Alberta Doctors' Digest

Do physicians have the right to binding arbitration in contract disputes?

Introduction and background

Following the unsuccessful effort to ratify the negotiated agreement with Alberta Health in the spring of 2021, it became clear to many that the absence of a binding arbitration clause was a major issue for physicians.

The agreement that was sent out for ratification provided for mediation following the breakdown of negotiations, with the ability to publish the mediator's recommendations, which was unsuitable for many. At the various town hall meetings leading up to the ratification process, many physicians raised this issue as a concern, and clearly it was a major factor leading to the "no" vote.

It became clear that there was either a lack of understanding or a misapprehension about what exactly binding arbitration was and whether physicians represented by the AMA were entitled to this mechanism when negotiations fell through. This was reinforced by continued references to an "Ontario lawsuit" and the claim for a declaration of an entitlement to arbitration.

The lack of binding arbitration was exacerbated by history. For over four decades, the AMA always had the right to arbitrate in its agreements with government until the minister unilaterally terminated the AMA agreement in the spring of 2020 (even though arbitration has never been invoked).

Given that negotiations have recommenced, it might be useful to review these alleged authorities that are said to give rise to this "right" to binding arbitration as well as the background and status of the Ontario action.

Before going there, however, it would be helpful first to have a common understanding of exactly what arbitration is.

What is arbitration?

Simply put, arbitration is a dispute resolution process whereby parties to a dispute present their respective positions to an agreed-upon (or court appointed) independent third-party arbitrator (or an arbitration panel) with the intent of securing a decision that will be binding on the parties going forward. It is similar to going before a judge to secure a ruling, except it is less formal (as the parties create their own process and rules), more expeditious, and normally less costly.

In the commercial context, arbitration can be "rights arbitration" (which is the resolution of unresolved disputes relating to the interpretation or application of an existing contract during its term) or "interest arbitration" (which is the resolution of unresolved issues relating to the renewal or renegotiation of a contract, either during its term or following the lapse of its term).

The resolution of disputes between the AMA and the minister relating to the renewal or renegotiation of the master agreement would fall into the latter category (the AMA's desire for "rights arbitration" has never really been a problem).

Supreme Court of Canada and the right to association

In its 2015 decision *Saskatchewan Federation of Labour* v *Saskatchewan*, the Supreme Court of Canada reviewed whether the right to strike was constitutionally protected under section 2(d) of the *Charter*, which protects freedom of association, and whether access to dispute resolution mechanisms was required.

This case stemmed from various strikes in Saskatchewan's public sector, including nurses, highway workers, snow plow operators, and corrections workers, which ultimately culminated in public safety concerns.

In response, the Government of Saskatchewan enacted new legislation which severely limited and regulated strikes in the public sector. While the union and employer could negotiate an "essential services agreement" in the event of work stoppage, the public employer could nonetheless unilaterally force certain employees classified as "essential services" to return to work. As the law curtailed the right to strike, the union argued that it was unconstitutional as it limited employees' freedom of association.

In what reads like a history text book, the Supreme Court reviewed the background of labour law in Canada and internationally, and it noted the common theme of a fundamental power imbalance between employers and employees. As such, the court concluded that the "right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining."

It is important to bear in mind that the AMA is not a union and is not bound by or entitled to the benefit of labour legislation that embeds concepts like strike action or arbitration. Physicians in Alberta are largely exempt from that legislation, and instead enjoy the benefit of the AMA's legislated right to exclusive representation negotiations with the minister involving compensation matters.

Some laws that might infringe on constitutional freedoms can be saved by section 1 of the *Charter*, which permits encroachment on one's rights so long as the law at issue can be demonstrably justified in a free and democratic society. However, in the *Saskatchewan Federation of Labour* decision, the Supreme Court importantly noted that the unilateral authority of the employers to decide whether and how essential services were to be maintained during a work stoppage without a "review mechanism" or without a "meaningful dispute resolution mechanism" to resolve bargaining impasses did not justify the infringement. Most critically for the purposes of this analysis, however, the court did not go on to define what constituted a "meaningful dispute resolution mechanism," leaving the door open for creative solutions which might (but do not necessarily) end with arbitration.

The key finding is this: in situations where a right to strike cannot be exercised by a union or association, there must be an alternative "meaningful dispute resolution" process available. However, the court did *not* define that process as arbitration.

Ontario

In 2015, the Ontario Medical Association (OMA) filed a lawsuit against the Government of Ontario after Ontario's Minister of Health rejected the OMA's request for a dispute resolution process.

After the expiry of the parties' Physician Services Agreement in 2014, the government and OMA met to establish a new agreement. However, the parties were ultimately unsuccessful as the government's final offer included a dramatic reduction of physicians' compensation, among other things.

In response, the Ontario government unilaterally enacted regulations that reduced fee-for-service payments to physicians and payment reductions to other non-fee-for-service payments made to physicians under various contracts and programs. These changes were undertaken without engaging with the OMA in good faith negotiations.

As a result, the OMA filed a lawsuit against the Ontario government arguing that the government had violated Ontario physicians' freedom of association. More importantly, the OMA argued that the government had refused to agree to a process of "binding dispute resolution" and as such had made it impossible for the OMA to have a meaningful process of collective bargaining, thereby marginalizing the OMA.

Four years later, the parties voluntarily entered into arbitration, suspending the *Charter* litigation. After arbitration concluded, the OMA was awarded a new contract that removed restrictions on payments to physicians.

So, again, for the purposes of this analysis, it is important to understand that the Ontario courts have *not* ruled on the issue of entitlement to arbitration — the action is still before the court.

Conclusion

While binding arbitration may be the most common dispute resolution mechanism, it is not the only "meaningful" dispute resolution mechanism available to parties.

It is also important to understand that while binding arbitration might be perceived as an important component of any agreement between physicians and government, where there is no right to strike (in order to have certainty of dispute resolution), it is not a right guaranteed by the *Charter*, nor is it a right specifically directed by the Supreme Court in the seminal decision referred to above.

One final note … arbitration is a two-edged sword. It does not necessarily guarantee the result a party wishes. It only guarantees a result.

So to summarize, binding arbitration is one of many types of "meaningful dispute resolution" mechanisms but by no means the only one. In the absence of a right to strike, other processes such as mediation with recommendations would likely be endorsed by the courts.

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[1] As a preliminary point, all arbitration is "binding," so the expressions "arbitration" and "binding arbitration" shall be used interchangeably in this article.

[2] *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, s. 40.1

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