Delay in Alberta Public Sector Arbitration: Responsible Measure or Illegal Attack?

Introduction: *Public Sector Wage Arbitration Deferral Act*

On June 28, 2019, the *Public Sector Wage Arbitration Deferral Act* became law in Alberta.[1] The Act suspends and delays binding wage arbitrations between various public sector unions and their members' employer – the provincial government. The delay affects 24 collective agreements and impacts 180,000 public sector employees.[2] The Act has caused considerable controversy within Alberta's labour movement. United Nurses of Alberta (UNA) President Heather Smith says that the Act is the "biggest betrayal by government" that UNA has seen.[3] However, Alberta Finance Minister Travis Toews says that the Act is "simply a postponement of process" to responsibly consider the province's finances to "bring [them] into balance."[4]

Court challenges against the Act have been initiated by public sector unions including UNA and the Alberta Union of Provincial Employees (AUPE).[5] The unions believe that the *Public Sector Wage Arbitration Deferral Act* is an infringement on collective bargaining rights and is unconstitutional because it "substantially interferes" with the ability for public sector unions to have a meaningful collective bargaining process.

Responsible Measure or Unconstitutional Attack?

The Act delays upcoming and suspends ongoing arbitration between the province and public sector unions until after October 31, 2019.[6] Of note, arbitrations with "wage-reopener" clauses, which could have led to increased wages for some union members, are being delayed. For example, AUPE and UNA signed three-year collective agreements with the provincial government with a 0% wage increase for members in the first two-years. However, the third year of the agreement included a "wage-reopener" clause where binding arbitration would revisit wage increases moving forward.[7] The Act delays arbitration in the third year of the collective agreement for the "wage-reopener" deliberations.

Public sector unions view the Act as an attack on the collective bargaining process and an affront to their negotiated collective agreements. Collective agreements are the reason unions exist – the agreements govern wages and working conditions for members, and they come to life through extensive negotiations between employers and the unions which represent workers. For this reason, unions consider legislation that changes negotiated collective agreements to be an attack on the legitimacy of the collective bargaining process.[8] Further, the unions relied on the collective agreement schedules to have a timeline for when their members could see increased wages after two years with no increases. According to the Statement of Claim for UNA, "this was particularly important"

to them.[9]

The Alberta government, however, justifies the arbitration delay so that they can "fully understand Alberta's economic situation." The government believes that they "owe it to Albertans, and all public sector workers, to come to the table with information on the state of our economy and the impact it will have on our finances, so we can make responsible and informed decisions." Finance Minister Toews says that it would be "fiscally irresponsible" to conduct the arbitrations without having a better understanding of the province's finances.[10]

Opposition Leader Rachel Notley disagrees. She believes that the Act is a "fundamental breach of the constitutional rights of unionized employees."[11] Is the Act a responsible and prudent measure or an attack on the constitutional rights of unionized employees? Would a constitutional challenge of the Act have a chance at succeeding?

The Legal Framework: "Substantial Interference"

Section 2(d) of the *Charter* – the right to freedom of association – governs collective bargaining rights.[12]Since 2007, when the Supreme Court of Canada (SCC) first interpreted the section to protect collective bargaining, the Court has increasingly sided with unions to expand these rights. Justice Rosalie Abella, justifying this trend, wrote in an important case that "the arc bends increasingly towards workplace justice."[13] The Court has also stated that the right to freedom of association for collective bargaining must be "interpreted generously and purposively."[14]

The SCC has developed the "substantial interference" test to determine if government intervention in the collective bargaining process is a breach of the *Charter*. In short, government action will be deemed to offend the *Charter* if it "substantially interferes" with the process that allows workers to join collectively and advocate for their interests.[15] Without this process, unionized employees would be left "essentially powerless" to influence the terms of their employment.[16] It is important to note that the "substantial interference" test looks to the effect, and not the intent, of government action.[17]

Section 2(d) guarantees a right to process and not a guaranteed result from negotiations. The SCC stated that "a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals."[18] Legislative action that bans "recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power" would not be allowed.[19] One way to interfere with the process is to "set up a system that makes it impossible to have meaningful negotiations on workplace matters."[20] If government action is found to substantially interfere with the process of collective bargaining, then it will be deemed to be a *Charter* violation. The burden would then fall to the government to try and justify the Act under s 1 of the *Charter*.

Conclusion: Does the Act 'substantially interfere' with collective bargaining?

The public sector unions will argue that the Act breaches s 2(d) by "substantially interfering" with their right to a meaningful process of collective bargaining. The unions will argue that by unilaterally delaying the process of arbitration until after October 31, the province undermined, or made impossible, their ability to fairly advocate for their members' collective interests.

In response, the provincial government could argue that the delay of arbitration is not substantially interfering in the process. The province could argue that if arbitrations proceed after October 31st, then any interference with the collective bargaining process should not be classed as "substantial" since the proceedings would only be delayed by 4 months. If the Act is found to breach s 2(d), the province could try and justify the move under s 1 of the *Charter*, by claiming that taking time to understand the province's finances is a valid legislative objective and minimally impairs freedom of association rights.

Given the SCC's expansion of collective bargaining rights, and their assurances that "the arc bends increasingly towards workplace justice,"[21] there is a strong case that the *Public Sector Wage Arbitration Deferral Act* substantially interferes with collective bargaining rights. While the Act may be a good faith attempt by the provincial government to understand the province's financial situation, it is the effect of the law, and not the intent, that will be judged. The effect is continued delay and uncertainty in the collective bargaining process for the affected public sector unions and their members. Whether this amounts to a "substantial interference" in the collective bargaining process will be determined by the courts.

[1] SA 2019, c P-41.7.

[2] Government of Alberta, "Public sector wage arbitration deferral" (13 June 2019), online: *Government of Alberta* <alberta.ca/public-sector-wage-arbitration-deferral.aspx>.

[3] Michelle Bellefontaine, "Bill 9 seeks delay in wage talks for teachers, nurses, government workers until Oct. 31" (13 June 2019), online: *Canadian Broadcasting Company* <cbc.ca/news/canada/edmonton/bill-9-seeks-delay-in-wage-talks-for-teachers-nurses-government-workers-until-oct-31-1.5174689>.

[4] Clare Clancy, "'Egregious attack': Unions warn of labour unrest as province introduces bill to delay wage talks" (13 June 2019), online: *Edmonton Journal* <edmontonjournal.com/news/politics/province-introduces-bill-9-to-delay-wage-talks-with-unions> [Clancy]. The provincial government is waiting for advice from "the blue-ribbon panel," which has been tasked to investigate Alberta's finances and report with recommendations for cost-cutting measures.

[5] Alberta Union of Provincial Employees, "Bill 9 Update: Injunction Hearing Scheduled" (2 July 2019), online: *AUPE* <aupe.org/news/bill-9-update-injunction-hearing-scheduled/>;

United Nurses of Alberta, "UNA asks court to declare Bill 9 of no force or effect on constitutional grounds" (3 July 2019), online: *UNA* <una.ab.ca/1010/una-asks-court-to-declare-bill-9-of-no-force-or-effect-on-constitutional-grounds>.

[6]*Supra* note 1, s 2. See also Dean Bennett, "Alberta finance minister won't guarantee delayed union arbitration will occur" (19 June 2019), online: *Global News* <globalnews.ca/news/5410608/alberta-delayed-union-arbitration-labour-talks/>. Finance Minister Toews won't "guarantee" that government plans to continue arbitration after October 31, 2019.

[7] "The Ledge: Is Bill 9 a delay in process or an attack on unions" (14 June 2019) at 00h:01m:25s, online (podcast): *CBC: The Ledge* <cbc.ca/news/canada/edmonton/alberta-bill-9-arbitration-unions-public-sector-1.5176485>. For reference, a binding arbitration is where both parties to a labour dispute (in this case the provincial government and the public sector union) present their case to an independent arbitrator, and the arbitrator resolves the dispute. Both parties are then bound by the arbitrator's ruling, subject to appeal.

[8] *Ibid* at 00h:03m:15s.

[9] *United Nurses of Alberta v Alberta* (Statement of Claim) at para 20, online: *Untied Nurses of Alberta* <https://www.una.ab.ca/files/uploads/2019/7/Statement_of_Claim.pdf>.

[10] Government of Alberta, "Public sector wage arbitration deferral: Minister Toews" (13 June 2019), online: *Government of Alberta* <https://www.alberta.ca/release.cfm?xID=6404337BF7412-9BE7-8A84-A881D4C288598EA9>.

[11] Clancy *supra* note 4.

[12] *Canadian Charter of Rights and Freedoms,* s 2(d), Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[13] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 1 .

[14] *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 32 .

[15] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 81 . The Court states: "s. 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The government therefore cannot enact laws or impose a labour relations process that substantially interferes with that right."

[16] *Ibid* at para 68.

[17] *Fraser supra* note 14 at para 33.

[18] *MPAO supra* note 15 at para 71.

[19] *Ibid* at para 72.

[20] *Fraser supra* note 14 at para 42.

[21] *SFL supra* note 13 at para 1.