Alberta and its Physicians Clash Over a Right to Something Besides Striking

On 9 April 2020, the Alberta Medical Association (AMA) filed a lawsuit against the Government of Alberta alleging the Government violated the rights of the AMA and its members by unilaterally terminating a contract between the AMA and the Government.[1] The AMA represents physicians in Alberta, with one of its key roles being to negotiate with the Government on their behalf.[2] They claim the Government of Alberta violated their members' *Charter* right to freedom of association.[3] This right protects employees' ability to bargain collectively with employers – allowing employees to negotiate with employers more effectively.

The Dispute Between the AMA and the Government of Alberta

The AMA's claim centers on the Government's decision to unilaterally end the previous operating agreement between the AMA and Government. Provincial governments across Canada sign agreements with medical associations like the AMA which determine pay, working conditions, and other important features of physician life. In Alberta, the *Alberta Health Care Insurance Act* ("*AHCIA*") governs these agreements.[4] In November 2019, with the previous agreement between the AMA and Government expiring, they began negotiating a new agreement.

About a month into the negotiations, the Alberta Government passed the *Ensuring Fiscal Sustainability Act*.[5] This amended the *AHCIA* to allow the Minister of Health to terminate agreements made under the *AHCIA*. This included the agreement with the AMA. And, in February 2020, the Minister ended that agreement.[6] By terminating the agreement with the AMA, the Minister ended the bargaining process. The previous agreement included the right to enter arbitration, allowing an arbitrator to resolve the remaining disagreements. When the Minister terminated this agreement, this option was eliminated.

Section 2(d): Freedom of Association

The key *Charter* issue raised by the AMA concerns the right to freely associate. They allege that the Government violated this right by unilaterally terminating their previous agreement. The *Canadian Charter of Rights and Freedoms* guarantees everyone freedom of association.[7] In the 1980s and 1990s, the Court interpreted the freedom of association differently – it did not include the right to bargain collectively or to strike.[8]

Since 2015, the courts have taken a different approach. In a trilogy of cases, the Supreme Court clarified that section 2(d) protects the right to collective bargaining and the right to strike.[9] This means that if a government refuses to bargain with employees as a group,

they may be in breach of their *Charter* rights. Also, since employees have a right to strike, the government cannot force them to keep working. An example of a section 2(d) violation is a 2015 Saskatchewan law which defined "essential" services and barred employees in these services from striking.[10] This violated the employees' right to strike.

A government action or law violates employees' freedom of association if it "substantially interferes" with their ability to bargain collectively or to strike.[11] Substantial interference is anything that seriously hinders the employees' ability to exercise these rights. For example, by barring striking altogether, the Saskatchewan law discussed above substantially interfered with the employees' right to strike. On the other hand, a law which forces a single wage change does not violate this right.[12] Such a law does not substantially interfere with the employees' ability to bargain collectively or strike.[13]

The Alberta Medical Association's Section 2(d) Argument

The Alberta Medical Association claims the Government of Alberta violated their right to freedom of association by terminating their previous agreement, and thus substantially interfering with their right to bargain collectively.

Normally, when collective bargaining breaks down, employees can strike. Section 2(d) protects this right because striking, and the threat of striking, helps employees have roughly equal bargaining power with employers.[14] However, the AMA and its members refuse to strike for ethical and professional reasons. The AMA argues the Government must provide an alternative means of resolving disputes. The previous agreement between the Government and the AMA contained such a mechanism. After 90-days of "good faith" bargaining, the parties would submit to arbitration, where a third-party arbitrator would resolve the dispute. This solution was lost when the Government terminated the previous agreement. As a result, the AMA was left with no mechanism for resolving disputes.

The main issue for the court to decide is whether the Government's unilateral termination of the previous agreement constitutes a substantial interference with the AMA's right to bargain collectively. The answer may depend on how the court views the AMA's decision to not strike. Normally, when the Government removes striking as an option, it must give employees some alternative means of reaching an agreement.[15] Here, it is the AMA, and not the Government, that has removed the option of striking. Whether the Government breached the AMA's rights may thus depend on whether the *Charter* requires the Government provide an alternative dispute resolution mechanism.

Recently, the Supreme Court ruled that similar legislation in B.C. was unconstitutional.[16] There, B.C. legislation removed terms from an agreement between the Government and the British Columbia Teachers' Federation – a group representing school teachers in the province. Much like the Alberta law, the B.C. law unilaterally terminated a prior agreement. The Court found this to be a substantial interference with the teachers' right to bargain collectively. However, unlike the Alberta law, the B.C. law prohibited future collective bargaining on certain issues entirely. This clearly qualified as substantial interference. The substantial interference test is always "contextual and fact-specific".[17] The specifics of

each scenario may change the outcome dramatically.

Section 1 – Balancing Rights

If the court decides that the Government has violated the AMA and their member's section 2(d) right to bargain collectively, the Government will have an opportunity to justify its violation. Section 1 of the *Charter* allows for the balancing of rights. If a government can justify its infringement of a right, the infringement will be allowed. In this case, if the AMA shows that the Government's actions violated their rights, the Government could in turn try to justify this violation. There are several steps a judge must take to determine if the violation is justified.

One particularly important step is to determine if the violation of the right "minimally impairs" the AMA's right to freedom of association. For a violation of a *Charter* right to be justified, the Government's violation of the right must be the least impairing option that is reasonably possible to achieve the Government's objective.[18] If the Government can achieve its goal in a reasonable way which impairs the right less, the violation will not be justified. The Government's objective in terminating the agreement is likely to save Albertans money by paying physicians less.[19] The question at this stage would then be: does unilaterally terminating the agreement achieve this goal in a way which least impairs physician's right to bargain collectively? The Government will make arguments that it is, the AMA will argue that other methods were available.

Conclusion

By terminating the agreement with the AMA, and denying physicians the opportunity to arbitrate as their previous agreement allowed, the Government of Alberta has forced a difficult choice on the AMA: strike or accept our terms. This leaves physicians the option of legally striking, a decision which would leave Albertans without access to essential healthcare services. Because they refuse to strike for ethical reasons, the AMA is left with no meaningful way to negotiate.

Employees in Canada have a right to bargain collectively with their employers. Governments violate this right when they substantially interfere with employees' ability to do so. The courts will decide whether leaving the AMA with the choice of striking or accepting the Government's terms, rather than negotiating an agreement or entering arbitration, violates the AMA's *Charter* rights.

[1] See Demi Knight "Alberta Medical Association files lawsuit against provincial government", *Global News* (9 April 2020), online: <www.globalnews.ca/news/6799757/alberta-medical-assocation-files-lawsuit-against-provincial-government/>.

[2] *Alberta Health Care Insurance Act*, RSA 2000, c A-20.

[3] *Alberta Medical Association (CMA Alberta Division), Dr. Christine Molnar, Dr. Paul Boucher, and Dr. Alison Clarke v Her Majesty the Queen in Right of Alberta* (9 April 2020),

Edmonton QB (Statement of Claim), online (pdf): <www.albertadoctors.org/News pdfs/ama-statement-of-claim-apr-9-2020.pdf>.

[4] *Ibid*, s 40.1

[5] *Ensuring Fiscal Sustainability Act*, SA 2019, c 18.

[6] See OC 039/2020 (2020).

[7] *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 .

[8] See Mia Reimers, "Freedom of Association: The Constitutional Limits of Union Rights", *Centre for Constitutional Studies* (30 October 2014) online: <https://www.constitutionalstudies.ca/2014/10/freedom-of-association-the-constitutional-limits-of-union-rights/#righttostrike>.

[9] See *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1; *Meredith v Canada (Attorney General)*, 2015 SCC 2; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 .

[10] See *The Public Services Essential Services Act*, SS 2008, c P-42.2.

[11] See *SFL*, *supra* note 9 at para 78.

[12] But see *Manitoba Federation of Labour et al v The Government of Manitoba*, 2020 MBQB 92 at paras 307-349.

[13] See *Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)*, 2013 BCCA 371, leave to appeal to SCC refused, [2013] SCCA No. 404.

[14] See *SFL*, *supra* note 9 at para 55.

[15] *Ibid* at para 4.

[16] See *British Columbia Teachers' Federation v British Columbia*, 2016 SCC 49.

[17] *Health Services and Support-Facilities Subsector Bargaining Assn. v BC*, 2007 SCC 27 at para 92.

[18] See *R v Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC) at para 122.

[19] Dean Bennett, "Alberta doctors say a budget figure a deep salary cut when fee changes kick in", *CBC News* (28 February 2020), online: <www.cbc.ca/news/canada/edmonton/alberta-doctors-budget-cut-1.5480980>.