

Legal Lessons for Government Policy-makers (so far):

Wage Restraint Legislation in Canada

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Agenda

- Background
- Four Lessons for Policy-makers
- Concluding Advice

Legal Opportunism

- Strategy of exploiting potential loopholes in FOA jurisprudence
- Rather than comply with the spirit

Recent History



Source: Apple⁴ "Maps"

Temptations

- Rule-maker
- Growing debts and deficits
- Compensation a high proportion of budgets
- Essentiality of services
- Elasticity of wages

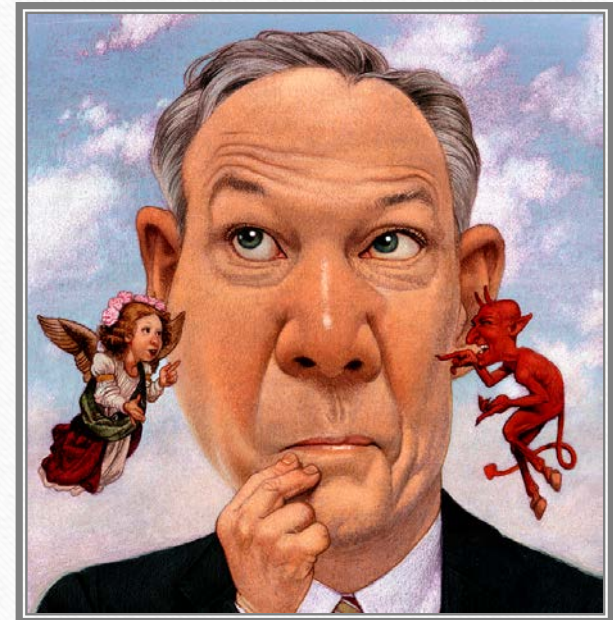


Image Source: <https://www.behance.net/gallery/14653781/Devil-on-my-shoulder-angel-at-my-feet>

Lesson #1:

Unproclaimed legislation counts

- Particularly if retroactive
- If retroactive, wage restraint legislation can be challenged qua legislation
 - *MFL* (QB 2020)
- Can also be challenged on the basis of government action
 - s. 32(1)(b) of *Constitution Act*; *BC Teachers'* (BCCA 2015); *BC Health Services* (SCC 2007)



Lesson #1:

Unproclaimed legislation counts

- No bright-line distinction between legislation and government action
 - Activities of executive branch before legislation is enacted can still be challenged
- Government conduct and the legislative provisions often interact
 - Amplify the interference in a way that is greater than the sum of the parts.

Lesson #2:

Importance of Early Consultation and Negotiation

- No duty to consult nor negotiate prior to enacting wage restraint legislation
 - *Mikisew* (SCC 2018) and *BC Health Services* (SCC 2007)
- “Pre-legislative consultation, then, can be seen as a replacement for the traditional collective bargaining process, but only if it truly is a meaningful substitution.”
 - *BC Teachers’* (BCCA 2015), para 287; See also *OECTA v. King* (ONSC 2022)
- Negotiations and comparator collective agreements matter in s. 2(d) analysis
 - *Meredith* (SCC 2015); *BC Health Services* (SCC 2007); *Dockyard Trades* (BCCA 2016)

Lesson #3:

Impact on Union Bargaining Power Matters

- Given contextual and fact-based inquiry required by SCC
- “Bargaining power” is ability to secure another’s agreement on one’s own terms.
- Sources of bargaining power of a union and its members
 - ability to sustain a strike
 - ability to make strategic trade-offs:

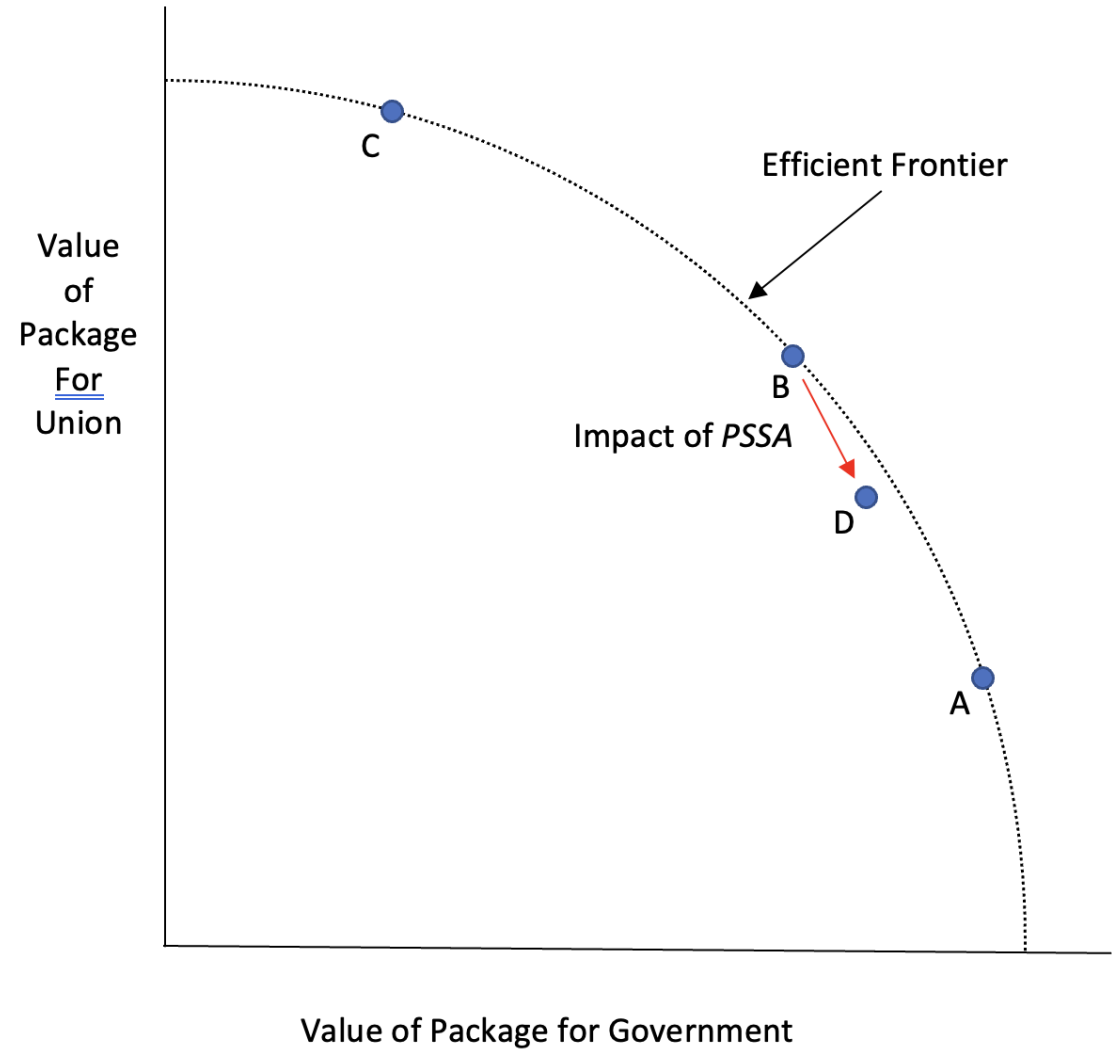
Lesson #3:

Impact on Union Bargaining Power Matters

- Generally, financial issues like compensation are most important
- Explicit trade-offs are often made between non-compensation and compensation items
- Union bargaining power often attenuated if compensation issues pre-determined (*MFL QB 2020*; *OECTA v. King ONSC 2022*)
 - No leverage in negotiating non-economic issues
- Union bargaining power further reduced if non-economic issues are not important enough to sustain a strike (*MFL QB 2020*; *OECTA v. King ONSC 2022*)

Lesson #3: Impact on Union Bargaining Power Matters

- Two-Issue Negotiation
Between Public Sector
Union and Government
Employer



Lesson #4: Be Fiscally Congruent With Wage Restraint Legislation

- Don't make large contributions to “rainy day funds” (MB)
- Don't reduce sales taxes (MB)
- Don't reduce income taxes (MB, ON)
- Don't eliminate longstanding sources of revenue (e.g., license plate sticker refunds in ON)
- Impacts *Oakes* analysis

Concluding Advice

- Foster a cooperative relationship with the public sector unions
- Where necessary, obtain financial concessions through hard bargaining and reductions in transfer payments
- Governments that negotiated were as effective at meeting their financial goals as governments that legislated
 - (Thompson 1988; Swimmer 2001)