

COURT FILE NUMBER 2003 07248

COURT COURT OF QUEEN’S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF(S) ALBERTA MEDICAL ASSOCIATION (CMA
ALBERTA DIVISION), DR. CHRISTINE
MOLNAR, DR. PAUL BOUCHER, AND DR.
ALISON CLARKE

DEFENDANT(S) HER MAJESTY THE QUEEN IN RIGHT OF
ALBERTA

DOCUMENT **STATEMENT OF DEFENCE**



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT NEUMAN THOMPSON
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Note: State below only facts and not evidence (Rule 13.6)

Statement of facts relied on:

Brief response to allegations in Statement of Claim

1. The Defendant, Her Majesty the Queen in right of Alberta, as represented by the Minister of Health, who operates a department of the Government of Alberta, the Ministry of Health (collectively, “Alberta Health”) denies each and every allegation contained in the Statement of Claim filed by the Alberta Medical Association (the “AMA”) and Drs. Christine Molnar, Paul Boucher and Alison Clarke (together the “Plaintiffs”), except those specifically admitted herein.
2. The Statement of Claim includes allegations in the nature of evidence and argument; it is not properly confined to pleadings of fact.
3. The Statement of Claim incorrectly states the name of one of the Plaintiffs. It should be as follows: “The Alberta Medical Association (CMA Alberta Division)”.

4. In brief answer to the entire Statement of Claim, Alberta Health says:
 - a. Section 2(d) of the *Charter* confers freedoms on individuals, not organizations like the AMA;
 - b. The individual Plaintiffs are not employees, in the position of employees, or in an “employment-like” relationship with Alberta Health. Section 2(d) of the *Charter* does not apply as alleged or at all to the circumstances plead by the Plaintiffs;
 - c. In the alternative, if the Plaintiffs are entitled to Section 2(d) *Charter* rights in their interactions with Alberta Health, their rights have not been infringed as alleged or at all. In particular, the Plaintiffs are not entitled to arbitration as a manifestation of any exercise of freedom of association rights, nor are they entitled to any other right or process claimed;
 - d. Section 40.2 of the *Alberta Health Care Insurance Act, RSA 2000, c A-20 (“AHCIA”)* does not infringe the freedom of association of the Plaintiffs;
 - e. Alberta Health at all relevant times dealt with the Plaintiffs in good faith; and
 - f. Alberta Health did not breach the agreement between Alberta Health and the AMA made effective April 1, 2011 (the “AMA Agreement”): the AMA Agreement was terminated by Alberta Health in accordance with its terms by operation of law, which was expressly negotiated and agreed to by the parties, following a period of good faith negotiation and consultation between Alberta Health and the AMA.

Physicians are not employees - How physicians are paid under the AHCIA

5. Pursuant to the *AHCIA*, the Minister of Health (the “Minister”) is responsible for administering and operating a non-profit plan to provide benefits for basic health services to all residents of Alberta (the “Plan”). The Plan is a publicly-funded insurance plan, whereby the Minister is obligated to cover the cost of specified insured health services provided by certain health practitioners to Alberta residents.
6. “Basic health services” covered by the Plan include “insured services”, which are medically required services provided by physicians. Basic health services also include certain services provided by other health practitioners such as dentists, optometrists, podiatrists, and others. These other health practitioners do not have an agreement with Alberta Health nor do they have an organization who holds exclusive representational rights.
7. The *AHCIA* deems every physician who is licensed to practice in Alberta (“Physicians”) to have opted into the Plan, unless the Physician has explicitly opted out. By remaining opted into the Plan, Physicians are entitled to submit claims for benefits in respect of the insured services they provide to Alberta residents.
8. For all Physicians, the rates payable by Alberta Health for insured services are set by the Minister in accordance with the *AHCIA* and the *Medical Benefits Regulation, Alta Reg 84/2006*, enacted under the *AHCIA*.

9. Pursuant to the *AHCIA* and its regulations, if Physicians have not opted out of the Plan, Physicians can either receive payments on a fee-for-service basis pursuant to the rates established in the Schedule of Medical Benefits, or they can enter into an arrangement with the Minister called an alternative relationship plan.
10. The *AHCIA* does not obligate the Minister to enter into an agreement such as the AMA Agreement in order to pay Physicians' claims for benefits for providing insured services. Rather, the obligation to cover the costs of insured services stems from the *AHCIA* itself and the *Canada Health Act*, RSC 1985, c C-6.
11. The *Canada Health Act* requires provinces to administer and operate a health care insurance plan on a non-profit basis. The plan must satisfy certain criteria in order to receive cash contributions from the federal government, including that it must provide reasonable compensation for all insured health services rendered by medical practitioners. The *AHCIA* satisfies this requirement. The *Canada Health Act* does not require provinces to have an agreement analogous to the AMA Agreement or a dispute resolution mechanism for Physicians.
12. Notwithstanding the entitlement to claim benefits in respect of insured services provided to Alberta residents, Alberta Health does not always pay claims for benefits directly to Physicians. Physicians practice in Alberta through a variety of different personal and corporate structures and arrangements. Most Physicians are independent contractors who claim benefits from Alberta Health for insured services provided. Some Physicians are in employment or contractor relationships with entities such as Alberta Health Services, Covenant Health, or a particular clinic, whereby those Physicians assign their benefits to the entity and the Physician is remunerated by the entity directly through a contractual service or employment agreement.
13. In specific reply to Paragraphs 13 and 14 of the Statement of Claim, Alberta Health denies that Physicians are employees of Alberta Health as alleged or at all.

The relationship between Alberta Health and the AMA

14. The AMA is a voluntary professional organization. Physicians in Alberta may choose to become members of the AMA, however, membership in the AMA is not a prerequisite to receiving payments under the Plan.
15. Alberta Health has, from time to time, entered into various agreements with the AMA, acting on behalf of its members, but Alberta Health specifically denies that such agreements deal with the wholesale terms and conditions of Physicians' work. Rather, such agreements have historically dealt with topics such as information sharing, grant agreements to support health initiatives, various physician assistance and support programs, and consultation matters.
16. In addition, the AMA has historically wished to have input into the rates of benefits paid for providing insured services, as set by the Minister under the *Medical Benefits Regulation*. This desire has resulted in agreements between Alberta Health and the AMA formalizing a process for consultation and negotiation regarding annual percentage changes to the rates

of benefits set by the Minister. The AMA Agreement is one such agreement, and is described in further detail below.

17. In 2018, the *AHCIA* was amended and Section 40.1 was added to recognize the AMA as the exclusive representative of Physicians on “compensation matters”, and as a representative of Physicians on health matters that touch and concern Physicians. “Compensation matters” are defined as the rates for benefits payable for the provision of insured services by a Physician, as well as funding for physician assistance and support programs (frequently referred to by the parties as “rates and prices”).
18. Pursuant to Section 40.1, Alberta Health is required to engage the AMA in good faith and consider the AMA’s representations on matters for which the AMA represents Physicians.
19. However, Section 40.1, like the remainder of the *AHCIA*, does not obligate the Minister to enter into any form of agreement with the AMA.

The AMA Agreement

20. Alberta Health denies that the Plaintiffs have described and characterized the AMA Agreement accurately, particularly in characterizing it as an agreement regarding the terms and conditions of Physicians’ work.
21. As noted above, the AMA Agreement took effect on April 1, 2011. The AMA Agreement was “evergreen” in that it had no set expiry date. Among other things, it set out a perpetual recurring negotiation process, funding for evergreen “Physician Support Programs”, and established of a number of committees.
22. However, there were terms dealing with certain time-limited matters. More specifically, the AMA Agreement required periodic negotiations to determine the following “Financial Matters” which applied during finite terms (referred to as a “Financial Term”):
 - a. Annual percentage increases or decreases to rates for insured services provided by Physicians;
 - b. Annual percentage increases or decreases to prices for the evergreen Physician Support Programs and, subject to paragraph 23 below, the non-evergreen “Physician Assistance Programs”;
 - c. The definition of a cost of living adjustment, if necessary, in relation to the annual percentage increases; and
 - d. The length of the next Financial Term.
23. The AMA Agreement also set out a dispute resolution mechanism regarding the Financial Matters, if the negotiation framework process did not result in an agreement.
24. The non-evergreen Physician Assistance Programs expired at the end of each Financial Term unless the parties negotiated otherwise. The AMA Agreement required the parties to follow

- a non-binding facilitation process regarding whether the non-evergreen Physician Assistance Programs were to continue for the subsequent Financial Term.
25. The initial Financial Term of the AMA Agreement was from April 1, 2011 to March 31, 2018. The second Financial Term was from April 1, 2018 to March 31, 2020.
 26. The AMA Agreement did not contain any provisions relating to workplace conditions or the terms of employment/service through whichever personal or corporate arrangement Physicians chose to provide insured services.
 27. Although the AMA Agreement had no expiry date, the AMA Agreement provided that it could be terminated at any time in its entirety by “mutual written agreement of the parties or by operation of law”.
 28. On October 28, 2019, Bill 21 (the *Ensuring Fiscal Sustainability Act*, SA 2019, c 18) passed first reading in the Legislature. Bill 21 introduced Section 40.2 of the *AHCIA* which prescribed the means by which the Minister could exercise the option to terminate the AMA Agreement by “operation of law”. Section 40.2 required that the AMA Agreement be terminated by an Order in Council. Bill 21 did not create any new right to terminate the AMA Agreement.

Negotiations and consultations between September 2019 – February 2020

29. Under the AMA Agreement, either party could serve notice on the other of its desire to commence negotiations on the expiring Financial Matters and the Physician Assistance Programs. Once notice was served, the parties were obliged to conduct good faith discussions/negotiations for a minimum of three months.
30. On September 3, 2019, the Minister, pursuant to Schedule 1 of the AMA Agreement, provided the AMA with formal notice to commence negotiations. On September 25, 2019, Alberta Health received notice from the AMA of its agreement to begin negotiations.
31. Alberta Health and the AMA agreed that the three-month negotiation period would be deemed to commence on November 13, 2019, the first day of negotiations, thus extending the three month good faith negotiation period.
32. On the first two days of negotiations, Alberta Health presented the AMA with the following:
 - a. A comprehensive opening proposal for a successor agreement to replace the AMA Agreement;
 - b. A presentation including the rationale for Alberta Health’s proposal;
 - c. Notice that it would discontinue two Physician Assistance Programs, the Rural Remote Northern Program and the Business Cost Program, effective April 1, 2021;
 - d. A presentation regarding Bill 21 including the fact that Section 40.2 of the *AHCIA* was introduced to define the legal mechanism by which Alberta Health could

terminate the AMA Agreement by “operation of law”, as expressly agreed to in the AMA Agreement;

- e. A list of changes that Alberta Health proposed to make to the Schedule of Medical Benefits (“SOMB”) for which it wanted to engage the AMA outside of the negotiation process (the “SOMB Proposals”); and
 - f. Notice that should a satisfactory agreement not be reached during the good faith negotiation period, Alberta Health would consider terminating the AMA Agreement by operation of law as agreed to in the AMA Agreement.
33. Alberta Health and the AMA met for a total of 13 days of negotiations between November 13, 2019 and January 31, 2020. In addition, there were other meetings held between Dr. Molnar – AMA President, the Executive Director of the AMA, and various representatives of the Minister and Alberta Health to facilitate the process during this negotiation period.
34. Throughout the process, Alberta Health’s representatives presented comprehensive proposals, detailed rationales, answered all questions related to the items presented to the AMA’s bargaining team and fully disclosed information sought by the AMA to assist the AMA in assessing and responding to Alberta Health’s proposals.
35. The AMA attended negotiations ill-prepared, which hindered the negotiations process. The AMA did not have an opening proposal, consistently focused on matters tangential to the AMA Agreement, did not provide substantive feedback to Alberta Health’s proposals, and did not table any proposals until well into the negotiations period.
36. Once the AMA offered proposals for consideration, Alberta Health considered the AMA’s proposals in good faith, responded to every proposal, and amended its own proposals in an effort to accommodate AMA interests.
37. Taken together, Alberta Health negotiated in good faith, despite the AMA’s approach to negotiations.
38. On December 5, 2019, Bill 21 received Royal Assent, and Section 40.2 of the *AHCIA* came into force.
39. On January 23, 2020, the parties agreed to seek the assistance of a mediator. It was Alberta Health’s desire to reach an agreement and Alberta Health believed that an independent third-party mediator might assist the parties in finding common ground. The parties agreed to further extend the three-month negotiation period until February 29, 2020, in order to allow time for mediation.
40. Alberta Health accepted the mediator proposed by the AMA and mediation commenced on January 31, 2020 and ended February 14, 2020.
41. During mediation, Alberta Health:
- a. Tabled changes to the SOMB Proposals notwithstanding the fact that it had already engaged the AMA in a process separate from the negotiations for the AMA

Agreement and received written feedback from the AMA about the SOMB Proposals in December 2019;

- b. Proposed several revisions to the SOMB Proposals based on AMA feedback;
 - c. Proposed to continue the Business Cost Program and the Rural Remote Northern Program, with some revisions, based on AMA feedback; and
 - d. Agreed to a revised dispute resolution process to be included in any subsequent AMA Agreement.
42. The AMA was not prepared for mediation. It did not table any proposals for Alberta Health to consider until the final day of mediation. It did not offer any proposals regarding the SOMB Proposals despite the fact that it demanded that this subject be brought to the bargaining table for further discussion.
43. Mediation ended on February 14, 2020 when the parties and the mediator concluded that the parties were at an impasse in negotiations.
44. Between February 15 and February 20, 2020, Alberta Health had several discussions with the AMA concerning the possibility of terminating the AMA Agreement as a result of the unsuccessful mediation, including discussions between the Minister and the President of the AMA, Dr. Molnar.
45. On February 20, 2020, by way of Order in Council (OC 039/2020), and therefore by operation of law, the Minister terminated the AMA Agreement, effective February 20, 2020.
46. Alberta Health denies that it failed to advise the AMA of its intention to terminate the AMA Agreement.
47. The AMA was, at all relevant times, aware of Alberta Health's ability to terminate the AMA Agreement by operation of law, particulars of which include:
- a. It was expressly negotiated by the parties and agreed to in the AMA Agreement;
 - b. The possibility of using legislation to amend the AMA Agreement in order to achieve budget certainty was expressly communicated to the AMA during the prior round of negotiations in 2018;
 - c. Termination of the AMA Agreement was explicitly raised by Alberta Health in the first two days of negotiations in November 2019; and
 - d. Alberta Health was clear throughout negotiations that should negotiations and mediation not lead to a new AMA Agreement, that Alberta Health would consider terminating the AMA Agreement pursuant to the termination provisions in the AMA Agreement.

Negotiations and consultations after February 20, 2020

48. Following the termination of the AMA Agreement, Physicians continue to be compensated under the *AHCIA*. Physicians continue to provide insured services and receive payment of benefits pursuant to the *AHCIA*. Physician Support and Assistance Programs have been continued by the Minister. Alberta Health continues to engage with the AMA as required by the *AHCIA*, and otherwise, particulars of which include:
- a. Establishing working groups that met multiple times in March to continue negotiations;
 - b. Meetings between the Minister's office and the President of the AMA;
 - c. Meetings between Alberta Health representatives and AMA representatives; and
 - d. Consulting with the AMA regarding matters for which the AMA is the representative of Physicians.
49. More specifically, since the termination of the AMA Agreement on February 20, 2020, Alberta Health has continued to engage the AMA in good faith and consider the AMA's representations regarding compensation matters and other health matters that touch and concern Physicians, examples of which include:
- a. In response to concerns raised by the AMA regarding the impact on family physicians of Alberta Health's desire to change eligibility criteria regarding billing for complex modifiers, Alberta Health announced that these changes would not proceed;
 - b. In response to concerns regarding Alberta Health's proposed change to medical liability reimbursement fees paid by Physicians, Alberta Health announced that it would keep the fees at 2019-2020 amounts;
 - c. Alberta Health agreed to delay changes regarding Physician overhead and physician-on-call programs pending further consultation, based on feedback by the AMA;
 - d. Alberta Health engaged the AMA on the establishment of virtual health care codes in response to the COVID-19 pandemic;
 - e. Alberta Health established a committee to ensure Physicians working in the community were provided the opportunity to give input into the COVID-19 pandemic response; and
 - f. Alberta Health engaged the Section of Academic Medicine regarding the Alberta Academic Medicine and Health Services Program Agreements.
50. Alberta Health and the AMA continue to negotiate, and nothing precludes future agreements from being reached.

Any matters that defeat the claim of the Plaintiff(s):

Alberta Health has not breached the Section 2(d) *Charter* rights of the Plaintiffs

51. Freedom of association in the *Charter* is afforded to individuals, not to organizations such as the AMA.
52. The individual Plaintiffs and the Physicians represented by the AMA do not possess constitutionally protected rights to engage with Alberta Health in a process of collective bargaining, under Section 2(d) of the *Charter*.
53. Physicians are not employees of Alberta Health, or in “employment-like” relationships with Alberta Health, such as to give rise to a right to engage in collective bargaining with Alberta Health as a manifestation of their freedom to associate. The AMA Agreement is not akin to a collective agreement in the labour context.
54. In the alternative, if the Plaintiffs’ Section 2(d) *Charter* rights were engaged in the circumstances, or if the individual Plaintiffs possess a constitutional right to engage in collective bargaining with Alberta Health, Alberta Health has not interfered with these rights.
55. Section 2(d) of the *Charter* does not prescribe a right to an agreement such as the AMA Agreement or a right to a specific collective bargaining process.
56. Notwithstanding that the AMA Agreement was terminated, the individual Plaintiffs and other Physicians remain able to join together, to make collective representations to Alberta Health through the AMA about Physician compensation matters and other health matters that touch and concern Physicians, and to have those representations considered in good faith.
57. Similarly, Section 2(d) of the *Charter* does not prescribe a right to a specific dispute resolution process. Alberta Health denies that the Plaintiffs are entitled to an independent third-party dispute resolution mechanism, such as arbitration, as a manifestation of any right to a meaningful collective bargaining process. An independent third-party dispute resolution process is not an associational activity protected by Section 2(d) of the *Charter*.
58. In specific response to Paragraphs 15 and 59 of the Statement of Claim, Alberta Health denies that Physicians’ ethical and professional obligations prevent them from engaging in a collective withdrawal of services. The College of Physicians and Surgeons of Alberta’s Standards of Practice expressly allow Physicians to engage in job action and provide guidance on how Physicians may do so.
59. In further response to Paragraphs 15 and 59 of the Statement of Claim, Alberta Health states that Physicians have engaged in job action by withdrawing services or threatening to withdraw services in their communities. These announcements have been made to the general public, creating uncertainty and fear in the community, and have been used to undermine the public’s confidence in the health care system. These actions are analogous to threats of strike or walkout by unionized employees against their employer. In most cases, these Physicians have failed to follow through on their threatened withdrawal of services or have continued to provide services through the use of locums. The following is a list of communities who have been subject to job action by Physicians:

- a. Sundre – 9 Physicians including all of obstetrics;
 - b. Stettler – 5 Physicians;
 - c. Wainwright – 4 Physicians;
 - d. Rocky Mountain House – 4 Physicians;
 - e. Ponoka – 1 Physician;
 - f. Bonnyville – 1 Physician;
 - g. Lac La Biche – 10 Physicians;
 - h. Pincher Creek – 8 Physicians;
 - i. Crowsnest Pass – 10 Physicians; and
 - j. Fort Macleod – 2 Physicians.
60. The Plaintiffs have failed to demonstrate any action by Alberta Health which has interfered with their ability to engage in job action.
61. In summary, in response to the general allegation that Physicians are entitled to a specific dispute resolution process as a result of their inability to engage in a collective withdrawal of services, both of which are denied, Alberta Health states:
- a. Physicians are not entitled to any particular process of collective bargaining;
 - b. Independent third-party dispute resolution is not an associational activity protected by Section 2(d) of the *Charter*;
 - c. A number of Physicians, both individually and as a group, have engaged in, or have threatened to engage in, a withdrawal of services;
 - d. The unwillingness or inability of the AMA to engage and organize its members to undertake group job action is not a consequence of any breach of Section 2(d) of the *Charter*; and
 - e. The Plaintiffs have failed to demonstrate any action by Alberta Health which has interfered with their ability to withdraw services or engage in any other collective activity.
62. The enactment of Section 40.2 of the *AHCIA* did not substantially interfere with any of the Plaintiffs' rights under Section 2(d) of the *Charter*. Section 40.2 of the *AHCIA* merely set out the legal mechanism by which Alberta Health could exercise its contractual right to terminate the AMA Agreement by operation of law.
63. Order in Council (039/2020) was instituted after good faith, meaningful negotiations and consultation had taken place between the AMA and Alberta Health.

64. In response to Paragraph 61 of the Statement of Claim, Alberta Health denies that it has breached Section 2(d) of the *Charter* as alleged or at all. In the alternative, if Alberta Health has breached Section 2(d) of the *Charter*, its actions are justified under Section 1 of the *Charter*.

Alberta Health has not breached the Alberta Bill of Rights or any international labour organization standards

65. In response to Paragraphs 63 to 65 of the Statement of Claim, Alberta Health denies that it has breached the *Alberta Bill of Rights*, RSA 2000, c A-14, or any international labour organization standards, as alleged or at all, for the same reasons outlined herein.

Alberta Health is not liable to the Plaintiffs for breach of contract

66. In response to Paragraph 66 of the Statement of Claim, Alberta Health denies that it has breached the AMA Agreement as alleged or at all. The Minister terminated the AMA Agreement in accordance with Section 6(c)(i) of the AMA Agreement, which specifically allows for the AMA Agreement to be terminated by operation of law as negotiated and agreed to by the parties.
67. In the alternative, Alberta Health states that the AMA is precluded from bringing an action for breach of contract against Alberta Health in accordance with section 40.2(5) of the *AHCIA*.

The Plaintiffs are not entitled to the remedies and/or damages claimed

68. Alberta Health denies that the Plaintiffs have suffered any damages, as alleged or at all, and puts the Plaintiffs to the strict proof thereof. In the alternative, if the Plaintiffs have suffered damages, the amounts claimed are unreasonable, remote, and not attributable to any actions on the part of Alberta Health.
69. Alberta Health denies that the Plaintiffs are entitled to any of the remedies claimed or at all.

Remedies Sought:

70. Dismissal of the Plaintiffs' claim, with costs.