prohibiting the reinstatement of employees deemed to have used unnecessary force was broadened. The jurisdiction of the GSB to reinstate employees was curtailed in disciplinary or dismissal cases fuelled by criminal conviction or discharge. These alterations are due to GSB cases that, “did not give binding effect to criminal conviction.”¹¹⁶ In

¹¹⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 13 (19 October 1995) at 352 (Dave Johnson, Chair, Management Board of Cabinet).

¹¹¹ *Ibid.*

¹¹² Management Board Secretariat, *Labour Law Reform in the Ontario Public Service Employee Question and Answers*, (10 November 1995) at 2.

¹¹³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 13 (19 October 1995) at 352 (Dave Johnson, Chair, Management Board of Cabinet).

¹¹⁴ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 13 (19 October 1995) at 352-53 (Dave Johnson, Chair, Management Board of Cabinet).

¹¹⁵ *Crown Employees Collective Bargaining Act, 1993*, R.S.O. 1993, c. 38, s. 54(1).

¹¹⁶ Hadwen *et al.*, *supra* note 41 at 97.

particular, two employees that were each criminally convicted of sexual assault and discharged from employment won successful grievances against their discharge. Accordingly, the government amended *CECBA* so that a criminal conviction or discharge is considered conclusive evidence that the employee committed the act or omission in question. Once again, political concerns came to the fore.

Though not related to amendments to *CECBA*, it is worthwhile mentioning here that OPSEU did go on strike twice during the two-term Harris government. During the first strike, the government was somewhat engaged in the politics of the strike. OPSEU directed its venom directly at the Harris government and its policies. For its part, the government responded with a similar level of dialogue.¹¹⁷ At the same time, however, Johnson tended towards a more arm's length approach, refraining from bashing the union while emphasizing the role of process.¹¹⁸

F. Amendments under the McGuinty Government

In 2006, as part of a thorough reworking the *PSA*, the government amended *CECBA*, placing successor rights back into the Act.¹¹⁹ These provisions once again provided the same successor rights scheme under *CECBA* as under the *LRA*.

CECBA itself was, perhaps, on the table in August, 2008. In the middle of that month, MGS announced a consultation process which would focus on “modernizing Labour Relations in the OPS.”¹²⁰ The consultation process was to begin five days after the letter was dated. For the consultations, a facilitator was retained, and bargaining agents were summoned to attend up to nine days of consultations at a downtown Toronto hotel.

The materials and information provided by MGS prior to the meeting were scant – a 6-page PowerPoint slide deck was the main feature. In addition to calling for a “nimble” and “flexible” workforce, the slide deck announced that MGS was looking for a modernization which would allow the employer “to have the right resources in the right place at the right time.” It also highlighted a desire for the “[h]armonization of labour relations structures.” The existing bargaining unit structure was called into question, insofar as it related to correctional facilities, the OPP, and the “viability of small bargaining unite[s] such as PEGO”.¹²¹

Once the consultation process began, it quickly moved from plenary form into a series of one-on-one meetings between MGS and the various bargaining agents. Within two days of the beginning of the consultation process, a leading option emerged. This preferred option would have seen most of the AMAPCEO membership transferred without their consent (presumably via an amendment to *CECBA*) into OPSEU.

¹¹⁷ Martin Mittelstaedt & James Rusk, “Harris takes hardline with union, Premier sending signal to business” *The Globe and Mail* (27 February 1996), A1. (Harris: “I think they [OPSEU] were given this candy, this new tool, by Rae and they're determined to, you know, to go and use it and try it and I'm not so sure there was anything we could have done to stop them.”)

¹¹⁸ *Ibid.* (“There is a respected negotiation process in place here,” Mr. Johnson said. “For the government simply to come in and legislate, for example, is considered very heavy-handed. We also have to consider our working relationship with the union in future years.”)

¹¹⁹ Bill 158, *Public Service of Ontario Statute Law Amendment Act, 2006*, 2nd Sess., 38th Leg., Ontario, 2006.

¹²⁰ Letter from David Logan, Assistant Deputy Minister, MGS, to Gary Gannage, President, AMAPCEO (13 August 2008).

¹²¹ MGS, “Modernizing Labour Relations in the OPS: Consultations with Bargaining Agents” (PowerPoint slide deck, 13 August 2008).

OPSEU President Warren “Smokey” Thomas laid this out in a letter to his union’s local presidents and stewards. Thomas: “If approved by Cabinet and enacted, changes to the *Crown Employees Collective Bargaining Act (CECBA)* would transfer many positions represented by AMAPCEO to the OPSEU Unified bargaining unit, and also create a facilities-only bargaining unit for our members in Corrections.”¹²² Thomas went on to commend OPSEU’s negotiating team for its gains while staving off any take-aways. Finally, he cautioned that “proposals must be considered by the provincial Cabinet and the amendments passed into law, hopefully this fall, before any changes can come into effect.”¹²³

Concurrent with that letter, AMAPCEO staged a members’ rally denouncing the proposed changes near Queen’s Park. AMAPCEO also continued a campaign which featured the likes of encouraging members to bombard OPS senior management with emails detailing their displeasure with this attempt to ‘modernize’ the OPS.

However, over the following week, the thrust of the negotiations changed. Ultimately, a memorandum of agreement was entered into between MGS and AMAPCEO, PEGO and the OPPA. This memorandum saw some positions transferred out of AMAPCEO (though nowhere near the number that had previously been pursued) and into one of OPSEU or the OPPA. Further, AMAPCEO made concessions on certain outstanding issues of dispute between themselves and the employer. No amendments to *CECBA* were ultimately necessary.

None of this sat well with OPSEU. In a posting to OPSEU’s website, as well as in another letter to local presidents and stewards, Thomas decried the government for “squandering” a golden opportunity to modernize labour relations in the OPS.¹²⁴ To emphasize that union’s displeasure, OPSEU filed an unfair labour practice complaint with the Ontario Labour Relations Board.¹²⁵ Naming MGS, AMAPCEO, PEGO and the OPPA, OPSEU’s complaint stated that several sections of the *Labour Relations Act* were violated.¹²⁶ The complaint requested \$5 million in compensation for OPSEU.

4. Conclusion

The development of public sector labour relations law in Ontario has been uneven. While the general thrust has been towards normalization vis-à-vis the private sector format, those advances have been of the ‘two steps forward, one step back’ variety. These ‘steps back’ have been seen both when successor governments engage in retrenchment (e.g. Harris after Rae) as well as in legislative change which offers gains in one area while more firmly barring the door to change in another. Through the story of this legislative development in Ontario, we can off some analysis of the drivers of change.

A. Politics

Swimmer and Thompson conceive of public sector labour relations as essentially political, pointing to a government’s obvious concern with public opinion as a major driver of initiatives. As we have seen, political concerns were at the forefront at the early stages of development in this area. However, direct

¹²² Letter from Warren Thomas, President, OPSEU, to All Local Presidents and Stewards in the Ontario Public Service, OPSEU (4 September 2008).

¹²³ *Ibid.*

¹²⁴ *President’s Message: Historic Opportunity Squandered as Government Runs Scared*, online: OPSEU <<http://www.opseu.org/presidentsmessage/sept122008.htm>>

¹²⁵ *Ontario Public Service Employees’ Union and Ontario (Ministry of Government Services)* (Unfair Labour Practice Application, 12 September 2008, amended 10 October 2008).

¹²⁶ *Labour Relations Act*, R.S.O. 1995, c. 1, ss. 70, 72, 73(1), 73(2), & 76.

government control of labour relations had serious drawbacks. A questionable termination could – and did – lead to opposition attack. Thus, the government moved towards carving out a role for an employer-proper which could shield the government of the day from direct responsibility and accountability. As an employer-produced Q&A puts it: “There is a distinction between the government as employer and the government as legislator.”¹²⁷

There are, of course, issues which attract public scrutiny and create a need for politically-driven action (e.g. those amendments to *CECBA* driven by incidents of sexual abuse). But these are exceptions to the rule. The development of labour relations legislation in Ontario has seen depoliticization at the forefront. As we saw around the Keatinge hair-dye incident, the effort to depoliticize the sphere was an original driver of legislation. Through politically attaching themselves to labour relations, the government takes on a certain amount of risk in an area which promises scant rewards, given the lack of public attention focused on management of the public service. Thus, we can say that politics is a driver of legislative development in this area, insomuch as the government has worked to extricate itself from a primary role of responsibility.

B. Parties

Blais *et al.* found a relationship between party and ‘generosity’ to public employees. This has been borne out in this study. All of the original development of *CECBA* occurred under Conservative governance (the first steps were undertaken by a minority government). The most far-reaching – and most union-friendly – amendments were made by the NDP government. We then saw the Harris Conservatives amend the NDP-passed legislation, recrafting it in a manner more favourable to the employer. The McGuinty Liberal government has performed somewhere in the middle of the other two parties.

The performance of all three parties is as one would expect based on their distinct ideologies. That said, it is important to note that the differences between the parties’ performances are not vast. For example, though Harris promised to tear up the NDP changes, major features persisted, particularly the inclusion of the right to strike. Thus we can conclude that party matters. However, we do not careen from pole to pole as parties change. Though there are definite differences, there would appear to be widespread fundamental agreement on the character of public sector labour relations law – with each party favouring depoliticization.

C. Business-like government

NPM imports a business-type approach into public administration. The use of business methods leads, Warran argues, to a need to fundamentally alter much of the character of public sector labour relations. Specifically, for example, Warran points to the multiplicity of bargaining units in public sector entities as a problem for an employer seeking greater flexibility. Perhaps, then, it is no surprise to see that at both the Federal level (at the House of Commons) and at the provincial level (in the aborted 2008 attempt to amend *CECBA*) the employer side has made some initial efforts towards lessening the number of bargaining units.

Given the depoliticization of public sector labour relations, that more purely management concerns should come to the fore is not surprising. “Flexibility”, “nimbleness”, “having the right resources in the right place at the right time” are indicative of the chief concerns of the NPM era. Thus, we should

¹²⁷ *Employee Question and Answers*, *supra* note 112 at 4.

expect to see these sorts of concerns as the primary drivers of legislative change in the area of public sector labour relations.

Here, of course, the role of politics and party do re-enter the field. The corporate employer within the public service operates within the purview allowed them by legislation, and it is the government that enacts the legislation. The role of the party in power and the role of politics are, obviously, vital in the process of legislative development. Though one could reasonably expect an NDP government to be less enamoured with NPM principles than a Conservative one, this paper would argue that business-type concerns will remain core in the contemporary public service, no matter which party is in power. Business-type concerns will continue to drive change going forward. The role of politics and party may dictate the pace and extent of change, but the direction of the change will be one towards greater and greater similarity with the private sector and its labour relations statutes.