

IN THE MATTER OF AN ARBITRATION

BETWEEN: COLLEGE COMPENSATION AND
APPOINTMENTS COUNCIL

AND: ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

AND IN THE MATTER OF A GRIEVANCE WITH RESPECT TO ONTARIO HEALTH PREMIUMS.

SOLE ARBITRATOR: O.B. SHIME, Q.C.

APPEARANCES:

CHRISTOPHER G. RIGGS, Q.C. COUNSEL, and others
for the College

D.K. EADY COUNSEL, and others
for the Union

A hearing was held in this matter at Toronto
on September 14, 2004

AWARD

In this matter, the Union claims that the College has breached the Collective Agreement and/or

any related employment legislation by refusing to pay the OHIP premium on behalf of all employees in the academic bargaining unit. The Union requests the College pay the OHIP premium on behalf of all employees, full retroactive compensation with interest for any related losses for affected employees and any other appropriate remedy.

The College maintains that Bill 106, which amends the *Provincial Income Tax Act*, imposed a tax and while the tax is referred to as the Ontario Health Premium, it is, in effect, a tax not covered by the Collective Agreement.

On June 21st, 2004, the Hon. G. Sorbara introduced an Act to implement budget measures and amend the Crown Forest Sustainability Act 1994, referred to as Bill 106, which provides as follows:

INCOME TAX ACT

EXPLANATORY NOTE

The *Income Tax Act* is amended to impose a tax called the Ontario Health Premium. The new section 2.2 imposes the tax and the new section 3.1 governs how it is calculated. Consequential amendments are made to other sections of the Act.

The new section 29.1 of the Act specifies that the Public Accounts for each fiscal year shall include information about the use of the revenue from the Ontario Health Premium. The new section 29.2 provides for a review of the Ontario Health Premium by a committee of the Assembly.

That Bill provides

“Ontario Health Premium” means the tax described in section 2.2; (“contribution-santé de l’Ontario)

4. The Act is amended by adding the following section:

Ontario Health Premium

2.2(1) Every individual shall pay a tax, called the Ontario Health Premium, for a taxation year ending after December 31, 2003 if the individual is resident in Ontario on the last day of the taxation year.

(4) The amount of the Ontario Health Premium payable by an individual for a taxation year is as determined under section 3.1.

5. Subsection 3(2) of the Act, as enacted by the Statutes of Ontario, 1991, chapter 47, section 1, is repealed and the following substituted:

Gross tax amount

- (2) The gross tax amount of an individual for a taxation year for the purposes of subsection (1) is the amount of tax that would be payable by the individual for the taxation year under this Act,
- (a) before the addition of any amount determined under subsection (1) or any amount payable under section 2.2; and
 - (b) before the deduction of any amount under subsection 4(6) or any amount under section 8.

6. The Act is amended by adding the following section:

Calculation of the Ontario Health Premium

- 3.1(1) The following is the amount of the Ontario Health Premium payable by an individual for a taxation year:

- 1. If the individual's taxable income for the year does not exceed \$20,000, the individual's Ontario Health Premium for the year is nil.
- 2. If the individual's taxable income for the year exceeds \$20,000 but does not exceed \$36,000, the individual's Ontario Health Premium for the year is the amount calculated using the formula,

$$0.06 \times A$$

in which,

"A" is the lesser of \$5,000 and the amount of the individual's taxable income in excess of \$20,000 for the year.

- 3. If the individual's taxable income for the year exceeds \$35,000 but does not exceed \$48,000, the individual's Ontario Health Premium for the year is the amount calculated using the formula,

$$B + (0.06 \times C)$$

in which

"B" is \$300, and

"C" is the lesser of \$2,500 and the amount of the individual's taxable income in excess of \$36,000 for the year.

- 4. If the individual's taxable income for the year exceeds \$48,000 but does not

exceed \$72,000, the individual's Ontario Health Premium for the year is the amount calculated using the formula,

$$D + (0.25 \times E)$$

in which,

"D" is \$450, and

"E" is the lesser of \$600 and the amount of the individual's taxable income in excess of \$48,000 for the year.

5. If the individual's taxable income for the year exceeds \$72,000 but does not exceed \$200,000, the individual's Ontario Health Premium for the year is the amount calculated using the formula,

$$F + (0.25 \times G)$$

in which,

"F" is \$600, and

"G" is the lesser of \$600 and the amount of the individual's taxable income in excess of \$72,000 for the year.

6. If the individual's taxable income for the year exceeds \$200,000, the individual's Ontario Health Premium for the year is the amount calculated using the formula,

$$H + (0.25 \times J)$$

in which,

"H" is \$750, and

"J" is the lesser of \$600 and the amount of the individual's taxable income in excess of \$200,000 for the year.

- (4) The amount of the Ontario Health Premium payable by an individual for a taxation year that ends on or before December 31, 2004 is 50 per cent of the amount otherwise calculated under subsection (1).

7. (1) Subsection 4(3) of the Act, as re-enacted by the Statutes of Ontario, 2000, chapter 42, section 50, is amended by striking out "sections 3 and 4.3 to 4.8" in the portion before paragraph 1 and substituting "sections 2.2, 3 and 4.3 to 4.8".

(2) Clause 4(7)(b) of the Act, as re-enacted by the Statutes of Ontario, 2000, chapter 10, section 13, is amended by striking out the portion before subclause

(1) and substituting the following:

(b) the expressions "tax payable" and "tax otherwise payable" mean the amount of tax calculated under this Act that would be payable for a taxation year, other than the Ontario Health Premium

8. The definition of "tax otherwise payable" in subsection 7(3) of the Act, as re-enacted by the Statutes of Ontario, 1993, chapter 29, section 5, is repealed and the following substituted:

"Tax otherwise payable" for a taxation year means the amount of tax payable under this Act for the taxation year, other than the Ontario Health Premium,

- (a) after the deduction, if any, permitted under subsection 4(6),
and
(b) before any deduction permitted by section 8 or this section.
(impôt payable par ailleurs")

10. Subsection 23(2) of the Act, as re-enacted by the Statutes of Ontario, 1996, chapter 24, section 17 and amended by 1998, chapter 34, section 80, is amended by adding the following clause:

(d.1) the amount of the Ontario Health Premium payable by a taxpayer for a taxation year, based on the amount of the individual's taxable income for that year;

11. The Act is amended by adding the following sections:

Report about revenue from the Ontario Health Premium

- 29.1 The Public Accounts for each fiscal year shall include information about the use of the revenue from the Ontario Health Premium.

Review of Ontario Health Premium

- 29.2 (1) A standing or select committee of the Assembly shall be appointed to review the Ontario Health Premium within four years after this section comes into force.

Same

- (2) The committee shall begin its review on or after the date specified by the Assembly, which date shall be no earlier than June 30, 2008, and shall report the results of its review to the Assembly no later than December 31, 2008.

Both parties are agreed that Bill106 has not yet received royal assent, but payments are being deducted from the employees' pay cheques based on a tax convention that allows deductions for premium increases. The Union requests, that if legislation is changed as a result of the second and

third readings and prior to receiving royal assent, it have the right to make further submissions in this matter.

The Union, after reviewing the relationship between the different legislative changes to health insurance and the Collective Agreement, argued that the language of the document signed by the parties is intended to protect an employee from having to pay from his/her own pocket a clearly identifiable premium for health insurance. The Union submits the phrase "individually paid premiums for health insurance" covers something more than a reversion to OHIP and the language is sufficiently broad to cover the new Ontario Health Premium payable under Bill 106.

The Union submits that Section 2.2 of Bill 106 clearly identifies the amount to be paid as a health premium which is reflected in the scheme of the Bill. The Union asserts that all monies collected pursuant to Bill 106 is mandated for health care and is a premium that is individually billed for the purposes of health insurance. The Union argues the payment is made by individuals and the individual colleges deduct the amount from the payroll. The Union further argues that the premium can be calculated for each individual employee and is specifically ascertainable; the premium is earmarked for health purposes and is separated from other taxes and from general tax increases. The Union claims since the money is to be used for health care, it is not to be considered as a general tax.

The Union further argues the amount paid by an individual is a separate calculation based upon the individual's taxable income and this premium exists apart from the *Ontario Income Tax Act*.

In sum, the Union maintains that the legislation imposes individually paid premiums based on an individual's taxable income for the tax year, and is to be paid even if an individual does not pay the basic Ontario income tax. The Union claims notwithstanding that the premium is housed in the *Income Tax Act*, it is a matter of administration and the Government has chosen simply to collect the health care premium within the income tax structure, rather than have a separate administrative unit, which

does not derogate from the concept of the payment being a premium.

The Union submits the new premium is similar to the old premium under the previous OHIP legislation and the Collective Agreement language obliges the College to pay the premium. Also, the Union argues the purpose of the Collective Agreement provision is to ensure that if the Government requires the employees to pay for health care by way of premium, the College is obligated to pay that premium on the employee's behalf, which is similar to the OHIP premium that had been fully payable by the College under the previous legislation.

The College submits the issue in this matter is whether there is an obligation on the College to reimburse employees for an additional tax required as a result of the amendments to the *Income Tax Act*. The College submits there are three distinct historical components that should be considered: (a) OHIP. (b) The Employer Payroll Tax and (c) the current Bill 106. The College argues the previous OHIP legislation was structured in a conceptually similar way to insurance, and persons had to apply for insurance; when they became insured persons they would pay premiums and the Employer was required to deduct the premiums which discharged any liability to pay. The insured person had the primary liability, but the Employer was required to make the deductions. This insurance scheme carried on until the Employer Health Tax in 1989 removed the insurance structure that had previously been in place. Under the *Employer Health Tax Act*, the Employer was required to pay the tax which continues to the present day. The College submits it is important to bear in mind that the Payroll Tax continues in force and is not affected by Bill 106.

The College argues that one must separate form and substance and, in this case, the substance is important. Under the OHIP legislation there was an amount required to be paid by an individual to secure an insurance benefit which was the traditional sense of a premium. The College submits all the definitions established under OHIP were consistent with an insurance process and were

replaced by the Employer Health Tax. The College argues that Bill 106 imposes a tax and, in substance, there was an amendment to the *Income Tax Act* which requires an individual to pay a tax, referred to as the Ontario Health Premium. The legislation uses the word "individual" which refers to a tax on an individual tax payer. Under Bill 106 there are varying amounts which are payable which are progressive and, in that sense, amounts paid parallel the income tax, because they are based on individual income.

The College submits there is a fundamental distinction between Bill 106 and the OHIP insurance scheme, and if an individual doesn't pay the tax it is a violation of the *Income Tax Act* and subject to penalties under that *Act*. However, if the tax is not paid, a person is not disqualified from receiving healthcare and, accordingly, the insurance component is no longer present. The College submits the definition section does not contain a classic definition of "premium", and, accordingly, is not covered by the Collective Agreement. The College does not contest that the money received is used for healthcare, but maintains it is used for a variety of healthcare issues which includes patient care, the infrastructure and is quite broad. The College further submits, based on the authorities, the payment under Bill 106 constitutes a tax; since there is no suggestion that the amount is referable to a specific service it is, in effect, a tax and not a fee or a premium.

The College argues that, in context, where the Collective Agreement refers to reverting to individual paid premium that the references is to individually paid premiums under a system that parallels the OHIP system, which is a system of health insurance. Accordingly, payment under Bill 106 is not really a premium, nor is it a premium for health insurance; there is no insurance component to Bill 106 because it is, in effect, a tax statute. The College submits the Collective Agreement does not embrace the changes made in Bill 106 since there is no sense of premium and no sense of insurance and, accordingly, the Union's argument fails because of these hurdles. Also, the College asserts the use of the word "resumes" is similar to the concept of reversion and requires the Collective Agreement to look backwards to previously established arrangements. The intent of the parties is to pay 100% of

the billed premium to employees, but pursuant to Bill 106, there is no such thing as a billed premium.

And, finally, the College submits that Bill 106 is not directed to employees, rather it is directed to tax payers or individual's who have taxable income, whereas the Collective Agreement refers to premium for employees. There is also an immediate difficulty, which is to know how each employee is to pay or how much is to be paid on behalf of an employee, because the amount is based on taxable income and, accordingly, the amount per employee varies based on factors which are not relevant to a taxpayer's employment or to anything related to employment. Therefore, the obligation from an Employer is to pay an amount which is unrelated to a person's employment status and employment income.

In the result, the College argues there is not a premium to be paid for employees, there is no sense of resuming payment, the amount to be paid is not billed and there is not an obligation with respect to employees but rather with respect to taxpayers. The College submits the pattern established by the *Act* does not provide for any obligation by the Colleges to pay the increased tax and the language of the Collective Agreement does not encompass the obligations under Bill 106.

By way of reply, the Union submits the College's position is restrictive and there was no intent to revert to the old OHIP premiums. The Collective Agreement is concerned with changes to the Employer Health Tax and the intent was for the College to pay any premiums that were reinstated by the Government. The Union submits the employees did not pay for OHIP premiums in 1989 and any premiums were to be paid by the College on their behalf, and the Collective Agreement clearly relates to Health Insurance which is required to be individually paid. This is not in the same manner as previously, but the payment required is ascertainable for each employee. The Union submits the language of the Collective Agreement goes beyond the previous OHIP legislation and when the language refers to reversion it is broader than simple OHIP premiums. In effect, the language

provides where an employee is required to pay a premium for health insurance, the College is obligated to pay 100% of that premium. The Union submits all individuals are to pay the premium which includes employees. The Union argues there is a material distinction between employees and self-employed employers. Also, the Union claims this is not a tax increase and the Provincial tax rate was not increased, but rather Bill 106 provides for an Ontario health premium to be spent on healthcare and the mechanics of collection under the income tax system is a matter of form and not of substance and is simply an administrative convenience. The Union claims Bill 106 provides for an individually paid premium for health insurance and requires the employees to pay the premium.

After duly considering the legislation and the submissions, it is my view, that the legislative intent is to enact what is in substance a tax, and that reference in the *Act* to Ontario Health Premium is merely a label used to describe the tax; that label is not intended to convert the substantive tax into something different, namely a premium. Section 2.2 is clear on its face as to legislative intent. It requires every individual to “pay a tax”, and the tax is simply labelled or called the “Ontario Health Premium”. The clear intent of the legislation, is also confirmed by the definition section in the *Act*, which explicitly states the Ontario Health Premium **means the tax**, described in Section 2.2. There can be no clearer sentence as to the intended meaning of the legislation. And as further proof, the Explanatory Note to Bill 106 specifically states, the *Income Tax Act* is amended to “**impose a tax**” called the Ontario Health Premium. In my view, the mere labelling or calling the payment a Health Premium cannot derogate from the clear intention of the legislation to require individuals to pay a tax.

Support for the view that the payment is a tax is found in the decision of The Supreme Court of Canada in *Eurig Estate (Re)* [1998] 2 S.C.R. 565. In that case, a regulation made under the *Administration of Justice Act* provided for a schedule of fees to be paid in order to obtain a grant of probate. The majority of the Supreme Court found the probate levy was a tax and not a fee according to the criteria which had been set by the Court in earlier cases. Major J, for the majority stated as

follows at p576:

“Whether a levy is a tax or a fee was considered in Lawson, supra. Duff J. for the majority concluded that the levy in question was a tax because it was : (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body and (4) intended for a public purpose.”

Applying those criteria to the payment required under Bill 106, I determine that the payment is a tax. It is apparent that the payment is (1) enforceable under the *Income Tax Act*, (2) that it is imposed under the authority of the Legislature; (3) that it is levied by the Province and (4) intended for a public purpose.

Also, in *Eurig*, the Court distinguished between a fee and a tax which is a relevant consideration in this case. The Court found that a “nexus must exist between the quantum charged and the cost of the service. . . .”, and where there was no correlation between the amount charged and the cost of providing the service that the levy was a tax and not a fee. The evidence demonstrates that the Ontario Health premium is intended to fund health care generally and supplements the existing health care system, but the amount payable bears no specific correlation to the services provided. In my view, the general nature of the utilization of funds does not bear the more specific nexus or correlation contemplated by the Supreme Court of Canada so as to take it out of the tax category.

It was argued by the College that the method of calculation for the Ontario Health Premium indicates it is a tax because the amount varies with an individual’s taxable income and I now turn to that submission. Variation does not determine the nature of the payment, because insurance premiums will also vary. For example, younger drivers may pay a greater premium than older drivers. Also, unlike normal income tax, while there is some variation in the amount payable, based on individual’s taxable income for the year, the amount payable is within quite confined limits. And further, unlike regular income tax, there is a cap on the varying amounts to be paid within the separate income groups or

classifications. Accordingly, I determine that the variation in payment is not conclusive of the payment being a tax.

While the Ontario Health Premium differs somewhat from a tax, that is not to say it is a premium. A premium is usually calculated, in part, based on risk and more specific cost related to the insured group. Thus, to use the example referred to above, younger drivers are required to pay higher premiums, because they are perceived to be at greater risk. Similarly, extra health coverage beyond government health insurance may have varying premiums related to age groups, because different ages present different risks. The risk to the insured class is a major component of the amount of the premium to be paid. However, the amount payable under Bill 106 is not related to risk. The amount payable, while it is to be used for health care, is intended for a broad use in which risk is not clearly ascertainable and cost is not specifically related to the insured group. In effect, I find the amount payable is more akin to a tax than a premium.

In the result, I am compelled by both the language of Bill 106 and by the decision of the Supreme Court of Canada, which is binding upon me, to conclude that Bill 106 requires the payment of a tax and not a premium.

I now turn to consider the language of the letter signed by the parties which is as follows:

March 31, 2004

Re: Ontario Health Insurance Plan

The parties recognize that the method of funding OHIP has been changed from an individually paid premium to a system funded by an employer paid payroll tax.

If the government, at any time in the future, reverts to an individually paid premium for health insurance, the parties agree that the Colleges will resume pay 100% of the billed premium for employees.

L. Casselman
President

J. Farrell
Chair

Ontario Public Service
Employees Union

College Compensation and
Appointments Council

The letter must be set against the usual negotiation background. Where parties negotiate a collective agreement they generally agree to a compensation package. That compensation package may be allocated in different ways. Usually an amount is allocated to wages and another amount is allocated to benefits. However, the approximate amount of the wage package is known by the parties. In this case, the parties have bargained with a particular wage package in mind. However, the language of the letter contemplates some change, which I will turn to later in these reasons.

In my view, the parties would not have contemplated or bargained for an extraordinary charge such as occurred under Bill 106. In effect, Bill 106 did not change the existing Health Tax system, but rather imposes a surcharge or additional cost to the existing system. The nature of the surcharge or the extraordinary amount, in my view, was not contemplated by the parties at bargaining. Certainly, in calculating the total compensation package, in order to arrive at a collective agreement, had the parties contemplated a surcharge or an additional payment they would have bargained different language. In these circumstances, I find myself in agreement with the learned arbitrator in Jazz Air Inc. v. Airline Pilots' Association International, dated September 27, 2004, unreported, (M. Teplitsky, Q.C.) where he states as follows:

“First, at the time the parties negotiated their Collective Agreement, they were contemplating a health care environment in which the E.H.T. had replaced the premiums previously paid by individuals. They could not have contemplated this new tax which did not exist. Such an increase in compensation, as much as \$900.00 per annum cannot usually be achieved in a ‘rights’ arbitration”.

For these reasons, I conclude that the new surcharge or extraordinary Ontario Health Premium was not in contemplation of the parties when they negotiated the letter in issue.

Turning to the language of the letter itself, I find that the letter does not encompass the added

surcharge or extraordinary payment imposed by Bill 106. Any obligation under the letter is informed and conditioned by the first paragraph of the letter which refers to a change from an individually paid premium to a “system” funded by an employer paid payroll tax. Thus, the first paragraph of the letter distinguishes between two different systems and the second paragraph must be read in light of that change.

The second paragraph talks about *reverting* to an individually paid premium and *resuming* paying 100% of the billed premiums. The concise Oxford Dictionary, 9th ed., defines the word “revert” as:

“return to a former state, practice, opinion”.

However, the Government did not return the existing tax or tax system to its former state, or practice, because the existing state, or practice, namely, the existing paid payroll tax continues in effect. There is no reversion or change back either in the dictionary sense, or based on the negotiating background inference and premise regarding change contained in the first paragraph of the letter. Rather, there is simply an add on, or extraordinary charge, or surcharge to the existing system. The words “revert” and “resume”, in my view, contemplate a return or changing back from a paid payroll tax system to an individually paid premium system that would, in effect, eliminate the payroll tax system and put in its place an individually paid premium system at a similar or approximate cost.

In sum, the use of the word “revert” contemplates a return or change back from the current system to the old system or a system of a similar nature to the old system. It need not be a change back to OHIP, but rather to an individually paid premium. If the parties had wanted to capture a new tax or a new premium they could have so stated in more simple language, such as, “if the Government imposes any new or different charges or requires any new or different payments, those amounts will be paid for by the Colleges.” By referring initially to the change in systems, and bearing in mind the total compensation considerations that exist in bargaining, it is my view, when the agreement was signed, the parties contemplated a return or reversion to an individually paid premium system in

substitution for the existing system. Their language did not contemplate the extraordinary or additional charge or surcharge payment that is now imposed on the existing system.

And finally, in view of my earlier finding that this is a tax, I am unable to conclude that the letter by referring to a "premium" captures the "tax" which is required to be paid under Bill 106.

The grievance is dismissed.

DATED AT TORONTO THIS DAY OF OCTOBER, 2004.

Owen B. Shime, Q.C.