Date: 20090406

Docket: T-1832-06

Citation: 2009 FC 350

Ottawa, Ontario, April 6, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ROBERT BEAUCHAMP, GILLES LAVIGNE,
PUBLIC SERVICE ALLIANCE OF CANADA
and RACHEL DUPÉRÉ

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by the Public Service Alliance Canada (PSAC) and three of its members (the personal Applicants) challenging the ongoing failure by the Governor in Council (GIC) to proclaim into law Part III of the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (PESRA) dealing with workplace health and safety measures. This failure, they say, constitutes a violation of the rights of the personal Applicants and other similarly situated Parliamentary employees to life and security of the person under s. 7 of the

Canadian Charter of Rights and Freedoms (Charter). The relief claimed by the Applicants includes a declaration of a s. 7 Charter breach and an Order compelling the GIC to "forthwith" proclaim into force Part III of the PESRA which would, in turn, make Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (CLC) applicable to their employment. The Applicants' claims to relief under s. 15 of the Charter were withdrawn before the hearing.

I. Background

[2] PSAC represents approximately 400 employees of the House of Commons (employer) working in a number of locations within the Parliamentary Precinct including the Centre Block, the West Block, the East Block, the Wellington Building, the CD Howe Building, the Confederation Building, the Justice Building, La Promenade, 181 Queen Street and the Belfast Warehouse Complex. There are at least three other unions representing other House of Commons employees.

[3] Over the years PSAC and its members have been very concerned about the presence of asbestos in several of the buildings where they work and about the failure by their employer to deal with that problem to their satisfaction. Needless to say, these concerns have led to an increasing level of disquiet, mistrust and anxious discussion. PSAC is particularly concerned about the apparent unwillingness by the employer to share information on a timely basis about asbestos risks in the workplace.

[4] PSAC's concerns about workplace health and safety have not been limited to the asbestos risk. Other such matters include problems with air quality, the presence of molds and fungi,

blocked exit doors, improper storage of dangerous materials, excessive noise and repetitive strain injuries. All of these matters are thoroughly documented in the voluminous record before me.

[5] PSAC's underlying concern is that its members do not enjoy the full panoply of health and safety protections available to other federal employees under the CLC and available to most other Canadian employees under provincial legislation. This problem, they say, arises from the failure by the GIC to proclaim Part III of the PESRA which, in turn, would make Part II of the CLC applicable to their employment. The affidavit of Robert Beauchamp expresses this concern:

> 90. Between 1996 and the present day, PSAC has continued to write to and meet with individual Members of Parliament, hold demonstrations, and issue public statements, all in an attempt to see Part III of *PESRA* proclaimed. Attached hereto and marked as Exhibit "QQQ" are documents from 1999 which were circulated to PSAC Members as part of this campaign. On June 6, 2006, PSAC held a demonstration noting the 20th anniversary of the passage of *PESRA* into law.
>
> 91. Despite these efforts, and the significant resources expended by PSAC, we have been unable to convince the Government to proclaim Part III of *PESRA*. Parliamentary employees in Canada are among the very few groups not protected by health and safety legislation. I am aware that employees in provincial legislatures are subject to health and safety legislation, as are employees in the United States Congress and the United Kingdom's House of Parliament. Attached hereto and marked as Exhibit "RRR" are two newspaper articles from January 1995, one of which was in the Ottawa Citizen, documenting this.
>
> 92. Given the extensive efforts made by employees to proclaim Part III of *PESRA*, the continued failure of the Governor General in Council to do so causes me to believe there is good reason to be concerned about the health and safety situation in the House of Commons. Otherwise, these parts of the legislation would have been proclaimed. Access to the *Code* would allow Parliamentary employees to have effective channels through which to raise concerns about workplace health and safety. These channels would

> allow an independent adjudicator to make final decisions on matters of health and safety, taking this authority out of the hands of the employer, and provide employees with an established right to all information and reports held by the employer or the Government involving workplace health and safety. I believe such rights are necessary to ensure the health and safety of employees is properly protected.
>
> 93. I make this affidavit in support of the Application for judicial review of the Governor General in Council's failure to proclaim Part III of *PESRA*.

[6] Part I of the PESRA was proclaimed into law on December 24, 1986. Parts II and III of the PESRA have never been proclaimed despite a formidable and ongoing lobbying campaign by PSAC and others. It is the failure by the GIC to proclaim Part III of the PESRA which is at the root of this application.

[7] Notwithstanding the absence of direct CLC protection, PSAC and its members are the beneficiaries of health and safety protections under PESRA, and provided by their collective agreement. Part I of the PESRA provides for collective bargaining and other rights of employment. Strikes are prohibited and all unresolved collective bargaining disputes are determined by binding arbitration. Division IV of Part I of the PESRA sets out a system for resolving employee grievances. Under s. 62 any employee who feels aggrieved by the interpretation or application of a provision of a collective agreement or an arbitral award, or as a result of a matter affecting the terms and conditions of employment, may initiate a grievance. Among other matters, any grievance concerning the interpretation or application of a collective agreement or one which involves a

disciplinary suspension or financial penalty must (with the concurrence of the bargaining agent) be referred to adjudication before the Public Service Labour Relations Board (Board).

[8] The current collective agreement between the House of Commons and PSAC contains several provisions dealing directly with health and safety matters. For example, Article 35.01 requires the employer to carry on its operations in a manner that will not endanger the health and safety of any of its employees and to maintain its facilities in a clean and sanitary condition. It also contains a commitment that management will adhere to the basic principles of the CLC and the Canadian Occupational Health and Safety Regulations dealing with minimum standards for the health and safety of employees.

[9] The collective agreement also provides for the establishment of a joint occupational health and safety (JOSH) committee. That committee includes employees and representatives of the employer and is empowered, *inter alia*, to consider and dispose of employee health and safety complaints, to establish and maintain health and safety programs and to participate in workplace investigations. The JOSH committee is also entitled to full access to all health and safety reports prepared by the employer or at the employer's request. Any matter or complaint not resolved by the JOSH committee can be made the subject of a grievance.

[10] The grievance procedure established by the collective agreement is in a typical form. It provides for employees to present grievances for any "action or lack of action" by the employer. Grievances are prosecuted through three levels. Any grievance that is not resolved to the

satisfaction of the employee and which involves a matter falling within s. 62 of the PESRA can be referred to an independent adjudication before the Board. This includes matters involving the interpretation and application of the collective agreement. One can reasonably conclude from these provisions that any breach by the employer of its contractual health and safety obligations can be made the subject of a grievance which ultimately can be submitted for final resolution by way of independent adjudication.

[11] In collaboration with PSAC the House of Commons has also created a comprehensive Health and Safety Policy (Policy). The stated objectives of the Policy are threefold:

i. to prevent or minimize the incidence of injuries and illnesses in the workplace;

ii. to provide and promote a healthy and safe work environment; and

iii. to identify, control, mitigate or eliminate hazards in the workplace.

[12] The Policy provides a mechanism for resolving employee health and safety complaints as an alternative to the grievance process. It contains a definition of “danger” identical to that found in the CLC and includes a separate procedure for complaints involving employees who refuse dangerous work. Under the Policy, such refusals to work are treated in a manner very much like the CLC provisions and without the potential disciplinary ramifications that can arise under the collective agreement.

[13] The process for resolving complaints under the Policy is more informal than the grievance process but it does involve a referral to the JOSH Committee which is then required to conduct a prompt investigation. Where the Committee reaches a consensus, management is required to take corrective action within 30 days. In the absence of a consensus, the Policy requires that advice be sought from an approved independent expert whose report must be referred back to the JOSH Committee. If a disagreement remains, the dispute is to be determined by the Clerk of the House of Commons or by the Clerk's delegate. Even though this is an internal resolution process it does contain arms-length elements through the involvement of the JOSH Committee and the use of outside independent experts.

[14] The evidence before me is that PSAC and its members have never attempted to resolve the health and safety concerns identified in the record before me by resorting to their grievance rights under the collective agreement or by recourse under the Policy.

II. Issues

[15] (a) Is the Applicants' claim to relief justiciable?

(b) Does the failure by the GIC to proclaim Part III of the PESRA constitute a breach of the s. 7 Charter rights of the personal Applicants?

(c) Is the Applicants' claim to relief barred by their failure to exhaust their internal rights of recourse?

III. Analysis

Justiciability

[16] There are a number of significant problems with the framing of this application not the least of which is that the Applicants' are not challenging a decision of the GIC. Instead they seek mandatory relief from a failure by the GIC to act. They are asking this Court to order the GIC to carry out the purely legislative function of proclaiming legislation – a task which Parliament itself was not willing to execute when it delegated the proclamation discretion over Part III of the PESRA to the GIC in 1986.

[17] The Applicants seek to justify this judicial intrusion by asserting that the GIC has ignored the will of Parliament by failing to proclaim Part III of the PESRA. This argument is based on the false notion that by passing the PESRA, Parliament intended that Part III of the CLC would apply to Parliamentary employees. In fact, the very opposite is true. By delegating the power to proclaim Part III of the PESRA to the GIC Parliament was obviously furthering an intent not to apply the CLC to Parliamentary employees until the GIC determined that it was appropriate and timely to do so. If it were otherwise Parliament would not have delegated the power to proclaim to the GIC.

[18] Once such a delegation of authority has been made by Parliament, the decision to proclaim is dependant upon the pleasure of the GIC unless and until Parliament reclaims to itself that authority. What the Applicants' are therefore seeking from the Court is an order which would defeat the intent of Parliament not advance it. That this would be an inappropriate intrusion into the legislative realm is well reflected in the following passage from the decision of Justice Bora Laskin

in *Reference re Criminal Law Amendment Act (Canada)*, 1968-69, [1970] S.C.R. 777, 10 D.L.R. (3d) 699 at para. 82:

> 82 It is beside the point that the result of the proclamation in this case may not be congenial to this Court. We miss a step in the legislative process if we purport to read the consequences of the proclamation back into the severable power to promulgate the legislation. To look at the proclaimed legislation in the light of a supposed parliamentary intention, gleaned from looking at the legislation as if it had been made effective without the conditional terms of s. 120, is to truncate that section and plunge into an abyss of speculation. Moreover, it is to make an assumption that there was a limited trust reposed by Parliament in the executive, and, further, that it lay with the Courts to enforce that trust. If there has been a failure to live up to Parliament's expectations on the manner in which the proclamation power should be exercised, the remedy does not lie with the judges.

Also see: *R. v. S. (S.) et al.*, [1990] 2 S.C.R. 254 at paras. 31 and 32 and *Carrion v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 584 at para. 14.

[19] Other authorities indicate very clearly that the courts must not usurp the legislative function. Even where Charter principles might justify an intrusion into the legislative area it is generally only the expression of the law, and not the processes of its creation, that can be the subject of judicial attention and then only with considerable caution. For this I rely upon cases such as *R. v. Langille* (1992), 119 N.S.R. (2d) 79 (C.A.), *Lucas v. Toronto Police Service Board* (2001), 54 O.R. (3d) 715 (Div. Ct.), *Reference re Criminal Law Amendment Act*, above, at para. 80, *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at para. 104 and *Canadian Council for Refugees v. Canada*, 2008 FCA 229 at para. 53. Even in a case like *Vriend v. Alberta*, [1998] 1 S.C.R. 493 Justice Cory was careful to point out at para. 55 that the underinclusive legislation under review had been proclaimed.

[20] The evidence is also clear that the outstanding proclamation of Part III of the PESRA has been under active consider by the GIC and by Parliament since at least December 24, 1986, when the GIC decided to proclaim into force Part I of PESRA but not Parts II or III, up to and including a June 3, 2003 House of Commons vote.[1] It is quite clear from the record that the unwillingness of the GIC and Parliament to confer CLC protection on Parliamentary employees has been based on a concern that some of those provisions could conflict with the privileges of Parliament including the privileges of its Members. It is certainly not the proper role of a court to second-guess the wisdom of such choices or to pass judgment on these types of legitimate competing values and interests. Such policy-based choices are simply not an appropriate subject matter for judicial review: see *Vriend*, above, at para. 136.

The Claim to Charter Relief

[21] As I understand the Applicants' position, it is that their s. 7 Charter interests have been infringed by the failure of the GIC to extend to them the CLC health and safety protections available to most other federal employees. This would include the right to refuse to perform dangerous work without fear of retaliation and to call in a Health and Safety Officer who may order remediation of workplace hazards. The Applicants do not appear to be saying that it is the actual working conditions in the Parliamentary Precinct that give rise to a deprivation of their s. 7 rights but only

[1] The June 3, 2003 vote defeated a motion to read Bill C-419 a second time and refer it to Committee. Bill C-419 was a Private Member's Bill which would, among other things, have brought Parts II and III of *PESRA* into force on the day the Bill received Royal Assent.

that they are entitled to greater legislative protection to effectively deal with the ongoing workplace risks they claim to face.

[22] The Applicants' s. 7 argument is certainly novel but it is not one that I am disposed to accept. A person does not automatically suffer an interference with a s. 7 security interest because of the absence of legislative protection. Usually there must be some form of coercive or harmful government conduct to support such a claim. Even if the working conditions in the Parliamentary Precinct were sufficiently egregious to support an arguable claim for s. 7 Charter relief (of itself a novel legal proposition), I cannot think of any situation where the Court would find it appropriate to order Parliament or the GIC to proclaim legislation as a solution. At most, the appropriate relief would be limited to the correction of the problem at hand up to, and perhaps including, the vacation of the premises. In that respect the Applicants' claim to mandatory relief is extraordinarily excessive and unwarranted even if a Charter breach was evident on this record.

[23] This is also not a case which could ever support a positive duty under s. 7 of the Charter because the record said to give rise to a deprivation of the Applicants' rights is woefully inadequate. This concern was duly noted by Chief Justice McLachlin in *Gosselin v. Quebec*, [2002] 4 S.C.R. 429 at para. 83 where she described the record before her as a "frail platform" to support such a claim. This is a matter of even greater concern in the context of an application like this one where the claimants have not attempted to build a complete evidentiary record by first challenging the employer's impugned conduct through the collective agreement grievance process. Even the decision by Justice Louise Arbour in *Gosselin*, above, upon which the Applicants place heavy

reliance, speaks to the need for a proper evidentiary record which demonstrates that exclusion from a statutory regime has caused a substantial interference with the exercise and fulfillment of a protected right (see para. 365). This would, of necessity, include a consideration of the adequacy of any alternative measures that had been made available by the state to address the problem at hand. On this record the asserted deprivation is more theoretical than proven because the Applicants have failed to test the adequacy of the alternative methods of recourse available to them. Those are processes which might well have led to a determination that the prevailing working conditions do constitute a serious and immediate health and safety hazard. That is not a determination that is open to me in the face of the conflicting and untested evidence in this record.

[24] I do not intend to delve any more deeply into the justiciability and Charter issues raised by the Applicants because the failure by the Applicants to exhaust their internal rights of recourse under the collective agreement and the Policy is fatal to this application.

Alternate Recourse

[25] The Applicants' attempt to justify their failure to enforce their health and safety rights by arguing that those rights are inadequate in a number of respects and that they fall short of the protective standards and processes that are available under the CLC. For instance, they point to the absence in the Policy of an obligation to provide health and safety information to PSAC and to employees. They also express concern that enforcement of the Policy ultimately depends upon the will of the Clerk of the House of Commons. These concerns are not, however, particularly significant given that the collective agreement recognizes both a disclosure obligation and recourse

to arbitration. The concern that the refusal to work provisions of the collective agreement are deficient because of the stated potential for discipline also ignores the fact that the Policy provides an alternate option to refuse dangerous work which does not attract the risk of discipline.

[26] The Applicants' criticisms of the Policy and the collective agreement are also undermined by their failure to fully test those avenues of recourse and to assess their adequacy. It is simply not good enough for the Applicants to argue theoretically about the relative merits of different schemes for dealing with workplace health and safety issues when they have failed to take the obvious step of enforcing what appear to be very robust health and safety obligations coupled with arbitral recourse and independent expert review. Indeed, if PSAC is as concerned as it claims to be about failures by the employer with respect to disclosure and the maintenance of a healthy and safe workplace, it is difficult to understand why it has done nothing meaningful to advance those concerns to a conclusion through either the collective agreement grievance process or the more informal complaint process set out in the Policy. The only excuses given for this failure are that either employees are concerned about the possibility of retaliation if they refuse dangerous work or that any complaints advanced were satisfactorily resolved. Inasmuch as there is no evidence that the employer has ever acted in a retaliatory way, that concern is entirely speculative. This is also not an excuse for the failure of PSAC to present a grievance under Article 35.01 of the collective agreement alleging a breach of the employer obligations to adhere to the basic principles of the CLC and to conduct operations in a manner that will not endanger the health and safety of employees. And even though the collective agreement does not match the CLC protections with respect to the

refusal to perform dangerous work, the Policy does match the CLC provisions and surprisingly no one appears to have ever tested its efficacy[2].

[27] To the extent that the Applicants have meritorious health and safety concerns, they must be addressed within the collective agreement grievance process or through the alternative dispute resolution mechanisms established by the Policy. It is only in such a context that the evidence necessary to support such claims can be presented and assessed. Those alternative processes need only be adequate to the task and not perfect: see *Froom v. Canada (Minister of Justice)*, [2005] 2 F.C.R. 195 (C.A.) at para. 12. Such an approach also avoids the problem of judicial interference with the legislative and policy functions of Parliament and the GIC.

[28] Under PESRA Parliament has created a scheme for dealing with labour issues including the resolution of health and safety disputes and, by adopting the Policy, the employer has attempted to supplement the statutory provisions. Those systems should not be circumvented through the courts. There are many authorities which recognize that principle of deference including *Vaughan v. Canada*, [2005] 1 S.C.R. 146 where Justice Ian Binnie stated:

> 39 Sixthly, where Parliament has clearly created a scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.

---

[2] Evidence of Robert Beauchamp, Applicants' Record, at page 2912.

Also see *Anderson v. Canada*, [1997] 1 F.C. 273 (C.A.) at para. 4 and *Jones v. Canada (Attorney General)*, [2007] F.C.J. No. 532, 2007 FC 386 at paras. 38-40.

IV. Conclusion

[29] This application for judicial review has no merit and must be dismissed. Costs are awarded to the Respondent under Column IV.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed. Costs are awarded to the Respondent under Column IV.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1832-06
STYLE OF CAUSE:	Beauchamp et al. v. AGC
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	March 2 and 3, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	April 6, 2009

APPEARANCES:

Mr. Raven and Mr. Astritis 613 567 2901 613 567 2901	FOR THE APPLICANTS
Mr. Graham 613 952 7898	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Ottawa, ON	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT