Ford Government Moves to Undermine the Integrity and Independence of the Firefighter Arbitration Process

On November 15, 2018, the Ford government introduced Bill 57, the *Restoring Trust, Transparency and Accountability Act, 2018*. Bill 57, which amends a large number of statutes, received Royal Assent and was passed into law on December 6, 2018.

This memorandum summarizes the changes contained in Schedule 18 of Bill 57, which amends the *Fire Protection and Prevention Act, 1997* (the "FPPA"). The amendments to the FPPA are a significant attack on the integrity and independence of the interest arbitration process in the fire services sector.

Bill 57 also restricts internal firefighter association decisions regarding "two-hatters" – decisions that have served to safeguard full-time professional firefighters and the communities that employ them. The implications of those changes are summarized below.

Changes to the Firefighter Interest Arbitration Process

A. Elimination of nominees

Interest arbitration in the fire sector, where the right to strike is curtailed, has long involved a system in which each party appoints its own nominee to the board of interest arbitration, and the two nominees appoint a neutral, third party chairperson. Bill 57 replaces three-member arbitration boards with a single arbitrator for every interest arbitration that had not been commenced by notice given before November 15, 2018.

This change will undermine both the fairness and the effectiveness of the interest arbitration process, as well as firefighters' confidence in that process. This is especially so given that it is the government that appoints the single arbitrator if the parties cannot reach an agreement as to who the arbitrator should be.

Nominees have played a crucial role, for both union and employer parties, in the resolution of interest arbitration disputes across Ontario. This is not only true in the fire sector but also in other sectors, such as the hospital sector. Even in police interest arbitrations, the parties are free to agree to nominees should they choose to do so.

This long-standing practice in the fire sector reflects the faith that previous governments have had in the expertise and fairness that nominees bring to the process, and the confidence that the parties have had in that process as a result of the participation of nominees. Nominees have played a key role in:

- assisting the chair in assessing the parties' priorities
- ensuring a consistency in decisions across the fire sector and avoiding "outlier" decisions, and
- ensuring that the final decision more closely approximates a freely negotiated resolution, as nominees bring their particular labour relations expertise to the benefit of the chair

The inclusion of nominees reflects the reality that interest arbitration is not a purely legal process in which an arbitrator looks for the one legally correct answer. Rather, it is an accommodative process and a process of extended negotiation, where the tripartite board of arbitration seeks to arrive at an outcome that reflects, to the extent possible, the outcome that would have been bargained if the right to strike had not been prohibited.

What has over time made the loss of the right to strike acceptable in the fire sector, and what has sustained the confidence of firefighters in the interest arbitration process, is the tripartite nature of the process. The passage of Bill 57 significantly erodes that confidence.

To the extent that the purported purpose of these amendments is to expedite scheduling and the final award in the interest arbitration process, other less draconian measures could have been implemented to achieve that end.

B. Imposition of new criteria on the single arbitrator

Bill 57 imposes new statutory criteria that the (now) sole arbitrator must consider when rendering a decision, and eliminates certain other criteria from the previous version of FPPA.

The sole arbitrator must consider:

- a comparison of the terms and conditions of employment of firefighter and other employees in the public and private sectors

- a comparison of collective bargaining settlements reached in the same municipality and in comparable municipalities (including bargaining units governed by the *Labour Relations Act, 1995*), having regard to the relative economic health of the municipalities

- the economic health of Ontario and the municipality, including but not limited to changes to labour market characteristics, property tax characteristics and socio-economic characteristics

- the employer's ability to attract and retain qualified firefighters [this criterion was also in the previous version of the FPPA]

- the interest and welfare of the community served by the fire department

- any local factors affecting the community

Bill 57 also:

- eliminated certain criteria, including the employer's ability to pay in light of its fiscal situation and the extent to which the employer's services may have to be reduced if current funding and taxation levels are not increased

- amended other criteria in the current legislation, including by removing the requirement that arbitrators consider the nature of the work performed when comparing firefighters and other comparable employees in the public and private sectors

As set out above, Bill 57 now refers to criteria such as "economic health" and "changes to labour market characteristics, property tax characteristics, and socio-economic characteristics" of the municipality. These criteria are entirely new and are not imposed on interest arbitrators or other employees subject to interest arbitration regimes in any other sector. There is no basis for firefighters to have these unprecedented and imprecise criteria imposed on them.

These new the criteria seem aimed at limiting the independence of arbitrators in determining appropriate comparable employees, including by trying to direct arbitrators to distinguish between police and firefighter awards in a single municipality, and between firefighter awards in comparable municipalities.

Hopefully arbitrators will continue to apply existing principles of comparability. If arbitrators point to these criteria as directing them not to do so, constitutional challenges to the legislation will likely result, on the basis that the criteria undermine the necessary

degree of arbitral independence and fairness required both by s. 2(d) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of association, and by international law.

C. Other procedural changes

Bill 57 also introduces procedural changes to the interest arbitration process, including:

- a requirement that written submissions "on all matters remaining in dispute" be exchanged by the parties before the first day of the interest arbitration hearing

- a requirement that, upon the request of either party, the arbitrator issue written reasons "clearly demonstrating" his or her consideration of the new legislative criteria set out above

These changes risk undermining procedural fairness and the necessary flexibility of the interest arbitration process. No other interest arbitration legislation in Ontario dictates how the interest arbitration board or arbitrator is to draft their reasons. Such a directive undermines the "give and take" of the interest arbitration process whereby the arbitrator seeks to craft an award that replicates the "give and take" of negotiations.

Requiring the arbitrator to state in his or her reasons how the new statutory criteria were considered is a recipe for arbitral error and an invitation to judicial review applications on the adequacy of the reasons – with the attendant delay, cost, and uncertainty to all parties.

Interference with Associations and "Two-Hatters"

"Two hatters" are firefighters who have two paid jobs as firefighters – one as a full-time firefighter with one municipality, and one as a paid part-time firefighter with the same or another municipality.

Bill 57 curtails the decision-making authority of firefighter associations regarding "two-hatters" by:

- prohibiting associations from penalizing or otherwise disciplining two-hatters for violating the International Association of Fire Fighters' ("IAFF") constitution and by-laws

- prohibiting civil actions by firefighter associations or others to enforce fines against two-hatters for violating the IAFF constitution and by-laws

- prohibiting municipalities from discharging or refusing to employ two-hatters who have been expelled, suspended or refused association membership as a result of their two-hatter status

- rendering "closed shop" language in firefighter collective agreements inoperative as it applies to "two-hatters"

For several reasons, firefighter associations believe that it is in the best interests of both their members and the public that firefighters work only on a full-time basis for one municipality.

For example, two-hatters undermine an association's ability to secure important health and safety protections for their members. Municipalities are reluctant to extend enhanced health and safety and workers compensation benefits to its professional firefighters when those firefighters may be injured or exposed to contaminants while working in another municipality as a part-time firefighter.

Firefighter associations have also argued that two-hatters may risk weakening both fire services that employ them. A two-hatter who spends hours at an emergency scene in a neighbouring municipality as a part-time firefighter, and then leaves the emergency scene to report for full-time duties on a regularly scheduled shift with another municipality may well be too fatigued to properly perform those duties, and may represent a danger to their fellow firefighters and the public.

From the perspective of firefighter associations, the Bill 57 amendments constitute an unwarranted interference into their internal affairs and may well have significant adverse effects on firefighters and the communities they serve.