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: Apple “Maps”
Temptations

• Rule-maker
• Growing debts and deficits
• Compensation a high proportion of budgets
• Essentaility 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)