Bill 124: Wage restraint legislation confirmed unconstitutional for unionized employees; government responds

February 13, 2024

In a decision issued Feb. 12, 2024, the Ontario Court of Appeal (ONCA) upheld a lower court's declaration that the *Protecting a Sustainable Public Service for Future Generations Act, 2019* (Bill 124) is unconstitutional with respect to its application to unionized employees.

A few hours later, the Ontario government issued a press release stating that it would not be appealing the ruling; would be repealing Bill 124 in its entirety in the coming weeks; and would be "urgently" introducing regulations to exempt non-unionized workers from Bill 124 until it is repealed. Media reports also stated that the province's budget would be adding billions of dollars to affected industries to account for retroactive pay that had been limited under Bill 124.

Summary

- A number of public-sector unions had challenged Bill 124's wage restraint provisions, arguing that the legislation unduly interfered with unionized employees' right to freedom of association and related collective bargaining rights under section 2(d) of the *Charter*.
- On Nov. 29, 2022, the Superior Court of Justice agreed, finding the legislation to be unconstitutional, and struck down Bill 124 in its entirety.
- In its decision released on Feb. 12, 2024, the ONCA dismissed the appeal and agreed with the lower court's ruling in respect of unionized employees.
- However, since the collective bargaining protections afforded under s.2(d) of the *Charter* only apply to unionized employees, the ONCA held that it was an error for the lower court to strike down the entirety of Bill 124 as a whole. Bill 124 should have been upheld for non-unionized employees.
- The Ontario government confirmed it would not be appealing the ruling, and in fact would be taking steps to walk back the application of Bill 124 to non-unionized employees and ultimately repealing it entirely in the coming weeks.

Background

As we previously shared, Bill 124 was introduced in June 2019 and set out three-year "moderation periods" applicable to most employees (both unionized and non-unionized) in a wide range of broader public sector employers, including public hospitals, school boards, colleges and universities, long-term care homes, children's aid societies and non-profits who received at least $1 million in government funding. The moderation periods generally limited wage increases to one per cent per year, subject to certain exceptions.

On Nov. 29, 2022, the Ontario Superior Court of Justice sided with several unions who had argued that Bill 124 was unconstitutional. In brief, the Court found that Bill 124 infringed on the applicants' right to freedom of association (section 2(d) of the *Canadian Chart of Rights and Freedoms*) but not the applicants' freedom of speech or equality rights, and Bill 124's infringement was not saved by section 1 of the *Charter*.

The Ontario Court of Appeal's decision

On Feb. 12, 2024, the ONCA upheld the lower court's declaration that Bill 124 is unconstitutional, but only with respect to unionized employees who are afforded protections under section 2(d) of the *Charter*.

The ONCA applied the two-part test for determining whether a "substantial interference" with *Charter* 2(d) rights had occurred, wherein the court must:

1. assess the importance of the matter to the process of collective bargaining; and
2. look at the manner and extent to which the measure impacts on the collective right to good faith bargaining and consultation.

Compensation is clearly of central importance to collective bargaining and thus the first element of the test was met.

With respect to the second element, the Court analysed the following four factors to conclude that there had been a substantial interference with collective bargaining rights:

1. There was no significant collective bargaining or meaningful consultation prior to the passage of the legislation;[1]
2. The broad definition of "compensation" in Bill 124 (essentially, any benefit that can be monetized) significantly limited what unions could negotiate, such as hours, work, vacation, leaves, assignments and transfers, and impeded their negotiating leverage;
3. Bill 124 included only an "illusory, rather than a meaningful" process for exemptions (the province having only granted one despite numerous requests) and the right to strike was not a viable alternative in the circumstances; and
4. The terms of Bill 124 did not match other collective agreements negotiated in the public sector in the same time period, which provided for higher wage increases and other changes in compensation.

To determine whether a substantial interference with a *Charter* right is nonetheless justified under section 1 of the *Charter*, the Court applied the usual test as follows:

1. The legislation satisfied the requirement that it pursue a pressing and substantial objective (*i.e.,* the responsible management of Ontario's finances and the protection of sustainable public services); but
2. The means chosen to achieve that objective were not proportional, in that:
    a. it did not have a fully rational connection in all sectors (*i.e.,* in the electricity and academic sectors, the constraint of compensation would not impact the province's financial status given the nature of the funding agreements already in place);
    b. the province did not demonstrate that other available avenues (such as voluntary wage restraint, bargaining with employees under its direct employment, and capping funding to broader sector employers) would have been unsuccessful; and
    c. the salutary effects were not proportional to the deleterious effects, in part because the legislation disproportionately affected women, racialized populations and/or low-income earners who were frequently organized public sector workers, by limiting their ability to negotiate for better compensation and benefits of a monetary value.

Conclusion

Given the above analysis, the ONCA dismissed Ontario's appeal and agreed with the lower court that Bill 124 was unconstitutional given the infringement on freedom of association and collective bargaining rights under the *Charter*.[2]

However, the Court noted that it was an error for the lower court to then strike out the entire statute as a remedy. At paragraphs 228-230, the ONCA wrote:

> The rights protected by s. 2(d) of the *Charter* do not apply in the same way to non-represented [non-unionized] employees and accordingly the Act is only unconstitutional in so far as it applies to the represented employees covered by the Act. […] I would grant the appeal, but only to the extent of varying the disposition to declare that the Act is invalid in so far as it applies to represented employees.

Response and key implications

Hours after the decision was released, the Ontario government confirmed that it would not appeal. In fact, it stated that it would be taking steps to repeal Bill 124 in its entirety.

Recognizing that the decision has differing implications for unionized vs. non-unionized employees, and given that repealing legislation takes some time, the government also stated that it would be introducing regulations on an urgent basis to block the application of Bill 124 to non-unionized employees (who might otherwise still be captured by its constraint measures).

Employers in the broader public sector now have greater clarity and flexibility in resuming wage negotiations – for both unionized and non-unionized employees – without Bill 124's constraints.

If, as promised, the legislation is repealed in its entirety, employers also need not be concerned with the anti-avoidance measures contained therein, which would have prohibited later payment of wages held back during the moderation periods. This approach is consistent with what appears to be increased funding from the government to account for retroactive wage adjustments.

We note that the *Broader Public Sector Executive Compensation Act, 2014*, however, continues to apply to designated executives at a narrower range of employers (including hospitals, school boards, universities and colleges, and certain public bodies), and its compensation freeze has not been impacted by these recent developments.

If you have any questions regarding broader public sector compensation issues, please reach out to Maddie Axelrod or your regular BLG Labour & Employment lawyer. For an update specific to the education sector, please see here.

[1] Although these steps are not necessary, their presence would have assisted in showing that there was not a substantial interference.

[2] Justice Hourigan dissented and would have allowed the appeals. He was of the view that the application judge and the majority decision made errors in law with respect to the rational connection, minimal impairment and proportionality analyses of the section 1 test, noting that they failed to consider the positive impacts of the Act.

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