Bill 66: Ontario's Omnibus Offensive

The *Restoring Ontario's Competitiveness Act* ("Bill 66") is an omnibus Bill which, if passed, will amend several pieces of legislation covering a wide range of issues.

Initially tabled on December 6, 2018 for First Reading, the Bill has attracted a broad spectrum of criticism, from environmentalists warning that the Bill would permit development in the Greenbelt,[1] to child-care advocates concerned about the Bill's implications for kids' safety in unlicensed daycare facilities,[2] to workers' rights advocates.[3] In telling contrast, the Ontario Chamber of Commerce has applauded the government's commitment to "cut unproductive red tape," thereby "easing the strain on businesses."[4]

This memo contains a summary of Bill 66's proposed amendments to the *Employment Standards Act, 2000*, the *Labour Relations Act, 1995*, and the *Education Act*.

The Ford Government's Continued Attack on Workers: The ESA and LRA amendments

Following closely on the heels of the enactment of Bill 47, which erased many of the legislative gains achieved through Bill 148,[5] Bill 66 continues the Ontario government's attack on working people across the province. Contrary to the Ontario government's claim that this Bill will allow businesses to create "good jobs",[6] the proposed amendments to the *Employment Standards Act, 2000* and *Labour Relations Act, 1995* would in fact intensify precarious employment and eliminate protections for thousands of Ontario workers.

---

[1] Jeff Gray, "Ontario bill would open up Greenbelt, activists warn," Globe & Mail, December 7, 2018.

[2] Shawn Jeffords, "Ford government defends changes to child care rules under new bill," Global News, December 7, 2018

[3] Sara Mojtehedzadeh, "Ontario government's proposed changes reduces employers' obligation to pay overtime, critics say," Toronto Star, December 7, 2018.

[4] Ontario Chamber of Commerce, "Media Release: Reducing Red Tape Fundamental to a Stronger Ontario," December 6, 2018.

[5] Daniel Sheppard, "Bill 47, The Making Ontario Open for Business Act, 2018: What does it do to Labour & Employment Laws in Ontario?", October 24, 2018.

[6] Ontario, Backgrounder: "Proposed Changes to Create Jobs and Reduce Regulatory Burden in Specific Sectors."

A. Proposed Amendments to the *Employment Standards Act, 2000*

(i) No approval required for excessive weekly work hours

The current version of the *Employment Standards Act, 2000* ("ESA") prohibits employers from requiring employees to work more than 48 hours in a week, unless the Ministry of Labour's Director of Employment Standards approves an agreement between an employee and employer to increase the weekly limit.[7]

The 48 hour weekly limit on working hours dates back almost 75 years. The *Hours of Work and Vacations with Pay Act* of 1944 set the weekly maximum at 48 hours. It allowed for exceptions to be made when an employer and employee agreed, and what was then known as the "Industry and Labour Board" granted its approval.[8]

The policy rationale for requiring approval from a neutral third party regulator, whether it be the Board in 1944 or the Director in 2018, is obvious. As recognized by the Supreme Court of Canada, employment relationships are "typically characterized by unequal bargaining power, which places employees in a vulnerable position vis-à-vis their employers."[9] The Director's approval is therefore necessary to ensure that employees are not forced to enter into "agreements" that are not in their interests. When exercising the discretion to approve an excessive hours agreement, the Director considers, among other things, whether the employer has previously violated the ESA or its regulations, and the health and safety of employees.[10]

Bill 66 would eliminate the need for the Director to approve excessive weekly hours agreements, removing the regulatory oversight that has been part of the Ontario employment law landscape for nearly three quarters of a century. The amended ESA would permit an employee's weekly hours of work to exceed 48 hours as long as the employee and employer agreed,[11] thereby disregarding the "power imbalance that [the Supreme Court] has recognized as ingrained in most facets of the employment relationship."[12]

---

[7] *Employment Standards Act, 2000*, SO 2000, c 41, s. 17(1)(b). This rule is subject to "exceptional circumstances" as defined in s. 19.

[8] Employment Practices Branch, *Employment Standards Act, 2000: Policy & Interpretation Manual*, p. 11-1.

[9] *McKinley v. BC Tel*, 2001 SCC 38 at para. 54.

[10] ESA, ss. 17.1(8)(a) and (b).

[11] Schedule 9, s. 3-6 [amending s. 17 and repealing ss. 17.1, 17.2 and 17.3 of the ESA].

[12] *McKinley v. BC Tel*, *supra* at para. 54.

(ii) No approval required for overtime averaging

The ESA currently requires an employer to pay employees overtime premium pay (1.5 x their regular wage) for hours worked in excess of 44 hours per week. It also allows an employee and employer to agree to average hours of work over two or more consecutive weeks, provided the Director of Employment Standards grants approval for such an arrangement.

In determining whether to approve an overtime averaging arrangement, the Director will consider the same types of factors as he or she would consider with an excessive weekly hours agreement – namely, the employer's current and past contraventions of the ESA and the health and safety of employees, among other factors.[13] According to the Ministry of Labour, an application for overtime averaging is more likely to be refused in circumstances where "[n]o clear benefit … is demonstrated for employees in non-unionized workplaces."[14]

Bill 66 would eliminate the need to receive the Director's approval for overtime averaging agreements.[15] Instead, the only limitation on such an "agreement" would be that it not exceed four weeks. This would allow employers to structure the schedules of their employees to avoid or limit the amount of overtime they have to pay, so long as they have their employees' "agreement." For example, an employee with a 4 week long averaging "agreement" who works 58 hours per week for three straight weeks and no hours in the fourth week would receive no overtime premium pay because their average weekly hours would not exceed the threshold.

(iii) ESA poster not required to be posted in the workplace

The ESA requires the Minister of Labour to prepare and publish a poster providing information about the Act and the regulations. Employers must not only give each employee a copy of the poster, but also post it in a conspicuous place where it is likely to come to the attention of employees."[16]

---

[13] ESA, s. 22.1.

[14] Ontario Ministry of Labour, "Applications for Excess Weekly Hours of Work or for Averaging Hours of Work for Overtime Pay Purposes."

[15] Schedule 9, s. 8 [amending s. 22(2) and (2.1) of the ESA].

[16] ESA, s. 2(3).

Bill 66 would eliminate the requirement to post the poster in the workplace,[17] removing a significant method for workers to learn their about rights under the ESA. This amendment is particularly problematic given that one barrier to the enforcement of basic ESA entitlements is workers' lack of knowledge about their rights.[18]

Moreover, the allegation that pinning a poster to a wall or corkboard in the workplace amounts to a "burdensome" regulation which undermines the ability of Ontario businesses to compete in the global marketplace is perplexing, to say the least.[19]

B. Proposed Amendments to the *Labour Relations Act, 1995*

The "non-construction employer" provisions of the *Labour Relations Act, 1995* ("LRA") were introduced by the Progressive Conservative government of Mike Harris in the late 1990s. On application to the Ontario Labour Relations Board, an employer that establishes that it is a "non-construction employer" can obtain a declaration to the effect that any collective agreement to which it was previously bound ceases to apply in the construction industry.[20] In order to succeed in such an application, an employer is required to demonstrate that it "does no work in the construction industry for which [it] expects compensation from an unrelated person."[21]

Bill 66 would amend the LRA to deem several public entities, including municipalities, school boards, hospitals, universities, and colleges, among others, to be "non-construction employers."[22] Trade unions that hold construction bargaining rights for those entities would cease to represent their employees in the

[17] Schedule 9, s. 2(2) [repealing ss. 2(3) and (4) of the ESA].

[18] See for example, Law Commission of Ontario, *Vulnerable Workers and Precarious Work: Final Report*, December 2012, Chapter III, Section C. 1, p. 50.

[19] Ontario, Backgrounder: "Proposed Changes to Create Jobs and Reduce Regulatory Burden in Specific Sectors."

[20] LRA, s. 127.2(3).

[21] LRA, s. 126(1).

[22] Schedule 9, ss. 12 -15 [amending LRA, ss. 125-127].

construction industry. Any collective agreements that trade unions have with those entities covering work in the construction industry would cease to apply.[23]

One significant effect of this amendment would be that municipalities, school boards and other public entities that fall within the expanded definition of "non-construction employer" would no longer be required to subcontract in accordance with the construction industry collective agreements to which they are presently bound. This means that these entities be able to use to non-union contractors to perform their construction work.

In the event this proposed amendment to the LRA is passed, it may be challenged by construction trade unions on the basis that it interferes with workers' freedom of association guaranteed by subsection 2(d) of the *Canadian Charter of Rights and Freedoms*. While the Ontario Court of Appeal has held that the general "non-construction employer" are constitutionally compliant,[24] there are a number of ways it can be argued that the proposed amendments in Bill 66 overstep the bounds, and substantially interfere with workers' associational rights contrary to the Charter.

Analysis of Bill 66's proposed amendments to the *Education Act*

(i) Changes to requirements for third party extended day programs for kindergarten students

Section 259(1) of the *Education Act* requires every school board to run an extended day program, or to ensure that a third party program is run, for kindergarten students. Subsection 259(2) sets the requirements for third party extended day programs for kindergarten students, as follows:[25]

> A board shall ensure that a third party program operated for the purposes of this section meets the following requirements:

[23] Schedule 9, s. 14 [amending LRA, s. 127(2)].

[24] *Independent Electricity System Operator v. Canadian Union of Skilled Workers*, 2012 ONCA 293

[25] *Education Act*, RSO 1990, c E.2, s 259(2).

> 1. The program must be a child care centre licensed under the *Child Care and Early Years Act, 2014* or another program prescribed by the regulations made under this Part.
>
> 2. The program must be led by an early childhood educator or another person who meets the criteria of a person who the operator of a child care centre is required to employ as a child care provider, as set out in a regulation made under the *Child Care and Early Years Act, 2014*.
>
> 3. The program must meet any conditions and criteria prescribed by the regulations, policies or guidelines made under this Part, including conditions and criteria related to programs or operators of programs.

Bill 66 will repeal subsection 259(2)2, underlined above, thus removing the reference to early childhood educators ("ECEs").

We note that, even under the existing regulations, which are set out below, a person other than an ECE can be appointed to operate a child care centre if a director appointed by the Minister views them as "capable."[26] As a result, the effect of this amendment, at least in the short term, appears to be somewhat less dramatic than it initially appears. The Act will continue to require that a third party program be a "child care centre licensed under the *Child Care and Early Years Act, 2014* or another program prescribed by the regulations made under this Part." At present, no program is designated under the regulations.

O. Reg. 137/15 under the *Child Care and Early Years Act, 2014* requires that a licensee of a child care centre employ a "supervisor" who "shall plan and direct the program of the child care centre, be in charge of the children, oversee the staff and who shall be responsible to the licensee."[27] A "supervisor" is defined in the same regulation as follows:[28]

[26] O. Reg. 137/15 under the *Child Care and Early Years Act, 2014*, s. 53.

[27] O. Reg. 137/15 under the *Child Care and Early Years Act, 2014*, s. 6(4).

[28] O. Reg. 137/15 under the *Child Care and Early Years Act, 2014*, s. 53.

> (a) is a member in good standing of the College of Early Childhood Educators, has at least two years of experience providing licensed child care and is approved by a director; or
>
> (b) in the opinion of a director, is capable of planning and directing the program of a child care centre, being in charge of children and overseeing staff.

Therefore, under the current regulations, child care centres, including those that provide third party extended day programs in schools, will continue to be required to have an ECE, or someone else a director has identified as a suitable substitute, in charge.

However, removing s. 259(2)2 from the *Education Act* makes the Minister of Education's regulation-making power under the *Child Care and Early Years Act, 2014* more significant. The Minister could change the regulatory requirements, including the requirement that an ECE or other capable person be in charge of child care centres at any time, without going through the legislature.

(ii) Changes to requirements for third party extended day programs for grades 1-6 students

Bill 66 makes a similar change with respect to the provisions governing extended day programs for grades 1-6 students.

Subsection 259.1(1) of the *Education Act* requires every board to operate an extended day program, or ensure there is a third party program in place, for grade 1-6 students. Subsection 259.1(2) sets the requirements for third party extended day programs for grades 1-6 students, as follows:[29]

> (2) A board shall ensure that a third party program operated for the purposes of this section meets the following requirements:
>
> 1. The program must either,

[29] *Education Act*, s. 259.1(2).

> i. meet the requirements set out in subsection 259(2) for a third party program operated for the purposes of subsection 259(1), or
>
> ii. be a program prescribed by the regulations made under this Part.
>
> 2. The program must meet any conditions and criteria prescribed by the regulations, policies or guidelines made under this Part, including conditions and criteria related to programs or operators of programs.

Subsection 259(2), which is set out in the section on kindergarten students above, is incorporated by reference into subsection 259.1(2)1(i). This means that s. 259.1(2) includes the requirement that a program be "led by an early childhood educator or another person who meets the criteria of a person who the operator of a child care centre is required to employ as a child care provider, as set out in a regulation made under the *Child Care and Early Years Act, 2014*."

Bill 66 will repeal subsection 259.1(2)1 and substitute the following:[30]

> 1. The program must be a child care centre licensed under the *Child Care and Early Years Act, 2014* or another program prescribed by the regulations made under this Part.

Thus, the amended *Education Act* would no longer directly require that a third party extended day program be "led" by an ECE or other person who meets the criteria under the *Child Care and Early Years Act, 2014*. However, for the same reasons articulated above, the change is not as significant as it initially appears, at least for the present, given that a licenced child care centre must be led by an ECE or other capable person by virtue of O. Reg. 137/15 under the *Child Care and Early Years Act, 2014*. The main effect of this amendment, then, is to leave the Minister of Education with the discretion, pursuant to her regulation-making power, to either change the supervisory requirements for licenced child care centres or to designate other programs which could afford even less protection.

[30] Schedule 3, s. 5 [amending s. 259.1(2)(1) of the *Education Act*].