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Majority of Court of Appeal for Ontario Upholds Lower Court Decision - Finds Bill 124 Unconstitutional

February 14, 2024

On February 12, 2024, the Court of Appeal for Ontario released its decision[1] on the constitutionality of the ***Protecting a Sustainable Public Sector for Future Generations Act, 2019*** (often referred to as "Bill 124").[2] Bill 124 restricted increases to salaries and compensation for employees (unionized and non-unionized) in the broader public sector to no more than 1% each year of a three-year moderation period.

A majority of the Court of Appeal upheld the decision of the Ontario Superior Court of Justice[3] that Bill 124 violates the right to freedom of association under the *Canadian Charter of Rights and Freedoms* ("*Charter"*) and cannot be justified under section 1 of the *Charter*. The appeal court further held that Bill 124 did not violate the *Charter* rights of non-unionized employees as, unlike unionized workers, they do not have a constitutionally protected right to associate for the purposes of bargaining terms and conditions of employment. As such, Bill 124 should not have been struck down in relation to non-unionized employees.

Justice Hourigan, in dissent, would have upheld Bill 124 in its entirety.

The Province of Ontario has indicated it does not intend to appeal the Court of Appeal decision and will take steps to repeal Bill 124 in its entirety (including in relation to non-unionized employees) in the coming weeks. Until then, the Province will urgently introduce regulations to exempt non-unionized and non-associated workers from Bill 124.

Bill 124 – Brief Overview

Proclaimed into force on November 8, 2019, the stated intent of Bill 124 was to ensure any increase in compensation to Ontario public service employees, or employees in the broader public sector, was consistent with the principles of responsible fiscal management and sustainability of the public service. To that end, Bill 124 placed a 1% cap on wage and other compensatory increases for impacted public and quasi-public sector employers for a three-year moderation period. A comprehensive overview of Bill 124 can be found in our briefing note of November 2019.

Within hours of receiving Royal Assent, Bill 124 received criticism from a variety of public sector unions, many of which said the Bill was unconstitutional. That challenge went before the Ontario Superior Court of Justice in September of 2022 and, on November 28, 2022, the court released its decision, holding Bill 124

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[1] *Ontario English Catholic Teachers et al v Ontario (Attorney General)*, 2024 ONCA 101 (Favreau JA, for Doherty JA; Hourigan JA dissenting) [*OECTA et al v Ontario*].
[2] *Protecting a Sustainable Public Sector for Future Generations Act, 2019, SO 2019, c 12*.
[3] *Ontario English Catholic Teachers et al v Ontario (Attorney General)*, 2022 ONSC 6658 (Koehnen J).

unconstitutional and of no force and effect (see our briefing note of December 2022). The Province appealed the decision to the Court of Appeal for Ontario.

Court of Appeal for Ontario

As noted above, the key issue before the Court of Appeal was whether Bill 124 infringed on the right to freedom of association under section 2(d) of the *Charter* and, if it did, whether the infringement was nonetheless reasonable under section 1 of the *Charter*.

The Province's Position

In summary, the Province argued three principal points:

i. The lower court's decision was contrary to earlier decisions of the Supreme Court of Canada and other appellate courts in Canada that found similar wage restraint legislation to be constitutional.
ii. The lower court erred in its analysis of the meaning of freedom of association by essentially turning the right to associate (*i.e.*, the right to bargain), which the Supreme Court has said is 'procedural,' into a substantive right to achieve a particular outcome. The Province argued the procedural right to bargain remained intact under Bill 124 for many important terms of employment.
iii. The lower court erred in its application of section 1 of the *Charter* by failing to sufficiently defer to the Province's policy choices in the face of a pressing need to address the deficit through control of public sector wages and compensation.

The Majority Decision

The majority of the Court of Appeal dismissed the appeal. The crux of the court's decision is its finding that Bill 124 does not preserve a meaningful process of consultation and good faith negotiation over working conditions:

> Taking into consideration the context in which Bill 124 was introduced and the restraints imposed by the Act, I am satisfied that the Act substantially interferes with the respondents' right to participate in good faith negotiation and consultation over their working conditions. The circumstances of this case are distinguishable from other cases where wage restraint legislation was deemed constitutional because, here, there was not meaningful bargaining or consultation before the Act was passed, the Act significantly restricts the scope and areas left open for negotiation in the collective bargaining process, there is no meaningful mechanism of collective agreements to be exempted from the Act, and the public sector collective agreements to which the Act does not apply generally provide for higher annual wage increases than 1%. Further, I find that the Act is not saved by s. 1 of the *Charter* because it does not minimally impair the respondents' right to freedom of association, and because the Act deleterious effects outweigh its benefits.[4]

Regarding section 1 of the *Charter*, the Court of Appeal (majority and dissent), found the lower court erred in finding the Province had failed to establish a pressing and substantial objective for Bill 124. In

[4] *OECTA et al v Ontario*, *supra* note 1 at para 182.

other words, the lower court failed to give sufficient deference to the Province's ability to pursue its priorities in financial and budgeting matters:

> In my view, the application judge erred in his approach to the analysis of whether Ontario had posited a pressing and substantial objective because he failed to give sufficient deference to the legislature's policy objectives. […]
>
> While I appreciate the Supreme Court has warned that courts should treat fiscal rationales as constitutionally suspect, these are ultimately matters of degree. Fiscal prudence on its own may be constitutionally suspect. However, where fiscal prudence arises from the government's determination that it faces real potential for fiscal crisis, the court should not engage in an overly technical analysis of the economic evidence and should refrain from analyzing subsequent savings or spending policies to access the credibility of the government's stated objective. Governments are entitled to set policy objectives and one of their cores areas of policy-making is fiscal and budgetary. If the government can state a pressing and substantial objective that is rooted in evidence, the court should defer to that policy choice.[5]

However, ultimately, the majority of the Court of Appeal found Bill 124 fails the test of proportionality and minimal impairment; that any legislation which impairs freedom of association do so only as minimally necessary to achieve its pressing and substantial objective(s): "Ultimately, the only potential rationale for obviating the process of collective bargaining is expediency. However, in the absence of any evidence showing a need for expediency, imposing broad-based legislation of this nature is not minimally impairing."[6]

The Court of Appeal also found the lower court erred in declaring the entirety of Bill 124 unconstitutional. Bill 124 applies to unionized and non-unionized employees in the broader public sector. However, non-unionized employees do not bargain collectively and, as such, do not benefit from the same protections as their unionized counterparts under section 2(d) of the *Charter*. The lower court's "declaration was [therefore] overly broad and should be limited to a declaration that the Act is unconstitutional in so far as it applies to represented employees."[7]

The Dissenting Opinion

Justice Hourigan held Bill 124 to be constitutional and, if not, to be saved by section 1 of the *Charter*.

As a starting proposition, His Honour questioned the decision of the majority to wade "into matters that have always been within the exclusive remit of the legislative branch." In his view, "when judges second guess a government's policy decisions in the course of their *Charter of Rights and Freedoms* analysis, they are touching the third rail of judicial reasoning. Such conduct imperils the legitimacy of constitutional judicial review" and "undermine[s] our democratic form of government."[8]

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[5] *OECTA et al v Ontario*, *supra* note 1 at paras 181 and 182.
[6] *OECTA et al v Ontario*, *supra* note 1 at para 209.
[7] *OECTA et al v Ontario*, *supra* note 1 at para 6.
[8] *OECTA et al v Ontario*, *supra* note 1 at paras 233 and 244.

Substantively, Justice Hourigan was of the view that Bill 124 does not substantially interfere with the right to collective bargaining and as such does not violate freedom to associate under section 2(d) of the *Charter*. In summary, His Honour made the following findings of fact and law:

- The Province determined there to be a pressing need for Bill 124. It has an interest in reducing wage growth in entities that are provincially funded or provincially owned.
- The record shows that, prior to Bill 124, the Province had attempted, unsuccessfully, various options to limit public spending growth. It was therefore open to the Province to choose a legislative solution that did not result in involuntary layoffs or mandatory unpaid days off.
- There was no evidence the Province acted in bad faith.
- While the Province had no legal obligation to consult or negotiate prior to introducing Bill 124, consultation did take place and amendments were made before the Bill was proclaimed into force.
- It was an error and unrealistic to conclude that voluntary wage restraint would have been a better alternative to legislation,
    - when the Province is not the employer or at the bargaining table for many of the workers covered by Bill 124, and
    - given the strong and well-known opposition to wage restraint of several of the respondents.
- Bill 124 does not preclude good faith negotiation and consultation on several important terms of employment, and there was ample evidence that after the passage of Bill 124 unions were able to engage in collective bargaining and achieve significant gains. Further, strikes or strike votes were available to unions and used by several of them to obtain workplace gains.
- The lower court judge's factual findings were "filled with personal opinions and value judgements in the place of evidentiary-based factual findings."[9]

What's Next?

As noted above, the Province will not appeal the Court of Appeal's decision, bringing an end to a five-year debate over the constitutionality of Bill 124. Instead, the Province will take steps to repeal Bill 124 in its entirety and urgently introduce regulations to exempt non-unionized and non-associated workers from the Act. Employers whose employees were covered by Bill 124 are encouraged to consult with experienced labour counsel regarding the impact of the decision on their collective agreements.

To learn more and for assistance, contact your Sherrard Kuzz lawyer or info@sherrardkuzz.com.

[9] *OECTA et al v Ontario*, *supra* note 1 at para 304.