

REPRESENTATION OF EARLY CHILDHOOD EDUCATORS BY OECTA

Summary of Cavalluzzo November 9, 2009 Legal Opinion

AVENUE TO REPRESENT	ITEMS TO CONSIDER
<p>Integrated Unit of Teachers & ECEs</p> <ul style="list-style-type: none"> • OECTA & school boards must agree to expand scope of bargaining unit to include ECEs • Amend OECTA constitution 	<ul style="list-style-type: none"> • Agreement between OECTA & board could be made prior to ECEs being hired • Easiest to achieve (from administrative perspective) • Not a great deal of OLRB case law in this area • Would be easier to deal with a OLRB if majority of ECEs supported being represented by OECTA • If successful, could be challenged by another union within the first year with argument that OECTA was not entitled to represent the ECEs (OLRA S 66)
<p>Voluntary Recognition for Separate ECE Unit</p> <ul style="list-style-type: none"> • Recognition of OECTA as the bargaining agent for separate ECE units • Amend OECTA constitution 	<ul style="list-style-type: none"> • Agreement between OECTA & board would have to wait until after ECEs are hired • New and separate ECE units created • Simpler process to follow than certification • An employee or other union could bring a challenge forward within the first year (OLRA S 66)
<p>Certification Application</p> <ul style="list-style-type: none"> • In accordance with OLRA* • Amend OECTA constitution or establish separate union to represent ECEs (as was done with OT's when they were organized) 	<ul style="list-style-type: none"> • OECTA & school board could agree to combine teacher & ECE bargaining units • No termination option could be brought forward in first year • Termination option could be brought forward in the last 3 months of the life of the collective agreement (OLRA S 63) • Costly • Time consuming • Any union that loses a representation vote cannot undertake certification for one year • Other unions likely to intervene in certification process

CAVALLUZZO HAYES SHILTON
MCINTYRE & CORNISH LLP

BARRISTERS

SOLICITORS

474 Barchurst Street
Suite 300
Toronto, Ontario M5T 2S6
Telephone: 416-964-1116
Facsimile: 416-964-5895
Email: contactus@cavalluzzo.com
Website: www.cavalluzzo.com

In Association with Patrice F. Band

Please refer to:
Direct Line:
Email:
Assistant:
Email:
Tel:
File No.:

Paul J.J. Cavalluzzo
416-964-5500
pcavalluzzo@cavalluzzo.com
Isabel Taylor
itaylor@cavalluzzo.com
416-964-1115 Extn 2243
091039

November 9, 2009

Mr. Marshall Jarvis
General Secretary
Ontario English Catholic Teachers' Association
65 St. Clair Avenue East
Toronto, ON M4T 2Y8

Dear Marshall:

Re: Representation of Early Childhood Educators

You have asked our views on strategies that OECTA could pursue to represent Early Childhood Educators (ECEs). We understand that you are especially interested in an assessment of options available to represent an integrated bargaining unit of Teachers and ECEs. In particular, you asked whether it would be legally possible for OECTA to achieve representation rights through an accretion to existing OECTA bargaining units. You also sought our advice in relation to the following questions:

- (1) What kind of preference may a school board provide OECTA without contravening the *Labour Relations Act's* ("LRA") prohibitions on employer support?
- (2) Would school boards and OECTA have to wait until ECEs are hired before entering into a voluntary recognition agreement ("VRA")?
- (3) What steps are necessary to organize ECEs under the LRA through (a) certification and (b) voluntary recognition?
- (4) What political positions could OECTA take to enhance the community of interest between teachers and ECEs?

- (5) What are the implications if OECTA is unable to amend its Constitution to permit representation of ECEs?

We begin by setting out the options available to OECTA to acquire representation rights for ECEs. Following this, we address the questions listed above.

I. Summary of Conclusions

OECTA could pursue the following options to seek representation rights for ECEs.

- (1) The most promising option for OECTA to represent an integrated unit of teachers and ECEs likely would be for OECTA and school boards to voluntarily agree to expand the scope of the existing OECTA Teachers' bargaining units to include the ECE group (i.e. "accrete" the ECE group to the existing OECTA unit). There are three preconditions for such a voluntary accretion: (i) OECTA would have to secure the agreement of school boards; (ii) OECTA would have to amend its Constitution to permit representation of ECEs; (iii) OECTA would have to persuade the Board that an accretion is appropriate where the added employees fall outside a statutorily defined bargaining unit.
- (2) If voluntary accretion is not possible, OECTA would have two further options, each of which has advantages and disadvantages.
 - (a) OECTA and school boards could agree to voluntarily recognize OECTA as the bargaining agent for a separate ECE bargaining unit.
 - (b) Alternatively, OECTA could file a certification application to represent ECEs. If OECTA's certification application were successful, it might be possible for OECTA and school boards to agree to combine the ECE and Teacher units.

II. Options for Representing ECEs

(1) Voluntary Accretion to Existing OECTA Units

The option which would be the easiest from an administrative perspective is for OECTA to represent an integrated unit of teachers and ECEs would be for OECTA and school boards to agree to voluntarily accrete the existing OECTA units. This would involve expanding the scope of existing OECTA collective agreements to include ECEs. However, this is a risky option in that it may be legally problematic for the reasons given below. As

noted above, in order to pursue this option, OECTA would have to secure the agreement of the school boards. As well, OECTA would have to amend its Constitution to permit representation of ECEs.

For a voluntary accretion to be legally valid in Ontario, a union must be able to demonstrate that it is entitled to represent the majority of employees in the bargaining unit at the time the agreement is entered into: s. 66 LRA. In recent decisions, the OLRB has concluded that the relevant unit is the entire accreted bargaining unit, not the added-on portion.¹ In order for a voluntary accretion to be valid in a standard case, the Ontario Labour Relations Board ("OLRB") requires that the union be able to show that it had the support of the majority of employees in the entire accreted bargaining unit at the time the voluntary recognition agreement (VRA) was entered into. However, OECTA's situation is a unique because the Teacher's unit is a statutorily-defined bargaining unit.

There exists very little caselaw on the issue of whether parties can agree to the voluntary accretion of a statutorily defined unit. There exists caselaw in British Columbia in which the labour board concluded that it was possible to vary the scope of statutorily defined teacher bargaining units to add other educators.² The British Columbia Labour Relations Board has ruled that it has the power to vary teacher bargaining units in cases where there is a shared community of interest between teachers and the educators sought to be added. However, it is unclear whether the OLRB would adopt the same analysis. In at least one teacher jurisdictional dispute case (*Kawartha Pine Ridge District School Board*),³ the OLRB has suggested that it cannot alter the description of teacher bargaining units since the description of these units and the identity of the bargaining agents for these units are statutorily mandated in the *Education Act*. OECTA would have to rely on the British Columbia caselaw to argue that the *Education Act* only mandates that the groups of teachers listed in s. 277.3 of the *Act* are included in one bargaining unit at each school board. OECTA would argue that the *Education Act* does not preclude other educators whose work is integrated with that of Teachers from also being included within these units. However, for this argument to be successful, it will be necessary to distinguish the OLRB's statements in relations to s. 277.3 of the *Education Act* in the *Kawartha Pine Ridge District School Board* case. It may also be possible to argue that, in the same way as parties may vary the scope of certified units through collective bargaining, the parties can agree to expanded scope clauses in collective agreements so long as the clauses include the Teachers required to be included under s. 277.3 of the *Education Act*. We note that the lack of any Ontario caselaw directly on point makes the strength of such an argument

¹ *York (Regional Municipality)*, [2000] O.L.R.D. No. 353.

² *Board of School Trustees of School District No. 36 (Surrey)*, [1989] B.C.L.R.B.D. No. 59; *Board of School Trustees of School District No. 64 (Gulf Islands)*, [1991] B.C.L.R. B.D. No 55.

³ *Kawartha Pine Ridge District School Board*, [2002] O.L.R.D. No. 176.

difficult to gauge. Moreover, we would be faced with the OLRB comments referred to above albeit made in a different context.

If the OLRB did accept the voluntary accretion of the existing OECTA bargaining units, the OLRB would then examine whether OECTA was entitled to represent the majority of employees in the unit. As noted, in carrying out this analysis in a typical case, the OLRB would focus on the entire accreted unit. A good argument can be made that the same approach should be applied to statutorily-defined units. It could then be argued that, regardless of OECTA's level of support amongst ECEs, OECTA would be entitled to represent the majority of employees in the unit. This is because of OECTA's statutory designation as bargaining agent for teachers who would form the majority of employees in the unit. However, we note that it is unclear what approach the OLRB would use since we have not located any caselaw involving the voluntary accretion of statutorily defined units. As a result of this uncertainty, it would be best if OECTA was able to demonstrate majority support amongst ECEs. If OECTA had majority support amongst ECEs, OECTA then could argue that it had the support of a majority of employees, regardless of whether the Board evaluated support within the entire accreted unit or within the add-on ECE group.

We note that it would be open to an ECE or competing union to seek to terminate any VRA under s. 66 of the LRA. Under s. 66 an employee in a bargaining unit or union representing an employee in the unit can seek termination of a union's bargaining rights during the first year after a VRA is entered into by alleging that the union was not entitled to represent employees in the unit at the time the agreement was entered into. In order to terminate OECTA's bargaining rights, CUPE or OSSTF might seek to argue any of the following: (i) that a statutorily-defined unit cannot be accreted; (ii) that OECTA is not entitled to represent the majority of employees in the bargaining unit; and/or (iii) that the VRA is invalid as a result of unlawful employer support. As noted above, there exists very little caselaw on the voluntary accretion of statutorily-defined bargaining units. However, in our view, OECTA would have reasonable arguments available to it to defend against such a challenge under s. 66 of the LRA. As discussed further below, it likely also would have arguments available to it to defend against any charge of unlawful employer support.

As noted, due to the dearth of caselaw involving statutorily defined units, there are real risks in pursuing the voluntary accretion option. Competing unions could seek to bring termination applications which could be combined with their own applications for certification of ECEs. Nevertheless, the voluntary accretion option is likely the easiest administrative option for OECTA to pursue in order to represent an integrated unit of Teachers and ECEs.

Because this option has legal problems but is advantageous from an administrative perspective, it might be strategic to pick one school board and use it as a representative case. An expedient procedure must be selected in order to be able to use it as a guideline for other boards in the province.

In the event that school boards do not agree to voluntary accretion, OECTA would have two alternative options: voluntary recognition of a separate ECE unit or the filing an application for certification. Each of these options has advantages and disadvantages which we review in the next two sections.

(2) Voluntary Recognition for Separate ECE Unit

If school boards will not agree to the voluntary accretion of the existing OECTA bargaining units, OECTA could seek a VRA to recognize OECTA as the bargaining agent for separate ECE units. This option may be less preferable to the voluntary accretion option since it would create a new and separate unit for OECTA to administer and represent. The main advantage of a VRA is that it is simpler than certification. That is, it would avoid the expense and delay associated with certification proceedings. The main disadvantage of this option is that an employee or competing union could bring a termination application under s. 66 of the LRA during the first year after the VRA was entered into. The competing union would argue that it has an existing collective agreement which covers the ECE's so that the VRA is illegal. In order to defend against the termination application, OECTA would have to show that it represented the majority of ECEs at the time the VRA was entered into.

As with the accretion option, in order to represent ECEs as OECTA, it would be necessary for the union to amend its Constitution to permit representation of ECEs. Otherwise, OECTA would have to establish a separate union to represent ECEs.

(3) Certification Application

An alternative option would be for OECTA to seek certification to represent ECEs. This would require OECTA to follow the steps necessary to obtain certification which are set out more fully below. If OECTA was successful in certifying an ECE bargaining unit, it may be possible for it and school boards to agree to combine the Teacher and ECE units. While the LRA used to provide the OLRB with the power to combine bargaining units upon certification, that power was repealed several years ago. However, in Ontario, parties are not bound by the unit for which they have been certified and may vary this unit once a collective agreement is entered into. In the same way, it might be possible for OECTA and school boards to agree to combine the Teacher and ECE units if OECTA was successfully certified to represent ECEs. However, as with the voluntary accretion option outlined above, the fact that the Teacher unit is statutorily-defined makes the prospect of combining units somewhat less certain. It is not perfectly clear that parties could agree to combine a statutorily-defined unit with a certified unit. However, this uncertainty would be no greater than the uncertainty surrounding whether parties can agree to voluntarily accrete a statutorily-defined bargaining unit.

The main advantage of the certification option is that no termination application could be brought in the first year since s. 66 does not apply to certified units. Termination applications and/or certification applications by other unions could only be brought during the "open period".⁴ The main disadvantages of the certification option are the expense and delay associated with certification proceedings, as well any risk that OECTA might lose a representation vote. If OECTA lost a representation vote, it (as well as any other union) would be barred from seeking certification for a period of one year.

The other disadvantage is that CUPE or OSSTF would likely intervene in the application for certification and argue that the ECE's are already represented by them in the bargaining unit at the board over which they have bargaining rights. In this situation, the OLRB would have to determine whether the ECE's fell within the other unit. CUPE or OSSTF could also make this claim by filing a grievance under their own collective agreement.

As with the voluntary recognition option, in order to represent ECEs as OECTA, it would be necessary for the union to amend its Constitution to permit representation of ECEs. Otherwise, OECTA would have to establish a separate union to represent ECEs.

III. Analysis With Respect to Questions Listed Above

(1) What kind of preference may a school board provide OECTA without contravening the LRA's prohibitions on employer support?

(a) Review of Jurisprudence on Unlawful Employer Support

Section 15 of the LRA provides that the OLRB will not certify a union if an employer has participated in its formation or administration or has contributed financial or "other support" to it. Section 53 invalidates a collective agreement in such circumstances. Both the OLRB and the Ontario Divisional Court have held that ss. 15 and 53 must be applied purposefully rather than mechanically.⁵ In a frequently cited decision, the OLRB interpreted the purpose of these sections as:

⁴ The open period is defined as follows: within the last three months of the collective agreement's operation, in the case of a collective agreement with a term of three years or less; or in the case of collective agreements of more than three years, in the thirty-fourth, thirty-fifth, and thirty sixth months of operation or the last three months of every year of operation thereafter or the last three month of operation, as the case may be: ss. 7(4), 7(5), s. 63(2) of the LRA.

⁵ *Construction Workers Local 52 v. Ontario (Labour Relations Board)*, [2009] O.J. No. 2912; *Ontario Hydro*, [1989] O.R.B Rep. Feb. 185.

prohibit[ing] the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relations with their employer.⁶

In other cases, the OLRB has stated that the purpose of these provisions is to prevent employer-dominated unions or so called "sweetheart deals", and to ensure that the union and employer are involved in an arm's length relationship.

Whether or not particular employer actions will amount to unlawful employer support will depend on the factual circumstances in any particular case as well as the larger context and history to the parties' relationship. The very same actions may be permitted in one context and not in another. For example, the OLRB has found that an employer's provision of a list of employees to a union in an organizing drive amounted to improper employer support one case but not in another.⁷ The different result arose from the fact that, in the first case, the trade union had been formed to thwart another union's organizing attempts. By contrast, in the second case, the union had a long history of arm's length collective bargaining with the employer's parent company.

The OLRB is more likely to scrutinize the employer's actions when there is an active contest between two unions.⁸ However, the OLRB also has suggested that a contest between two very sophisticated unions whose independence from employers is unquestionable may weigh against a finding of unlawful employer support.⁹

Several cases have addressed whether it will constitute unlawful employer support for the employer to permit the union to use its premises for organizing purposes. The OLRB has found that employer assistance, such as permission to use its premises, is less likely to amount to unlawful support if it is granted after the union has some support amongst employees.¹⁰ However, the critical issue in all cases remains whether the employer's actions are inconsistent with the purpose of preserving the arm's length relationship between the union and the employer and employee free choice in selecting a union. On

⁶ *Edwards & Edwards Ltd.* (1952), 52 CLLC, para. 17027.

⁷ *Tri-Can*, [1981] OLRB Rep. Oct. 1509; *Continuous Mining*, [1990] OLRB Rep. April 404.

⁸ *Trent Metals Limited*, [1979] OLRB Rep. August 827

⁹ *Coca-Cola Bottling Co.*, [2004] O.L.R.D. No. 287.

¹⁰ *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 at para. 85.

this issue, we note that the OLRB has drawn a distinction between activities which prevent employees to express their true wishes versus activities that simply provide an opportunity for a union to influence the wishes of employees.¹¹

The OLRB has made clear that there is nothing *per se* unlawful about entering into a VRA, including the voluntary accretion of a collective agreement.¹² In some cases, the OLRB has found that an employer's expression of a preference for one union over another may constitute impermissible employer support.¹³ In these cases, the OLRB found that it could not be satisfied that the employees were freely, for their own reasons, choosing the union preferred by the employer over another competing union, rather than simply respecting their employer's preference. The cases where the expression of employer preference has been found to amount to unlawful employer support usually involve situations where an employer prefers a union due to the union's willingness to bend to the employer's wishes. The OLRB has approved of VRAs and refused to find unlawful employer support where there were good and valid business reasons for an employer to negotiate with a particular union and it was satisfied that any agreement was not a "sweetheart deal".¹⁴ In the end, the overarching principle is that, while employers are entitled to express their preferences, employer support must not undermine the necessary arm's length relationship between the employer and the union and thereby undermine the employees' free choice of their bargaining agent.¹⁵

¹¹ For example, in a case involving a contest between CUPE, SEIU and OSSTF to represent school board employees, the OLRB ruled that it was not an unfair labour practice for the school board to deny leaves to SEIU members to campaign for OSSTF while permitting CUPE members to use school time and materials in its campaign. The OLRB was satisfied that the outcome of the eventual representation vote reflected the true wishes of employees. It also reasoned, *inter alia*, that what OSSTF was in essence complaining about was a loss of opportunity to campaign as compared to CUPE, not that the vote did not represent the true wishes of employees: *Conseil scolaire de district des écoles catholiques du sud-ouest*, [2000] O.L.R.D. No. 105.

¹² *SERCA Foodservice Inc.*, [2001] O.L.R.D. No. 1300 at paras. 96-98.

¹³ *Covertite Eastern Ltd. and CLAC, Local 52*, [1996] O.L.R.D. No. 1734 at para. 61; *Central Park Lodges Ltd. and CAW-Canada*, [2002] O.L.R.D. No. 2310.

¹⁴ *SERCA Foodservice*, *supra* at para. 98. November 2, 2009

¹⁵ *Construction Workers Local 52 v. Ontario (Labour Relations Board)*, [2009] O.J. No. 2912 at para. 16.

(b) Application to OECTA's Situation

In OECTA's case, any support or assistance provided by school boards would be provided for denominational rights purposes and arguably as a recognition of the community of interest between teachers and ECEs. Nevertheless, in order to defend against any allegations of unlawful employer support, it will be important for OECTA and school boards to maintain an arm's length relationship at all times in order to minimize any perception that school boards are conferring unlawful favours upon OECTA. The signing of a VRA or the voluntary accretion of the OECTA unit would not *per se* amount to unlawful employer support. It is also unlikely that a school board would be found to have provided OECTA with unlawful support by tacitly permitting OECTA to enlist the support of ECEs during the in-service sessions held prior to the start of the school year. Since OECTA has a longstanding arm's length relationship with school boards, the use of their premises during the sessions to sign up members would not be considered unlawful employer support.

(3) Would school boards and OECTA have to wait until ECEs are hired before entering into a VRA?

The OLRB has ruled that VRAs for new bargaining units cannot be entered into before employees have been hired. The OLRB has found that a VRA entered into before employees are hired would violate the employees' right to choose their own bargaining agent. However, in several cases, the OLRB has distinguished between situations where a VRA is for a new unit versus a situation involving the voluntary accretion of an existing unit. In the latter situation, the OLRB has suggested that it is permissible for parties to enter into a voluntary accretion agreement before the employees in the add-on group have been hired.¹⁶ This conclusion is consistent with the OLRB's approach to accretion which focuses on the entire accreted bargaining unit, not the added-on group. This caselaw would suggest that an agreement to voluntarily accrete existing OECTA units could be entered into before the ECEs are hired.

In the event that the parties opt for a VRA for a separate ECE unit, school boards and OECTA would have to wait until ECEs are hired before entering into the VRA. However, we note that the OLRB has found that employees do not actually have to start working before a VRA is entered into. The OLRB has ruled that, for the purposes of demonstrating support amongst new employees, it is sufficient that a *bona fide* employment relationship has been created. The OLRB has found that an employment relationship is created once a person formally accepts an unconditional offer of employment.¹⁷ In *Distinction Service Plus*, a competitor union argued that the VRA entered into was invalid because the employees had not started actively working for the employer. The OLRB disagreed. It

¹⁶ *SERCA Foodservices Inc.*, [2001] O.L.R.D. No. 1300 at para. 115-16; *Fernbrook Homes Ltd.*, [2006] O.L.R.D. No. 3277 at para. 61.

¹⁷ *Distinction Service Plus Inc.*, [2007] O.L.R.D. No. 441 at paras. 24, 25 and 28.

found that it was unnecessary for the employer and union to wait until the employees had started to perform work before entering into a VRA. It was sufficient that a *bona fide* employment relationship had been entered into.

The OLRB will not issue a bargaining certificate unless there is more than one employee in a bargaining unit as of the application date: s. 9(1) LRA. In certification cases, labour boards have been concerned to ensure that employees have more than a tenuous relationship to the workplace at the time an application for certification is filed. Labour boards require a clear relationship to the workplace in order to guard against situations where employers hire persons only on paper in an attempt to dilute a union's membership evidence. The certification caselaw has not squarely dealt with the issue of whether employees must have started work before an application can be filed, or whether the creation of a *bona fide* employment relationship is sufficient. In our view, the same reasoning used in the *Distinction Service Plus* case may similarly apply to an application for certification – i.e. the creation of a *bona fide* employment relationship may be sufficient even if employees had not actually started actively working for the employer. This would be subject to the “build up” policy of the OLRB, i.e. the number of members signed up is reasonable in light of the number of ECE's eventually hired by the board.

(4) What steps are necessary to organize ECEs under the *Labour Relations Act* through (a) certification and (b) voluntary recognition?

(a) Certification

The following is a list of the primary steps required to seek certification:

- (i) OECTA would need to have at least 40% of ECEs sign membership cards. Membership cards must be written and signed (including the date of the signature) and indicate that an employee is a member of the union, has applied to become a member, or has otherwise expressed a desire to be represented by the union: OLRB *Rules of Procedure*, ss. 1, 43s.
- (ii) OECTA would serve its application for certification on the employer and file it with the OLRB. Its application for certification would have to be accompanied by a list of the names of the union members in the proposed bargaining unit and the signed membership cards: s. 7(13) LRA.
- (iii) The employer would have two days to respond to the application and could make submissions on a variety of issues including the bargaining unit description, the number of employees in the proposed bargaining unit, who is (or should be) included or excluded from the bargaining unit, and whether the union has the support of at least 40% of individuals in the unit.
- (iv) The OLRB would review the evidence submitted by the union to confirm that it had 40% or more support within the proposed bargaining unit. If the OLRB

determined that 40% or more of the individuals in the bargaining unit proposed in the application appear to be members of the union at the time of the filing of the certification application, it would order a representation vote among individuals in the voting constituency: s. 8(2) LRA.

- (v) The OLRB would determine the appropriate voting constituency to be used for a representation vote, taking into account the bargaining unit proposed in the application and the one, if any, proposed by the employer: s. 8(1) LRA.
- (vi) Unless the Board directed otherwise, a vote by secret ballot would be held within five days after the date on which the application was filed: s. 8(5) and (6) LRA.
- (vii) The Board would certify the bargaining unit if more than 50% of the ballots were cast in OECTA's favour.
- (viii) If OECTA did not receive the support from more than 50% of individuals casting ballots, the OLRB would dismiss OECTA's application. No union would be permitted to seek certification of an ECE unit for a period of one year: s. 10(3) LRA.
- (ix) Finally, if OECTA does not amend its constitution to include ECE's, the new union would have to establish its status as a trade union under the LRA.

(b) Voluntary Recognition

There are no formal procedures that must be followed to conclude a VRA. However, in order to defend against a termination application under s. 66 of the LRA, OECTA would have to be able to show that it had the support of a majority of employees in the bargaining unit. As noted above, if OECTA enters into a VRA for an accreted unit composed of teachers and ECEs, it is unclear whether OECTA would have to show that it had the support of a majority of employees in the entire unit or just the ECE group. As a result, it would be prudent for OECTA to ensure that it has majority support in the ECE group. If OECTA entered into a VRA for a separate ECE unit, it would need to show that it had the support of a majority of ECEs.

(5) What political positions could OECTA take to enhance the community of interest between teachers and ECEs?

It is unclear whether, under Ontario law, OECTA would have to demonstrate a community of interest between teachers and ECEs to defend a voluntary accretion of the OECTA units. However, the British Columbia Labour Relations Board has required the existence of community of interest before agreeing to accrete teacher bargaining units in that province since the "essential character" of the units was statutorily defined as teacher units. To a large extent community of interest arises from school board decisions regarding the

integration of the work of Teachers and ECEs. In this respect, it will be of assistance that the Pascal report recommends that Teachers and ECEs carry out overlapping functions.

OECTA may be able to enhance the community of interest between Teachers and ECEs by taking certain political positions. Political positions that OECTA could consider include:

- that ECEs who are qualified as Teachers could have the same opportunities to transfer into any available teaching positions;
- that ECEs who transfer into a teaching position could be provided with some credit for experience acquired as an ECE;
- that Teachers should not supervise ECEs, or evaluate their performance;
- that as many of the collective agreement provisions as possible apply equally to both groups;
- that ECEs have access to the same benefit plans, leave entitlements, professional development opportunities and working conditions as Teachers;
- that ECEs have all the same privileges of OECTA membership enjoyed by Teachers.

In addition, in public pronouncements, OECTA could emphasize the following:

- the Pascal report's recommended overlap between the functions of Teachers and ECEs;
- the fact that the two groups are responsible for delivering different aspects of the same curriculum;
- the fact that both groups will be working with the same students;
- the fact that some ECEs are qualified Teachers;
- that ECEs are governed by their own professional college and that those who are qualified as Teachers are governed by the Ontario College of Teachers.

(6) What would be the implications of not being able to amend the OECTA Constitution to provide for representation of ECEs?

The main implication of a failure to amend OECTA's constitution would be OECTA's inability to represent ECEs as OECTA. This would mean that OECTA would not be able to represent an integrated bargaining unit of Teachers and ECEs even if school boards agreed to enter into VRAs for such units. Even to represent a separate ECE unit, OECTA would have to establish a separate union as it did when it established OCOTA to represent occasional teachers under the LRA.

Conclusion

In this letter, we have outlined the options that OECTA could pursue in order to represent ECEs. As described, the most preferable way for OECTA from an administrative perspective to represent an integrated unit of teachers and ECEs likely would be through

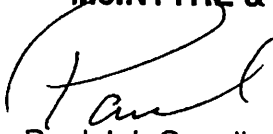
the voluntary accretion of existing OECTA units. Another option for representing an integrated unit would be to seek certification and, if successful, to then seek the agreement of school boards to combine the Teacher and ECE units. Alternatively, OECTA could seek to represent a separate ECE unit either through voluntary recognition or certification. As we are in new legal terrain, each option has its own legal and political risks.

The most strategic approach is to get a board to voluntarily agree to accrete a teacher bargaining unit to include ECE's. The board should give notice of this to all bargaining agents. This should be done shortly after the AGM as there is no need to wait until September as we suggested before. This would likely instigate an application under s.66(1) of the LRA by the other trade union claiming that it already represents the ECE's under its collective agreement. This would get us before the OLRB as there is no other way to get before the OLRB on a voluntary accretion. It would be important to pick a board where the scope clause of the union's collective agreement clearly would not cover ECE's. This approach would answer the crucial questions of whether you can voluntarily accrete to a statutorily defined unit employees who do not fall within the statutorily defined unit. A positive response from the OLRB would suggest that the ECE's have more of a community of interest with the OECTA teacher bargaining unit than with the unit of the competing union.

We hope this opinion has been of assistance to you. Please do not hesitate to contact me directly if you have any questions or if you would like to discuss further.

Yours truly,

CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH LLP



Paul J.J. Cavalluzzo
PJJC:it

CAVALLUZZO HAYES SHILTON
MCINTYRE & CORNISH LLP

BARRISTERS

SOLICITORS

474 Bathurst Street
Suite 300
Toronto, Ontario M5T 2S6
Telephone: 416-964-1115
Facsimile: 416-964-5895
Email: contactus@cavalluzzo.com
Website: www.cavalluzzo.com

In Association with Patrice F. Band

Please refer to:
Direct Line:
Email:
Assistant:
Email:
Tel:
File No.:

Paul J.J. Cavalluzzo
416-964-5500
pcavalluzzo@cavalluzzo.com
Isabel Taylor
itaylor@cavalluzzo.com
416-964-1115 Extn 2243
090039

November 13, 2009

Mr. Marshall Jarvis
General Secretary
Ontario English Catholic Teachers' Association
65 St. Clair Avenue East
Toronto, ON M4T 2Y8

Dear Marshall:

Re: Representation of Early Childhood Educators

You have asked our opinion on the following hypothetical situation:

"If OECTA organizes the ECEs and a future government replaces all the teachers with ECEs in the Early Learning Program. Would OECTA be constrained in any fashion by the OLRA, in fighting against the removal of the teachers due to the fact the ECEs have been organized?"

Your question relates to any restrictions in the *Labour Relations Act* which might interfere with OECTA's authority to fight a government regulation replacing teachers from the classroom. In particular, you are concerned with the effect of the duty of fair representation (DFR) on OECTA's efforts to oppose this regulation when it represents the ECEs. It is reasonable to assume that such a regulation would benefit ECEs in that it would expand their work opportunities.

The answer to this question depends on the manner in which OECTA acquires the bargaining rights for the ECEs. If these rights are acquired by an accretion to the teacher bargaining unit as we described in our November 9, 2009 letter, there would be no violation of the DFR if OECTA was to oppose a government move to remove teachers from the classroom. The justification for this action would be that it was in the interests of the whole

bargaining unit to oppose the government policy. It is a defence to a DFR complaint if the union acts in the interests of the whole unit even if some members of the unit may be prejudiced by the action.

However, OECTA would be very restricted in the situation in which it represents the ECEs in a separate bargaining unit from the teacher unit. In this scenario, the unit would be composed solely of ECEs. If OECTA took a position against a government policy which benefitted the bargaining unit, it would be a violation of the DFR as such action would not be in the interests of the bargaining unit. Any government policy which expands the work opportunities of the unit should be welcomed by the bargaining agent and not opposed.

In conclusion, the manner in which OECTA represents the ECEs will dictate how it can respond to government policy in the future.

We hope this letter will be of assistance. If you have any questions, please contact me.

Yours truly,

**CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH LLP**



Paul J.J. Cavalluzzo
PJJC:it