Report on Bill 124- Decision

Summary of decision- **paragraphs 6 – 16**

Summary of decision – (Justice Koehnen) just an overview summary of everything that follows. (guide to reading the decision)

**Does the Act Violate Section 2 (d) of the Charter - paragraph 33**

**What it means to have a constitutional right to collectively bargain and to strike**

What Justice Koehnen starts with beginning at **paragraph 33** of his reasons is the competing conceptions of what it means to have a constitutional right to collectively bargain and to strike that the unions and government argued, the government took a very narrow approach, the Unions took a much broader approach.

Justice Koehnen accepts that freedom of association and the right to bargain is actually a real substantive right and that when you enact legislation that precludes the ability of unions to bargain over something as important as compensation, that is substantial interference with collective bargaining and in the course of his reasons he distinguishes a number of cases that weren’t exactly favorable to us both in the Ontario Court of Appeal and some other courts.

He basically says in **paragraph 49** Ontario’s narrow interpretation of the right to bargain under section 2 (d) is rejected **there must be a meaningful process** in which unions can put on the table those issues that are a concern to workers. If legislation takes issues off the table that interferes with collective bargaining, then the question becomes is the interference substantial? He says of course it is. First of all, in deciding whether the interference in collective bargaining is substantial, you have to look and see if the issues of concern are important to workers. He has no trouble concluding that compensation is important to workers and collective bargaining and then he goes through a litany of evidence about the way in which this interference is substantial because of the extent to which it undermines good faith negotiation and consultation. (He summarizes all of this in **paragraph 60)**

List of evidence in which the legislation has substantial interference:

* financial impact of the wage cap
* impact on the ability to trade compensation against other issues
* the impact on staffing
* the impact on wage parody between public and private sector employees
* the impact on employee self-government, the impact on freely negotiated agreements
* the adverse impact on the right to strike
* the impact on interest arbitration
* the impact on the extent to which the legislation undermines the relationship between unions and our members
* and the impact on the power balance between employers and employees

**Exemption process -- Government argued that Unions can still negotiate within the 1%**

One of the key arguments the government made was that the Union can still negotiate within the 1% limit.

Justice Koehnen states in **paragraph 73** that the fact the act allows for negotiation within the 1% limit does not demonstrate an absence of substantial interference, it is **actually evidence** of substantial interference. Koehnen then used a directional analogy that it is not unlike an authoritarian state claiming it permits freedom of speech providing it remains in the narrow limits the state allows.

**Illustration of substantial interference**

The Government made a big deal out of a service employees’ agreement where employees at the circle of care who earn around 31,200 / year on average and were able to negotiate an improvement to their benefits, but to do this they had to give up a 1% salary increase. This is an illustration of how Bill 124 substantially interfered with collective bargaining.

**The impact on Trading Salary against other issues – Paragraph 78**

Beginning in **paragraph 78** the issue of being able to trade salary against other issues both from the Unions expert and the Governments. The Justice unequivocally says that he prefers the Unions expert (Hebdon) evidence over the governments expert although he heavily relies of some of the concessions, he (the government expert “Riddell”) made when he was cross examined about the extent of Bill 124 interferes with bargaining. The Justice also relies on arbitrators’ decisions who all emphasized the extent to which Bill 124 undermines the normal give and take of collective bargaining.

**Paragraph 86** – **“The reduction in negotiating power that the Act has brought about prevents employees from having their views heard in the context of a meaningful process of consultation that could lead to an improvement of working conditions.”**

**Impact on Staffing** – **Paragraph 87-101**

Undermining staffing and inability to negotiate necessary improvements

Impact of Bill 124 on undermining staffing, particularly in the health sector, and the inability to negotiate necessary improvements to deal with severe staffing shortages.

**Paragraph 113 – 122** he talks extensively about the adverse impact on the right to strike and how the 1% limit undermines the right to strike and similarly impact on interest arbitration.

**Paragraphs 123-131**- In **Paragraph 131** he quotes from several interest arbitration awards saying how they have been straight jacketed.

**Union Communications- Paragraph 160 – 162**

On the specific question of union communications

The Government argued that Unions communicate through their members, highlighting improvements that had been negotiated thus there is no interference in bargaining. He says that is completely out of context, unions obviously need to try to “sell” collective agreements to their membership or they would be engaged in bad bit bargaining, the unions comments are all in the context of the constraints the act would pose and in no way does that demonstrate there isn’t substantial interference in bargaining.

**Experts on Collective Bargaining - Paragraphs 163 -172**

– Justice Koehnen “prefers the evidence of professor Hebdon (Labour) to that of Professor Riddell (Government)”

**Consultation – Paragraphs 176-198**

when do consultations provide constitutional protection.

There was an argument made by the government that they had consulted in good faith and this somehow relieved them of any interference with collective bargaining because they consulted before enacting Bill 124. The Justice says it was clear from the outset it was not in any way designed to reach an agreement; the four questions they ask weren’t aimed at reaching an agreement, there was no proposal made by the government.

Justice does not accept the Governments submission. (Reasoning 179 through 182)

(This wasn’t truly bargaining)

**Previous Expenditure Restraint Decisions** – **Paragraph 199- 219**

Series of previous expenditure restraint decisions including under the federal expenditure restraint act from 2008 where various courts upheld wage control legislation and he distinguishes those cases on the bases that in those cases what was imposed had been otherwise freely bargained, here what was imposed is different than the outcome of free collective bargaining.

He notes that there was a salary cap imposed, in those cases the imposed salary cap wasn’t less than the rate of inflation and here the employees have been deprived of the right to negotiate compensation increases to keep up with inflation although he says he’s only going to take in to account inflation as it existed when the legislation was enacted which was about 2.4% not 7%+ that we see now. (even with the 2.4% consideration it falls short of the 1%)

He says that the federal legislation back in 2008 was enacted in the context of a financial crisis and that isn’t the case here and that even in those cases there was at least some serious negotiation with Unions before enacting legislation.

**Freedom of Speech –** **Paragraph 220 - 225**

Some unions argued that the bill violated the freedom of speech

He says that’s not really the way to analyze this, it’s an attack on freedom of association and collective bargaining that’s the right lens to assess the constitutionality of the legislation.

ONA & OPSU & UNIFOR all brought a section 15 equality discrimination against women argument because of the disproportionate impact of these wage control legislations on women in the public sector compared to say to police and fire fighters – **he rejects that argument.**

So it stands on the substantial interference with the right to collective bargaining, the right to strike and then he turns to section 1 (the provision under which the government can say even though we violated workers rights or anyone’s rights and freedoms if we can prove that it’s a reasonable limit justified in a free and democratic society then the legislation should be sustained and upheld) so it’s the fence to a breach of charter rights.

He says although some deference is owing to the government, he’s not convinced that there was a first stage of the section 1 test– (you have to have a really good reason to overturn people’s rights), what the courts call a pressing and substantial objective and he says when you look at the evidence it doesn’t appear that the government’s decision was a severe fiscal crisis of the kind that might justify over riding charter rights, he points to the relatively limited savings that the government thought it was achieving $400 million dollars (*recent report from the financial accountability office putting it much higher*) but that was the basis upon which the government cabinet submission that they disclose what their projected saving to be.

Justice Koehnen says the applicants note that against that $400 million, the government had various tax cuts when they came to power **$4.3Billion**, **$4.1 Billion** in 2020, **$5.7 Billion** in 2021 another **$7 Billion** in 2022 and another **$9.9 Billion** in tax cuts and then in addition another **$1 Billion** from license plates stickers. Koehnen notes that it is for government to enact if they want tax cuts but you have to explain why at the same time you are doing that, you are infringing on workers collective bargaining rights, and they didn’t do that – that’s around **paragraph 285-289.**

The second part of the section “one” test is if you have a really important reason (and he finds that they didn’t )– but even if they did, you have to show the legislation advances that really important objective and is reasonably necessary.

Although in general terms it may be that moderating compensation rate increases is logically connected to the governments stated objective of managing the provinces finances, protecting sustainability of public services it goes beyond what even Ontario pays for.

Examples given

* The example of the electricity sector where there is **no government funding**
* The example of the university sector where there is **limited government funding**
* The example of the long-term care sector where there is only **no direct connection between the level of government and wage increases.**

For all those reasons it doesn’t meet the rational connection test.

Then the question is whether it was reasonably necessary to restrict workers’ bargaining rights and the right to strike and arbitrate.

He says **no** because in the past and even the government’s own collective bargaining expert (Riddell) recognizes that you can try to voluntarily negotiate wage restraints, so they fall short on that basis.

**Balancing Salutary and Deleterious Effects - Paragraph 338 – 355**

Finally, he says that the severe effects of infringement on the charter right are in no way offset by the limited benefit of the wage control legislation that’s **beginning paragraph 338**

**Remedy - Paragraph 356 – 361** -

On the question of remedy, both parties agree that his job was to determine if the legislation was unconstitutional, which he does, he strikes down Bill 124 in its entirety. On remedy that’s going to be deferred to a later hearing but goes further to make clear that to the extent there are provisions in the act that suggest that you can’t get compensation for breach of charter rights those themselves are unconstitutional. He declares the act to be void and of no effect.

**As of right now the legislation is of no force and effect.**

The next order of business should be how we re-dress what has been stolen from workers since Bill 124 was enacted.

Legal counsel for the OFL recommended that our view should be that the court has spoken and that it is a thorough, careful assessment of the evidence about the adverse impact of the legislation on workers and their right to bargain and their protection of their living standards.

**Units that Have re-opener Language**

Many collective agreements have some sort of language regarding a remedy if Bill 124 is struck down.

Wage re-openers can take a number of different forms, but to the extent that the typical language is that in the event that Bill 124 is struck down (there are different versions of this some say your entering into agreement agreeing to the 1% without prejudice), ultimately where isn’t arbitration and subject to the specific language of your agreement the likely remedy will to going before Judge Koehnen and working out the remedy, litigating the remedy which could include some sort of process of some kind.

For example, in the Bill 115 case most of the unions settled the remedy ATFO didn’t, and they went back before the judge who heard the case, and he ended up ordering the damages.

Historically in charter cases the damages have not been the full measure of what’s lost, they have often been more a lump sum. The Remedies will likely be a unit-by-unit remedy.

Where the agreements say you will return to the table, you can return to the table however, if you are unable to reach an agreement, what doesn’t happen is the collective agreement is reopened and you have the right to strike – that is not normally how it works out.

Some employers may try to get you to deal with it in the next round of bargaining.

**Units that do NOT Have re-opener language**

Units without those provisions’ unions would take the position the remedy is available to go to the court.

This is not to say that the Employers would agree, or the Gov would agree however that is the position to take.

This finding of substantial interference and it not being justified is being made without even accounting for that additional horrendous devastating impact that covid had on inflation.