

School Board Update

Ontario Court Rules *Putting Students First Act* is Unconstitutional

Date: April 22, 2016

This week, the Ontario Superior Court of Justice declared the *Putting Students First Act (PSFA)* unconstitutional in its decision *OPSEU et al. v. Ontario*^[1]. The *PSFA* was repealed in 2013 and the remedy for the constitutional breach has not yet been determined. However, this important decision, which we review in this *School Board Update*, will almost certainly have significant ramifications for Ontario school boards.

The Decision

On April 20, 2016, the Ontario Superior Court of Justice declared the *PSFA* unconstitutional. In particular, the Court held that the Ontario government had infringed the applicant unions'^[2] right to freedom of association by substantially interfering with the collective bargaining process during the Fall of 2012 and with the passage of the *PSFA*.

Background

In the summer of 2012, the Ontario government entered into a Memorandum of Understanding with the Ontario English Catholic Teachers' Association (OECTA MOU). However, this agreement had no direct impact on Ontario school boards.

Subsequently, the Ontario government introduced Bill 115, which became the *PSFA*, in part to address the fact that upon the expiry of teacher collective agreements across the province on August 31, 2012, the "statutory freeze" under the *Labour Relations Act* would have come into effect. This, in turn, would have led to immediate and substantial increases in teacher compensation effective September 1, 2012 due to movement on teacher salary grids.

The *PSFA* required that any collective agreements in the school board sector entered into after August 31, 2012 had to be "substantively identical" to the OECTA MOU. In the event that school boards and affected unions were unable to reach collective agreements by December 31, 2012, such agreements could be imposed upon the parties. This, in fact, took place across Ontario. While the *PSFA* was repealed on January 23, 2013, the imposed collective agreements remained in place.

Five unions (ETFO, OPSEU, OSSTF, Unifor and CUPE), which represented teachers, other professionals and support staff in the negotiations, brought an Application to the Superior Court of

Justice, arguing that the *PSFA* itself as well as Ontario's process and procedures leading up to its enactment resulted in a breach of their right to freedom of association as guaranteed by section 2(d) of the *Charter of Rights and Freedoms (Charter)*.

Superior Court of Justice

The issue before the Court was to determine whether the Ontario government had substantially interfered with "a meaningful process of collective bargaining", a right guaranteed by section 2(d) of the *Charter*. Justice Lederer found that it had, and thus Ontario had infringed the unions' right to freedom of association:

When reviewed in the context of the *Charter* and the rights it provides, it becomes apparent that the process engaged in was fundamentally flawed. It could not, by its design, provide meaningful collective bargaining. Ontario, on its own, devised a process. It set the parameters which would allow it to meet fiscal restraints it determined and then set a program which limited the ability of the other parties to take part in a meaningful way. [para. 135]

Justice Lederer found that the *PSFA* was part of an overall process taken by Ontario that interfered with collective bargaining:

The *Putting Students First Act* completed the actions of Ontario which interfered with the freedom of association that was apparent and part of the process it adopted from the outset. When the central negotiations, as set up by Ontario, did not succeed, they were set aside and replaced by one agreement entered into by one bargaining agent. That bargaining agent had responsibility for the concerns of only its members but became, by arbitrary decision of Ontario, the after-the-fact representative of all members of all bargaining agents in the education sector; a group whose concerns and priorities would have differed, one from the others. When the *Putting Students First Act* is understood in the context of the process as a whole, it becomes apparent that it did nothing other than sustain and confirm the interference with collective bargaining. By requiring that agreements entered into before August 31, 2012 be "substantially similar" and that those made after that date be "substantively identical" to the OECTA agreement, Ontario made it clear that there would be no bargaining that diverted in any meaningful way from the terms of the OECTA deal. [para. 171]

The breach of section 2(d) of the *Charter* could not be saved under section 1 of the *Charter* because "the means used to accomplish Ontario's goals were arbitrary and not based on care of design. It follows that the means adopted were not rationally connected to Ontario's objectives [of fiscal restraint]." The means used by the government to obtain its objectives were also not the least intrusive means of doing so. Further, Ontario's process lacked proportionality:

In its desire to reach an end it had defined, Ontario over ran the rights of the employees. The end sought by Ontario could have been achieved through more targeted legislative or administrative

action and fairer, meaningful collective bargaining. The impact was not just on the economic circumstances of education workers but on their associational rights and the dignity, autonomy and equality that comes with the exercise of that fundamental freedom. [at para. 270]

Remedy

The parties requested that the question of remedy be left to them after a decision was rendered. Thus, the Court did not issue a remedy.

However, Justice Lederer provided some additional comments on the question of remedy. He stated that it is important to find a balance in the relationship between employers and employees, and added that “it is not clear to me what would be accomplished by any substantial or overly aggressive remedy.”

Conclusion

This decision will almost certainly have a significant impact on the school board sector, but the specific consequences are unclear at this time. We are monitoring the situation closely and will provide updates as they become available.

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[1] 2016 ONSC 2197

[2] Ontario Secondary School Teachers’ Federation (OSSTF), Elementary Teachers’ Federation of Ontario (ETFO), Ontario Public Service Employees Union (OPSEU), Canadian Union of Public Employees (CUPE) and Unifor (formerly Canadian Auto Workers, which merged with Communications, Energy and Paperworkers)

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