What's New in HR Law

Bill 124: The Saga Ends, with a Declaration of Unconstitutionality and a Promise of Repeal

February 14, 2024 | By Emily Elder

Bottom Line

On Monday, February 12, 2024, the Ontario Court of Appeal released its decision in *Ontario English Catholic Teachers Association v. Ontario (Attorney General)*. Justice Favreau, writing for the majority, found Bill 124 (the "Bill") unconstitutional as relating to unionized employees in the broader public sector, but upheld its application to non-unionized employees. In dissenting reasons, Justice Hourigan would have found the entire Bill constitutional.

The Ontario government has since announced its intention to repeal Bill 124 in its entirety, and has expressed an intention to introduce regulations exempting non-unionized employees until the repeal occurs.

Decision Under Appeal

The original Decision in Ontario English Catholic Teachers Assoc. v. His Majesty, 2022, 2022 ONSC 6658 (CanLII) came out in 2022, and arose as a result of a number of unions' arguments that Bill 124 was unconstitutional on a number of bases. The application judge rejected the arguments that Bill 124 violated ss. 2(b) (freedom of expression) or 15 (equality rights) of the Charter, but accepted the union applicants'

2(d) (freedom of association) arguments. He also found that these violations of freedom of association were not reasonable in a free and democratic society, as required by s. 1 of the Charter. He declared the entire Bill unconstitutional.

The Attorney-General of Ontario appealed.

ONCA Holding

The Court of Appeal dismissed Ontario's appeal, but found that the Bill is constitutional as it applies to non-unionized employees in the broader public sector, as these employees do not have the same rights to freedom of association as unionized employees. Therefore, the Court held that the application judge's declaration was overly broad, and the Bill continues to apply to non-unionized employees.

The Court reviewed the Supreme Court of Canada's freedom of association principles, and reaffirmed that the *Health Services'* 2-part test for "substantial interference with collective bargaining" continues to apply. Specifically:

> 1. Courts are to examine "the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert."
>
> 2. Courts then have to turn to consider "the manner in which the measure impacts on the collective right to good faith negotiation and consultation."

These are fact-specific inquiries, as both the SCC and the ONCA have previously held.

The fact-specific nature of the analysis figures significantly in the majority's decision. Justice Favreau explains that the factual findings underpinning a declaration of unconstitutionality must be respected on appeal, absent a palpable or overriding error. He then closely analyzes and distinguishes prior wage restraint cases, highlighting in each the factual context that differentiated this case from those.

Applying the cases, Justice Favreau discusses the "indicia of interference" (para 114; analysis paras 115-145), to find that Bill 124 substantially interferes with collective bargaining as protected in s. 2(d).Justice Favreau also finds that these violations are not saved by s. 1.

He does, however, overturn the application judge's reasoning on the first pressing and substantial objective. The application judge held that Bill 124 failed this step. Justice Favreau disagrees, holding that the application judge did not defer to the legislator's right to prioritize budgeting and financial matters. He ultimately finds that Bill 124 fails at both the rational connection and minimal impairment steps, and declares that Bill 124 is invalid insofar as its application to unionized employees.

Ontario Responds with a Promise to Repeal

The Government of Ontario almost immediately announced that it would not appeal the ONCA's decision to the Supreme Court, but instead would repeal Bill 124 in its entirety. Further, the government has committed to promptly introduce regulations exempting non-unionized employees from the impact of the Bill until the repeal occurs.

Take Away

Broader public sector employers who are party to collective agreements with re-opener clauses will want to consider the language of those clauses carefully, including whether they apply to wages only or to compensation as a whole. Further, all broader public sector employers may wish to consider how the repeal of this Bill will affect their non-represented employees.

Need More Information?

For more information or assistance, contact Emily Elder at eelder@filion.on.ca or your regular lawyer at the firm.

Filion Wakely Thorup Angeletti LLP
management labour and employment law

PROUD MEMBER OF L&E GLOBAL
Alliance of Employers' Counsel Worldwide

ADVOCATES for EMPLOYERS of CANADA

Toronto
Bay Adelaide Centre
333 Bay Street
Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
252 Pall Mall Street, Suite 100
London, Ontario N6A 5P6
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West
Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca

Kitchener-Waterloo
137 Glasgow Street
Suite 210, Office 175
Kitchener, Ontario N2G 4X8
tel: 519.433.7270
fax: 519.433.4453
kitchener-waterloo@filion.on.ca