Bill 124 ruled unconstitutional, and Arbitrator Kaplan Awards 2.75 per cent compensation increase for Ontario teachers

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On Feb. 12, 2024, the Ontario Court of Appeal released its landmark decision in *Ontario English Catholic Teachers' Association v. Ontario (Attorney General)*, 2024 ONCA 101. The Court of Appeal upheld a Superior Court ruling that Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, was unconstitutional – but only insofar as it applied to unionized workers.

This ruling follows on the heels of a 2.75 per cent compensation increase for certain Ontario teachers as a result of the Superior Court's ruling, set out in a Feb. 9, 2024 interest arbitration award by Arbitrator William Kaplan: *The Crown in Right of Ontario v The Ontario Secondary School Teachers' Federation and The Elementary Teachers' Federation of Ontario*, 2024 CanLII 8967 (ON LA).

Key takeaways

- Bill 124 was a wage-restraint statute which limited compensation increases to one per cent for each 12-month period during a three-year "moderation period" for unionized and non-unionized public sector employees, including teachers and other school board employees.
- On Nov. 29, 2022, the Superior Court of Justice struck down Bill 124 as unconstitutional, on the basis that it unlawfully interfered with the freedom of association by limiting employees' ability to engage in collective bargaining rights and strikes.
- Following the Superior Court decision, on Feb. 9, 2024, Arbitrator William Kaplan awarded a 2.75 per cent compensation increase for the 2021-2022 school year for public school teachers represented by ETFO and OSSTF.
- On Feb. 12, 2024, a 2–1 majority of the Ontario Court of Appeal upheld the Superior Court's ruling that Bill 124 was unconstitutional, but only insofar as it applied to represented (unionized) employees.
- Justice Hourigan dissented, suggesting that the majority were second-guessing the Ontario government's legitimate policy decisions.
- The Ontario government will not appeal the decision to the Supreme Court of Canada, and will instead repeal Bill 124 in its entirety.

Background

Bill 124 was legislation that imposed a one per cent cap on wage increases for the public sector. The government introduced it on June 5, 2019, and it received Royal Assent on Nov. 7, 2019. It applied to both union and non-union employees in the broader public sector, including school boards.

Bill 124 imposed a mandatory three-year "moderation period" for almost all non-executive employees of school boards. Bill 124 did not apply to "designated executives" within the meaning of the *Broader Public Sector Executive Compensation Act, 2014*, such as Directors of Education and Supervisory Officers (Superintendents), who are subject to the salary freezes in that legislation.

During the moderation period, employees' salary rates could not increase by more than one per cent for each 12-month period of the moderation period, subject to three exceptions permitted under a compensation plan or collective agreement: length of employment, assessment of performance, or completion of a professional course or program. "Compensation entitlements" were included in this one per cent limit, which meant that increases in benefits, bonuses, etc. could not be used to circumvent the one per cent salary increase cap.

Bill 124 struck down as unconstitutional by the Superior Court

On Nov. 29, 2022, Justice Koehnen of the Ontario Superior Court of Justice held that Bill 124 was unconstitutional, and therefore of no force or effect, in *Ontario English Catholic Teachers' Assoc. v. His Majesty, 2022*, 2022 ONSC 6658. Justice Koehnen held that Bill 124 interfered with collective bargaining rights and the right to strike, which are part of the freedom of association guaranteed by section 2(d) of the *Canadian Charter of Rights and Freedoms*.

As Justice Koehnen wrote, Bill 124 "interferes with collective bargaining not only in the sense that it limits the scope of bargaining over wage increases, but also… it prevents unions from trading off salary demands against non-monetary benefits, prevents the collective bargaining process from addressing staff shortages, interferes with the usefulness of the right to strike, interferes with the independence of interest arbitration, and interferes with the power balance between employer and employees" (para 9).

The Ontario government did not seek a stay of the decision, but it appealed it to the Ontario Court of Appeal, which heard the matter in June 2023.

2.75 per cent compensation increase for 2021-2022 school year for Ontario teachers

In the wake of the Superior Court decision, the Ontario government and two teachers' unions, the Elementary Teachers' Federation of Ontario (ETFO) and Ontario Secondary School Teachers' Federation (OSSTF), negotiated 0.75 per cent compensation

increases for the 2019-2020 and 2020-2021 school years, the first two years affected by Bill 124. The parties referred the matter of remedy for the 2021-2022 school year to interest arbitration before Arbitrator William Kaplan.

OSSTF and ETFO argued that a 3.25 per cent should be awarded, while the Crown took the position that a 1.5 per cent increase was appropriate. Note that these wage increases would be in addition to the one per cent increases that were already negotiated under Bill 124.

Arbitrator Kaplan awarded a 2.75 per cent compensation increase for the 2021-2022 school year. While Arbitrator Kaplan relied on several factors in coming to this decision, he paid particular attention to the 2022 inflation rates, and the recruitment and retention issues facing the sector. Arbitrator Kaplan noted that the award was somewhat lower than the outcomes in the energy sectors and in the health sector, but somewhat higher than the trends in the Ontario Public Service and post-secondary sector.

Ontario Court of Appeal Upholds Superior Court decision

On Feb. 12, 2024, in a 2–1 decision, the Ontario Court of Appeal confirmed Justice Koehnen's decision, holding that Bill 124 was indeed unconstitutional – but only insofar as it applied to unionized workers. Writing for herself and Justice Doherty, Justice Favreau held that section 2(d) of the *Charter* protects against substantial interference with the associational activity of collective bargaining. To find a breach of section 2(d) collective bargaining rights, a court must:

- Assess the importance of the matter to the process of collective bargaining; and
- Look at the manner and extent to which the measure impacts on the collective right to good faith bargaining and consultation.

According to the Court of Appeal's previous decision in *Gordon v. Canada (Attorney General),* 2016 ONCA 625, actions that restrict certain matters, such as salary, hours of work, job security, seniority, equitable and human working conditions and health and safety protections, are considered "constitutionally suspect."

Justice Favreau held that Bill 124 allowed for no significant collective bargaining or meaningful consultation in relation to compensation increases, as the one per cent cap came into effect as collective agreements came to an end, starting on June 5, 2019. In fact, the government had introduced Bill 124 in anticipation of the beginning of collective bargaining in the school boards sector. Moreover, the broad definition of "compensation" included any kind of benefit or compensation that can be monetized, such as sick days, vacation days and other benefits, significantly limiting the areas that remained available for negotiation. The one per cent cap was not commensurate with other collective agreements negotiated in the public sector in the same time period, which frequently exceeded the wage cap.

Justice Favreau further held that Bill 124 left no meaningful right to strike. Section 27 did allow the Minister to "exempt a collective agreement from the application of this Act," via regulation, providing a theoretical goal for a strike. However, many employees covered by Bill 124 were not employed directly by the provincial government, so a strike would

place no “meaningful pressure on the government to grant an exemption.” In addition, “the right to strike in Ontario arises after the parties engage in a series of required steps, and, once those steps are completed, the union and its members can only strike over matters which the employer can compromise” (para 136).

Having declared a violation of section 2(d) of the *Charter*, Justice Favreau examined whether the violation could be justified in a free and democratic society under section 1 of the *Charter*, and held that it could not. She noted that in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, the Supreme Court of Canada suggested that section 2(d) rights may be infringed on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks, and national crisis. The surrounding circumstances of Bill 124 did not rise to this high standard.

Justice Favreau concluded that the government had established a pressing and substantial objective – to manage the Provinces’ finances in a responsible manner and to protect the sustainability of public services – but this objective was not rationally connected to Bill 124 insofar as certain workers were concerned, namely in the electricity and post-secondary education sectors, because those sectors did not depend exclusively on the government for funding. Further, there was a more “minimally impairing” means of achieving this goal: simply allowing collective bargaining to proceed but taking a hard line on wage restraint in those negotiations. Ultimately, the government could not explain why wage restraint could not have been achieved through good faith collective bargaining. Justice Favreau also considered the fact that, because of Bill 124, “organized public sector workers, many of whom are women, racialized and/or low-income earners, have lost the ability to negotiate for better compensation or even better work conditions that do not have a monetary value” (para 225).

However, Justice Favreau held that non-represented employees do not benefit from the protections afforded to represented employees under section 2(d) of the *Charter*, and therefore Bill 124 could only be declared unconstitutional with respect to represented (unionized) employees.

Justice Hourigan’s dissent

Despite the majority’s decision, Justice Hourigan wrote a lengthy dissenting judgment, concluding that Bill 124 did not violate section 2(d) of the *Charter*, nor was it unjustified under section 1. While a dissent is not legally binding, it can act as persuasive authority that can guide future decisions.

Justice Hourigan suggested that both the majority and the Superior Court judge were second-guessing the Ontario government’s legitimate policy decisions to curb spending on public sector workers’ compensation. He focused on whether Bill 124 constituted a *substantial* interference into the right of collective bargaining and found that it did not. Collective bargaining occurred under Bill 124, and unions secured important gains for their members, even though compensation increases were temporarily capped, and the right to strike on these other issues was preserved and utilized.

Further, Justice Hourigan disagreed with Justice Koehnen’s factual findings on the section 1 *Charter* analysis. Justice Hourigan agreed with the majority that the government had a pressing and substantial objective: to achieve financial sustainability.

However, he also found that Bill 124 had a rational connection to this objective, that it was the minimally impairing option to achieve the objective (as opposed to seeking wage restraint during collective bargaining), and the actual unsustainable fiscal state of the province would have justified the infringement of *Charter* rights.

The Government's response

Despite Justice Hourigan's dissent, in a news release on the day of the decision, the Ontario government confirmed that they will not appeal the Court of Appeal's ruling to the Supreme Court of Canada. Rather, they will repeal Bill 124 in its entirety.

In the meantime, "To solve for the inequality of workers created by today's court decision" – namely the finding that Bill 124 was constitutional insofar as it applied to non-unionized employees – the government announced that it "will urgently introduce regulations to exempt non-unionized and non-associated workers from Bill 124 until it is repealed."

Key implications

School boards should be aware of these significant decisions. Even for school boards who do not employ teachers represented by ETFO and the OSSTF, the 2.75 per cent compensation increase awarded by Arbitrator Kaplan will have an impact on salary negotiations in this sector. Further, the Court of Appeal's holding that Bill 124 still would have applied to non-unionized public sector workers – if not for the Ontario government's recent announcement – could encourage non-union employees to attempt to engage in collective bargaining.

If you have any questions about this important decision, please contact John-Paul Alexandrowicz and Melissa Eldridge, the Co-Chairs of BLG's National School Boards Practice.

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