Alberta Doctors' Digest

Alberta Union of Public Employees vs Alberta

One of the first pieces of legislation introduced by the new Alberta government this last spring was *Bill 9*, the *Public Sector Wage Arbitration Deferral Act*. This legislation was passed as a result of the refusal of various public sector unions to agree to delay arbitrations for wage settlements arising from the “wage-reopener” provisions in year three of their respective collective agreements. The effect of the act was to defer decisions on arbitrations until the end of October to allow the government’s analysis of economic conditions in the province to be completed.

The Alberta Union of Provincial Employees (AUPE), the first union affected, lost no time in challenging the legislation, claiming in its statement of claim a breach of its right to freedom of association under s. 2(d) of the *Charter of Rights and Freedoms*. Given that the merits of their case would not be heard for a period of time, and wishing to continue with its arbitration with the government, AUPE also filed an application seeking an injunction, preventing the implementation of the legislation in the interim (and thus allowing the arbitration to proceed).

Ordinarily, an injunction would not be granted by the court as the Alberta *Proceedings Against the Crown Act* forbids a court from granting an injunction against the Crown (deferring to what is referred to as a “declaratory judgment”). However, in Alberta, constitutional proceedings provide for an exception to this ban, and thus the application proceeded before Justice Macklin of the Court of Queen’s Bench of Alberta.

In his highly publicized and controversial decision, Justice Macklin granted the AUPE’s application to stay the implementation of the *Public Sector Wage Arbitration Deferral Act*.

In considering the AUPE’s application, Justice Macklin applied the well-known three-part test for an interim injunction set out in the Supreme Court of Canada 1994 decision in *RJR-MacDonald Inc*. *vs Canada*, which requires an applicant to demonstrate the following:

1. There is a serious issue to be tried.
2. Irreparable harm will be suffered if interim relief is not granted.
3. The balance of convenience between the parties favors the applicant.

Was there a serious issue to be tried?

The court held that the first stage of the test had been met and the serious issue to be tried is whether *Bill 9* interferes with the AUPE’s s. 2(d) right to freedom of association under the *Canadian Charter of Rights and Freedoms*. Specifically, Justice Macklin was concerned that the ability of one party to unilaterally change the terms of a collective

agreement infringed upon the balance of power protected by s. 2(d). The court stated as follows:

[28] By effectively rendering aspects of the collective agreement inoperative, *Bill 9* then calls into question the value of associating for the purposes of collective bargaining and entering into a collective agreement. As stated in *British Columbia Teachers' Federation vs British Columbia*, 2015 BCCA 184 at para 285:

The act of associating for the purpose of collective bargaining can ... be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory.

[29] As outlined below, an arbitration within specified timelines is a substantive term of the collective agreement. *Bill 9* is a unilateral nullification of that term. *Bill 9*, therefore, may have an impact on the s. 2(d) charter right to freedom of association since it raises the issue of whether it makes collective bargaining between the government and employee representatives effectively impossible (see *Meredith vs Canada [Attorney General]*, 2015 1 SCR 125, 2015 SCC 2 at para 45; BCTF at para 295).

[30] Moreover, the Supreme Court of Canada has recognized that s. 2(d) rights balance unequal power relationships and create a more equal society. In *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1, the court confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims:

… to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society… [at para. 58]

[Emphasis Added]

Would AUPE suffer irreparable harm if the injunction is not granted?

The court held that the second stage of the test had been met and that the AUPE established that it would suffer irreparable harm if the injunction was not granted. While Justice Macklin acknowledged that the AUPE would lose all the benefits of its previously agreed-upon concessions, he was mostly preoccupied with the harm the legislation would inflict upon the parties' relationship.

Justice Macklin explained as follows:

[38] *Bill 9* is a unilateral action by one of two parties to a collective agreement, freely negotiated, to amend the terms of the agreement. AUPE compromised its position and its rights in order to reach the agreement. As stated above, the term now being amended by the legislation is substantive, therefore *Bill 9* is a substantial interference with associational activity (see *Mounted Police Association of Ontario vs Canada [Attorney General]*, 2015 SCC 1 at para 75; *Ontario [Attorney General] v Fraser,* 2001 SCC 20, [2001] 2 SCR 3). It will cause irreparable harm to AUPE and its members if HMQ is allowed to unilaterally alter a substantive term of the agreement as it would mean that no agreement it has ever reached, or may reach in the future, with HMQ is safe from the threat of legislative change.

[39] There will accordingly be irreparable harm to future negotiations, possibly leading to a justifiable refusal to negotiate and compromise. The alleged harm is not the delay in receiving retroactive wage increases – it is the harm to the bargaining relationship between the parties, only one of whom can use its power to amend an "agreement."

[Emphasis Added]

Balance of convenience

The third branch of the test required the court to consider the harm to each party and for whom an interim injunction is most convenient. The court also considered the interest of the public. The court held that this final state of the test had been met.

[52] It is generally in the public interest that parties to otherwise valid agreements, freely negotiated, honor their obligations under those agreements. Members of the public often turn to the courts or other dispute resolution mechanisms to enforce contracts or seek remedies for their breach. As the Supreme Court of Canada has said:

Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer-term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance ... (*Bhasin v Hrynew*, 2014 SCC 71 at para 60).

[53] Members of the public expect that parties to an agreement will honor commitments made in agreements, and they reasonably expect that parties with whom they contract, regardless of who that may be, will honor the terms of the agreement made. It is no different if one of the contracting parties is the government. A member of the public expects, and is entitled to expect, that an agreement reached with the government will be honored. While the breach of any contract may result in the payment of damages to the aggrieved party, a unilateral legislated change to a collective agreement may also result in the breach of the s. 2(d) charter rights of the aggrieved party, as argued in this case.

[54] It is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations through legislation that may interfere with charter rights.

[Emphasis Added]

Current status

As of the date of writing this column, Justice Macklin's decision was under appeal. The appeal was argued on August 16 and it was expected that the court would issue its decision (with reasons) the following week. If the Appeal Court dismisses the appeal of Justice Macklin's decision, then public sector arbitrations would proceed (unless the government chooses to take further unilateral action).

Regardless of the outcome, the merits of the applicant AUPE's case have not, to date, been dealt with, which will be the real test for this government. If the legislation is struck down as unconstitutional, then all pending arbitrations will proceed and conclude, and decisions will be made that will impact this government.

More to the point, those decisions will also impact groups like the Alberta Medical Association who, while not in the same union category as AUPE, nevertheless are dealing with use of public funds and are facing pending negotiations with government. Those negotiations will no doubt be influenced by how the government deals with its public sector unions.

Interesting times, indeed.

Correction

In the last edition of *Alberta Doctors' Digest*, in the discussion on "effective referral" for medical assistance in dying (MAID), the following comment was made regarding the status of this concept in Alberta:

"Physicians in Alberta who receive a request for MAID but who decline for religious reasons must ensure that the patient has timely access to Alberta Health Services' central coordination service. There is, however, no requirement of providing effective referrals. Thus in Alberta, the onus remains on the patient to find a MAID provider, not with the physician."

A reader contacted *ADD* to point out there was no reference to the College of Physicians & Surgeons of Alberta Standards of Practice dealing with conscientious objection, which states:

1. When charter freedom of conscience and religion prevent a regulated member from providing or offering access to information about a legally available medical or surgical treatment or service, the regulated member must ensure that the patient who seeks such advice or medical care is offered timely access to:

- a regulated member who is willing to provide the medical treatment, service or information; or
- a resource that will provide accurate information about all available medical options

The reader recognized that the application of this clause has not been challenged in a hearing or a court of law, but the feeling was that the onus is on the member, not the patient, to ensure the patient has access to another member or at least a resource (e.g., the coordination service of Alberta Health Services).

Banner photo credit: Gerd Altmann, Pixabay.com