Appendix C

Discussion Paper: Options for Teacher – Employer Collective Bargaining

INTRODUCTION

The purpose of this paper is to promote discussion about the options for teacher-employer collective bargaining structures and processes in British Columbia. This is part of the process I am using to engage with the parties to teacher collective bargaining to inform my final report.

The range of issues I have to deal with is very broad. The elements of collective bargaining structures and processes interact in complex ways. In order to allow discussion of options to be manageable, I have identified five key dimensions, to be discussed separately, which define the salient elements around which choices have to be made. The five dimensions, phrased as questions are:

- Where will issues be bargained?
- Who will be the bargaining agent for the employer?
- How will impasses at the bargaining table be resolved?
- What should be the scope of bargaining?
- What transition measures are required?

Considering these elements separately is necessary to make the issues at all tractable for discussion. Notwithstanding this, it is essential to keep in mind that each element interacts with all of the others in defining the "whole."

I have tried to delineate, along the five key dimensions, what I believe are the range of feasible options. I have tried to discuss the issues entailed as objectively as possible. I stress that I still have an open mind about key issues and, accordingly, I encourage the parties to take at face value the label "discussion paper" and continue their dialogue with me.

The next five sections of the paper consider each of the dimensions in turn.

I. WHERE WILL ISSUES BE BARGAINED/

From 1988 until 1993 teacher collective bargaining was done at the local level between the local teachers' association and the local school board. In 1994 the provincial government implemented a new bargaining structure which was to have two tiers of bargaining to it. Provincial items would be bargained between the bargaining agent for teachers and a bargaining agent for public school employers, both recognized by statute, while other items could still be bargained locally as before. In practice, the split of issues decided upon resulted in virtually all significant issues being designated as provincial items. The decision to move to provincial bargaining was a controversial one, and there remain proponents of returning all negotiations to the local level. There also have been other proposals of where bargaining should occur. I have identified five options for discussion.

If we are going to made a decision about where bargaining should happen, it is important to give due consideration to what would be necessary in order for that structure to be successful. Accordingly, under each option I will not only briefly discuss that options strengths and weaknesses, but also what, in my opinion, would be minimally necessary for that particular option to be capable of leading to effective collective bargaining. In this section I will concentrate on this question from the perspective of the dynamics of the bargaining table. In the next section I will look at the question from another perspective – the need to have an alignment between a particular bargaining structure and the accountability for financing the K-12 system.

1. All Issues Are Negotiated at a Common Provincial Table

All issues being negotiated at a provincial table would result in common standards across the province. This should contribute to teachers being treated

equally, regardless of which school district they work in. Common provisions may serve to enhance teacher mobility from district to district which could have benefits for both teachers wishing to move and districts looking to hire experienced teachers.

There are efficiencies resulting from having only one negotiating table and given the provincial nature of this form of bargaining there is a greater link with initiatives of the provincial government in terms of provincial policy and funding decisions.

On the other hand, one provincial agreement for everything would limit the ability to tailor contracts to local differences and needs. The "lowest common denominator problem" or the potential generalization of terms and conditions for all bargaining unit members poses challenges to both sides in being able to make a deal. There are issues that may be of particular significance in some, but not most districts or locals. Collective bargaining is inherently about making difficult tradeoffs. How does an organization find the political ability to make such tradeoffs in the context of this type of heterogeneity? How does it overcome the tendency to either neglect all such issues or allow them to become "showstoppers"?

The discussion in the previous paragraph points to the key consideration in making it possible to get to a collective agreement under this option – both bargaining teams must be able to come to the table with the ability and willingness to bargain. This may seem like a trite statement, but it is far from it. The ability of an organization to organize itself to develop a negotiable mandate, empower a bargaining team to sit down at the negotiating table, engage in the give and take of bargaining, and bring back a tentative agreement that it will try to sell to its membership is far from a trivial capacity. Even if an organization has that capacity, it may not choose to exercise it if it feels the "real deal" is going to be made by somebody other than the team sitting across the table from it.

In general there are provisions common to all collective agreements, those common to most agreements and those that address a particular workplace need unique to the services provided or particular location. Given the nature of provincial bargaining and the potential for the lowest common denominator problem identified above, for provincial bargaining to be successful a mechanism must be adopted for unique and important local issues.

In addition, there is a challenge that arises from the legacy of previous negotiations. When provincial negotiations commenced in British Columbia there were seventy-five local agreements in place. There was, and remains, a "transitional" challenge of transforming these separate agreements into one provincial agreement that may or may not be supplemented by local or regional sub agreements. This is discussed in more detail in Section V below.

2. All Issues Are Negotiated at a Local Table

The 1988-93 period, at least until the last round of negotiations, demonstrated that it is possible to get settlements where all bargaining is done at the local level. Local agreements arguably reflect local differences and needs. On the other hand, this differentiation can lead to unequal treatment of teachers and unequal learning opportunities for students in different school districts.

Many school trustees believed, and continue to believe that the bargaining power in 1988-93 was very unequal in favour of the teachers – that, in essence, local bargaining was not really local because of the highly disciplined and coordinated way in which the BCTF organized around local bargaining. In making this observation I am not in any way suggesting that the BCTF should be faulted for what it was able to achieve in that period – it arguably did an excellent job of what it was supposed to be doing in a collective bargaining context. But there is

a legacy, at least of perception, that would have to be addressed, if we were to return to local bargaining.

Finally, with respect to how bargaining tables are organized, the existence of many tables negotiating locally results in a considerable duplication of effort and infrastructure. This duplication is costly and represents a stress on the systems' financial and human resources.

The previous paragraph points to one of the issues that would have to be addressed. Unless the school boards believe they are well enough organized and coordinated to deal with a disciplined, coordinated BCTF, a repeat of the 1988-93 scenario is likely to unfold. It is difficult to see how that could lead to the stability and maturation that we are looking for. Accordingly, some thought would have to be given to the "bargaining infrastructure" to support local school boards as well as to the "rules of engagement" between local boards and local teachers' associations and their relation to their provincial associations.

An additional requirement for the success of the local approach would be that local school boards would need the fiscal autonomy to make the bargain with their local teachers' associations. This will be discussed more extensively in the next section.

3. All Issues Are Negotiated at a Regional Table

The concept here is to divide the province into a number (between five and twelve) of regions that would group school districts together that share common interests. The basic idea is that it would provide a reasonable compromise between local bargaining and provincial bargaining.

A regional approach would allow for greater attention to local differences than if everything was negotiated at the provincial level. It would also lessen the extent of, but not totally eliminate, the lowest common denominator problem. It would provide greater economies of scale in bargaining than if everything was done locally. Finally, it may be somewhat easier to get commonality across the province for issues for which this is felt to be important than in the case where all bargaining is done locally.

While the idea is to group districts that share common interests, it is not obvious where to draw the line. For example, should Prince George, essentially an urban district, be grouped in with rural school boards in the north central part of the province, or should it be its own "region?" Would the capital district be grouped in with the rest of Vancouver Island, or would it be its own region? What about Kelowna? Is there a lower mainland region or a metropolitan Vancouver region? And so on.

Perhaps the most significant issue is that, without a corresponding change in governance of the K-12 system, we may be making our alignment problem even worse – the negotiations would now be one level removed from both the provincial government and the local school boards. Who would the regional bargaining agent be accountable to?

Once again the last paragraph points to the major issue to be dealt with in order to allow for success. A workable governance model where both the provincial government and local school boards are able to delegate the mandate to make a deal would have to be developed.

4. Issues Are Split Between Provincial and Local Tables

This is the option that we have had, at least *de jure*, in British Columbia since 1994. In theory, this model enables the segregation of issues that are best dealt with at the provincial table from those that are best dealt with at the local level. This would allow tailoring of issues of particular significance to specific local districts. This, in turn should reduce the extent of the lowest common denominator problem.

Deciding on the split of issues can be problematic, particularly if there is disagreement about the desirability of provincial bargaining in the first place. It is also challenging when, as in our case, the parties are working from a series of local agreements without the benefit of a transition process to move from the local bargaining regime to the provincial one. The legislation establishing the current system states that "cost items" are to be dealt with at the provincial table. The parties, through agreement in 1994, applied the concept of cost items broadly. Many have expressed the opinion that, taken to its extreme, this leaves little of consequence to be dealt with at the local level. Related to this is a notion that, if there is no money to bargain with at the local level, it is more difficult to make tradeoffs around non-monetary items negotiated at the local level.

This model would require the same conditions identified under Option 1 above. In addition, there needs to be substantive agreement on the split of issues between the local and provincial tables.

5. Issues Are Split Between Provincial and Regional Tables

This option is a valid one, but there is little need to belabour a discussion of it – it essentially grafts the issues discussed under Option 3 to those just discussed under Option 4.

II. WHO WILL BE THE BARGAINING AGENT FOR THE EMPLOYER?

I take as a given that the bargaining agent for teachers is not an issue. If bargaining is to take place at a provincial table, the bargaining agent would be the BCTF. If bargaining is to take place at a local table, the bargaining agent would be the local teachers' association. In contrast to its current role as the bargaining agent, the BCTF as a provincial union would serve in an organizing and coordinating capacity to the local associations. If we were to move to bargaining at the regional level, there would need to be some re-definition of teachers' bargaining agents, but I do not believe there would be any significant issue there.

The answer is less automatic on the employers' side. This stems from the fact that we have a "co-governance model" in British Columbia in which the provincial government and local school boards share responsibility, accountability and authority for the K-12 education system.

In my report last November I argued that one of the key factors contributing to difficulties in teacher collective bargaining has been the lack of clarity/misalignment with respect to the structure of collective bargaining and the accountability for financing the K-12 system. I recommended:

> " . . . the terms of reference direct the commission to pay special attention to the need for alignment between any proposed bargaining structure and the accountability for financing the K-12 sector." (p. 21)

Accordingly, I believe it is essential in this Section to not only outline different options as to the bargaining agent for the employers, but also to identify what fiscal alignment would align responsibility, accountability and authority in a

democratically sustainable way with each particular option for the employer bargaining agent.

For purposes of discussion, it is useful to distinguish between options where the major cost items - salaries, benefits, etc. – are negotiated at a provincial table and where they are negotiated at a local table.

Options if Major Cost Items Are Negotiated at a Provincial Table

1. Employers' Bargaining Agent Explicitly Controlled by Province

Under this option the provincial government would bargain the agreement. In such an option there could be, and probably should be, provision for school boards to have representation on the employers' bargaining committee. The purpose of this would be to inform the employers' bargaining position as to the implications for schools and school districts of various contract proposals. It would, however, be clearly understood by all parties that the "deciding vote" is held by the provincial government.

Under this option provision to provide the human resource management and labour relations services that are not specifically focused on collective bargaining, that are currently provided by BCPSEA, would need to be made, possibly through other mechanisms and structures.

The fiscal alignment under this option would be pretty straightforward. There would be a clear understanding about where "the buck stops" – it stops with the provincial government. The provincial government would be responsible and accountable for both the financing of the system and the costs imposed on the system by the collective agreement negotiated with teachers.

Under the current financing arrangements in British Columbia, where the provincial government is responsible for virtually all of the funding of the K-12 system, this option would most clearly align the structure of collective bargaining and accountability for financing that system.

On the other hand, this option could be perceived as reducing the role of school boards in determining terms and conditions of employment for their employees.

2. Employers' Bargaining Agent Explicitly Controlled by School Boards

In such an option, the bargaining agent would be governed by a board elected solely by school boards – the provincial government would have no explicit role in governance of the agent. Membership in the provincial bargaining agent would be mandatory for all school boards.

There would be a significant potential for fiscal misalignment with accountability for financing under this option if all, or virtually all, of the funding for the K-12 system remains the responsibility of the provincial government while school boards have the lead in bargaining major cost items. To illustrate the problem here, consider two scenarios that could be realized.

In the first scenario, school boards negotiate a "very costly" (i.e. above the prevailing pattern in the rest of the public sector and/or in K-12 systems elsewhere in Canada) contract without due attention to the province's fiscal situation/projected grants to school boards. This would create a situation where the system would appear to be under funded, relative to the cost of the negotiated contract.

In the second scenario, school boards negotiate a "reasonable" (i.e. in line with prevailing patterns) contract and subsequently the provincial government

reduces real per student grants to the system. Again, this would create a situation where the system would appear to be under funded relative to the cost of the negotiated contract.

Under either scenario, the public is likely to be confused as to whom to hold accountable for the situation – the provincial government or school boards? Collective bargaining would not be aligned with accountability for financing the K-12 system.

There are two possible solutions to this misalignment. One would be to make local school boards primarily responsible and accountable for financing their local schools. How this would work is discussed below under Option 4.

The second solution would be some construct that clarifies responsibilities and accountabilities while still leaving the provincial government primarily responsible for financing the system. Such a construct would be a multi-year "fiscal contract" between the government and the school boards. The terms of this "contract" would require the provincial government to make multi-year (three or four years) funding commitments to the K-12 system. These commitments would be viewed as the minimum commitments the provincial government makes unless there are extraordinary economic circumstances (analogous to a *force majeur* clause in a contract) such as an unexpectedly severe downturn in the provincial economy. The contract would also require the provincial government to make explicit any other policy parameters that it will require the system to operate under.

The requirements for school boards under such a contract would include the acceptance of the requirement to run balanced budgets on an annual basis, as well as that a negotiated contract must be "actuarially level" within the terms of the contract funding commitment and the period thereafter. The purpose of this latter requirement would be to prevent a situation where a contract commits to significant backend loading of costs that could present the government with an

apparent under funding scenario just beyond the current planning horizon. Without these requirements for the school boards, there is the potential for regularly created “under funding crises’ which would in short order lead the provincial government to conclude that it could not live with the structure of collective bargaining – i.e. it would not be democratically sustainable.

Such a “fiscal contract” would lead to the required fiscal alignment if it were accepted by the provincial government, school boards and teachers. It would be clear that the primary responsibility for the funding of the school system rests with the provincial government. By corollary, the costs of teachers’ contracts will be primarily a function of the dollars provided to the K-12 system by the provincial government. At the same time, school boards, who are more directly responsible for the employer/employee relationship and for the day-to-day success of their schools, get to negotiate the actual contract with teachers.

On the other hand, it might be argued that, given the provincial government’s funding role, teachers are effectively negotiating with the provincial government, and this would be done more transparently as under Option 1. There may also be concerns about the “enforceability” of the contract on both sides.

3. Employers’ Bargaining Agent Is Jointly Accountable to School Boards and the Province

This is a “hybrid” of Options 1 and 2, analogous to the current BCPSEA.

Notwithstanding that the provincial government is actually on the “inside” in this model, in my opinion there will still be a need for a more clearly defined understanding of responsibility, authority and accountability. How would the bargaining mandate be established – who is ultimately accountable for that? Is it clearly understood that the provincial government is ultimately accountable for

the interaction of the cost of collective agreements and the funding provided for the system? I believe that some of the criticism leveled from time to time at the current BCPSEA model stems from lack of clarity on these types of issues.

This clarification would ideally be reflected in a "fiscal contract" between the province and the board analogous to that outlined under Option 2. The major difference between this option and the previous one is that the "enforcement" of the contract may happen more automatically through internal (i.e. within the governing board) discussion over the development of the bargaining mandates.

Adopting this option would be relatively easy to do, given the existence, structure and resources of BCPSEA. The "hybrid" approach may be the most effective way to recognize, and manage the reality of co-governance where the provincial government provides virtually all of the funding for the system.

This model, like collective bargaining since 1987, would come with historical baggage. Even with careful clarification of accountability for mandate development, it will be an ongoing challenge to maintain that clarity. If school boards were to become primarily responsible for financing the school system, the hybrid approach would be hard to justify.

Option if Major Cost Items Are Negotiated at Local Tables

4. Employer Bargaining Agent is the Individual School Board

If major cost items are to be negotiated at local tables, then the obvious bargaining agent would be the local school board. School boards would be free to organize themselves in the way that best suits the circumstances at the time. Having said this, one of the lessons of 1988-93 is that school boards need to

have a level of coordination, support and discipline symmetrical with that of the BCTF if negotiations are to reflect a relatively equal balance of power.

The significant issue here is not the definition of the bargaining agent, but what is necessary to affect the appropriate fiscal alignment. Virtually everybody seems to agree that, if major cost items are to be negotiated at the local level, the local boards must have enough fiscal autonomy to make the bargain. For example, if a local school board wants to pay its teachers somewhat more than average, or if it would like to have a lower pupil/teacher ratio, it needs access to its own source of revenue.

In theory, local school boards do have access to their own source of revenue – they have the ability to hold a referendum to raise incremental property taxes on local ratepayers. The conventional wisdom is that this theoretical possibility is not practical. Accordingly, some advocate that, while the provincial government should remain responsible for funding the bulk of the K-12 enterprise, that local school boards should have the ability to levy additional taxes to "top up" provincial funding.

After due consideration, I have concluded that this would not get the alignment of responsibility, authority and accountability right. If local school boards are going to be responsible for negotiating the major cost items, it will only be democratically sustainable if they are also accountable for the majority of financing of their schools. I see no other way than to have the level of government responsible for determining the cost of the enterprise also be accountable for the financing of that cost.

As I discussed in my report last November, democracy requires government to make difficult choices about the allocation of scarce taxpayers' money amongst competing public imperatives. For democracy to work well, the public has to know which governments to hold accountable for which choices.

The problem with the “top up model” is that it would obscure accountability to the public for adequate funding of the school system and the taxation required for that funding. If a member of the public feels that the schools in his/her community are inadequately funded, would he/she blame the provincial government because it does not transfer sufficient monies to the local school board, or would he/she blame the local school board for not levying sufficient “top up taxes?” If, on the other hand, a member of the public feels her/his local taxes are too high, would she/he blame the provincial government because it does not transfer sufficient monies to the local school board, or would she/he blame the school board for negotiating “excessively” costly collective agreements with its employees?

What this means in practice is that, in order to have local bargaining determine the major cost items, we would need to return to a situation where school boards are responsible for raising the significant majority of their funds through local taxes. This would appropriately align responsibility, authority and accountability. If voters in a particular school district would like to see more money spent on their local schools, they can vote for candidates who support that. In turn, the school board will be directly accountable to local taxpayers for the level of taxation.

I believe most British Columbians would have concerns about such a scenario on equity grounds – without some mechanism to equalize revenue raising capacity across school districts there would likely be significantly greater differences in educational opportunities between children who live in districts with relatively low property tax bases and children who live in districts with relatively high property tax bases than currently.

This could be addressed through an equalization system – analogous to the one the federal government runs to transfer money to the “have not” provinces.

While such a system would be technically complex, there is no reason why the provincial government could not transfer revenue between districts so that any district that levies taxes at the average rate, regardless of how rich or poor its tax base is, would have access to the average revenue per student. Those districts that decide to tax at a higher rate would have access to greater than average revenue per student. Conversely, those districts that decide to tax at a lower rate would have access to lower than average revenue per student. So, while there would still potentially be differences in the money spent per student from one district to another, those differences would arise from democratic decisions made at the local level, not from a disparity in taxing capacity between districts.

The reader may note that I have written above about "taxes," not specifically "property taxes." There is a reason for this. Perhaps contrary to what many homeowners might think when they pay their annual property taxes, the amount of money nominally collected by the provincial government as "school taxes" only covers a fraction – approximately one third – of the expenditures on British Columbia's K-12 system. To return to a situation where most of the costs of the school system could be financed through local property taxes would require an increase in the average total (i.e. municipal and school) property tax in the order of magnitude of fifty percent. Such an increase is unlikely to be politically practical. If this is indeed true, then, to make this realignment of financial accountability feasible, there would have to be an alternative/supplemental revenue source identified and agreed upon. To maintain the appropriate alignment this alternative/supplemental source would have to be one for which the local school board was transparently accountable to the local taxpayer.

I need to make it clear that I am taking no position here on whether or not local bargaining should be re-adopted in British Columbia, or whether or not funding of the K-12 system should be realigned in the way outlined here – the latter would clearly be outside my terms of reference. I am merely saying that there would need to be a major realignment of funding along the lines outlined here **if** we

were to return to local bargaining of major cost items – and such an opinion is required by my terms of reference.

A return to local bargaining, with the realignment described above, would result in the cleanest alignment of responsibility, authority and accountability of all of the options. It would also result in the most direct definition of the employer/employee relationship.

On the other hand, it could lead to a balkanization of the education system with, in particular, greater disparity in working conditions for teachers and learning opportunities for children within British Columbia.

If Major Cost Items are Negotiated at the Regional Table

Again, there seems to be little need to belabour a discussion about the possibility of regional tables. The issues in this case would essentially be the same as in the case where major cost items are negotiated at a provincial table, and the options discussed in that context (albeit replicated by the number of regional tables) would be the same here.

III. HOW WILL IMPASSES AT THE BARGAINING TABLE BE RESOLVED?

Undoubtedly the most contentious dimension in this exercise is the question of dispute settlement – if the right to strike/lockout should be restricted in any significant way, and if so, what alternative mechanism(s) are available to bring the parties to agreement.

Before examining the options, it is useful to provide a little context by reviewing the basics of collective bargaining theory.

The "Simplified Theory" of Collective Bargaining

Because the interests of management and labour are not completely aligned (e.g. other things being equal management would prefer lower compensation costs and labour would prefer higher compensation), there needs to be some pressure to compel **both** sides to find a fair compromise.

Since the 1930's in most of the western world strikes/lockouts have become the generally accepted way for this pressure to be felt. A strike/lockout imposes costs on both parties, and is generally viewed as the "weapon of last resort," but the fact that it is available to either party provides a powerful incentive for both parties to be "reasonable" at the table.

Because of the stakes involved, all jurisdictions have established Labour Relations Codes (or equivalents) that lay out the rules for how and under what circumstances this mechanism can be employed.

Ideally, agreements are reached at the bargaining table without resort to strikes/lockouts and without imposition by a third party. In a "mature" collective

bargaining relationship strikes/lockouts are relatively infrequent and, when they do occur are relatively short lived because the two parties have worked out constructive relationships where they have found the basis for a fair sharing of the responsibilities for, and the benefits of, a successful "enterprise."

The evolution from an "immature" to a mature relationship is difficult, if not impossible if: i) either party perceives the "power balance" in the relationship to be essentially unequal; or ii) there is outside intervention that "saves the parties" from the consequences of failing to be able to reach agreement at the bargaining table. In fact, these two factors are likely to interact – a party that perceives itself as weaker at the table is likely to position itself for an appeal for external intervention.

Ideally then, the parties should be left to work out their issues on their own, perhaps with facilitation or mediation assistance as needed. However, because strikes/lockouts can impose costs on third parties –suppliers and customers in the private sector, clients and families of clients in the public sector – governments in most jurisdictions retain the right to intervene in one form or another to mitigate the costs on third parties, and/or to expedite or impose a settlement. The range of interventions include, among others:

- controlled strike/lockout – limitations on the right to strike/lockout (e.g. essential services designation);
- an imposed "cooling off" period;
- legislating an end to a strike/lockout;
- imposing a settlement;
- imposing a settlement procedure (e.g. arbitration).

While these interventions are justified on the basis of the costs that a strike/lockout can impose, the interventions themselves have costs. They can prevent the development of the mature bargaining relationship described above.

Parties may not feel an “ownership” of the settlement imposed upon them, and may not feel an obligation to make it work. If the third party intervention is perceived as being biased in favour of one party or another, the party that feels it has been disadvantaged may find other, counterproductive ways to make its voice heard.

There is no costless method of settling impasses at the bargaining table. There will inevitably be difficult choices to make that involve tradeoffs between short-term considerations and long-term considerations, and between the interests of the parties at the collective bargaining table and of affected third parties.

Options for Impasse Resolution

1. Regular Strike/Lockout

As discussed above, a strike/lockout imposes costs on both parties at the table. The party initiating the strike/lockout is demonstrating its “resolve” to require a better offer from the other party. At a certain point the desire to end the costs borne by the parties provides the basis for the compromises necessary to get to agreement.

If left to work itself out over a sufficient period of time, the collective bargaining relationship will generally mature to the point where the two parties develop a mutual respect for each other and a common understanding of a fair sharing of the responsibilities for and the benefits of a successful enterprise. The experience of a strike/lockout in which the parties are not “saved from themselves” by outside intervention can have a sobering effect that ultimately forces the parties to work out the issues themselves.

This, admittedly idealized, notion of a maturing relationship can run counter to some real world experience. The notion of third party costs has been raised above – the implicit question to be answered is whether it is fair to impose those costs on third parties while the parties to collective bargaining go through their "maturing" process. Another factor to consider is whether the bargaining power between the parties is fundamentally unequal, in which case a real maturing is unable to happen. Finally, human beings and their organizations are imperfect vehicles for pursuing rational self-interest – patterns of decision making may reflect a whole host of cognitive, emotional, and power-related issues that can get in the way of the mature relationship. An adage from the labour relations world that is symptomatic of this last point is the notion that "it is much easier to take them out on strike than to get them back to work."

2. Controlled Strike/Lockout (Essential Service Designation)

For most of the past thirty years teacher collective bargaining has been subject to restrictions or limitations including legislation that allows for the designation of education as an essential service which means that, in the instance of a work stoppage, the levels of service which may be withdrawn are subject to essential service designation – i.e. the level of strike/lockout activity is subject to control, hence the label "controlled strike." The only significant instance over this period of time when this actually played an explicit role was in the 2001/02 round of collective bargaining which ultimately ended in the legislated contract of January 2002.

The political justification for essential service designation is that a full disruption of the K-12 system imposes excessive costs on key segments of society that are not directly represented at the bargaining table – students and their families. The history of the past dozen years in British Columbia – in which governments of both the "right" and the "left" have legislatively intervened to end or prevent work

stoppages in the K-12 system can be taken as evidence that the public views the costs of those stoppages as being "excessive." Hence, essential service designation is meant to inject the "public interest" into the equation.

The BCTF's position is that essential service designation is an unwarranted restriction on free collective bargaining.

There is a significant public policy issue here that requires weighing conflicting rights, values and interests. At this stage, however, I want to focus on a somewhat more pragmatic question – how does essential service designation, and the particular way it is defined and implemented, affect the likelihood of getting to a negotiated settlement.

Recall the discussion above about the logic of the strike/lockout weapon in compelling agreement at the bargaining table because it brings pressure on both sides. If it is still intended that the strike/lockout tool will continue to be the primary motivation to bargain through an impasse to a collective agreement, then essential service designation must be defined and implemented in such a way that **both** sides bear a cost, and a substantial cost, for allowing the strike or lockout to continue. The BCTF argues that if services are maintained in full or to a large extent there is little pressure on the employers' side to settle. On the other hand, if the way essential service designation is defined and implemented in the K-12 system allows teachers to resort to a significant level of withdrawal of services without paying an economic cost in terms of lost salary, the pressure on the employees' side to settle is reduced as well.

Essential service designation was not fully defined and implemented in the 2001/02 contract dispute, so it cannot be said definitively whether the "balance of costs calculus" described above ultimately would have borne fruit in terms of a negotiated settlement. Furthermore, care needs to be taken in generalizing from one instance. It is reasonable to raise the question, however, as to whether the

essential service designation of education, as currently reflected in legislation is likely to facilitate the parties getting to a negotiated settlement at the bargaining table. A related question is whether the result will be a prolonged, "low intensity" work action that will not be sufficient to compel the parties to get to agreement, but may do more long-term damage to the overall K-12 enterprise than a short-term full scale strike/lockout might do.

If the intent of essential service designation is to minimize or even totally eliminate the disruption of education services, then the strike/lockout lever is essentially not available as an impasse resolution tool. The implication of this is that third party resolution of some sort is the only tool available to resolve an impasse, and it probably would be better to recognize this fact upfront in the design of the collective bargaining process.

3. Arbitration

As a substitute for the strike/lockout process, or perhaps after the strike/lockout process has not resulted in an agreement after a reasonable period of time, a third party is asked to find the "fair compromise" between the two parties. There are many different arbitration models/approaches:

- Conventional interest arbitration;
- Final offer arbitration;
- Mediation-arbitration;
- Interest arbitration with pre-established criteria;
- Non-binding arbitration;
- Etc.

At this point, it would be premature to go through an exercise in exhaustively reviewing the strengths and weaknesses of each. The more basic issue is the

positives and negatives of arbitration as an alternative to allowing the strike/lockout dynamic to play itself out and letting the parties reach agreement at the bargaining table.

Arbitration does avoid, or ends, the costs to the parties and to third parties of a strike/lockout. It may be the only way to get to a fair settlement between parties that are "irreconcilably" far apart in positions.

On the other hand, parties may become reliant on arbitrators to do their "heavy lifting" for them in making the tough tradeoffs that bargaining requires. This reliance is likely to prevent the development of a mature relationship between them. As noted above, a contract determined by a third party also reduces the sense of ownership of the agreement, potentially reducing parties' willingness to make the agreement work. The arbitrator, no matter how wise and fair, cannot possibly understand the full implications of choices/tradeoffs for the enterprise as well as the parties can; accordingly, tradeoffs made by the arbitrator may not be the same ones that two parties sharing a mutual interest in the success of the enterprise would make. Finally, both parties experience an inevitable loss of control – they may have terms imposed upon them that they would never have agreed to, even after a long strike/lockout.

4. Legislatively Imposed Settlement

The only other alternative to settle an impasse at the bargaining table would be for the government with the appropriate authority to legislate a new contract for the parties. Such legislation is sometimes based upon terms recommended by a mediator, but not accepted by one or both of the parties. Sometimes it is based upon terms that one of the parties had agreed to but the other party rejected. And sometimes the legislation is based upon the government's own view of what is "fair."

A legislatively imposed settlement comes with essentially the same positives and negatives that an arbitrated settlement with two key differences. First of all, it makes the government, which is ultimately accountable to all of the people in a jurisdiction, rather than an arbitrator, responsible for the terms of the contract. At election time, the public can hold the government accountable for its decision and the consequences of it. Secondly, there is an additional cost over an arbitrated settlement in that a legislatively imposed settlement is likely to be perceived as unfair by at least one of the parties to the dispute.

Collective Bargaining as a Repeated Exercise

The outline of the options above runs the risk of portraying each option as an isolated case. It needs to be emphasized that each instance of a contract established under any of those options will occur in a particular historical context. This context encompasses both the sequence of stages in the current round of collective bargaining as well as the "lessons learned" in previous rounds of collective bargaining. It is also influenced by how bargaining objectives are determined and the way in which the bargaining agents create and manage constituent expectations concerning bargaining achievements.

The figure on the page 96 is meant to portray a simplified depiction of the various forks in the road that the collective bargaining process might take. To keep the figure from getting unduly complex and confusing, not all of the possible intermediate processes that might have occurred – mediation, fact finding, cooling off periods, etc. – have been represented.

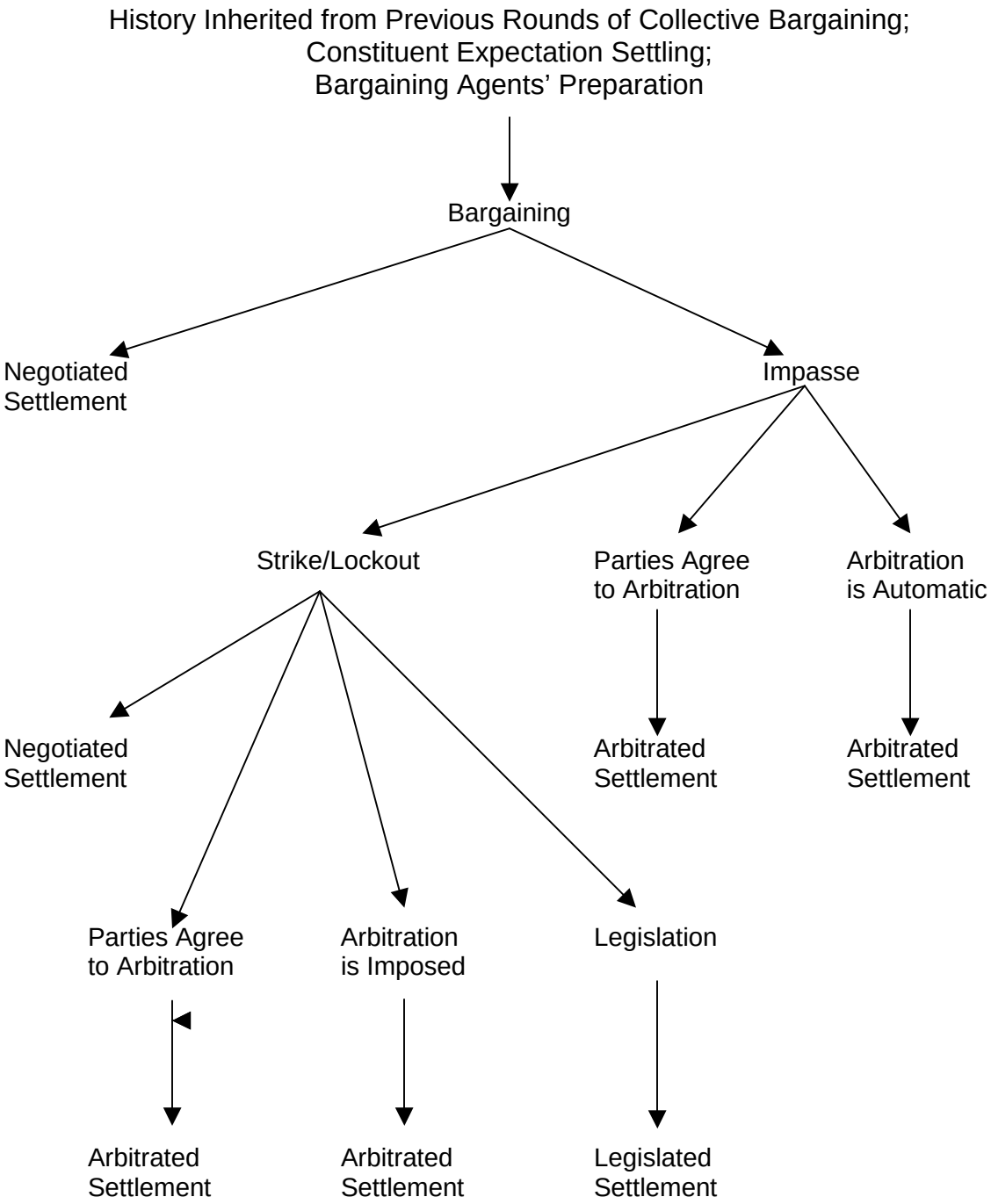
In general, the collective agreement is likely to be viewed as more satisfactory to both parties the further "north" and the further "west" on the diagram we end up.

Ideally then, we should want to maximize the probability that we end up in the northwest of the figure rather than in the southeast.

A more subtle, but perhaps more important, point is that the beliefs, strategies and behaviours brought to each round of collective bargaining will be conditioned by the way previous rounds played out. If, for example, previous rounds ended up with imposed settlements of one form or another, it would not be surprising to find parties positioning themselves on the expectations that pattern will repeat itself. This likely has a negative effect on the ability to get to a negotiated settlement. The inability to get a negotiated settlement then triggers a repeat of the imposed settlement pattern, reinforcing the "lesson."

A fundamental question for the parties is whether they are capable and willing to make changes that will reduce the likelihood of this pattern repeating itself. A fundamental question for my final report is what changes in structures and processes would encourage/support/reinforce such changes by the parties.

Simplified Depiction of Bargaining Outcome Possibilities



IV. WHAT SHOULD THE SCOPE OF BARGAINING BE?

In my report last November, I recommended, for a variety of reasons, that it would be better if the Commission did not examine scope of bargaining issues (see the discussion on page 30 of my November report). In discussions with parties earlier this year, most notably with the BCTF, I agreed to at least consider whether I should revisit this conclusion. Accordingly, I included several questions about scope of bargaining in questions I sent to the parties at the end of March. These questions were also discussed in the facilitated session held with the parties in May. For purposes of discussion, four options with respect to scope are identified.

1. Current Legislated Restrictions on Scope of Bargaining

Legislation in 2002, complemented by legislation in 2004 restricts the ability to negotiate:

- Class size and composition;
- Case loads or teaching loads;
- Staffing levels or ratios, or the number of teachers employed by a Board;
- Assignment of students to a class, course or program.

In place of collective agreement class size and composition provisions, school district-wide average class size limits and individual class size limits were placed in the *School Act.* The government rationale for the legislation was to entrench class size limits in the *School Act* and remove it from the bargaining table. Class size and related matters affect a broader constituency than the parties at the bargaining table. The public policy decision of the government was designed to remove these matters from the bargaining table due to their importance to

students and parents. The BCTF believes this legislation is an unfair restriction on teachers' ability to negotiate their working conditions.

The legislation limiting the scope of bargaining and the statutory class size provision in the *School Act* and regulations were not in existence during the last round of provincial bargaining. The effect of the legislation on the content of bargaining proposals and the interpretation to be advocated by the parties during future bargaining session on the effect of the legislation on bargaining proposals is unknown at this time. What scope the *School* Act allows for reconciling the implications of policy decisions around class size and composition on teachers' working conditions will likely be the subject of future discussions and possible referrals to the Labour Relations Board, arbitration hearings or court challenges. Any conclusions would be highly speculative.

2. Substantive Consultations on Education Policy Macro-Parameters

Given the nature of public education there is a strong connection between learning conditions for students and the working conditions for teachers. Having said that, there are differing opinions as to whether learning conditions should be the subject of collective bargaining – directly or indirectly – or whether matters deemed primarily matters of public policy should be determined in another forum. If you accept the proposition that you can distinguish learning conditions from working conditions, an option to give teachers and other public education advocates more voice would be to supplement the current scope of bargaining with substantive consultations between government and the public education policy advocates over "macro-parameters" – student/teacher rations, average class size, maximum class size, etc. now contained in the *School Act* and regulations.

In addition to consultation about the macro parameters, it may make sense to have a broader dialogue about overall funding and other elements of education

policy. This advice, advocacy, policy formulation forum would not be collective bargaining in the same sense that terms and conditions of employment are determined.

While there would be no contractual requirement for the government to respond to the positions put forward by the public education advocates in such a consultative forum, it could effectively give those advocates, in particular teachers, more voice than currently if:

- The consultation were part of a genuine effort on both sides to establish a real dialogue; and/or
- The consultation was part of a politically transparent process which demonstrates to the public the policy choices and tradeoffs that the government has available to it.

3. Provincial Negotiations of Macro-Parameters

This option would broaden the scope of bargaining beyond that in Option 1. It would allow the BCTF to bargain, and make tradeoffs to achieve changes to working conditions through the establishment of parameters or a framework. The parameters or framework would be the basis upon which school organization decisions are made at either the district or school level. This macro approach would allow the employer side to easily understand the cost implications of negotiated changes, while maintaining districts' ability to allocate resources amongst specific schools and classrooms in accordance with locally-determined needs.

4. Return to Full Scope Bargaining

This option would essentially entail a return to the scope of bargaining that existed from 1988-2002.

V. WHAT TRANSITION MEASURES ARE REQUIRED?

Regardless of whether major cost items will be negotiated at a provincial or at a regional or local level, there will be a major transition issue that needs to be addressed.

If Major Cost Items Are Negotiated at the Provincial Level

Arguably, a significant reason why province-wide negotiations since 1994 have not been more successful is that not enough thought was put into what would be necessary to move from a legacy of seventy-five individual collective agreements to one province-wide agreement. There was inevitably going to be a challenge in blending seventy-five agreements into one for two related reasons:

i. The lowest common denominator problem – on both the employer and employee side. Teachers and management in any district are going to be naturally reluctant to give up something they believed they had negotiated and "paid for" in a previous round of bargaining. Similarly, both sides are going to be reluctant to accept language or conditions believed to be more specifically tailored for other districts. This factor made it even more difficult for both bargaining teams to make the types of tradeoffs that are required to get to a collective agreement;

ii. An overloaded agenda. Arriving at a province-wide agreement in essence means negotiating a whole new agreement on all of the dimensions established in all of the local agreements. But the local agreements were themselves the results of three separate rounds of negotiations.

Without an explicit transition strategy/mechanism, it was almost inevitable that the "provincial agreement" would emerge the way it has:

- essentially an umbrella agreement that grandfathered the existing seventy-five (now sixty) local agreements with:

    - salary adjustments that have been across-the-board increases, without addressing any of the intra-regional anomalies that had developed;
    - limited agreement on some provincial language;
    - significantly outdated language in many of the local agreements because of the difficulty in negotiating new language on a province-wide basis.[13]

Such a platform makes progress at a province-wide table even more challenging than it otherwise would be.

If the decision is made to keep the negotiations of major cost items at the provincial level, a first order of business will be to deal with this problem.

1. Continuing Negotiations

In theory, the parties could negotiate the common agreement. The evidence of the past ten years is that this may be an insurmountable challenge. Accordingly, another option should be put on the table.

[13] It should be noted, however, that there has been some success under the *Mid-Contract Modification* process.

2. Third Party Transition Process

The process suggested here is analogous to what was done in the 1990's in the healthcare sector in British Columbia when it underwent a major consolidation. Hundreds of bargaining units were consolidated into three provincial bargaining units. An Industrial Inquiry Commissioner was appointed to develop a process to arrive at a consolidated collective agreement for each unit

The process developed two different exercises – *melding* for arriving at common non-monetary provisions, and *leveling* for arriving at common monetary provisions. Where parties were unable to conclude an agreement on an issue or issues an expedited arbitration process was employed to resolve the matters at issue.

In the melding process all existing collective agreement language was examined and the parties chose, for each provision, that language which would best fit a single, consolidated collective agreement. It should be noted that no new language was developed in this process; rather, the parties were bound to choose only language which already existed.

Leveling addressed only monetary provisions. Here, as opposed to the melding process, the parties were able to develop new provisions. Each job was evaluated and a new wage benchmark was negotiated, to be implemented across the new consolidated bargaining unit. Reaching these new benchmarks was achieved within fiscal parameters consistent with an established net cost to government. Leveling was not a process of identifying the most generous provision for each job and implementing it within the funds available. Instead, the parties were negotiating to determine, given their content, the appropriate compensation for each job.

It should be stated frankly that this would not be a pain-free process. Leveling up to the most generous provision on each dimension would have a significant cost implication for government, and would probably not be the most effective use of incremental funds in the K-12 system, even presuming the provincial government was willing/able to provide the incremental funds. On the other hand, it would not be fair to teachers to follow the opposite route of leveling down to the least generous provision on each dimension. The fiscal parameters for this process (e.g. zero net cost to government, $X million available for transition, or whatever) would have to be established at the start of the process.

If Major Cost Items Are Negotiated at the Regional or Local Level

If the decision is made to move negotiations of major cost items to regional or local tables, a different type of transition problem would arise – that of negotiating capacity on the employers' side.

At the local level, school boards do not have the "industrial relations infrastructure" that they had ten years ago. Due consideration would have to be given as to how to rebuild this infrastructure. The same point, suitably modified, would apply to negotiations at the regional level.

CONCLUDING COMMENTS

As stated in the Introduction, this discussion paper is genuinely intended to promote discussion. I look forward to continuing the dialogue with the parties as I work towards writing my final report.