EMPLOYMENT & BENEFITS - CANADA

Ontario court finds government's 'intransigent' bargaining strategy unconstitutional

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Introduction

The Supreme Court of Canada's 'new labour trilogy' – three landmark constitutional law decisions from January 2015 – called into question basic aspects of Canadian labour law. These decisions sparked a heated debate in the labour law community as to whether Canadian workers had a new set of greatly expanded workplace rights (for further details please see "British Columbia appeal court takes narrow view of new labour trilogy").

Just over one year later, some lower courts appear to be taking the view that the new labour trilogy has not reshaped Canadian workers' rights to organise, bargain collectively and take strike action.

However, a recent Ontario Superior Court of Justice decision regarding collective bargaining in the education sector appears to take the opposite view. In that decision, the Ontario court relied on the new labour trilogy to find that the provincial government's conduct at the bargaining table violated the protection for freedom of association under Section 2(d) of the Canadian Charter of Rights and Freedoms.

Facts

In *OPSEU v Ontario,* 2016 ONSC 2197 (April 2016), the Ontario Superior Court of Justice considered the Ontario government's conduct in the 2012 to 2013 round of collective bargaining with Ontario teachers and other education workers.

Specifically, a large number of collective agreements for workers in Ontario's education sector were due to expire in 2012. Following months of collective bargaining between school boards, unions and the provincial government, various important issues remained unresolved.

As the expiration date for many of the collective agreements approached, the government grew concerned that a statutory freeze would take effect and bind the parties to the collective agreement terms then in force for the foreseeable future. Given that the government was seeking to achieve cost savings, this was highly problematic.

The government thus introduced and enacted Bill 115, the Putting Students First Act. This legislation required that any collective agreements entered into by August 31 2012 include terms "substantially similar" to those in the collective agreement that had already been reached with the Ontario English Catholic Teachers' Association. Further, if such agreements were not reached by December 31 2012, they could be imposed by the government.

Several unions banded together and launched a legal challenge to the government's actions based on

the Charter of Rights and Freedoms.

In court, the government argued that it had been willing to engage in good-faith negotiations throughout the bargaining process and even following the passage of Bill 115. Further, it argued that it had been willing to accept changes to the financial parameters that it had put in place through the legislation and ultimately negotiated more favourable deals with some of the unions. In the government's view, this was all that the Supreme Court case law required. In any event, the government argued, the charter did not prevent "hard bargaining" or insistence on a specific financial proposal.

Decision

The court disagreed. It found that the government's conduct in bargaining had in fact violated the affected workers' charter rights.

First, the court found that the government had designed the bargaining process entirely on its own and then set financial parameters that would force the negotiations to a predetermined outcome. For the court, this "narrowing" of the bargaining process gave rise to a substantial interference with workers' freedom of association.

The court emphasised that the government had set system-wide financial parameters, but then refused to meet with the unions as a group. Moreover, the government also refused to provide information to individual unions regarding the specific impacts of financial proposals on each union's members. In the judge's view, this was a "structural problem" that reflected the government's "inflexible and intransigent" approach.

Second, the court concluded that the government's eventual willingness to make favourable adjustments to the initial financial parameters – and the fact that some of the unions actually negotiated deals with it – did not undermine the unions' constitutional claims. In the court's view, the unilateral imposition of parameters and the threat and passage of Bill 115 so undermined the bargaining process that any outcomes that flowed from it were tainted. For the court, the outcomes of the process actually "confirmed" that a charter violation had occurred.

The court concluded that the government's conduct in bargaining violated the protection for freedom of association in Section 2(d) of the charter. Further, it could not be saved as a "reasonable limit" on a constitutional right pursuant to Section 1 of the charter.

Damages or other remedy?

Notably, the court suggested that it was reluctant to issue a significant remedy against the government despite its violation of the charter. Its brief comments on this point suggest that a court's primary focus in such cases should be on ensuring a fair process, not providing a favourable outcome for either party. In this regard, the court expressed concern with ensuring that the labour relations "balance" was preserved and not tilted in favour of either the employer or the union.

The parties jointly asked the court to defer its consideration of an appropriate remedy pending further negotiations. It remains to be seen what remedy, if any, the court will ultimately find to be appropriate.

Comment

Considered together, the elements of the Ontario court's decision suggest that the new labour trilogy's impact on Canadian labour law is developing unevenly. The Ontario court appears to be adopting a more expansive vision of the protection for freedom of association than some other Canadian courts. However, the court's apparent reluctance to issue a significant remedy against the government calls into question the practical relevance of these expanded rights.

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