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Curious Interactions between the *Charter*, Contempt Orders, and the Evolution of Section 1

Written by: Sarah Burton

Case commented on: *Alberta v AUPE*, 2014 ABCA 197

In *Alberta v AUPE* the Alberta Court of Appeal reviewed the validity of a civil contempt order issued against the Alberta Union of Public Employees ("AUPE"). While ultimately upholding the order for civil contempt, the unanimous Court of Appeal sizably narrowed its provisions to protect AUPE's freedom of expression. The decision turned on two issues: the admissibility of televised news reports as evidence, and the constitutionality of court orders that restrict free speech. Of these two issues, the *Charter* discussion is particularly interesting. The Court of Appeal presented and applied an alternative to the *Oakes* test, holding that *Oakes* is ill-suited to challenges that do not involve laws of general application. In addition, the Court curiously failed to consider a critical threshold issue – namely, whether the *Charter* applied to court orders at all. Thus, *Alberta v AUPE* not only widens a narrow exception to the *Oakes* test, it imposes *Charter* restrictions on contempt orders without discussing its authority to do so.

Background Facts

In April of 2013, a "wildcat" strike (one without union leadership's authorization or support) arose at the Edmonton Remand Centre. It quickly expanded to several correctional facilities across the province. The striking employees were governed by the *Public Service Employee Relations Act*, RSA 2000, c P-43 [*PSERA*], which prohibits strikes (*PSERA* at s. 70). As such, the government of Alberta filed a complaint with the Alberta Labour Relations Board (the "Board").

The Board issued a series of directives that (a) ordered the striking AUPE members to return to work, (b) directed AUPE to "immediately" notify the striking members of the directives, and (c) ordered AUPE to make reasonable efforts to bring the strike to an end (the "Directives"). The Directives were filed with the Court of Queen's Bench, wherein they became court orders. When the strike continued, the Government of Alberta brought an application against AUPE for civil contempt of the court orders.

The Honourable Associate Chief Justice Rooke in chambers granted the government's application. In reaching this decision, Justice Rooke relied on televised video clips in which various AUPE officials made contemptuous statements about the court orders (para 11). Justice

Rooke also reviewed material on the AUPE website, finding its effort to comply with the Directives "wholly inadequate" and "an insult" (para 11).

The resulting Order (the "Contempt Order") emphasized purging the contempt. It created escalating fines in case the strike continued, and further directed AUPE to (at para 13):

- Remove references to solidarity or support for the strike;
- Publish the Court Orders on its website;
- Prohibit any of officers of AUPE from publishing solidarity with the strike on social media or other website;
- Publish clear statement encouraging AUPE members to comply with the Directives and return to work on the AUPE website;
- Refrain from publishing their version of the news covering the strike (collectively, the "Impugned Provisions").

AUPE appealed the ruling of civil contempt, and the content of the Impugned Provisions. AUPE argued that Justice Rooke erred by (at para 14):

- Finding AUPE in civil contempt;
- Acting without jurisdiction and contrary to *PSERA*;
- Relying on inadmissible hearsay to hold AUPE in contempt;
- Admitting evidence that was more prejudicial than probative;
- Failing to consider the impact of the Contempt Order on those who were not represented in Court; and
- Unreasonably restraining AUPE's s. 2(b) *Charter* rights (with regards to the Impugned Provisions)

AUPE's Civil Contempt

The Court of Appeal upheld the ruling of civil contempt.

AUPE had attempted to exclude evidence of its contempt. It argued that Justice Rooke identified AUPE representatives through video news clips, and that this identification amounted to inadmissible hearsay (paras 20 - 22). It also argued that the prejudicial value of these clips outweighed their probative effect (para 27).

These arguments were largely unsuccessful. On the hearsay issue, AUPE had posted many of the clips on its own website, and added its own clips as AUPE "news reports". AUPE thus identified many of its own representatives, and held them out with the authority to speak on its behalf. The Court of Appeal ruled Justice Rooke was entitled to rely on this evidence (paras 24, 25). Some clips featured speakers who were not identifiable as AUPE representatives by government affiants or AUPE's website. This evidence was inadmissible, but since Justice Rooke did not rely on these statements, the error was not fatal (para 26).

As to the prejudicial effect of the evidence, AUPE argued that the video clips contained considerable (prejudicial) commentary about the strike, while they had little probative value. While the Court of Appeal agreed with this characterization for some videos, the Court of Appeal observed that Justice Rooke did not focus on the overtly prejudicial clips (para 32).

Given the degree of discretion owed, and the substantial evidence supporting contempt, the Court of Appeal held there was no palpable and overriding error issuing the Contempt Order.

The Constitutionality of the Impugned Provisions

While the decision on civil contempt stood, the Impugned Provisions did not survive *Charter* scrutiny. The Province of Alberta argued that AUPE's *Charter* challenge was nothing more than a collateral attack on s. 70 of *PSERA*, and refused to make submissions on the issue. The Court of Appeal rejected the government's collateral attack argument, and held that the Impugned Provisions unjustifiably infringed AUPE's freedom of expression.

Section 2(b) Infringement

The Court of Appeal reviewed a history of case law to demonstrate the importance of freedom of expression in the context of labour disputes. It held that AUPE had a constitutionally protected right to make and post video clips about the strike, and that the Impugned Provisions clearly limited AUPE's ability to meaningfully express itself (para 45). Thus, the Court of Appeal held that the Impugned Provisions (which contained both positive and negative directions) directly impacted AUPE's freedom of expression. The Court of Appeal drew strength from the Supreme Court of Canada decision in *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight*], where a "similar direction" was made in the context of an arbitrator's order (para 46).

Section 1 Analysis

Turning to the s. 1 justification, the Court of Appeal considered two options: applying the *Oakes* test, or adopting the *Dagenais/Mentauk* framework. The Court of Appeal described these tests as "alternative[s]" (para 51), with the latter being developed in the context of publication bans to balance freedom of expression with other important interests. The Court drew on statements in *R v NS*, 2012 SCC 72 [*NS*] (dealing with a witness' right to where a niqab while testifying), that the *Dagenais/Mentauk* framework now has a broader application (para 49, quoting *NS* at para 7).

The Court remarked that the *Oakes* analysis is "difficult to apply" in cases that do not review the constitutionality of a general law (para 52). The Supreme Court of Canada has made similar comments when faced with Charter challenges to discretionary decisions (See for example *Doré v Barreau du Québec*, 2012 SCC 12 [*Dore*] at para 37). Thus, while the *Dagenais/Mentauk* framework was developed in a different context, the Court of Appeal opted to apply a balancing framework guided by its principles.

The *Dagenais/Mentauk* framework has two stages once it is clear competing interests are engaged (at para 53, see also *Re: Vancouver Sun*, 2004 SCC 43 at para 32). First, it considers whether the infringement (and extent thereof) is necessary to protect the administration of justice. If so, the second stage considers whether the salutary effects of the infringement outweigh its deleterious effects.

Justice Rooke did not consider the necessity and effects of the Impugned Provisions. Indeed, given that the constitutional challenge arose out of the Contempt Order, Justice Rooke did not consider a *Charter* issue at all. The Court of Appeal held that, despite valid arguments regarding the necessity of the Impugned Provisions to protect the administration of justice, they were not properly balanced with AUPE's freedom of expression. As such, the Impugned Provisions were struck for unjustifiably breaching AUPE's s. 2(b) *Charter* rights.

Commentary

The *Charter*'s Application

Alberta v AUPE is a peculiar decision – but the peculiarity stems more from what is not said, rather than what is. The Court of Appeal plainly assumes that the *Charter* applies to the Contempt Order. The closest they come to discussing this issue comes by way of reference to the *Slaight* decision. In discussing the s. 2(b) breach, the Court states:

> [46] [P]aragraph 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*.**
>
> (Emphasis added)

Slaight dealt with an order from an administrative adjudicator. Unlike the present case, in *Slaight* the Supreme Court of Canada questioned whether the *Charter* could apply to an adjudicator's decision. They answered in the affirmative, because the adjudicator was a creature of statute. His entire authority was statutorily derived, and therefore, the exercise of that authority was limited by the *Charter*. Justice Lamer (dissenting in part, but whose reasoning was accepted on this point) explained (at pp 1077-1078):

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. **The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute**. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied …. **Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so**.
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> (Emphasis added)

In the present case, Justice Rooke in chambers is not a statutory creature – his authority as a superior court justice is not granted by statute, and his jurisdiction is inherent. The *Slaight*

reasoning does not assist the Court of Appeal in establishing that the *Charter* applies to the Contempt Order.

Peter Hogg has weighed in on this issue, and attempted to reconcile a collection of inconsistent case law on the *Charter*'s application to court orders (Peter W. Hogg, *Constitutional Law of Canada: 2013 Student Edition*, (Toronto: Carswell, 2013) at 37-21 [Hogg]). Perhaps unsurprisingly, these contradictory cases often arise in the context of labour disputes. In *Retail, Wholesale and Department Store Union v Dolphin Delivery*, [1986] 2 SCR 573 [*Dolphin Delivery*], the Supreme Court of Canada held that the *Charter* did not apply to a court order that restricted a union's secondary picketing activity. Later, in *British Columbia Government Employees' Union v. British Columbia*, [1988] 2 SCR 214 [*BCGEU*] the same Court ruled that an injunction restricting picketing in front of the British Columbia Court House infringed s. 2(b), but was saved by s. 1.

Hogg has attempted to reconcile (or at least accommodate) the apparent contradiction by drawing two points of distinction: (1) labour disputes that involve purely private parties, and (2) the application of a statute to the dispute. Hogg explains (at 37-21):

> [In *Dolphin Delivery*] [n]o government was involved in the dispute, and no statute was applied to the dispute …The ratio decidendi of *Dolphin Delivery* must be that a court order, when issued as a resolution of a dispute between private parties, and when based on the common law, is not governmental action to which the Charter applies … Where, however, a court order is issued on the court's own motion for a public purpose (as in *BCGEU*), or a proceeding to which government is a party … than the Charter will apply to the court order.

Hogg's reasoning, applied to the present case, would conclude that the *Charter* does apply to the Contempt Order as the government of Alberta was a party to the proceeding (and perhaps also, that the *PSERA* was involved in the decision). But despite the fact that the Court of Appeal (may have) reached the correct decision, this does not excuse its failure to engage with this foundational, complicated and unsettled issue.

It is possible that this failure stemmed from Alberta's refusal to make submissions on the *Charter* argument (other than that it was a collateral attack on *PSERA*). The Court of Appeal, therefore, did not argue points that were not put to them. Nonetheless, failing to flag the issue of application leaves a significant gap in the Court's reasoning. By refusing to engage this issue, one is left with the impression that all court orders are subject to the *Charter*, regardless of the situation. This is plainly not true, and casts an uneasy shadow over the judicial authority to issue contempt orders.

The Expansion of *Dagenais/Mentauk*

The second point of interest flows from the Court's choice to apply the *Dagenais/Mentauk* framework over the *Oakes* test. Typically, the *Dagenais/Mentauk* approach is seen as a complement rather than an alternative to *Oakes*. However, two 2012 Supreme Court of Canada decisions (*NS* and *Dore*) provided support for expanding the *Dagenais/Mentauk* test as an independent alternative when dealing with challenges to discretionary or common law decisions.

In *Alberta v AUPE*, the Court of Appeal clearly endorses this development. This decision, therefore, may be viewed as part of a larger trend ending the *Oakes* monopoly on s. 1 analysis.

The *Dagenais/Mentauk* analysis arises in cases that do not challenge a law of general application. It's growth has roots in logistical difficulties. According to various judges, when a *Charter* challenge focuses on discretion rather than a law, *Oakes* is a difficult fit. For example, is a discretionary decision "prescribed by law" or does it pursue a "pressing and substantial objective"? *Dagenais/Mentauk* attempts to preserve the proportionality, necessity and (to some extent) the minimal impairment components of *Oakes*, while de-emphasizing the aspects that are geared to legislative challenges. In the Court of Appeal's view at least, the *Dagenais/Mentauk* framework asks similar questions to *Oakes*, but in a more relevant way.

Notably, however, the *Dagenais/Mentauk* framework appears to import more deference than *Oakes* (*Dore* at paras 36 - 45). The focus is on balancing competing rights such that the greater good is advanced. While minimal impairment analysis may be integrated into the "necessity" stage of *Dagenais/Mentauk*, this issue is wrapped into broader concerns.

It will be interesting see where the *Dagenais/Mentauk* framework will go next. While the *Oakes* analysis is currently alive and well in the criminal sphere, the rationale advanced by the Alberta Court of Appeal and the Supreme Court in *NS* would, on its face, apply to a broad variety of criminal *Charter* challenges. Whatever happens next, it appears we are witnessing a significant evolution in s. 1 analysis. It remains to be seen if this development weakens individual *Charter* protections when challenging a discretionary decision.