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Ontario Superior Court of Justice Declares Bill 124 Unconstitutional

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On November 8, 2019, Ontario's Bill 124 - the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* ("Bill 124") – was proclaimed in force. The stated intent of Bill 124 was to ensure public sector compensation increases were consistent with the principles of responsible fiscal management and sustainability of the public service. Bill 124 placed a 1% cap on wage and other compensatory increases for impacted public and quasi-public sector employers for a three-year moderation period. A comprehensive overview of Bill 124 can be found in our November 2019 briefing note.

Within hours of receiving Royal Assent, Bill 124 received criticism from a variety of public sector unions, many of which stated an intention to challenge Bill 124's constitutionality before the courts. That challenge went before the Ontario Superior Court of Justice in September of 2022 and, on November 28, 2022, the court released its decision, holding the bill unconstitutional and of no force and effect. On request of the parties, the issue of remedy was deferred to a later hearing.

The Ontario Government has announced its intent to appeal the decision. This briefing note provides an overview of the decision and a discussion of what may happen next.

Ontario Superior Court of Justice

The key issue before the court was whether Bill 124 infringed on the right to freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms* (the *"Charter*") and, if it did, whether the infringement was nonetheless a reasonable limit demonstrably justified in a free and democratic society (in other words, was Bill 124 saved by section 1 of the *Charter*).

On the question of whether Bill 124 violated the right to freedom of association, the court followed the Supreme Court of Canada's earlier rulings that both collective bargaining and the right to strike are constitutionally protected under freedom of association. The court was satisfied that Bill 124 substantially interfered with the right to collectively bargain such that it violated section 2(d). The Government argued section 2(d) protects the process of collective bargaining but does not protect a particular outcome. The court agreed, but nonetheless held this did not extend so far as to allow the Government to predetermine the outcome of the process itself:

> … the imposition of a 1% pay cap has a material effect on the process of collective bargaining. It has taken off the table any discussion of wage increases above 1%. That materially limits the ability of employees to put issues on the table for negotiation. If a collective goal of employees was a wage increase of more than 1%, that is no longer possible. Moreover, if one of the underlying purposes of collective bargaining is to equalize power imbalances between employees on the one hand and

> employers or the state on the other hand, that purpose is fundamentally undermined when the state intervenes by imposing limits on wage increases. In the latter situation, collective bargaining does not equalize power. Rather, it exacerbates inequality by allowing the state to prevent employees from having a meaningful discussion about the issue. While the *Charter* may not protect outcomes, it should also not allow the state to predetermine outcomes.

The court was satisfied Bill 124's interference with collective bargaining went beyond restricting wage increases:

> …For example, it prevents unions from trading off salary demands against non-monetary benefits, prevents the collective bargaining process from addressing staff shortages, interferes with the usefulness of the right to strike, interferes with the independence of interest arbitration, and interferes with the power balance between employer and employees. I find that these detrimental effects amount to substantial interference with collective bargaining both collectively and individually.

The court then considered whether Bill 124 was nonetheless justified as a reasonable limit on freedom of association in a free and democratic society and thus saved by section 1 of the *Charter*. The court held it was not.

To satisfy the section 1 threshold the Government needed to establish four things: (1) there was a pressing and substantial objective to be achieved by the legislation; (2) there was a rational connection between the legislation and that objective; (3) Bill 124 caused minimal impairment of the right to freedom of association; and (4) the benefit from Bill 124 outweighed its detrimental effect.

The court held:

(1) There was no pressing and substantial objective to be achieved in 2019 when Bill 124 was introduced. Ontario was not facing a financial or economic crisis that justified the infringement of a fundamental freedom, unlike in earlier cases from other jurisdictions where wage restraint legislation was imposed in the face of more significant financial circumstances.

(2) There was a rational connection between Bill 124 and the desired objective. However, the legislation went far beyond this objective as it applied to wages in certain workplaces and industries that had no connection to Ontario's budget or deficit.

(3) Bill 124 did not represent a minimal impairment to section 2(d), nor did its benefits outweigh its detrimental effect. The Government could have taken a "hard line" at the bargaining table that it could not pay more than a 1% wage increase, without the need for legislation. The Government may have been reluctant to take such a stance due to a fear of strikes. However, the right to strike has constitutional protection. Accordingly, trying to avoid strikes was not sufficient justification for the legislation.

What happens next

The Government has announced its intention to appeal the court's decision to the Court of Appeal for Ontario.

In 2020, a constitutional challenge to similar wage restraint legislation was launched in Manitoba. The Manitoba Court of Queen's Bench held the legislation was unconstitutional, but the decision was reversed by the Manitoba Court of Appeal. In October of 2022 the Supreme Court of Canada refused leave to appeal the Court of Appeal decision. However, by that time the Government of Manitoba had repealed the legislation of its own accord.

Whether the Court of Appeal for Ontario will reach a conclusion similar to the Manitoba Court of Appeal remains to be seen. Until then, Bill 124 is of no force and effect. Employers covered by Bill 124 should consult with experienced labour and employment counsel to consider how this recent decision may impact past or future compensatory decisions impacting their workplace.

To learn more and for assistance, contact your Sherrard Kuzz lawyer or info@sherrardkuzz.com.

The information contained in this briefing note is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This briefing note is current as of ***December 2 2022*** *and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the briefing not is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP.*

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