School Board Update

Ontario to Introduce Sweeping Legislation Concerning School Board Bargaining

Date: August 20, 2012

On August 16, 2012, the Ontario government announced its intention to introduce the *Putting Students First Act* (the "Bill"). If passed, this legislation would, among other matters, establish unprecedented controls on current school board collective bargaining, freeze current teacher salary grids, require the radical alteration of existing sick leave and retiring gratuity plans, permit regulations regarding teacher hiring and the use of diagnostic tests and give the Minister of Education broad discretion to end labour disruptions. This *FTR Now* discusses the impending legislation and its consequences for school boards.

THE BILL

A draft text of the Bill has been released. It sets outs requirements for terms that must be included in employment contracts (for non-bargaining unit employees) and collective agreements (for bargaining unit employees) during the "restraint" period. That period will apply for a minimum of two years unless otherwise extended by regulation, but in any event is not to exceed three years. The restraint period will commence for teachers (and for most other employees) on September 1, 2012.

Collective Agreement Provisions are Prescribed

All new collective agreements will be for a period of two years. The Bill distinguishes between collective agreements involving teachers represented by the Ontario English Catholic Teachers' Association ("OECTA") and those involving all other unionized school board employees. Any new OECTA teacher collective agreements would have to strictly incorporate and be consistent with the terms set out in the bilateral July 5, 2012 Memorandum of Understanding ("MOU") between the government and OECTA. In accordance with the OECTA MOU, the parameters of such agreements would include the following factors:

- a zero per cent increase to existing grids in 2012-13 and 2013-14;
- grid movement (partially deferred) to be funded by three unpaid leave days to take place on previously scheduled professional activity days;
- agreement to restructure the salary grid with a view to long-term, sustainable savings;
- freezing currently vested retirement gratuity entitlements for payment of unused sick days;
- discontinuance of future sick day and retirement gratuity accrual;
- a restructured short-term sick leave plan that would include 10 sick days at 100 per cent followed by 120 days of sick leave at either 90% under certain conditions (i.e. five consecutive days of sickness or any absences due to an "ongoing or intermittent medical condition") or at 66.67% otherwise;
- regulation of the hiring of long-term occasional and contract teachers; and
- autonomy for teachers in applying diagnostic assessment.

The contents to be negotiated into other collective agreements will depend upon whether or not the involved bargaining agent (e.g. OSSTF, ETFO, CUPE etc.) has, on or before August 31, 2012, negotiated a bilateral memorandum of understanding with the Ministry of Education that is "*substantially similar* in all relevant aspects" to the OECTA MOU.

It is to be noted that the Bill does not contemplate the involvement of any school boards or school board associations in the establishment of any such "substantially similar" MOUs.

Where any such "substantially similar" MOU has been negotiated, the affected school boards may then negotiate a new

collective agreement with terms that are themselves “substantially similar” to the terms of the applicable MOU.

Where no such “substantially similar” MOU has been negotiated between the bargaining agent and the Ministry, the affected boards must negotiate new collective agreements involving terms that are “*substantively identical* in all relevant aspects” to the OECTA MOU.

In either situation, the Ministry will also have the power to prescribe other collective agreement terms.

Avoidance of Statutory Freeze

The Bill would also, for the applicable restraint period, prohibit school boards and their bargaining agents from agreeing to or putting into effect any terms or conditions that are inconsistent with the OECTA MOU or other “prescribed” conditions during any period of time when a collective agreement is not in effect. The Bill provides elsewhere that it will prevail in any conflict with the *Labour Relations Act*. These two provisions would effectively neutralize the impact of the “statutory freeze” provided for under the *Labour Relations Act* on items addressed by the OECTA MOU. They are, in concert, presumably intended to preclude the unrestricted movement of teachers and support staff along the experience components of their salary grids that would otherwise occur, making such movement possible only in connection with the offsetting savings contemplated by the OECTA MOU.

New collective agreements (even if already established) are declared not to come into force except through the provisions of the Bill. This is also evidently designed to prevent the unrestricted “rollover” of collective agreements that would otherwise lead to movement on salary grids.

Ministerial Review and Provision for Cabinet Intervention in Local Collective Bargaining

Subject to the Bill’s many significant restrictions on negotiated outcomes, local bargaining will continue. Every new school board collective agreement, whether involving teachers or support staff, must be submitted to the Minister for review to determine whether its terms are “substantially similar” or “substantively identical” (as the case may be) to the applicable MOU. It is unclear as to the latitude that school boards will have under either expression. While the review is ongoing, (i) the operation of the new collective agreement is suspended as is any right to strike or lock out that would otherwise exist and (ii) terms and conditions of the expired collective agreement (subject to consistency with the OECTA MOU) will continue to apply.

In the event that a negotiated collective agreement does not, in the opinion of the Minister of Education, meet the standards set out in the legislation, the Lieutenant Governor-In-Council [1] (effectively “Cabinet”) may “order” that the offending aspects be deemed to have been made in compliance with the Bill or require the parties to negotiate a new collective agreement altogether. So long as an order does not take effect prior to the commencement of the applicable restraint period, such orders may be retroactive.

If the Minister reaches the conclusion (and advises Cabinet) that local parties “appear unable to settle a collective agreement” that complies with the Bill, or in any event if no such agreement has been reached by December 31, 2012, Cabinet may, by “order”, impose a collective agreement on the parties or prohibit (or terminate) strikes and/or lockouts, require striking employees to return to work and/or require the board to resume normal operation. In other words, the powers of bargaining units to strike and of boards to lock out are preserved, subject to extraordinary new powers of government intervention. Cabinet may (but is not obliged to) make orders regarding consultative processes involving school boards and bargaining agents to be employed before exercising such powers.

The Bill provides the highly unusual feature that all Cabinet orders prevail over the provisions of the *Labour Relations Act* and the *Education Act.*

Quite apart from the foregoing, the Bill also states simply that Cabinet “may impose by regulation a collective agreement on a

board, employee bargaining agent and the employees" in question. The Bill generally provides extraordinary scope to Cabinet to make regulations, including the power to repeal the Act by proclamation.

Regulations Concerning Teacher Hiring and Use of Diagnostic Tests

The Bill specifically permits Cabinet to generally prescribe terms and conditions in collective agreements "including" (but not limited to) terms and conditions respecting (i) criteria and processes to be used in the hiring of teachers by boards and any other matters related to the hiring of teachers, and (ii) the use of diagnostic assessments of students.

Non-Union Board Employees

For non-union employment contracts (excluding those concerning senior board officials and trustees already subject to the compensation restraint provisions established under Bill 55), the Bill establishes a two-year compensation freeze as well as mimicking other provisions of the OECTA MOU (e.g. no accumulation of new sick days, locking in of current retirement gratuity values, revisions to sick leave/short-term disability plans, etc.). Each board will be required to provide a "compliance report" to the Minister regarding its non-union employees.

Enforced Compliance With Prescribed Terms

The Bill provides that all legislated terms are deemed to be included into every employment contract and new collective agreement, and that if any term of an employment contract or new collective agreement does not comply with the provisions of the Bill, the non-compliant terms will be inoperative. Any interest arbitration award made in respect of the restraint period must be consistent with the provisions of the Bill, and will be deemed inoperative to the extent of any inconsistency.

No compensation shall be paid to any employee, before, during or after the restraint period, for compensation not received as a result of the Bill. If any payments are made by a board to an employee in contravention of the Bill, the employee will be required to pay them back.

Restrictions on Court and Tribunal Jurisdiction to Question the Bill and Governmental Actions Thereunder

The Bill contains a number of highly unusual provisions regarding its adjudication. Specifically, the Minister may, if he or she considers it to be in the public interest, make a complaint to the Ontario Labour Relations Board alleging a contravention of the Bill's provisions. However, the Bill provides that neither an arbitrator nor the Ontario Labour Relations Board will be allowed to inquire into the constitutionality of the Bill or whether its provisions are in compliance with the Ontario *Human Rights Code*. The Bill also states that, whether made by the Minister or Cabinet, no regulation, order, decision, act, advice, direction or term or condition imposed on employment contracts or collective agreements "shall be questioned" by any court.

GOING FORWARD

In an announcement dated August 20, 2012, the government advised the House Speaker to recall the Legislature (which is not currently sitting) for August 27, 2012, in order to introduce the Bill.

Until that time, the Bill is being "previewed." Once the Legislature is sitting, the Bill may be expedited and passed in one day on agreement of all parties. Without agreement, it must move through the standard legislative process—First and Second Reading, possible referral to Committee, Third Reading and a then vote. Obviously, given the minority status of the current government, passage of the Bill is not guaranteed. Boards must therefore prepare for this eventuality as well.

Should you have any questions regarding this proposed legislation, please contact Michael A. Hines at 416.864.7248, Dolores M. Barbini at 416.864.7303, or any other member of Hicks Morley's School Board Practice Group.

[1] Decisions made by the Ontario Premier and his or her Cabinet, which have been approved by the Lieutenant Governor, become decisions made by the “Lieutenant Governor-In-Council.” For ease of reference in this *FTR Now*, those decisions will be referred to as decisions made by “Cabinet.”

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