School Board Update

Concerted Withdrawal of Voluntary/Extracurricular Activities by Teachers Declared an Unlawful Strike

Date: April 22, 2013

In a landmark ruling, and after much anticipation, the Ontario Labour Relations Board ("OLRB") has finally rendered its decision in the longstanding debate about whether the withdrawal, in combination or in concert, of participation in voluntary extracurricular activities by teachers constitutes a "strike" within the meaning of the *Education Act.* In this *FTR Now*, we review the decision and the events leading up to it.

The OLRB application was commenced by the Trillium Lakelands and Upper Canada District School Boards ("School Boards"), who jointly brought an application under section 100 of the *Labour Relations Act* ("*LRA*"). They alleged that the Elementary Teachers' Federation of Ontario ("ETFO") had engaged in unlawful activity by calling, authorizing, counselling and encouraging an unlawful strike by, among other methods, advising its members not to participate in voluntary/extracurricular activities outside the 300 minute instructional day. Such advice was claimed by ETFO to be in protest of the Ontario government's passing of Bill 115, the *Putting Students First Act, 2012*, and the imposition of collective agreements thereunder.

On January 14, 2013, ETFO issued a Provincial Takeover Bulletin ("Bulletin") advising its members of a "provincial Executive" resolution which stated "that ETFO members not participate in voluntary/extracurricular activities outside the 300 minute instructional day." The Bulletin then stated that "ETFO members will withdraw" from the performance of any activities that could be characterized as "voluntary" according to ETFO criteria that, in the view of the School Boards, clearly encompassed mandatory and expected duties.

The School Boards made a conscious decision to direct their application at this Bulletin and the communications of the ETFO Executive, rather than to impugn the conduct of individual teachers. As a result, the evidence in the case was limited to the Bulletin and an agreed statement of facts. This included various emails from local ETFO officials interpreting the Bulletin and providing express direction to members employed by the School Boards that ETFO was prohibiting members from engaging in voluntary/extracurricular activities.

HEART OF THE DECISION

Section 81 of the *LRA* states that no trade union and no officer, official or agent of a trade union shall counsel, procure, support or encourage an unlawful strike. The OLRB easily found that,

through its Bulletins and the advice of its officials to members, and despite its insistence to the contrary, ETFO and its officers had “supported” or “encouraged” the withdrawal of voluntary/extracurricular activities. Therefore the only issue was whether the withdrawal of these activities amounted to a strike.

There is a definition of “strike” in Ontario, found in subsection 277.2(4) of the *Education Act*, that is unique to the school board sector:

Strike

[…]

(b) “strike” includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed or may reasonably be expected to have the effect of curtailing, restricting, limiting or interfering with,

(i) the normal activities of a board or its employees,

(ii) the operation or functioning of one or more of a board’s schools or of one or more of the programs in one or more schools of a board, or

(iii) the performance of the duties of teachers set out in the Act or the regulations under it,

including any withdrawal of services or work to rule by teachers acting in combination or in concert or in accordance with a common understanding.

The School Boards argued that, given the breadth and unique focus of the “strike” definition, voluntary activities, including extracurriculars, were clearly caught by various elements of the definition. In particular, the School Boards argued that the definition focuses on the impact or effect of the activity, rather than the actual cessation, slow down or refusal to perform “work” in concert. They also argued that the withdrawal of voluntary/extracurricular activities curtailed, restricted, limited or interfered with the normal activities of the Boards as well as the operation or functioning of one or more of their schools. Finally, the School Boards argued that the withdrawal met the classic definition of a “work to rule” as it has been understood in the school board sector in this province for decades.

In response, ETFO argued that the legislative history of the definition ought to be taken into account because (in ETFO’s view) it demonstrated a clear and conclusive legislative intent to exclude extracurricular activities from the definition of strike. The OLRB, after reviewing the history of all the relevant amendments to the *Education Act* over the last 20 years, concluded that the significance of the legislative history was not at all clear, and therefore provided no assistance in shedding light on the proper interpretation of the definition. ETFO’s interpretive approach was

therefore rejected.

Returning to the current definition of strike, the OLRB easily concluded that the "wording of the statute is more than broad enough to catch these voluntary activities in the definition of a strike" and that there were sound labour relations for so finding. The OLRB refused to accept that "voluntary" activities were exempt from the "strike" definition, holding that this would open the door to a "definitional quagmire" and endless disagreement. On this point, the Chair commented that "like any professional, it is impossible to imagine, let alone exhaustively list every conceivable specific duty or activity a teacher may be called upon to perform". Accordingly, the Chair refused to even attempt to demarcate the "fuzzy" line between the mandatory and voluntary duties of a teacher, thus rejecting ETFO's argument that the withdrawal of voluntary activities should be permissible as a form of political protest.

ETFO also argued that voluntary activities were unpaid and simply not "work", and therefore the refusal to perform them could not be a strike. The OLRB struggled with this argument but ultimately rejected it for two main reasons. First, as argued by the School Boards, the definition of a strike in the *Education Act* makes no reference to "work" or compensation, but rather focuses solely on the impact of the activities in combination or concert. Second, the Chair noted that the school board sector in Ontario has a long tradition of teachers providing extracurricular activities without additional compensation. Teachers are paid annually (not by the hour) and "the system in Ontario still seems to expect and to depend on volunteerism to deliver some expected components of it."

IMPACT OF REPEAL OF BILL 115

In the course of its decision, the OLRB made a second important ruling regarding the survival of imposed collective agreements despite the repeal of Bill 115.

Bill 115 was repealed by the government on January 23, 2013, just two days before the hearing was to commence. Accordingly, ETFO raised a preliminary argument that the repeal had "undone" the government's imposition of collective agreements in the province. In the alternative, ETFO argued that, even if the terms and conditions imposed by Bill 115 survived the repeal, they did not amount to a collective "agreement", since they had been imposed by statute. In either situation, ETFO contended that if any of its activity amounted to counselling or encouraging a strike, such a strike would be lawful since it occurred while no collective agreement was in force.

The OLRB rejected ETFO's position and confirmed that the imposed collective agreements survive the repeal of Bill 115. This conclusion was based on subsection 51(1) of the *Legislation Act*, which expressly states that the repeal of an Act does not affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act. The OLRB also confirmed that the imposed collective agreements do constitute "collective agreements" for the purposes of the *LRA* even though they were not voluntarily agreed to by the parties.

DECISION RENDERED DESPITE ETFO'S SUSPENSION OF ADVICE TO ITS MEMBERS

The hearing into the many issues described above ended on February 12, 2013. Weeks passed without a decision. On March 26, 2013, as the OLRB was on the verge of issuing its decision on the merits, ETFO confirmed to its members, as was widely reported in the media, that it was suspending its "advice" regarding voluntary/extracurricular activities. As a result, a hearing was held on short notice to deal with ETFO's argument that there was no longer a labour relations purpose in issuing a decision. The School Boards strenuously opposed the motion, contending that ETFO's suspension of its advice (for an indeterminate period of time) should have no impact whatsoever on the issuance of a decision on the merits.

The OLRB issued its entire decision on April 11, 2013, nine days following this supplementary hearing. It rejected ETFO's arguments and agreed with every argument raised by the School Boards, holding that it was appropriate to render its decision for the following reasons:

- In light of the long history of the use of withdrawal of extracurricular activities as a tactic by teacher unions, the School Boards had reason to fear a recurrence despite ETFO's temporary suspension of the work to rule;
- The Chair stated that the "legality of this tactic has bedevilled teacher labour relations in this province and others for decades" and ETFO's advice to members applied, and was intended to apply, not just to members employed by the School Boards, but to over 70,000 members throughout the province, reflecting a strong public interest in the issue;
- The fact that ETFO had begun its campaign in January against the government and had continued it throughout the hearing, only to end it on the eve of a decision being released demonstrated that the issue was "capable of repetition yet evasive of review", and therefore the OLRB was not comfortable adjourning the hearing without rendering a decision;
- Given the extensive resources already expended on the hearing (by the parties and the ORLB), not to issue a decision seemed to cater to "collateral political interests" and would "throw away" the investment made to that point in the resolution of the issue; and
- The OLRB was concerned that not issuing a decision might be construed "as an abdication of its public responsibility".

IT MAY NOT BE OVER YET

From the outset of the hearing, ETFO has claimed that the broad definition of "strike" in the *Education Act* violates freedom of expression and freedom of association rights under the *Charter*. During the hearing, the parties agreed to bifurcate the proceedings and deal with ETFO's *Charter* challenge only if the work to rule was declared to be an unlawful strike. This has now occurred, and the parties have again been invited by the OLRB to determine whether the

Charter issue will be pursued. The parties are to advise the OLRB as to their positions on this issue by Thursday, April 25, 2013.

If you require more information about this decision, please contact Michael A. Hines at 416.864.7248, Dolores M. Barbini at 416.864.7303, John-Paul Alexandrowicz at 416.864.7292 or your regular Hicks Morley lawyer.
