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File No.	141132

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BY E-MAIL: tyachnin@opseu.org

Thom Yachnin
Ontario Public Service Employees Union
100 Lesmill Road
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Dear Mr. Yachnin:

RE: Corrections Bargaining Unit and CECBA

You have asked for our opinion on the following general question:

> "Under the current provisions of CECBA, is it possible for the Union and Employer to negotiate a binding agreement, through the use of an Order in Council or some other mechanism, for a "stand alone" collective agreement for the Corrections Bargaining Unit (such that the Corrections Bargaining Unit is not covered by the terms of the central collective agreement referenced in section 25(1) of CECBA), or is it necessary for CECBA to be amended (opened up) for there to be a "stand alone" collective agreement for the Corrections bargaining unit?"

You have also asked us to take into review six considerations related to this general question. I will initially address the general question and then proceed to review the subsidiary considerations.

A. Legislative Context

1. CECBA

When the *Crown Employees Collective Bargaining Act* ("CECBA" or the "Act") was

amended by the Conservative government in 1995, the law continued the existence of seven bargaining units previously designated in 1993 by an Order in Council (s. 24.(1) of the Act). The description of these bargaining units was frozen until a collective agreement was negotiated after December 13, 1993 (s. 23(2)). OPSEU was designated as the bargaining agent for six of the seven designated bargaining units (s. 24(1)).

The collective bargaining regime established by the Act is bifurcated into central and local bargaining issues. With respect to central bargaining issues, section 25 of the Act provides the following statutory conditions which are relevant to this opinion:

- There is one collective agreement governing certain specified central issues in the designated bargaining units (s. 25(1)).
- No other collective agreement can deal with the specified central issues (s.25(2)).
- The designated bargaining units are deemed to be one bargaining unit for the purpose of the collective agreement governing the specified central issues (s.25(4)).
- The description of the deemed bargaining unit cannot be altered (s.25(5)).
- If more than one union represents the seven designated bargaining units, then there is a deemed certified council of trade unions for the purposes of the central collective agreement (s.25(7)).

It should be noted that s. 54 of the Act provides that bargaining unit descriptions under CECBA can be altered under the *Labour Relations Act* after the first collective agreement is made under the new legislation. However, s. 54(3) provides that s. 54 does not apply to a bargaining unit continued by s. 23, namely the seven designated units, which include the Corrections Bargaining Unit.

With respect to local bargaining issues, CECBA contemplates separate local collective agreements. Under s. 26 of the Act, the employer and the bargaining agent can negotiate a collective agreement governing issues which are not specified as central issues under the *Act* for each bargaining unit.

2. The Present Bargaining Structure

We are advised that prior to the 2002 round of collective bargaining, the government of Ontario and OPSEU agreed to consolidate five occupational bargaining units into the "Unified Bargaining Unit". The sixth bargaining unit continued to be the Corrections

Bargaining Unit. Under s. 25(4) of the Act, these six bargaining units[1] are part of the "deemed" unitary bargaining unit for central bargaining and cannot be altered in light of s. 25(5).

Under the present scheme there is a Central Working Conditions Collective Agreement with a term of January 1, 2013 to December 31, 2014. This agreement applies to all six bargaining units that are deemed to be one bargaining unit under the *Act*. The first part of the agreement deals with the "Central Working Conditions and Employee Benefits Collective Agreement" ("Central Agreement"). The second part of the agreement sets out the collective agreement on local issues for the Unified Bargaining Unit. The final part of the agreement sets out the collective agreement on local issues for the Corrections Bargaining Unit. Finally, Article 1.1 of the Central Agreement provides for the following recognition clause:

> "1.1 The Ontario Public Service Employees Union (OPSEU) is recognized as the exclusive bargaining agent for a bargaining unit consisting of all employees employed within the two bargaining units (Unified and Correctional) which are the successor units to the six bargaining units as described by the Lieutenant Governor in Council in OIC 243/94 dated February 3, 1994, in the Tripartite Agreement between the Crown, OPSEU and AMAPCEO dated April 21, 1995, plus those employees included in the six bargaining units by the agreement of the Crown and OPSEU from February 3, 1994 to December 31, 2008".

B. Analysis Of Central Issue: Can The Corrections Bargaining Unit Negotiate A "Standalone" Collective Agreement?

The question at issue is whether a "stand alone" collective agreement for the Corrections Bargaining Unit can be established by a mechanism other than an amendment to CECBA. Other mechanisms could include an agreement between the parties supported by an Order in Council, regulation or other executive legal instrument.

In our opinion, a "stand alone" collective agreement for the Corrections Bargaining Unit can only be accomplished by an amendment to CECBA. As specified above, s. 25 of CECBA sets out three statutory prohibitions which preclude a "stand alone" collective agreement:

(i) only one collective agreement can deal with the specified central issues;

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[1] In addition there is a seventh bargaining unit, which is represented by AMAPCEO. This creates legal problems referred to below in light of the wording of s.25.

(ii) the designated bargaining units, including the Corrections Bargaining Unit, are deemed to be one bargaining unit for the purposes of the Central Agreement; and

(iii) the description of the deemed bargaining unit cannot be altered.

The legislation is clear and unequivocal. In our system of legislative supremacy, no executive instrument whether it be an Order in Council or a Regulation, can conflict with legislation. Moreover, there is nothing in CECBA which gives the Crown the power or authority to override CECBA vis-à-vis the bargaining units structure. In short, in light of s. 25 of the Act, the legislation would have to be amended in order to establish a "stand alone" Corrections Bargaining Unit.

It should be noted that the present collective bargaining arrangements under CECBA seem to be inconsistent in part with the wording of the Act. For example, both OPSEU and AMAPCEO represent the seven designated bargaining units. However, there is more than one central collective agreement (one for OPSEU represented bargaining units and one for AMAPCEO represented bargaining unit) and there is no certified council of unions for the purposes of the central agreement contrary to the wording of s. 25 of CECBA. This anomaly was recognized by the Ontario Labour Relations Board in the *PSAC* case: [2014] O.L.R.D. No. 348. At paragraph 47, the Board stated:

> "Counsel acknowledged that the Crown, OPSEU and AMAPCEO have not strictly observed the terms of CECBA, due to errors contained in the legislation which it enacted in 1994. However, counsel argued that the fact that the Crown, OPSEU and AMAPCEO have agreed upon different structures for bargaining does not mean that CECBA is spent. He argues that the fundamental bargaining structure established by CECBA remains the same."

This case is currently before the Board.

In our view, these anomalies do not permit the Crown or any party to agree to an arrangement which is in conflict with the wording of CECBA regardless of whether such an agreement is supported by an executive instrument such as an Order in Council or Regulation. As mentioned, in our legal system the legislature is supreme, subject only to the constitution. Once the legislature enacts legislation such as CECBA, no person, including the Crown, can defy the law without express statutory authorization. Whatever the reasons for the anomalies in the current bargaining structures, they do not give license to act contrary to the law and the clear wording of CECBA.

It should also be noted that we were advised of a process of discussion in August and September, 2008 before Christopher Albertyn as Facilitator in which the employer and CECBA bargaining agents discussed a reconfiguration of bargaining units under

CECBA, including the Corrections Bargaining Unit. The employer wanted the unit restructured so that all bargaining unit employees who work in the correctional facilities would be placed in the OPSEU Corrections Bargaining Unit. However, no consensus was reached in these discussions. As a result, one cannot infer any legal conclusion from these discussions. Under the law, if a consensus was reached that was inconsistent with s. 25 of CECBA, then such consensus would have to be implemented by way of a legislative amendment for the reasons referred to above. As long ago as the *Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373, in which OPSEU participated, the Supreme Court of Canada ruled that an executive act, such as an Order in Council, cannot be inconsistent with a statute.

C. Subsidiary Considerations

Below, we provide our analysis of the six considerations that you asked us to review in our analysis.

1. The practice of OPSEU and the Crown of deferring the negotiating of the essential services agreement until the point that an impasse is reached at the bargaining table, as opposed to at the time set out in section 33(1) of CECBA

Section 33(2) of the *Act* permits the parties to agree to negotiate at a time other than the time lines specified in s.33(1). Accordingly, such a practice is not inconsistent with CECBA.

2. The creation of a seventh bargaining unit, now represented by AMAPCEO, by Order in Council, and the practice of not having OPSEU and AMAPCEO bargain as a council of trade unions governed by a central collective agreement, and to instead have the AMAPCEO unit governed by a "stand alone" collective agreement, in light of sections 23(1), 25(1), 25(2), 25(4) and 25(7) of CECBA and Order in Council 243/94 as incorporated in the 2013-2014 Central collective agreement at Appendix 2 on pg. 1562

The bargaining structures utilized by AMAPCEO are referred to above. As stated, these structures are inconsistent with the wording of s. 25 of CECBA and as such the arrangement is legally problematic. Even the Crown, as a party to the AMAPCEO bargaining structure, is not legally entitled to act contrary to the statute.

3. The fact that OPSEU and the Crown have negotiated to move members between different bargaining units (ie. the movement of

Probation and Parole Officers into the Corrections bargaining unit), given the language of sections 23(1) and 25(5) of CECBA

Like the other designated bargaining units, the description of the Corrections Bargaining Unit can be amended in accordance with s. 23(2) of CECBA so long as the change occurs after the first collective agreement entered into after December 13, 1993. The movement of Probation and Parole Officers to the Corrections Bargaining Unit was an amendment to the description of the two bargaining units involved within the meaning of s. 23(2) of CECBA.

4. The agreement of the parties to collapse the six bargaining units represented by OPSEU into the Unified and Corrections bargaining units, given the language of section 23(1) of CECBA.

The creation of the Unified Bargaining Unit is also permitted by s. 23(2) of CECBA as the Act contemplates that the OPSEU designated bargaining units can be changed after the first collective agreement entered into after December 13, 1993.

5. The removal of the civilian employees of the OPP from the Unified bargaining unit to the OPPA, given the language of section 23(1) of CECBA

The removal of the civilian employees of the OPP from the Unified Bargaining Unit to the OPPA appears to have been permitted by an amendment to the *Public Service Act* ("*PSA*") in 2001. In this regard, we refer to T. Hadwen et al., *Ontario Public Service Employment Labour Law* at p.312:

> "The legislation[2] amended the *PSA* to establish a collective bargaining section for OPP civilians. Prior to 2001, civilian employees of the OPP were included in the appropriate Ontario Public Service (OPS) bargaining units represented by three *CECBA* unions, OPSEU, the Association of Management Administrative and Professional Crown Employees of Ontario (AMAPCEO) and the Professional Engineers of the Government of Ontario (PEGO). The 2001 *PSA* amendments allowed the OPPA to displace the *CECBA* unions as the exclusive bargaining agent for the civilian OPP employees.[3] The amendments to the *PSA* defined periods when the OPPA had one opportunity to file the displacement application

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[2] Footnote 432: *Public Service Amendment Act,* S.O. 2001, s.7,s.12, introducing *PSA,* S.28.0.1-28.0.9.

[3] Footnote 433: *PSA*, R.S.O. 1990, c.P.47, s.28.0.1-28.0.10

with the OLRB.[4] The OPPA brought a successful application to displace OPSEU's bargaining rights with respect to OPP civilian employees.[5] Therefore, the OPPA now represents two bargaining units of persons associated with the OPP. One bargaining unit consists of members of the OPP force and the other consists of civilian employees of the OPP."

6. The fact that pensions have not been included in the central collective agreement, in light of the language of section 25(1)(4) of CECBA

The *Ontario Public Service Employees' Union Pension Act, 1994*, SO 1994, c 17, Sch. establishes and regulates the OPSEU Pension Plan. Section 3(1) of that Act provides that it applies despite any other statute. As such, the negotiation and inclusion of pensions outside the central collective agreement is legally permitted notwithstanding s. 25(1)(4) of CECBA.

D. Conclusion

In summary, the above six considerations do not alter our opinion that a legislative enactment or amendment is required to achieve a "stand alone" collective agreement for the Corrections Bargaining Unit.

We hope that this opinion will be of assistance to you. If you have any questions or comments, were would be pleased to discuss them with you.

Yours very truly,

CAVALLUZZO SHILTON MCINTYRE CORNISH LLP

Paul J.J. Cavalluzzo
PC/it

[4] Footnote 434: The application had to be brought during the last three months of the current collective agreement of the *CECBA* bargaining agent then representing the employees: *Public Service Act,* s.28.0.2(2)2.

[5] Footnote 435: *Ontario (Management Board of Cabinet),* [2001] O.L.R.D. No.4581