

## ONTARIO LABOUR RELATIONS BOARD

**2947-12-U** The Minister of Education, Applicant v. **Elementary Teachers' Federation of Ontario and Sam Hammond**, Responding Parties, v. Ontario Public School Boards' Association and Ontario Secondary School Teachers' Federation, Intervenors.

**BEFORE:** Bernard Fishbein, Chair.

**APPEARANCES:** Robert E. Charney, Len Hatzis, Rochelles Fox and Tim Hadwen for The Minister of Education; Howard Goldblatt, Ethan Poskanzer, Steven Barrett, Heather Ann McConnell, Sam Hammond and Gene Lewis for Elementary Teachers' Federation of Ontario and Sam Hammond; Michael Hines and Dolores Barbini for Ontario Public School Boards' Association; Simon Blackstone, Karen Ensslen and Pierre Côté for Ontario Secondary School Teachers' Federation.

**DECISION OF THE BOARD:** January 11, 2013

1. This is an application filed by the Minister of Education pursuant to section 11 of the *Putting Students First Act, 2012*, S.O. 2012, c.11 (the "Putting Students First Act" or "Bill 115"), sections 79, 81, 83 and 100 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 (hereinafter referred to as the "*Labour Relations Act*" of "the Act") and Part X.1 of the *Education Act* R.S.O. 1990, c.E.2 (the "*Education Act*"). The Minister alleges that the Elementary Teachers' Federation of Ontario (hereinafter referred to as "ETFO" or the "responding party trade union" or the "responding party") and its President, Sam Hammond, have engaged in unlawful activity in contravention of these statutes, and the Minister is of the opinion that it is in the public interest for her to make application to the Ontario Labour Relations Board (hereinafter referred to as "the Board" or the "Ontario Labour Relations Board") pursuant to section 11 of the *Putting Students First Act* in connection with the withdrawal of services called for by ETFO for January 11, 2013.

### **Background**

2. This application arises in the following context. On January 2, 2013, by Order in Council made under section 9(2)(2) of the *Putting Students First Act*, collective agreements were imposed for, among others, bargaining units represented by ETFO. These collective agreements are effective from September 1, 2012 to August 31, 2014.

3. On the afternoon of January 9, 2013, ETFO announced its intention to have its members engage in a "day of protest" or "political protest" on Friday, January 11, 2013, which is a regular school day. The president of ETFO, Sam Hammond, indicated that the January 11, 2013 action would be a "full day" that would involve the full day withdrawal of services by ETFO's membership on a province-wide basis. In explaining the "day of

protest” to its membership prior to conducting a vote to “authorize it”, ETFO advised its members on its website that they would lose one day’s salary and one day of pensionable service by engaging in the one-day province-wide “day of protest”, not hiding the fact that the “day of protest” involves the withdrawal of services.

4. As a result of the announcement by ETFO on January 9, 2013, it appears that very many public English school boards in Ontario have advised the Ministry and/or parents that schools for elementary (and junior high) students will not be open on January 11, 2013, or at least that whether they will be open will not be clear until the morning of January 11, 2013.

### **Preliminary Objections**

#### **(a) Deferral to Court**

5. Having heard the submissions of the parties, I declined to defer this to court proceedings, as urged by ETFO, and that I was advised have been initiated by the unions. Leaving aside that those court proceedings would not be heard until September, 2013 at the earliest (and they may be later), Bill 115, to say nothing of the *Education Act* and the *Labour Relations Act*, explicitly envisages an application to the Ontario Labour Relations Board for violations of Bill 115 including allegations of unlawful strikes, and this Board has often dealt with the question of whether a political protest constitutes an unlawful strike. Although I appreciate ETFO’s advice that it has no plans either for another day of protest, or vote to hold another day of protest as required by the ETFO constitution, that is only no plan at the present time, in the hope that the new Premier will revisit Bill 115. I have no way of knowing whether that is an overly optimistic assessment by ETFO or not – in which case the question of whether such a political protest can constitute an illegal strike might arise again well before the court determination. I also appreciate that section 14 denies the Board the jurisdiction to determine whether Bill 115 is constitutionally valid – something ETFO asserts and is litigating in the court case and would put before me if it could. But that is not the question in these proceedings – it is whether the political protest can constitute an illegal strike. For that argument, ETFO intends to argue that its political protest is protected by the Charter – whether Bill 115 itself violates the Charter or is arguably just a bad law. For that argument section 14 of Bill 115 is not material. In these circumstances I was not prepared to defer this application. Further detailed reasons for this decision can be requested by any party.

#### **(b) Lack of Standing by the Minister**

6. ETFO argues that the Minister has no standing to bring this Application. There is no dispute that the Minister would not have standing to bring the Application pursuant to section 100 of the *Labour Relations Act* or the *Education Act* (see section 277(4) and (5) of the *Education Act*).

Section 11 of Bill 115 provides:

11. The Minister may, if he or she is of the opinion that it would be in the public interest, make a complaint to the Ontario Labour Relations Board alleging a contravention of this Act.

7. What is required for the Minister to have standing is a “contravention of this Act”, namely Bill 115. The Lieutenant Governor has made an order within the meaning of section 9(2) of Bill 115 imposing collective agreements pursuant to section 9.2(i). I am satisfied “that order” within the opening paragraph of a Section 9(2) includes **all orders** under section 9(2) including an order to impose a collective agreement under 9(2)(i). Section 9(4) provides:

(4) A strike or lock-out in contravention of an order made under paragraph 2 of subsection (2) is deemed to be an unlawful strike or lock-out for the purposes of the *Labour Relations Act, 1995*.

Whether this is a strike or not remains to be determined, but I am satisfied that if it is a strike, section 9(4) deems it to be an illegal strike. ETFO says it is still not “in contravention of an order”. I do not see how what is statutorily deemed an illegal strike after an order under section 9(2)(i) imposing a collective agreement cannot amount to a contravention of that order. As well there is no dispute that those collective agreements would have a no-strike or lock out provisions, so I am also persuaded that a strike in contravention of those provisions of the collective agreement that is imposed by the order, is also a contravention of that order imposing the collective agreement.

8. I make this determination without giving the statute either the purposive interpretation, as urged by the Minister, or a strict interpretation as urged by ETFO, but on what I believe to be the clear and simple reading of the words of the statute. Again, further detailed reasons for these decisions can be requested by any party.

### **Merits of the Application**

9. The facts giving rise to this application were not seriously in dispute and the matter proceeded on the particulars pleaded by the Minister (with certain explanations and caveats made by counsel for ETFO). There was no dispute that there is a collective agreement, albeit imposed by Bill 115, in place and that strikes are prohibited during the term of the collective agreement. The particulars also disclose that ETFO and its president have, at the very least, have supported and encouraged the holding of an illegal strike against the school boards to be held on January 11, 2013, albeit characterized by ETFO as a “day of protest” or “political action”.

10. The Minister points me to the well established jurisprudence of this Board that a “political strike” during the term of a collective agreement (what the parties in some of the cases referred to as a “mid-term strike”) is still an unlawful strike under the Act. See *Ontario Hospital Association* [2003] OLRB Rep. July/August 622; *General Motors of Canada Limited* [1996] OLRB Rep May/June 409 and *British Columbia Teachers Federation v. British Columbia Public School Employers’ Assn.* [2009] 306 D.L.R. (4<sup>th</sup>) 144.

11. ETFO seeks to distinguish these cases by saying that they involve strikes during freely-negotiated collective agreements or because the Board (or the British Columbia Court of Appeal) could not precisely or effectively determine the parameters of a “political strike. ETFO says neither of those factors are applicable here.

12. I am not persuaded that these are sufficient or salient distinctions. I am not persuaded that ETFO’s suggested test for a political strike that would be exempted from the unlawful strike provisions is workable and that it would not undermine the fundamental provisions of the Act that preclude strikes during the course of a collective agreement. Nor am I persuaded that the Charter protection afforded to speech (whether “labour speech” or speech generally) outweighs the disruption that will be wrought on the statutory labour relations scheme by acceding to ETFO’s position – in other words that the section 1 defence to the Charter violation is not as applicable in this case as it was in all the previous cases. Accordingly, the day of protest that ETFO has indisputedly authorized and supported for January 11<sup>th</sup>, 2013 is an unlawful strike under the Act.

13. I heard the parties’ submissions with respect to the appropriate remedial relief in these circumstances. In the circumstances, therefore, I make the following orders and declarations:

- a) a declaration that ETFO has called or authorized or threatened to call or authorize an unlawful strike contrary to section 81 and 83 of the *Labour Relations Act, 1995*;
- b) a declaration that Sam Hammond has supported or encouraged an unlawful strike or threatened an unlawful strike, which he knew or ought to have known, as a probable and reasonable consequence of his action, would cause others to engage in an unlawful strike, contrary to sections 81 and 83 of the *Labour Relations Act*;
- c) a declaration that a refusal to work by teachers on January 11, 2013 as part of a concerted effort to disrupt delivery of education to elementary schools in Ontario would constitute an unlawful strike, contrary to section 79 of the *Labour Relations Act*;
- d) a direction that ETFO, Sam Hammond and its officers, officials or agents and anyone acting on their behalf cease and desist from authorizing, supporting, encouraging or threatening to call or authorize an unlawful strike;
- e) a direction that ETFO forthwith provide notice of these declarations and directions contained in this decision to their members who are employed by school boards in Ontario by all appropriate means;

- f) a direction that ETFO or anyone having notice of this direction refrain from engaging in an unlawful strike against the school boards and refrain from any act which they know or ought to know will prompt other persons to engage in an unlawful strike;
- g) a direction that a copy of this decision be posted at every ETFO bulletin board in every public elementary school that employs members of ETFO as soon as reasonably possible for the next 30 days.

14. Due to the lateness of the hour (it is now after 3:30 a.m. on January 11, 2013 and this hearing commenced at 3:00 p.m. on January 10, 2013), and the need to immediately release a decision of the Board, the foregoing is only a brief summary and highlights of the reasons for my decision or all of the arguments made to me. More detailed and fuller reasons for this decision will be provided at the written request of any of the parties to these proceedings.

“Bernard Fishbein”

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for the Board