Roy Adams, Commentary on the Saskatchewan Essential Services Decision

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In his decision regarding the Saskatchewan Public Service Essential Service Act, (February 6, 2012) Justice Dennis Ball has done the community a huge service by addressing many of the issues contributing to the "bewilderment" resulting from recent SC labour decisions.

Although Freedom of Association is considered globally to be a human right that, in the context of work, includes the right to organize without interference, the right to bargain collectively and the right to strike, in Canada the latter two rights had no constitutional protection until 2007 when the Supreme Court overturned 20 years of jurisprudence by "constitutionalizing" collective bargaining. However by refusing to accept the common Canadian notion that the term collective bargaining is a process inextricably bound to the Wagner-Act model of labour legislation, it left many perplexed. Its Fraser decision, which split the court in several directions, muddied the water even more. Particularly frustrating to many was the refusal by the SCC to clarify the status of "the right to strike."

A major device used by Justice Ball to cut through the confusion was to closely tie dissenting opinions issued by then Chief Justice Dickson in the 1980s, to the reasoning of the majority of the present court. In essence Justice Ball treated the Dickson dissents (in the trilogy of cases that addressed the right to strike, most notably the Alberta Reference) as if they had become an integral part of the rationale of the present court. Since the current SCC majority has relied heavily on those dissenting opinions and has, in fact, either used directly or paraphrased many of Justice Dickson's notions, that is not an unreasonable approach. Had the SCC majority (as constituted at the time when it considered Fraser) squarely addressed the right to strike it most likely, it seems to me, would have reasoned much like Justice Ball.

From the perspective he has adopted, Judge Ball is easily able to show that the right to strike is essential to meaningful collective bargaining. In his Alberta Reference dissent, after an extensive review of the essentiality of collective bargaining to a democratic society (using language later paraphrased by the current SCC majority) Dickson CJ said

> "…effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the Charter." That statement is crystal clear and free of all ambiguity.

Justice Ball also addresses directly arguments put forth by counsel for the Saskatchewan government in defense of its legislation. Those arguments reflect a good deal of the criticism that has been put forth by various pundits subsequent to the Health Services and Fraser cases. Justice Ball considers those arguments and effectively refutes them.

Adopting a spin that has been promoted by some government and management-side lawyers, the Saskatchewan Government argued that the Fraser case "represented a substantial retreat" from Health Services and that it replaced "bargaining" in "collective bargaining" with something akin to "listening" or perhaps "consulting." The government also asserted that "applicants claiming that laws violate s. 2(d)" must demonstrate that the impugned laws make their ability to associate "substantially impossible" rather than meeting the less onerous "substantial interference" standard established in Health Services. And finally the govt notes that the SCC has never "explicitly recognized a constitutional right to strike" and thus the Saskatchewan court should not do that.

Justice Ball firmly rejected that position. The "Government of Saskatchewan's interpretation of what was decided in Fraser," he says, "cannot be correct." If it were "it would mean that the SCC said one thing in Health Services and something different in Fraser. It would mean that s. 2(d) protections for collective action to achieve work place goals amount to nothing more than meaningless paper rights…" (90)

He goes on unequivocally to state: "I do not accept that in Fraser the SCC resiled from its position in HS, nor do I accept that the decision in Fraser is in any way incompatible with recognition of a right to strike as a fundamental freedom under s. 2(d) of the Charter." He accepts at face value the statement by the SCC majority in Fraser that:

> "Health Services is grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments and consistent with this Court's purposive and generous interpretation of other Charter guarantees."

The SCC did not refrain from addressing the right to strike because there was any doubt that it deserved constitutional protection, but rather because it was not at issue in the cases put before it. In both Health Services and Fraser "the court explicitly stated that it was not dealing with the issue of the right to strike."

In effect Justice Ball firmly rejects the minority opinion of Justice Rothstein (supported by Justice Charron) asserting that Health Services was wrongly decided and that the pre-Health Services status quo should be reinstated. Without directly confronting the Rothstein opinion, Justice Ball in effect considers the points made in that decision and rejects them. The Ball decision is thus a setback to those seeing in Rothstein's opinion a ray of hope that this annoying disturbance might go away.

In short, this decision goes a long way in clearing up the "bewilderment" of the Canadian labour community around the implications of recent Supreme Court decisions. If it withstands appeal, the three key aspects of the universal human right to freedom of association at work (the right to organize, the right to bargain collectively and the right to strike) will have become firmly ensconsced as constitutional rights of all Canadians.

Despite its many positives, the Ball decision does not get us all the way down the road to where we need to be. Drawing heavily on Justice Dickson, Judge Ball firmly concluded that the full range of international labour law is applicable to Canada. That was the

correct conclusion, I believe. The problem is that too few Canadian lawyers, professors, trade unionists or government officials understand international law and its implications. Indeed, Justice Ball reveals his own inadequate understanding of that body of law when arriving at his opinion on the constitutional status of the Saskatchewan Trade Union Act.

In rejecting the view that Health Services requires legislatures to enact an "elaborate legislative superstructure" he says "what is required is a rudimentary structure that protects the essential components of collective bargaining." No problem, so far, but he then goes on to say that among the "basic elements" of such legislation would "likely" be "an assessment of the freely expressed wishes of the majority concerning a bargaining representative" and "a requirement that the employer bargain exclusively with that representative." Although Justice Ball weakly says that "these are not necessarily elements derived from a Wagner Act model," he seems to be unaware of the relevant international law. That law clearly says that governments may not make majoritarian exclusivity a minimum condition for collective bargaining recognition.

What this implies, it seems to me, is that a great deal of learning still needs to take place in Canada. Much work needs to be done before we begin to approach a legal environment and an on-the-ground reality that fully respects the universal human rights of Canadian workers.