Bill 124: Wage-cap legislation declared unconstitutional by Ontario Superior Court

November 30, 2022

Did the government's preferred fiscal policies under Bill 124 warrant infringing on the constitutionally protected right to collective bargaining?

The Ontario Superior Court says "no."

In a decision issued Nov. 29, 2022 (the Decision), the Court has struck down the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124 or the Act) as unconstitutional. This Decision impacts broader public sector employers, including healthcare sector employers, long-term care homes, education sector employers and other organizations that receive government funds.

Key takeaways

- In striking down Bill 124, the decision will directly impact compensation practices and terms of employment for broader public sector workplaces. Many employers had negotiated collective agreements, which committed to reopening compensation if the legislation is revoked. Accordingly, unions and employers are likely heading back to the bargaining table, as this decision opens the door for unions to seek "back-pay" from the government.
- Many interest arbitrators will also consider revisiting previous awards decided in accordance with the Act. The Decision found that the Act confined arbitrators to limited outcomes and skewed the impartial decision-making process.
- The hearing on remedies will take place at a later date, and it remains to be seen how the court will address the wage restraint which has been in place for the last three years – whether through lump-sum payments, retroactive adjustments to wages or otherwise.
- Beyond the impact on compensation practices, the Decision also offers important insights into what government actions will be considered "substantial interference" and underlines the importance of a meaningful collective bargaining process. The decision also emphasized the negative impact of capping wages on staffing, the relationship between unions and their members, and the right to strike.

Background

On June 5, 2019, the Ontario government introduced Bill 124 with the aim of capping public sector wage increases to one per cent annually for a three-year "moderation period", subject to certain exceptions. Union lawyers challenged the constitutionality of the Act, arguing that it infringes on employees' freedom of association, freedom of speech, and equality rights under the *Canadian Charter of Rights and Freedoms* (the Charter), and asked the Court to strike down the Act on those grounds.

The Court's decision

On Nov. 29, 2022, the Court released its highly anticipated decision in *Ontario English Catholic Teachers Association v. His Majesty*, 2022 ONSC 6658, declaring the Act unconstitutional. While the Court found no violations under sections 2(b) (freedom of speech) and 15 (right to equality) of the Charter, it found that the Act infringed on the applicants' right to freedom of association under section 2(d) of the Charter. In the context of labour relations, section 2(d) of the Charter constitutionally protects collective bargaining and the right to strike. In assessing the detrimental effects of the Act, the Court found "substantial interference with collective bargaining both collectively and individually" (*i.e.*, the Act unlawfully prevents or restricts discussion and negotiation within the collective bargaining process). The Court also found that the Act was not saved by s. 1 of the Charter, as it could not be demonstrably justified in a free and democratic society.

Application of the Act

The Act applied to a wide range of employers, employees, and unions in the broader provincial public sector, including Crown agencies, school boards, universities, colleges, public hospitals, and non-profit long-term care homes. The Act created a three-year moderation period and imposed a general limit on salary increases of 1 per cent per year, which applied to non-union wages, collective agreements, and arbitration awards.

The Act violates s. 2(d) of the Charter

Section 2(d) of the Charter is infringed if a government measure "substantially interferes" with collective bargaining. The government unsuccessfully argued that the Act did not interfere with the right of employees to free association, nor with their ability to make representations to their employers. It further argued that the essence of the applicants' claim is to guarantee an outcome of a wage increase higher than 1 per cent, when such outcomes are not constitutionally protected. The Court found this view of the right to freedom of association as it applies to collective bargaining to be too narrow.

When defining "substantial interference", the Court cited *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia* (2007), where the Supreme Court of Canada established the two questions a court should ask to determine whether there is "substantial interference":

- How important is the matter affected to the process of collective bargaining?

- How does the measure impact on the right to good faith negotiation and consultation?

In answering the first question, the Court underscored the vital importance of wages to employees and that wages assumed an even greater importance in this case, as inflation was 2.4 per cent at the time that the Act was introduced. On that basis, the Court found the 1 per cent limit on wage increases was central to the applicants' ability to engage in effective collective bargaining.

With respect to the second question, the Court outlined several ways in which the Act substantially interfered with the process of collective bargaining, in violation of section 2(d), including that the Act:

- Had an excessive financial impact as it limited the ability of employees to put issues on the table for negotiation and weakens unions' bargaining power.
- Impacted the ability of unions to address staffing issues directly affecting the working conditions of current employees, specifically in the healthcare sector.
- Undermined the self-government purpose of collective bargaining.
- Gave the Treasury Board Secretariat the power to override collective agreements that have been freely agreed to, thereby unilaterally nullifying freely negotiated agreements.
- Provided a substantial disincentive to strike by rendering it financially meaningless because the total benefit that they would receive by striking is a wage increase of 1 per cent or an increase of benefits equal to 1 per cent of wages.
- Impacted interest arbitration by binding arbitrators and subjecting their awards to rollbacks by the Treasury Board Secretariat, thereby prohibiting arbitrators from considering the factors they are statutorily mandated to apply.
- Undermined the relationship between unions and their members by depriving collective bargaining units of their fundamental right of self-determination and imposing arbitrary terms on them, leading members to ask what purpose collective bargaining serves if they can get more outside of the process than within it.

Did the government have a duty to consult?

Certain applicants took the position that Ontario had a duty to consult with them before passing the Act. While the government did conduct consultations in this case, they were not sufficient to save the Act from being found unconstitutional. This is because they were not designed to reach any agreement with any applicants and they did not carry the necessary characteristic to make consultations a substitute for collective bargaining.

The violation is not justified under s. 1 of the Charter

To justify a Charter violation under s. 1 of the Charter under the Oakes test, the government must establish:

- a pressing and substantial objective,
- a rational connection between the means and the objective,
- minimal impairment of the Charter right, and
- the salutary benefits of the Act outweighs its deleterious effects.

The Court was mindful of the deference it owed to legislatures in policy choices, especially when dealing with complex fiscal and economic issues, and "that judges ought not to see themselves as finance ministers." Nevertheless, the Court found that Bill 124 did not pass the Oakes test because:

- While managing public resources in a way to sustain public services can amount to a pressing and substantial objective, the Court found that the government failed to demonstrate that the economic conditions in 2019 were sufficiently critical to warrant violating the constitutionally protected right to collective bargaining.
- While moderating the rate compensation increases is logically related to the responsible management of the Province's finances, the Act went well beyond the wages for which Ontario pays directly, and captured sectors where the Ontario government does not fund wages - undermining a rational connection between the object of the Act and the measures taken to achieve it.
- There were alternative, less impairing measures available to the government than those provided under the Act, and the government failed to establish minimal impairment and failed to explain why voluntary wage restraint was not pursued.
- Finally, the deleterious effects of the Act outweigh its salutary effects. The Court rejected the government's argument that bringing public sector wages in line with private sector wages is a valuable social goal. It found that "the government is using its desire to undo the benefits of the Charter right to collective bargaining as a justification to infringe on that very right."[1] The Court identified a glaring inconsistency in the government's violation of the applicants' Charter rights to save approximately $400 million per year when the government simultaneously cut taxes in excess of over 10 times that amount.

With respect to remedies, the court reserved the consideration of any remedies to a further hearing, but noted that any attempt to limit the availability of Charter remedies within the Act are similarly constitutionally invalid.

The government has announced its intention to appeal the court ruling. When appealing, the government could request a stay of proceedings.

[1] *Ontario English Catholic Teachers Assoc. v. His Majesty,* 2022 ONSC 6658, at para 345.

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