

Labour & Employment

McGill law professors not surprised labour board certified their union

By **Luis Millán**

(November 15, 2022, 11:40 AM EST) -- Almost a year to the day when McGill law professors formally launched proceedings to become recognized as an exclusive bargaining unit for faculty members, the longer than expected legal battle culminated with an unequivocal victory after the Quebec labour board granted certification, a first for professors in the university's 200-year history.

The "slam dunk" decision by the Quebec Administrative Labour Tribunal sets the stage for changes to the labour landscape at McGill, with the new union intending to flex its muscles over a growing inclination towards centralization at the university, safeguard the collegial governance at the faculty level and negotiate a collective agreement that will provide better working conditions and security, according to leaders of the Association of McGill Law Professors (AMPL).

"We will be directed entirely by the will of our members, and we'll seek to include within our collective agreement security around those matters that are most important to our members," said Evan Fox-Decent, McGill law professor and interim president of the AMPL. That includes, he said, "matters having to do with the governance of our faculty, matters having to do with hiring, possibly matters having to do with merit allocations, matters having to do possibly with how we distribute shares and awards."



Evan Fox-Decent, McGill University

"There's a whole sort of smorgasbord of things that frankly have been more or less outside the reach of our members to play an active role in managing or governing, even though we do have a faculty council."

Quebec labour board adjudicator Jean-François Seguin held that the AMPL could follow in the footsteps of the Université de Sherbrooke

and York University and establish a bargaining unit that represents only their faculty. At the Eastern Township-based university, engineering professors have their own separate union while at York, professors at Osgoode Hall Law School are unionized through the Osgoode Hall Faculty Association, with remaining faculty members under the York University Faculty Association. The overwhelming majority of Canadian professors are unionized as less than a handful are not represented by a certified bargaining unit.

Seguin found that the AMPL met under the so-called greenfield context — or in workplaces where there are no other bargaining units — every single one of the five legal criteria to be accredited as a union under the provincial *Labour Code*. Under Quebec case law, would-be bargaining units must demonstrate that there is a community of interests, a will of employees, that they are bound geographically or organizationally independent, and that its entity would not harm industrial peace.

“Frankly, we weren’t surprised by the outcome,” remarked Richard Janda, interim secretary of the AMPL and a McGill law professor who teaches extracontractual obligations, business associations, administrative process and environmental law. “The judge really did seem to make that very clear in decision that this is not a close call. McGill is not unionized, at least the professors are not unionized and so the overall orientation of the *Labour Code* is that, as the judge took pains to demonstrate, is actually to favour certification, unless a quite high burden is met by the university to show that it wouldn’t make sense to certify. And that very high burden simply wasn’t met.”

McGill University will be examining the decision “thoroughly,” said an unnamed spokesperson in an e-mail to *The Lawyer’s Daily*. The university considers that the unit proposed by the petitioning association to be “inappropriate,” as none of the current bargaining units or staff associations cover a single faculty. “Nonetheless, the university acknowledges the decision,” said the spokesperson. There are 14 unions at McGill, none of which represent professors, except for the AMPL initiative.

If McGill decided to seek judicial review it would be “perilously close” to vexatious given the “slam dunk nature” of the decision, maintains Fox-Decent, who teaches judicial review of administrative actions. “The judge leaves no doubt whatsoever that we don’t simply meet each of the individual criteria, but in most cases, far surpass them,” added Fox-Decent, Canada Research Chair in Cosmopolitan Law and Justice. “And that collectively, there’s just no question that we are a distinctive group, and we have a capacity to represent ourselves. McGill certainly has the capacity to enter into collective marketing negotiations with us, which is essentially the test.”

The head of the Canadian Association of University Teachers (CAUT), David Robinson, was far from certain that it would be a cinch for McGill law professors, giving them odds of 60-40, if only because the Quebec labour board is “a little bit different” from other labour boards across the country. “I was kind of worried about this issue of the integrity of the bargaining unit, or whether a small sub unit within a larger workplace when people are doing the same kinds of jobs so whether they would allow that to happen,” said Robinson, whose organization provided the AMPL with financial backing. “But they did accept the argument that the Faculty of Law was, in a sense, a unit within the institution.”

Now the hard work begins, and it hinges on co-operation between the two sides, something that is far from a given, even if the university does not seek judicial review, said Robinson. The makeup of the bargaining unit will likely be a source of contention as the AMPL is considering including associate deans, joint appointees and people who are appointed to positions that are convertible into tenure track jobs but who do not yet formally have a tenure track position. “The administration is going to play a little bit tough when it comes to defining who’s eligible to be a member of the bargaining unit,” predicted Robinson. “This isn’t unusual when a group is certified and when we try to define who can be eligible to be a member. We often get some pushback so we may have to go back to the tribunal at some point for a ruling on eligibility.”



Robert Leckey, McGill Faculty of Law dean

Also potentially in question is the leeway granted to the dean to manage the Faculty of Law. The adjudicator found that McGill's Faculty of Law has its own teaching, research and administrative culture, with its own academic, administrative, human resources and communication staff. The faculty also sets its own conditions regarding salaries, working hours, promotion opportunities, credits, supervision, teaching support, funding, grants and scholarships and professional development — much of which is determined by Faculty of Law dean Robert Leckey. In testimony, Leckey explained that he has the final word on assignments, administrative load, and teaching load. Leckey also testified that the faculty has its own expectations and criteria for the accreditation of professors, and confirmed that the university's Provost never meets the candidate and has never refused an application.

What's more, Leckey has an agreed margin with the provost, specific to the faculty, in terms of salary negotiation at hiring. Leckey is also responsible for merit reviews, an annual exercise where professors meet with the dean to discuss salary increases, usually a flat increase of around 1.3 per cent, a figure that might be boosted by another two-to-three per cent depending on merit allocation, said Fox-Decent. "Some of our colleagues may wish to revisit how we allocate merit, may wish to suggest that there'd be a committee that works with the dean or works independently of the dean," explained Fox-Decent. "We have not had the opportunity to discuss this with our colleagues, but I do expect that it will be at the very least a topic of conversation."

Another issue that will undoubtedly be the source of negotiations is McGill's growing push towards centralization, the *raison d'être* behind the formation of the union, said Janda. Over time university officials have shunted aside the strength of the university, the faculties' capacity to govern themselves, in lieu of centralization, a shift exemplified by the administration's stand on COVID-19 in August 2021, added Janda. "Academic staff are not permitted to determine, unilaterally, that they will teach remotely rather than in person," said a letter penned by Christopher Manfredi, McGill's provost and vice-principal academic, adding that fear about campus safety or concern about relatives who might be at heightened risk or exposure to COVID-19, including those living under the same roof are not "valid reasons for granting permission to teach remotely."

"The university of today has become a much more corporate body that's symbolized by the fact that the moniker used by the university itself for its own administrative apparatus, as they call it, Central," noted Janda. "We think there's a need to strike a better

balance. We hope that collective bargaining will get us there.”

AMPL leaders acknowledge that their efforts will be under the spotlight, given that there’s a question mark over whether other faculties may follow suit. “Without being too cynical or paranoid about it, I think we know that the first round of collective bargaining can also be about trying to expose fractures, divisions in the bargaining unit, get second thoughts among people as to whether they really want this,” said Janda. “So it’s exciting that we have this possibility, but it’s also something that we have to handle responsibly and carefully.”

In the meantime, while waiting for McGill’s decision on whether it will seek judicial review, the AMPL will hold elections within two weeks, fulfilling a promise that interim officers made that they will resign once certified.

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