Case In Point

Manitoba Court of Appeal Upholds Public Sector Wage Restraint Legislation

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In *Manitoba Federation of Labour et al v The Government of Manitoba*, the Manitoba Court of Appeal upheld the province's public sector wage restraint legislation that had previously been ruled unconstitutional. The Court based its decision on the fact that the impugned legislation was broad-based and time-limited, and that it preserved a process of consultation and negotiation on other workplace matters.

The *Public Services Sustainability Act* (*PSSA*) was tabled in 2017 by the Manitoba government but has not yet been proclaimed into law. Once in force, the legislation imposes a four-year "sustainability period" in which wages and "additional remuneration" cannot be increased during years one and two, and which are capped at increases of 0.75% and 1% during years three and four. A retroactive element of the *PSSA* would also invalidate past collective agreements or arbitral decisions which granted increases inconsistent with these limits. Upon proclamation, the *PSSA* would impact approximately 120,000 public sector workers in Manitoba. The challenge to the constitutionally of the *PSSA* was brought before the legislation came into force.

The Trial Decision

In June 2020, Justice McKelve of the Manitoba Court of Queen's Bench deemed the *PSSA* unconstitutional for violating section 2(d) (freedom of association) of the *Canadian Charter of Rights and Freedoms*. Justice McKelve referred to the legislation as "draconian" and concluded that it substantially interfered with collective bargaining on monetary terms or benefits: "[t]he legislation circumvents and compresses the leverage or bargaining power available and inhibits the unions' ability to trade off monetary benefits for non?monetary enhancements." Justice McKelve also pointed to objective data, citing that of the 21 collective agreements settled since the introduction of the *PSSA*, each one had only achieved "minor improvements." Justice McKelve referred to the *PSSA* as creating duress and a "take it or leave it" scenario for collective bargaining.

At the Appellate Level

The Court of Appeal considered the constitutional validity of the *PSSA* to be a question of law, and it therefore applied the standard of correctness to its review.

Specifically, the Court found the trial judge made multiple errors when she distinguished the instant case from *Meredith v. Canada (Attorney General)* (a recent decision of the Supreme Court of Canada in which it upheld comparable wage restraint legislation). Ultimately, the Court held that the *PSSA* did not substantially interfere with section 2(d) rights because the legislation was broad-based and time-limited, and did not deny a meaningful collective bargaining process from still taking place.

The Court relied heavily upon *Meredith* and recent appellate-level decisions regarding section 2(d). This line of case law requires that a "substantial interference" with section 2(d) be shown in order to prove a *Charter* violation. The Court articulated the applicable two-prong test as follows:

Determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries: first, whether the measure substantially impacts the capacity of the union members to come together and pursue collective goals in concert; and second, whether the measure impacts on the collective right to

good faith negotiation and consultation. [at para 127, quoting from the Supreme Court of Canada decision *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*]

Manitoba conceded that the first inquiry was met, as wage caps met this criterion.

The second criterion focused on “good faith; does Manitoba’s conduct respect the fundamental precept of collective bargaining—the duty to consult and negotiate in good faith…?”

The Court held that the *PSSA* did not remove the ability of unions to engage in collective bargaining and consultation with the province over other workplace matters unrelated to wages. In this regard, it listed a number of workplace issues which are untouched by the *PSSA* and which remain as important bargainable issues: health and safety issues; seniority and bumping procedures; disciplinary procedures; grievance procedures; reclassification issues; performance appraisals; recruitment and retention; contracting out; and job security, including no-layoff clauses.

Additionally, and in contrast to Justice McKelve, the Court used the fact that 21 collective agreements had been settled in light of the *PSSA* as evidence that the legislation did not eliminate the collective bargaining process. It stated that “[w]hile it must be noted that acceptance of the agreements was conditional on the *PSSA* being constitutional, the fact remains that bargaining continued for those unions wanting to participate in such a process.” The Court was particularly critical of the trial level decision on the issue of process. It noted that “[t]here is no legal prerequisite on governments to consult or negotiate prior to passing legislation. Yet, [Justice McKelve] uses the lack of prior collective bargaining as a reason to support her conclusion that the *PSSA* is unconstitutional.”

Going Forward

The decision is helpful for governments which have enacted or are considering enacting wage restraint legislation. The Court’s focus on preserving the collective bargaining process affirms the precedent set by *Meredith* and adds to mounting section 2(d) *Charter* jurisprudence. This decision is clear that a government can introduce wage restraint legislation so long as it preserves some ability for unions to negotiate on other workplace matters and offer consultation throughout the process.

The Manitoba Federation of Labour has indicated it is considering appealing the decision to the Supreme Court.

Editor’s Note: On October 27, 2022, the Supreme Court of Canada denied leave to appeal this decision.