School Board Update

Bill 122 Passes Third Reading and Receives Royal Assent

Date: April 10, 2014

Bill 122, the *School Boards Collective Bargaining Act, 2014* ("*SBCBA*"), passed third reading on Tuesday, April 8, 2014 and received Royal Assent on Wednesday, April 9, 2014. It now awaits proclamation by the Lieutenant Governor. Our School Board Update of October 24, 2013 described the Bill in considerable detail. In this School Board Update, we review the most significant changes that were made to the Bill as it progressed through the Legislature.

THE KEY CHANGES

Good faith duty to cooperate with school board associations expressly imposed on the Crown (subsections 18(2) and 43(3))
This is, from the perspective of school boards, the most important amendment to the Bill. Formerly, the Bill obliged school board associations (and councils of associations established for support staff central bargaining) to "co-operate in good faith with the Crown in preparing for and conducting central bargaining". However, no reciprocal obligation was owed by the Crown to school board associations. This situation has now been remedied. The Crown will be required to "co-operate in good faith with an employer bargaining agency in preparing for and conducting central bargaining." The Crown owes no similar obligation to teacher federations or unions. This, in our view, makes it clear that the Crown no longer occupies a strictly neutral position as between employers and unions, but rather has a special, qualitatively different relationship with school boards within the central bargaining process. Interestingly, neither the "duty to co-operate" placed upon school board associations nor the reciprocal "duty to co-operate" placed on the Crown are enforceable as if they formed part of the *Labour Relations Act, 1995* ("*LRA*"), begging the question as to the proper enforcement mechanism for these duties.

Elimination of the Crown's ability to unilaterally "reserve" matters for central bargaining (section 24)
Bill 122 gave the Minister the discretion to reserve for central bargaining any matter that, in the Minister's opinion, could result in a significant impact on the implementation of provincial education policy or that could, in the Minister's opinion, result in a significant impact on expenditures for one or more school boards. This ability has been eliminated. The scope of central bargaining is to be determined by the parties, failing which it shall be established by the Ontario Labour Relations Board ("OLRB") under section 28 in accordance with specified criteria, including the two factors mentioned above.

Arbitration of central terms within local agreements (section 42)
Bill 122 permitted central parties to seek arbitration over disputes regarding central terms. However, the Bill restricted the issue to "the interpretation" of the central clause and confined the remedy available to the "obtaining of a declaration" – no substantive relief against individual boards or unions could be ordered. The *SBCBA* has changed this by providing central parties with access to "final and binding arbitration to resolve any difference concerning the interpretation, *application or administration* of any central term of a collective agreement" [emphasis added]. This suggests that a central employee bargaining agency can involve itself (and its corresponding central employer bargaining agency) directly in the interpretation *and application* of the central provisions of an individual school board's collective agreement. This is reinforced by the fact that the new subsection 42(5)2 allows the centrally appointed arbitrator "to interpret and apply local terms to the extent necessary for the purpose of resolving a difference respecting any central terms at issue in the arbitration". The revised section 42 no longer limits the arbitrator to making declarations. Rather, subsection 42(5)4 will allow the arbitrator to "make orders in respect of each of the collective agreements" that contain the central term. The Crown is entitled to "intervene" in such arbitrations. Where a local school board has obtained a decision of a local arbitrator involving a central term, this decision is subject to displacement by a subsequent decision of a centrally appointed arbitrator, which will have to be applied on a going forward basis.

OTHER CHANGES

Applicability of *LRA* to the Crown (subsection 4(2))
The *LRA* does not, according to its own terms (subsection 4(2)) bind the Crown. This means that the Crown cannot, for example, be held liable for any unfair labour practice under the *LRA* such as interfering with a trade union or an employer's association. In the original draft of Bill 122, the *LRA* was made applicable to the Crown, but only "to the extent necessary to enable the Crown to exercise its rights and privileges" under the Bill. Once again, this appeared to insulate the Crown from possible liabilities under the *LRA*. This was criticized and the *SBCBA* now makes the Crown also subject to the *LRA* to the extent necessary "to perform the Crown's duties" thereunder. It remains unclear as to whether this goes so far as to expose the Crown to liabilities under the *LRA* in respect of, for example, bad faith bargaining.

Obligation of the Crown to participate in central bargaining (subsection 13(2))
The Bill originally established central bargaining for teachers and permitted the Crown to establish central bargaining for other unionized school board employees but did not oblige the Crown to participate in any form of central bargaining. This position was criticized since the impetus behind central bargaining from the perspective of school boards and unions was to "bring the money to the table". The *SBCBA* will now require actual Crown participation wherever central bargaining occurs.

Changes to central bargaining for support staff (subsections 20(1) and 23(2))
Under the initial Bill, the Minister had complete discretion in deciding whether or not to recognize a trade union as an "employee bargaining agency" for the purposes of central support staff bargaining. Unions were uncomfortable with this level of discretion. The *SBCBA* will now require the Minister to so designate a trade union where the trade union requests that to occur in respect of a specified group of bargaining units and where the trade union (and its affiliates) represent two-thirds of the bargaining units and two-thirds of the employees involved in the particular group proposed by the trade union. Where this occurs, a central table in respect of the designated bargaining units must also be established. Other support staff employee bargaining agencies may still be established by regulation without the request of the involved union(s).

Consolidation of French-language teacher bargaining (subsections 21(1)5 and 23(1))
Previously, the Bill provided for separate central teacher bargaining as between French public and French Catholic boards, with an option for the Minister to consolidate those processes. The Act now mandates that consolidation in respect of teacher bargaining.

Loss of voting privilege for non-payment of fees (subsections 21(10) and (11))
The regulation-making power o the Minister in respect of payment of fees by an individual board to the trustees' association that represents it in central bargaining has been expanded to allow the regulation to provide for the forfeiture of that board's voting rights upon a failure to pay the prescribed fees.

Restrictions on Minister's power to replace a designated trustees' association (subsection 22(2.1))
School board associations were disappointed with the original Bill's provision granting the Minister the power to replace a designated trustees' association in central bargaining with a "committee" of school boards, simply when the Minister formed "the opinion" that the association was "unable or unwilling to exercise its rights and privileges or perform its duties as an employer bargaining agency". The *SBCBA* will now require the Minister to consult with the school boards that are represented by the trustees' association and, following those discussions, to have "reasonable grounds" for forming the opinion. These procedural and substantive requirements will provide at least some measure of realistic legal recourse for an ousted trustee association, should it wish to challenge the Minister's actions.

Resolving disputes about the scope of central and local bargaining (subsections 28(2), (2.1), (3), (3.1) and (3.2))
One of the problematic aspects of the Bill lay in the considerable potential for confusion as to the borders between central and local issues. While those disputes may still arise, the process for their resolution is now clearer. To begin with, the *SBCBA* now provides that there may not be any strike or lockout in an effort to affect the scope of central bargaining. Second, the *SBCBA* provides that a dispute at local bargaining as to the central/local status of any "matter" shall be referred to the central table for resolution and, failing agreement there, to the OLRB for binding determination. Similarly, disputes on the

scope of central bargaining arising at the central table will be referred to the OLRB.

Five days' notice required before changing terms and conditions under clause 86(1)(a) of the *LRA* (section 35.1)
The Bill had made the traditional sanction powers of strike and lockout (whether exercised centrally in respect of central matters or locally in respect of local matters) subject to a new requirement that the exercise of any such power be preceded by five days' notice. The *SBCBA* will now also extend this five day notice requirement to the exercise of the ability to change terms and conditions by an employer bargaining agency in respect of central matters and by a local board in respect of local matters.

Clarification of ratification processes (section 38)
The Bill required ratification of a central memorandum of settlement ("MOS") by central parties (and "approval" by the Crown) as well as ratification of any local MOS by the local parties. However, it did not specify the mechanism by which such ratification was to be achieved. The *SBCBA* now makes it clear that the ratification processes for trade unions and employees are as set out in sections 44 and 79 of the *LRA*, requiring votes of more than 50 percent in favour as applied separately in respect of central and local MOUs. Local parties have no ability to "ratify" central items, so the ratification vote of a central employee bargaining agency will evidently involve the entire group of employees that will be affected by the central MOU. It does not appear that a federation or union could specify any form of double majority in respect of a central ratification. The *SBCBA* also now clarifies that the "weighted majority" voting process for the employer bargaining agency specified in subsection 21(4) is to be followed in its ratification process – a matter previously left in doubt. Where the central bargaining involves support staff bargaining and a council of trade unions, the weight to be assigned to the votes of employees in each bargaining unit may be determined in the documents that establish the council.

Term of collective agreements presumptively to be three years (section 40)
Initially, the Bill provided for terms ranging from two to four years, to be determined by regulation. The *SBCBA* will now provide for three year terms, subject to variation by regulation, provided that the Minister has first consulted with the involved central bargaining agencies.

WHAT HAS BEEN LEFT UNCHANGED?

Voting majority for school board and trustee associations
The definition of voting majority for an employer bargaining agency found in subsection 21(4) remains essentially as it was before:

If voting is required in respect of collective bargaining by an employer bargaining agency designated by subsection (1), the outcome of a vote must be decided *by the approval of a majority of the school boards that are represented by the agency, with their votes weighted* to reasonably reflect, for each school board, the size of the bargaining units containing employees of the school board. [emphasis added]

As noted in our School Board Update of October 24, 2013, this formulation does *not* appear to require the support of a "double majority" (i.e., a numerical majority of boards that, among them, employ a numerical majority of employees in the involved bargaining units). Rather, the votes of individual school boards are "reasonably weighted", with a simple majority of those "weighted" votes being required for any proposal to be approved.

If you have any questions regarding the *SBCBA*, please feel free to contact any member of our School Board Practice Group.

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