TTL HEALTH LAW

When is a Bargaining Agent not a Bargaining Agent in Democratic Society

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Introduction

Union membership is supposed to offer greater bargaining power for employees who join the union and surrender to the bargaining agent the right to negotiate on their behalf all work-related and salary matters with the employer.

Approximately one third of Canadian workers and almost all public sector employees are members of a union. In the certification of a union the workers vote to participate and the bargaining agent is led by someone that the members elect in a democratically organised and run election selection process.

By joining a union the employees or workforce have transferred their own individual power to negotiate for themselves to the bargaining agent and it puts significant legal liability on the bargaining agent to ensure that it negotiates at all times in the best interests of the membership. This legal obligation is referred to as “the union’s duty of fair representation of the members’ interests.”

Physicians cannot, as a matter of law, voluntarily unionize pursuant to existing labour laws. Physicians are not technically “employees”. Physicians have none of the benefits of being employees with guaranteed pensions, sick leave, paid vacation, extended health care and the like and yet, physicians are legally prohibited from earning their living in any other way than by accepting payment for their work from the Ontario government.

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The OMA is, nonetheless, legally and factually the bargaining agent with the Ontario government on behalf of all of the provinces physicians. Unlike other public sector union representatives there was no democratic vote by the physicians to become members of the union and there was no democratic election by the members for the leadership position of their bargaining unit.

The OMA became the professions bargaining agent as a result of a special Act of the Legislature making the payment of dues to this bargaining agent legally binding and prohibiting any other group or association or representative from bargaining on behalf of physicians in Ontario. In a nutshell, the Ontario government appointed the OMA as the professions bargaining agent by enacting law and imposing the arrangement upon Ontario's physicians.

The Legislative History

Commitment to the Future of Medicare Act, 2004, SO 2004, c 5

Agreement for determining amount

12. (1) The Minister of Health and Long-Term Care **may** enter into agreements with the associations mentioned in subsection (2), as representatives of physicians, dentists and optometrists, to provide for methods of negotiating and determining the amounts payable under the Plan in respect of the rendering of insured services to insured persons. 2004, c. 5, s. 12 (1).

Associations

(2) The associations representing physicians, dentists and optometrists are,

(a) the Ontario Medical Association, in respect of physicians;

This is the same language as in the old Health Care Accessibility Act, RSO 1990 which the *Commitment to the Future of Medicare Act* replaced.

The Ontario Medical Association Dues Act (1991, SO 1991, c 51), which came into force on June 26, 1991, requires that all physicians practicing or researching in Ontario must pay the OMA dues and assessments regardless of whether they are members or not according to the Rand formula (s. 2 & s. 3). This legislation was tabled during the NDP government which asked the OMA whether it would support the legislation in lieu of a fee increase for doctors, obviously the OMA said yes.

The dues, if not already paid directly to the OMA by the physician, are deducted from the amounts submitted for reimbursement from OHIP. OHIP will then pay the dues to the OMA unless told otherwise. The dues are required to be paid whether a physician is part of the OMA or not. According to the Newsletter from the Medical Reform, a physician is not required to be a member of the OMA but most are.

Although organizations such as the Ontario Association of Radiologists (OAR) and the Concerned Ontario Doctors (ODC) have voiced concerns regarding how the OMA have represented their interests through their negotiations with the MOHLTC they continue to represent Ontario physicians in negotiations with the MOHLTC by government made law and the mandatory dues arrangement now in place.

Past Grievances

The OAR, in 1998, initiated legal proceedings against the OMA, certain OMA directors and the Ontario government due to the effect that the Physician Services Committee recommendations regarding cut-backs to address utilization growth and the effect on radiologist's technical fees. The action was instigated under the auspices that the PSC recommendations were not acceptable and that the OMA should be held accountable to radiologists given their responsibility to fairly represent their interests. The statement of claim filed on May 1, 1998 stated:

1) Certain recommendations of the PSC are null and void and have no binding effect on the OAR or the radiologists of Ontario.
2) Defendant OMA directors acted in the conflict of interest and are in breach of their fiduciary duties and of their duties of skill and diligence to the radiologists of Ontario by virtue of the OMA board decision.
3) The OMA and defendant directors are obliged to indemnify the radiologists of Ontario for any amounts by which radiologists may be prejudiced by the PSC utilization-control decision, and damages in the amount of $225 million are being claimed against the OMA for breach of duty of fair representation.
4) Damages in the amount of $225 million are also being claimed against all individual director defendants for acting in a conflict of interest, in breach of their fiduciary duties and duties of skill and diligence.

The Ministry of Health and the OMA argued that the OAR cannot represent radiologists as an association that the suit must be by individual radiologists. Individual representatives were then included as plaintiffs and the matter was to go forward as a class action lawsuit. Certification as a class action was granted.

On December 22, 1998 the OAR filed an application for judicial review seeking to have the OAR appointed as the bargaining agent for radiologists instead of the OMA. It was ultimately decided that the MOH could deny the OAR's request to be the official bargaining agent for the purpose of negotiating technical and professional fees as representation was deemed by the courts to be a political matter and the MOH has decided to maintain its collaboration with the OMA even in the face of objections from physicians who no longer wished to be represented by the OMA.

Source: http://www.collectionscanada.gc.ca/eppp-archive/100/201/300/cdn_medical_association/forum/vol-42/issue-4/0001.htm

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The Ontario Medical Association

The Ontario Medical Association (OMA) represents the political, clinical and economic interests of the province's medical profession. Practising physicians, residents, and students from Ontario's six medical schools are eligible for OMA membership. Membership is optional, but payment of dues is not. The dues are deducted automatically form every physicians OHIP payment.

Past OMA-MOHLTC Agreements

Previous agreements confirmed the Government's recognition of the OMA as the "exclusive representative" of Ontario physicians for the purpose of "negotiation of physician compensation… funded in whole or in part, directly or indirectly, by the Minister". They also stated that the MOHLTC will continue to negotiate with the OMA over all non-fee-for-service or blended compensation template agreements and as a matter of significance provides that the MOHLTC is committed not to "deal directly" with individual physician groups with the caveat that a majority of the group elects to have the OMA acting as its negotiating representative. Other sections of the Agreement goes towards the process of negotiating, the ability to retain facilitators and mediators and an acknowledgment of the OMA's role in broader health care policy and systems issues as they affect physicians although this role is only consultative as the MOHLTC may rely on other stakeholders. Past agreements reinforced the OMA's status as the "trade union" or "bargaining agent" for Ontario physicians with the preamble stating outright that "physicians in Ontario exercise their right to freedom of association under section 2(d) of the Charter through the OMA".

> "AND WHEREAS the Government of Ontario consults and negotiates with OMA as the representative of the medical profession in Ontario;" (Memorandum of Agreement between the OMA and MOHLTC (2008 Agreement))

> "The MOHLTC acknowledges that the OMA is the representative of physicians in Ontario for the purpose of this relationship, these negotiations and this Agreement." (Clause 1.1 - Memorandum of Agreement between the OMA and MOHLTC (2008 Agreement))
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> "the OMA and the MOHLTC entered into a Memorandum of Agreement that recognizes the OMA as the exclusive representative of physicians practicing in Ontario" (2012 Physician Services Agreement)

Charter Challenge

The OMA launched a Charter challenge against the MOHLTC on October 29, 2015 after unsuccessfully attempting to secure binding dispute resolution mechanisms and two rounds of unilateral cuts to physician fees. The challenge is based on the immediate need to have a Physician Services Agreement which protects the quality patient-focused care, that the government has failed to recognize and has threatened the OMA's right to represent physicians in fee negotiations with the province and that the government had unilaterally altered the fee schedule without engaging in a process of good faith bargaining with the OMA.

The New Agreement

Although the new four year agreement, tabled on July 11, 2016, has not been formalized yet by the membership which will be done by vote at the end of July, the agreement provides for "co-management" of the physician services budget (the "PSB") between the MOHLTC and the OMA. It provides that those physicians who join family health networks (FHN) and family health organizations (FHO) will no longer be penalized. The government has also formally agreed to a process to significantly amend contentious provisions in Bill 210 (the Patients First Act). The agreement also seeks to address the "relativity gap" addressing disparities between groups and "modernizing" the fee schedule and to reign in physicians who bill more than $1-million a year providing for progressive discounts on fee-for-service billion above $1-million.

The agreement allows for funding for population growth, aging and increases in physician supply at an amount of 2.5%. It also calls for $200 million in permanent reductions but if Ontario doctors stick to the budget they can be provided with one-time payment of $50-million in 2016-17, $100 million in 2017-18, $120-million in 2018-19 and $100-million in 2019-20. If physicians go over the budget the amount will be clawed back.

Although the agreement stipulates that there will be a permanent facilitator in place that will assist in co-management of the health care system and will be used to provide binding resolution this does not amount to binding arbitration and the OMA's Charter challenge is not being withdrawn.

Physician Groups Response

Both the "Concerned Ontario Doctors" and "Doctors Ontario" have indicated on their webpages that they will be voting "No" to the tentative physicians' agreement. "Concerned Ontario Doctors" will be holding a rally on July 22nd stating that:

> "Closed-door negotiations between the Ontario Liberal government and the Ontario Medical Association have led to a proposed contract that does not put patients first: more clinic will close, more doctors will leave and wait times will grow."

"Doctors Ontario" provides the following five reasons why they will vote "No" to the agreement:

1. The new OMA President, Dr. Virginia Walley, promised the OMA wouldn't resume negotiations without the government first agreeing to binding arbitration as a condition for heading back to the table. Walley broke this promise, not only to her members but also to OMA Council, who made it clear that without binding arbitration there would be no deal.

2.

2. While the OMA and the government will spin this to the media that Ontario's doctors are receiving a 10% pay raise over the next four years, the truth is, this new agreement actually makes permanent the 15% cuts to our fees the government unilaterally imposed on doctors during the past two-plus years we've been without a contract.

3. By agreeing to 'co-manage' the health-care system with the government, the OMA has now put every doctor in the province in the position of helping the government ration care, thereby forcing us to throw our patients 'under the bus' in order to help the government save money, just so they can win the next election.

4. Should the province find it's spent too much money on physician services at the end of each fiscal year, this agreement will make Ontario's doctors solely responsible for that over-run, which will likely result in clawbacks as high as 10% to 20%.

By signing this agreement, and urging Ontario's doctors to support it, the OMA has placed its own interests (i.e. the $50-$60 million per year in mandatory dues it takes from your pockets via the Rand formula) above those of its members and our patients.

Conclusion

On July 11, 2016, the Ontario Medical Association (OMA) made an unexpected announcement to its members – it had reached a tentative four-year agreement with the Ontario government. The press release posted on the OMA website listed key components of the Patient Services Agreement (PSA) such as annual increases, funding to allow for the addition of new physicians annually, and so forth.

The list, however, did not include a clause for binding arbitration – a major point of contention for Ontario's doctors and the OMA, which had previously said was an absolute must.

Ontario's 33,000 doctors were then invited to participate in a non-binding vote on the tentative agreement, starting on July 27.

One element that continues to be excluded from any contract ever struck between the OMA and the province is a binding arbitration clause. It is still missing from the current offer.

From a legal perspective, good faith negotiations always require a provision for dispute resolution should the parties find that after exhausting all avenues, they fail to come to an agreement. Every such contract has a binding arbitration clause as a standard draughtsmanship provision.

Binding arbitration, the backbone of a bargaining unit's power, puts the final outcome in the hands of arm's length, third parties with the appropriate education, training, and expertise to reach a fair and balanced binding decision, because the parties cannot agree themselves.

Such a clause is even more crucial in this case when you consider how the OMA came to be the bargaining unit for Ontario's doctors back in 1991 when the NDP was in power: in lieu of a fee increase for physicians, the OMA agreed to support legislation that would officially appoint the association as the bargaining unit for all physicians in Ontario.

The OMA initiated a lawsuit before the July 11, 2016 four-year agreement was reached challenging the government's refusal to agree to binding arbitration designed to impose a fair, balanced and timely contract between the parties. When inviting Ontario's 33,000 doctors to participate in a vote on this tentative agreement

it also advised the profession that they would not be withdrawing the lawsuit.

All of this begs the question: why does the government continue to refuse to "consent" to binding arbitration for doctors when it is part and parcel to the negotiation process for all other sectors, both public and private? Their refusal has led to the lengthy delay that has left doctors without an agreement for more than two years and has forced them to challenge the government under the Charter of Rights and Freedoms.

Affording our physicians the courtesy of binding arbitration will undoubtedly bring the transparency and fairness that all doctors are seeking in a process that was created without their consent or input and continues to operate without their knowledge and behind closed doors.

The expertise and guidance of a qualified arbitrator would give credibility to the end result, and would be more cost-effective for the government, better for the public, and respectful of our hard-working physicians.

A Charter challenge will take years to make its way through the courts, if it is even pursued in light of the fact that a "deal" has now been reached by the OMA on behalf of its members. It will cost both sides millions of dollars. The taxpayers' money that will be invested to litigate this Charter challenge over the next four to five years could be better spent on the delivery of healthcare, lifting morale, and indicating some appreciation for the medical profession that our lives depend on.

Bargaining in good faith requires that each side give something to get something. The physicians do not like the terms of this newly negotiated four-year contract. However, a binding arbitration clause in the new contract would be a " bargain" that guarantees the profession will not be in this position at the end of the 4 years or in the future if the parties once again at the end of the contract term, reach a complete impasse on a fair and balanced replacement for the future. Obtaining this provision, as part of the "bargain" guarantees the result the profession is seeking.

Litigation before the courts does not guarantee that binding arbitration will be included in their contract. The outcome of the “charter challenge” is anything but guaranteed.

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