

Arbitrator rules boards not required to schedule ECEs for full-day kindergarten

November 08, 2017

In a decision under the central dispute process released on Oct. 13, 2017, arbitrator **Russell Goodfellow** ruled that the **Education Act** (the Act) and its regulations do not require school boards to schedule early childhood educators (ECEs) to be present in a **full day kindergarten (FDK) classrooms in Ontario for the full length of the “instructional program”** each school day.

The Goodfellow decision departs from a prior award that arose from a local grievance involving the [Windsor-Essex Catholic District School Board](#). In that case, arbitrator Surdykowski held that "the ECE must be in the classroom (or teaching area) with the teacher for every minute of every instructional day" and that "ECE breaks [could not] be scheduled or taken during instructional time..." The Surdykowski decision is the subject of a judicial review. However, that judicial review was adjourned pending the disposition of the central grievance by arbitrator Goodfellow.

Unlike the Surdykowski decision, the Goodfellow decision arose from the central dispute **resolution process set out in the School Boards Collective Bargaining Act, 2014**, and so will directly impact all 29 Catholic school boards represented by the Ontario Catholic School Trustees' Association (OCSTA). **Further, as an interpretation of the Act and not a specific collective agreement**, the decision may have an effect on the 43 other school boards in Ontario.

Background

The Ontario English Catholic Teachers' Association (OECTA) initiated a central grievance in relation to the FDK program. Under the central dispute resolution process in the collective agreement, the Crown is also a party to the proceeding.

In 2010, the Act was amended to require boards to phase in full-day kindergarten from 2011 to 2015. One requirement of the phase-in of FDK was that at least one position in each junior kindergarten (JK) and kindergarten (K) class of 16 students or more was to be designated as requiring a properly qualified ECE, in addition to the teacher. The FDK program would also provide for 300 minutes of instructional time per day.

Some school boards, including the Ottawa Catholic District School Board (the Board) **from which the central grievance arose, were scheduling ECEs' contractual breaks during instructional time, leaving the teacher to supervise the students alone for up to 60 minutes per day. During students' recess and lunch breaks, the ECE would supervise the students.**

OECTA grieved this scheduling practice, arguing that the Act, regulations, and certain policies, guidelines, and contextual materials required both the teacher and the ECE to be present in the classroom for the entire 300 minutes of instructional time.

OECTA took the position that the scheduling practice was precluded by the Act and regulations. OCSTA and the Crown took the position that the scheduling practice was lawful. BLG represented OCSTA in this hearing.

Submissions of the Parties

OECTA's primary argument was that in reading the Act, regulations, and additional materials in context, it was apparent that that ECE-teacher team was the "functional equivalent" of the teacher acting alone in an older grade. OECTA argued that this "functional equivalence" meant that the Board was not truly providing the required 300 minutes of "instruction" if either the teacher or ECE were not present in the classroom for any part of the 300 minutes. Put another way, OECTA's position was that the statutory obligation to deliver a 300-minute FDK instructional program requires school boards to schedule both a teacher and an ECE to be present in the classroom for the full 300 minutes. Drawing from case law that established a teacher must be present in an older grade for classroom time to count as instruction, OECTA argued that the same standard should apply to the ECE-teacher team.

In response, OCSTA argued that there had been no breach of the Act or its regulations. Rather, the Act confirms that in an FDK classroom, teachers are required to instruct, while ECEs are required to co-operate and co-ordinate with teachers with respect to various classroom matters. OCSTA's position is summarized as follows:

The plain and ordinary meaning of the words in the Act is clear and does not preclude the practice of scheduling ECE breaks during instructional time, without a replacement ECE. The Board's duty is simply to appoint an ECE to a designated position in a JK or K class. The ECE's duty is to co-operate and co-ordinate with teachers with respect to various classroom matters, but does not require the ECE to be in the classroom at all times during the instructional day or tied to the hip of the teacher. Further, the presence of the ECE does not detract from the teacher's duty to instruct and thus is not required for purposes of the Board's duty to provide the minimum period of the instructional program.

OCSTA also emphasized that in the absence of a statutory prohibition otherwise, school boards were free to schedule ECE breaks at times that were pedagogically supported. It may be preferable, for example, to schedule an ECE break during quiet time, rather than during lunch time or recess when students are busy learning through exploratory play. Although ECEs and teachers work as a team, the ECE-teacher team is not the "functional equivalent" of a teacher in an older grade.

The Crown's submissions complemented those of OCSTA. The Crown asserted that OECTA was reading unsupported requirements into the Act regarding the implementation of the FDK program. The Crown also confirmed that the intention of the legislative amendments that introduced the FDK program was to provide school boards with as much flexibility as possible with respect to its implementation. OECTA's rigid interpretation was not consistent with that intent.

Decision and analysis

Arbitrator Goodfellow "agree[d] with the OCSTA that there is nothing [in the legislation] that suggests that the Board would be in violation of its duty to provide a minimum period of instruction simply because the ECE was taking a break without a replacement." In this regard, the arbitrator ruled that the grievance was dismissed.

As the party asserting a legislative requirement or prohibition, OECTA bore the onus of proving it – but, in the arbitrator's view, had failed to do so. The arbitrator held that the requirement asserted by OECTA is not set out expressly in the Act or regulations. Arbitrator Goodfellow stated:

Recognizing that delivery of the 300-minute instructional program requires the constant scheduled presence of 'teachers', I cannot find the same to be true for ECEs. The Act does not say it, the Regulations do not say it, it does not appear in any policy or guideline, and it is not a feature of any of the materials to which OECTA refers as "context", even assuming I was able to consider them.

He further dismissed OECTA's "functional equivalence" argument, concluding as follows:

..."functional equivalence" is a theory, described as an inference, chasing a result, that is nowhere provided for. What is needed is not "functional equivalence" but legal equivalence – something that would convey a clear legislative intent that ECEs and teachers are to be treated the same in respect of school boards' 300 minute "instructional program" obligations, and that something is not there.

Arbitrator Goodfellow held that school boards are required to deliver a 300-minute instructional program on each school day at all grade levels, now including JK and K. He stated that delivery of the "instructional program" at other grade levels has been recognized as requiring the continuous scheduled presence of a "teacher". That requirement, however, is tied to the status, qualifications and duties and responsibilities of a "teacher", which include the duty to "teach", to provide "instruction" and to "carry out...the instructional program assigned to the teacher by the principal".

Arbitrator Goodfellow pointed out that these are not the duties of an ECE. He stated that ECE duties, though important, are different. "They are defined as 'co-operating' and 'co-ordinating' with the 'teacher' with respect to certain matters, which include 'providing education', but which do not include 'teaching,' 'instruction' or, indeed, carrying out the 'instructional program'."

He concluded that not only are ECEs not teachers, the two together do not add up to a “teacher” or stand in the shoes of a teacher for the purpose of the 300-minute instructional program.

The arbitrator ruled that the obligations that apply to school boards in respect of teachers and the instructional program have not been made to apply to ECEs and the instructional program. He held that “ECEs and teachers are different statutory creatures with different duties and responsibilities.”

He found that teachers are statutorily responsible for instruction while ECEs are not. “In the context of the FDK program, there is simply a new category of educational professional on the scene with whom the teacher is required to co-ordinate and co-operate, and vice versa, in delivering the new educational product.”

Comment

As a central grievance award, based on interpretation of the Act and regulations, rather than a specific collective agreement, the Goodfellow decision and its reasons may have an impact on school boards throughout the province.

Depending on a school board’s individual circumstances – such as whether FDK classes have students of mixed ages, operate bilingually, schedule recess on a staggered basis, or whether adequate replacement supervision is readily available, ECE breaks may be scheduled at a time that is pedagogically and operationally appropriate, provided such breaks are consistent with relevant collective agreements.

We understand that OECTA has made the determination to have this decision judicially reviewed. We will continue to monitor this matter and provide updates as the issue unfolds in Divisional Court.

By

[Maddie Axelrod](#)

Expertise

[Corporate Governance, Education](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2024 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.