Court of Queen's Bench of Alberta

Citation: Alberta Union of Provincial Employees v Alberta, 2021 ABQB 398

Date: 20210520
Docket: 1903 13095
Registry: Edmonton

Between:

Alberta Union of Provincial Employees, Guy Smith, Susan Slade, and Karen Weiers

Plaintiffs

- and -

Her Majesty the Queen in Right of Alberta

Defendant

Reasons for Decision
of the
Honourable Mr. Justice K.S. Feth

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[1] The Alberta Union of Provincial Employees ("AUPE") and three of its members have sued the Government of Alberta ("the Government") alleging that the *Public Sector Wage Arbitration Deferral Act*, SA 2019, c P-41.7 ("*Arbitration Deferral Act*") offended various workers' constitutional right to freedom of association by substantially interfering with the operation of collective agreements and ongoing bargaining relationships.

[2] The legislation, proclaimed in June 2019, temporarily suspended interest arbitrations established under wage re-opener provisions in collective agreements between AUPE and specified public sector employers, including the Government and Alberta Health Services ("AHS"). According to the preamble to the *Arbitration Deferral Act*, the Government wanted

time to gather, consider, and obtain advice about new information concerning Alberta's economy and the Government's financial state before proceeding with the arbitration hearings.

[3] AUPE complains that the *Arbitration Deferral Act* violated freely negotiated contractual obligations for the conduct and timing of the arbitrations, and that the Government acted unilaterally and in bad faith to trump rulings from the arbitration panels dismissing the employers' requests for adjournments.

[4] The legislation delayed the arbitrations by approximately four months, allowing the employers to introduce new evidence at the hearings that would not have otherwise been admissible and to revise their positions. The arbitration panels subsequently delivered wage awards in January 2020.

[5] AUPE contends that the delay adversely affected the wages awarded to its members, harmed the ongoing bargaining relationships between AUPE and the employers, and undermined the bargaining agent relationship between AUPE and its members.

[6] The Government contends that the legislation is now exhausted and the concrete dispute between the parties has disappeared. On that basis, the Government argues that AUPE's constitutional claim is moot and the Court should not exercise its discretion to hear a moot case. The Court is invited to strike the action for disclosing no reasonable cause of action.

[7] AUPE counters that the Statement of Claim pleads a reasonable cause of action, the underlying controversy between the parties is very much alive, and remedies are still available including a declaration and damages. The action is therefore not moot. Even if the action was moot, this would not be a proper case to summarily foreclose the possibility that a trial judge would exercise the Court's discretion to hear a moot claim.

[8] For the reasons to follow, I conclude that a reasonable cause of action is pleaded and the claim is not moot. Consequently, I decline to strike the action.

Striking a claim

[9] The Government relies on subrule 3.68(2)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010: an action may be struck if a "commencement document or pleading discloses no reasonable claim."

[10] The test for determining whether an action should be struck for disclosing no reasonable claim (or cause of action) is described in ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42 [***Imperial Tobacco***] at para 17:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: ... Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial ... [emphasis added]

[11] When applying the test under subrule 3.68(2)(b), the Court must "accept the allegations of fact as true except to the extent the allegations are based on assumptions or speculation or where they are patently ridiculous or incapable of proof" and "the Court must err on the side of generosity in applying the test and permit novel, but arguable, actions to proceed": ***Grenon v***

Canada Revenue Agency, 2017 ABCA 96 at para 6, leave to appeal to SCC refused, 37584 (21 September 2017).

[12] In ***Imperial Tobacco***, at para 21, the Supreme Court of Canada emphasized the importance of permitting claims to proceed where the law is evolving:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. ... The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions ...Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[13] Striking statements of claim that do not disclose a cause of action weeds out hopeless claims and promotes litigation efficiency, reducing time and cost: ***Imperial Tobacco*** at paras 19 and 20.

[14] The party applying to strike carries the burden of demonstrating that it is plain and obvious the pleadings disclose no reasonable cause of action: ***Carbone v Burnett***, 2019 ABQB 98 at para 10.

[15] No evidence may be submitted in support of an application made under subrule 3.68(2)(b): see subule 3.68(3). However, factors other than evidence must be considered in determining whether a novel claim reveals a reasonable cause of action, including the underlying litigation context. A chambers judge "hearing an application to strike a statement of claim must consider earlier reported decisions addressing aspects of the same claim, including the result of companion litigation": ***HOOPP Realty Inc v The Guarantee Company of North America***, 2015 ABCA 336 at para 20.

[16] The parties placed some litigation context before me by agreement, including the delay in the interest arbitration process, the contents of the arbitration awards, and certain facts in their written submissions. They also acknowledged that this litigation was the subject of commentary from the Alberta Court of Appeal when setting aside an Interim Injunction granted early in the action: ***Alberta Union of Provincial Employees v Alberta***, 2019 ABCA 320 [***AUPE CA***].

[17] The Government does not rely on subrule 3.68(2)(d), which allows for an action to be struck if the "commencement document or pleading constitutes an abuse of process."

[18] Some of the jurisprudence concludes that mootness should be considered under subrule (d), which allows for evidence explaining how the claim became moot: ***Nascho Enterprises Ltd v Edmonton (City)***, 2014 ABQB 569 at para 52; ***McMeekin v Northwest Territories (Liquor Commission)***, 2008 NWTSC 67 at para 35, aff'd 2010 NWTCA 1 (applying the antecedent rule).

[19] In most applications seeking to strike for mootness, evidence is required to explain how the controversy is spent, whether an adversarial context remains, why the Court's resources should or should not be expended to hear a moot claim, and whether the rights of the parties are still affected. Before me, only the pleadings and the limited admissions about the litigation context are the record for this application.

Issues

[20] As the application is framed under subrule 3.68(2)(b), three issues arise:

a. Does the Statement of Claim plead a reasonable cause of action, even if the claim is novel?

b. Has the controversy between the parties been rendered moot?

c. If the controversy is moot, should the action be allowed to proceed to trial so that a trial judge may determine whether to exercise the Court's discretion to hear or decide a moot issue?

[21] Following a discussion about the constitutional protection for the collective bargaining process, I will address each of these issues.

Analysis

a) Freedom of association in labour relations

[22] Section 2(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter"*) guarantees the right of workers to associate in pursuit of collective workplace goals: ***Health Services and Support - Facilities Subsector Bargaining Association v British Columbia***, 2007 SCC 27 at para 19 [***Health Services***]; ***Ontario (Attorney General) v Fraser***, 2011 SCC 20 at paras 2 and 42 [***Fraser***]; ***Mounted Police Association of Ontario v Canada (Attorney General)***, 2015 SCC 1 at paras 45 and 67 [***Mounted Police***].

[23] The guarantee protects the right of workers to engage in a meaningful *process* of collective bargaining. The outcomes sought through that associational activity are not guaranteed, nor is access to a particular model of labour relations: ***Health Services*** at paras 89, 91; ***Mounted Police*** at para 67.

[24] Section 2(d) of the *Charter* guards only against "substantial interference" with associational activity. As explained in ***Health Services***, at para 92, to constitute substantial interference with freedom of association, either the intent or effect of state action must "seriously undercut or undermine the activity of workers joining together to pursue common goals of negotiating workplace conditions and terms of employment with their employer." State action includes both legislation and those activities undertaken by the government as an employer: ***Health Services*** at para 88.

[25] The interference must be "so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer": ***Health Services*** at para 91.

[26] The constitutional right includes workers' ability to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith: ***Fraser*** at paras 33, and 41-42.

[27] In a general sense, as explained in ***Health Services*** at para 93, determining whether a government measure disturbs the protected process of collective bargaining to a substantial degree involves two inquiries:

> The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[28] When considering an alleged infringement of the right to a meaningful process of collective bargaining, the Court also examines whether the state action disrupts the balance of negotiating power between workers and the employer necessary for the meaningful pursuit of workplace goals. Substantial interference with collective bargaining negates meaningful association by rendering the workers' collective efforts pointless and encouraging the view that future associational activity will be futile: ***Mounted Police*** at paras 71 and 72; ***Health Services*** at paras 90 and 92; ***British Columbia Teachers' Federation v British Columbia***, 2016 SCC 49, adopting the dissenting reasons of Justice Donald in 2015 BCCA 184 at paras 281 and 284-287 [***BCTF***].

[29] Meaningful collective bargaining is premised on "'approximate equality' between employees and employers in the collective bargaining process": ***BCTF*** at para 291 of the adopted reasons in the Court of Appeal.

[30] Legislated alterations to a collective agreement can offend s 2(d), especially where the legislation unilaterally nullifies significant contractual terms and effectively denies future collective bargaining: ***Fraser*** at para 76. Substantial interference with the operation of an existing collective agreement can undermine future attempts at collective bargaining, in part because the process is then under threat of being unilaterally invalidated by state action.

[31] Bad faith by the employer denying workers' meaningful discussion and consultation may substantially interfere with the process of good faith collective bargaining: ***Health Services*** at paras 92 and 96; ***BCTF*** at para 283. Good faith negotiation requires parties to meet and engage in meaningful dialogue through which positions are explained and each party considers the other's representations. Positions must not be inflexible and intransigent, and parties must honestly strive to find some middle ground. No specific test for finding good faith has been formulated as the assessment is fact-based and context specific: ***BCTF*** at paras 334-335.

[32] As Justice Donald explained in ***BCTF***, at para 287, if a government:

> ... prior to unilaterally changing terms of employment, gives a union the opportunity to meaningfully influence the changes made, on bargaining terms of approximate equality, it will likely lead to a finding that the union was not rendered feckless and the employees' attempts at associating to pursue workplace goals were not pointless or futile...

[33] Good faith pre-legislative consultation can therefore be relevant in assessing whether a substantial interference has occurred.

[34] A temporary interference with collective bargaining or the operation of a collective agreement can result in a substantial interference with a meaningful process of collective bargaining, depending on the overall contextual realities of the past bargaining relationship between the workers and the employer: ***BCTF*** at paras 298, 377, and 384-385.

[35] In ***Saskatchewan Federation of Labour v Saskatchewan***, 2015 SCC 4 at para 24 [***SFL***], which expanded a meaningful process of collective bargaining to include the right to strike, the

majority of the Supreme Court of Canada confirmed that a meaningful process also includes the right of workers to "speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative."

[36] A meaningful process of collective bargaining therefore requires independent bargaining representation and a degree of choice that enables workers to have effective input into the selection of collective goals advanced by their association. Moreover, the accountability of the bargaining representative to the workers is an important factor in assessing whether employee choice is present: ***Mounted Police*** at paras 85-90.

[37] Even where a substantial interference is established, the interference may be saved under s 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society. Significant disruption to the collective bargaining process may be permitted on an exceptional and usually temporary basis: ***Health Services*** at para 108.

[38] In sum, the freedom of association guarantee in the field of labour relations has significantly evolved since ***Health Services***. The changing jurisprudence was characterized in ***SFL*** as an arc that "bends increasingly towards workplace justice": para 1. Moreover, the "law on the extent to which collective bargaining, and collective agreements, are protected by the *Charter* is still being developed": ***AUPE CA*** at para 24.

b) A reasonable cause of action is pleaded

[39] The Statement of Claim pleads that the *Arbitration Deferral Act* infringed freedom of association for the workers in various AUPE bargaining units as follows:

a. Freely negotiated provisions in the collective agreements were overridden;

b. Unilateral suspension of the interest arbitrations prevented AUPE and its members from engaging in a meaningful process of collective bargaining;

c. AUPE was not consulted in good faith by the Government about suspending the interest arbitrations;

d. The Government acted in bad faith by reneging on the wage re-opener provisions in the final year of the collective agreements;

e. The Government created an environment in which meaningful collective bargaining in good faith with the employers is not possible; and

f. The Government undermined AUPE's ability to perform its functions as bargaining agent.

[40] The Statement of Claim seeks a declaration that the *Arbitration Deferral Act* is of no force and effect. Damages are requested under s 24(1) of the *Charter*, including lost wages and special damages for costs incurred preparing for the interest arbitrations. The litigation context between the parties includes the Plaintiffs' contention that the arbitration awards were reduced because of the postponement, resulting in both past loss of income and the continuing suppression of future income.

[41] In its submissions, AUPE elaborates that the *Arbitration Deferral Act* substantially interfered with a meaningful process of collective bargaining by suppressing wages for the final year covered by the collective agreements and by causing two ongoing adverse effects:

a. Wage suppression will continue indefinitely since future increases are negotiated utilizing the reduced wage structure as a floor; and

b. AUPE was undermined as a bargaining agent, which impairs the bargaining relationship and adversely affects AUPE's effectiveness for its members.

[42] The Government contends that the pleadings fail to establish a breach of s 2(d) of the *Charter* because the facts do not demonstrate a "substantial and unjustifiable violation of bargaining rights." That position co-mingles the "substantial interference" element of a s 2(d) breach and the justification analysis under s 1 of the *Charter*. I will address them separately.

i) A "substantial interference" infringement is arguable

[43] The Government's concerns focus on the merits of the claim, rather than the adequacy of the pleadings.

[44] First, the Government contends that wage suppression is conjecture and AUPE will not be able to prove that fact at trial. However, that is an issue of proof, not pleadings.

[45] An application to strike under subrule 3.68(2)(b) is not a summary judgment application. The pleaded facts are assumed to be true, including the "litigation context" admitted by the parties for the purposes of this application. The pleaded facts, read as a whole, do not suggest that they are patently ridiculous or incapable of proof, or bald conclusory statements based on assumptions or speculation.

[46] My task is not to predict and prejudge the evidence that will be called at trial when assessing whether a reasonable cause of action is presented.

[47] The pleadings allege the necessary facts to maintain a claim. AUPE has a reasonable prospect of convincing a trial judge that wages were adversely affected by information which only came to light because of the postponement created by the *Arbitration Deferral Act*. After the interest arbitration process was postponed, the public sector employers introduced new economic data and changed their positions, moving from a proposal of no wage increases to instead seeking a 2% rollback in wages. AUPE can refer to the arbitration panels' reasons for decision and the record before them to suggest how outcomes were affected. Inferences might be drawn by a trial judge about the impact the revised data and submissions had on the awards, especially after comparing them to the original record and submissions.

[48] Allegations that postponing the arbitration process substantially interfered with subsequent collective bargaining and AUPE's effective representation of its members require evidence at trial. So too will the assertions about bad faith and the consultative process. However, the factual foundation for those claims is pleaded. An inability to prove the allegations is not plain and obvious.

[49] Second, the Government submits that the claim is "unlikely to succeed" at trial because the magnitude of any interference with these collective agreements is less than the changes found constitutional in other cases, including those in which wage restraint legislation was upheld: ***Meredith v Canada (Attorney General)***, 2015 SCC 2 [***Meredith***]; ***Gordon v Canada (Attorney General)***, 2016 ONCA 625; ***Federal Government Dockyard Trades and Labour Council v Canada (Attorney General)***, 2016 BCCA 156; ***Canada (Procureur général) c Syndicat canadien de la fonction publique, section locale 675***, 2016 QCCA 163.

[50] That position mischaracterizes the "plain and obvious" inquiry as a determination of whether success at trial is "unlikely." Moreover, the Court is invited to engage in a merits assessment, rather than focusing on the contents of the pleadings, which expressly allege that meaningful collective bargaining in good faith with the employers is not possible because of the effect of the legislation and the Government's lack of good faith consultation.

[51] Such a comparative exercise also ignores that the constitutional analysis is contextual, fact-specific, and varies with the industry culture and workplace in question: ***Mounted Police*** at para 93; ***Health Services*** at para 92. Further, the facts of those cases should not be understood as a minimum threshold for finding a breach of s 2(d).

[52] Comparisons to wage settlements for other employees have been utilized in the constitutional jurisprudence to show that a government-imposed wage structure was within the realm of freely negotiated, good faith bargaining outcomes: see for example ***Meredith*** at para 28. However, that is distinguishable from the exercise advocated by the Government in this case. While the magnitude of permissible interference in other cases might be instructive, it is not determinative and the analysis remains contextual.

[53] More fundamentally, the Government asks me to find, as plain and obvious, that a temporary interference with these collective agreements had no material impact on long-term public sector collective bargaining involving AUPE and the various employers covered by the *Arbitration Deferral Act*.

[54] In ***AUPE CA***, the majority of the Alberta Court of Appeal discussed whether delaying the arbitrations for four months would bring about any fundamental change to the overall collective bargaining relationship. They expressed skepticism, noting at para 23 that the "prospect of legislative variation of collective agreements ... is an inherent part of collective bargaining; any resulting 'damage' to the collective bargaining relationship is largely inherent in that prospect."

[55] The majority nevertheless expressed their conclusion with some equivocation at para 23:

> The exercise on a particular occasion of the legislative mandate to override collective agreements is *unlikely* to have a material impact on the overall, long-term nature of public sector collective bargaining. [*emphasis added*]

[56] The dissenting Justice went further in finding no reviewable error in the chambers judge's conclusion that the unilateral suspension of the arbitration proceedings established irreparable harm by damaging future collective bargaining and the parties' ongoing relationship: ***AUPE CA*** at paras 64-66.

[57] The equivocation expressed by the majority of the Court of Appeal is still warranted on the record before me. The Government's actions, its motivations, and the consequent effects on public sector workers are factual issues that are best determined at trial with the benefit of discovery and *viva voce* testimony.

[58] A trial also permits exploration of the thesis that the balance of negotiating power, both real and perceived, was not substantially influenced by state action that converted the "prospect" of legislative variation to collective agreements into a reality. Legislative interference with a collective agreement is an extraordinary demonstration of control, especially where the Government is the employer.

[59] Flexing legislative muscle to intervene in the operation of collective agreements can send a formidable message about the relative strengths of public sector employers and their employees. The difference between having the ability to throw a punch and actually doing so is manifest. The risk is no longer theoretical. A visceral impact can result.

[60] The circumstances in which that legislative power is exerted can also speak to the willingness of the Government to intervene in future cases. Unilateral nullification that is disproportionate to its underlying rationale can suggest that collective bargaining is not respected. If the justification is weak or less intrusive options were available, workers might perceive the legislative action as a signal that nullification of contractual terms will be unexceptional, imposing a chilling effect on the utility of future negotiations.

[61] Workers might then be convinced that their voices have little influence and that collective agreements are easily ignored. At a minimum, the "approximate equality" of bargaining power between employers and employees might be disturbed.

[62] Here, legislative action was taken merely because the Government wanted new information about Alberta's economy and its financial state. Nothing suggests the provincial government did not already have economic and financial data. The preamble to the *Arbitration Deferral Act* states that significant changes had occurred in Alberta's economy since the 2018-2019 Third Quarter Fiscal Update and Economic Statement, but the record before me does not demonstrate that a change had occurred or that the parties lacked the data and economic modeling to address any changes. Indeed, the Statement of Claim pleads that the Government provided AUPE with some information about the economy shortly before the introduction of the proposed legislation, but the information did not establish a change in Alberta's economic circumstances.

[63] The concern is not only with the justification offered, but also the failure to adequately consult about less intrusive alternatives, such as a negotiated opportunity to provide the arbitration panels with additional evidence after the commencement of the hearings or delaying legislative nullification until the arbitration awards issued and the Government's financial circumstances were further updated. If the latter, the impact of any legislative intervention would then have been transparent.

[64] Applying the two inquiries from ***Health Services***, the "matter affected" by the legislative interference was not just the timing of the arbitration process, but the integrity of the collective agreements and respect for the collective bargaining process. As pleaded, the manner in which the interference affects the collective right to good faith negotiation and consultation is fundamental. Meaningful bargaining and approximate equality are compromised over the long-term. The magnitude of the interference, as alleged in the Statement of Claim, is substantial. The material facts grounding those allegations are not plainly and obviously incapable of demonstrating the substantial interference advanced by the Plaintiffs.

[65] Third, the pleadings raise a novel question about the impact of state action on AUPE's ability to function effectively as a bargaining agent. The Plaintiffs submit that "harming the underlying bargaining relationship" and "undermining the effectiveness of a bargaining agent" potentially engage freedom of association. The Plaintiffs concede that these are not recognized violations of meaningful collective bargaining in the constitutional jurisprudence, but submit that they are principled claims deserving of a trial and the opportunity to further develop the common law.

[66] The building blocks of this argument can be found in the existing caselaw and common labour relations practices.

[67] The principle of good faith in collective bargaining "implies recognizing representative organizations": ***Health Services*** at para 98, citing with approval principles taken from the International Labour Organization. Freedom of association already includes workers' right to independent representation, which is predicated on speaking through a bargaining representative of their choice, and accountability of the bargaining representative to the workers. Freedom of association also directly protects government employees against any interference by management in the establishment of an employee association, independent of any legislative framework: ***Delisle v Canada (Deputy Attorney General)***, [1999] 2 SCR 989, 1999 CanLII 649 at paras 10 and 32; ***Dunmore v Ontario (Attorney General)***, 2001 SCC 94 at para 41.

[68] Unionized workers are in continuing employment relationships with their employers. Unilateral exercises of governmental or legislative action for the benefit of the employers can adversely affect the bargaining relationship over the long term. The jurisprudence recognizes these lasting effects as the basis for an infringement of freedom of association.

[69] Since workers organize and communicate through a representative, their relationship with that representative materially affects their ability to participate in associational activity. Confidence in the agent's knowledge, competence, and fidelity can influence how bargaining proposals and recommendations are evaluated by workers. Dissension within the bargaining unit about the agent's effectiveness can affect unity and resolve. A weakened agent might be less inclined to engage in hard bargaining and more willing to make concessions to the employer so as to avoid conflict within its membership.

[70] Employer practices that undermine the bargaining agent's independence or effectiveness can impair the agent's ability to represent workers and advance their interests. Weakening the bargaining agent can disturb the balance of negotiating power between the employer and those workers.

[71] Undermining the role and integrity of a bargaining agent is widely recognized as an unfair labour practice in Canadian labour relations legislation: see as examples *Labour Relations Code*, RSA 2000, c L-1, s 148; *Public Service Employee Relations Act*, RSA 2000, c P-43, s 45; *Canada Labour Code*, RSC, 1985, c L-2, s 94. While the constitutional jurisprudence does not embrace the Wagner model of labour relations or any particular statutory apparatus, the prevalence of these legislative provisions speaks to the importance of protecting the relationship between workers and their representative.

[72] A meaningful process of collective bargaining, at least arguably, requires safeguards to ensure that the workers' chosen bargaining agent is able to function independently and effectively, without substantial interference from state action.

[73] I accept the Plaintiffs' submission that in an evolving area of constitutional law, these issues about maintaining the integrity of the bargaining relationship and the representational relationship between workers and their bargaining agent warrant exploration at a trial. Evidence is required to assess whether any disruption to either relationship resulted in a substantial interference with a meaningful process of collective bargaining for these workers.

ii) Justification of an infringement requires evidence

[74] The Government contends that even if a substantial interference is shown, any infringement of s 2(d) is minimally impairing and justifiable under s 1 of the *Charter*.

[75] That argument demands evidence and attracts the Government's burden of proof in establishing such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The s 1 analysis cannot be determined on an application to strike.

[76] In any event, the Statement of Claim expressly pleads that the infringement of s 2(d) fails to advance a sufficiently important governmental objective, is disproportionate with the legislation's objectives, and is not a reasonable and demonstrably justified limit under s 1.

[77] Accordingly, I conclude that a reasonable cause of action is pleaded.

c) The legal controversy is not moot

[78] Mootness arises when the underlying legal controversy between the parties no longer exists, the substratum of the litigation has disappeared or a judicial ruling would have no practical effect on the rights of the parties.

[79] The general rule is that the Court should decline to hear or decide a case addressing only a hypothetical or abstract question, except in special circumstances.

[80] The leading authority on mootness is ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 at 353 [***Borowski***]:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. ...
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[81] On an application to strike, the Court must be satisfied that the absence of a live controversy is plain and obvious: ***Taft v Alberta***, 2010 ABCA 366 at para 16 [***Taft***].

[82] The Government argues that no live controversy remains between the parties because the arbitrations have been completed, the impugned legislation is spent, and the Court's ruling on the merits of the action will provide no meaningful remedies.

[83] First, that position misapprehends the dispute. The Plaintiffs allege that the purpose or effect of the legislation was to substantially interfere with a meaningful process of collective bargaining and that the consequences of the interference continue. The controversy between the parties is therefore not whether the legislation is still operative or the arbitrations remain suspended, but rather, whether and to what extent the legislation disturbed and continues to impair collective bargaining.

[84] Second, the cause of action is grounded on the consequences of the legislation, not whether the legislation is exhausted.

[85] Third, remedies are potentially available. In ***SA v Metro Vancouver Housing Corp***, 2019 SCC 4, at para 60, the Supreme Court of Canada articulated four conditions to granting declaratory relief:

> Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought...

[86] The Government argues that the Plaintiffs' claim is only hypothetical at this time and will not settle a "live controversy" because the legislation is no longer operative. However, as explained, that position misapprehends the controversy. The dispute about the purpose and effect of the legislation is real.

[87] The Government also contends that the Statement of Claim does not disclose a viable damages claim. As a general rule of public law, damages will not be awarded for the harm suffered as a result of the mere enactment or application of a law that is subsequently found to be unconstitutional, absent conduct that is clearly wrong, in bad faith or an abuse of power: ***Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick***, 2002 SCC 13 at para 78. This limited immunity is raised by the Government as a comprehensive defence.

[88] The Statement of Claim pleads, however, that the Government acted in "bad faith" by reneging on the settlement that resulted in the collective agreement. The Government counters that the pleading refers to an "implicit agreement" by which AUPE members would not strike in exchange for the wage re-opener provisions and that no such agreement is tenable in law. Nonetheless, that nuance ignores the overall substance of the pleadings which is that the Government acted in bad faith by interfering with the collective agreements. Furthermore, the Plaintiffs expressly plead an absence of good faith through the unilateral suspension of the arbitrations and that the legislation created an environment in which meaningful collective bargaining in good faith by the public employers is not possible moving forward.

[89] The pleadings allege sufficient facts to establish an arguable damages claim pursuant to s 24(1) of the *Charter*.

[90] Fourth, the Government's position on this application is incompatible with written submissions tendered in opposition to the Interim Injunction application in 2019. As part of the litigation context, I have been provided with the following extracts from the Government's written argument at that time:

> If [the *Arbitration Deferral Act*] is ultimately found at trial to be unconstitutional, there are many remedies available. A new arbitration could be ordered, or a decision remitted to the arbitrator for reconsideration. That is frequently done in appellate decisions. ... Importantly, it will also give freedom to the judge who hears the trial of this action to determine the remedy.
>
> ...

> There are a variety of possible solutions that would be available at trial to remedy any harm to AUPE. ... For example, declaratory relief may be available, the decision can be remitted to the arbitrator, and orders for retroactive payments to employees are all possibilities in this case.

[91] While I appreciate that a party's position can change as litigation unfolds and greater legal analysis is undertaken, the Government was arguably right the first time.

[92] During the oral argument before me, the Government confirmed that it will continue to defend the action if the Statement of Claim is not struck. The risk of a remedy being granted against the Government is apparently sufficient to maintain its interest.

[93] Fifth, the Government's position is at odds with comments from the majority of the Court of Appeal in ***AUPE CA***. While reviewing the tripartite test for an interlocutory injunction, the Court conducted a preliminary assessment of the merits of the case to confirm the presence of a serious question requiring a trial. The serious question was identified as the constitutionality of the legislation: para 8.

[94] The majority of the Court found that there is "obviously an important issue here": para 24. They concluded that the changes to collectively bargained rights and whether any breach of s 2(d) could be saved under s 1 of the *Charter* were "issues for a trial, at which both parties can present evidence and argument": para 24.

[95] I conclude that the action is not moot.

d) The discretion to hear a moot claim remains available

[96] Even if no live controversy is present, a moot issue may still be permitted to proceed to trial. Mootness does not automatically bar adjudication. The application of the doctrine is discretionary.

[97] In ***AUPE CA***, the majority of the Court of Appeal remarked that even if the issue of the constitutionality of Bill 9 is moot by the time the trial is held, "this may well be one of those cases where the courts should hear and decide a moot issue": para 24.

[98] In ***Borowski***, at 358-363, the Supreme Court of Canada provided guidance on the exercise of discretion. The following factors should be considered, although none is determinative and the process is not mechanical:

a. The presence of an adversarial context in which both parties have a stake in the outcome, so that positions are adequately canvassed;

b. Respect for judicial economy, recognizing the scarcity of judicial resources and the proper use of those resources; and

c. Sensitivity to the proper law-making function of the court and the efficacy of judicial intervention, so as not to intrude on the legislative branch of government.

[99] The Government must demonstrate no reasonable prospect that a trial judge would exercise the Court's discretion to hear a moot claim. If the outcome of the discretionary exercise is not plain and obvious, the action must be allowed to proceed: ***Taft*** at para 16.

[100] The Government acknowledges that the defence of the action will continue if the Statement of Claim is not struck. The adversarial framework for the contest will not be compromised. Both sides are well-resourced.

[101] Judicial resources will be consumed, but nothing before me explains the complexity of the outstanding steps in the litigation or the anticipated length of the trial. No litigation plan, for example, is tendered to describe the remaining steps. While the Court must be vigilant in preventing any wasteful use of scarce resources, the magnitude of the concern is not clear.

[102] The Court must always be cautious about being pulled into a political or public policy debate that is most appropriately the domain of the Legislature. However, this litigation raises important issues about fundamental constitutional freedoms and the alleged abuse of power and bad faith by the Government, operating through the Legislative Assembly. An improper intrusion into the role of the legislative branch of government is unlikely.

[103] The Plaintiffs seek a judicial determination so that meaningful collective bargaining will be honoured in the future. Many public sector workers and employers are potentially affected. At this stage of the proceeding, based on the limited record, it is not plain and obvious that a trial judge would decline to hear the claim, even if the controversy is technically moot.

Conclusion

[104] The application to strike the Statement of Claim is dismissed. If the parties cannot settle the costs, they may provide written submissions to me within 45 days to resolve the issues.

Heard on the 25th day of February, 2021.
Dated at the City of Edmonton, Alberta this 20th day of May, 2021.

K.S. Feth
J.C.Q.B.A.

Appearances:

Patrick Nugent
Adam Cembrowski
for the Plaintiffs

David Kamal
Aleish Bartier
for the Defendant