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Bill 124 Charter Challenge - Telephone Town Hall Q&A

When Ford's wage suppression legislation was passed in 2019, ONA immediately began to put our charter challenge together to prove that Bill 124 is unconstitutional on two main grounds: it targets a female-dominated profession and interferes with our right to collectively bargain.

On September 28, 2022, two weeks after the Bill 124 court case ended, ONA held two telephone town halls for members to ask questions and hear updates from our legal team. ONA's legal team shared how they put together a strong case of affidavits case law and presented thousands of pages of evidence in court, before opening the floor to questions. As ONA continues to challenge the bill in court, we will bring this fight to the public in the media and by organizing our membership, labour allies, and communities for the respect and fairness we deserve.

Background on Bill 124 and ONA's Charter challenge:

- Before Bill 124 was passed in 2019, ONA made it very clear in its consultation with the government that if there was any wage suppression legislation, that nurses should be exempt because of the extreme shortage of nurses and the adverse effect on women if such legislation was passed.
- In June 2019, the government passed the legislation and ONA was not exempt, but some other groups were exempt such as municipal firefighters and police. A small part of ONA's membership was exempt, as was staff at municipal long-term care homes and for-profit long-term care homes. There was no clear rationale why certain groups were exempt and others were not.
- In their final reading of Bill 124 in November 2019, the government decided not to exempt the nurses. ONA filed a Charter challenge against the legislation based on two grounds: right to collective bargaining and equality on the basis of sex.
- The legislation impacts over 90% of ONA's members and limits any wage increases for a three-year period to a maximum of 1%. Additionally, the bill limits any increases to total compensation, including benefits, leaves, premium, premium pay, and pension contributions, to a maximum of 1%.
- ONA's legal team gathered evidence to support the claims that the legislation impacted meaningful collective bargaining and disproportionately impacted ONA's predominantly female membership in a discriminatory manner.
- Through 2020, ONA staff and members were interviewed. Seven affidavits were filed to support the arguments. Evidence included the pre-existing context before Bill 124 was introduced, specifically the severe recruitment and retention crisis in the healthcare sector that had been ongoing for years, leading to a shortage of nurses. The legal team argued that Bill 124 limited the ability of unions to be able to negotiate not only monetary elements that would help to address recruitment and retention, but also non-monetary elements because of the ways it weakened

the union's bargaining power to be able to advance proposals regarding part-time staffing ratios or issues arising out of the pandemic.

- ONA also sought a panel of experts who had in-depth knowledge and experience in collective bargaining, women's work in the health-care sector, and economics.
- The government's response was that there was no harm or interference to meaningful collective bargaining for unions and that the legislation had no impact on the basis of sex or gender, because the act did not distinguish between male and female workers.
- The evidence went in under four affidavits and witnesses from both sides were cross-examined by ONA and the government.
- ONA's legal team were in court for two weeks in September 2022. They were there with nine other applicants, including the Ontario Federation of Labour and other unions. The judge asked many questions, such as evidence that ONA's right to negotiate was significantly impaired. The judge was also interested in how Bill 124 sliced up ONA's traditional bargaining and why it excluded police and municipalities, including male-dominated professions. Finally, the judge was intrigued about Bill 106, which was introduced in April 2022 to allow the government to override Bill 124. ONA's response to the judge was: the only way for the government to respond meaningfully and enhance wages for nurses or permanent wage increases for personal support workers is to override their own legislation. ONA also demonstrated to the judge that pay equity itself is not the answer to low wages and closing the gender wage gap. The Pay Equity Act is too limited and does not respond to the fundamental question about women's equality and charter rights.
- The judge is reviewing the many volumes of evidence ONA has put forth in court. ONA's legal team estimates that it will take at least six months for him to review all the evidence.

Below are the top 8 questions answered at the town halls:

Q1: With 40 unions going to court against Bill 124, will the final decision made be across the board for all 40 unions or can the judge make individual decisions for each union?

A1: It's possible in theory that there could be different outcomes based on the legal analysis. For example, in the energy sector, they were making quite a different argument with respect to the lack of connection between the way in which the energy sector is funded and any government savings that could be realized through the application of Bill 124 to them. Thus, it is possible that there could be different decisions made for each group. But given the similarity of arguments and the strengths of evidence that was put forward by all the unions, we think it would be somewhat unlikely to see a major fracturing of decisions across the applicants.

Q2: If the judge decides in our favour, will members be compensated retroactively? What about retirees?

A2: From the very first Bill 124 arbitration case, ONA asked for what's called a re-opener clause. That means that if ONA is successful and the legislation is found to be void, then we ask the judge, "I'll make it simple for you, Judge, just void the Bill 124." Then because ONA has re-openers, ONA can go back and retroactively negotiate the collective agreement in question if they're not able to successfully negotiate it. That would be retroactive to the three-year period. For a nurse who retires, they should be getting retroactive payment and of course ONA in the re-opener would be arguing all kinds of things, including higher wages for inflation recruitment or retention and various things related to COVID. We certainly hope that the judge would follow that and allow us to go back and retroactively negotiate the monetary portions of the collective agreement.

Q3: What is to stop the government from enacting another wage cap legislation and what can we do to stop that?

A3: When you look at wage suppression legislation and the various challenges that have been brought to such legislation in the past, the courts in upholding or striking down this legislation have given guidance about what makes it constitutionally acceptable. When the Ontario government introduced Bill 124, they likely looked at those past court decisions and decided to introduce it for a limited period of time, to not make it 0%, and to apply it not just to one sector but to most of the public sector, likely because they believed it would therefore be constitutional in light of the existing case law. ONA addressed those arguments in our case. But one of the things that distinguishes past legislation from Bill 124 is that past legislation that has been upheld as constitutional was based on imposing a cap that had a foundation in actual collective bargaining.

What will stop the government from introducing wage suppression legislation in the future is reasoning from the courts about what's permissible and what's not permissible. To the extent that legislation imposing wage caps has been found to be constitutional in the past, we're arguing that's not the case here and we're hoping that the court agrees with us so that this kind of legislation cannot be reintroduced in the future.

Q4: Does ONA’s legal team think that Bill 124 is just a way for the government to work towards privatization of health care?

A4: The government has certainly distinguished between private and public health care. For instance, ONA has 150 public hospitals that were covered by Bill 124. ONA represents members at two private hospitals that were not covered by Bill 124. Similarly, for-profit long-term care homes were not covered by Bill 124. This certainly indicates their particular interests. But whether they can do that through wage suppression, they could do that through many other ways.

However, the expert evidence showed us a variety of things that come into play. It showed that most public sector workers don’t have as high an income as the government claims and that unions really matter for public sector workers because they're primarily women and the way in which women close the gender pay gap is

through their union. Will this bill help the government privatize more? We don't think that was its true objective, but certainly its overall objective is wage suppression because it assumes that everybody working in the public sector has high incomes and that's not true.

Q5: Will nurses who were terminated qualify for retroactive pay if this court case is won?

A5: If ONA is able to negotiate retroactively through the re-openers for the years of the collective agreement, then it should retroactively apply to others. In regard to the years of the collective agreement, this means that there's the hospital central that has certain dates and then there's the long-term care homes with their own date. So, if you are working during that period of time, ONA will certainly try to seek retroactive pay for anybody who was actually working at that time.

Q6: What does total compensation of 1% look like? My employer will not implement any retention or recruitment initiative, as they say it would be an excess of 1%.

A6: Total compensation is defined very broadly under Bill 124. It includes not just wages or salary, but it also includes any kinds of payments that are made to individual workers, so that's the whole range of benefits or premiums over time. In addition to that very broad definition, employers have been treating the definition also quite broadly. So, they have taken the position, for example, that they won't discuss adding a grid step between year eight and year 25, which would have helped with recruitment because there would be an increase available to those mid-career to more senior nurses, and that would help with retention of more experienced nurses. Therefore, total compensation is very broad. The only exclusions that exist under the act are for things like performance pay or if someone gets an additional degree, then their wages could be increased in recognition of that. But many of those don't apply in the unionized environment generally, and certainly many of those don't apply in the nursing context.

Q7: Manitoba Appeals Court recently upheld wage suppression legislation. How is Bill 124 different from Manitoba's legislation?

A7: What's happening in Ontario is different than what's happening in Manitoba. Manitoba instituted 0% increases plus other minor increases. But at the court here in Ontario, we completely distinguished ourselves from them, and pointed to the need to consider the context for other wage suppression legislation, which was a fiscal crisis. In Ontario, there isn't a fiscal crisis. We have a health crisis, and it's the nurses who have been put at the center of the bullseye and are being made to pay for the health crisis. That's unacceptable and not what happened with many of the federal cases, and arguably, even in Manitoba. Also, the key thing is that when Bill 124 was introduced in Ontario, the going rate of wage increases was 1.75% and the government legislated lower than that.

A recent case in Nova Scotia is also important. The court of Nova Scotia noted that you just can't start with legislation – you must start with negotiating first, talking to workers, consulting with them, and that you need to do that before you even begin to think about

legislating wages. ONA had much to say in the court about how you negotiate first, how you consult first.

For both the Manitoba and Nova Scotia cases, none of them were done in the middle of a global pandemic and without a fiscal crisis. Since then, through collective bargaining, not only have they not been able to address the wage cap issue, but they haven't been able to address the increased inflation that's gone through the roof and the issues of COVID. And that's always been restrained through Bill 124 from dealing with any of those issues, so it's a very different situation in Ontario and we think the judge got the full picture on that.

Q8: What are the next steps if we are successful? Can the government appeal the decision and what would that look like?

A8: If the unions win and the government loses, the government does have the ability to appeal or to seek leave to appeal to the Court of Appeal. Similarly, if the unions lose at this level, they would also then have the ability to seek leave to appeal at the Court of Appeal. The Court of Appeal would grant that permission. In a case of this nature, depending on what the reasons were, there is a strong likelihood of being granted that permission. It's entirely possible that there will still be another fight at an appeal level.

Another question related to this is the use of the notwithstanding clause. We've seen this particular government use the notwithstanding clause twice, after a very long history of the notwithstanding clause not being used by governments. So, we can't rule out the possibility that they would do it in this case and we'll just have to see whether they think that they could bear the public pressure in that context.