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Concerted Withdrawal from Voluntary Activities by Ontario Teachers Constitutes Unlawful Strike

Mireille Giroux

Perhaps to the surprise of many, the Ontario Labour Relations Board (the "Board") has ruled that the concerted withdrawal by Ontario elementary school teachers from voluntary activities constitutes an unlawful strike. The April 11, 2013 decision in *Trillium Lakelands District School Board and Upper Canada District School Board* was issued pursuant to an application by two school boards for a declaration that the Elementary Teachers' Federation of Ontario ("ETFO") engaged in unlawful activity by calling, authorizing, counselling, and encouraging an unlawful strike by advising its members not to participate in voluntary and extracurricular activities in protest against Bill 155, the *Putting Students First Act*.[1]

Chair Bernard Fishbein also determined that there was a labour relations purpose to issuing the decision that the withdrawal of the voluntary activities was a strike, despite ETFO suspending the advice to its members and notwithstanding the repeal of Bill 115.

Labour Relations Purpose

Following nine days of hearing, and as the Board was "on the verge" of issuing its decision in this matter, the ETFO announced that it was "suspending its advice to members regarding voluntary/extracurricular activities".[2] The Board considered whether issuing its decision served a labour relations purpose.

In the past, the Board has refused to grant declaratory relief where an allegedly unlawful strike had ended, drawing on the judicial principle of mootness, i.e. a court may decline to issue a decision in a matter if the decision "will not have the effect of resolving some controversy which affect or may affect the rights of the parties."[3]

Although the Board did not disagree with this past approach, it nonetheless held that, in the circumstances, it ought to issue its decision. The Board noted that the suspension

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[1] *Trillium Lakelands District School Board v Elementary Teachers' Federation of Ontario*, 2013 CanLII 20262 (ON LRB).
[2] *Ibid* at para. 6.
[3] *Ibid* at para. 10, citing *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

by ETFO of its advice to its members did not mean the issue had been fully settled and become academic, given that ETFO had not conceded that it had engaged in unlawful conduct or that the advice to its members was improper, or committed that it would not resort to this conduct again. Further, the Board's general "disinclination to venture into hypothetical situations that were not fully argued in an adversarial context" did not apply given that the lengthy oral hearing was completed and no significant additional waste of resources would result from the release of the decision.[4]

Impact of the Repeal of Bill 115

The Board held, most importantly, that collective agreements imposed pursuant to Bill 115 survived its repeal. Central to Chair Fishbein's reasons on this issue was s. 51(1) of the *Legislation Act*, which provides, that the "repeal of an Act…does not affect the previous operation of the repealed or revoked Act…[or] affect a right, privilege, obligation or liability that came onto existence under the repealed or revoked Act." Further, the Board confirmed that the forward-looking provisions contained in the bill were no longer law. For instance, the restraint period prescribed in Bill 115 could no longer be extended for a third year and the restrictions on mid-contract negotiations between the parties to a collective agreement no longer existed.

Chair Fishbein rejected the argument of the ETFO that a valid collective agreement must have been "freely negotiated" by the parties and, by being imposed pursuant to Bill 115, the collective agreement between the parties in this case was invalid. He held that agreements that were not "freely negotiated" such as those imposed pursuant to first contract arbitration under the *Labour Relations Act* and interest arbitration under the *Hospital Labour Disputes Arbitration Act* still constitute collective agreements.

Unlawful Strike

The parties had agreed for the purpose of the application that the ETFO had encouraged its members to withdraw from or cease voluntary activities, including organizing and supervising team sports teams and other student clubs and distributing communications to parents such as permissions slips and newsletters. The Board held that this conduct fell within the definition of a strike as defined in s. 277.2 of Part X.1 of the *Education Act*:

> (4)…(b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed or may reasonably be expected to have the effect of curtailing, restricting, limiting or interfering with,
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> (i) the normal activities of a board or its employees,

[4] Ibid at para. 28.

> (ii) the operation or functioning of one or more of a board's schools or of one or more of the programs in one or more schools of a board, or
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> (iii) the performance of the duties of teachers set out in the Act or the regulations under it, including any withdrawal of services or work to rule by teachers acting in combination or in concert or in accordance with a common understanding.

According to the Chair, the degree of interference is irrelevant, given that the *Education Act* does not prescribe the quantity or quality of interference required. The test under this provision is met when the interference is to the "normal activities" or the operation or functioning of a program. By encouraging its members to cease performing voluntary activities, the ETFO was "at a minimum, 'interfering' with the operation of a school or a program in a school".[5] Because the voluntary activities in question had long been offered and performed by teachers, the ETFO had also been "interfering in the normal activities of a Board".[6] Moreover, the withdrawal of voluntary services fell within the definition of "work to rule", under s. 277.2. Accordingly, the test for interference had been met and the withdrawal from voluntary activities constituted a strike within the meaning of the *Education Act*.

More generally, the Board held that there were "sound labour relations reasons"[7]for finding that the withdrawal from voluntary activities constituted a strike. Excluding voluntary activities would require that voluntary and non-voluntary activities be determined. Because it "is impossible to imagine, let alone exhaustively list every conceivable specific duty or activity a teacher may be called upon to perform"[8], this would create "a definitional quagmire" and cause future uncertainty and disputes. In the Board's view, there was therefore no principled or logical basis for excluding voluntary activities from the definition of a strike, "in particular in the education sector.[9]

In its examination of the difficulties with defining voluntary activities, the Board considered case law providing that, in the education sector, there may be circumstances in which activities that were originally voluntary may, over time, become mandatory. The ETFO argued that these cases did not apply given the agreement among the parties that the activities in question were voluntary. The Board rejected this argument, providing "the demarcation of what the mandatory duties of teachers are is at best fuzzy…what the parties may agree in their collective agreements will not preclude the Board from finding what may be contractually permissible conduct to still amount to an unlawful strike since unlawful strikes are prohibited conduct under the LRA which parties cannot contract out of."[10]

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[5] *Ibid* at para. 115.
[6] *Ibid* at para. 116.
[7] *Ibid* at para. 127.
[8] *Ibid* at para. 129.
[9] *Ibid*.
[10] *Ibid* at para. 135.

The Board did not issue a final order given possible outstanding Charter issues in this case. The ETFO asserted that the Board may have to apply Charter values when interpreting the definition of a strike and, alternatively, that the *Education Act* as a whole may infringe on the freedoms of expression and association. The Board did not consider the Charter issues during the hearing. In its decision, it invites the parties to make submissions on whether there is a labour relations purpose to continuing litigation in this matter, including dealing with Charter issues. Until then, Ontario teachers' unions are prohibited from encouraging their members to engage in concerted activity that interferes with the normal activities of a school board or the functioning of a school program. From the perspective of the teachers' unions, this decision, along with the imposition of collective agreements pursuant to Bill 115 and the declaration by the Board that the withdrawal of services to engage in a one-day political protest, limits teachers' ability to engage in meaningful bargaining and political action. From a broader labour relations perspective, the Board's declaration of an illegal strike, while refusing to qualify or quantify the meaning of "interference" under s. 277.2 of the *Education Act*, may create uncertainty for Ontario teachers, their unions and even school boards in the future – leading to either future litigation or further issues in collective bargaining.

About the Author:

Mireille Giroux is currently completing her articles at Koskie Minsky LLP, where she will be returning as an associate following her Call to the Bar in June 2013. Mireille completed her undergraduate studies in political science and economics at the University of Ottawa and obtained a J.D. from the University of Toronto.