School Board Update

Ontario Government Proposes Central Bargaining for School Boards

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The Ontario government has introduced legislation that would, if passed, provide for central bargaining for school boards – a significant departure from how collective bargaining has historically occurred in the sector. Bill 122, the *School Boards Collective Bargaining Act, 2013*, was introduced at First Reading on October 22, 2013, and will now undergo consideration by the Legislature.

In this *FTR Now*, we will consider the key changes proposed by Bill 122 and the potential impacts for school boards in Ontario.

BACKGROUND

Bill 122 is the latest step in the Ontario government's attempts to address collective bargaining issues in the school board sector, and can be seen as a continuation of developments from the previous few years. It would replace the provisions of the *Education Act* related to collective bargaining.

The Bill would continue existing teachers' bargaining units at the province's school boards, which would continue to be represented by the current teacher associations as bargaining agents:

- l'Association des enseignantes et des enseignants franco-ontariens ("AEFO");
- the Elementary Teachers' Federation of Ontario ("ETFO");
- the Ontario English Catholic Teachers' Association ("OECTA"); and
- the Ontario Secondary School Teachers' Federation ("OSSTF")

However, Bill 122 would formalize and give structure to what has become a reality in the past few rounds of school board negotiations – the involvement of the Ministry of Education. This would be accomplished through the proposed medium of central bargaining.

CENTRAL BARGAINING – TEACHERS

The key feature of Bill 122 is the new central bargaining structure, which is intended to run in parallel with local bargaining.

The Bill would establish five central tables to facilitate central bargaining for teachers:

- a central table for French-language public district school boards for every teachers' bargaining unit represented by AEFO;
- a central table for French-language separate district school boards for every teachers' bargaining unit represented by AEFO;
- a central table for every teachers' bargaining unit represented by ETFO;
- a central table for every teachers' bargaining unit represented by OECTA; and
- a central table for every teachers' bargaining unit represented by the OSSTF.

There would be two parties to central bargaining – an "employer bargaining agency" and an "employee bargaining agency". The Bill would, however, grant the Crown the right to participate in central bargaining at any central table that is established.

Where the Crown elected to participate in central bargaining, no agreement could be reached without the tri-partite concurrence of the employer bargaining agency, the employee bargaining agency and the Crown.

Central bargaining for teachers would be mandatory. Individual boards would not be able to negotiate “central terms” at the local level, nor would they be able to “opt out” of the central process or otherwise avoid being represented by their designated “employer bargaining agency”. The Bill is silent on how the sequencing of different central bargaining processes might be controlled.

Where a memorandum of settlement (bilateral or, if the Crown participates, trilateral) is reached at a central table, the Bill provides for a further requirement of “ratification” by the two agencies and “approval” by the Crown.

The following organizations would be designated as the employer bargaining agencies:

- L’Association des conseils scolaires des écoles publiques de l’Ontario for French-language public district school boards;
- L’Association franco-ontarienne des conseils scolaires catholiques for French-language separate district school boards;
- the Ontario Catholic School Trustees’ Association for English-language separate district school boards; and
- the Ontario Public School Boards’ Association for English-language public district school boards and boards established under section 68 of the *Education Act*.

Each employer bargaining agency would be deemed by law to have the capacity and authority to conduct central bargaining as contemplated by the Bill. Each would be given the authority to represent school boards during central bargaining, to bind the boards to the central terms of their collective agreements and “to exercise all of the school boards’ rights in respect of central bargaining”. The scope of this last phrase is not altogether clear. The Bill specifically removes the process of giving notice to bargain from local participants – notice to bargain would occur centrally and would apply to all local boards and bargaining units that were subject to the central bargaining in question.

Employer bargaining agencies would have the ability to agree to mid-term amendments to central terms and would be responsible for representing the involved boards in a new centralized arbitration process that would be developed to resolve disputes over central terms.

Employer bargaining agencies would be subject to a duty of fair representation towards the school boards they represented. They would also be required to establish policies and procedures to effectively exercise their new responsibilities. If a voting process is to be used by an employer bargaining agency, approval must be based on a majority of the school boards with the votes “weighted to reasonably reflect” the size of each board’s bargaining unit. These agencies would also have a duty to co-operate in good faith with the Crown in preparing for and conducting central bargaining.

The “employee bargaining agencies” would be the four teachers’ associations. They would have obligations imposed on them similar to those imposed on the employer bargaining agencies.

As noted, the Crown could elect to participate in any central bargaining process, and it would be entitled to participate in all aspects of the central bargaining, including negotiations, conciliation, mediation and interest arbitration.

Notably, the Bill would establish the need for Crown consent before employer bargaining agencies could take key steps in central collective bargaining, such as referring the dispute to an interest arbitrator, “authorizing or requiring” school boards to lock out employees, or changing terms and conditions after the expiry of the statutory freeze period (whether unilaterally or with the agreement of an employee bargaining agency). The ability of an employer bargaining agency to “authorize or require school boards to lock out employees” is not explained.

Finally, Bill 122 would establish a process by which employee bargaining agencies could raise issues relating to

denominational and linguistic education rights, which would then be allocated to local bargaining. If the parties could not agree on whether to exclude the matter raised from central bargaining, the OLRB would have the authority to determine the issue.

CENTRAL BARGAINING – OTHER EMPLOYEES

Given the number of unions that represent other employees of school boards, it is not surprising that Bill 122 does not mandate central bargaining for other groups of employees. Nevertheless, the Bill does permit the government to establish other central tables and to designate, by regulation, a “council of trade unions” to be an employee bargaining agency for employees in specified non-teacher bargaining units. This would likely duplicate and formalize the assemblies of support staff unions that have participated in recent bargaining processes.

Similarly, the Bill would allow the government to establish a “council of trustees’ associations” to conduct centralized support staff bargaining. Central bargaining would then occur, subject to the same process as described above.

LOCAL BARGAINING

In addition to the central bargaining introduced by Bill 122, there would also be local bargaining that would be more in line with traditional collective bargaining. The parties to the local bargaining would be the school board and the local bargaining agents holding bargaining rights at that board.

Not surprisingly, the scope of local bargaining would include any issue that did not fall within the scope of central bargaining. The Bill clarifies that local bargaining would remain subject to the requirements of the *Labour Relations Act, 1995* (“*LRA*“).

THE KEY ISSUE – WHAT ARE “CENTRAL TERMS”?

It goes without saying that the government has been “at the table” in one sense or another in the past several rounds of school board bargaining, imposing (to a greater or lesser extent and with a variety of inducements) different forms of “centralized” negotiations. However, in strictly legal, statutory terms, the current school board bargaining model is premised on local bargaining. This fact has been reflected by the recurring need for individual school boards to adopt, ratify, append or otherwise accept (or reject) any centrally determined outcomes.

Bill 122 would effectively graft on to the current statutory model of local bargaining a new centralized bargaining process, one that can result in the imposition of “central terms” that individual school boards will not be able to avoid. The extent of the impact on the current “local” model (and the resulting incursion on existing school board autonomy) will therefore depend to a very great extent on the definition of “central terms”, specifically the range of school board interests that can qualify for (or be subject to) negotiation as a “central term”.

Bill 122 does not directly define the “central terms” that will be subject to the new processes. Rather, the determination of the negotiable “central terms” in any round of bargaining will, itself, be a matter of negotiation between the involved employer bargaining agency, employee bargaining agency and the Crown. This means that the “central terms” may well vary as between central tables and from one bargaining round to the next.

Where the parties cannot agree on whether an issue should or should not be a “central” issue, the dispute can be taken to the Ontario Labour Relations Board (“OLRB”) for resolution. The OLRB will apply specified criteria such as the impact of the issue on provincial education policy, its cost implications for one or more school boards, whether the matter raises issues common to a number of the school boards involved and any other factors the OLRB considers relevant.

Apart from the trilateral method of determining the scope of central bargaining described above, Bill 122 also permits the Crown to unilaterally “reserve” a matter for central bargaining where education policy or significant expenditures are

implicated.

COLLECTIVE BARGAINING DISPUTE RESOLUTION

Bill 122 also addresses how dispute resolution would fit into the new bargaining regime. Although the Bill contemplates the resolution of impasse by consensual interest arbitration, the process of strike/lockout would remain available in a modified form. Specifically, Bill 122 contemplates that there could be strikes and lockouts both with respect to central bargaining and with respect to local bargaining. In each case, the requirements of the *LRA* would have to be met, as amended by the Bill.

With respect to strikes, Bill 122 would require a five-day written notification by either the central employee bargaining agency (in the case of a strike over central bargaining) or the local employee bargaining agent (in the case of a strike over local bargaining). The current broad *Education Act* definition of “strike” in respect of teachers would remain unchanged.

With respect to lockouts, Bill 122 would also impose a five-day written notification by an employer bargaining agency before it could “authorize or require a school board to lock out employees” following an impasse in central bargaining. Similarly, a local board would be required to give five days’ notice before it could lock out employees following an impasse in central bargaining. Importantly, in both cases the Crown must first consent to any lockout related to central bargaining.

For lockouts related to local bargaining only, the five-day written notice requirement would apply to the local board, but the Bill would not require Crown consent.

Where a central bargaining dispute is referred to interest arbitration, the Bill mandates that the arbitrator consider the following criteria in addition to other criteria considered by the arbitrator to be relevant:

- the school boards’ ability to pay;
- the extent to which services would be reduced if current funding and taxation levels are maintained;
- the economic situation of Ontario;
- a comparison between the public and private sectors; and
- the school boards’ ability to attract and retain qualified employees.

Bill 122 also establishes a procedure to address the situation where a central employer bargaining agency seeks an employee vote on its final offer that has been rejected by the involved central employee bargaining agency.

COLLECTIVE AGREEMENTS

A collective agreement would be comprised of both the central terms and the local terms that have been agreed to or decided by arbitration. The Bill confirms that the parties to the agreement remain the school board and the local bargaining agent.

Collective agreements would be required to have terms of two, three or four years, which would be specified by regulation. They would have commencement dates of September 1st of the applicable year.

Amendments to a collective agreement could only be agreed to by the parties and participants who were at the relevant bargaining table. Thus, for example, a change to a central term would require the agreement of the relevant employer bargaining agency, employee bargaining agency and the Crown.

Where differences arise over the interpretation of centrally bargained terms, the Bill would establish a centralized grievance process. That is, if a dispute developed over the meaning of a central term of a collective agreement, the relevant employer bargaining agency and employee bargaining agency would be permitted to submit the matter to a rights arbitration. The Crown would have a right to participate in the proceeding, and would have to consent to any settlement reached by the parties.

OTHER MATTERS

Bill 122 addresses a number of other matters incidental to the new bargaining regime. Of note, the Bill establishes a priority as between collective agreement provisions and the various education-related statutes:

- a central term of a collective agreement would prevail over a local term;
- Bill 122 and its regulations would prevail over a collective agreement;
- the *Education Act* and its regulations would prevail over a collective agreement;
- Bill 122 and its regulations would prevail over the *LRA* and its regulations; and
- the *Education Act* and its regulations would prevail over Bill 122 and its regulations.

CONCLUSIONS

If passed, Bill 122 would result in significant changes for collective bargaining in the school board sector, including radically redefined roles for school boards and trustee associations.

We remind readers that the governing Liberals still control only a minority of the Legislature, so they will need the buy-in of one of the other parties to ensure passage of the Bill. Based on recent experience, this could result in changes to the Bill as it goes through the legislative process. Hicks Morley will continue to monitor Bill 122 and will report on its progress.

Bill 122 will be discussed in detail at our upcoming Hicks Morley School Board Management Conference, to be held on November 15, 2013 at the Holiday Inn – Toronto International Airport. For further information on this Conference or to register, click here.

If you would like to discuss how Bill 122 might affect your board, please contact Michael Hines at 416.864.7248, Dolores Barbini at 416.864.7303, or any other member of our School Board Practice Group.

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