

Charter Challenge:

"On April 20th, 2016, the Ontario Superior Court of Justice agreed with CUPE that Bill 115, the so called Putting Students First Act, violates the Charter rights of our 55, 000 members employed in the education sector. Needless to say, this is a very significant and important legal victory.

The judge's ruling is 84 pages long. In it the judge sets out how both Bill 115 and the so called bargaining process preceding the passage of the Bill substantially interfered with our right to collective bargaining as guaranteed under the Charter of Rights and Freedoms, s. 2(d) – freedom of association. The judge had harsh words for the government and used terms such as "ill-conceived," "fundamentally flawed," and "arbitrary" to describe its approach to bargaining. Oh yes, he also said that the government was "both inflexible and intransigent" during the process. I'm sure that no one who was involved in those negotiations back in 2012 would disagree!

The judge held that our Charter right of freedom of association was violated in two respects. First, the process developed by the government that commenced in early 2012 was structurally problematic for a number of reasons. For example, the government could not or would not provide bargaining unit or even union specific data regarding costs. This meant that CUPE and the other unions were in effect bargaining in the dark. Also, proposals by unions were only considered by government on a system wide basis yet, each union was of course only bargaining on behalf of its own members. Further, once the agreement with OECTA was made on July 5, 2012, the government insisted that every other deal had to mirror the OECTA deal. As a result, OECTA had become the representative for all workers in the province – teachers and non-teachers alike. The court specifically noted that CUPE members' interests are very different than teachers – as we had made clear right from the get go back in 2012. All in all, the judge said, the government had created a "situation which made collective bargaining impossible" and that violates our Charter rights.

The second Charter violation occurred because Bill 115 gave the government the authority to prohibit strikes and did not provide any alternative such as binding arbitration.

The question I am sure you and many others are now asking is what does this ruling mean in terms of a remedy. The judge urged the parties to attempt to settle that question but, as of yet there have not been any discussions with the government. That is something we are hoping to get started in the coming weeks. The one thing I will note is that if we do not get an agreement on remedy then it will go back to the judge to determine what is appropriate in all of the circumstances." Gavin Leeb, Town Hall Call, May 2nd, 2016.

What might the judge order if the parties can't reach an agreement on remedy?

No one knows. However, it is interesting to note what the judge did say about remedy in his award:

On page 83 the judge states: "The problem with what took place is with the process, not the end result."

And on page 84 "At the moment (without having heard any submissions), it is not clear to me what would be accomplished by any substantial or overly aggressive remedy."

How long does the government have to file an appeal?

Once the remedy has been determined (either through agreement of the parties or by the judge) the government or CUPE can file notice of appeal within 15 days.

CUPE has meetings planned with OSSTF, OPSEU, ETFO and UNIFOR (the other unions who participated in the charter challenge) to discuss next steps.

(This document was first presented at the School Board caucus Ontario Division Convention: May 2016)