Excerpts from Justice D.P. Ball's ruling on the constitutionality of The Public Services Essential Services Act and the Trade Union Act

Queen's Bench for Saskatchewan Citation 2012 SKQB 62

INTRODUCTION

(4) In Part I of this judgment I conclude that the PSES Act infringes upon the freedom of association of employees protected by s. 2(d) of the *Charter*, in a manner that cannot be justified under s. 1 of the *Charter*. Accordingly, the PSES Act is declared to be of no force or effect, with the declaration of invalidity suspended for a period of 12 months. In Part II of this judgment I conclude that the TUA Act does not infringe on the *Charter*, and dismiss the plaintiff's claim for a declaration of invalidity.

OVERVIEW OF DECISION

(96) However, all services provided by public sector workers are not essential. It cannot be credibly argued, for example, that the services provided by every employee of every governmental ministry, Crown corporation and agency, every city, town and village, and every educational institution, are so essential that their discontinuance would jeopardize the health and safety of the community. Can it be said that the community would be at risk if employees at casinos and liquor stores in Saskatchewan decided to withdraw their services in support of higher wages?

(99) There is no reason in principle, then, why governments should not be required to negotiate mutually acceptable wages and other terms and conditions of employment with their own employees. This is one explanation of why the right to bargain collectively and the right to strike have been extended to all employees, including those in the public sector.

(115) **I am satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada's labour history, recent Supreme Court of Canada jurisprudence and labour relations realities. It is also supported by international instruments which Canada has taken to uphold. Governments may enact laws that restrict or prohibit essential service workers from striking, but those prohibitions must be justified under s. 1 of the *Charter*.**

(159) The Government responds by asserting, first, that it did engage in an extensive consultation process before enacting the impugned legislation, and seconded, that it had no duty to consult with SGEU in any event.

(160) The Government's first contention is not supported by the evidence. Although the Government made a valiant effort to prove otherwise, the evidence clearly establishes that substantive consultations with respect to the PSES Act took place only

between the Government and employer groups. It also establishes that although the largest public sector Unions made every effort to meet with Government representatives in order to have meaningful input into the legislation, their efforts were unsuccessful. Any consultation with the Unions about the PSES Act was superficial at best.

(163) Quite apart from the political environment of the time, it may also be that the Government did not consult with the Unions because the PSES Act was intended to have not one, but two objectives: the first, being to ensure the continuation of essential services during a labour dispute; the second, being to alter the balance of power at the collective bargaining table. The most obvious way to alter the balance of power would be to empower every public employer to prohibit any meaningful strike activity by employees while ensuring that the employees would have no access to any alternative dispute resolution process.

(193) As well, an unnecessary imbalance is created by giving public employers unilateral power under 9(2) of the PSES Act — a power that invites decisions to be made during a labour dispute based on their perception of which employees are most important to their union, or which ones are most opposed to collective action. The Government offered no response to the proposition that unions should have input into the naming of the employees and no explanation for why the public is better protected by conferring that power on the employers.

(205) No further comparative analysis is required. It is enough to say that no other essential services legislation in Canada comes close to prohibiting the right to strike as broadly, and as significantly, as the PSES Act. No other essential services legislation is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential service workers and, where those designations have the effect of prohibiting meaningful strike action, an independent, efficient, overall dispute mechanism. While the purposes of all other essential services legislation is the same as the PSES Act, none have such significantly deleterious effects on protected rights under s. 2(d) of the *Charter*.

(206) At para. 7 of this judgment I referred to the three basic approaches to essential services dispute resolution in Canada, and stated that the PSES Act ostensibly adopts a "designation" or "controlled strike" model. I used the word "ostensibly" because where a "designation" model results in such a high level of essentiality that the capacity to engage in meaningful strike action is abrogated, it in essence becomes a "no strike" model.

(285) I have determined that the provisions of *The Trade Union Amendment Act 2008* do not infringe on the rights of employees to organize, to bargain collectively and to strike, all of which are protected by s. 2(d) of the *Charter*.