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Court Challenge to Bill 115, Putting Students First Act Rights Must Be Provided With a Guarantee



Steelworkers join teachers and education workers and 20,000 other working people of Ontario at first mass rally at Queen's Park against Bill 115 the *Putting Students First Act*, August 28, 2012.

Court Challenge to Bill 115, Putting Students First Act

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Court Challenge to Bill 115, Putting Students First Act Rights Must Be Provided With a Guarantee

On December 14 the Ontario Superior Court began to hear arguments from unions challenging Bill 115, the infamous *Putting Students First Act* passed by the McGuinty Liberals and Hudak Progressive Conservatives in September, 2012.



The Bill gave the government and in particular the Minister of Education at the time, Laurel Broten, broad discretionary powers to rule by decree without any recourse for the people affected. The Minister could impose contracts on all teachers and education workers and locally-elected school boards in the province; change those imposed terms unilaterally and criminalize opposition. All of this the government did, including preparing conditions for the Labour Board to declare elementary teachers' strikes and coordinated withdrawal of extracurricular activities illegal based on the fraud that despite not agreeing to it, they in fact had a collective agreement. It then repealed the legislation in the face of massive opposition from teachers and education workers and all working people. It didn't however repeal the anti-social measures it imposed. These included wage freezes, the snatching of already banked sick days and the cutting in nearly half of all sick days into the future. To its shame the government claims it "permitted" the victims of this imposition to "negotiate" certain tweaks of what was imposed and now claims this shows that the victims accepted the assault. This is equivalent to a rapist claiming that their victim consented to being raped. It is unacceptable.

The government took the funds it had removed from public education and proceeded to pay hundreds of millions of dollars to various monopolies, like Cisco and Toyota to name a few, as well as to the banks which hold Ontario's debt, in the form of interest payments. This, all the while claiming it required the powers of Bill 115 to "put students first."



Rights such as the right to negotiate wages and working conditions cannot be violated with impunity at the whims of a government if a society is to claim it is democratic. In the opinion of *Ontario Political Forum* the government should be held to account in the court and redress provided so that a new equilibrium can be established in the K-12 education sector that provides stability for everyone concerned. Without accountability and redress, the anarchy and chaos which the government imposed on the system will not be resolved in favour of those who rely on public education for a bright future. Without accountability and redress such anti-democratic actions will only continue in Ontario and in other

parts of Canada, undermining the public interest in favour of the monopolies. It will only deepen the legitimacy crisis of the neo-liberal direction for society and lead to further destruction of the social fabric. This is an issue for everyone. Respect for teachers and education workers and the vital jobs they perform, as well as for locally-elected school boards and the role they should play in defending the interests of their communities is indispensable for providing the youth with a bright

future.



Will Teachers, Education Workers and All Ontario See Justice Done?

On December 14, four years since four unions which represent teachers and education workers launched their court challenge under the *Canadian Charter of Rights and Freedoms* to the Ontario McGuinty Liberal government's passage and use of Bill 115, the infamous *Putting Students First Act*, the Ontario Superior Court began to hear the unions' arguments.

Though it was repealed four months after being adopted, the pay freezes and removal of banked sick days imposed by the legislation were all kept in place as the starting point for the new round of negotiations that started during the 2014-2015 school year.

By taking the original bill to court, the unions are trying to affirm the rights of the working people against their usurpation by the government and the private interests who are served by the so-called austerity agenda Bill 115 enforces.

To date, under one excuse or another, justice eludes them. The Ontario Secondary School Teachers' Federation (OSSTF), the Elementary Teachers' Federation of Ontario (ETFO), the Canadian Union of Public Employees (CUPE) and the Ontario Public Service Employees' Union (OPSEU) said Bill 115 violates the *Charter of Rights and Freedoms* and is therefore unconstitutional.

In explaining his union's reasons for launching the Charter Challenge when it was first announced, ETFO president Sam Hammond said: "The *Charter* guarantees the right of people to organize, engage in collective bargaining, and withdraw services to advance workplace goals. This is a right we will fight for all the way to the Supreme Court of Canada.

"The *Charter* also guarantees the right not to be deprived of fundamental rights. It protects employees from being forced to work under terms and conditions which are coerced, dictated, or imposed by the state. Certainly Bill 115 violates these rights on many counts."

CUPE Ontario president Fred Hahn stated: "The Liberals are cynically trying to portray this bill as only being about teachers and a wage freeze. It's not. This is an unprecedented attack on the civil rights of all education workers -- some 200,000 Ontarians, including thousands of support staff who are the backbone of our education system." He accused the Liberals of creating chaos in education and denounced them for "getting ready to bring the same unfair, unconstitutional chaos to long-term care homes, child care centres, hospitals, universities -- a huge list of the services Ontarians rely on every day."

OPSEU President Warren "Smokey" Thomas also emphasized that Bill 115 was just the beginning of an assault on the entire public sector and public services in Ontario and that it needed to be fought.

Originally the unions' challenges were to begin being heard in June 2014. The unions had announced their intention to challenge the bill on October 11, 2012, one month after Bill 115 became law. Then in March 2014, at a case management meeting convened by the Ontario Court judge assigned to the case that brought together the lawyers for the four unions and those of the

government, the Ontario Attorney General requested an adjournment on behalf of the government of the June 2014 hearing dates. A June date would have put the hearings right in the middle of the 2014 provincial general election, which would have spelled disaster for the Liberals as they needed to convince teachers and education workers and the working people in general that they represented a "progressive alternative" to the Hudak PCs. An open airing of what the Liberals had done under Bill 115 would have smashed their electoral campaign, given that Kathleen Wynne as an MPP and cabinet minister in the McGuinty government had voted for the legislation, then once she took over as leader refused to address its consequences by reversing the draconian measures it was used to impose. Whether deliberate or not the rescheduling ensuring that this did not become an issue in the election.

The Attorney General based his request on two reasons:

1. Three cases similar in nature to the Bill 115 case were currently being argued before the Supreme Court of Canada. The Attorney General argued that the law was currently changing on the meaning of the protections for collective bargaining and strike action under s. 2(d) of the *Charter* and that those cases would be very instructive to the Judge hearing the Bill 115 challenge. He also argued that on a practical basis, the Court dates in June 2014 would be wasted because all parties would have to return following the Supreme Court's decision to address the updated law.
2. Another union, Unifor, that also had some members affected by Bill 115 had requested to intervene in the challenge and would need some time to file its materials.

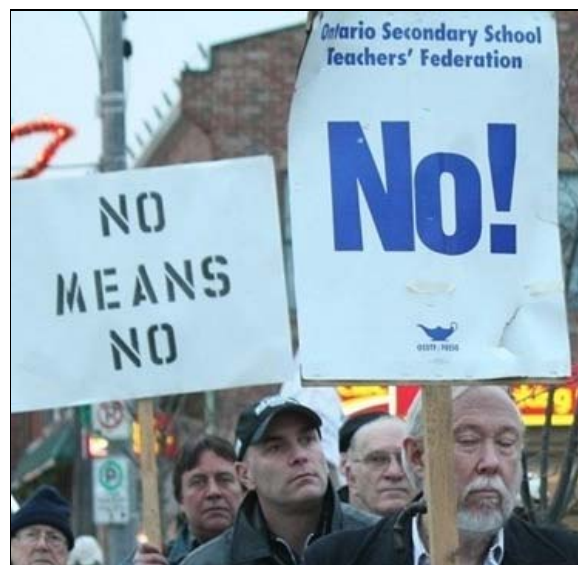
The judge granted the government's request for a postponement. Now, one year and nine months later, the hearing pitting ETFO, OSSTF, OPSEU, CUPE and Unifor versus the Crown and the Ontario Public School Boards' Association (OPSBA) has finally commenced.



Supreme Court Rulings on the Charter and Workers' Rights

- Mira Katz -

One of the arguments made by the Attorney General of Ontario for delaying the hearing for the court case against the government's use of Bill 115 was that a series of cases was at the time before the Supreme Court of Canada concerning the *Charter* and workers' rights which the government felt would set a precedent for what happens in this case. Labour lawyer Paul Cavalluzzo, writing in January 2015, called three recent decisions by the Supreme Court of Canada "a historic win for workers' rights" saying the Supreme Court has now defined the scope of constitutional protection for workers' rights under s. 2(d) of the *Charter*. The jurisprudence that flows from the three decisions -- *Saskatchewan Federation of Labour v. Saskatchewan*, *Mounted Police Association of Ontario v. Canada*, and *Meredith v. Canada* -- constitutes what is referred to as the new labour



"trilogy" that Cavalluzzo says "unequivocally establish[es] that freedom of association under section 2(d) of the *Charter* in the labour context protects the right of employees:

" to establish, belong to and maintain a trade union;

" to join a trade union of their choosing that is independent from management;

" to engage in a meaningful process of collective bargaining, including the right to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, and to have a means of recourse should the employer not bargain in good faith; and

" to strike."

It is of note that Cavalluzzo also writes, in summarizing one of the cases of the "trilogy," that deals with the federally legislated *Expenditure Restraint Act* ("ERA") that legislated caps on wage increases across the federal public sector for several years, that the *Charter* is not violated by imposing contract terms under "certain conditions." The ERA rolled back scheduled wage increases for RCMP members that had been previously agreed to by the Treasury Board. RCMP members challenged the law on the basis that it violated their constitutional right to collective bargaining, as recognized by the Supreme Court of Canada in *Health Services*, 2007 SCC 27.

Cavalluzzo writes regarding the decision that "[t]he Meredith case essentially amounts to a finding by the Court that the government action did not substantially interfere with the limited 'consultation' process that the RCMP had. The decision nevertheless suggests that it may be difficult for trade unions to challenge wage restraint legislation under s. 2(d) of the *Charter*, particularly where the wage restraint legislation is time-limited, imposes a wage increase that is not unreasonable, permits free negotiation of other important workplace issues, and involves government consultation prior to its enactment."



This precisely explains the attempts made by the Liberals to claim, among other things that the hearings will certainly reveal, that despite the imposed contracts, teachers and education workers were still able negotiate certain tweaks. This is also the stand being taken by the government of Nova Scotia that has currently tabled Bill 115-like legislation to impose wage freezes on all public workers in Nova Scotia. There the claim is that workers cannot negotiate the financial "parameters" imposed by government, but can negotiate certain contract language so long as it remains within a neo-liberal austerity "net-zero" framework. At the same time the Couillard Liberal government in Quebec has been trying to impose austerity on public sector workers there using the threat of imposed contracts if it does not get its way.

Writing in December 2012, shortly after the education unions' announced their Charter Challenge to Bill 115, *Ontario Political Forum* pointed out:

"One of the experiences of the Canadian working class which is important to consider to understand McGuinty's arrogance regarding the legislation and the extreme measures his government is taking to steal \$2.19 billion from education is the experience of the British Columbia health care workers. In 2007 they brought an appeal of the Health and Social Services Delivery Improvement Act (Bill 29) passed by the Campbell Liberals in 2002 to the Supreme Court of Canada.

"The decision of the court in that matter affirmed that collective bargaining is protected under the *Charter of Rights and Freedoms*. This was an affirmation of the right of workers to organize collectively to defend their interests. It is likely this is the precedent upon which the challenge in Ontario will in part base itself. In addition to this affirmation however, the decision of the Court affirmed the Liberal government's justifications for the 'crisis of sustainability' and the necessity to impose anti-worker measures as a solution. The Supreme Court in the BC case took issue with the way in which the anti-worker measures were imposed, rather than the content of its attacks. This is likely why McGuinty is very conscious of trying to promote the Provincial Discussion Table (PDT) discussions as a consultative process in which the government tried to get the unions to 'understand' the 'crisis' Ontario is in and voluntarily accept the anti-worker measures. No doubt the deal with the Catholic teachers' union at the PDT will also be cited as proof that 'some' unions understood the crisis and accepted the bitter medicine. It is also likely why McGuinty has been so vicious in trying to claim that the legislation is aimed at defending 'gains in the classroom' and presenting teachers and education workers' unions as threats to Ontario's financial well-being. He is trying to present anti-worker, anti-social measures as reasonable to 'protect children' through programs such as full day kindergarten, the same way the Campbell government argued that its measures were required to defend healthcare from a 'crisis of sustainability.' This will no doubt be cited as the high ideals of the government in court to justify its violation of rights as reasonable under the circumstances of a crisis of the government's own creation."



Opening Day of Hearing



On the opening day the courtroom originally set for hearing the case on Bill 115 was too small for the number of people in attendance. Clearly there is great interest in ensuring that the government doesn't get to pull a fast one on the workers in this case.

Thomas R. Lederer, the presiding judge, said the hearing was a "big deal" as this is a time when the balance between employers and employees is being readjusted. The case, he said, is part of the "constitutionalization of collective bargaining rights" as indicated by the Supreme Court's "new labour trilogy."

In its submission in response to the unions' challenges the government argues: "This case is about what constitutionally permissible options are available to government when it faces a looming fiscal challenge." Its lawyers argue that Bill 115 does not violate the *Charter* because the contracts were imposed only "after many months of good-faith consultation."

ETFO lawyer Howard Goldblatt began by discussing the origins of bargaining in 2012, involving ETFO's meeting with three insolvency lawyers acting for the government and their take it or leave it offer -- a scenario ETFO refers to in its submission as having to bargain "with a metaphorical gun to its head." But the meeting was voluntary, he argued, and not part of the legal bargaining process so ETFO chose to proceed instead with the school boards as its members' legal employers.



Goldblatt said the government then told the school boards to bargain as they wished, but that the results had to fit within the framework of a Memorandum of Understanding (MOU) the Ontario English Catholic Teachers Association (OECTA) had signed with the Ministry of Education, or they could be put under supervision by the province.

ETFO said Bill 115 allowed the government to impose whatever terms it wanted and prohibited the Ontario Labour Relations Board from determining its constitutionality, something it

would normally be able to do.

During the opening session, the Judge and ETFO lawyer Howard Goldblatt clarified that the reason for the hearing was the unions' concern that by enacting Bill 115 the government had treated the education sector differently than others.

Another ETFO lawyer, Steve Barrett then began the process of making arguments for ETFO's factum (legal brief for its case) and against the reply submitted by the government. He argued that all measures of meaningful collective bargaining, including the right to strike, both of which are protected by the *Charter*, were neutralized by Bill 115.

(CBC, Toronto Star, @etfocb)



Background

- Enver Villamizar -

A brief review of the context surrounding Bill 115's passage is important. The method used to impose the neo-liberal austerity agenda and the reactionary methods to deal with the people's resistance is something the Liberals have become past masters at on behalf of the ruling circles in Canada. In Nova Scotia the Liberal government there has tabled legislation similar to Bill 115

which will allow the government to impose wage freezes on all public sector workers. In Quebec the Liberal Couillard government as well as the city of Montreal are also in the midst of dictating new arrangements in the sphere of public education and public services generally based on the experience of the Liberals in Ontario.



Rally of 30,000 Ontarians on January 26, 2013 which converged on the Liberal Leadership Convention in which Kathleen Wynne was selected Premier by delegates.

Ontario's Bill 115, the *Putting Students First Act*, was passed following an agreement that was reached between the provincial government and the negotiating team of the Ontario English Catholic Teachers Association. All other teacher and education workers' unions were also engaged in a "provincial discussion table" (PDT) with the government in which their participation was voluntary since an official provincial bargaining regime was not in place then as it is today. The government nevertheless declared the OECTA MOU to be a "template" for them, with its provisions for stealing banked sick days and more from their collective agreements. The template would have to be accepted by all other unions or it would be imposed.

As part of the voluntary PDT process, the government brought the various education unions one by one to meet with their negotiating team, which was headed by none other than former bankruptcy Judge James Farley. This was the same judge who rubber-stamped Stelco's (now U.S. Steel) attempts to steal Hamilton steelworkers' pensions and benefits in its first Companies' Creditors Arrangement Act (CCAA) process. This "team" with no expertise in education and armed with their take it or leave it ultimatum to hand over banked sick days and agree to other neo-liberal arrangements in education was the first shot fired by the Ontario Liberals headed by Dalton McGuinty to try and force teachers and education workers to submit. Submit they did not however, and most then focused on negotiating with local school boards, the legal employers, as it was clear the province was only interested in dictating.

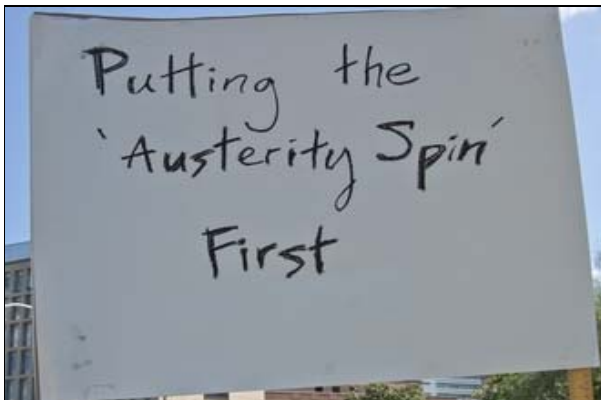
It was in this context of blackmail and threats that the OECTA negotiating team signed an MOU which was not brought to its locally elected presidents for approval -- something that raised the ire of OECTA members and showed that a fix was in by the government to try and set a pattern for

everyone. The government also bypassed the provincial Catholic Trustees Association, the third party to the PDT process, to get its deal with OECTA. Part of the manoeuver involved the government agreeing to bring in through regulation a mechanism to impose a seniority-based system for the hiring of new teachers and long-term occasional teachers. This was a major issue especially for OECTA occasional teachers whose experience with nepotism in the hiring process at local boards led them to demand such an arrangement. The government agreed to impose it through regulation as part of getting new Catholic teachers to go along with the MOU and to try and divide the members of all the unions broadly between full-time or contract teachers and newer occasional teachers. This was all part of the scheme to get a "template" to then try and make it appear as if the government had negotiated in good faith with at least one union, while the others were just being obstructive.

One of the big issues the government got OECTA to agree to in their MOU was the elimination of banked sick days, that if unused were converted to retirement gratuities for any teachers and education workers whose collective agreements provided for that. The problem was that the vast majority of OECTA members no longer had provisions for a retirement gratuity in their collective agreements. So in essence OECTA had accepted the elimination of something that already did not apply to most of its members. It did however apply in a massive way to other education unions. The OECTA MOU framework was therefore used by the government to remove over \$2 billion in banked sick days/retirement gratuities mainly from these other unions.



In the four months following its introduction Bill 115 was used to impose contracts on teachers and education workers across the board in the K-12 sector and steal over \$2.19 billion from public education, using OECTA's MOU as the template. This took the form of the unilateral cancellation of banked sick days and reduction in sick days available to teachers and education workers as well as two years of imposed wage freezes. The legislation granted the Minister of Education vast arbitrary powers over the province's teachers and education workers and their working conditions as well as locally elected school boards. The contracts it was used to impose set up the trap to criminalize teachers' and education workers' resistance in the form of their withdrawal from extracurricular activities. The Labour Board eventually declared this withdrawal illegal based on the fact that despite not being accepted voluntarily, the imposed contracts were nonetheless contracts, and thus the unions were not in a "legal" position to strike.



The government claimed it required the powers it granted itself in the legislation in order to impose a period of "restraint" on teachers and education workers. It had also prepared similar legislation for the entire public sector, making it clear that those who did not submit would face the full force of the state.

School boards were also in the government's sights. One of the boards that objected to being sidelined from negotiations that culminated in OECTA signing a MOU with the government, and whose trustees refused to sign onto it after the fact, was the Windsor-Essex Catholic Board. With Bill 115 making its way through the Legislature, on August 28, 2012 the government moved quickly to usurp the Board's authority, taking it over and placing it under a supervisor whose first act was to sign the OECTA MOU on behalf of the disempowered trustees. This was a clear message to other school boards about what awaited them should they decide not to cooperate with the government's agenda.

As this all took place, a broad movement of teachers and education workers, students and parents gained steam as people began to read the legislation and recognize that this was in fact an attack on the rights of everyone and it was important to say No! This includes rallies, petition campaigns and massive strike votes by teachers and education workers involving tens of thousands of Ontarians in the fight for the rights of all.



In the midst of imposing Bill 115 the Liberals also attempted to gain a majority in the provincial legislature through a provincial by-election they created the need for by offering a cushy position as head of the Workers' Safety Insurance Board to a sitting Progressive Conservative MPP,

Elizabeth Witmer. She accepted the offer, freeing up her seat in the riding of Kitchener-Waterloo. This by-election became a rallying point for the organized resistance of the working people who went all out to ensure the Liberals did not win the by-election, which would have given them the one seat they needed for a majority; nor did they allow the PCs to keep the seat, which they would have used to claim that the people of Ontario stood against teachers and education workers and their unions.

The NDP won an overwhelming victory in the by-election, which blocked the bogus austerity agenda and sent shockwaves through the Liberal ranks. Their premier, Dalton McGuinty, was forced to resign shortly afterwards and was followed by high-ranking Liberal MPPs including the Ministers of Finance, Energy and Education, amongst others. This set up further by-elections where the working people made more advances in holding the government to account for its vicious assaults on workers' rights and its use of funds stolen from them to pay off various monopolies.

Following McGuinty's resignation, and with the working people up in arms over it, Bill 115 was repealed, but not before being used against teachers and education workers, leaving in place the imposed contracts. Former cabinet minister in McGuinty's government, Kathleen Wynne was selected Liberal leader at a leadership convention on January 26, 2013 while some 30,000 people converged outside in the cold to demonstrate. She became an unelected premier, brought to power to quell the unrest of the working people and youth who had risen in opposition to austerity in the form of the despised Bill 115 and its premise that the government required arbitrary powers to violate rights in order to eliminate the deficit and pay the rich in other ways. Wynne's supposed "new tone," which almost exactly matches the talk today about the Trudeau government's new tone was used to "permit" the unions to negotiate some modifications to the imposed terms, but only within parameters set by the government that upheld the fraudulent austerity agenda with the claim of there being "no new money." The Wynne Liberals then set out to legislate a new provincial bargaining system in order to ensure that negotiations did not spiral out of their control in the future.

Beginning in September 2014 teachers and education workers faced another round of negotiations. This time it has been under the new two-tiered provincial/local bargaining regime in force in Ontario, but with the contracts imposed in the last round using Bill 115 as the starting point and "no new money" still the government's mantra. In this round as well the government passed legislation to give itself the power to order striking teachers and education workers back and relied on the Labour Board to do this for it showing not much has changed. The latest round is coming to an end; however none of the outstanding issues given rise to by Bill 115 have been resolved. The current legal challenge before the Superior Court is a venue where the unions will make their case against what transpired under it so as to try and obtain redress.



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