

Feb. 13, 2024

Bill 124 Court of Appeal Decision Summary

Ontario Court of Appeal confirms Bill 124 violates unionized workers' right to collective bargaining, dismisses government's appeal

The Court of Appeal has dismissed the government of Ontario's appeal of the Superior Court's decision to strike down Bill 124 as unconstitutional in relation to unionized workers.

In a 2-1 decision, Favreau JA and Doherty JA upheld the lower court decision of Koehnen J, finding that Bill 124 violates the constitutional rights of unionized employees to meaningful collective bargaining, as guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms*. Section 2(d) of the *Charter* protects freedom of association, which in turn has been recognized by the Supreme Court of Canada to protect the rights of workers to form unions and to bargain collectively to advance their common workplace goals.

Bill 124 imposed a 1% cap on increases to total compensation for employees in the broader public sector for three-year periods. For ONA members, Bill 124 suppressed nurses' wages during a time of unprecedented shortages on the front lines of a global pandemic, when the demand for nurses' skilled labour would otherwise have generated greater bargaining power to improve wages and working conditions.

The Court of Appeal reaffirmed foundational principles established by the Supreme Court of Canada (SCC) that:

1. Freedom of association is a fundamental freedom protected by s. 2(d) of the *Charter*. Section 2(d) protects the right to engage in meaningful collective bargaining.
2. While s. 2(d) does not guarantee specific outcomes, it protects the right to a meaningful process of collective bargaining from "substantial interference" with the ability of workers to join together to pursue common goals and negotiating workplace terms and conditions with their employer.
3. Creating a process that substantially interferes with workers' bargaining power is inconsistent with the guarantee of freedom of association under s. 2(d).
4. Determining whether a law violates the right to collective bargaining under s. 2(d) is a contextual and fact-specific assessment of:

- a. Whether the matters impacted by the legislation are of central importance to the process of collective bargaining and the ability of union members to come together and pursue collective goals in concern"; and
- b. Whether the legislation substantially interferes with the collective right to good faith negotiation and consultation.

The Court held that compensation is a matter of central importance to collective bargaining and that the 1% cap imposed by Bill 124 constituted a "substantial interference" with the collective bargaining rights of unionized workers.

The Court rejected Ontario's arguments that Bill 124 was similar in design to prior wage restraint legislation upheld by the courts in the context of the 2008 global financial crisis. The Court found that the constitutionality of wage restraint legislation requires a contextual analysis, not simply a comparison of provisions in the statutes. Wage restraint legislation is not constitutionally complaint *per se* if it has certain characteristics.

The Court identified the following principles regarding constitutional analysis of wage restraint legislation (paras 99-102):

1. Imposing limits on potential outcomes of collective bargaining interferes with good faith negotiation and consultation because it limits the potential areas and scope for negotiation and consultation.
2. While there is no "formula" for determining whether the degree of interference rises to the level of "substantial interference" required to find a violation of s. 2(d), courts will look to the following factors in assessing the circumstances and process leading to the passage of wage restraint legislation:
 - a. Whether significant collective bargaining and/or meaningful consultation occurred prior to the passage of the legislation. Both collective bargaining and consultation on legislation can serve as evidence that there was no substantial interference with the collective bargaining process.
 - b. Whether the legislation itself leaves room for meaningful negotiation and consultation.
 - c. Whether the legislation allows for a process of exemption from the legislation.
 - d. Whether the terms of the legislation replicate the terms of free collective bargaining in the public sector.

With respect to the impact of Bill 124 on unionized workers' rights to collective bargaining under s. 2(d), the Court found:

1. The government introduced Bill 124 without allowing an opportunity for significant collective bargaining before it came into effect (para 117).
2. The government's 4 weeks of consultation prior to introducing Bill 124 did not amount to meaningful consultation (para 121).
3. Bill 124 removed the ability to negotiate about significant matters including not only compensation but also undermining unions' ability to use wages and other compensation as a bargaining chip to achieve gains in other areas (para 126).
4. Bill 124 did not provide a meaningful process for exemption. The evidence showed that only one exemption was granted and that the possibility of an exemption was illusory, lacked a defined process or criteria, and was not a meaningful avenue of negotiation (paras 131-134).
5. The difference between the 1% cap and results achieved in other negotiated collective agreements supports a finding that Bill 124 had significant impact on the ability of impacted workers to come together to negotiate their collective interests with employers (paras 138-144).

The Court further held that the violation of s. 2(d) rights was not justified under s. 1 of the *Charter*. When a Court finds that legislation has violated a *Charter* right, they must next assess whether the violation of that right is justified under s. 1 of the *Charter*, which requires that *Charter* rights and freedoms are guaranteed subject only to "reasonable limits as can be demonstrably justified in a free and democratic society". This requires an analysis of whether: i) the legislation has a pressing and substantial objective; ii) whether the means chosen by the government to achieve that objective are rationally connected to the objective; iii) whether there is a less harmful, or "minimally impairing" means of achieving that legislative goal; and iv) whether the legislation is proportional, meaning that its positive effects outweigh its negative effects.

Applying the s. 1 test, the Court of Appeal held as follows.

1. Bill 124 did meet the requirements of a "pressing and substantial objective" and means that are "rationally connected" to that objective (except in the energy and university sectors).
2. However, the government failed to demonstrate that Bill 124 "minimally impaired" the infringement of s. 2(d) rights. Ontario provided no evidence that it could not achieve its goals through other means, including collective bargaining with its own direct employees or capping funding to broader public sector employers. Ontario failed to explain why the right to a meaningful process of collective bargaining should be infringed by legislation without first attempting to engage in good faith bargaining (paras 206-208). The government failed to demonstrate any need for expediency that might justify legislating compensation caps (para 208).

3. The Court further held that Bill 124 was not proportional and that its negative (deleterious) effects outweighed its positive (salutary) effects. While the government's core functions include responsible fiscal management and delivery of public services to Ontarians, the government failed to explain why wage restraint could not have been achieved through good faith bargaining. In contrast, Bill 124 stripped organized public sector workers, many of whom are women, racialized and/or low-income earners of the ability to negotiate for better compensation and non-monetary improvements to working conditions (paras 221-225).

The Court of Appeal confirmed Bill 124 to be unconstitutional insofar as it applied to unionized workers. It held that s. 2(d) does not apply in the same way to non-represented employees and that Bill 124 remains valid as it applies to non-unionized employees.