

## OLRB RULES LOCAL STRIKES UNLAWFUL, WHILE GOVERNMENT PROCEEDS WITH BACK-TO-WORK LEGISLATION

On May 26, 2015, the Chair of the Ontario Labour Relations Board (the "OLRB"), Mr. Bernard Fishbein, released his decision declaring the local strikes in three public school boards, Durham, Sudbury (Rainbow) and Peel (the "affected boards") unlawful. He imposed a two-week moratorium, after which local strikes at the affected boards could lawfully resume. On May 28, 2015, the government passed back-to-work legislation which supersedes the moratorium and prohibits strikes for the remainder of the school year.

Students in Durham have been out of school since April 20, 2015, some six weeks. Sudbury students at Rainbow District School Board have been off since April 27, 2015 and Peel students have been out of the classroom since May 4, 2015.<sup>1</sup> In total, the local strikes have kept more than 74,000 high school students from attending school at the affected boards.

The affected boards, supported by intervenors, the Ontario Public School Boards' Association ("OPSBA") and the Crown, applied to the OLRB on May 12, 2015 to declare the local strikes by the Ontario Secondary School Teachers' Federation ("OSSTF") and its members unlawful, and contrary to the *School Board Collective Bargaining Act*, 2014, S.O. 2014, C. 5 (the "*SBCBA*").<sup>2</sup>

In its decision, the OLRB recognized that the *SBCBA* creates a two-tier system of bargaining, where central issues are bargained at the central table, and

<sup>1</sup> Jane Taber and Selena Ross, "Ontario to end high-school teachers' strike with back-to-work legislation", *The Globe and Mail*, May 25, 2015 online: <<http://www.theglobeandmail.com/news/national/ontario-to-legislate-striking-teachers-back-to-work/article24587953/>>.

<sup>2</sup> OSSTF raised a *Charter* argument, but the parties agreed to set that aside to avoid delaying the decision on whether the local strikes were lawful. OSSTF has until May 29, 2015 to inform the OLRB whether it wants to pursue its *Charter* argument at a future OLRB hearing.

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local issues are bargained at local tables.<sup>3</sup> Section 34(3) of the *SBCBA* provides for a two-tier system of strikes: central strikes can be “in respect of central bargaining”, on five days’ written notice, and local strikes can be “in respect of local bargaining” on five days’ written notice. There is no statutory requirement that central bargaining be concluded before local bargaining.<sup>4</sup>

The affected boards argued that the local strikes were unlawful because they were not “in respect of local bargaining”, contrary to the two-tier scheme of the *SBCBA*. The OLRB accepted the affected boards’ arguments that to allow local strikes to “bleed into” central strikes would be “destructive of the entire scheme that the *SBCBA* has established.”<sup>5</sup> The OLRB elaborated on this argument, including in the following paragraph:<sup>6</sup>

... the applicant School Boards and the Crown say that to allow local strikes to be “in respect of central bargaining” or central bargaining issues would also undermine the effectiveness of the *SBCBA*, which goes to great and explicit length to separate the two tiers of bargaining. In their submission, it undermines the exclusive bargaining agency status of OPSBA and the limited and unique role of the Crown by allowing central issues to be addressed, if only in strikes, over which neither has any control. I find these arguments persuasive and compelling and accept them.

In order to decide whether the local strikes at the affected boards were in respect of any central issues, and thus unlawful, the OLRB heard evidence about the nature of the picketing. This included photographs of picket signs, OSSTF communications to members and statements to the media, oral evidence from OSSTF and school board witnesses.

The OLRB concluded that the local strikes were at least partly “in respect of” class sizes,

professional practice/responsibility and professional judgment, all of which OSSTF, OPSBA and the Crown had agreed were central issues to be bargained at the central table. This made the local strikes contrary to the two-tier scheme of the *SBCBA*, and therefore unlawful.

Mr. Fishbein was careful in his decision to confirm that the local strikes were unlawful because they were “improperly taking place in the wrong tier as dictated by the *SBCBA*”,<sup>7</sup> and not because demands on central issues like wages are unlawful. Further, the OLRB confirmed that section 34(3) of the *SBCBA* “prohibits employees striking [locally] “in respect of central bargaining”, even if all the statutory prerequisites for strike with respect to local bargaining have been met.

Any future application by a school board that a local strike is not “in respect of local bargaining” will be assessed on a case-by-case basis, with a specific focus on whether at least part of the strike concerns central bargaining issues. Mr. Fishbein stated the test for future violations of the local strike provisions of the *SBCBA*:<sup>8</sup>

Accordingly, even if there are local strikes with local issues and the statutory prerequisite for local strikes have been met, if I am convinced that the evidence discloses in some significant way that the employees are striking “in respect of central bargaining”, then I believe the *SBCBA* will have been violated.

The OLRB specifically stated that it was not “too onerous a burden” on any union subject to the *SBCBA* to be “vigilant in ensuring their local strikes cannot be construed as being “in respect of central bargaining””.<sup>9</sup>

Mr. Fishbein directly addressed in his decision why OSSTF would have employees strike in respect of central bargaining in three local strikes, at least in part, due to clearly central issues. He wondered why

<sup>3</sup> See for example OLRB Decision in Case No. 0376-15-U, unreported, at paras. 16-18, and 56.

<sup>4</sup> OLRB Decision at para. 22.

<sup>5</sup> OLRB Decision at para. 38.

<sup>6</sup> OLRB Decision at para. 53.

<sup>7</sup> OLRB Decision at para. 56.

<sup>8</sup> OLRB Decision at para. 65.

<sup>9</sup> OLRB Decision at para. 87.

OSSTF would not have “put itself in a lawful position to engage in a central strike”, because there would have been “no uncertainty” about whether the strike was central or local.<sup>10</sup> He noted that the Elementary Teachers’ Federation of Ontario (“ETFO”) has adopted a central strike strategy, which is presently at a partial work-to-rule phase. Mr. Fishbein decided it was plausible that the real reason for OSSTF’s local strikes was that they are less draining on the strike pay reserves, and that OSSTF could avoid the possibility that OPSBA would take advantage of a statutory freeze period and alter some central terms and working conditions.<sup>11</sup>

As a remedy for the portions of the local strikes that were on central issues, and therefore unlawful, Mr. Fishbein imposed a two-week moratorium on local strikes.<sup>12</sup> The purpose of the two-week moratorium is to give OSSTF an opportunity to “purify” or “cleanse” the local strikes of portions that are “in respect of central bargaining.” He also noted that the parties could continue local bargaining, and that local strikes were not permanently prohibited by his decision. However, as set out below, the Government has passed Bill 103 legislating the teachers at the affected boards back to work, and prohibiting strikes for the remainder of the school year.

#### **GOVERNMENT PASSES LEGISLATION DIRECTING TEACHERS BACK TO WORK**

On May 25, 2015, the Ontario government received an advisement from the Education Relations Commission that the OSSTF local strikes were putting the school year of students at the affected boards in jeopardy. That same day, the government introduced Bill 103, the *Protecting the School Year Act, 2015*, which directs striking high school teachers in the affected boards to return to work. Bill 103 was passed on May 28, 2015.

The teachers at the affected boards had already been ordered back to work on May 27, 2015 by the OLRB. However, Bill 103 supersedes the two-week moratorium imposed by the OLRB as a remedy for the unlawful strikes. Bill 103 will prohibit any further

strikes or lockouts in respect of local bargaining issues between OSSTF and the school boards. Bill 103 also imposes fines of up to \$2,000 per day for an individual and up to \$25,000 per day for OSSTF or a school board if they contravene the prohibitions on strikes and lockouts.

The Ministry of Education has indicated that it will waive the requirement that students spend 110 hours on each class to get a credit. The three public school boards are assessing whether to cancel or go ahead with final exams and what parts of the curriculum need to be taught in the last four weeks of the school term.<sup>13</sup>

With respect to the resolution of outstanding local issues, Bill 103 creates a binding mediation-arbitration process, which will apply separately to each of the school boards and the local bargaining agents.

In addition, Bill 103 establishes the criteria to be applied by the mediation-arbitration panel (which mirror those found in section 38 of the *School Boards Collective Bargaining Act, 2014*):

1. The employer’s ability to pay in light of its fiscal situation.
2. The extent to which services may have to be reduced, in light of the decision or ward, if current funding and taxation levels are not increased.
3. The economic situation in Ontario.
4. A comparison, as between the employees and comparable employees in the public and private sectors, of the terms and conditions of employment and the nature of the work performed.
5. The employer’s ability to attract and retain qualified employees.

Any award issued may provide for the retroactive alteration of one or more local terms from August 31, 2014.

Bill 103 creates a binding mediation-arbitration process, which will apply separately to each of the school boards.

<sup>10</sup> OLRB Decision at para. 84.

<sup>11</sup> OLRB Decision at para. 85.

<sup>12</sup> OLRB Decision at para. 95.

<sup>13</sup> *Supra*, note 14.

The teachers' unions have warned that Bill 103 will inflame the already intense labour situation.

Since May 21, 2015, secondary school teachers at the Halton District School Board and Ottawa-Carleton District School Board have been on work-to-rule job action. This work-to-rule includes reporting only marks on report cards, picketing at lunch, wearing of OSSTF colours and no attendance at school staff meetings.

The OSSTF has now applied for provincial conciliation. Under the Ontario *Labour Relations Act*, 1995, conciliation is the step OSSTF must take before launching a province-wide strike. In this regard, OSSTF will likely be in a legal strike on provincial issues in September 2015. OSSTF President, Paul Elliot, indicated that the back-to-work legislation "actually has inflamed the situation" and the union is now "looking at where we can go in the fall."<sup>14</sup>

While the government's move will allow the students to complete their academic year, it signals the beginning of significant turbulence in the education sector across the Province. The teachers' unions have warned that this legislation will inflame the already tense labour situation and could lead to disruptions in the fall.<sup>15</sup>

### PUBLIC ELEMENTARY SCHOOLS

On May 11, 2015, Ontario's 73,000 public elementary teachers commenced job action across the Province, as they are in a legal strike position.<sup>16</sup> The work-to-rule strike action affects all 32 Ontario English public school boards. To date, the Elementary Teachers' Federation of Ontario

("ETFO") has engaged in two phases of incremental withdrawal of service.

According to an ETFO bulletin dated May 8, 2015 entitled, "Strike Protocol: Work-to Rule – Phase 1", teachers are not taking part in any EQAO standardized testing, preparing report card comments, filling in for absent principals or conducting any reading, writing or mathematics assessments other than those that the teacher deems necessary to report on student progress."<sup>17</sup>

In "Phase 1", ETFO teachers and occasional teachers will remain in schools to carry out their instructional duties with students, provide extra help to students and maintain contact with parents.<sup>18</sup>

According to an ETFO Bargaining Bulletin, dated May 25, 2015, ETFO will begin the second phase of its work-to-rule campaign on June 1, 2015.<sup>19</sup> In addition to the activities withdrawn in Phase 1, ETFO members will no longer:

- Complete any paperwork, applications or proposals to the Ministry of Education for special grants or funding.
- Participate in the preparation or completion of Grade 8 to Grade 9 transition reports.
- Participate in any grade-to-grade transition meetings.
- Complete end of year Ontario Student Record (OSR) activities including filing, sorting and completion of French cards.

<sup>14</sup> Ashley Csanday, "Forcing Ontario teachers back to work now could lead to bigger disruptions in the fall: union boss", *National Post*, May 25, 2015 online: <http://news.nationalpost.com/news/canada/forcing-ontario-teachers-back-to-work-now-could-lead-to-bigger-disruptions-in-the-fall-union-boss>.

<sup>15</sup> Kristin Rushowy and Robert Benzie, "Back-to-Work legislation sparks warnings of further teacher unrest", *Toronto Star*, May 25, 2015 online: <http://www.thestar.com/yourtoronto/education/2015/05/25/ontario-to-table-back-to-work-legislation-for-striking-teachers.html>.

<sup>16</sup> Kristin Rushowy and Richard J. Brennan, "Elementary teachers to begin job action", *Toronto Star*, May 9, 2015 at p. A2.

<sup>17</sup> Kristin Rushowy, "Ontario elementary teachers plan job action Monday", *Toronto Star*, May 5, 2015 (online): <http://www.thestar.com/yourtoronto/education/2015/05/05/ontario-elementary-teachers-plan-strike-action-monday.html>.

<sup>18</sup> ETFO Bulletin, "ETFO Strike Action Starting Monday Targets Education Ministry, Not Students", May 8, 2015 online: <http://www.etfo.ca/MediaRoom/MediaReleases/Pages/default.aspx>.

<sup>19</sup> ETFO Media Release, "Sweeping Back-to-Work Legislation a Throw-Back to Bill 115", May 27, 2015, online: <http://www.etfo.ca/MediaRoom/MediaReleases/Pages/default.aspx>.

- Participate in any in-school meetings or professional learning activities on the end of year Professional Activity (PA) day.
- Book any field trips for the 2015-16 instructional year.
- Attend any meetings/workshops/training or undertake tasks related to various Ministry of Education activities, including the new sex education curriculum and the School Mental Health ASSIST (SMHA) initiative.

In a news release, dated May 27, 2015, ETFO President Sam Hammond said, "The premier and the minister of education need to stop misleading the public by saying the current labour disputes are about money, which is a deliberate misrepresentation," added Hammond. "The demands of the Ontario Public School Boards' Association (OPPSBA) to control teachers' preparation time, remove fair hiring practices, and increase supervision time and paperwork are the root of the bargaining problem."<sup>20</sup>

ETFO is the country's largest teacher union. The job action affects more than 817,000 elementary school students across the province.

## CATHOLIC SCHOOLS

With respect to Ontario's Catholic teachers, on April 24, 2015, the Ontario English Catholic Teachers' Association ("OECTA") received a strike mandate from its members' of 94.2 percent. OECTA represents both elementary and secondary students in Ontario's 29 Catholic school boards.

OECTA has applied for conciliation, which means that OECTA will likely not be in a legal strike position until mid-June 2015.

OECTA has indicated that it does not anticipate that there will be labour unrest in Ontario's Catholic schools for the duration of the 2014/2015 school

year. OECTA President James Ryan stated, "unless the government and trustees move off of their current position, you are likely to see every classroom in the province of Ontario shut down."<sup>21</sup>

## NET ZERO BARGAINING

With respect to the government's position, in a press conference held on April 15, 2015, Liz Sandals, the Minister of Education, confirmed that she remains committed to reaching a negotiated collective agreement. The Minister stated that the government has said all along that this is a "net zero round of bargaining". Ms. Sandals said that "the government is certainly willing to negotiate wage increases, but those need to be offset by savings elsewhere in the agreement."<sup>22</sup>

It is the Minister's position that any wage increase that may be negotiated must be absorbed by employers within Ontario's existing fiscal plan. The Minister stated, "If you were to listen to me, if you were to listen to the Premier, if you were to listen to the chair of Treasury Board, if you were to listen to the Minister of Finance, we have all been consistent that that's the negotiation."<sup>23</sup>

The challenge for the parties will be to reach negotiated collective agreements both at the central and local tables that are in line with the Government's fiscal plan, supports student success and builds public confidence in the education system.

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<sup>20</sup> *Ibid.*

<sup>21</sup> Jane Taber and Selena Ross, "Ontario high-school students back in class after teacher strikes declared illegal", *The Globe and Mail*, May 27, 2015, online: <<http://www.theglobeandmail.com/news/national/ontario-high-school-students-back-in-class-after-teacher-strikes-declared-illegal/article24638896/>>.

<sup>22</sup> Media interview with Minister Sandals, dated April 15, 2015.

<sup>23</sup> *Ibid.*