In the Court of Appeal of Alberta

Citation: Alberta v AUPE, 2014 ABCA 197

Date: 20140617
Docket: 1303-0127-AC
Registry: Edmonton

Between:

The Government of the Province of Alberta

Respondent
(Applicant)

- and -

The Alberta Union of Provincial Employees

Appellant
(Respondent)

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Mr. Justice Russell Brown

Memorandum of Judgment

Appeal from the Order by
The Honourable Associate Chief Justice Rooke
Dated the 29th day of April, 2013
Filed on the 1st day of May, 2013
(Docket: 1303-06059)

Memorandum of Judgment

The Court:

I. INTRODUCTION

[1] The Alberta Union of Public Employees (AUPE) appeals an order holding it in civil contempt for failing to comply with three Directives issued by the Alberta Labour Relations Board (the Board) in the context of a wildcat strike at several correctional facilities across the province (the Contempt Order). The Board Directives were entered as Queen's Bench Orders pursuant to sections 18(6), 86, and 88(2) of the *Labour Relations Code*, RSA 2000, c L-1 [the *Code*].

[2] For reasons that follow, the appeal is allowed in part. The chambers judge made no palpable and overriding error in finding AUPE in contempt. However, portions of the Contempt Order limit AUPE's freedom of expression in a manner that cannot be justified under s 1 of the *Charter* as a reasonable limit.

II. BACKGROUND

[3] On Friday, April 26, 2013, several AUPE members, consisting of correctional peace officers and service workers, walked off their jobs at the Edmonton Remand Centre in response to the suspension of two AUPE members who voiced health and safety concerns about working conditions. More AUPE members followed suit later that day and into the evening by walking off the job at several other correctional facilities throughout Alberta.

[4] The respondent Government of Alberta filed a complaint with the Board alleging that AUPE violated section 70 of the *Public Service Employee Relations Act*, RSA 2000, c P-43 [*PSERA*], which prohibits strikes.

[5] On Saturday, April 27, 2013, the Board issued a Directive ordering the striking AUPE members to cease their illegal strike and desist from engaging in further strike activity. The Board further directed AUPE to take steps to notify its striking members of the Directive and to "make every reasonable effort to bring the illegal strike to an end".

[6] That same day the wildcat strike expanded to numerous other facilities across Alberta, in spite of the Board Directive.

[7] Alberta brought a further application and the Board issued three revised Directives, which included the following provisions:

> (a) The Employees are to cease their illegal strike and desist from engaging in any further strike activity;
>
> (b) All Employees engaged in illegal strike activity are directed to return to work immediately;
>
> (c) The Union shall immediately take steps to notify the Employees of these Board Directives by all reasonable means;

(d) The Union shall make every reasonable effort to bring this strike to an end, including advising Employees of their obligation to comply with these Directives.

[8] On Saturday, April 27, 2013, the Board Directives were filed in the Court of Queen's Bench pursuant to sections 18(6) and 88(2) of the *Code* and became court orders. The court orders were served on AUPE at approximately 9:00 am on Sunday, April 28, 2013.

[9] The wildcat strike continued and expanded throughout the Province throughout the day on Sunday, April 28, 2013 and into Monday, April 29, 2013.

[10] On Monday, April 29, 2013, Alberta brought an application for an order for civil contempt and other relief, returnable at 4:00 pm that day. AUPE was served electronically with the application at 1:30 pm and received a filed copy of the application at 3:00 pm for the hearing set for 4:00 pm.

III. DECISION BELOW

[11] The chambers judge found that AUPE was in contempt of the court orders and the Board Directives, relying on evidence of contempt from "the very mouths of the AUPE senior officials, in direct defiance" (ARD F6/6-8). The chambers judge reviewed the material that AUPE had posted on its website. He noted that the Board Directives were not posted on the website when they were first issued on April 27. He noted that, on April 29, the website contained cursory mention of the Board Directives, and that it continued to contain statements that supported the job action and "promote[d] that correction officers defy injunction and continue to wildcat" (ARD F6/29-35). He concluded that AUPE's efforts to comply with the Board Directives and notify employees by all reasonable means of the Board Directives were "wholly inadequate" and "an insult" (ARD F6/35-38).

[12] In reaching his conclusion on contempt, the chambers judge also relied on video recordings that showed AUPE officials making contemptuous statements to AUPE members and to the media. He concluded that "there [was] absolutely defiance by [AUPE's] President implicitly, not quite as strong, by the Vice-President, Ms. Rusznak, and certainly by the officer and head of the Union local […], Mr. McChesney" (ARD F6/40 – F7/2). He found that the tone of the videos was "mocking", "defiant" and "sarcastic" in relation to the Board Directives and the court order. He found that while AUPE's officials mention the Board Directives and the court order, they did not demonstrate genuine support of them, nor did they encourage compliance with them. He found that by urging union members to "stay […] strong", "stay[…] out here", "stay[…] out until we get what we want", and "not go […] back until all our concerns are addressed", the tenor of the leadership's statements was "utter defiance" of the Board Directives and the court order.

[13] The chambers judge then imposed remedies, with an emphasis on purging the contempt. In addition to imposing escalating fines should the strike continue, the chambers judge also made the following orders:

8. AUPE is directed to remove from its website any and all references to solidarity or support with the strike referred to in these Directives;

9. The Orders of the Court containing the Board Directives, bearing the Court filed stamp, shall be published forthwith on the AUPE website;

10. No statements in solidarity with or in support of the strike referred to in these Orders of the Court containing the Directives shall be published on any website or any social media site by any officer of AUPE;

11. Leadership of the Union, specifically Guy Smith (President), Clarke McChesney (Chair of Local 003), and Carrie-Lynn Rusznak (Vice President), are to sign and publish on the AUPE website, in clear and unambiguous terms and without equivocation, a statement encouraging the members of AUPE to meet their obligations under paragraph 4 of the ALRB Directives, and specifically to cease their strike and return to work immediately and to remind all members of AUPE to comply with the Directives;

12. AUPE continues to be authorized to publish third party news reports from independent media sources with respect to the strikes referred to in the Orders of the Court containing the Directives, but are prohibited from publishing their version of the news relating to the strikes referred to in the Orders of the Court containing the Directives, on its website or elsewhere.

IV. ISSUES

[14] AUPE challenges the chambers judge's finding of contempt as well as paragraphs 8 through 12 of the Contempt Order. It argues that the chambers judge:

(a) Erred in finding AUPE in civil contempt of the orders of the Court containing the Board Directives;

(b) Acted without jurisdiction and contrary to the *PSERA* when he issued orders in the nature of a mandatory injunction without compliance with the statutory requirements including notice and service in section 68 of *PSERA*;

(c) Granted an order that unreasonably restrained AUPE and others from exercising the freedoms guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*;

(d) Failed to consider the impact of his Order upon those who were not represented before the Court;

(e) Relied on inadmissible hearsay evidence; and

(f) Admitted evidence that was more prejudicial than probative.

V. STANDARD OF REVIEW

[15] The standard of review in considering an appeal from a contempt citation varies with the issue. Where the appeal involves a question of law, the standard of review is correctness: *Koerner v Capital Health Authority*, 2011 ABCA 289 at para 5, 515 AR 392 [*Koerner*]. Where the issue relates to the exercise of discretion, the standard is one of reasonableness: *Broda v Broda*, 2004 ABCA 73 at para 8, 346 AR 376. The findings of fact and inferences of fact underlying a finding of contempt are reviewed for palpable and overriding error: *Koerner* at para 5. The finding of contempt in a particular case involves the application of a legal standard to the facts, meaning it is a mixed question of fact and law and it is reviewable on the palpable and overriding error standard: *Koerner* at para 5.

[16] AUPE argues that the issue of whether the chambers judge relied on inadmissible hearsay evidence is reviewable on the correctness standard. This assumes that the chambers judge mischaracterized or misapprehended the legal test for hearsay; therefore the hearsay issue is a question of law. However, if the chambers judge used the correct legal test to determine the admissibility of the evidence, the question of whether the evidence was inadmissible hearsay is one of mixed fact and law, reviewable on the palpable and overriding error standard. Whether the probative value of the evidence outweighs its prejudicial effect is a discretionary determination made by the chambers judge: *Draper v Jacklyn et al*, [1970] SCR 92 at 96-97, 9 DLR (3d) 264. As such, it is reviewable on the reasonableness standard.

[17] Constitutionality is a question of law, reviewable on the correctness standard: *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 28, [2003] 2 SCR 504; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58, [2008] 1 SCR 190.

VI. ANALYSIS

[18] We will address the issues in the following order. We will first consider whether the chambers judge erred by finding AUPE in contempt. This issue first requires an analysis of the issues surrounding the admissibility of the hearsay and video evidence, as that evidence formed the basis for the chambers judge's finding of contempt. Second, we will address the *Charter* issues. Third, we will deal with whether the chambers judge had jurisdiction to issue the Contempt Order. And last, we will consider whether the Contempt Order affected persons who were not represented in court.

A. The Chambers judge properly found that AUPE was in contempt

1. Admissibility of Video Evidence

[19] The chambers judge admitted into evidence several video clips. AUPE challenges the admissibility of the video clips on two grounds: (1) that they were hearsay evidence; and (2) alternatively, the prejudicial effect of the video evidence outweighs its probative value.

a. Hearsay Issues

[20] AUPE argues that the chambers judge erred in holding AUPE responsible for public statements made by certain individuals because he improperly relied on vicarious admissions in order to identify the speakers as AUPE's officials.

[21] Multiple video clips were tendered before the chambers judge to show that AUPE's leadership made public statements to striking members and to the media defying the Board Directives and supporting continued strike action. The videos were made on April 26 and 27, 2013 but continued to be available on AUPE's website after the Board Directives were entered as Orders and served on AUPE leadership.

[22] AUPE acknowledged that the statements made by AUPE leadership fall within the admissions against interest exception to inadmissible hearsay evidence. However, it argues that these admissions cannot be used as evidence because the identities of the speakers were proven through inadmissible hearsay. The chambers judge found that there was no issue about the identity of the speakers in the videos and held that, in some cases, they had identified themselves.

[23] We find that there is no issue with respect to the identification of AUPE president, Guy Smith. One of Alberta's employees, Ms. Vasko provided both affidavit and *viva voce* evidence identifying Mr. Smith as AUPE's President and confirmed that she knew him personally. In our view, this is sufficient direct evidence proving Mr. Smith's identity.

[24] Further evidence about the identity of AUPE officials consisted of a video attached to the affidavit Ms. Claudia Vaquerano, a Government employee. The video, posted on AUPE's website on April 29, 2013, identified Guy Smith as President of AUPE and Clarke McChesney as the Chair of AUPE Local 003. AUPE controls the content of its own website and the identities of these people were confirmed on that site. Therefore, we find that AUPE has admitted Mr. Smith's and Mr. McChensey's specific identities and their authority to speak on behalf of the Union. The chambers judge was entitled to rely on this evidence to establish identity.

[25] Videos and "news reports" published by AUPE on its website hold several individuals out as agents for the Union. This creates ostensible authority for these individuals to speak on behalf of the Union. Mr. McChesney's and Mr. Smith's public statements are admissible pursuant to the admissions and the vicarious admissions against interest exceptions to the exclusion of hearsay evidence: see John Sopinka, Sidney N Lederman & Alan W Bryant, *The Law of Evidence in Canada,* (Toronto, Butterworths: 1992) at 279-293.

[26] More problematic is the identification of AUPE Vice-Presidents Erez Raz and Carrie-Lynn Rusznak. Ms. Vasko could not identify these two persons through personal knowledge. Instead, she relied on inadmissible hearsay, consisting of AUPE's website as the basis for identification. This was insufficient evidence to identify Mr. Raz and Ms. Rusznak and their evidence was inadmissible hearsay. However, this is not fatal, as the chambers judge did not rely on Mr. Raz's comments in his reasons. While he noted Ms. Rusznak's comments in support of his finding of contempt, they were less damning and her defiance of the Court Order was less strong than Mr. Smith's. There was sufficient evidence of defiance

by Mr. Smith and Mr. McChensey that any error in the chambers judge's reliance on Ms. Rusznak's comments would not have made a difference.

b. Prejudicial effect versus probative value

[27] AUPE further argues that the chambers judge admitted evidence that was more prejudicial than probative. It submits that the chambers judge should not have admitted the media reports into evidence because they contain narrative that cannot be attributed to AUPE and because content is prejudicial.

[28] In his reasons, the chambers judge only relied on the portions of these media reports that were attributable to AUPE, specifically, where AUPE leadership made public comments. The chambers judge found that the focus was on statements made by AUPE's officials and was alive to the need to separate out background information and focus on the specifics of the evidence. Based on the record, we are satisfied that the chambers judge did not rely on the secondary commentary by media reports. He relied only on the portions showing the action of AUPE leadership [see ARD, F6/40-F8/12].

[29] The appellant further argues that the prejudicial effect of the videos is not minimized by the chambers judge's ability to disregard the prejudicial elements, citing *R v Villeda*, 2011 ABCA 85, 502 AR 83, and *R v Vuradin*, 2011 ABCA 280, 515 AR 25; affirmed on other grounds 2013 SCC 38, [2013] 2 SCR 639. Both cases illustrate that chambers judges must be cautious in self-directing, since they are still susceptible to relying on prohibited forms of reasoning. However, in *Villeda* and *Vuradin*, the chambers judge improperly relied on evidence even after self-directing. Here, the chambers judge did not rely on the portions of the videos alleged to be prejudicial. His reasons refer only to statements made directly by AUPE officials and not to any statement made by the media, or the way in which the statements were presented. There is nothing in the transcript of proceedings or in the chambers judge's reasons which suggests that his reasoning was coloured by the media portrayal of events. There is a presumption of judicial regularity, and here there is no evidence to rebut that presumption.

[30] Where evidence is found to be prejudicial, it will only be excluded where its prejudicial effect outweighs the probative value. This was a discretionary determination by the chambers judge. In this case, the chambers judge admitted the video evidence holding that the videos provided context to the comments of AUPE's officials.

[31] In our view, video clips in Exhibit 2 (CD) do not disclose any media commentary that creates prejudice to the appellant. Only one of the clips contained media commentary and it is a recitation of facts. We find that the chambers judge's decision to admit the videos in Exhibit 2 and place no weight on the media portions was reasonable.

[32] The video clips in Exhibit 1 consist primarily of media commentary. They describe the strike in terms that are not completely balanced and they do not contain any admissible commentary from AUPE leadership. The AUPE speakers on these clips were Mr. Raz and Ms. Rusznak, both of whom were not identified independently at trial. In our view, it was not reasonable for the chambers judge to admit this exhibit because there was no admissible probative value in these clips and the clips lean toward the prejudicial end of the spectrum. However, since the chambers judge's decision did not hinge on this

evidence, the result would have been the same even without this error: *R v O'Brien*, 2011 SCC 29, [2011] 2 SCR 485: see Roger P. Kerans & Kim M Willey, *Standards of Review Employed by Appellate Courts*, 2d ed (Edmonton: Juriliber, 2006) at 299-300.

2. Conclusion on Contempt

[33] AUPE argues that the chambers judge erred in finding it in contempt. AUPE also submits that it sufficiently complied with the Board Directives and the court order.

[34] The chambers judge made several findings of fact:

- the statements on the website remained online as AUPE's position at the time of the contempt application [ARD, F5/33-38];
- the website was AUPE's prime vehicle for communicating information;
- the Order required AUPE to notify employees by all reasonable means of the Board Directives;
- given the importance of AUPE's website, reasonable means would have included posting the Order to the website [ARD, F6/19-23];
- the website contained many statements supporting and encouraging the strike, and only one line stating there was an injunction in place [ARD, F6/25-38];
- there was no notification to the employees on the record for over 36 hours and held that this contravened the provision in the Board Directives that notice be given "immediately" [ARD, F8/28-29];
- the steps taken to notify employees by all reasonable means of the Board Directives were "wholly inadequate" [ARD, F6/37];
- AUPE leadership made public statements that mocked the Board Directives [ARD, F7/2-9].

[35] The finding of contempt is a mixed question of law and fact reviewable on the palpable and overriding error standard. Given the test for contempt and the substantial evidence supporting each element of contempt, the chambers judge did not commit a palpable and overriding error in finding AUPE in contempt. We decline to intervene.

B. The chambers judge's order unreasonably restrained AUPE's rights under section 2(b) of the *Charter*

[36] At the hearing of this appeal, counsel for AUPE conceded that paragraph 9 of the Contempt Order was simply a method to communicate the Board Directives to its membership and did not offend section 2(b) of the *Charter*. It limited their submissions to the clauses in paragraphs 8, 10, 11, and 12 of the Contempt Order (the "Impugned Paragraphs").

[37] AUPE argues that the Impugned Paragraphs both restrict and direct AUPE's freedom of expression in a way that contravenes s 2(b) of the *Charter*. The Impugned Paragraphs direct AUPE and its leadership to make certain denunciatory statements about the strike to its members on its website and also restrict AUPE from expressing support for the strike.

[38] In response, Alberta argues that AUPE's *Charter* argument should be dismissed as an improper collateral attack on section 70 of the *PSERA*, which prohibits certain strike action and the Board's Directives. Before us, Alberta chose not to address the *Charter* argument on its merits.

1. Breach of section 2(b) of the *Charter*

[39] Section 2(b) provides:

> 2. Everyone has the following fundamental freedoms:
>
> [...]
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[40] Section 2(b) of the *Charter* protects any activity that conveys or attempts to convey meaning: *Irwin Toy v Québec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577. In the context of labour disputes, freedom of expression is an essential component because it assists in bringing the debate about labour conditions into the public realm and in alleviating the power imbalance between employers and individual workers: see *RWDSU, Local 588 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 34-35, [2002] 1 SCR 156 [*Pepsi-Cola*].

[41] In the more traditional sense, section 2(b) protects one's ability to make statements, but it also includes the freedom from being forced to express a particular message: *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416. Thus, freedom of expression protects a person from being compelled to express an opinion or belief that is not his own: see *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 81 DLR (4th) 545; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1.

[42] In the labour context, protected expression encompasses a wide range of activities. This Court has recognized that "the picket line itself is an expressive activity": *UFCW v Alberta*, 2012 ABCA 130 at para 62, 522 AR 197; 2013 SCC 62, [2013] 3 SCR 733. As McLachlin CJ and LeBel J stated in *Pepsi-Cola*, picketing includes a wide range of activities:

> 30 […] Picketing represents a continuum of expressive activity. In the labour context it runs the gamut from workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances of buildings. Beyond the traditional labour context, picketing extends to consumer boycotts and political demonstrations (see Daishowa Inc. v. Friends of the Lubicon (1998), 39 O.R. (3d) 620 (Ont. Ct. (Gen. Div.)). A picket line may

> signal labour strife. But it may equally serve as a physical demonstration of individual or group dissatisfaction on an issue.
>
> […]
>
> 32 Picketing, however defined, always involves expressive action. As such, it engages one of the highest constitutional values: freedom of expression, enshrined in s. 2(b) of the *Charter*. This Court's jurisprudence establishes that both primary and secondary picketing are forms of expression, even when associated with tortious acts: *Dolphin Delivery*, supra. […].
>
> 33 Free expression is particularly critical in the labour context. As Cory J. observed for the Court in *U.F.C.W., Local 1518 v. KMart Canada Ltd*., [1999] 2 S.C.R. 1083, "[f]or employees, freedom of expression becomes not only an important but an essential component of labour relations" (para. 25). The values associated with free expression relate directly to one's work. A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth*: Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313; *KMart*, supra.

[43] Further, freedom of expression also encompasses the ability to collect information for distribution. In *UFCW v Alberta*, Slatter JA held:

> [65] Where freedom of expression is engaged, that encompasses an ability to collect the information that is to be distributed: *R. v National Post*, 2010 SCC 16 at para. 33, [2010] 1 SCR 477. Thus, if the union had a right to express its views about the collective bargaining process, the strike, and crossing of the picket line, it also had a right to gather information for that purpose. That would provide some constitutional protection for making the videos of the picket line.

[44] There is no question that, in the present case, the constitutional protection for making the videos of the picket line extends to posting videos and materials to AUPE's website and other social media. The evidence before the chambers judge demonstrated that the website included AUPE "news" which conveyed information about the strike to its readers. This clearly falls within the spectrum of expressive content protected by section 2(b) of the *Charter*.

[45] In our view, the Contempt Order directly affects AUPE's freedom of expression. It does so by imposing both negative and positive obligations on AUPE. Paragraphs 8, 10, and 12 of the Contempt Order impose negative obligations on AUPE to refrain from taking certain actions. They limit the content that AUPE can publish on its website and elsewhere. They also prohibit AUPE from publishing any statement of solidarity or support for the strike. As discussed above, this is clearly meaningful expression, particularly in the context of a labour dispute.

[46] Further, paragraph 11 of the Contempt Order imposes positive obligations on AUPE by directing it to make specific statements encouraging AUPE members to comply with the Board Directives and to publish the Board Directives to its website. The Supreme Court found that a similar direction infringed

freedom of expression by putting words in the mouth of the speaker: see *Slaight*. There, an adjudicator required the employer to write a reference letter for an employee with specified positive content. The Supreme Court held that forcing a person to make specific statements is a clear infringement of the s 2(b) right to freedom of expression. Similarly in this case, the Contempt Order requires AUPE to make statements it may not agree with and imposes the same kind of action that infringes s 2(b) in *Slaight*.

2. Justification under section 1 of the *Charter*

[47] AUPE argues that the 2(b) *Charter* infringement cannot be justified under the *Dagenais/Mentuck* test: see *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 120 DLR (4th) 12, and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442.

[48] The *Dagenais/Mentuck* test was developed in the context of publication bans and it has been applied to discretionary orders that limit freedom of expression by the press during judicial proceedings: *Vancouver Sun (Re)*, 2004 SCC 43 at para 31, [2004] 2 SCR 332; *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at para 28, [2005] 2 SCR 188.

[49] While the *Dagenais/Mentuck* test does not specifically contemplate the facts of this case, we find guidance in its general principles. Indeed, recent Supreme Court jurisprudence has acknowledged that the principles of the *Dagenais/Mentuck* framework have broader application: *R v NS*, 2012 SCC 72, [2012] 3 SCR 726.

[50] In *R v NS*, a witness who wore a niqab for religious reasons was required to remove it while testifying. The Supreme Court had to balance the witness's freedom of religion and the accused's right to a fair trial. The court held that the answer could be found in the *Dagenais/Mentuck* approach:

> [32] Under the *Dagenais/Mentuck* framework, once a judge is satisfied that both sets of competing interests are actually engaged on the facts, he or she must try to resolve the claims in a way that will preserve both rights. *Dagenais* refers to this as the requirement to consider whether "reasonably available alternative measures" would avoid the conflict altogether (p. 878). We also call this "accommodation". We find a way to go forward that satisfies each right and each party. Both rights are respected, and the conflict is averted.
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> […]
>
> [34] If there is no reasonably available alternative that would avoid a serious risk to trial fairness while conforming to the witness's religious belief, the analysis moves to the next step in the *Dagenais/Mentuck* framework. The question is whether the salutary effects of requiring the witness to remove the niqab, including the effects on trial fairness, outweigh the deleterious effects of doing so, including the effects on freedom of religion (*Dagenais*, at p. 878; *Mentuck*, at para. 32).
>
> [35] As *Dagenais* makes clear, this is a proportionality inquiry, akin to the final part of the test in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[51] The alternative to using the *Dagenais/Mentuck* framework would be to use the *Oakes* analysis. That was the used approach in *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214, 53 DLR (4th) 1.

[52] In *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], the Supreme Court noted that the *Oakes* framework is difficult to apply outside the context of reviewing a law or other rule of general application for *Charter* compliance. Some aspects of the *Oakes* test are poorly suited to the review of discretionary decisions, both of judges and of administrative decision-makers: *Doré* at para 37. Indeed, in *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174, the Supreme Court did not undertake an *Oakes* analysis but instead attempted to balance the interests at stake in the regulation of secondary picketing in a labour dispute in a way that conformed with *Charter* values.

[53] Ultimately, the *Dagenais/Mentuck* test and the *Oakes* test rely on similar principles. The *Oakes* test asks whether there is a a pressing and substantial objective and whether the means to achieve that objective are proportional. On the other hand, the *Dagenais/Mentuck* framework says a publication ban should only be ordered when:

1) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

2) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[54] In our view, the *Dagenais/Mentuck* framework is flexible enough to assess whether the Contempt Order is a reasonable limit on AUPE's freedom of expression.

[55] We pause to note that the chambers judge did not have the benefit of full argument about the impact of sections 2(b) and 1 of the *Charter*, even though AUPE briefly mentioned a possible *Charter* infringement in oral argument. Indeed, that was not the focus of the parties' argument at the contempt application; the *Charter* issues arose only after the chambers judge issued the Contempt Order and the remedies in the Impugned Paragraphs. In addition, there was little evidence before the chambers judge about the consequences if the strike continued or about what alternative measures could be used to ensure compliance with the Board Directives and the court orders. Accordingly, the chambers judge did not turn his mind to whether the contempt order, as written, was necessary to end the strike and whether its salutary effects would outweigh its deleterious effects.

[56] In this case, the competing interests are AUPE's freedom of expression and the proper administration of justice. The relevant questions are: (a) was the contempt order necessary to prevent a serious risk to the proper administration of justice because reasonably available alternatives would not prevent the risk; and (b) did the salutary effects of the Contempt Order outweigh its deleterious effects on AUPE's freedom of expression.

[57] The evidence showed that there were potentially dangerous risks to the administration of justice. Those included:

- AUPE disregarded and defied the Board Directives and the resulting court orders;
- there was insufficient correctional staff at certain facilities;
- the RCMP officers who were temporarily fulfilling the contingency plan were not trained to deal with the circumstances that could arise in a penitentiary environment;
- there was prisoner unrest and some instances of property damage and violence; and
- some inmates were not making it to court appearances, interfering with the administration of justice.

[58] While the risks to the administration of justice were serious in the circumstances, a balance had to be struck to protect AUPE's *Charter* rights. In our view, without further evidence, it would be difficult to conclude that the circumstances were so serious and dangerous as to justify limiting the right to freedom of expression by imposing both negative and positive obligations as was done in the Impugned Paragraphs. While the strike had been in place for several days, the terms of the Contempt Order that limited freedom of expression were to continue indefinitely. There was no evidence about whether the salutary effects of the Impugned Paragraphs outweighed AUPE's freedom of expression and its ability to communicate its position during a labour dispute. In light of the constitutional protection of expression, lesser measures were called for to ensure compliance than the measures ordered in the Impugned Paragraphs, which went beyond ensuring compliance and sought instead to impose adhesion. Accordingly, we are not satisfied the Impugned Paragraphs can be justified under section 1 of the *Charter* on this record.

3. Collateral Attack

[59] Alberta argued that AUPE could not invoke the *Charter* to challenge the Impugned Paragraphs because these clauses are consistent with section 70 of *PSERA*. Alberta claims that, by arguing that these clauses are inconsistent with the *Charter*, AUPE is in effect launching a collateral attack on section 70 and the Board Directives.

[60] The common law rule against collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal: *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 71, [2004] 1 SCR 629 [*Garland*]. In *Garland* at para 72, the Supreme Court said: "[t]he idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system." The rule against collateral attack on orders can prevent abuse of process by preventing parties from improperly attacking an order in a forum other than the one where it was issued. Collateral attack of a legislative scheme occurs where a party challenges the statute or regulation in proceedings indirectly, without challenging the legislation itself.

[61] Alberta submits that section 70 of the *PSERA* prohibits AUPE from expressing solidarity and support for a strike by its members, which is consistent with the Contempt Order. It argues that AUPE's *Charter* challenge to the Contempt Order is an improper indirect attack on the *PSERA* that is prohibited by the rule against collateral attack.

[62] We disagree. Section 70 of the *PSERA* only says that a union cannot cause or attempt to cause a strike, or consent to a strike. Section 70 does not say that AUPE must issue statements supporting the Board Directives, nor does it prohibit AUPE from publishing its own views, which is what the Contempt Order directed. In this sense, the Contempt Order goes much further than what *PSERA* requires of unions; this is what AUPE challenged, not section 70.

[63] We also disagree with the argument that AUPE is collaterally attacking the Board Directives, which remain in place and have acquired the status of court orders. AUPE is only challenging the remedial orders issued as part of the contempt proceedings. This is not a collateral attack on the Board Directives. It is simply a challenge to the chamber judge's interpretation of the Board Directives and to the measures he imposed for purging the contempt. Further, the proceedings in this case were completely in line with the procedure in the *PSERA* and the *Labour Relations Code*, which allows parties to enter Board directives as court orders and to seek their enforcement through contempt proceedings, as was done in this case.

C. The chambers judge had jurisdiction to issue the Contempt Order

[64] AUPE argued that the chambers judge did not have jurisdiction to grant the Contempt Order. It argues that the Contempt Order was in the nature of a mandatory injunction and, therefore, the notice requirements in section 68 of the *PSERA* applied. Section 68 provides:

> 68(1) Notwithstanding anything in this Act, the *Judicature Act* or any other Act, when an action occurs that either party considers to be a strike or lockout, no injunction before trial shall be granted ex parte to
>
> (a) a party to the dispute, or
>
> (b) any other person or party
>
> to restrain a party to the strike or lockout from doing any act in connection with the strike or lockout.
>
> (2) Every affidavit intended to be used in support of an application for an interim injunction to restrain a person from doing any act in connection with a strike or lockout shall be confined to those facts that the deponent is able of the deponent's own knowledge to prove, and a copy of the affidavit shall be served with the application.
>
> (3) If members of a trade union are the defendants or intended defendants, the application may be served on an officer of the trade union or a member of it who is engaged in the activity proposed to be restrained or a person engaged in that activity.

> (4) The application shall be served in sufficient time before the time fixed for the hearing, not being less than 4 hours in any event, to enable the person to attend at the hearing of the application.

[65] AUPE argues that Alberta's application for contempt sought to compel AUPE to take certain steps and to restrain it from taking certain action. It argues that the contempt application was, in effect, an application for a mandatory injunction and, therefore, Alberta's application ought to have been served at least four hours before the start of the hearing. Since AUPE was served approximately an hour before the application, it argues that the chambers judge did not have jurisdiction to grant the Contempt Order.

[66] We disagree with AUPE's characterization of the nature of the contempt application. Alberta's contempt application was not an application for fresh injunctive relief. The contempt proceedings were remedial in nature; they were merely seeking to enforce the Board Directives that had already been filed with the court. Alberta filed its contempt application only after the Board conducted its hearing into the labour dispute and after it issued directives that had an injunctive effect. Alberta was in effect seeking direction from the court about how AUPE might purge its contempt and how it might achieve compliance with the Board Directives.

[67] Section 68 of the *PSERA* applies only to fresh injunction applications. It does not restrict the remedial discretion of a judge to enforce compliance with court orders.

[68] This ground of appeal fails.

D. The Contempt Order did not affect persons who were not represented in court

[69] AUPE argues that the chambers judge erred by failing to consider the impact of the Contempt Order on persons not represented in court. It argues that AUPE's officials (Mr. Smith, Ms. Ruznak and Mr. McChesney) were not named as respondents in the contempt application; did not have the benefit of being represented by counsel and, yet, paragraph 11 of the Contempt Order requires them to take specific actions.

[70] The opening lines of paragraph 11 state: "Leadership of the Union, specifically Guy Smith (President), Clarke McChesney (Chair of Local 003), and Carrie-Lynn Ruznak (Vice President) are to sign and publish on the AUPE website [...]". We do not read paragraph 11 as a personal remedy against the named individuals. Instead, it is a direction for AUPE to take certain actions through its officers. A union can only act through its officers and, in this case, the listed individuals were the key spokespersons for AUPE during the labour dispute. The evidence was clear that they had made contemptuous statements on behalf of AUPE and, therefore, it was reasonable for the chambers judge to conclude that AUPE could purge its contempt through statements from these same spokespersons.

[71] This ground of appeal fails.

VII. CONCLUSION

[72] The appeal is allowed in part.

[73] We do not find any error in the chambers judge's finding of contempt. However, we conclude that the Impugned Paragraphs infringed AUPE's freedom of expression under section 2(b) of the *Charter*. Due to the lack of a proper evidentiary foundation, we conclude that the Impugned Paragraphs cannot be justified under section 1 of the *Charter*. Therefore, we strike paragraphs 8, 10, 11, and 12 from the Contempt Order.

Appeal heard on March 25, 2014

Memorandum filed at Edmonton, Alberta
this 17th day of June, 2014

Authorized to sign for: Picard J.A.

Veldhuis J.A.

Brown J.A.

Appearances:

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