Ontario Introduces Wage Restraint Legislation

Bill 124, the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*

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Introduction

On June 5, 2019, the President of the Treasury Board introduced the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (Bill 124) into the Legislative Assembly. After limited debate and perfunctory committee hearings, the legislation was passed on November 7, 2019, and came into force on November 8th. Bill 124 imposes a series of 3-year "moderation periods" (in the form of salary and compensation caps) on a variety of unionized and non-unionized workplaces. During these periods, increases to both salary rates and to existing or new compensation requirements (including salary rates) are capped at 1% per year, subject to certain exceptions described below.

However, Bill 124 does not apply to override compensation increases provided for in existing collective agreements or arbitration awards, so long as those agreements are in effect and/or awards made on or before June 5, 2019.

Bill 124 also purports to prohibit any salary or compensation increases before or after the moderation period, where they are designed to make up for the salary and compensation restraints imposed by the Act.

This overview is restricted to providing an explanation of the provisions of Bill 124 itself. However, given the extent to which Bill 124 can be seen to interfere with the right to free collective bargaining (including the right to strike, or to interest arbitration in the case of essential service workers - rights which the Supreme Court of Canada has now found to be constitutionally protected under section 2(d) of the *Canadian Charter of Rights and Freedoms*), it can be anticipated that challenges will be brought to the constitutionality of Bill 124.

Who Does Bill 124 Apply to?

Bill 124 applies to a wide range of employers, employees and unions. The Act applies to the following employers:[1]

- The Crown in Right of Ontario;
- Every agency of the Crown;

[1] Section. 5(1). Unless otherwise noted, all citations are to the provisions of Bill 124 as it read at third reading on November 7, 2019.

- School Boards;
- Universities and Colleges;
- Public Hospitals;
- Non-profit long-term care homes;
- Children's Aid Societies;
- Ontario Power Generation and its subsidiaries;[2]
- Ornge (the province's air ambulance and medial transport authority);
- Every authority, board, commission, corporation, office or organization of persons where a majority of its directors, members or officers are selected or appointed by Cabinet or a Minister of the Crown (for example, the Independent Electricity Systems Operator);
- Certain transfer payment recipients (i.e. every authority, board, commission, corporation, office or organization that is not-for-profit and, in 2018, received at least one million dollars in funds from the government of Ontario); and
- Any other authority, board, commission, committee, corporation, council, foundation or organization that may be prescribed by regulation.

Bill 124 does not, however, apply to municipalities, local municipal boards, or boards, authorities, offices or other organizations whose members are chosen or appointed under the authority of a municipal council,[3] nor does it apply to Indigenous communities (defined as "bands" within the meaning of the federal *Indian Act* or other entities that may be prescribed by regulation), boards, commissions, etc., whose members are chosen or appointed by an Ingenious community, or Indigenous policing authorities recognized under the *Police Services Act*.[4] "For-profit" entities are also exempted from the *Act*, though the Provincial Cabinet has the power to make regulations under the *Act* extending it to cover a for profit entity.[5]

In terms of bargaining agents, Bill 124 applies to the workers and their bargaining agents in workplaces covered by the legislation.[6] This includes certified and voluntarily recognized bargaining agents under the *Labour Relations Act*, the *Crown Employees Collective Bargaining Act, 1993*, the *School Boards Collective Bargaining Act 2014*, the *Colleges Collective Bargaining Act, 2008*, the *Ontario Provincial Police Collective Bargaining Act, 2016*, as well as

[2] Sections 34-35 (inserting s. 190 into the *Labour Relations Act, 1995* and s. 143 into the *Employment Standards Act, 2000*).
[3] Section 5(2).
[4] Section 5(2)(3.1)-(3.3).
[5] Section 5(2)(4).
[6] Sections 6, 8.

any organization that collectively bargains or negotiates terms and conditions of employment relating to compensation or that has a framework for collectively bargaining over compensation.

In turn, "collective agreement" is broadly defined to include a collective agreement within the meaning of the *Labour Relations Act, 1995*, as well as "an agreement, whether negotiated or the result of an arbitration award, between an employer or an employers' organization and a bargaining organization to which the Act applies, in respect of compensation for employees".[7]

The legislation does not, however, apply to various judicial officers, including judges, justices of the peace and case management masters,[8] or to designated executives within the meaning of the *Broader Public Sector Executive Compensation Act, 2014*.[9] The Minister also has the power to exempt the application of the Act to any employees or classes of employees.[10]

When are the "Moderation Periods" Established Under Bill 124?

The restraint imposed by Bill 124 applies to what the Bill defines as "moderation periods". which in all cases last for 3 years. These periods commence at different times for different employers and employees, depending for the most part on whether a collective agreement was in effect on June 5, 2019.

Unionized Workplaces:

For unionized workplaces, the start of a moderation period depends on the status of the applicable collective agreement or arbitration awards as of June 5, 2019 (the date the legislation was introduced in the Legislative Assembly), as follows:

- Where a collective agreement is in force on June 5, the moderation period begins the day after that agreement expires.[11]

- Where there is no collective agreement in force as of June 5 because the last agreement has expired, the moderation period begins in most cases on the day following the expiry of the previous agreement.[12] However, there are three exceptions:

    - a memorandum of settlement for a collective agreement entered into before June 5, but ratified after that date;

    - a collective agreement ratified on or before June 5 but which comes into operation after that date; or

[7] Section 2.
[8] Section 7.
[9] Section 6(3). That statute already establishes a separate system for regulating the compensation of certain senior executives working in the broader public sector.
[10] Section 6(2).
[11] Section 9(1)(1).
[12] Section 9(1)(2).

- An agreement to renew a collective agreement that is in operation on June 5 for a single specified term.

If one of these exceptions applies, the moderation period begins the day immediately following the expiry of the collective agreement that gives effect to agreement listed above.[13]

- Where there is no collective agreement in force as of June 5 because the parties are bargaining their first collective agreement, the moderation period begins on the commencement date of the first collective agreement.

The President of the Treasury Board has the power to make exceptions to these rules though regulations. Under this power, certain collective agreements entering into force after June 5, 2019 and that expire no later than December 31, 2021 would not be subject to a moderation period. The period would only begin in the day following their expiry (i.e. no later than January 1, 2022).[14] The Minister may only make a regulation under this authority if the collective agreement itself, a memorandum of settlement, or an extension agreement for such an agreement was entered into *before* November 8th.[15]

A different set of rules applies when there is no collective agreement in force as of June 5 and the parties are engaged in interest arbitration.. In that case, the commencement of the moderation period follows the following rules:

- If an arbitration award was issued on or before June 5, 2019, the moderation period begins the day after the expiry of the collective agreement that gives effect to the award.[16]

- If no award has been issued by June 5th, and the parties settle a collective agreement, the moderation period begins on the commencement date of that collective agreement.[17]

- If an award is issued after June 5th, but before November 8th, the moderation period begins the day after the expiry of the collective agreement that gives effect to the award.[18]

- If an award is issued after November 8th, the moderation period begins on the commencement date of the collective agreement that gives effect to the award.[19]

Non-Unionized Workplaces:

For non-unionized workers, the moderation period can begin on any date selected by the employer that is on or before January 1, 2022.[20] The only exception is where a non-unionized

[13] Section 9(2)-(3).
[14] Section 9(5).
[15] Section 9(6).
[16] Section 9(1)(4)(ii).
[17] Section 9(1)(4)(i)(B).
[18] Section 9(4).
[19] Section 9(1)(4)(i)(A).
[20] Section 14(1).

employee's compensation increases in step with increases provided to other workers under a collective agreement. In that case, the moderation period for the non-unionized worker is required to line up with the moderation period applicable to the collective agreement.[21]

What are the Restrictions Imposed During the Moderation Period?

Bill 124 imposes limits to increases to salary rates, as well as incremental increases to any existing or new compensation entitlements during the three-year moderation period, whether as a result of negotiation, collective bargaining, or interest arbitration.

Limit to Salary Rate Increases:

Salary rates are defines as including "a base rate of pay, whether expressed as a single rate of pay, including a rate of pay expressed on an hourly, weekly, bi-weekly, monthly, annual or some other periodic basis, or a range of rates of pay."[22]

Bill 124 imposes a ceiling of 1% on any increases to these salary rates during each 12-month period in a moderation period. The Bill also provides that increases may be less than 1%.[23]

However, this limit does not apply to increases under either a collective agreement or a compensation plan that permits salary increases due to length of time in employment, an assessment of performance, or the worker's completion of a program or course of professional or technical education.[24] In effect, what this means is that workers may still move up pre-existing salary grids or receive merit increases, but that the grids themselves may not be altered beyond the annual 1% caps imposed during the moderation periods.

Limits on Overall Compensation Increases:

Bill 124 imposes a separate 1% annual cap on any incremental increases to existing or new compensation entitlements (including increases to salary rates).[25] Compensation is a broader concept than salary. It is defined to include salary, but also all other payments provided to or for the benefit of workers, including benefits, perquisites and all other forms of discretionary or non-discretionary payments.[26]

The legislation provides that the 1% cap on incremental increases to compensation is to be calculated on the basis of the average for all employees covered by a collective agreement or, in the cases of workers not represented by a union, all unrepresented workers in the workplace.

There is also an important exception for situations where the cost to an employer to maintain an existing benefit at the same level increases. In that case, so long as the benefit itself does not

[21] Section 14(2).
[22] Section 2
[23] Sections 10(1) (unionized workers) and 14(1) (non-unionized workers).
[24] Sections 10(2) (unionized) and 14(2) (non-unionized).
[25] Sections 11(1) and (2) (unionized) and 16(1) and (2) (non-unionized).
[26] Section 2, definition of "compensation".

change, any increase in the cost of providing that benefit does not count as an incremental increase in compensation for the purposes of the 1% cap.[27]

Importantly, salary increases based on length of service, performance or educational programs – which as set out above do not count against the 1% cap on salary increases – would also not count against the 1% cap on overall compensation increases.[28]

Increases deemed not to constitute Salary or Compensation Increases

The legislation also provides that a number of particular kinds of payments do not constitute new or increased salary or compensation.

First, payments made as part of a voluntary exit program are not counted. However, for this rule to apply, the voluntary exit program must be approved by the Management Board of Cabinet.[29]

Second, the Minister has the power to specify by regulation that certain compensation is provided for the purpose of reducing the growth in compensation costs over the long-term. When such a designation is made, that compensation does not count as new or increased salary or compensation.[30]

Finally, changes occasioned by certain changes to pension plans are also excluded as new or increased salary or compensation. This exception applies when an employer converts a single employer pension plan to a jointly sponsored pension plan pursuant to certain provisions of the *Pension Benefits Act*.[31] Increases to salary or compensation that are provide in exchange for an increase in member-required pension contributions that are occasioned by such a conversion are not counted as new or increased salary or benefits under Bill 124.[32]

Can Lost Increases to Salary or Compensation During a Moderation Period be Made Up Later?

Bill 124 also purports to regulate increases to salaries and compensation outside of moderation periods. The legislation would prohibit increases – either before or after a moderation period – that are intended to make up for increases that would have been provided but for the legislation.[33]

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[27] Section 11(3) (unionized) and 16(3) (non-unionized).
[28] While the legislation does not explicitly state this, it is the necessary implication of sections 11(2) and 16(2), which provide that salary increases other than these types of exempted increases *do* count as increases to total compensation. The fact that these non-exempted salary increases are specifically included in the calculation of compensation increases suggests that exempted salary increases would not be included. Moreover, including salary increases based on seniority, merit or training in the calculation of total compensation increases would, in the vast majority of cases, render the salary cap exemption meaningless.
[29] Sections 12.1, 16.1.
[30] Sections 12.3, 16.3.
[31] *Pension Benefits Act*, RSO 1990, c P.8, ss. 80.4, 81.0.1.
[32] Sections 12.2, 16.2.
[33] Section 18.

In other words, Bill 124 prohibits employers from providing larger salary or benefit increases before or after a moderation period in order to make employees "whole".

As a practical matter, it may be difficult in any particular case to determine whether a given increase is due in whole or in part to a desire to make up for depressed increases during a moderation period. However, as discussed below, the Minister has broad discretion to decide whether or not a given salary increase is designed to make up for the restrictions imposed during the moderation period.

How Will the Government Monitor Compliance with Moderation Period Rules?

Bill 124 provides an extensive directive-making authority for the Management Board of Cabinet, enabling it to collect, disclose and use a wide range of information in order to ensure compliance with the Act.[34]

Management Board is empowered to direct employers governed by the Act to provide any information related to collective bargaining or compensation that Management Board considers appropriate for the purpose of ensuring compliance with the Act. This may include (but is not limited to) information respecting collective agreements, bargaining mandates, costing information, submissions to arbitrators, and compensation policies.[35]

These directives may be general or specific in their application,[36] and must be complied with by any employer to whom they are directed.[37]

The directive may require that the information be provided to any persons that the Management Board considers appropriate,[38] including even political staffers in a Minister's Office.[39]

Directives issued under the Act take precedence over Ontario's privacy legislation.[40] Any employer who provides personal information in accordance with a directive is deemed to comply with both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.[41] While those statutes otherwise require that persons whose personal information is being disclosed be notified prior to disclosure, Bill 124 would override this requirement, merely providing that the information collected by way of a

[34] Section 19.
[35] Section 19(2).
[36] Section 31(2).
[37] Section 31(1).
[38] Section 19(5).
[39] Section 19(5)(a)(ii).
[40] Section 19(6). In particular, directives issued under s. 19 prevail over the provisions of both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*. We note, however, that they do not take precedence over the *Personal Health Information Protection Act*. While there are likely to be few cases where a directive would call for the disclosure of personal health information, were one to do so, it may be that *PHIPA* would take priority.
[41] Section 19(3).

directive is to be kept confidential and only be used for the purposes authorized in the directive itself.[42]

All directives made under Bill 124 would have to be published on a public website.[43]

How Will the Government Enforce Compliance with Bill 124?

Apart from section 13 of the Bill, which provides that the Act prevails over any collective agreement or arbitration award, the Bill grants broad and sweeping powers to the Minister[44] to review collective agreements and arbitral awards to determine if they comply with the Act.

The Minister is empowered, in his or her "sole discretion", to make an order that a collective agreement or arbitral award is inconsistent with the *Act*.[45] However, parties to an agreement or award must be given notice that the Minister may exercise their power and be given 20 days to make submissions.[46] After those 20 days, the Minister may make an order without any further notice to the parties.[47]

Where the Minister has made an order declaring that a collective agreement or arbitral award is not consistent with the Act, the agreement or award is rendered void, and is deemed to have never had any effect.[48] As drafted, it may be that this means that the entire collective agreement or award would be void, and not merely the terms that exceed the 1% increases permitted by the *Act*.

In these circumstances, the parties are required to return to the same stage in bargaining as they were at immediately before they settled the terms of their agreement, and are required to bargain a new agreement that complies with the Act. While this takes place, the terms and conditions of employment that existed immediately before the voided agreement came into force apply.[49]

Similarly, where the Minister voids an arbitral award, the parties are required to conclude a new agreement. The arbitrator who issued the voided award remains seized and may issue a new award that complies with the *Act*, or the parties may negotiate a compliance collective agreement. As where the Minister voids a collective agreement, the terms and conditions of employment that existed immediately prior to the issuance of the award apply.[50]

Bill 124 recognizes that in some circumstances, a collective agreement or arbitral award may cover multiple employers, only some of whom are subject to the *Act*. If the Minister voids such an agreement or award, the effect of such a decision only extends to the employers covered by

[42] Section 19(4).
[43] Section 31(5).
[44] The Minister is defined as the President of the Treasury Board or another Cabinet Minister granted the powers of the President of Treasury Board.
[45] Section 20(1).
[46] Section 20(2).
[47] Section 20(3).
[48] Section 13.
[49] Section 20(4).
[50] Section 20(5).

the legislation.[51] The legislation does not fully explain the consequences of this rule, particularly how the parties to a multi-employer agreement are to return to the bargaining table with respect to some, but not all employers who are party to the agreement itself.

Power to Exempt Employees or Collective Agreements from the Application of Bill 124

Notably, the power given to the Minister to determine whether a collective agreement or award is inconsistent with the *Act* suggests that the Minister may, in some circumstances, decline to make such an order.

As well, the Bill provides that regulations may be enacted exempting any employee or class of employees from the application of the *Act*[52] or exempting any collective agreement from the application of the *Act*.[53]

As such, parties making submissions to the Minister under the process discussed above are not limited to arguing that their agreement's comply with the *Act*'s caps. They may also wish to consider advocating for the Minister to issue regulations exempting their agreements.

Bill 124 also allows for regulations to govern any transitional matters that arise from the enactment of the *Act*. Any transitional regulation would take precedence over the provisions of Bill 124 itself.[54]

Restriction on Legal Challenges to Bill 124 or to Decisions Made Under Bill 124

Bill 124 contains an unusually lengthy set of rules that appear designed to limit the ability of both individual workers and unions to challenge the legislation itself or decisions made under it.

With respect to direct challenges to the law, Bill 124 removes the jurisdiction of either the Ontario Labour Relations Board or labour arbitrators to inquire into either the constitutionality of the *Act* or its consistency with the *Human Rights Code*.[55] While somewhat unusual in Ontario, provisions limiting tribunals' jurisdiction in this manner are valid and enforceable.[56] However, these provisions would not prevent a party from challenging the constitutionality of Bill 124 before the Superior Court.

Bill 124 also provides that the power of the Minister to void collective agreements or arbitration awards is to be exercised in the Minister's "sole discretion". While any such decision would still be subject to challenge by way of judicial review in the Divisional Court,[57] it can be expected

[51] Section 20(1.1).
[52] Section 6(2).
[53] Section 21.
[54] Section 32(4)-(5).
[55] Section 23.
[56] See *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513; *R. v. Conway*, [2010] 1 SCR 765.
[57] See *Judicial Review Procedure Act*, RSO 1990, c. J.1, ss. 2(1), 6(1). See also *Crevier v. A.G. (Quebec)*, [1981] 2 SCR 220.

that the Minister will argue that, by providing that decisions are to be made in the Minister's sole discretion, a court should extend the Minister's decisions considerable deference on any judicial review application.

Bill 124 also contains a number of provisions designed to prevent persons from seeking legal remedies for losses that result from the operation of the law. Specifically, Bill 124 provides that:

- Compliance with the Act is not constructive dismissal either at common law or under provisions of the *Employment Standards Act*;[58]
- Acts done in compliance with the Act do not constitute expropriation or the tort of injurious affliction;[59]
- There is no cause of action against the government or an employer for any acts done are a direct or indirect result of Bill 124, regulations made under it, or directives issued by the Management Board, and no proceeding may be instituted or maintained based on any such acts;[60]
- No person is entitled to any compensation for any loss or damages occasioned directly or indirectly as a result of Bill 124;[61]
- Nothing in Bill 124 alters any existing employment relationship or creates an employment relationship between the Crown and affected employees;[62]
- No complaint under the *Employment Standards Act* may be made or investigated in respect of any provision of Bill 124.[63]

Protection of Certain Statutory Rights

Although as set out above, Bill 124 removes many potential avenues for redress for workers and unions, the legislation purports to preserve the right to collectively bargain and to engage in lawful strikes or lockouts. [64] Of course, these rights are clearly abrogated by the Bill's overriding restrictions on the salary and compensation increases that can be negotiated or awarded.

Bill 124 also contains limited provisions that preserve legal rights in relation to compensation increases that may be potentially in excess of the 1% restriction otherwise imposed. In particular,

[58] Section 24.
[59] Section 25.
[60] Section 26(1) and (2). While drafted in broad terms, this provision would appear to be limited to proceedings of a civil nature, seeking damages or other equitable remedies. As a matter of constitutional law and principle, they are best read as not purporting to bar proceedings for judicial review, or challenges to the constitutionality of the legislation itself.
[61] Section 28.
[62] Section 30.
[63] Section 35 (inserting s. 143(3) into the *Employment Standards Act*).
[64] Sections 4 and 5.

the *Act* provides that nothing in the *Act* or regulations is to be interpreted or applied so as to reduce a right or entitlement

- under the *Human Rights Code*;[65]
- under the *Employment Standards Act* prohibiting discrimination in pay or benefits on the basis of sex (or, in the case of benefits, age or family status);[66]
- to the applicable minimum wage;[67] or
- under the *Pay Equity Act*.[68]

What Comes Next?

As of November 8th, 2019, Bill 124 is in force, and therefore its rules for determining moderation rules are now set. Unions should continue to consider their options with respect to the impact of this legislation on their bargaining activities, including whether they may wish to seek exemptions from the operation of the *Act* from the Treasury Board. In addition, unions who are affiliated with labour councils or other umbrella organizations may wish to consult with them with respect to coordinated political or other action.

[65] Section 22(a).
[66] Section 22(b).
[67] Section 22(c).
[68] Section 22(d).