Ontario Court Rules Putting Students First Act Unconstitutional

May 27, 2016

On April 20, 2016, Ontario Superior Court Justice Lederer rendered a decision that was both momentous and unusual.

OPSEU v. Ontario[1] is momentous because it finds that the "process and procedure adopted by Ontario to put in place... collective agreements" in the education sector in the 2012 to 2013 time period breached the constitutional right to bargain collectively of the various unions representing teachers and other employees of the school boards.

The decision is unusual because it is a judgment with no immediate consequences. It is also noteworthy that, while Lederer J. ultimately ruled in favour of the Unions, he was critical of all of the participants:

The process, as it had evolved, was not a cooperative response to the continued responsibility to provide the best public education in the presence of a high level of fiscal uncertainty. It was oppositional and adversarial. The government unilaterally amended a process that all the parties acknowledge had been successful in the past. It did not consult or ask for input. For all its insistence that it was acting as a facilitator, it was in no sense standing back ready to assist the negotiations if needed. It set the issues and limited the discussion. For their part, two of the unions responded by refusing to take part... The president of another signed the letter requesting an emergency meeting, but did not appear or send a representative to the meetings that did take place... It would seem that one of the unions was unprepared even to concede that there was a fiscal problem... For the moment, I say only that it is clear that the need to find a solution to the fiscal problems while fostering policies that would sustain a high level of education was not assisted by the oppositional approach and adversarial attitude of the parties [para. 43].

Charter Right To Collective Bargaining

The case was brought by five Unions[2] under the *Canadian Charter of Rights and Freedoms*.[3] While the *Charter* contains no express reference to collective bargaining, over the past ten years, the Supreme Court of Canada has recognized that the right to freedom of association, which is protected by section 2(d), encompasses the rights of

employees to join together to make collective representations to the employer, and to have those representations considered in good faith.

Background

The seeds for what happened in 2012 were sown in 1998, when funding for public education passed from being primarily the responsibility of local school boards (which had the authority to levy taxes for this purpose) and instead became a provincial responsibility. As a result of that transition, the Province has taken a more direct interest, and played a greater role, in the negotiation of collective agreements in the education sector. This, in turn, led to the Province implementing a Provincial Discussion Table ("PDT") process in 2008. The goal of the PDT process was to provide for a two tier process: (i) general, broader province-wide issues would be dealt with in the PDT process; and (ii) local issues would be dealt with in separate negotiations between the unions and school boards who would ultimately enter into agreements.

Showdown

In 2012, a large number of contracts for unionized workers in the education sector were set to expire. At the same time, Ontario faced a fiscal crisis. To make matters worse, the Province was determined to pursue two conflicting objectives: (i) to cut costs; and (ii) to continue the roll-out of Full Day Kindergarten while capping class sizes.

On February 15, 2012, the Province initiated the PDT process. It is fair to say that Justice Lederer demonstrated a gift for understatement in observing that, "The process did not develop as Ontario had hoped [para. 23]." At the initial meetings, the Province presented its “parameters” for any agreements. From the outset, the tension between the Province's desire to negotiate province-wide agreements, and the need to enter into bargaining unit-specific agreements was apparent:

The approach taken by Ontario required that the unions bargain individually but on a province-wide foundation. Ontario presented no other option and permitted none. When asked to convene a meeting with all the bargaining units, Ontario refused. Its representatives advised those involved only that it would consider any joint proposal they brought forward [para. 146].

On July 5, 2012, the Province entered into a Memorandum of Understanding with the Ontario English Catholic Teachers' Association. This agreement had no direct impact on Ontario school boards. The remaining collective agreements were set to expire on August 31, 2012. Absent new agreements, a statutory freeze would take effect, which would have meant that the existing contracts would remain in effect, and teachers covered by them would move through the salary grid on an annual basis.

Faced with the prospect of significant additional costs, and realizing that it would not be able to negotiate new agreements with all of the represented groups, the Province passed Bill 115 — the *Putting Students First Act.*[4] The PSFA:

- Required that any agreements entered into before August 31, 2012 would have to be "substantially similar" to the OECTA MOU;

- Required that any agreements entered into after that date would be "substantively identical" to the OECTA MOU; and
- Provided that if new agreements were not arrived at by Dec. 31, 2012, they could be imposed.

In the face of the PSFA , some groups negotiated new collective agreements. Others did not, and the Province imposed agreements upon them. In the words of Lederer J.:

[T]he unions were compelled to accept the parameters as they had found their way into the OECTA agreement, either by way of including its terms, agreeing to provisions that were substantially similar to them, substantively identical to them or as they were imposed by regulation [para. 100].

While the Province maintained that the OECTA MOU was merely a "roadmap" for future agreements, Lederer J. found that this was not the case and that, instead: "It was a surrogate, a stand-in, for a centrally negotiated agreement [para. 156]."

On January 23, 2013 the Province repealed the PSFA, but the new agreements were left in place. While some further discussions occurred, the unions had lost their leverage. The school boards had little impetus to accept any changes to the agreements that were in place, and the unions had lost the power to strike. Indeed, when ETFO had attempted to take job action earlier that month, the Ontario Labour Relations Board had ruled that the strike was unlawful, because the *Labour Relations Act* prohibits strikes during the term of a collective agreement. The imposition of collective agreements, with the corresponding elimination of the right to strike had removed "the only remaining arrow in the collective bargaining quiver [para. 187]."

Breach Of Collective Bargaining Rights

Lederer J. found that "between the fall of 2011 and the passage of the *Putting Students First Act,* Ontario infringed on the applicants' *Charter* right to meaningful collective bargaining [para. 134]." Specifically:

[T]he process engaged in was fundamentally flawed. It could not, by its design, provide meaningful collective bargaining. Ontario, on its own, devised a process. It set the parameters which would allow it to meet fiscal restraints it determined and then set a program which limited the ability of the others parties to take part in a meaningful way. From the outset, there was a structural problem [para. 135 to 136].

The Province had, "created a situation which made meaningful collective bargaining impossible [para. 148]."

Section 1 Analysis

The finding that a *Charter* right has been breached is not the end of a constitutional challenge.

Instead, once a breach has been found, section 1 of the *Charter* affords the Government the opportunity to prove that the breach falls within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

society."[5] The section 1 analysis tends to be particularly challenging (and controversial) when, as in this case, the challenged conduct involves the allocation of public funds. In such cases, the notion that it is the democratically-elected government, rather than the courts, that should decide how limited resources should be allocated, contends against the principle that financial concerns should not be allowed to trump fundamental rights.

The section 1 analysis involves a two-step process. First, the Court must determine whether the Government's actions were intended to address a "pressing and substantial concern". The Province filed an affidavit from the former Governor of the Bank of Canada to establish the depth of the fiscal crisis the Province sought to address.

Lederer J. was satisfied that the Province's objective was pressing and substantial:

In this case, David Dodge has explained and opined that the fiscal circumstances warranted, if not required, an immediate response. In accepting this, I am mindful... that it is not for the Court to look behind, interpret and attempt to resolve different perspectives on complex economic concerns... The government chose to act on the advice of David Dodge. Deference is owed to this decision [para. 244].

Lederer J. found, however, that the Province could not satisfy the second step of the test under section 1, which requires proportionality between the importance of the purpose and the impact on *Charter* rights. In this case, Lederer J. found that the Province's approach lacked a rational connection to its goals, because the process it implemented was arbitrary and unilateral, and was not carefully designed. The Province's departure from the PDT process that had worked in the past in favour of an *ad hoc* process that was presented to the unions as a *fait accompli* without consultation failed to impair the right to collective bargaining as minimally as possible.

Lederer J. noted that the Province could have achieved its objectives by passing legislation that confirmed its early learning policies and postponed the "freeze" that would otherwise occur under the existing agreements, in order to allow more time for the parties to engage in meaningful collectively bargaining, through which to examine other means of reducing costs in the education sector. The measures adopted by the Province failed the requirement of overall proportionality, because, "[t]he end sought by Ontario could have been achieved through more targeted legislative or administrative action and fairer, meaningful collective bargaining [para. 220]." As a result, the breach of section 2(b) could not be justified.

The Future

As noted earlier, the decision does not prescribe a remedy for the breach. This reflects, in part, courts' traditional reluctance to dictate to legislatures how they should address socio- economic issues. As Lederer J. noted:

Everyone involved is searching for the right answers to difficult questions. The fact remains that Ontario was and may still be in a difficult fiscal circumstance. If so, we are all affected. Ontario accepted that it should act. The problem with what took place is with the process, not the end result. It is possible that had the process been one that

properly respected the associational rights of the unions, the fiscal and economic impacts of the result would have been the same or similar to those that occurred.

…

Ontario and the applicants have a continuing and ongoing relationship. At the moment (without having heard any submissions) it is not clear to me what would be accomplished by any substantial or overly aggressive remedy. Could it reward one side to the detriment of the process as a whole? We are all still learning.

[paras. 273 to 276]

Fundamentally, the case emphasizes the importance of the process implemented in labour negotiations.

It is not clear what will happen next. The Province could try to appeal the case, or enter into negotiations with the Unions to determine a way forward (as Lederer J. was clearly inviting the parties to do). It may well be that an appeal and negotiations will proceed in tandem. In the meantime, there will be great deal of uncertainty in the education sector.

[1] 2016 ONSC 2197 ("Decision").

[2] The Elementary Teachers' Federation of Ontario ("ETFO"), Ontario Public Service Employees Union ("OPSEU"), Canadian Union of Public Employees ("CUPE"), Unifor (formerly the Canadian Auto Workers) and Ontario Secondary School Teachers' Federation ("OSSTF").

[3] Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 (the "Charter").

[4] SO 2012 Ch. 11 (the "PSFA").

[5] *Charter, supra,* s. 1.

By

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