IN THE MATTER OF AN ARBITRATION UNDER
THE ARBITRATION ACT

B E T W E E N:

CANADIAN UNION OF PUBLIC EMPLOYEES

("CUPE")

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the MINISTER OF EDUCATION and the ATTORNEY GENERAL

("the Crown")

RE: *Putting Students First Act – Charter* Damages

Before: SOLE ARBITRATOR: M.G. Mitchnick

APPEARANCES:

For the Union:
Gavin Leeb, National Director, Legal Branch
Elizabeth Nurse, Counsel
Russ Armstrong, Assistant Regional Director
Jim Morrison, National Representative
Terri Preston, Chair, OSBCC

For the Crown:
Ferina Murji, Counsel
Dianne Paquette, Crown
Alison Warrian, Crown

Hearing held in Toronto, Ontario on July 6th, 2017.

AWARD

This matter has its origins in the Province's *Putting Students First Act, 2012,* and, more specifically, in the Judgment of the Ontario Superior Court, 2016 ONSC 2197, that the totality of the Province's actions in implementing that *Act* created a violation of the affected bargaining-unit members' "freedom of association" rights under s. 2(d) of the Canadian *Charter of Rights and Freedoms.* The Court, as the parties had agreed, left it to the parties to make the attempt initially to reach agreement on what would constitute an appropriate remedy for those members, and, as indicated in the Agreed Facts below, all but one of the 5 applicant Unions bringing the challenge have been able to arrive at such an agreement.

All of the agreements on remedy call for the pay-out of a specified amount of money to members of the bargaining units, and those agreements for 3 of the 4 Unions also provide for the manner in which those pay-outs are to be handled. The exception is the provincial CUPE agreement, and that is the issue that is before me for decision in the present proceedings. The issue was dealt with in an expedited way, based upon the following Agreed Statement of Facts:

AGREED STATEMENT OF FACTS

The parties appear before Arbitrator Morton Mitchnick in accordance with the Agreement to Arbitrate (Appendix A to the Minutes of Settlement, dated June 8, 2017).

The issue between the parties relates to the method of distribution of monies that the parties agree are owing to CUPE members as a one-time general damage award for the breach of the CUPE Applicants' rights under section 2(d) of the *Canadian Charter of Rights and Freedoms* (as is further described below).

Three attachments are appended to the agreed statement of facts:

(i) the Ontario Superior Court of Justice decision of Justice Lederer re *Ontario Public Service Employees Union et al.* v. *Ontario* (CV-12-465269);
(ii) the Minutes of Settlement between the parties respecting the remedial consequences of Justice Lederer's decision; and
(iii) a tax opinion retained and submitted by CUPE.

The following recitation of agreed facts are provided in order to assist Arbitrator Mitchnick in making his determination regarding the method in which the agreed upon settlement amount shall be distributed to CUPE members who fall within the scope of the above referenced Minutes of Settlement ("MOS").

The parties agree that Arbitrator Mitchnick is limited to considering the documents and facts referenced herein to make his determination.

1. On April 20, 2016, the Superior Court released its decision in the five applications brought by five education sector unions (ETFO, OSSTF, OPSEU, CUPE and Unifor) finding an unjustifiable violation of s. 2(d) of the *Charter of Rights and Freedoms*.

2. By agreement between the parties, the Court did not address the question of remedy in this decision. The Court encouraged the parties to engage in discussions on next steps, prior to any further hearing on the question of remedy. In the absence of a negotiated resolution, a further hearing on remedy would be scheduled with the judge.

Background:

3. The applications challenged the constitutional validity of: (i) the tripartite provincial discussion table (PDT) process with the Ministry of Education, school board employers' associations and education sector unions to achieve collective agreements for the 2012-2014 school years, (ii) the passage of the *Putting Students First Act*, *2012* (PSFA)in September 2012, and (iii) the subsequent imposition of collective agreements under the PSFA.

4. As in 2004 and 2008, a PDT process was held from February to August 2012. The Ministry entered the discussions by tabling parameters that were later announced in the 2012 Budget, namely 0% wage increases, termination of banking sick days annually, removal of the sick leave gratuity pay-out, creation of a short-term sick leave plan and no movement up salary grids (all of which were to take place September 1 for most bargaining units). The government's position was that the acceptance of these parameters would meet the province's fiscal plan, allow the roll-out of full day kindergarten and maintain class size caps, which in turn would save between twenty to thirty thousand jobs in the sector. Education sector unions participated in the PDT process to varying degrees and at different times.

5. After very extensive negotiations, the Ontario English Catholic Teachers Association (OECTA) and the francophone teachers' federation, the Association des

enseignantes et des enseignants franco-ontariens (AEFO), as well as the Association of Professional Student Services Personnel (APSSP) and a small group of educational assistants reached Memoranda of Understanding (MOU) with the Crown prior to the passing of the PSFA.

6. The Crown encouraged all remaining parties to seek agreements (either provincially or locally) that reflected the OECTA MOU however no agreements were immediately concluded.

7. As a result, the PSFA was enacted (released in draft on August 16, 2012). The PSFA implemented the MOUs for the signing unions and it gave the remaining unions/federations and employers/associations until August 31, 2012 to reach MOUs that were "substantially similar" to the OECTA MOU. After August 31, 2012 collective agreements had to be "substantively identical" in relevant respects to the OECTA MOU.

8. Further, under the PSFA parties were given until December 31, 2012 to negotiate local collective agreements consistent with the OECTA MOU (local issues not covered by the MOUs continued to be bargained without parameters except for the timeline).

9. CUPE reached an MOU with the Ministry on December 31, 2012.

10. Effective January 1, 2013 employment terms consistent with the OECTA MOU were imposed on non-bargaining education sector employees. The CUPE MOU was not imposed until later in January to give the parties time to ratify.

11. Further, in January 2013, all submitted local agreements were approved, and collective agreements were imposed by Order in Council ("OIC") on the remaining bargaining units and school boards.

12. The PSFA was repealed on January 23, 2013.

13. In October 2012, OSSTF, OPSEU, ETFO and CUPE each served a *Charter* challenge to the PSFA. The unions argued a violation of: (i) the right to collective bargain as protected by s. 2(d) of the *Charter* and (ii) the right to strike, also protected by s. 2(d). In 2014, Unifor (formerly CAW Canada) launched a similar claim. None of the Applications challenged the MOUs negotiated post-repeal of the PSFA, or the *School Boards Collective Bargaining Act*, which received Royal Assent

in April 2014.

14. The Applications were heard together in a seven-day hearing in December 2015.

Decision of the Superior Court:

15. On April 20, 2016, the Superior Court of Justice (Lederer J.) released its decision finding a *Charter* violation.

16. The Court held that:

(i) Between late 2011 and the passage of the PSFA, the government violated the *Charter* s. 2(d) right of the education sector unions to a process of good faith collective bargaining by virtue of the "flawed" PDT (provincial discussion table) process of consultation engaged in by the government. The Court found that the government breached s. 2(d) by insisting on sector-wide agreements without setting specific financial targets for each union. The court specifically noted that CUPE members' interests are very different than teachers. This, the Court found, rendered the collective bargaining "meaningless" and had created a "situation which made collective bargaining impossible".

(ii) The PSFA violated s. 2(d) by constraining potential bargaining outcomes after its passage and by imposing by Order in Council important terms and conditions of employment taken from an agreement reached in July 2012 with OECTA (the Ontario English Catholic Teachers Association);

(iii) The PSFA further breached *Charter* s. 2(d) by empowering the government by Order in Council to prohibit any strike action and by not providing any alternative such as binding arbitration. In the context of the case, the Court found that the right to strike was a constituent part of the collective bargaining process; and

(iv) The violations of s. 2(d) were not saved by s. 1 of the *Charter*. Although the Court accepted Ontario's evidence that the fiscal crisis of 2008 justified a response by the government, the Court found that the means chosen were not rationally connected to that goal, and did not impair the collective bargaining right as minimally as possible.

17. By agreement between the parties, the Court did <u>not</u> address the question of remedy in this decision.

18. The Court encouraged the parties to engage in discussions on next steps, prior to any further hearing on the question of remedy. In the absence of a negotiated resolution, a further hearing on remedy would be scheduled with the judge.

Agreements on Remedy Reached Between the Crown and Each of the Applicants:

19. The Crown has reached individual agreements on the issue of remedy resulting from the Superior Court's determination with four of the five principal applicants (OSSTF, OPSEU, CUPE, Unifor. No agreement on remedy has been reached with ETFO.

20. The agreements concluded between the Crown and OPSEU and between the Crown and OSSTF are provincial deals which apply to all of their education sector bargaining units in the province.

21. The Crown concluded two separate agreements with CUPE: CUPE (provincial agreement applicable to all relevant CUPE members with the exception of members in CUPE Local 27) and CUPE Local 27.

22. The Crown concluded three separate agreements with UNIFOR: UNIFOR Local 302 (representing custodial and maintenance employees of the Avon Maitland District School Board "AMDSB") and Ron Riberdy and Maureen Plaquet, UNIFOR Local 302 (representing custodial and maintenance employees of the Waterloo Catholic District School Board "WCDSB") and Ron Riberdy and Maureen Plaquet and UNIFOR Local 2458 (representing custodial and maintenance, and office clerical technician employees of the Windsor-Essex Catholic District School Board "WECDSB") and Ron Riberdy and Maureen Plaquet.

23. In each of the agreements the Crown made commitments to pay specific sums of money to each applicant to address the s. 2(d) *Charter* violation as determined by the Superior Court. The specific consideration and payment structures of each of these individual agreements vary.

Summary of the Provincial CUPE Minutes of Settlement:

24. The Crown committed to providing a one-time general damage award for the breach of CUPE applicants' rights under s. 2(d) of the *Charter*.

25. The parties agreed that the sum to be paid to each affected CUPE member would be apportioned depending upon whether a person was an employee under a CUPE collective agreement in one of the 2012-2013 or 2013-2014 school years or in both school years. If a person was an applicable employee for one school year s/he would be entitled to $452.75. If a person was an applicable employee for both school years s/he would be entitled to $905.50.

26. The agreement between the parties clearly outlines that the specified amounts are "*forecasts based on projected headcounts*". The agreement goes on to stipulate that

"*actual amounts paid may vary from the amounts listed [in paragraph 26 above]* ***but the total amount to be allocated shall not exceed [the one-time general damage award agreed to by the parties]***. (emphasis added) [See paragraph 2 of the Minutes of Settlement]

27. Although the terms of the settlement agreement have been reached, the parties remain unable to agree on the method for distributing the one-time general damage award payment. Accordingly, the parties agreed to have this issue determined by an Arbitrator in accordance with the terms of the MOS (paragraph 3) and the "Agreement to Arbitrate", which is appended to the MOS as Appendix A.

28. CUPE obtained a legal opinion in relation to the tax treatment of the "one-time general damage award" referred to in paragraph 24 above. The opinion states that the amounts paid are not income and should not be subject to deduction. As part of the agreement between the Crown and CUPE, the Crown is responsible for making the required fixed payment but makes no representation and assumes no responsibility or liability with respect to the appropriate tax treatment of any payments made to any person under the agreement.

29. The tax opinion is included as an attachment to these stipulated facts. While the tax opinion is referenced within the agreed statement of facts, the Crown does not adopt, agree with or endorse the opinion and determinations made therein. To be clear, the Crown simply acknowledges that CUPE retained an opinion and acknowledges that CUPE has received an opinion regarding the tax treatment of the settlement funds.

Appendix A - The Agreement to Arbitrate:

30. The parties require a determination regarding how the monies stipulated in the MOS should be distributed to CUPE members (other than members of Local 27). Specifically, whether the funds shall be:

    a. Paid to school boards as employers of CUPE members, to be distributed in accordance with paragraph 2 of [the] Minutes of Settlement **or**

    b. Paid to a mutually acceptable third-party administrator to be distributed in accordance with paragraph 2 of [the] Minutes of Settlement.

31. The Agreement to Arbitrate sets out a due diligence process for the one-time payment of damages for each option described immediately above (as described in paragraph 2 of the Agreement to Arbitrate).

32. The due diligence process that supports the one-time payment is the same for either method of payment distribution. The difference lies with whom the Crown makes its damage payment to: either the school board or a mutually acceptable third party administrator.

33. In the event that the Crown is required to distribute the one-time general damage award to a third-party administrator, the Crown will be responsible for reimbursing CUPE for the costs reasonably incurred to a maximum amount (as referenced in paragraph 9 of the Agreement to Arbitrate).

Memoranda of Settlement Reached with Other Applicants to the Court Challenge:

34. As referenced above, the Crown has reached agreement on the remedy resulting from the Superior Court decision with four of the five Applicants. Agreements were reached on the following dates:

    i) November 16, 2016.....UNIFOR, Local 2458, WECDSB

    ii) November 30, 2016.....CUPE Local 27

    iii) December 2, 2016.....UNIFOR, Local 302, AMDSB

    iv) January 24, 2017.....UNIFOR, Local 302, WCDSB

    v) February 24, 2017.....OSSTF

    vi) May 3, 2017.....OPSEU

    vii) June 8, 2017.....CUPE

35. Each of the above noted agreements were subsequently ratified by the respective members.

36. Each of the agreements require the Crown to pay specific sums of money to each applicant to address the s. 2(d) *Charter* violation determined by the Superior Court.

37. While the specific consideration and payment structures of each of these above referenced individual agreements vary, each agreement (with the exception of the provincial CUPE agreement at issue in this arbitration) requires the Crown to issue its funding/payment obligations to the applicable school boards. The school boards are then responsible for distributing the settlement payments to individual applicable members.

Additionally, the third paragraph of the Memorandum of Settlement between CUPE and the Crown stipulates as follows:

> (3) The method of distribution of the $56, 700, 000 described in (2) above shall be determined by an arbitrator appointed for that purpose, in accordance with the Agreement to Arbitrate at Appendix "A".

Appendix "A", as amended now to reflect the appointment of myself as Arbitrator, provides:

Appendix "A"

AGREEMENT TO ARBITRATE

1. The Crown and the CUPE Applicants hereby agree to appoint Arbitrator Morton Mitchnick to determine the method of distribution to CUPE members (other than members of Local 27) of the amount of $56,700,000 in one time damages for breach of the CUPE Applicants' s. 2(d) *Canadian Charter of Rights and Freedoms'* rights, as described in *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269.

2. Arbitrator Mitchnick's jurisdiction shall be limited solely to the method of distribution of the funds to CUPE members (other than members of Local 27). Specifically, whether the funds shall be:

    a. paid to school boards as employers of CUPE members, to be distributed in accordance with paragraph 2 of these Minutes of Settlement **or**

    b. paid to a mutually acceptable third party administrator to be distributed in accordance with paragraph 2 of these Minutes of Settlement.

3. Arbitrator Mitchnick shall have no jurisdiction to determine any issue other than that listed in paragraph 2 above.

4. The parties to the arbitration shall be the Crown and CUPE.

5. The parties agree that this arbitration constitutes an arbitration under the *Arbitration Act, 1991*.

6. Notwithstanding ss.54 and 55 of the Arbitration Act, 1991, the Crown and CUPE shall each pay one-half of the arbitrator's fees and expenses. Arbitrator Mitchnick shall have no jurisdiction to award costs of the arbitration.

7. The appointment of Arbitrator Mitchnick is irrevocable, unless otherwise agreed by the parties.

8. In the event that Arbitrator Mitchnick orders that damages be paid to school boards for distribution, under 2(a) above, the following process shall apply:

   a) The entitlement of a CUPE member to a payment under these Minutes shall be subject to a due diligence review by CUPE. The Crown shall endeavour to provide, or request school boards to provide, reasonable employment data requested by CUPE as necessary to facilitate the payments under paragraph (2) of the Minutes of Settlement. The Crown will not collect or use more personal information than is reasonably necessary to meet this purpose. The Crown shall complete its disclosure of data to CUPE no later than August 31, 2017. CUPE shall complete its due diligence review by September 30, 2017. Arbitrator Mitchnick shall be seized of any dispute related to the provision of data.

   b) CUPE shall endeavour to notify its members of any entitlement to a payment under paragraph (2) of the Minutes of Settlement by October 1, 2017.

   c) If an individual CUPE member's entitlement is in dispute, CUPE may refer the question to Arbitrator Mitchnick for determination. Any referral of a dispute to Arbitrator Mitchnick must be made by October 31, 2017. Arbitrator Mitchnick shall have no discretion to amend or extend this deadline.

   d) Upon completion of the steps outlined in (a), (b) and (c) above, the Crown shall make the payment of $56,700,000 to school boards for distribution no later than six weeks following the completion of disputes under (c). The amount of the Crown's payment shall be fixed, regardless of the number of individuals who are entitled to receive payments.

9. In the event that Arbitrator Mitchnick orders that damages be paid to a third party administrator for distribution, as per 2(b) above, the following process shall apply:

a) The entitlement of a CUPE member to a payment under these Minutes shall be subject to a due diligence review by CUPE. The Crown shall endeavour to provide, or request school boards to provide, reasonable employment data requested by CUPE as necessary to facilitate the payments under paragraph (2) of the Minutes of Settlement. The Crown will not collect or use more personal information than is reasonably necessary to meet this purpose. The Crown shall complete its disclosure of data to CUPE no later than August 31, 2017. CUPE shall complete its due diligence review by September 30, 2017. Arbitrator Mitchnick shall be seized of any dispute related to the provision of data.

b) CUPE shall endeavour to notify its members of any entitlement to a payment under paragraph (2) of the Minutes of Settlement by October 1, 2017.

c) If an individual CUPE member's entitlement is in dispute, CUPE may refer the question to Arbitrator Mitchnick for determination. Any referral of a dispute to Arbitrator Mitchnick must be made by October 31, 2017. Arbitrator Mitchnick shall have no discretion to amend or extend this deadline.

d) Upon completion of the steps outlined in (a), (b) and (c) above, the Crown shall make the payment of $56,700,000 to a mutually agreeable third party administrator for distribution no later than six weeks following the completion of disputes under (c). The amount of the Crown's payment shall be fixed, regardless of the number of individuals who are entitled to receive payments.

e) If CUPE and the Crown are unable to mutually agree upon a third party administrator, the question may be referred to Arbitrator Mitchnick for determination.

f) The Crown shall reimburse CUPE for the costs reasonably incurred in the administration of the payments under paragraph (2) of the Minutes of Settlement up to a maximum of one million dollars ($1, 000, 000). This reimbursement shall be in addition to damages payments under paragraph (2).

   CUPE shall receive at least two quotes from third party administrators. Upon the awarding of a contract, the Crown shall flow fifty percent of the amount of the contract, up to a maximum of $500,000, to CUPE. The balance shall be paid within six weeks of the Crown receiving appropriate invoices for the services of the third party administrator.

10. Arbitrator Mitchnick's decision shall be final and binding. For greater certainty, the parties agree that there are to be no appeals from Arbitrator Mitchnick's decision on any matter, including questions of law.

As observed at the hearing, this is not a matter of interpretation of an Agreement reached by the parties, generally referred to as a "rights" arbitration. Rather, it is a process designed to "complete" the parties' settlement of this matter by determining the single issue on which they were not able to come to agreement on their own. That is, the matter is akin to what is commonly referred to as an "interest" arbitration. And in interest arbitration, arbitrators have long held that close regard must be had to any "patterns" of settlement that already have emerged in the free marketplace.

Here, as the final paragraph of the Agreed Facts indicates, that "replication" principle operates in an unbroken way to support the position of the Province: all of the other Unions that have settled on this matter, including CUPE's Local 27, have agreed that the appropriate way for the distribution of the stipulated sum to be administratively handled is through the school boards that were the employers of the affected members. It is open to CUPE to demonstrate in clear fashion why that existing pattern ought not to be followed in the present case, but I do not have in front of me any obvious basis for such departure. While it is agreed that "the specific consideration and payment structures of these other agreements do vary", I have nothing before me to indicate either the manner or extent to which they so vary. All that is known is that they were negotiated under the same circumstances as gave rise to the CUPE "Provincial"' settlement, and that, according to paragraph 36 of the Agreed Facts, they provide by way of the *Charter* remedy a similar pay-out to members of a total agreed-upon amount.

CUPE argues that it is nonetheless the Third Party Administrator (TPA) model that ought to be adopted here instead, for considerations of efficiency and consistency. But even to the extent that CUPE may have additional oversight responsibility for the TPA model, it is acknowledged in the Agreed Facts that the "due diligence" process for CUPE under either model is exactly the same, as is the resort to a dispute-resolution method should that become necessary at any stage of the pay-out determination. Either way, as Appendix A reflects, the Union, as would be the Third Party Administrator, is wholly reliant on the school boards to provide the necessary "employment data", as the sole possessor of such records. The addition of a TPA would simply add another step in the communication chain, when the actual dialogue over what information is required, or the completeness or accuracy of any data provided, is going to be one effectively arising between the school board and the Union. And with the school-board-based pay-out

system previously agreed to for the other 3 Unions, there likely are already processes in place for the collection and review of the pertinent data that CUPE may be able to step into immediately.

As for consistency, if an issue does arise over the entitlement of any employee, including, one would think, its quantum, those issues fall to be determined by the third-party dispute-resolution process that exists in exactly the same way under both 8(c) and 9(c) of the Agreement to Arbitrate. CUPE's main cause for concern with the procedure adopted by the other 3 Unions is the possibility that the school boards may "mishandle" the tax treatment of these payments; i.e., act in a manner inconsistent with the terms of the Province and CUPE's Memorandum of Settlement. But as the Province was quick to point out in the proceedings before me, and as the Agreed Statement of Facts re-iterates (paragraph 24), in the MOS "the Crown committed to providing a one-time general damage award for the breach of CUPE applicants' rights under s. 2(d) of the *Charter*". It does not surprise me that the Province, notwithstanding paragraph 24, forswore making any representation as to the ultimate tax or other treatment of the pay-outs it committed to, given that that treatment for the bulk of those payments is in large measure a federal matter beyond the Province's jurisdiction. What the Province did do, as it noted again at the hearing, is agree to describe the payment to each employee as "a one-time general damage award for the breach of [*Charter*] rights". Such description is a term of art in normal labour-relations practice, as the Province's team would undoubtedly have known, connoting a payment that is distinct from "income" and therefore not subject to the so-called "statutory" deductions at the point of disposition. The school boards, under the scheme of the MOS, act merely as pay agents for the Province and its obligations here, and to meet the Province's obligations are required to make those payments in accordance with the intentions of the contracting

parties, being CUPE and the Province. And the Province, far from signalling in these proceedings any desire to resile from the extent of its commitment under the MOS, re-iterated its desire to see the affected employees in the units receive the "full benefit" of what the MOS has undertaken to provide to them. If a dispute *does* arise as to the meaning of the MOS on this point, CUPE presumably would have its resort to the third-party determination process provided by s. 8(c). And as there is nothing to distinguish one individual employee from another on the point, it is unrealistic to expect that this question would have to be submitted for determination by the Arbitrator on any more than one occasion (or by the Superior Court, in the event it is somehow determined that the Arbitrator does not have the jurisdiction to decide this particular question). It is true, as CUPE submits, that CUPE has no recourse against the school boards, who, although put forward by the Province as "pay agents", are not parties to this settlement articulating the *Charter* remedy. But any "shortfall" in the MOS as to what is required for the school boards to be expected to carry out the mandate of the MOS will be a matter between the Province and the school boards; at the end of the day it will be for the Province, whatever it has to do to make it happen, to satisfy the Arbitrator that pay-outs have been made to all affected employees in accordance with the terms of the Memorandum of Settlement. I believe that the rights of CUPE and its bargaining-unit members are being adequately protected.

On the basis of all of the foregoing, therefore, it is my award that utilizing the school-board system of pay agents proposed under Option (a) of section 2 of the Agreement to Arbitrate, in the present circumstances constitutes the appropriate method of distribution, and I so order. In doing so I note CUPE's concern that such system needs to include a method whereby individuals appearing on the list of more than one school board can be readily identified so

that the appropriate treatment of their payment can be considered and dealt with.

Dated at Toronto this 12th day of July, 2017

Sole Arbitrator

SCHEDULE A

Court File No.: CV- 12- 466524

B E T W E E N:

CANADIAN UNION OF PUBLIC EMPLOYEES, CATHERINE BARRETT, SUSAN HANSON, ELIZABETH MCDONALD AND SYLVAIN PICHÉ

Applicants

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTER OF EDUCATION, and THE ATTORNEY GENERAL OF ONTARIO

Respondents

- and -

ONTARIO PUBLIC SCHOOL BOARDS ASSOCIATION

Intervener

MINUTES OF SETTLEMENT

Whereas the Canadian Union of Public Employees ("CUPE"), Catherine Barrett, Susan Hanson, Elizabeth McDonald and Sylvain Piché on their own behalf and on behalf of all of the members of CUPE (collectively the "CUPE Applicants") are parties to the within Application.

And whereas by Order of Himel J, dated March 4, 2014 and entered April 3, 2014, the within Application was consolidated with Toronto Applications nos. CV-12-465269, CV-12-465278, CV-14-499232 and CV-12-465306 and heard on the merits together with them by Lederer J under the title of proceeding, *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269, with judgment reserved.

And whereas Lederer J issued a judgment on the merits on the issues of liability in the consolidated Applications on April 20, 2016, holding that the s. 2(d) *Canadian Charter of Rights and Freedoms'* rights of the Applicants were breached by the conduct of the

Government of Ontario and by the *Putting Students First Act, 2012* (hereinafter the "*PSFA*"), which imposed collective agreements on CUPE locals representing education workers and local school boards or approved collective agreements between CUPE locals and local school boards, pursuant to the *PSFA*.

And whereas the issues of liability and remedy were bifurcated in the consolidated Applications.

And whereas Lederer J encouraged the parties to the consolidated Applications to attempt to arrive at a remedy for the *Charter* breaches found by the Court.

And whereas CUPE Local 27, CUPE, the Crown and the Greater Essex County District School Board reached an agreement dated November 30, 2016 in which CUPE agreed that that agreement constituted a full and final settlement of any and all issues and claims arising from Toronto Application no. CV-12-466524 or the liability findings of Lederer J. in the consolidated Applications that were or could be advanced by CUPE Local 27 in those proceedings or in any other legal proceeding.

And whereas the affected CUPE members assert that they have suffered damages consequential to the *Charter* breach, which assertion is, for the purpose of this settlement only (and not for the purpose of any other proceedings) not contested by the Crown.

And whereas none of the parties to the within Application are a person under a disability for the purposes of the Rules of Civil Procedure.

The Respondent and the CUPE Applicants hereby agree to the following, as full and final settlement of any and all issues and claims arising from the within Application or the liability findings of Lederer J in the consolidated Applications that were or could be advanced by the CUPE Applicants in their own right or on behalf of their members:

1) The Crown agrees that it will not appeal the judgment of Lederer J finding liability against the Crown dated April 20, 2016 in *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269, in so far as it relates to CUPE or its members, and in particular, the Crown agrees that it will not bring an appeal in respect of the within Application (Court File No.: CV- 12-466524). It is agreed that the Crown does not waive its right to appeal the judgment of Lederer J finding liability against the Crown (dated April 20, 2016 in *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269), in so far as it relates to the Applicants in Applications CV-12-465269, CV-12-465278, CV-14-499232 and CV-12-465306, who are not parties to these Minutes of Settlement (i.e., the Applicants other than the CUPE Applicants). The parties agree that the outcome of any remedy determinations that may be made by the Court in *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269, and the outcome of any appeals that may be taken by any party in respect of liability or remedy in *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269, or in Applications CV-12-465278, CV-14-499232 and CV-12-465306, shall have no

bearing on the respective rights and obligations of the parties under these Minutes of Settlement.

2) The Crown shall provide $56,700,000, to be paid to CUPE members (other than members of Local 27), as a one-time general damage award for the breach of the CUPE Applicants' rights under s. 2(d) *Canadian Charter of Rights and Freedoms*, as described in *Ontario Public Service Employees Union et al v. Ontario*, CV-12-465269. The sum that is paid to each affected CUPE member shall be apportioned so that a person who was an employee under a CUPE collective agreement in only one of the 2012-2013 or 2013-2014 school years shall be paid one-half of the amount that is to be paid to an affected CUPE member who was an employee under a CUPE collective agreement in both of those school years. These amounts shall be $905.50 and $452.75.

   For the purposes of this agreement, "school year" means the period September 1 to the following August 31 (e.g. September 1, 2012 to August 31, 2013).

   The amounts listed here are forecasts based on projected headcounts. The actual amounts paid may vary from the amounts listed here but the total amount to be allocated shall not exceed $56,700,000.

3) The method of distribution of the $56,700,000 described in (2) above shall be determined by an arbitrator appointed for that purpose, in accordance with the Agreement to Arbitrate at Appendix "A".

4) Upon presentation of a Bill of Costs from the CUPE Applicants, the Crown shall reimburse the CUPE Applicants their legal costs incurred up to the Court's decision on liability of April 20, 2016, such legal costs being solely related to the proceedings before the Ontario Superior Court of Justice in the within Application. The amount of reimbursement shall be on the partial indemnity scale, as agreed, or failing agreement, as assessed by a Court Assessment Officer.

5) Upon presentation of appropriate legal invoices from CUPE, the Crown shall reimburse the CUPE Applicants for 60% of all costs reasonably incurred in obtaining the legal opinion of Aird & Berlis dated May 30, 2017 considering the tax implications of damages for breach of s.2 rights under the *Charter of Rights and Freedoms*.

6) The CUPE Applicants agree to instruct their counsel to execute a consent to an Order substantially in the form set out in Appendix "B" dismissing the within Application with prejudice and without costs. The CUPE Applicants further agree that they will not participate as a party or intervener in any remaining *Charter* applications that challenge the PSFA or any other issues arising in the within Application and consolidated in Court File Number CV-12-465269 titled *Ontario Public Service Employees Union et al v. The Crown in Right of Ontario* or in any

appeal or other proceeding that may be brought in connection with the same subject matter as that of the consolidated Applications.

The undersigned declare that they have read these Minutes of Settlement and fully understand the terms of this settlement and that they have received, or had the opportunity to receive, legal advice from their respective solicitors with respect to these Minutes of Settlement.

A waiver of any default, breach or non-compliance under these Minutes of Settlement is not effective unless in writing and signed by the party to be bound by the waiver. No waiver shall be inferred from or implied by any failure to act or delay in acting by a party in respect of any default, breach or non-observance or by anything done or omitted to be done by any other party. The waiver by a party of any default, breach or non-compliance under these Minutes of Settlement shall not operate as a waiver of such party's rights under these Minutes of Settlement in respect of any continuing or subsequent default, breach or non-observance.

These Minutes of Settlement shall be binding upon and shall enure to the benefit of the respective successors, heirs, assigns, officers, directors and employees, and agents and solicitors (as those terms may apply) of the parties.

Should there be any breach of any term of these Minutes of Settlement, the parties shall be entitled to all legal and equitable remedies available at law.

The parties are permitted to enter into these Minutes of Settlement in counterparts. Executed copies of these Minutes of Settlement may be transmitted via facsimile, email or courier.

Notwithstanding any other rights with respect to the enforcement of the terms of these Minutes of Settlement that the parties may have, the parties hereto irrevocably acknowledge and consent to the jurisdiction of the Ontario Superior Court of Justice to resolve any dispute arising in relation to these Minutes of Settlement, except for those matters described in paragraph 3 above and in Appendix "A". The Minutes of Settlement shall be governed by, and interpreted and enforced in accordance with, the laws of the Province of Ontario and the laws of Canada as applicable therein.

The parties agree that these Minutes of Settlement reflect the entire agreement among the parties with respect to the settlement of the Application. Any prior communications with respect to the settlement of the Application, be they written or oral, are of no effect and are superseded by these Minutes of Settlement.

The CUPE Applicants hereby represent and warrant that, subject to such ratification procedure they adopt, they have the authority to bind all their members in respect of the subject matter of this settlement. CUPE shall ratify this agreement by June 30, 2017.

For greater certainty the Respondent makes no representation and assumes no responsibility or liability with respect to the appropriate tax treatment of any payments made to any person under this settlement.

Signed on this 8th day of June, 2017.

FOR THE RESPONDENT, THE CROWN IN RIGHT OF ONTARIO as represented by THE MINISTER OF EDUCATION:

_____

Andrew Davis

ADM (A), Education Labour and Finance Division

FOR THE APPLICANT, CANADIAN UNION OF PUBLIC EMPLOYEES

_____

Mark Hancock

_____

Catherine Barrett (APPLICANT)

_____

Susan Hanson (APPLICANT)

_____

Elizabeth Mc Donald (APPLICANT)

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Sylvain Piché (APPLICANT)