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Manitoba Federation of Labour et al. v The Government of Manitoba, 2020 MBQB 92

In a decision dated June 11, 2020, the Manitoba Court of Queen's Bench, *per* Madam Justice McKelvey, found the Government of Manitoba violated s. 2(d) freedom of association of the *Canadian Charter of Rights and Freedoms* by substantial interference in a meaningful process of collective bargaining through enactment of *The Public Services Sustainability Act*, S.M. 2017 c. 24 (PSSA) and that the violation was not justified pursuant to s. 1 of the *Charter*.

The action was brought by the Manitoba Federation of Labour (MFL) and 28 affiliated and non-affiliated unions, including three faculty associations: University of Manitoba Faculty Association (UMFA), Brandon University Faculty Association (BUFA) and University of Winnipeg Faculty Association (UWFA).

Background

Notice of the intention to introduce public sector wage legislation was provided in the Throne Speech of the new Progressive Conservative government in November 2016, and a Government committee ("Public Sector Compensation Committee") was formed in December of that year. The *PSSA* was introduced in the Manitoba Legislature on March 20, 2017 and received Royal Assent on June 2, 2020. The *PSSA* provides that it comes into effect on proclamation, but proclamation has not yet occurred. This led the Government to argue that the Court had no jurisdiction to hear a *Charter* challenge, a claim the Court ultimately rejected as, to all intents and purposes, the Government and the affected employers treated the *PSSA* as in effect anyway.

The purpose of the *PSSA* is to "create a framework" to ensure that future compensation increases to public sector employees reflect the fiscal situation of the province, consistent with "responsible fiscal management" while protecting the "sustainability of public services". Further, the *PSSA* authorized a "portion of sustainability savings" could be used to subsequently fund increases in compensation or other employee benefits. (*PSSA*, s. 1)

The Act sets out a "sustainability period" of four years based on the rates of pay on March 20, 2017. During this period, there can be no increase greater than 0% in the first and second years, 0.75% in the third and 1.0% in the fourth year. The *PSSA* was modeled on wage restraint legislation in Nova Scotia which has the same name (Bill 148, the *Public Services Sustainability (2015)* Act) and which is also facing a Constitutional challenge before the Nova Scotia Court of Appeal.

Evidence

According to the affidavit of the President of the MFL, a Fiscal Working Group of union and government representatives was created after the Throne Speech in November 2016 and met a number of times before the PSSA was introduced. However, from the onset the Government refused to consider other alternatives than legislation and in January 2017, the unions became aware from media reports that the legislation had in fact already been drafted.

Affidavits submitted to the Court by Greg Flemming, Executive Director of UMFA, along with a further affidavit by former President, Mark Hudson, were influential in the Court's findings on the impact of the *PSSA* on collective bargaining. In September 2016, the University of Manitoba proposed a general wage increase that, with market adjustments, would have resulted in a salary increase of 17.5% over a four-year collective agreement. In October, the Government became aware of the University's offer, and advised the University that public sector wage controls were likely and directed it to withdraw the monetary offer, replacing it with a one-year wage freeze. The University was also directed to not mention the Government's intervention. The result was a breakdown in bargaining that led to a one-month strike in November 2016 and a one-year settlement with modest non-monetary gains. The one-year wage pause mandated by the Government was therefore achieved.

Having reserved its right to do so in the settlement, UMFA proceeded with an unfair labour practice complaint against the University to the Manitoba Labour Relations Board alleging bad faith bargaining. The LRB found for the union and awarded $2.5M in damages.

The one-year agreement expired in March 2017 and when the parties commenced collective bargaining, the University then applied the *PSSA* four-year wage parameters and refused to implement benefit improvements negotiated in 2016. A tentative agreement was reached in August 2017 that was expressly subject to UMFA's right to return to the bargaining table for revision should the *PSSA* be found unconstitutional.

The UMFA evidence was that while it was ratified, its membership considered the 2017 agreement a "big loss" and expressed a lack of confidence in the bargaining team and dissatisfaction with the continuing payment of union dues. The relationship between the union and its members, it was submitted, was damaged in the long-term. The UMFA experience was mirrored by Unifor Local 3007, which experienced the same intransigence from the University of Manitoba based on application of the *PSSA,* and a collective agreement was ratified with the same proviso for re-opening if the legislation was found unconstitutional.

An affidavit by the Chief Negotiator for the Brandon University Faculty Association, Jon-Tomas Godin, set out the restriction on collective bargaining arising from application of the *PSSA* with Brandon University. The restriction was acknowledged by the University in a Memorandum of Understanding, and the new collective agreement was subsequently ratified with a similar statement in respect to the constitutionality of the legislation.

Other unions provided similar evidence in respect to their public sector employers engaging in bargaining on the basis of *PSSA* limitations on monetary increases. As a result, the evidentiary picture was fully developed showing significant interference in the process of collective bargaining as well as consequent dissatisfaction and unrest by the affected unions' membership.

The impact on collective bargaining was also the subject of two competing expert witness reports and testimony. Dr. Robert Hebdon of McGill University outlined the nature and mechanics of collective bargaining and expressed his opinion that the application of the *PSSA* substantially impaired the bargaining process. The elimination of bargaining on monetary provisions hollowed out the process given that the unions had no bargaining power because of the inability to trade-off monetary with non-monetary items, and the futility of going on strike simply on non-monetary issues. Indeed, the experience of UMFA in 2016 and 2017, amongst others, supported Dr. Hebdon's view. The opinion of the Government-called expert, Dr. Richard Chaykowski, maintained that the *PSSA* did not substantially interfere with collective bargaining. This view was effectively challenged in cross examination when it was noted that Dr. Chaykowski had previously taken a contrary view of wage restraint legislation impact on collective bargaining in his academic writing. Madam Justice McKelvey ultimately concluded that the evidence of Dr. Hebdon was to be preferred.

Finally, the Court considered the evidence of government witnesses who were called to support the s. 1 *Charter* claim that the financial circumstances justified interference in collective bargaining through the public sector wage controls set out in the *PSSA.* That argument was subject to an effective counter by the union expert, Dr. Eugene Beaulieu of the University of Calgary. Dr. Beaulieu noted that Manitoba was not in a fiscal crisis in 2016, and in fact made policy decisions that significantly reduced revenue. These included personal and sales tax cuts, along with significant transfers to the Province's stabilization fund, despite also borrowing money and no longer reporting revenue from two government agencies in the Government accounting reports' understated reported revenues.

These Government policies and initiatives, along with overestimating budget deficits by 10 to 30 per cent each year, could not, in Dr. Beaulieu's view, justify the attack on public sector wages. Nor, according to Dr. Beaulieu, could a claim that the Government was seeking to protect its bond rating for borrowing by controlling expenditures – that argument was also inconsistent with the decisions to reduce revenue. In the end, the evidence points to the Government attempting to create a fiscal condition that it could then use to justify public sector wage controls. This was a politically manufactured "crisis" in other words.

In reviewing all the evidence, Madam Justice McKelvey found that the public sector employers treated the *PSSA* as in effect and applicable to their collective bargaining; that the unions had demonstrated substantial interference in collective bargaining as a result of the legislation; that the expert evidence was consistent with such a finding of interference; and that the Government's policies and initiatives were a matter of political choice and not forced upon it by the fiscal condition in 2016 or afterward.

The Law and Application

Initially, the Court disposed of the jurisdictional issue whereby the Government claimed that the *PSSA* was not law as it was not proclaimed. The Court reviewed the authorities on when a statute becomes law to conclude that it was when it was passed and given Royal Assent and was not then dependent on proclamation to be "law". Further, the evidence established that the Government and employers all treated the *PSSA* as in effect and governing collective bargaining – the Court perceptively referred to the *PSSA* as the "Elephant in the Room".

The Court, however, held that there was no duty as claimed by the unions on the Government to either consult with them, or alternatively to engage in collective bargaining with them, prior to the enactment of the legislation. Madam Justice McKelvey held that the existence of a duty of pre-legislation consultation had been expressly rejected by the Supreme Court of Canada in the *BC Health Services* case, and there could also be no requirement of pre-enactment collective bargaining. In essence, the constitutionality of the legislation is determined by its content, not by a breach of a duty to consult prior to enactment. However, that does not mean consultation is not considered in *Charter* litigation as it is relevant in the s. 1 assessment as to whether there is minimal impairment of a *Charter* right and, in particular, whether alternatives were considered as may arise from a meaningful consultation process. The Court's subsequent finding that there was a limited and "perfunctory" consultation that was not meaningful, and there was no intention by the Government to seriously consider any other options than legislation, did not establish a breach of s. 2(d) through a failure to consult, but was important in the assessment of the s. 1 justification for violation of s. 2(d) claimed by the Government.

The s. 2(d) freedom of association review focused on the Supreme Court of Canada cases, *BC Health Services, MPAO* and *Meredith*[1]. The Court focused on *BC Health Services* in adopting the two-part test to establish a substantial interference in the process of collective bargaining: the importance of the matter in the process of collective bargaining and the manner in which the legislation impacts on the collective right to good faith negotiation and consultation.

Madam Justice McKelvey found that the *PSSA* "effectively removed union rights to collectively bargain any monetary terms or benefits" (*MFL*, para. 307) and thus, the first step in establishing substantial inference in collective bargaining was met. The second part was met on the evidence of the negative impact on the process of meaningful collective bargaining. In coming to the conclusion on this second element, the learned justice was required to

1. Health Services and Support – Facilitators Subsector Bargaining Assn v. British Columbia, 2007 SCC 27; Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1; Meredith v. Canada (Attorney General), 2015 SCC 2.

address the line of cases, including *Meredith* and some provincial courts of appeal[2], in which the Federal Government's *Expenditure Restraint Act* (ERA) was found to have not violated collective bargaining as protected under s. 2(d).

The Government of Manitoba maintained that the *PSSA* was similar to the *ERA* provisions and thus the findings in those cases should apply in assessing the *PSSA*. Madam Justice McKelvey disagreed, first noting that there had been collective bargaining undertaken by the affected parties prior to the passage of the *ERA* and that there were significant differences in the impact of collective bargaining on both monetary and non-monetary items under the *PSSA* as compared to the *ERA*. The learned justice proved a long list of reasons for finding substantial interference (*MFL,* para. 348).

Having found that that the *PSSA* violates s. 2(d), the Court went on to consider the application of s. 1 of the *Charter*, which provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The test for reasonable limits is set out by the Supreme Court of Canada and known as the *Oakes*[3] test which the Court then reviewed under the applicable elements.

The objective of the impugned law must be pressing and substantial

The Court agreed that the Government had made a series of policy choices that reduced and misreported its available revenue that had the effect of creating larger deficits. The Court noted the only substantial reduction in expenditure was public sector compensation.

In rejecting that the Government's claim that its objective was pressing and substantial, Madam Justice McKelvey found that the evidence did not establish Manitoba was in a difficult financial situation. There was no evidence of financial crisis or exigency. Nonetheless, for completeness, the Court went on to consider the remainder of the s. 1 analysis.

Rational connection between the Government objective and the legislation

Here the Court found for the Government, finding that while the legislative choice can be questioned, there was a rational connection in that the *PSSA* would assist in controlling public sector compensation.

Minimal Impairment

This element of the s. 1 test is a proportionality analysis that assesses the legislation to minimally impair the fundamental freedom. The Court notes that the burden is on the Government to show that the impairment found through the wage controls under the *PSSA* were the least drastic means. Madam Justice McKelvey found that the evidence established the Government did not "meaningfully consider any alternatives" to the legislation. This is where the lack of consultation comes in as noted above where the Court rejected a duty to consult or to engage in collective bargaining prior to the introduction of legislation.

The Court also found that there was no proportionality between the deleterious effects of the legislation on s. 2(d) rights and the objectives the Government had in bringing in the *PSSA*. Here again the Court noted the Government's policy choices in reducing and misreporting available revenue.

Final Balancing

In considering the overall impact of the *PSSA* on collective bargaining, Madam Justice McKelvey held that the evidence established the relationships between the unions and their membership and between the unions and the employers were negatively affected and there could be a chilling effect on future collective bargaining. More to the point, the learned justice stated:

> The Government is facilitating popular tax revenue reduction measures on the backs of public sector workers. Proportionality does not exist. (*MFL*, para. 422)

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2. Meredith v. Canada; Gordon v. Canada (Attorney General) 2016 ONCA 625; The Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General), 2016 BCCA 156; Canada (Procureur général) v. Syndicat canadien de la fonction publique, section locale 675, 2016 QCCA 163
3. R. v. Oakes, [1986] 1 SCR 103.

Significance of the *Manitoba of Federation of Labour* Case

This is obviously an important decision in advancing protection for collective bargaining under the *Charter of Rights and Freedoms*, s. 2(d) freedom of association. Further, the jurisdictional finding that the *PSSA* did not have to be formally in effect is significant as it would prevent a government from shielding legislation from challenge by the expediency of not proclaiming it, while ensuring it is applied regardless.

While we do not yet know if the Government will appeal the decision to the Manitoba Court of Appeal, this Queen's Bench decision will be helpful in two other constitutional challenges to collective bargaining restraint and wage control legislation in other provinces: Nova Scotia (Bill 148, the *Public Services Sustainability (2015) Act*) and Ontario (Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*).

The Nova Scotia case is being heard as a constitutional reference and so is proceeding directly to the Nova Scotia Court of Appeal. The Act received Royal Assent in December 2015 and proclaimed almost two years later in August 2017. On proclamation, the Government referred the Act to the Court of Appeal to determine its constitutionality. There has been and continues to be significant delay as the Government tries to block the introduction of affidavit evidence from the eight intervening unions who will be heard at the hearing and resists disclosure of cabinet documents in respect to the timing of its decision to bring in legislation.

As such, there are preliminary decisions that will have to be made by the Nova Scotia Court before the hearing on the merits can be scheduled and heard. Given this legislation was the template for the Manitoba Government in drafting the *PSSA* – even down to having the same title - the *MFL* judgment will have factual similarity in the Nova Scotia legislative provisions and likely in its effect on collective bargaining. Indeed, given the evidence and subsequent findings by the Manitoba Court, the Nova Scotia Government may double down on its efforts to avoid evidence on the impact of Bill 148 being introduced at the Court.

In Ontario, Bill 124 provides for wage caps on a wide range of public sector workers and there are a number of separate challenges filed by four Ontario teacher unions, a coalition led by the Ontario Federation of Labour that includes Ontario Confederation of University Faculty Associations (OCUFA), the Ontario Nurses Association, Ontario Public Service Employees Union and the Carleton University Academic Staff Association (CUASA).

The challenges will all be heard together at the Ontario Superior Court of Justice and the *MFL* decision will be an important addition to the argument before the Court. In that regard, the Manitoba Court's analysis is particularly significant given how Madam Justice McKelvey distinguished the *Expenditure Restraint Act (ERA)* cases the Government of Manitoba relied upon in the s. 2(d) caselaw review. Further, the s. 1 finding that a pressing and substantial objective had not been established, but rather a financial exigency was the product of Government policies, may be significant on the facts for both the Nova Scotia and Ontario cases as well. The "bootstrap" argument having been rejected in Manitoba!

The UMFA, BUFA and UWFA are to be congratulated on their role in the *MFL* case and we can all join OCUFA, CUASA and the labour movement in general in anticipating a similar positive outcome in the upcoming *Charter* challenges.