



**SUBMISSION OF THE
ONTARIO PUBLIC SERVICE EMPLOYEES UNION
TO THE REVIEW OF THE *COLLEGES*
*COLLECTIVE BARGAINING ACT***

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Introduction

The Ontario Public Service Employees Union (OPSEU) represents over 125,000 workers in many areas of public service throughout the Province of Ontario. In the college sector, we represent over 17,000 full-time college workers – in both academic and support staff in the 24 Colleges of Applied Arts and Technology (commonly known as CAAT). We welcome the opportunity to present OPSEU's views to your review of the *Colleges Collective Bargaining Act*.

We are pleased that the Ontario Government has finally recognized the patent injustice of the continued exclusion of the approximately 18,000 part-time and “sessional” college workers¹ from participation in any form of collective bargaining. We are also pleased that remedying this unconstitutional situation is the focus of this statutory review.

As you are of course aware, OPSEU has consistently sought redress for the part-time employees in the college system. It has brought applications for certification on their behalf and has brought a constitutional challenge on their behalf,² it has sought a remedy at the International Labour Organization through the aegis of its national union, the National Union of Public and Government Employees,³ and it has expended time and energy bargaining terms and conditions of employment in the full time collective agreements which have benefited college workers.

OPSEU has also assisted in the formation in 2006 of the Organization of Part-time and Sessional Employees of the Colleges of Applied Arts and Technology (“OPSECAAT”) to help with the mobilization of these excluded employees. Most recently, and as is well-known, OPSEU itself has embarked upon an organizing

¹ Although recognizing that “sessional” academic employees are not “part-time”, for ease of reference in this submission we will use of the term “part-time” to refer to both sessional and part-time employees at the colleges unless the context requires otherwise.

² *Sault College of Applied Arts and Technology* [1985] OLRB Rep. August 1293.

³ International Labour Organization, 343^d *Report of the Committee on Freedom Association*, Case No. 2430, November 2006.

campaign to ensure that these employees are collectively represented in their employment at the colleges.

No other trade union has the depth of experience in the college sector as has been developed by OPSEU. Indeed, no other trade union than OPSEU has represented or, to our knowledge, even sought to represent employees in the Ontario college sector. We therefore speak as the voice of the employees of the colleges.

It is from this experience in the college sector that OPSEU urges you to focus on the main purpose of this review, i.e., *the inclusion of workers currently excluded from collective bargaining*. While it may be tempting to attempt to achieve a consensus concerning other areas where the *Colleges Collective Bargaining Act* may be reformed, we would caution against such an approach. The workplace parties have lived with and bargained under the current Act for over 30 years. They understand its provisions and have conducted themselves according to its norms. Such a collective bargaining structure should not be tampered with lightly. Any party seeking a change to the current Act ought to bear a heavy onus which clearly and convincingly demonstrates why such a change is in the interest of the system, and not merely in the narrow interests of a particular party.

It is OPSEU's respectful submission, as set out in greater detail in this brief, that the current system of collective bargaining as mandated by the *CCBA* has served the parties, the students, and the public well over the more than thirty years of its existence. The parties have bargained over 30 collective agreements over this period. There have been few work stoppages or interruptions in the college education system during this time. As a result of the collective bargaining process contained in the *CCBA*, the parties have constructed a rational and non-arbitrary basis for the employment of over 17,000 college employees which has, in turn, provided the basis for a reliable and high-quality education system across the Province. It is apparent that the current collective bargaining system works

well. It is equally apparent that the only serious problem that needs legislative addressing is the unjustifiable exclusion of so many employees from that system.

As you are aware, the Supreme Court of Canada's decision in the *B.C. Health Services* case⁴ has prompted the Government's initiative to review the *CCBA*. We note that this decision not only recognizes that access to collective bargaining is a constitutional right, it also recognizes that this right extends to access to a collective bargaining process that must meaningfully address the working conditions of the employees concerned. OPSEU states that nothing less than full access to the current *CCBA* collective bargaining process – which provides the “normal” mechanisms of collective representation enjoyed by almost all other workers in Canadian society - is sufficient to satisfy this important constitutional requirement. There is simply no rational policy justification for any measure short of this.

With this in mind, OPSEU is concerned that there may be a perception that since employees are “gaining” collective bargaining rights, something must be given to employers to “balance” the current legislative initiative. This perception, we say, fundamentally misconstrues the nature of constitutional rights. Such a perception, we say further, wrongly the question of what the current remedial exercise is “about”, *i.e.*, *the righting of a historical wrong*. Employees and their trade unions should not have to pay for these rights by having other statutory rights diminished.

OPSEU is firmly of the view that the sole issue that is not in balance in the current *CCBA* system is the exclusion of the colleges' part-time workers. The Supreme Court of Canada has mandated the extension of collective bargaining rights to these workers. The exclusion of part-time workers is what the

⁴ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27.

Government has clearly signaled an intention to eliminate. We respectfully submit that that should remain the focus of your review.

Question 1: What is the appropriate collective bargaining model (central, local, two- tier)?

OPSEU strongly supports the retention of a central, province-wide bargaining structure as the locus for collective bargaining in the college system. We believe that this system has worked to produce a stable, coherent system of employment in Ontario's colleges for those employees eligible for collective bargaining. Further, the central bargaining structure is reflective of the province-wide college system and, in turn, encourages the consistent high-quality service delivery to students across the province. Particularly with the advent of collective bargaining for part-time and excluded employees – who have long worked within an arbitrary and unsettled employment relationship- - we believe that a centralized collective bargaining structure is now of even greater importance.

As is the case in many other aspects of the collective bargaining system under the current *Colleges Collective Bargaining Act*, the central bargaining model has worked for the parties:

- Collective agreements having applicability to each of the colleges in the Province have been reached without resort to strike action in all but four of the rounds of bargaining since the inception of collective bargaining under the *CCBA* in 1975 and only on two occasions since 1985;
- The participants in the collective bargaining process are required to negotiate only two contracts on a periodic basis to administer the employment of over 17,000 employees; by any estimation, this is a remarkably efficient utilization of the parties' (and the public's) resources - certainly when compared to the prospect of up to 96 separate rounds of

bargaining;⁵

- These collective agreements have established, for the employees of the college system eligible to engage in collective bargaining, a rational and non-arbitrary basis upon which their employment relationship is regulated and administered;
- This system, in turn, has the effect of preventing competition between colleges for staff and resources, thereby permitting colleges to focus more squarely on their educational mandates;
- A centralized bargaining process also has the clear benefit of providing the Government with stable projections for funding of the colleges, a process that would be hindered or perhaps rendered impossible were costs to be dependent upon the results of up to 96 rounds of collective agreement negotiations.

The parties are sophisticated participants in collective bargaining. They have learned to successfully manage the province-wide system for over thirty years. We do not believe that the present time – i.e., the advent of a new dimension of collective bargaining by virtue of the inclusion of the part-time employees - is an appropriate time to engage in significant changes to the locus of the collective bargaining process. We respectfully submit that this would be a recipe for labour relations disruption and destabilization because it would undermine the essential labour relations interest in vesting a bargaining agent with exclusive bargaining rights in respect of employees' terms and conditions of employment.

Further, OPSEU wishes to point out that, despite the centralized focus of the collective bargaining process, it is not unresponsive to the particularity of issues

⁵ As would be the case were there to be college-by-college bargaining and a bargaining unit configuration of separate full-time and part-time academic and support staff units.

that may arise in a specific college, colleges, or region. Local issues can and should be bargained in order for the collective bargaining process to remain responsive to the needs of its environment. However, we are of the view that the scope and the extent of that local bargaining ought not to be statutorily mandated, but determined by the collective bargaining parties themselves.

Indeed, there are already significant provisions in the collective agreements between parties either procedurally facilitating collective bargaining at a local college level, or that are themselves the products of local collective bargaining.

The current academic collective agreement⁶ specifically provides for a wide range of processes and *fora* in which the local workplace parties are able to address the issues that may relate to a specific college, including the reaching of agreements:

- The appointment and operation of a Union College Committee with the power to address the local application of the agreement.⁷
- The establishment of an Employee/Employer Relations Committee (E.E.R.C.) that will consider matters of a local college concern.⁸
- Provision for binding local agreements between the union local and a college governing workload assignments that must be followed in timetable creation.⁹

⁶ 36.02 Negotiations shall begin within 30 days following notification for amendment as provided in 36.01.

Proposals having application to an individual College only which the parties to this Agreement agree are appropriate for discussion at meetings directly between a College Committee of three members (as appointed under 7.01) shall be held at mutually agreed dates during the period of one month following receipt of the notification referred to in 36.01.

Failing settlement, such proposal(s) may then be included as matters for discussion in the negotiations between the parties of this Agreement.

⁷ Article 7.03 of the Academic Collective Agreement.

⁸ Article 9.03C of the Academic Collective Agreement.

⁹ Article 11.01M of the Academic Collective Agreement.

- The establishment of a Workload Monitoring Group (WMG) at each college that can be composed according to agreements made at the local level between the union local and the college.¹⁰
- The power of the WMG to review individual workload assignments where requested at the local level and to make recommendations as to amendments or binding additions to the provisions governing workload assignments at the college for local negotiation in accordance to address the particular workload needs at the college.¹¹
- The joint selection of one or more Workload Resolution Arbitrator (WRA) by the college President or the President's designee and the union local president.¹²
- The establishment of a College Employment Stability Committee (CESC) at each college to deal with layoffs¹³ and displacements through technological change¹⁴ and make recommendations regarding the enhancement of local employment stability, including identifying local adaptations of other provisions of the Agreement which may have an impact on employment stability.¹⁵
- The availability of an expedited arbitration process agreed to by the union local and the college.¹⁶
- Return-to-Work policy.¹⁷

¹⁰ Article 11.02 B 2 of the Academic Collective Agreement.

¹¹ Articles 11.02 C1, 11.02 D4, 11.02 D5 and 11.02 G of the Academic Collective Agreement.

¹² Article 11.02 F1 of the Academic Collective Agreement.

¹³ Article 29 of the Academic Collective Agreement.

¹⁴ Article 30 of the Academic Collective Agreement.

¹⁵ Articles 28.03 and 28.05(iii) of the Academic Collective Agreement.

¹⁶ Article 33 of the Academic Collective Agreement.

¹⁷ Letter of Understanding re: Return-to-Work, dated June 28, 2006.

- The facilitation of employment equity.¹⁸

Moreover, in the last round of academic bargaining, the colleges tabled bargaining proposals that would allow for the local development of alternatives to the collective agreement workload provisions. The parties reached a lengthy Letter of Understanding¹⁹ which provides for the local development and implementation of workload “pilot projects”. While it may be too early to evaluate the success of these alternative workload provisions, their very existence is testimony to the ability of the central parties to provide for local flexibility in a centralized bargaining framework.

The OPSEU support staff collective agreement facilitates an even broader range of collective bargaining at the local level. Issues such as the following are each, to greater or lesser extent, handled locally by the college workplace parties:

- The extension of the twelve month period for (non-bargaining unit) projects of a non-recurring kind;²⁰
- The establishment and operation of a Union College/Campus Committee,²¹ to deal with a wide variety of local employment matters;
- Arrangements for time off for Union business;²²
- Arrangements for flexible work hours;²³
- Extension of “prior arrangements” concerning occupational health and safety;²⁴

¹⁸ Letter of Understanding re: Employment Equity, dated June 28, 2006.

¹⁹ Letter of Understanding re : Workload Pilot Projects, Dated June 28, 2006.

²⁰ Article 1.6 Support Staff Collective Agreement.

²¹ Article 4 Support Staff Collective Agreement.

²² Article 4.2.2 Support Staff Collective Agreement.

²³ Article 6.1.4 Support Staff Collective Agreement.

- Employment stability process, including the establishment of a local committee, advancement of “strategies”, and arbitrator selection;²⁵
- Determination of seniority for excluded positions;²⁶
- Extension of time limits for grievances, agreement to “full board arbitration panels”, the site of arbitrations, and the use of external counsel;²⁷
- Arrangements concerning standby;²⁸
- VDT and EERC matters;²⁹
- Return to work process.³⁰

It may be that the Employer bargaining agent and some of the colleges remain dissatisfied with the extent of these collective bargaining outcomes, and that they may be proposing to you recommendations that would *statutorily mandate* a greater degree of local participation in the collective bargaining process. We strongly urge you to reject such requests. OPSEU believes that the process of free collective bargaining already provides the Employer entity with ample opportunity to prioritize local bargaining as a collective bargaining objective, and to seek to establish its venues and processes in the collective agreement between the parties. OPSEU objects to the employer entity attempting to utilize the statutory reform process to obtain what ought to and has been attainable at the collective bargaining table. We therefore recommend no change to the language in the *CCBA* mandating centralized collective bargaining, and further

²⁴ Article 13.3 Support Staff Collective Agreement.

²⁵ Article 14 Support Staff Collective Agreement.

²⁶ Article 17.3.2 Support Staff Collective Agreement.

²⁷ Article 18 Support Collective Agreement.

²⁸ Letter of Intent, December 18, 2003.

²⁹ Letter of Intent, June 23, 1983.

³⁰ Letter of Intent, December 18, 2003.

recommend no additional language mandating local collective bargaining because it is unnecessary.

Question 2: What are the appropriate bargaining unit descriptions?

It is now the general collective bargaining norm that broader-based, more-inclusive bargaining unit structures are optimal for both the negotiation and administration of collective agreements. OPSEU believes that the rationale favouring such structures has applicability in the present context, and that there are clear advantages to a bargaining structure comprised of two bargaining units (one of all full time and part-time academic employees and one of all full time and part-time support employees). These advantages include:

- **bargaining and administrative efficiency:** there would be only two sets of negotiations, and only two sets of administrations required to administer the collective agreements;
- **common terms and conditions of employment:** one of the central achievements of collective bargaining – and one of the obvious problems arising out of the current exclusion of part-time personnel – is the establishment of rational remuneration structures for essentially similar work both within the colleges individually, but also across the entire college system;
- **elimination of jurisdictional disputes:** in the absence of jurisdictional lines between part-time and full-time units, the possibility of work jurisdiction disputes would be reduced if not removed entirely;
- **elimination of “whipsawing” possibilities:** with single units in both the academic and the support areas, the collective bargaining parties would be precluded from engaging in inefficient and frequently destructive strategies of playing off one group against the other;

- **formulation of rational career trajectories inside each bargaining unit:** individual employees, in a unified bargaining structure, would be able to pursue career opportunities in their areas of work without being confronted with what appear to them to be artificial barriers to their progress.

OPSEU believes that these traditional collective bargaining values would be significantly enhanced by a two unit “all employee” structure at the colleges. The incorporation of the part-time and excluded employees into the existing bargaining unit structure would expedite the achievement of equitable working conditions for the formerly excluded employees and go a significant distance towards righting the historical wrong of their exclusion from collective bargaining for so many years.

In particular, OPSEU sees no serious barriers to the integration of part-time support employees into the existing support bargaining unit, and it is our strong recommendation that the legislation immediately make provision for a single unit for these employees. In most cases, these excluded part-time support employees perform the same kind of work as their full-time colleagues. In many cases, that work is performed literally side-by-side, with only the numbers of hours an employee works per week determining whether or not they are paid according to the terms of the collective agreement.

Moreover, the current collective agreement regulating the terms and conditions of employment for full-time support staff employees could, with relatively minor amendments, be adapted through negotiation to the employment realities of their part-time colleagues. In particular,³¹ the classification and payband system established in the support staff collective agreement are of a generic nature and can with relative ease accommodate the work functions that are performed by the currently excluded support staff employees. Further, the existing seniority

³¹ Article 7 Support Staff Collective Agreement.

system in the full time unit already contemplates a proration of service accumulated into the part-time unit,³² making the integration of new members into the unit a relatively simple matter in this respect.

OPSEU endorses the principle of a two unit structure and recognizes the labour relations benefits of larger more comprehensive bargaining units in the college system. OPSEU is also strongly of the view that any bargaining unit structure needs to be province-wide and that collective bargaining be conducted centrally.

Nevertheless, the practical reality of the exclusion of part-time and sessional employees from all collective bargaining for over 30 years will necessarily entail transitional, integration and representational issues that may cause you to consider it inappropriate to proceed immediately to a two bargaining unit structure, and for you to determine that what is appropriate in the circumstances is a three or four bargaining unit structure, with separate units for either or both of the currently excluded part-time support and academic employees (including the sessionals).

OPSEU accepts that, in certain circumstances, there may be divergences in interest between employees who are currently considered part-time and those that are now considered full-time. However, OPSEU is concerned that many of such differences between full and part-time employees are the product of their historical exclusion from collective bargaining and that they may disappear over time. It is reasonably clear that many of the present forms of employment, particularly in the academic sector will be substantially altered by collective bargaining. We strongly urge you to consider them the product of the current (irrational) bargaining unit structure, rather than the driver of the current legislative initiative. We believe that it would be a serious mistake to lock in for another generation a bargaining unit configuration which reflects transitional concerns.

³² Article 14.3, Support Staff Collective Agreement.

For that reason, OPSEU strongly recommends that, were you to determine that a three or four bargaining unit structure be the appropriate configuration today, that it nevertheless be subject to a fulsome statutory process of review of that bargaining unit structure in the new legislation. Our proposal contemplates that such a review could be initiated by any of the collective bargaining parties, and would be applicable to either the support or the academic units, or both. Such a review, we further propose, should be conducted by a neutral third party. Our preference is for a review process similar to that currently exercised by the Canada Industrial Relations Board pursuant to the provisions of the *Canada Labour Code*,³³ and would enable parties to collective bargaining to have relief from a bargaining structure that is flawed or no longer serving its purpose. We recommend, finally, that such a power be vested in the Ontario Labour Relations Board under a reformed *Colleges Collective Bargaining Act*.

³³ Section 18.1, *Canada Labour Code*.

Question 3: Who should represent the Colleges in bargaining?

As the trade union representing employees in the colleges system, OPSEU has a direct interest in ensuring that the representative body for the colleges has a strong statutory mandate to fully participate in the central collective bargaining process. We believe that such a mandate is essential to preserving the efficacy and viability of the central collective bargaining system, and in ensuring that the various college participants in it have a strong sense of the legitimacy of its outcomes. While we are not, in the circumstances, prepared to make detailed recommendations in this regard, we are of the view that the entity bargaining on behalf of the colleges must be sufficiently representative of the various constituencies amongst the colleges, and be understood to be such, so as to ensure that its decision-making processes are not undermined by divergent individual college interests once difficult decisions must be made. In short, the Union needs a bargaining counterpart with whom it may make binding and enduring agreements in the central bargaining context.

Further, OPSEU is acutely aware that the Government is a critical funding source for the college system in Ontario, and therefore considers it to be unrealistic to structure an independent bargaining agent model in the college system analogous to the agency system in place in the construction industry pursuant to the *Ontario Labour Relations Act*. As one of the central payers in the system, and more importantly, the political entity ultimately responsible for outcomes in the post-secondary educational system in Ontario, the Provincial Government ought to retain a significant role in the process by which the Employer bargaining entity is structured and its incumbents selected. The elimination of such a role, we believe, would create a vacuum at the bargaining table, and would impede the process of collective bargaining.

Finally, OPSEU wishes to recommend an extension to the role played by the Employer bargaining entity during the term of the collective agreement to ensure the further viability of the central collective bargaining system. Currently, of course, the statute provides a role for the College Compensation and Appointments Council exclusively in respect of the *negotiation* of collective agreements, and little if any formal role in any subsequent process, including collective agreement administration. Further, the *Colleges Collective Bargaining Act* contemplates collective agreement negotiation itself to take place on a periodic basis, leaving little formal room for the resolution of province-wide problems in the interim. OPSEU has a direct interest in ensuring that it has a bargaining counterpart to deal with system-wide issues in mid-contract. Doing so, we respectfully submit, may serve to legitimize the irreducibly province-wide nature of the collective bargaining system for the Employer participants. We therefore suggest that the provision of a mandate to deal with system-wide issues during the term of a collective agreement would significantly enhance the operation of the overall collective bargaining system.

Question 4: Should any categories of employees be excluded from collective bargaining?

There are two main categories of employees excluded from collective bargaining in the Ontario college system, together with additional minor types of exclusion. We will deal with each of these separately.

(i) “Managerial and Confidential” Exclusions

The first category consists of employees excluded due to the definition of “person employed in a managerial and confidential capacity” in s. 1 of the *CCBA*. This exclusion, dating from 1975, was typical of many “managerial and confidential” exclusions contained in public sector labour relations of the time. For example, the *Crown Employees Collective Bargaining Act* prior to its amendments in 1993 contained similar exclusion language. There is no question that the above definition would serve to exclude more employees than would be excluded under traditional OLRA criteria. Most notably, persons under the OLRA who are “confidential” to other excluded employees are not automatically excluded under the OLRA criteria whereas they are excluded pursuant to clause (d) of the definition of “managerial and confidential” under the *CCBA*.

With some reluctance and for largely practical reasons, it is our position that the current categories of “managerial and confidential” exclusions should be maintained. Once again, the parties have lived under this regime for over 30 years. Many of the employees in “excluded” positions have considerable years of service, different terms and conditions of employment and have generally become, over many years, part of the “management team” at the particular college. Work has been allocated to them that might have to be removed if they were included in a bargaining unit. There would also be benefit, seniority, years

of service, bumping and layoff, and job promotion integration issues if these employees were placed into one of the existing bargaining units.

We note, in addition, that the number of affected employees is likely to be very small, (perhaps one or two employees in some of the smaller colleges). Despite OPSEU's active campaign to include currently excluded employees, we are unaware of any requests from these employees to be placed into a bargaining unit. Indeed, it is highly likely that certain employees who view themselves (and are viewed by others) as part of the management team may not wish to be placed in a bargaining unit and, in turn, certain unionized employees may also be uncomfortable with their entry into the unit. For example, existing employees may be "bumped" by longer-service, newly- included employees in the event of layoffs depending on how seniority rights are interpreted under the existing collective agreements.

To be clear, OPSEU is *not* taking the position that employee wishes ought to determine the issue of whether the exclusion criteria should be changed. We merely point out that there will be significant integration issues should these formerly "managerial or confidential" employees be placed into one of the existing bargaining units, and that the absence of any interest in this occurring by the participants in the process ought to be considered a critical factor, particularly in light of the difficulties to the parties and to the employee participants that such inclusions may engender. Certainly, if the experience of the analogous changes to the *Crown Employees Collective Bargaining Act* is to be a guide, it is likely that there will be considerable corrosive litigation over the matter which may even overshadow the far more significant issue of the inclusion into the collective bargaining system of the part-time employees at the various colleges.

In our view and for the above reasons, the existing "managerial and confidential" exclusion criteria serve the needs of the parties adequately. For practical reasons, we submit, they should not be amended.

(ii) “Part-time Exclusions”

The second main type of exclusion is found in the definition of “employee” in s. 1 of the *CCBA* which then references Schedules 1 and 2 to the Act (the bargaining unit definitions).

In Schedule 1 (the description of the Academic bargaining unit),

“(vi) teachers who teach for six hours or less per week”,

“(vii) counsellors and librarians employed on a part-time basis”,

“(viii) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty-four month period (commonly referred to as “sessionals”)

are all excluded from the *CCBA* and are excluded from any other statutory collective bargaining regime.

In Schedule 2 (the description of the Support Staff bargaining unit),

“(vi) persons regularly employed for not more than twenty-four hours per week”, and

“(ix) a person engaged for a project of a non-recurring kind”

are all excluded from the *CCBA* and are also excluded from any other statutory collective bargaining regime.

These categories of exclusions are colloquially referred to as the “part-time exclusions” (even though some of the excluded individuals are in fact employed on a full time albeit time limited basis, e.g., “sessional” instructors).

It is, of course, OPSEU’s position that the part-time exclusions can no longer be maintained. These exclusions are a historical wrong. It is no longer debatable that such exclusions are unconstitutional. There can be no policy justification for their continued exclusion from collective bargaining and we believe that the Government has correctly recognized this reality and made the part-time exclusion issue the focus of this *CCBA* review. Therefore, we strongly urge you to recommend to the Government that the “part-time” exclusions, including sessionals, be removed from the *CCBA* and that those categories of employees be allowed to enjoy the same rights as included employees.

(iii) Other Exclusions

There are other exclusions (such as a “professional exclusion”, and certain categories of students). Given that most professionals are also excluded from collective bargaining legislation of general application, OPSEU does not consider it necessary to amend this exclusion.

The student exclusion merits comment. Students are frequently employed by colleges on a part-time or temporary basis. Where a student is employed in a regular support position (and which is not related to their course of study or to a certification or licensing requirement—the language of the exclusion criteria in Schedule 2) and works more than twenty-four hours a week, they are included in the bargaining unit. For example, students “employed during the summer vacation period” are not excluded from collective bargaining. However, students employed on a part-time basis are excluded by the part-time exclusion. OPSEU’s position is that all employees including students doing regular

“bargaining unit” work (e.g., working in the bookstore) should be eligible for collective bargaining.

However, where the employment is related to their course of study, e.g., a co-op program or is associated with a “certification, registration, or other licensing requirement” where the student has graduated from a college and during the twelve month post-graduation period, OPSEU believes it is in the best interests of the system and the students that those two “student” exclusions be maintained. Students must be able to complete “practical” or job experience parts of their education and this type of employment fits uneasily into a collective bargaining framework. Therefore, exclusions (vii) and (viii) of Schedule 2 should be maintained.

For the reasons stated above, OPSEU strongly recommends that the exclusions commonly referred to as the “part-time” exclusions be removed from the *CCBA* and that these employees should be permitted to enjoy the same rights as other “employees”. The other exclusion criteria should be left untouched.

Question 5: What is the appropriate bargaining agent certification process?

(i) Need for an “Initial” Certification Process

Because, historically, OPSEU was designated as the bargaining agent for the two statutorily-defined bargaining units (Schedules 1 and 2) and its bargaining rights therefore pre-dated the advent of the current legislation, the *CCBA* does not include within it any real “certification” process. Sections 66 through 71, which do provide for displacement of the bargaining agent in one of the designated units, would not be capable, we believe, of adequately supporting an “initial” certification process.

OPSEU assumes that those employees who have been wrongly excluded from collective bargaining (known as the “part-time” excluded) will be permitted to engage in collective bargaining under the *CCBA*. We have already provided you a rationale why those employees should be *directly* placed into the existing bargaining units represented by OPSEU. Assuming, however, that your recommendation is that these currently excluded employees be placed in a separate bargaining unit or not otherwise “automatically” represented by OPSEU, there clearly needs to be a mechanism to allow for both certification and voluntary recognition of a bargaining agent, trade union or “employee organization”.

(ii) Certification Process Must Require Province-wide Units

OPSEU’s strongly held position (explored elsewhere in its Brief) is that such a certification or voluntary recognition process must be both province-wide (ie. include all colleges) and that these units be subject to central bargaining. We do not consider merely “deeming” a province-wide unit to be appropriate to be sufficient, since under the prevailing jurisprudence it is clear that alternative

descriptions may also be “appropriate”. Therefore, the statute should either define specifically the appropriate academic or support “part-time” units on a province-wide basis, then indicate that they are the *only* appropriate bargaining units able to be certified or subject to voluntary recognition. Without this clarification, we suggest, there is a risk that bargaining for “part-timers” may devolve to a local, college by college bargaining unit basis. As we indicated in our discussion of the importance of central collective bargaining, this would be a recipe for labour relations chaos.

There are currently two bargaining units. If bargaining units for “part-timers” are not statutorily defined on a province-wide, all college basis, it is conceivable that there could be up to 48 more bargaining units in the college sector. Even this assumes that the part-time units are not further subdivided (for example, sessionals in one academic unit, and part-time teachers in another). As you can see by this example, unless the certification or voluntary recognition process is centralized, there is a real risk of significant and paralyzing fragmentation of the bargaining unit structure in the college system.

(iii) Methods of Acquisition of Bargaining Rights

The next issue pertains to the appropriate method of certification or voluntary recognition assuming that the bargaining unit structure has been pre-determined by statute and is not subject to the standard “appropriateness” criteria contained in the OLRB jurisprudence.

First, it is important that the new *CCBA* provide for the ability of a trade union to be voluntarily recognized by the Employer organization (which we would assume to be the current College Compensation and Appointments Council) for the defined bargaining units. We would therefore recommend that the Council be statutorily empowered to “stand in the shoes” of the colleges for voluntary recognition purposes, something that is not only not expressly provided for, but

appears to be prohibited by the language of the current legislation.³⁴ Further, there should be “room” in the *CCBA* for voluntary recognition. A voluntarily recognized bargaining agent should have the same rights, duties and obligations as a certified or designated trade union or “employee organization” under the *CCBA*. In addition, there should be a majority challenge requirement similar to s. 66 of the current *OLRA* in the new *CCBA* to prevent abuse and “sweetheart” deals.

Second, there should be a certification process in the *CCBA*. While it may be tempting simply to impose the *OLRA* “quick representation vote” model in these circumstances, there are significant logistical problems inherent in doing so. First, there are twenty-four colleges. Second, those colleges may have dozens of separate buildings, locations and campuses. Thirdly, we seriously doubt the Employer’s ability to assemble province-wide lists of employees in the customary two day period. There is also a real question about the Union’s ability to check voters lists before votes are ordered and provide meaningful challenges to the list. Fourth, trying to conduct a province-wide vote within five days would be virtually impossible given the logistics. It is not even clear whether the *OLRB* would have sufficient staff to supervise the ballot count.

It is for these reasons that *OPSEU* suggests that a “card check” model be the appropriate model for certification in the defined bargaining units. College employees are sophisticated, well-educated and capable of understanding what happens if and when they sign a Union card. There can be little doubt that if a union signs up 55% of the employees in the defined bargaining unit, that this is

³⁴ Section 2 of the *CCBA* provides as follows:

Application of Act

2. (1) This Act applies to all collective negotiations concerning terms and conditions of employment of employees. R.S.O. 1990, c. C.15, s. 2 (1).

Negotiations to be in accordance with Act

(2) No such collective negotiations shall be carried on except in accordance with this Act. R.S.O. 1990, c. C.15, s. 2 (2).

an adequate test of employee wishes in all the circumstances. A card check model avoids all of the problems and disruptions of a province-wide representation vote yet provides a more than adequate method of ascertaining the wishes of the employees. As you are also aware, this model has been reintroduced in the construction industry by the current Government. We see no reason why it cannot be “reintroduced” to allow persons who have been historically and unconstitutionally excluded from collective bargaining the right to choose their bargaining agent.

Finally, there should also be provisions for a representation vote where the Union reaches a threshold of card-based representation short of majority (e.g., 35%).

Question 6: Should any items or issues be excluded from collective bargaining?

(i) Start and end date of collective agreements—s. 45 of the CCBA

Section 45 of the *CCBA* requires that any collective agreement have a term of operation of not less than one year and that it begin on September 1st and expire on August 31st. Therefore, the parties cannot negotiate a term different than set out in s. 45 of the *CCBA*.

It is OPSEU's position that both of these "restrictions" should be maintained in the new *CCBA*.

Dealing first with the timing of the start and expiry of collective agreements, it is relatively common elsewhere in the education sector that agreements begin on September 1st and end on August 31st. Indeed, the identical requirement is contained in s. 277.11 of the *Education Act* and is applicable to teacher bargaining in Ontario. Furthermore, now that this is statutorily required for teacher bargaining across Ontario, many non-teacher collective agreements in the educational sector also provide for a September start and August end date. Obviously, this is to correspond to the academic year and the operational realities of the education sector, and is a practice that makes practical sense.

Again, it makes no labour relations sense to change this statutory requirement solely for the purpose of bringing it into line with the practice elsewhere in the labour market. The requirement provides for certainty and allows for any new terms and conditions of employment to occur in the "new" academic year. Moreover, any change to this requirement would simply result in both sides spending time "jockeying" in bargaining for an end date that would best suit the

particular party's bargaining advantage. Having the start and end dates of agreements defined in the statute has been a feature of college bargaining for over 30 years. There is simply no reason, we submit, to change this statutory provision.

(ii) Superannuation

Currently, s. 3 of the *CCBA* provides that any term and condition of employment can be bargained with the exception of "superannuation". It is important to bear in mind, in this context, the impact of the Supreme Court of Canada decision in the *B.C. Health Services*. In that case, the Court finally found the right to collective bargaining to be a protected right under the *Charter*. It also specifically disapproved of collective bargaining statutes that removed certain important items from collective bargaining. Therefore, we accept that any restriction on collective bargaining rights must be carefully scrutinized. However, it is our submission that the continued restriction placed on superannuation negotiations under the *CCBA* withstands both constitutional and labour relations policy scrutiny.

Simply put, the colleges, OPSEU, the Government and excluded employees have already created a pension plan outside the collective bargaining process which serves the interests of all unionized, non-unionized, excluded and managerial employees of all the colleges. The CAAT Pension Plan provides for representation from all Employer and employee groups (both unionized and non-unionized) through the Sponsors and Board of Trustees of the Plan. OPSEU fully endorses the current Plan and its structure and has no desire to subject that Plan to the collective bargaining process. In our view, putting the matter into the realm of collective bargaining negotiation would have the effect of disenfranchising non-unionized employees (who would, of course, have no say in the outcome of the collective bargaining processes) and creating areas of conflict between participating bargaining units in what has become an increasingly

delicate and highly specialized area (who would, at separate tables and perhaps at separate times, be negotiating the provisions of the same pension plan).

Again, we believe that the current system works and works well for all college employees. If it ain't broke, don't fix it.

(iii) Background to the CAAT Pension Plan

In our view, it is useful to review some of the features of the plan in order to demonstrate that its insertion into the collective bargaining arena would be the cause of considerable conflict within the plan itself, ultimately, perhaps, leading to its reconfiguration. OPSEU considers this to be a very successful plan, and once again, we consider any proposed innovation to it to be unnecessary.

The CAAT Plan was established in September 1967 and first operated under a management agreement between the Ontario Municipal Retirement System (OMERS) and the Council of Regents. The latter was an antiquated pension plan that OPSEU lobbied to have changed. An agreement was ultimately reached between OPSEU and the Government, and a new CAAT Pension Plan became effective on January 1, 1995. That new plan was based on the secondary school teachers' plan and like the teachers, constituted a central plan for all college members. In addition, like the teacher's plan, the new CAAT plan was not subject to collective bargaining. All colleges are members of the CAAT plan. Through an Order in Council, ACAATO (now Colleges Ontario) was designated the management representatives.³⁵

The joint Sponsors, consisting of four members from Colleges Ontario, three from OPSEU (1 Academic, 1 Support, 1 Staff) and one from the Ontario College Administrators Association (OCASA) make up the decision-making body. The

³⁵ See Sponsorship and Trust Agreement – CAAT Pension Plan, December 13, 2006, (as amended).

decision-making process in the sponsorship agreement specifically requires that all amendments to the terms of the Plan must be unanimous. And, as noted, at least one of the sponsors was a representative of excluded staff.

There is established a separate Board of Trustees to administer the Plan, consisting of six 6 Employer representatives (which in practice are retired college presidents), four OPSEU representatives, one member from OCASA and one representative of the retirees. (The latter rotating through the three employee groups) The Trustees make recommendations (based on a majority vote) to the sponsors concerning such matters as investment and ultimately responsible for the overall operation of the Plan. The Trustees have hired approximately 25 staff to assist them in this role.

It is clear that the CAAT Plan would have to be fundamentally altered or revised to enable the Plan to be the subject matter of collective bargaining due to the unique features of its current governance structure, most notably the unanimity requirement for Plan amendments.

Further, it is important to note that a continued exclusion of the plan from the ambit of collective bargaining would by no means be anomalous in this area. There are other major public sector plans which operate in very similar ways to the CAAT Pension Plan and are also excluded from the parameters of collective bargaining. The Teachers' Pension Plan, for example, covers 167,000 teachers in elementary and secondary schools in Ontario as well as 104,000 pensioners (including survivor pensions). Originally created in 1917, the net assets of the plan were \$106 billion in December, 2006. It is co-sponsored by the Government of Ontario and the Ontario Teachers' Federation (OTF) with authority for plan changes delegated to the six-member partners' Committee. It is a Defined Benefit Plan.

OMERS Plan is another example of a very successful pension plan which operates outside of the collective bargaining process. It is a multi-employer, public sector defined benefit plan set up in 1963 to provide pension benefits to workers employed by 160 employers – mostly municipal governments and other local agencies. By the end of 2006 there were 906 employers, 237,000 active members and more than 100,000 retirees. Members receive \$1.7 billion annually in retirement, survivor and disability pensions. The Plan is a jointly-sponsored plan with employer and member governance. OMERS plan members work for many different governments and agencies primarily at the local level. Approximately 80 per cent of members are in unions or employees associations and 20 per cent are either managers or elected officials.

It is our position that the CAAT Pension Plan works well for all employees within the current structure – i.e. outside the parameters of collective bargaining. We also believe that the Plan could easily accommodate the increase in numbers once the exclusion of part-time and sessional employees is removed from the legislation and they can participate on an equal basis with the full-time employees.

However, we believe that the insertion of the present plan into the collective bargaining arena would not be beneficial to the employees governed by the plan, since it is likely that it would have to be reconfigured or perhaps split so as to reflect bargaining structures. Further, it is extremely important to note that the inclusion of superannuation as a bargainable item would have the effect of disenfranchising from its governance all other employees of the colleges who are not parties at the bargaining table. All workplace parties are represented now and in the absence of any evidence that the system is not working, the area of superannuation should be left alone.

Question 7: What should the role of the College Relations Commission be?

Currently, the College Relations Commission (CRC) duties are set out in s. 56 of the *CCBA*. OPSEU is aware that many of the functions formerly performed by the CRC are now effectively performed by the OLRB (such as supervising votes). However, it is our view that the CRC still has a useful role to play. In particular it should continue to maintain an awareness of negotiations between the parties (s. 56(1)(b)). It should also compile statistical information (s. 56(1)(b)) through the Colleges Relations Commission Information System (CRCIS).

It is anomalous, we concede, that the CRC has the jurisdiction to determine bargaining in bad faith cases whereas the OLRB has the jurisdiction to deal with other unfair labour practices. However, given that the current chair of the CRC is also the current chair of the OLRB, there is little practical difference.

Despite the apparent anomalies, OPSEU believes that the CRC's most important function is set out in s. 56 (1)(h) and that is:

“...to advise the Lieutenant Governor in Council when, in the opinion of the Commission, the continuance of a strike, lock-out or closing of a college or colleges will place in jeopardy the successful completion of courses of study by the students affected by the strike , lock-out or closing of the college or colleges.”

OPSEU believes that the CRC should maintain that important role. It is important, in OPSEU's view, that there be a neutral body in place to determine the point at which the very purpose of the college system may be undermined by the failure of the parties to reach a collective agreement through the collective bargaining process. The ongoing role of the CRC, we further submit, also provides for a much-needed neutral, dispassionate examination of the volatile and political situation that frequently arise in the collective bargaining process,

while at the same time relieving the process from what would otherwise likely result in direct intervention by the Government.

OPSEU believes that the advisory role of the CRC in such circumstances also recognizes that the Government is ultimately accountable for the college system and needs to be provided with proper neutral advice before stepping in to resolve a strike, lock out or closing of a college or colleges.

Question 8: Are there possible amendments to *CCBA* that would enhance the collective bargaining process and permit the Colleges to achieve their goals and mandate?

It is our position that the main purpose of this *CCBA* review process is to provide collective bargaining rights to those employees who have been historically and wrongly excluded from collective bargaining under the *CCBA*. While it might be tempting to tinker with other parts of the Act, there is a real and substantial risk that such changes would upset the delicate but longstanding balance that the current Act has achieved. The sophisticated workplace parties have bargained (with considerable success) under the current regime for over 30 years and have negotiated well over 30 collective agreements (academic and support). Removing provisions of the current *CCBA* or changing those provisions will inevitably change the balance between the parties. OPSEU's position is that there is no need to try and achieve a different balance or to listen to a party as to why the current provisions do not work. The Act does work and the proof is in the history. OPSEU's position is "if it ain't broke, don't fix it" and we say the *CCBA* "ain't" broke so don't fix it.

The current *CCBA*, while containing different or slightly different provisions from other Ontario collective bargaining statutes, has served the parties well. The *CCBA* was designed to regulate collective bargaining and the parties in a particular and unique province-wide sector and framework, and it is therefore not surprising that its provisions would depart somewhat from the collective bargaining norm in Ontario.

In addition, the parties (OPSEU, the Council and the colleges) have a full appreciation of the strength and weaknesses of the current Act. While it might be tempting to tinker with particular provisions (for example, the elimination of the "factfinding process" or the "updating" of the powers of arbitrators to the OLRA

standard), such tinkering runs the risk of upsetting a longstanding and delicate balance between the parties. The sophisticated workplace parties are demonstrably capable of bargaining collective agreement provisions to deal with any real or perceived deficiencies in the current *CCBA*.

It is our belief that the current Act has served the parties well (with the notable and unconstitutional exception of the exclusion of part-time workers from the Act). The bargaining process contained in the *CCBA* is tailored to the unique features of the college system; the current Act contains certain unique provisions because it seeks to regulate a unique collective bargaining regime. Provisions such as the “deemed strike” (ss. 59(2)) and the “deemed lockout” (ss. 63(3)) are unique to the *CCBA* (in the sense that they are not found in other Ontario collective bargaining statutes). These provisions are unique because the province-wide system of collective bargaining for an entire system is unique. Removing with or tinkering with these provisions would undermine the provincial nature of collective bargaining by allowing the Union to engage in rotating strikes or the Council and the colleges to engage in rotating lock outs. The possibility of the use of these tactics, we suggest, may be considered inappropriate in the educational environment.

As a further example, the reason why notice to bargain is given earlier under the *CCBA* than under the *OLRA* relates to the fact that the parties must account for the selection or election of bargaining teams, demand setting and preparation for bargaining in 24 separate colleges. This increased and required level of coordination simply requires, as a practical matter, for bargaining to begin earlier than what may be required in a traditional industrial setting.

In addition, since the Act requires collective agreements to expire on August 31st (s. 45), the early start to bargaining recognizes the reality that much of the workplace (management and employees) are essentially required by the demands of the college academic year to take their vacation in the summer.

The *CCBA* recognizes, wisely, we say, that it would be undemocratic and contentious if the Union or the Council insisted on a vote taking place during the summer when many employees would be on holidays.

Insofar as there are provisions such as factfinding and final offer selection that are generally no longer part of collective bargaining processes mandated by other labour relations statutes, the parties have worked through these issues together. Whether one of the technical steps towards a legal strike or lock out is a factfinding process (*CCBA*) or a conciliation-no board process (*OLRA*) makes no practical difference to these workplace parties. There is no need to change the current system.

It might be surprising to some that *OPSEU*'s position would not encompass such things as a request to "update" the powers of arbitrators to the *OLRA* standard. However, we see the Act as a conceptual whole. *OPSEU* could seek "modern" arbitrators' powers (ie. s. 48 of the *OLRA*) that might be seen by the Union, the colleges and the Council as a "win" for the Union. In turn, the colleges and the Council might seek changes to other parts of the *CCBA* which would be perceived as a "win" for them. Indeed, it is possible to engage in such a process on almost a clause by clause or part by part basis. Inevitably one party or the other will be dissatisfied and there is no question that the current balance would be upset.

As most Ontario governments have found over the last 20 years of labour law reform, there is an inevitable upsetting of the previous balance after a particular reform or set of reforms is put in place. This also inevitably sets in motion further calls for statutory reforms and further attempts to right the ship. (Consider for example, how many times the *OLRB*'s interim relief powers have been amended in the last 15 years). In our view, there is a considerable risk that such tinkering will advantage one party over the other and will create problems that will make it harder for the colleges to achieve their mandate.

We expect that the colleges will be asking you to recommend the removal of the “deemed strike” (s. 59(2)) and the “deemed lock-out” (s. 63(3)) provisions from the reformed Act. This is precisely the sort of tactical reform request that you ought to resist. It will upset the delicate balance of collective bargaining interests achieved by the current Act, and which the parties have effectively internalized into their relationship.

To illustrate the degree to which the norms of the system have been internalized by the parties, we note that the Council of Regents (the forerunner to the current Council) has strenuously argued *in favour* of the retention of the “deemed strike” provisions of the *CCBA* as an integral component of the collective bargaining system during the course of the Lavigne v. OPSEU litigation.

7. Having provided that there shall be no strike unless all employees have had an opportunity to vote by way of secret ballot on the College’s “last offer”, the Act goes on to provide that, where the employees have voted to strike and the union gives notice thereof, all employees in the bargaining unit concerned are deemed to be taking part in the strike, and until the strike is ended, no employee is to be paid salary or benefits.

8. Integral to the concept of central bargaining under the Colleges Collective Bargaining Act is the fact that there is no room for local bargaining of a separate collective agreement for each college. Local deals between locals and colleges or teachers and colleges would undermine the central system of bargaining.

9. In the event of a Province-wide strike, if some teachers returned to work and earned wages, those teachers would have no real stake in seeing the strike come to an end and accordingly, might vote against a prospective deal resulting in a prolonged strike.³⁶

OPSEU certainly agrees with the rationale expressed by the Council of Regents regarding s. 59(2) of the *CCBA*. The rationale obtains equally today. We do not

³⁶ Factum of the respondent Council of Regents in Lavigne v. OPSEU et al (Ontario Superior Court), page 5.

raise this in order to suggest that the colleges don't really want to remove the "deemed strike" provisions. We raise it to demonstrate that both parties support and have benefited from the current system, and that they have learned to live with it. It may be that in extreme circumstances, the destruction of such a system is warranted. That is not the situation before you today. The record of stable collective bargaining under the *CCBA* would indicate that the current system should be preserved and not destroyed. We believe that the current *CCBA* has enabled and actually assisted the colleges to achieve their fundamental mandate of serving the educational and training needs of the province. The colleges bargaining agenda, we respectfully submit, ought not to be confused with their mandate.

On a final note, we believe that the current *CCBA* system has allowed (or at least has not prevented) the colleges from achieving their mandate. It should be kept in mind that there are at least two purposes to any collective bargaining regime. One is to allow the Employer to achieve their goals. The other is to provide for the best collective bargaining regime to allow the employees and their Union to achieve their goals.