

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOCIETY OF UNITED PROFESSIONALS, LOCAL 160 OF THE
INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL
ENGINEERS, JO-ANN KINNEAR, CINDY ROKS, and VELMA FRANCIS

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED
BY THE ATTORNEY GENERAL OF ONTARIO and THE PRESIDENT OF
THE TREASURY BOARD

Respondents

APPLICATION UNDER Rule 14.05 of the Ontario *Rules of Civil Procedure*, ss. 2(b), 2(d), 7 and 24(1) of the *Charter of Rights and Freedoms*, and s. 52 of the *Constitution Act, 1982*

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come on for a hearing on a date to be determined at 393 University Avenue, Toronto ON M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date _____ Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 8th Floor
Toronto ON M5G 1R7

TO: The Attorney General of Ontario
Constitutional Law Branch
Crown Law Office - Civil
720 Bay Street, 4th floor
Toronto ON M7A 2S9

AND TO: The President of the Treasury Board
99 Wellesley Street West, Room 4320
Toronto ON M7A 1W3

APPLICATION

1. The Applicants, the Society of United Professionals, Local 160 of the International Federation of Professional and Technical Engineers (“The Society”), Jo-Ann Kinnear, Cindy Roks, and Velma Francis make application for:

- (a) a declaration that the *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, SO 2019, c 12 (“Bill 124” or the “Act”), in particular ss 2, 5, 6, 8, 9, 10, 11, 12, 16, 18, 24, 26, 32, and 34, s 190 of the *Labour Relations Act, 1995*, SO 1995, c 1, Sch A (the “LRA” and collectively with Bill 124 the “Impugned Provisions”), and the acts of the Respondents carried out thereunder violate s 2(d) of the *Canadian Charter of Rights and Freedoms* (the “Charter”) in that they substantially interfere with The Society’s and its members’ right to bargain collectively and collectively withdraw their labour in an effort to negotiate and improve their working conditions and are of no force and effect to the extent of the violation;
- (b) a declaration that the Impugned Provisions and the acts of the Respondents carried out thereunder violate s 2(b) of the *Charter* in that they substantially interfere with The Society’s and its members’ right to engage in collective expressive activity such as strikes and are of no force and effect to the extent of the violation;
- (c) a declaration that ss 32 and 34 of the Act are inconsistent with s 24 of the *Charter* and the constitutional principle of the rule of law to the extent they purport to immunize the Respondents against claims for damages and deny The Society and

its members access to an appropriate and just legal remedy and are of no force or effect to the extent of the inconsistency;

- (d) a declaration that the Impugned Provisions and the actions of the Respondents as set out below substantially interfere or interfered with The Society's and its members' right to bargain collectively and to engage in collective expressive activity under ss 2(d) and 2(b) of the *Charter*, respectively and such substantial interference is not saved under s 1 of the *Charter*;
- (e) a declaration that, insofar as the Impugned Provisions and/or the acts of the Respondents carried out thereunder infringe on and deny the rights and freedoms guaranteed by ss 2(b) and 2(d) of the *Charter* and cannot be justified under s 1 of the *Charter*, the offending provisions and/or offending acts are invalid and of no force and effect pursuant to s 52 of *the Constitution Act, 1982*;
- (f) a declaration that any collective agreement or terms and conditions of employment entered into under or as a result of the Impugned Provisions or imposed on The Society and its members by, as a result of, in accordance with, or pursuant to the Impugned Provisions are null and void and of no effect and are to be replaced by collective agreements freely bargained without influence from the Impugned Provisions;
- (g) an order for compensation for any losses and recovery of monies that Society members were required to forgo or pay back, as the case may be, as a result of the Impugned Provisions and/or the Respondents' acts;

- (h) an order for damages resulting the unjustified infringement of ss 2(b) and 2(d) of the *Charter* and denial of the Society's and its members' rights and freedoms thereunder;
- (i) an order that the Society's members employed at Ontario Power Generation ("OPG"), the Independent Electricity System Operator ("IESO"), and the Ontario Energy Board ("OEB") are exempt from the Impugned Provisions;
- (j) an order that this Application be consolidated with Court File No. CV-20-00637314 (the "OFL Application") to which the Society is also an Applicant on behalf of its members employed by Legal Aid Ontario;
- (k) the costs of this Application on a substantial indemnity basis; and
- (l) such further and other relief as to this Honourable Court may seem just.

2. The grounds for the application are:

- (a) The Applicant The Society is the exclusive bargaining agent for approximately 8,600 employees in Ontario;
- (b) The Society represents approximately 8,000 members in the Ontario energy sector, including approximately 3,573 members employed at OPG, 646 members employed at the IESO, and 146 members employed at the OEB;
- (c) The Applicant Jo-Ann Kinnear is employed by OPG as a Program Coordinator in the Production Support Department for OPG's South Central Operations and is a member of The Society. As an OPG employee, Ms. Kinnear oversees matters

related to OPG property in her region, including short-term temporary land use agreements with third parties, fostering relationships with municipalities, monitoring construction intersecting with OPG property, and advising on public safety issues concerning OPG property;

- (d) The Applicant Cindy Roks is employed by the IESO as a Senior Contract Analyst and is a member of The Society. As an IESO employee, Ms. Roks manages the IESO's renewable energy contracts with renewable energy suppliers and policy issues arising therefrom;
- (e) The Applicant Velma Francis is employed by the OEB as a Public Information Officer and is a member of The Society. As an OEB employee, she is responsible for responding to written and phone inquiries from members of the public regarding the Ontario energy sector and the OEB's regulation of the electricity and natural gas sectors;
- (f) The Applicants bring this application on behalf of and for the benefit of all Society members affected by the Impugned Provisions, except for those members employed by Legal Aid Ontario for whom The Society is seeking relief in the OFL Application;
- (g) The Respondent Attorney General of Ontario is Chief Law Officer of the Crown responsible for defending the constitutionality of the legislation enacted by the Legislative Assembly of Ontario;

- (h) The Respondent President of the Treasury Board (the “Treasury Board”) exercises powers under the Act and is responsible for its administration;
- (i) Together the Respondents are agents of and represent the Crown in Right of Ontario (the “Province”) in this Application;

THE RELEVANT EMPLOYERS

- (j) OPG is a for-profit corporation constituted under the Ontario *Business Corporations Act*, RSO 1990, c B 16 and operated pursuant to the *Electricity Act*, 1998, SO 1998, c 15, Sch A (the “*Electricity Act*”). The Province is the sole shareholder of OPG;
- (k) OPG’s principal purpose is the generation and sale of electricity. It owns and operates electricity generation facilities in Ontario and the United States;
- (l) The IESO is a non-profit corporation operated pursuant to the *Electricity Act*. It monitors the provincial power system to ensure reliability, operates and settles the wholesale electricity marketplace, promotes energy efficiency, and plans for future electricity needs;
- (m) The OEB is a corporation without share capital continued under the *Ontario Energy Board Act, 1998* and the *Electricity Act*;
- (n) The OEB regulates natural gas and electricity utilities in Ontario, including setting electricity rates, creating rules governing the market for electricity and ancillary services, and licensing electricity generators like OPG;

- (o) The Society bargains collectively and enters into collective agreements with OPG, the IESO, and the OEB, respectively. The government of Ontario is not a party to the collective agreements;
- (p) The Society's collective agreements with OPG and the IESO provide that the parties will resolve collective bargaining disputes by binding mediation-arbitration;
- (q) The Society's collective agreement with the OEB provides that Society members have the right to engage in strike action in the event they cannot resolve collective agreement disputes;

BACKGROUND AND IMPACT OF THE IMPUGNED PROVISIONS

- (r) The Applicants adopt and rely on the grounds set out at paragraphs 276-308 of the OFL Application in addition to the grounds set out below;
- (s) Section 190 of the LRA ("Section 190") incorporates ss 1-16 and 24-38 of Bill 124 and applies them to OPG and its subsidiaries, any trade union certified or voluntarily recognized under the LRA representing employees of OPG and/or its subsidiaries, and any members of such trade union, including The Society and its members who are employed at OPG;
- (t) Section 190 prohibits trade unions, including The Society, from applying to the Ontario Labour Relations Board on behalf of its members in respect of the provisions of Bill 124 incorporated into the LRA;
- (u) Collectively, the Impugned Provisions substantially interfere with The Society's and its members' ability to engage with their employers in meaningful collective

bargaining, including but not limited to their right to meaningful dispute resolution through strike action or binding arbitration, as applicable, which are protected by s 2(d) of the *Charter*;

- (v) Likewise, the Impugned Provisions substantially interfere with The Society's and its members' right to express themselves with regard to their working conditions by engaging in strike action as a form of peaceful expression protected by s 2(b) of the *Charter*;

THE IMPUGNED PROVISIONS VIOLATE THE *CHARTER*

- (w) As set out in paragraphs 309-314 of the OFL Application and the following paragraphs, the Impugned Provisions violate ss 2(d) and 2(b) of the *Charter*;
- (x) The Society's collective agreement with OPG expires on December 31, 2021, at which time the Impugned Provisions will impose substantial restrictions on The Society's and its members' ability to exercise their constitutionally protected right to meaningful collective bargaining by interfering with central terms of their employment and their right to participate in binding arbitration to resolve any collective bargaining impasses;
- (y) The Society's collective agreement with the IESO expires on December 31, 2021, at which time the Impugned Provisions will impose substantial restrictions on The Society's and its members' ability to exercise their constitutionally protected right to meaningful collective bargaining by interfering with central terms of their employment and their right to participate in binding arbitration to resolve any collective bargaining impasses;

- (z) The Society's collective agreement with the OEB is effective from April 1, 2019 to March 31, 2022. The Society's negotiation of this collective agreement concluded on August 1, 2019. During the negotiations, the Treasury Board instructed the OEB that Bill 124's restrictions applied to any new collective agreement with The Society, and that the OEB and The Society could not negotiate salary or other compensation increases above 1% for each 12-month period of the applicable moderation period;
- (aa) The Treasury Board also required the OEB to obtain Treasury Board approval of any agreement that the OEB and The Society reached to ensure compliance with the Act;
- (bb) Under s 9 of the Act, the collective agreement between the OEB and The Society is subject to a three-year moderation period because it was concluded after June 5, 2019, and under s 16 of the Act the Treasury Board could have voided the collective agreement if it did not comply with Bill 124;
- (cc) Under s 24 of the Act, the OEB cannot compensate The Society's members after the moderation period's expiry for compensation lost as a result of the Act's application;
- (dd) Accordingly, the Impugned Provisions have imposed and will continue to impose substantial restrictions on The Society and its OEB-employed members' ability to exercise their constitutionally protected right to meaningful collective bargaining by interfering with central terms of their employment and their right to withdraw

their services and engage in strike action to resolve any collective bargaining impasses;

- (ee) The Respondents did not engage in good-faith consultation with The Society or its members prior to imposing the Impugned Provisions;
- (ff) Instead, on April 4, 2019, the Treasury Board, on behalf of the Province, invited The Society to a “sector wide consultation” for unions in the energy sector on May 10, 2019;
- (gg) The May 10, 2019 so-called consultation lasted about one hour;
- (hh) At this so-called consultation, the Treasury Board did not allow for an exchange of ideas or discussion, instead the Treasury Board focused on imposing restrictions on energy workers’ compensation without regard for the sector’s self-funding operations, which do not contribute to the Province’s debt or the deficit;
- (ii) The Society and its members were not able to engage in a discussion about any alternatives during this one-hour meeting to the proposed legislative compensation caps, nor were they permitted to offer suggestions or continue the so-called consultations outside of this meeting;
- (jj) The Government introduced Bill 124 for first reading on June 5, 2019, just before the Ontario Legislative Assembly’s summer recess;

- (kk) Bill 124 was passed and received Royal Assent on November 7, 2019, just after the Legislative Assembly returned from the summer recess and after only two days of hearings in committee with limited testimony from witnesses;

THE IMPUGNED PROVISIONS ARE NOT SAVED BY SECTION 1

- (ll) As set out in paragraphs 315-319 of the OFL Application, the Respondents bear the burden of justifying under s 1 their substantial infringement of the Applicants' *Charter* protected rights and cannot meet this burden for the reasons the OFL Application asserts, as well as the following;
- (mm) Bill 124's purported objectives, among other things, are to "lower Ontario's debt burden" and reduce "public program expenses" associated with public sector compensation;
- (nn) OPG, the IESO, and the OEB (the "Energy Sector Employers") do not receive funding from the Province, nor do they contribute to the Province's debt or deficit;
- (oo) OPG funds its costs, including labour costs, from revenues generated by ratepayers, not provincial funding;
- (pp) The IESO is funded by fees charged to participants in the Ontario electricity market, not by the Province;
- (qq) The OEB is funded by licensees and natural gas and electricity generators, distributors, storage companies, transmitters, retailers and marketers, not by the Province;

- (rr) The OEB regulates OPG's and the IESO's labour costs by restricting the rates and fees charged to electricity market participants and incentivizing OPG and IESO to moderate labour costs by moderating rates;
- (ss) The Impugned Provisions do not take into account the Energy Sector Employers' individual economic realities, in particular that they are self-funded and, with respect to OPG, profit-generating;
- (tt) Because the Energy Sector Employers are not provincially funded, restricting The Society's and its members' ability to meaningfully collectively bargain with them, in particular with respect to employee salary and/or compensation increases, will not serve and is not rationally related to the Impugned Provisions' purported cost-saving objectives;
- (uu) Because the Impugned Provisions fail to take into consideration the Energy Sector Employers' individual economic realities, including that the OEB regulates OPG's and the IESO's costs, they do not minimally impair The Society's and its members' rights under the *Charter* and their deleterious effects outweigh any benefits;

DAMAGES ARE AN APPROPRIATE REMEDY

- (vv) The Applicants and Society members will forgo wage increases and suffer other monetary losses pursuant to the Impugned Provisions;
- (ww) The Province knew or ought to have known that the Impugned Provisions and/or acts carried out thereunder violate or would violate The Society's and its members' rights and freedoms under the *Charter*;

- (xx) A damages award is necessary to vindicate the Society's and its members' *Charter* rights and to deter future similar infringements of *Charter*-protected fundamental rights and freedoms;
- (yy) In purporting to restrict the Applicants' ability to claim damages or compensation in ss 32 and 34, the Impugned Provisions are contrary to s 24 of the *Charter* and the rule of law;

LEGISLATIVE PROVISIONS RELIED UPON

- (zz) The Applicants rely on:
 - (i) The *Sustainable Public Sector for Future Generations Act, 2019*;
 - (ii) The *Labour Relations Act, 1995*;
 - (iii) Sections 1, 2(b), 2(d), and 24 of the *Charter*, and section 52 of the *Constitution Act, 1982*;
 - (iv) The *Ontario Energy Board Act, 1998* and the *Electricity Act*;
 - (v) Rules 12.08, 14.05 and 38 of the *Rules of Civil Procedure*; and
 - (aaa) Such further and other grounds as the lawyers may advise.
3. The following documentary evidence will be used at the hearing of the application:
- (a) Affidavits to be filed; and
 - (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

Date: March 30, 2020

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