

UMFA Compensated for Wrongful Government Interference in Bargaining and the Freedom of Association

In February 2022, the Court of Queen's Bench of Manitoba ordered the Manitoba government to pay the University of Manitoba Faculty Association (UMFA) and its members significant damages arising from the government's surreptitious intervention in the 2016 round of collective bargaining. The damage award followed the Court of Appeal's confirmation that the Manitoba government's conduct substantially interfered with UMFA members' *Charter of Rights and Freedoms* right to associate. Although it is troubling that the Manitoba Court of Appeal found that the government's regressive wage restraint legislation did not violate the *Charter's* freedom of association guarantee, the condemnation of government interference in bargaining, and the subsequent damage award is a significant victory, particularly in light of increasing government interference in bargaining between academic staff associations and post-secondary institutions in several provinces.

This advisory follows the [CAUT Legal Advisory of July 2020](#).

Background

In 2017, the Pallister government in Manitoba adopted broad wage restraint legislation called the [Public Services Sustainability Act](#) ("PSSA").¹ The PSSA limited the salary increases possible for all public sector workers in Manitoba including those in post-secondary institutions. Wages were frozen for two years and pay increases were capped at 0.75% in year three and 1% in year four. UMFA and many other public sector unions challenged the legislation as breaching section 2(d) of the *Charter* (the freedom of association). UMFA claimed that the government's secretive orders and late insertion into the 2016 negotiations also violated its members' section 2(d) *Charter* rights. The Unions were successful at trial—the trial judge found that the law interfered with the right to collectively bargain (which is part of

1. S.M. 2017, c. 24. The legislation was introduced and passed, but never came into force. On November 4, 2021, the government announced the legislation would be repealed.

the freedom of association). The Court of Appeal overturned that decision with respect to the constitutionality of the legislation but upheld the trial judge's finding that Manitoba's behaviour during the 2016 UMFA negotiations breached section 2(d) of the *Charter*.

The Court of Appeal's Decision – Manitoba Federation of Labour et al v The Government of Manitoba, 2021 MBCA 85

***Charter* Analysis of the PSSA**

The Manitoba Court of Appeal ruled that Manitoba's PSSA did not substantially interfere with section 2(d) rights because it left intact some level of good faith collective bargaining. The Court of Appeal followed the Supreme Court of Canada's decision in *Meredith v. Canada (A.G.)*, 2015 SCC 2.

In *Meredith*, the Supreme Court held that the *Expenditure Restraint Act, S.C. 2009, c. 2* ("ERA")—wage restraint legislation which rolled back scheduled wage increases for RCMP members (and other federal civil servants) without prior consultation—did not violate section 2(d). The Supreme Court confirmed that a law which limits collective bargaining will only violate the *Charter* if it substantially interferes with the collective pursuit of the workplace goals.² The analysis examines the specific collective rights interfered with by the law, considers how substantial the interference is, determines whether the law effectively denies the workers' general rights to bargain collectively or strike, and evaluates whether the law still allows for some measure of good faith consultation and bargaining.³ The focus, according to the Court, should be on what kind

of process is left intact in spite of the legislation.⁴ Section 2(d) rights do not guarantee a particular kind of process or an outcome. In *Meredith*, the Supreme Court held that wage restraint legislation did not violate section 2(d) of the *Charter* because the limits imposed applied to all federal public servants, were consistent with the increases achieved elsewhere in the core public administration, and did not prohibit consultation on other compensation-related issues.⁵ Three appellate courts followed *Meredith* in denying claims by other civil servants affected by the ERA.⁶

Following the reasoning in *Meredith*, the Manitoba Court of Appeal ruled that Manitoba's PSSA does not substantially interfere with section 2(d) rights because it leaves intact some level of good faith collective bargaining. The Court appreciated that the law does not prohibit strikes, and that other than wages unions are still able to bargain numerous workplace issues such as health and safety, seniority rights, discipline, grievance procedures, and contracting out.⁷ Although there were no consultations prior to the law being passed, the effect of the legislation preserved many non-wage aspects of collective bargaining. The Court of Appeal ruled that the trial judge incorrectly distinguished *Meredith* from the case at hand.

Government Interference with UMFA's Negotiations

The Court of Appeal agreed with the trial judge that the government's conduct with respect to UMFA's negotiations with the University substantially interfered with members' *Charter* section 2(d) rights in two ways: (1) the government imposed new directives on the University's administration late in the bargaining process (and the mandate was significantly different than that which had

2. *Meredith v. Canada (A.G.)*, 2015 SCC 2 at paras. 24 and 25.

3. *Meredith v. Canada (A.G.)*, 2015 SCC 2 at paras. 28-30.

4. *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 at para. 95.

5. *Meredith v. Canada (A.G.)*, 2015 SCC 2 at paras. 28-30.

6. *Canada (Procureur général) c Syndicat canadien de la fonction publique, section locale 675*, 2016 OCCA 163 (Syndicat canadien), leave to appeal to SCC refused, 36914 (25 August 2016); *Federal Government Dockyard Trades and Labour Council v Canada*

(Attorney General), 2016 BCCA 156 (Dockyard Trades), leave to appeal to SCC refused, 35569 (1 December 2016); and *Gordon v Canada (Attorney General)*, 2016 ONCA 625, leave to appeal to SCC refused, 37254 (16 February 2017) all as summarized in *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 at paras. 62 to 71.

7. *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 at para. 119.

already been offered by the administration); and (2) the government instructed the University not to reveal those directives.⁸

Damages for Wrongful Government Interference in Bargaining – *Manitoba Federation of Labour et al v. The Government of Manitoba*, 2022 MBQB 32

Following the Court of Appeal's decision, the question of remedy went back to the trial judge.⁹ UMFA claimed damages in the millions of dollars to compensate for the provincial government's behaviour and the resulting losses suffered by UMFA and its members.¹⁰

Justice McKelvey found it particularly egregious that the provincial government ordered the University to keep secret its meetings and directions. She found that the order to the University to withdraw the 17.5 percent wage increase proposal after it had already been agreed greatly harmed the trust between UMFA and the Administration—as well as between UMFA's members and the bargaining team.¹¹ Thus, *Charter* damages would serve the purpose of promoting the value of section 2(d) rights.¹²

The judge awarded \$19,432,277.45 in damages:

- \$15 million to the membership (to compensate for the percentage salary increase they might otherwise have had);
- \$2,829,081.80 to UMFA to compensate strike expenses (strike pay from the strike fund, additional costs, health benefits, and operating a strike office outside campus); and

- \$1,603,195.63 in lost salary for UMFA's members because of the strike.

Were it not for Manitoba's imposition of a late mandate, and the forced secrecy, the strike could have been avoided.¹³ UMFA and its members incurred real losses, and their rights merited vindication. In addition, damages would serve as a deterrent for similar government activity in the future.¹⁴ Justice McKelvey concluded that a declaration would not be sufficient.¹⁵

8. At paras. 148 and 153.

9. The damages award went back to the trial judge because assessing loss and causation are factual determinations. Appellate courts typically do not engage in fact finding.

10. Previously, in *University of Manitoba Faculty Association v University of Manitoba*, 2018 CanLII 5426 (MB LB), the Manitoba Labour Board ordered the University of Manitoba to pay \$2.5 million in damages to UMFA for failing to bargain in good faith. The failure was that the University did not disclose the new directives issued by the government. There were no *Charter*

damages awarded and the Manitoba Government was not a party

11. *University of Manitoba Faculty Association v University of Manitoba*, 2022 MBQB 32 at para. 23.

12. In *Ward v. Vancouver (City)*, 2010 SCC 27, para. 44.

13. *University of Manitoba Faculty Association v University of Manitoba*, 2022 MBQB 32 at para. 51.

14. *University of Manitoba Faculty Association v University of Manitoba*, 2022 MBQB 32 at para. 44.

15. *University of Manitoba Faculty Association v University of Manitoba*, 2022 MBQB 32 at para. 44.