Date: 20081029

File: 568-02-164

Citation: 2008 PSLRB 90

Public Service Labour Relations Act

Before the Chairperson

BETWEEN

NICO VAN DUYVENBODE

Applicant

and

TREASURY BOARD
(Department of Indian Affairs and Northern Development)

Respondent

Indexed as
Van Duyvenbode v. Treasury Board (Department of Indian Affairs and Northern Development)

In the matter of an application for an extension of time referred to in paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations*

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson

For the Applicant: Himself

For the Respondent: Muriel Lamothe, employment relations advisor

Decided on the basis of written submissions filed November 30, 2007 and January 18, March 9, April 17, May 12 and June 5 and 12, 2008.

I. Application before the Chairperson

[1] Nico van Duyvenbode ("the applicant") filed an application for an extension of time to file grievances on November 30, 2007. By email to the Public Service Labour Relations Board (PSLRB or "the Board") on March 9, 2008, he asked the Board to rule on its independence from the Prime Minister and Cabinet. On June 12, 2008, the applicant filed a Notice of Constitutional Question as required by section 57 of the *Federal Courts Act*. No responses to the notice were received by the Board. It was determined by the Board that the two issues (extension of time and constitutional question) would be addressed by written submissions.

[2] Pursuant to section 45 of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, the Chairperson has authorized me, in my capacity as Vice-Chairperson, to exercise any of his powers or to perform any of his functions under paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*") to hear and decide any matter relating to extensions of time.

[3] The applicant filed written submissions and documents relating to his disputes with the Treasury Board ("the respondent"). The respondent also filed written submissions. The full submissions are on file with the Board. Some of the documents filed by the grievor relate to the merits of possible grievances and are therefore not relevant to my determination of the matters before me. Some of the documents also contain personal information that is not relevant to a determination of the matters before me. I view much of the personal information to be confidential in nature and have ordered that those documents be sealed. I have summarized only below the personal information that is relevant.

II. Background

[4] The applicant's employment was terminated for cause, pursuant to paragraph 12(1)(*e*) of the *Financial Administration Act (FAA)*, on May 3, 2006. In the letter advising him of this decision, he was advised of his right to file a grievance.

[5] The applicant commenced his employment in the federal public service in 1974 and joined the Department of Indian Affairs and Northern Development (DIAND) (formerly Department of Indian and Northern Affairs) in 1991. In 2000, he went on long-term disability leave. He has been engaged in litigation in the courts against

senior management at the DIAND since 2003. In that year, he commenced an action claiming damages for misfeasance in public office, intimidation, harassment, abuse of power and conspiracy.

[6] Before the termination of his employment, the applicant applied for an injunction against his imminent termination (*Duyvenbode v. Canada (Attorney General)*, 2006 CanLII 12322 (ON S.C.)). The court dismissed the application for an injunction. In its reasons, the court stated the following:

. . .

> *[10] The other legal impediment argued by Mr. Gay* [counsel for the Attorney General] *is whether the plaintiff is even entitled to maintain this action in this Court. While no motion to dismiss the action on this ground is before me, Mr. Gay pointed out that section 208* et seq. *of the* Public Service Labour Relations Act *[PSLRA] sets out a comprehensive scheme for the adjudication of grievances including those resulting from any occurrence or matter affecting the employees terms and conditions of employment. Section 236 of the Act provides that the comprehensive grievance adjudication scheme is in lieu of any right of action the employee may have in relation to the matter. The plaintiff has not taken his complaint to grievance in accordance with that statute. There are a number of authorities that confine an employee to the specific labour relations scheme agreed to or stipulated in lieu of an action in the law courts. [See:* Vaughan v. Canada, *[2005] 1 S.C.R. 146;* Johnson-Paquette v. Canada, *[2000] F.C.J. No. 441 (F.C.A.);* Wheatcroft v. Sinha, *[2001] O.J. No. 4588 (Ont. Sup. Ct.)]. . . .*
>
> *[11] In addition to the legal issues raised by counsel for the respondents, the most significant impediment I see facing the plaintiff on this motion is the requirement in the* RJR-Macdonald *tri-partite test to demonstrate that harm that cannot be adequately addressed by damages will occur if the relief is not granted. The plaintiff is suing for damages. If his employment is terminated he can grieve and upon adjudication he can be granted the range of remedies set out in the PSLRA. If he can maintain this action, a matter that is in doubt, he may recover damages. . . .*

. . .

[7] The Attorney General filed a motion to dismiss the applicant's statement of claim, and the Ontario Superior Court of Justice granted the motion on June 25, 2007

(*Van Duyvenbode v. Canada (Attorney General)*, 2007 CanLII 26614). In its reasons, the Court made the following observations and conclusions:

. . .

> *[6] The essential proposition advanced by the plaintiff in argument and in his written materials, is that his complaints about his personal discriminatory treatment in the workplace and his advocacy with his superiors over the proposal omnibus bill, accorded him the status of a "whistleblower", with the result that he should not be required to pursue his workplace grievances in the normal manner required by federal public service employment legislation, rather he should be able instead to proceed with this action in the Superior Court of Justice. I find on the evidence that the plaintiff's complaints consist of personal workplace issues as they relate to his harassment and discrimination allegations and therefore should be heard in the proper federal labour tribunals. His letter writing campaign, exposing his alleged mistreatment, does not make him a whistleblower, nor does the policy issue debated with his supervisors in the workplace, on which his position ultimately prevailed, constitute a whistleblower situation. There is, on the evidence before the Court, no air of reality to the plaintiff's claim that he is a whistleblower as that term is normally understood. The meaning and significance of being characterized as a whistleblower is discussed below.*
>
> *[7] The plaintiff takes the position that all federal public service labour tribunals or bodies appointed by the Government are biased and could not provide him with a fair hearing. Accordingly, he has declined to participate in an investigation by a third party investigator appointed by the Deputy Minister of DIAND, nor would he participate, after filing a harassment complaint with the Public Service Commission of Canada, in an investigation they sought to carry out.*
>
> ***The Law and Analysis***
>
> *[8] The dispute resolution mechanisms that guide labour disputes in the federal public service are contained in the* Public Service Staff Relations Act, *R.S.C. 1985, P-35 (the* PSSRA*) and* Public Service Labour Relations Act, *S.C. 2003, c. 22 (the* PSLRA*). The* PSSRA *applies to events that pre-date the enactment of the successor legislation, namely the* PSLRA, *which came into force on April 1, 2005. The* PSLRA *applies to events that post-date April 1, 2005 and is therefore inapplicable to most of the plaintiff's complaints.*
>
> *[9] The* PSSRA *and the* PSLRA *contain a comprehensive regulatory scheme for the resolution of employment-related*

disputes. Section 91 of the PSSRA *and section 208 of the* PSLRA *allow an employee to grieve virtually all employment-related issues up to and including the final level of the grievance process. The right of an employee to refer a grievance to third-party adjudication is limited by section 92 of the* PSSRA *and section 209 of the* PSLRA *to events arising out of a collective agreement, discipline or termination of employment. All other grievances are determined at the final grievance level.*

[10] Decisions made at the final level of the grievance process, and which could not be referred to adjudication, are final and binding. Decisions made by adjudicators under the PSSRA *or the* PSLRA *are not protected by a privitive clause and can be the subject of a judicial review application.*

[11] Section 236 of the PSLRA *is a new provision that is not in the* PSSRA*. Section 236 provides that the right of an employee to seek redress by way of grievance for any dispute relating to his or her terms and conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.*

[12] The evidence discloses that the plaintiff is part of the program management occupational group and is bound by a collective agreement which has been concluded between his bargaining agent, being the Public Service Alliance of Canada, and the employer's representative, being the Treasury Board Secretariat of Canada.

[13] The collective agreement contains a grievance procedure, which operates in conjunction with the provisions of the PSSRA *and the* PSLRA*. The scope of what can be the object of a grievance is described in section 91 of the* PSSRA *and section 208 of the* PSLRA*. An employee is entitled to file a grievance in respect of "any occurrence or matter affecting his terms and conditions of employment", which is broad enough to cover all employment related disputes.*

[14] Clause 18.23 of the collective agreement mirrors section 92 of the PSSRA *and section 209 of the* PSLRA*, which provides that employees can only refer to adjudication those grievances which involve, amongst others, the termination of employment. The terms of the Agreement, along with the* PSSRA *or the* PSLRA *constitute a comprehensive and exhaustive regulatory scheme that allows for the resolution of all employment-related disputes within the federal public service.*

[15] The record discloses that in September 1999, the plaintiff filed a complaint with the Canadian Human Rights Commission on the grounds that he had suffered discrimination on account of his physical disability. The

Commission refused to investigate and held that the plaintiff had been provided with voice activated equipment and that DIAND had adequately accommodated his physical disability. The plaintiff chose not to seek judicial review of the Commission's decision on the basis of his view that the Canadian Human Rights Commission was biased.

[16] Recently in Vaughan v. Canada, *[2005] S.C.J. No. 12 the Supreme Court of Canada reiterated that the courts retain a residual jurisdiction over labour disputes in cases where the employee's complaint relates to organizational wrong-doing ("whistleblower claims") and where the adjudication of the employee's grievance is left in the hands of the person ultimately responsible for the running of the organization under attack. To a similar effect is the Supreme Court's earlier decision in* Weber v. Ontario, *[1995] S.C.J. No. 59.*

[17] As these cases point out, the court's residual jurisdiction under the PSSRA *is very limited and should only be exercised in rare cases. The complaints raised by the plaintiff that pre-date May 1, 2005 in my view do not fall within this Court's residual jurisdiction and should be the object of a grievance. Any matters raised by the plaintiff that occurred after that date cannot be dealt with by this Court due to the express provisions of the* PSLRA, *section 236.*

[18] As noted I do not accept the plaintiff's claim that he is a whistleblower. The Supreme Court in Fraser v. Public Service Staff Relations Board, *1985 CanLII 14 (S.C.C.), [1985] 2 S.C.R. 455 provided a working definition of what constitutes a "whistleblower". Dickson J., (at para. 41), speaking for the court, held that the whistleblower concept covers situations where a person publicly discloses (a) an illegal act by a public official or (b) a government policy that jeopardizes the life, health or safety of the public. See also* Stenhouse v. Canada (Attorney General), *[2004] F.C.J. No. 469.*

. . .

[20] In order to assess whether the dispute falls within the so-called "whistleblower exception", this Court must (a) properly characterize the plaintiff's complaints and determine if they are of a kind that is foreseen by the whistleblower exception under Vaughan *and (b) whether the adjudication would be left in the hands of the person ultimately responsible for the running of the organization under attack. I agree with the defendants' submission that the essential character of the plaintiff's complaints are about wrongs that have been perpetrated against him personally*

> *and not about institutional wrong-doing that has a public interest component attached to it.*
>
> *[21] I further accept the defendants' submission that the fact that a plaintiff has raised a* Charter *allegation does not oust the jurisdiction of the federal dispute resolution scheme. A third level grievance officer or an adjudicator can dispense a remedy for a* Charter *breach. The Supreme Court in* Nova Scotia (Workers' Compensation Board) v. Martin, *[2003] S.C.J. No. 54 recently held that statutory tribunals and administrative bodies are entitled to provide remedies for* Charter *breaches. Within the context of arbitration, there is clear authority that adjudicators can decide* Charter *matters and award* Charter *remedies. In* Weber *the Supreme Court has confirmed that labor arbitrators acting under the* PSSRA *and a collective agreement have the legal authority to consider the* Charter *and award a remedy. In the present case the plaintiff's termination of employment can proceed to arbitration. The remainder would be decided by a third level grievance officer.* Charter *relief can be granted in either forum.*
>
> . . .
>
> ***Conclusion***
>
> *[27] In conclusion, for the reasons set out previously, I hold that the Superior Court of Justice has no jurisdiction to hear the plaintiff's complaints against his former employer. Such complaints must be asserted in the Public Service Labour Relations Board, under the applicable legislation. . . .*
>
> . . .

[8] At the time he filed his application for an extension of time, the applicant had not filed any grievances in the prescribed form. He did write to the Director of Human Resources at the DIAND on October 21, 1999, expressing an intention to file grievances against named individuals with regard to a performance review and his job description. On March 14, 2000 he wrote to the Director General at the DIAND indicating his intention to grieve the respondent's refusal to grant him leave with pay. In that correspondence, he stated that his bargaining agent representative would sign the grievance form on her return to work. From the documents submitted, it is clear that no formal grievance was ever filed. In an examination for discovery under the civil litigation process (February 9, 2006), he stated that he had not filed any grievances related to the subject matter of his statement of claim (allegations that did not include his termination of employment). He was also asked in his examination for discovery

(which occurred before his termination of employment) whether he knew that a termination of employment for incapacity could be referred to an independent adjudicator of the PSLRB. He responded that the PSLRB was in a conflict of interest. In his submissions, the applicant has stated his intention not to file grievances directly with the respondent, but rather directly with the PSLRB. I have addressed that position in my reasons for decision.

III. Summary of the arguments

[9] Both parties provided written submissions. I have included edited excerpts of those submissions below. The full submissions are on file with the PSLRB. As noted above, those parts of the submissions that contain personal medical information have been sealed. The applicant also filed a Notice of Constitutional Question ("Notice") that was sent to all attorneys general in accordance with the *Federal Courts Act*. I have included the relevant excerpts of this Notice below. The full Notice is on file with the PSLRB.

A. For the applicant, on extension of time

[10] In his initial application for an extension of time, received by the PSLRB on November 30, 2007, the applicant stated the following:

> *I ask you to approve under section 61 of the Public Service Labour Relations Regulations, in the interest of fairness, my request for an extension of time to file my grievances for adjudication by the Board of the employer's illegal termination of me for incapacity which the employer had caused, refused to accommodate and for which the employer neglected to obtain the required physician's fitness to work assessment which recommended that a return to work could be possible with accommodation and ending the discriminatory, harassing and retaliatory work environment. My grievances will also outline together with supporting proof the relentless illegal tactics used by the employer to achieve illegally the removal of an employee from his position. These illegal tactics included relentless personal and systemic discrimination of an employee with a disability, harassment, retaliations against an employee who dared to complain and who blew the whistle on the employer's illegal activities of misleading a Minister and of refusing to obey Acts of Parliament . . . .*
>
> *I am a public servant who has been illegally terminated because of a psychiatric disability which my employer, Indian and Northern Affairs Canada, has caused me to*

suffer as a result of years of threatening to terminate my employment, personal and systemic discrimination and harassment, retaliations for having dared to complain about illegal management conduct and for blowing the whistle on these illegalities and of the employers personal and systemic refusals to accommodate my disability. I have diligently pursued my complaints against my employer by filing complaints including several grievances only to find that the employer did not act on them or did not provide an effective impartial redress mechanism and access to natural justice which section 7 of the Charter guarantees me. I had therefore, taken the employer to court as early as 2003 to seek redress for these continuous illegal actions by the employer as it was at the time legal to take an employer to court particularly for breaches of the Charter. Even after the 2005 Supreme Court of Canada's decision on Vaughan *and the putting into force* [of] *the Public Service Labour Relations Act, I pursued my claim in court because I honestly believe that I am a whistle blower . . But on June 25, 2007, a judge ruled that I was in the wrong forum and am barred from court action by the PSLRA and must present my complaints to your Board where I should be able to obtain independent adjudication of all my complaints which date from 1997 to 2007.*

During the court hearing, the judge questioned the Department of Justice lawyers and made the observation that I could still file my complaints with the Public Service Labour Relations Board in spite of the time that has elapsed considering that this was caused by the need to determine jurisdictional issues. The Department of Justice lawyers representing the employer acknowledged that I could still submit my complaints to the Board by seeking leave from the Board for a time extension and that in all likelihood leave would be granted because I had been pursuing my complaints in the wrong forum. This pursuing in the wrong forum was the result of the Government's previous labour relations schemes which did not permit independent adjudication of all my complaints and had multiple fora for addressing complaints most of which like the grievance process or the PSC processes lacked independent adjudication. . . . The subsequent passage of the PSLRA and the Supreme Court Vaughan decisions made my pursuit by way of court action as per Perrera v The AG and Guenette v AG more difficult but not impossible given the residual jurisdiction of the courts particularly for complaints by whistleblowers which I honestly believe that I am and given sections 7 and 24 of the Charter which guarantee the right to independent adjudication.

I am preparing the submission of my grievances for adjudication by the PSLRB which because they include the

> *illegal actions committed by the Deputy Minister and Assistant Deputy Ministers can only be dealt with by the Board and not by any grievance level officer who is appointed and/or is a subordinate of the Deputy Minister. Because of the emotional difficulty in dealing with the illegalities committed by the employer, I have to take frequent pauses and follow my psychiatrist's advise on techniques to calm down and regain some sense of equilibrium. I have attached a psychiatrist's report which explains my mental disability and my limitations in being able to function in a sustained manner while being stressed. I have had several set backs in my physical health including an eye infection in August and a serious muscle tear in my left leg which made me immobile for September and much of October and which to this day prevents me from sitting more than an hour at a time at a desk or a computer or else my leg which is still inflamed engorges with fluids. In addition, my mother has this fall been diagnosed with terminal cancer which has caused more stress and forced me to attend to ensuring adequate care and to seeing to her affairs.*
>
> *I therefore, ask that you will accommodate me and will grant me an extension of time to complete and submit my grievances to the Board. . . . I ask that I be given an extension until after my mother has passed away to submit the grievances to the Board.*
>
> . . .
>
> [*Sic* throughout]

B. <u>For the respondent, on extension of time</u>

[11] The respondent replied on January 18, 2008, and stated the following:

> . . .
>
> *Mr. van Duyvenbode filed an application for extension of time on November 30, 2007 regarding his termination of employment on May 3, 2006. Over eighteen months have elapsed between the termination and Mr. van Duyvenbode's application to the Board for an extension of time limit which is a considerable delay.*
>
> *. . . It is the position of the Employer that the grievance is not one of which can be referred to adjudication as the employee had failed to comply with section 209(1) of the* Public Service Labour Relations Act *(PSLRA). As no grievance has been filed so far with the Department of Indian Affairs and Northern Development (DIAND), it is the Employer's position that before any referral to adjudication can be made, the*

grievance process must be followed and a grievance must be filed in order to allow the employer to analyse the situation and respond.

In his application for extension of time, Mr. van Duyvenbode admits that he did not intend and does not intend, in the future, to file a grievance with the Employer in regards to this issue before referring to adjudication. Section 209(1) of the PSLRA provides that where an employee has presented a grievance up to and including the final level in the grievance process and the grievance has not been dealt to the satisfaction of the employee, the employee may, subject to certain conditions, refer the grievance to adjudication. Mr. van Duyvenbode should have filed a grievance in accordance with the procedures outlined in his collective agreement. This is a prejudice to the Employer as DIAND should have the opportunity to address the grievor's concerns. It is also in contradiction with the grievance process which is negotiated between the parties to the collective agreement. It jeopardizes the dispute resolution mechanisms that guide labour disputes in the Federal Public Service.

Therefore, the Employer respectfully submits that an adjudicator appointed to hear a reference to adjudication under section 209 of the PSLRA does not have jurisdiction in this matter.

Also, Mr. van Duyvenbode takes the position that all federal public service labour tribunals or bodies appointed by the Government are biased and would not provide him with a fair hearing. Mr. van Duyvenbode should have followed the proper mechanisms provided to federal public servants for the resolution of employment dispute as he was well aware of them. Instead he chose to file a civil action through a different court system.

In 2003, Mr. van Duyvenbode filed a civil action in the Ontario Superior Court of Justice against the federal government and a number of his managers and senior officials, regarding a variety of personal work-related complaints alleging discrimination and harassment. As you will see in the attached transcript of the court proceedings. . . during cross examination. . . . Mr. van Duyvenbode admitted that he was aware that he could file a grievance but that he did not have confidence in the process.

. . .

> *Furthermore, in the event that the Board decides to consider this application for extension of time as an application to file a grievance, the employer submits that the grievance would be untimely.*
>
> *Mr. van Duyvenbode filed an interlocutory injunction to prevent the employer from terminating his employment. A decision out of the Superior court of Justice of Ontario was issued on April 13, 2006. . . . Mr. Justice Rutherford dismissed the motion. . . . In paragraph 11 of his decision, Mr. Justice Rutherford stated the following:*
>
> > 'If his employment is terminated he can grieve and upon adjudication he can be granted the range of remedies set out in the PSLRA. . . . It seems to me that his termination will be inevitable on the outdated medical evidence if the plaintiff maintains his refusal to be medically evaluated by Health Canada.'
>
> *Mr. van Duyvenbode filed an application of extension of time to refer to arbitration only after the court decision from Mr Justice Charles T. Hackland of the Ontario Superior Court . . . was issued on June 25, 2007, dismissing his case for lack of jurisdiction. The employee made his application on November 30, 2007 which is almost six months after the decision was issued but still over eighteen months after the termination of his employment. . . .*
>
> *Mr. van Duyvenbode was made aware of the grievance process. He was informed by counsel representing the Employer during cross examination for his civil action in the Ontario Superior Court of Justice on February 9, 2006, by Mr. Justice Rutherford in his decision of April 13, 2006, by Mr. Justice Charles T. Hackland in his decision of June 25, 2007 and his letter of April 28, 2006 . . . terminating his employment. Therefore there was no prejudice to the employee since he was aware of the grievance process. Mr. van Duyvenbode made a conscious decision not to grieve and waited until November 30, 2007 to file an application for extension of time to refer to adjudication. The excessive length of time that has elapsed since the termination of his employment would cause prejudice to the Employer in its ability to prepare a proper defence.*
>
> . . .
>
> [*Sic* throughout]

[12] The respondent referred me to the criteria for assessing applications for an extension of time set out in *Schenkman v. Treasury Board (Public Works and*

Government Services Canada), 2004 PSSRB 1, and submitted that the applicant had not met his burden of establishing valid reasons for an extension. The respondent set out the criteria as follows:

- *A clear, cogent and compelling reason for the delay*
- *the length of the delay*
- *due diligence of the application*
- *the injustice to the employee balanced against the prejudice to the employer*
- *the chance of success of the grievance*

C. <u>Applicant's reply and submissions on the independence of the PSLRB</u>

[13] In his request to the PSLRB for an extension of time to file a reply (email dated March 9, 2008), the applicant requested that the Board make a ruling on its institutional independence:

. . .

> *I ask the Board to rule on its ability to render and to unquestionably* [be] *believed to render a decision that is unbiased and free from direct . . . influence of the Prime Minister's and Government's displeasure with that decision.*

. . .

[14] The applicant submitted the following in support of his request:

. . .

> *. . . in light of Prime Minister Harper's very public firing of Ms Keen from her "at pleasure Order in Council" quasi judicial position as President of the Nuclear Safety Commision because the Prime Minister and the Government did not agree with her legally mandated decision. Thereby the Prime Minister, Cabinet and the Government have compromised the ability of all "Order in Council appointees" including this Board to make independent and unbiased decisions that are free from influence or pressure of the Prime Minister and Cabinet particularly when the Prime Minister and Cabinet (as Employer) are involved in the matter. . . .*

. . .

[15] In this email, the applicant suggested that the establishment of an independent labour court composed of judges would satisfy section 24 of the *Charter of Rights and Freedoms* ("the *Charter*") and would mitigate recent government actions that have compromised the independence of "order in council appointed boards."

[16] The applicant replied to the respondent's submissions on April 14, 2008. On April 17, 2008, he sent a revised version of his reply. I have excerpted below sections from the revised reply. In this reply, the applicant also addressed his constitutional challenge to the independence of the PSLRB. The following are the relevant excerpts from his submissions (the full submissions are on file with the PSLRB):

> *I. CHARTER CHALLENGE OF THE CONSTITUTIONALITY Of SECTIONS 22, 209, 214 and 236 OF THE PSLRA*
>
> *Before decisions on the merits for granting an extension of time can be considered by the Board, the Board is asked to rule on the constitutionality of sections 22, 209, 214 and 236 of the PSLRA which I have maintained violate sections 7, 15 and 24 of the Canadian Charter of Rights and Freedoms. . . . I ask also that the Board in the event of findings of breaches of the Charter to rule that the Board cannot deal with adjudication complaints brought forward by employees until the Government amends the PSLRA. I ask that the Board submits its ruling on the constitutionality of the PSLRA to the Prime Minister together with a recommendation to the Prime Minister that the Government amends, on an expedited basis for which all party support can easily be obtained, the PSLRA as follows:*
>
> *In matters of disputes between employees and the Government of Canada as employer the same standards of due process, equal treatment under the law and right to natural justice guaranteed to every Canadian by the Charter requires that the Government of Canada amend the PSLRA as follows:*
>
> *1. Appoint the Board members . . . as independent from government judges in a manner that is similar to the appointment of all court and tax court judges (I recommend that the current members of the Board be so appointed after the coming into force of these amendments to the PSLRA);*
>
> *2. Permit in section 209 adjudication by the Board of all grievances listed under section 208 of the PSLRA and include discrimination, harassment and retaliation grievances*
>
> *3. Strike sections 214 and 236 as being unconstitutional.*

4. Clarify section 208 (2) so that Charter based grievances can be submitted for adjudication under the PSLRA or must follow the procedure set out in section 24 of the Charter.

. . .

Section 12 of the PSLRA provides for appointment of all Board members and section 22 (1) for the removal for cause by Order of the Governor in Council which means by the recommendation and approval of the Prime Minister of Canada. In the adjudication framework of the PSLRA, where the Government of Canada as employer is almost always a party to the adjudication, such appointment and ability to remove Board members at will gives rise to a serious and real apprehension of bias and thus noncompliance with section 7 of the Canadian Charter of Rights and Freedoms right to natural justice.

. . .

. . . are all Board members so independently wealthy that they can say with total confidence that they can make independent decisions even though these decision may be opposed by or displease the government of the day and thereby risk displeasing the Prime Minister who appointed them? Can all members take the risk of financial loss and dislocation as well as public humiliation for having been fired by the Prime Minister over decisions that displease the Prime Minister?

This question is a very acute one in my case because Prime Minister Stephen Harper is a Defendant to my Claim in court and he is also a Defendant to my grievances to be submitted to the Board by virtue of the fact that on 18 occasions . . . the Prime Minister and his appointed Deputy Ministers have refused to obey section 15 of the Charter and to act in accordance with sections 22.1 (b), 22.2 (c), 126, 264 (1) and (2) (d), 264. (1), 268 (1), 269.1 (1) and (2) of the Criminal Code. The Prime Minister and his appointed Deputy Ministers have left themselves open not only to claims for redress of their illegal actions but also to civil litigation and criminal prosecution.

. . . As a party to my grievances, it is obviously a section 7 of the Charter denial of natural justice to have an Order in Council appointee appointed by the Prime Minister decide on matters in which the Prime Minister is a party and the appointee holds his office at pleasure of the Prime Minister.

. . .

This concern about the absence of clear independence of the PSLRB can be resolved by making the PSLRB (perhaps in combination with the Canadian Industrial Relations Board) into a Federal Labour Court with appointed judges who can only be removed by a decision of a judicial council and not by the government of the day. This is the structure in the Federal Tax Court for dealing with disputes between taxpayers and Government regarding the application and interpretation of the Income *Tax Act. It should also be the structure for the PSLRB in the interest of achieving the natural justice and due process guaranteed by section 7 of the Charter and equal treatment under the law under by section 15 of the Charter.*

Sections 209, 214 and 236 (1) of the PSLRA are also unconstitutional in that they seek to oust an employee's but not management's right to recourse to a court of competent jurisdiction guaranteed under section 24 of the Charter. Sections 209, 214 and 236 (1) deny employees any right to action including the section 24 Charter right to recourse to a court of competent jurisdiction. But no Act of Parliament can oust and thereby make a back door amendment to a provision of the Constitution of Canada. Only Parliament can amend the Constitution of Canada in matters which only affect the federal jurisdiction. However, this unconstitutionality & sections 209, 214 and 236 (1) can be remedied by my recommendation to amend the PSLRA so as to make the Board a Federal Labour Court and to have its members judges who are appointed in a manner similar to other judges and to make all matters that can be the subject of a grievance under section 208 subject to adjudication by the Board. Section 208 (2) of the PSLRA should also be clarified in that section 24 of the Charter provides for a redress procedure that would actually prevent an employee from presenting grievances dealing with breaches of the Charter. It may well be best to allow explicitely Charter based grievances under section 208 and to allow adjudication under section 209 of such Charter based grievances.

The employer's position about Charter based complaints of discrimination by the employer as expressed in the employers factum presented before Justice Hackland on May 15, 2007 . . . is clearly unconstitutional and not in conformity with section 208 of the PSLRA. The employer seeks by relying on section 209 and 236 (1) to oust the jurisdiction of the Board on Charter and harassment matters and on any interpretation and application of any statutes and their subordinate legislation dealing with the terms and condition of employment. The employer had previously emasculated the PSSRB, from providing the right to adjudication of Charter based complaints of discrimination

and of non-Charter complaints such as harassment and retaliation and now seeks too similarly emasculate the PSLRB. The employer's position on the jurisdiction of the Board is clearly unconstitutional because it seeks to deny employees . . . their section 7, 15 and 24 Charter rights to due process, natural justice, equal treatment under the law and right to recourse to a court of competent jurisdiction.

The employer's position which seeks to limit Charter discrimination and harassment based grievances to the jurisdiction of the final level grievance officer (a public servant) is clearly unconstitutional and in breach of section 24 and section 7 of the Charter. No appointed public servant, who most often are not even lawyers and who are entirely under the control of the Deputy Minister who may be a party to the complaint and who appoints the public servant can be considered to fulfil the requirement of section 24 recourse to a court of competent jurisdiction. Nor can an employee who is under the control of a party to the grievance provide access to natural justice and due process guaranteed under section 7 of the Charter. The fact that managers are not denied such fundemental Charter rights but employees are represents systemic discrimination under section 15 of the Charter and the denial of equal treatment under the law.

In fact, it would set a dangerous precedence for the Board to rule that sections 209, 214 and 236 (1) conform with the Charter. It would allow any Prime Minister to use his parliamentary majority to pass legislation which would give exclusive jurisdiction to appointed public servants to decide at a binding level Charter complaints and would deny jurisdiction to the courts of law as was clearly intended by the will of Parliament in 1981 and 1982 with the passing of the Constitution Act 1982. . . .

I ask that the Board first consider my constitutional challenge of the PSLRA and the employer's position with regard to the Act before deciding upon my request for extension of time or on any requests to decide upon the matter of the jurisdiction of the Board or on the substance of my grievances. The constitutional questions of the fact that the Prime Minister or the employer appoints members of the Board raises serious questions of real apprehension of bias and lack of independence. Such an appointed Board cannot provide the section 7 guarantee to the right to natural justice and can only do so if the Government on an expedited basis amends the PSLRB to appoint the current members and all future ones as judges whose tenure in office is not under the control of the employer.

. . .

II. REASONS FOR GRANTING THE REQUEST FOR EXTENSION OF TIME UNDER RULE 61

. . .

When the employee learned that his mother was dying from cancer in November 2007 . . . in the week before his mother died . . . the Judge granted an extension of time to June 25, 2008.

. . .

4. When the employee was preparing during August and September of 2007 his submissions to this Board and his requests for extension of time, the employer arranged to have more pressure on the employee so as to disrupt his efforts to submit his grievances to the Board by having Indian and Northern Affairs Canada and Human Resources Canada staff conspire to try force the employee against his written instructions to retire. . . .

The employer has continued through such relentless discrimination, harassment and retaliation against the employee and has refused into 2008 to accommodate under section 15 of the Charter the employee's disabilities which the employer has caused [in an] . . . a*ttempt to disrupt, impede and prevent the employee from preparing and filing his submissions to this Board. The employer has used repeatedly the discredited tactics which the passing of the* PSLRA *was supposed to correct or prevent and that is the employer's use of multi-fora, processes and proceedings to exhaust through attrition the mental, physical and financial resources of an employee who dares to seek redress for his complaints. The employer is thus directly responsible for having caused delays in the employee's submissions. It would be a total miscarriage of justice and section 7 of the Charter violation of the right to natural justice to deny an individual employee with limited resources and suffering a mental disability caused by the actions of the employer an extension of time when the Board and its predecessor have granted such extensions of time in for example* Palmer (2006 PSLRB 9) *and* Richard (2005 PSLRB 180) *and the employer with its virtually unlimited resources of thousands of employees and lawyers and money at its disposal has requested and been given an extension of time by the Court in the Afghan detainees litigation.*

. . . It is the employee's mental disability and the employers continued discrimination, harassment and retaliation that has caused the delays in the employee's submissions to the Board. A mentally disabled employee would at the best of time have difficulty in focusing on and preparing complex

documents. However, where the employer causes the employee to suffer repeated emotional upset and pain and suffering, it is extremely difficult for an employee with a mental disability knowing that the employer has caused his psychiatric injury to focus and to prepare and finalize his submissions to the Board. The Board should in the interest of justice consider the mental disability and the multiple pressures that the employer forces on the employee and grant the employee an extension of time to submit his grievances … These illegal personal and systemic actions by the employer are too important to dismiss without having a full hearing by an adjudicator who is independent from the employer, the Government of Canada.

In fact, the continued relentless abuse of the employee by the employer into 2008 begs the question that there may not be a need to request an extension of time. Where there is an on-going pattern of closely related illegal actions and abuse taking over a long period of time and is continuing into the present against the employee by the employer, there is no break in the complained of conduct by the employer. For the employer to attempt to compartmentalize every action as being distinct separate unrelated actions which require the filing of separate grievances would be an abuse of process under section 7 of the Charter.

. . .

I have diligently pursued my complaints against my employer by filing complaints including several grievances only to find that the employer did not act on them or did not provide an effective impartial redress mechanism and access to natural justice which section 7 of the Charter guarantees me. . . .

. . .

I, therefore, ask that you will accommodate me and will grant me an extension of time to complete and submit my grievances to the Board … or to rule that no extension of time is required because of the on-going objectionable conduct by the employer. I ask that I be given an extension of time until the end of September to submit my grievances so as to give me sufficient time to recover from my mother's death and from having to deal with the multiple pressures which the employer has placed on me in pursuing my rights to appeal court decisions. . . .

. . .

1. Compelling reasons for the delay:

1.1 None of the redress mechanisms established by the employer and tried by the employee, Nico van Duyvenbode, provided access to natural justice and a court of competent jurisdiction as provided for by sections 7 and 24 of the Charter. Consequently, he filed a claim in court and pursued that course because as a whistleblower of illegalities committed by the employer, he could pursue his court claim. It would be prejudicial to Mr. van Duyvenbode and a serious denial of natural justice to deny him an extension of time for claims which he diligently pursued but which a court has now declared was in the wrong forum.

1.2 Judge Hackland ruled on June 25, 2007 (which the employee did not receive until mid-July) that he was in the wrong forum and should submit his grievances to the PSLRB. It would be prejudicial and a denial of natural justice under section 7 of the Charter to deny the employee an extension of time for claims which he diligently pursued but in the wrong forum but which was a proper legal forum when he commenced his claims in court as per the Perrera et al v the A.G. and Guenette et al v. the A.G. and as per section 24 of the Charter and is the proper forum to make a Constitutional and Charter challenge of the PSLRA and to force the employer to amend the PSLRA.

1.3 The trauma of having the court claim struck down has further aggravated his ability to respond quickly and coherently to having to submit to a new process and procedures under the PSLRA and its regulations..

1.4 Mental disability which was caused by the illegal actions of the employer as outlined in attached psychiatrist's report aggravated by complicating physical illnesses, eye infections and muscle tear with ongoing muscle inflammation prevented concentrated action and completion of the grievances. It would be patently unfair and prejudicial to Mr. van Duyvenbode to deny him an extension of time and to allow the employer to profit from their illegal actions against the employee which caused his psychiatric injury of severe depression. . . .

1.5 The illness and subsequent terminal illness of his mother prevented him from concentrating on completing his grievances. It would be an injustice to deny an extension of time to an employee experiencing such trying circumstances.

2. Length of Delay

2.1 The length of the delay has been since the June 25, 2007 court decision dismissing his claim [and] *is not long and understandable given the employee's desire to secure the*

truly independent adjudication of the court, his mental disability compounded by physical ailments and the trying circumstances of his mothers illness as well as the continuous stress and time consuming pressures that the employer forces on the employee in the pursuit of his rights and in the employers attempt to disrupt, exhaust the limited mental, physical and financial resources of the disabled employee so as to cause delays in the employee's submission to the Board. The delay is not as of May 3, 2006 as the employer contends when at that time and since the employee has been diligently pursuing his claim in court under section 24 of the Charter which presumably under section 208 (2) of the PSLRA precludes him from filing a grievance to the Board.

3. Due diligence of the application

3.1 The employee has duly pursued his complaints of illegal activities by his employer through the court process and is trying to assemble all the relevant grievances and supporting proof substantiating these grievances which are more numerous than the court claims for a diligent and comprehensive manner for submission to the Board.

3.2 The length of the delay is also aggravated by the relentless discrimination, harassment and retaliations which persist to the present time under the authority & the Deputy Minister which serves to disturb and divert the applicant from completing the tasks necessary to complete his grievances for submission to the Board. . . All these illegal actions by the employer have sewed the employer to cause delays in the applicants preparation and submission of his grievances to the Board through the exhaustion of the disabled employee's limited mental, physical and financial resources.

4. Injustice to the employee balanced against the prejudice to the employer

4.1 Refusing an extension of time would be prejudical to the employee and patently unjust and would allow the employer to profit from the psychiatric injury which the employer has illegally caused the employee to suffer.

4.2 The employer has suffered no prejudice in the few months delay in having to defend against the grievances. The ability [of the employer] *to defend* [itself] *is not affected by the delay and even if there was some prejudice, the refusing of access to adjudication outweighs any prejudice to the employer. There can be no prejudice to the employer who insisted in court and convinced the court that the proper forum for dealing with the employee's complaints/grievances was referral to the PSLRB thereby causing further delay.*

4.3 The solicitor for the employer had stated in court that the government would not oppose a request for extension of time if the court ruled to dismiss Mr. van Duyvenbode's claim for being in the wrong forum. It would be patently unjust for the Government to profit from arguments used to obtain a dismissal of a court claim and then to reverse its arguments in order to obtain a denial of the extension of time in a forum, the PSLRB, which the employer has forced the employee to pursue.

4.4 The employer has demonstrated no prejudice to the employer in the delay of submitting grievances. . . .

4.5 The employer has not demonstrated that it is prejudiced or affected adversely in any way in its ability to prepare and submit its defence. The employee remains dumbfounded at the volume and weight of the documents of defence prepared by the employer at each step and at the considerable excess baggage charges that he has had to incur as a result.

5. Chance of success of the grievance

5. The chance of success of the grievances are excellent as they are supported with documentary evidence. . . The Board has the jurisdiction to hear the grievances of the employee under sections 209(1) (a), (b) and (c) of the PSLRA and under the Charter Challenge to include hearing grievances that deal with Charter matters. In particular. the Board has jurisdiction under section 209(1) (b) and (c) to hear grievances concerning the illegal tactics used by the employer of discrimination, harassment, retaliation and refusal to accommodate an employee with a disability to secure an illegal termination and to cause the employee to experience financial penalties though their disguised disciplinary actions.

6. Jurisdiction

6.1 The employer has claimed that by section 209(1) the employee must file grievances with the department. However, since the primary Defendant of the employee's grievances are past and the present Deputy Minister and his Assistant Deputy Ministers, it would be a flagrant section 7 of the Charter denial to due process and right to natural justice to have the Defendants name the public servant who will hear the final level grievance but whom they have appointed and control.

6.2 The department did not act in a timely manner on the four grievances which the employee filed with the department in 1999 and the employee has a real apprehension of bias in any hearing by a public servant

nominated, hired and under the control of several of the Defendants to his grievances.

6.3 The only alternative available to the employee under the PSLRA is to submit his grievances directly to the PSLRB. The department has had ten years to resolve the employees complaint/grievances and have refused to do so to the detriment and prejudice to his health and financial position.

. . .

7.1 . . . Eighteen months had elapsed since the termination but only 5 months since Judge Hackland's decision on June 25, 2007 received by the employee in mid-July. Given the pressures and stresses that the employer had been imposing on the employee and his mental disability, five months is not an extraordinary length of time for him to recover from the shock [of] *Justice Hackland's decision and to re-focus on the new and unfamiliar process of the* PSLRA.

7.2 . . . The department knows the nature and content of the grievances that will be filed with the Board from the employee's Statements of Claim, Affidavits and numerous letters to the department, Treasury Board, Clerk of the Privy Council and to three Prime Ministers as well as submissions to the PSC ad CHRC.

7.3 . . . the concern over bias and lack of independence of quasi- judicial tribunals has been raised in court and in a parliamentary committee by Ms Keen and in a parliamentary committee by the Auditor-General. The employee's experiences with the employer controlled redress mechanisms left him no option but to pursue his section 24 Charter rights to seek recourse from a court of competent jurisdiction. It also persuaded him to raise the Charter challenge of the employer appointing the Board members and also being a party to the mailer before the Board.

7.4 . . . The motion for an injunction to prevent the employer from carrying out before the fact an illegal termination of the employer was the proper procedure as no preventative or injunction measure Is provided for under the PSLRA. . . .

7.5 The employee also did not want to jeopardize his Claim in court by having it struck down for reasons of estoppel if he proceeded with a grievance and felt that the employer was trying to trap him into filing a grievance so that the employer would have better legal grounds for obtaining an order to strike the employees claim. The employee also believes that the employer deliberately terminated illegally his employment for incapacity without obtaining a doctors evaluation confirming that the employee could not return to

> *work in the foreseeable future in order to force him to file a grievance or even in the absence of a grievance to gain the tactical advantage of increasing the chance that the court would agree with the employer's position that the employee was in the wrong forum and should file a grievance with the PSLRB.*
>
> *7.6 The employer's solicitor offered in July 2007 the employee a settlement if he did not pursue a grievance with the Board which the employer would not have made had it been unlikely under the circumstances that the employee could not obtain an extension of time from the Board. In response to the employee's refusal to accept the settlement, the employer increased from August to the present the pressure and stress on the employee in order to impair him from filing his request for an extension of time and from completing his grievances for filing with the Board.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

D. <u>Respondent's reply</u>

[17] Initially, the respondent addressed only the request for an extension of time and stated that it deferred to the Board on the question of its independence (correspondence dated May 12, 2008). The Board requested that the respondent provide its submissions on the independence issue raised by the applicant, and the respondent provided those submissions on June 5, 2008. I have excerpted the relevant portions of both submissions below. The respondent also objected to the Board's jurisdiction to consider the constitutional questions until the attorneys general were properly notified as required by the *Federal Courts Act*. In light of the fact that the applicant subsequently provided notice to the attorneys general, I have not set out the respondent's argument on this point.

> . . .
>
> *. . . the Employer maintains its objections as outlined in its January 18, 2008 correspondence to the Board. Furthermore, the Employer will make additional comments which will show that Mr. Van Duyvenbode's request has no reasonable grounds, that he did not file a grievance within the required timelines and that the additional time that it took for him to make an application of time was as a result of his own*

actions. The employer makes the following additional comments:

1) *Mr. van Duyvenbode's request has no reasonable grounds.*

The employee started his letter of April 14, 2008 by raising issues pertaining to the constitutionality of certain sections of the Public Service Labour Relations Act (PSLRA). *The Employer will leave it up to the Public Service Labour Relations Board (The Board) to respond to those issues. However the Employer wishes to comment on Mr. van Duyvenbode's request that the Board delays its decision on his request for an extension of time until the Board decides on the constitutionality of the* PSLRA *and until the government has amended the* PSLRA. *The* PSLRA *already provides for a cycle review of the legislation. Therefore, there is no need for Mr. van Duyvenbode's request. If the Board granted such a request, the process could take many years and create a prejudice to the Employer. The legislation provides parameters to resolve labour relations issues and the specifics of a grievance process are negotiated by the parties through a collective agreement. Mr. van Duyvenbode does not seem to have the intention to follow the process in place at this moment. He continues to argue that he has no intention to file a grievance with the department before referring to adjudication which is not in line with article 209(1) of the* PSLRA *which states:*

> An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to. . .

2) *Mr. van Duyvenbode does not have a clear, cogent and compelling reason for the delay.*

. . . The delays in this case are attributable to the employee's own actions as he decided to go towards other legal avenues instead of the grievance process as he stated not having confidence in any federal public service labour tribunals or bodies appointed by the Government. He made that statement in court, in February 2006, while being cross-examined by the Employer's representative for his injunction motion to prevent immediate action to terminate his employment prior to the resolution of his civil claim at the Superior Court of Justice against the Attorney General of Canada and senior public servants alleging harassment and discrimination. . . He reiterated this statement in his letter of April 14, 2008 to the Board. Therefore, the medical condition that Mr. van Duyvenbode is bringing up as a rationale to explain the delays has no bearing in this matter. As in

Stubbe decision (149-2-114), *the grievor is attempting to divert attention from his own negligence in filing a grievance. Mr. Van Duyvenbode was given information from the judge in its decision of June 2006 that pertained to his injunction. He was informed that should he be terminated, his recourse would be a grievance under the* PSLRA. *Yet; he waited over 18 months after the termination of his employment to make an application for an extension of time to refer a grievance to arbitration.*

3) The length of the delay

Time limits set out in collective agreements are specific and should not be lightly set aside, as stated by the arbitrator in Mbaegbu (166-2-32261).

Section 61 of the Public Service Labour Relations Board Regulations *is clear. Sometime within the 25-day period following notice of termination Mr. Van Duyvenbode had to form the intention to grieve the Employer's action. He did not seem to have that intention until his civil claim case was dismissed on June 25, 2007 which is over 18 months after the termination of his employment. Even then, he did not make an application for an extension of time until almost 6 months later. The length of Mr. van Duyvenbode delay in filing his application is significant.*

Also, Mr. van Duyvenbode makes references to grievances, in plural, that he will be referring to adjudication. . . . This leads us to believe that his intention is to file grievances that are not just related to his May 3, 2006 termination of employment. He would be filing grievances that relates to events that happened between 1997 and 2007 as mentioned in his letter addressed to the Board on November 30, 2007. The Employer submits that any new grievances would be untimely and the Employer would object accordingly.

Mr. van Duyvenbode is even requesting that the Board provide him additional time until September 2008, to refer his grievances to adjudication which would be even more of a prejudice to the Employer.

4) Due diligence

Mr. van Duyvenbode was not diligent in pursuing his rights under the collective agreement and the PSLRA fix *his labour relations issues. Mr. van Duyvenbode was capable of preparing and filing lengthy documents for his other court proceedings but he claims that his health was refraining him from filing a grievance with his department He could have prepared similar documents for a grievance while attending to his other court proceedings if his intentions were to file a grievance which was clearly not so. It is only over 18 months*

after the termination of his employment that he did. Therefore, Mr. van Duyvenbode was not diligent in handing his grievance. The fact that the applicant did nothing until November 30, 2007 is a compelling argument for concluding that he had decided not to file a grievance.

Therefore, it is the employer's position, pursuant to the Wyborn case (147-33-226), that *the grievor never intended to file a grievance within the prescribed time limits. On the contrary, at the time in question, the grievor had made a conscious decision not to file a grievance. He changed his mind later when he realized that his file, as it stood, denied any further court proceedings.*

5) *Injustice to the employee balanced against the prejudice to the Employer*

Again the Employer believes that the reasons given by the employee to say that there is no prejudice to the Employer in granting an extention of time have no grounds. Contrary to what the employee believes, the excessive length of time that has elapsed since the termination of his employment would cause prejudice to the Employer in its ability to prepare a proper defence. Nevertheless, as stated in Boulay (Board file 149-2-160) *and submitted again by arbitrator Giguère in the* Wyborn *decision, the Board is not required to weight the prejudices that might follow upon the granting or refusal of an extension of time limits when it has found that the grievor has not formed the intention to grieve until after the time to do so has expired.*

There must be some finality in the process, otherwise cases like this would become unmanageable because anyone could file a referral to adjudication at any time after the time limit has expired.

As noted in Mark (568-32-122 & 166-32-37357), ...

> . . . there are good labour relations reasons for imposing time limits. First, the grievance and adjudication processes are intended to provide a final and binding method of resolving disputes that arise during the course of the collective agreement. Second, time limits contribute to labour relations stability by providing closure on the employees business decisions with the consequence of avoiding, for either the bargaining agent or the Employer, constant or long-term exposure to workplace incidents.

The Employer feels that responding to all issues brought forward by the employee in his attempt to respond to the Employer's objections would mean arguing the merit of the

case which would not be appropriate in an application for an extension of time.

In view of all these factors, the Employer submits that the adjudicator does not have jurisdiction and the application should be denied.

. . .

In his letter of April 14, 2008, the applicant is alleging that certain sections of the PSLRA *are unconstitutional. Specifically, the applicant is arguing that ss. 22, 209, 214 and 236 of the* PSLRA *violate ss. 7, 15 and 24 of the* Charter. *The underlying basis for the applicant's argument is that PSLRB members are not independent, because they can be removed for cause by OIC; the applicants says that this means that Board members can be removed on the recommendation and approval of the Prime Minister, and he has filed a law suit against the Prime Minister. He says that this alleged lack of independence results in his being denied due process, equal treatment and the right to natural justice under the* Charter. *He has asked that various provisions in the* PSLRA *be struck down, and that the PSLRB recommend to the Prime Minister that the Government amend the* PSLRA *in various ways.*

. . . the Employer respectfully submits that the PSLRB is institutionally independent, and the cited provisions are not unconstitutional.

The Supreme Court of Canada in Ocean Port Hotel Ltd. *v.* British Columbia, *[2001] 2* S.C.R. *781, 2001* SCC *52, at paragraph 20, established that "absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended."*

In light of the principle enunciated in Ocean Port, *one should examine briefly the framework for appointments that is set out in the* Public Service Labour Relations Act *Sections 12 to 23 cover the composition and mandate of the Board, appointments of the Chairperson, the Vice Chairpersons and the Members. Appointments are made by the Governor in Council.*

Section 2 of the Act defines "adjudicator" as a member who is assigned to hear and determine a grievance referred to adjudication, a person so-named in a collective agreement or

> *otherwise selected as an adjudicator by parties. In this case, an adjudicator would have to be a Board Member. Pursuant to section 18, each member "is to be appointed to hold office during good behaviour and may be removed by the Governor in Council for cause" [emphasis added]. Contrary to the Applicant's contention, adjudicators are not appointed "at pleasure." The removal for cause of persons appointed during good behaviour requires a high standard; and such a removal, in practice, is extremely rare.*
>
> *The legislation therefore provides for a very high degree of independence of adjudicators, as contemplated by Parliament, and therefore there is no reasonable basis for attacking the institutional independence of adjudicators.*
>
> *Consequently, the Employer respectfully requests that the Board not grant the application for extension of time limits as requested.*
>
> . . .
>
> [*Sic* throughout]

E. Applicant's reply and Notice of Constitutional Question

[18] The applicant replied to the respondent's reply of June 5, 2008 and also filed a Notice of Constitutional Question on June 12, 2008. The relevant portions of the reply are excerpted below. The submissions supporting the Notice mostly repeated his earlier submissions on the independence of the Board. I have therefore reproduced only a small portion of the submissions.

> *. . .* [The] *Ocean's Port Hotel* [decision] *does not apply here because in Ocean's Port the constitutionality of the statute was not being challenged whereas it clearly is in my case. Ocean's Port also clearly states that Tribinals and thus by inference final level grievance officers, to whom most of my s.208 grievances would be referred unless the PSLRB rules that it can adjudicate all s. 208 grievances, are not courts. In the case of the grievance level officer the PSLRA gives the grievance officer no expressed power to decide on questions of law and thus the final level grievance officer cannot represent him or her self as a Charter s. 24 court of competent jurisdiction.*
>
> *The* PSLRA *provisions for establishing the independence of the PSLRB members are in name only and cannot alter the fact that the employer, the Government of Canada who appoints Board members to adjudicate grievances to which the employer the Government of Canada is a party, can remove them at will albeit with a trumped cause as Prime*

Minister Harper's firing of Ms Keen on January 15, 2008 clearly demonstrates. Termination for cause can be for as little a cause as excessive expense account or travel expenditures. Just as important is the employer's influence over Board members who want promotions or re-appointments. The PSLRA replaces the inherent jurisdiction of the courts with that of the PSLRB or grievance officers without giving them the same level of personal and institutional independence when the question of independence can have a direct or underlying bearing on the type [of] decisions that Board members make and give rise to a real apprehension of bias. Prime Minister Harper's actions have compromised the appearance of independence of all Order in Council appointees.

I have submitted that ss. 12, 22, 209, 214 and 236 of the PSLRA are inconsistent with ss 7, 12, 15, 24 and 52 [of the Charter] *and these inconsistencies are not reasonable in a free and democratic society and thus the Board should rule them to be unconstitutional and to not be applicable and of no force or effect in my case. I have also asked the Board to ask the Prime Minister to amend the PSLRA in the manner as I have suggested so as to make the PSLRB for purposes of adjudication of grievances a fair, truly comprehensive, independent and effective Federal Labour Court.*

. . .

. . . I ask you in light of the arguments included in my Notice of Constitutional Question that the Board accommodate my disability by extending time as required by s. 15 of the Charter because my psychiatric disability which was caused by the employer and my physical disability limit my ability to respond to the employer's demands in the various fora in which my complaints are being heard.

I ask the Board to also notice and rule on the employer's violation to this date of s. 68 (3) of the PSLRB Regulations. *In spite of receiving my numerous written objections and complaints and particularly those in 2006 and 2007, at no time did the employer make available to me copies of the Board approved grievance forms. At no time did the employer send me these grievance forms and say sign these forms and attach the letters which we have received including some 18 letter to Prime Minister Harper and we will process them as grievances. In view, of this fact, I ask the Board to rule that the employer has contributed to the Griever's late submission of his grievances and the time limitation period for filing grievances can only commence upon the date when the employer provides the Grievor with the authorized grievance forms.*

> *I have been prejudiced as I have previously noted in replying to the employer's [submissions] . . . because the employer did not attach copies of the decisions on which they rely and the* Stubbe, Wyborn *and* Boulay *cases are not available on the Government's websites including the Board's website.*
>
> *In the May 12, 2008 response the employer claimed that I had no intention to file a grievance which is not true. I included my grievance in my court claim because I believed that to be the proper and legal forum for resolving my claim. It would have been extremely prejudicial to my court claim if I had filed a grievance at that time. That is probably the reason why the Attorney General and the employer arranged for my illegal termination for cause (incapacity) when the employer is accused of causing that incapacity so that the employer could claim that I was barred by estoppel from proceeding with my court claim or barred from having the grievance heard by the PSLRB.*
>
> *The employer in its May 12th letter is incorrect in calculating the length of delay. My first approach to the Board was in August of 2007 not six months after. The time extension should cover all of the complaints which I have raised in my claim since 2003. The employer has had ample time to prepare its defenses to these complaints and is in no demonstrable way prejudiced by the delay. Nor are any of the managers and their superiors prejudiced in any demonstrable way. On the contrary, many have received promotions. . . .*
>
> *The employer is incorrect in its May 12, 2008 letter in saying that I could prepare simultaneously documents for the court and for the Board. This is a clear example of the employer wanting to profit from having caused an employee to suffer a psychiatric injury and to render him less capable of responding to the requirements of both the court and the* PSLRA *processes. The employer's systemic abuse of employees makes it less likely that employees can in a timely and effective manner challenge the illegalities committed by the employer and seek an effective remedy to their complaints. It is a systemic strategy by the employer to render the complaining employee less effective by making him suffer relentless and illegal abuse and then through a procedural rulings such as for failing to file grievances within a very narrow time frame to avoid having to defend the merits of the case for which often they have no defense.*
>
> . . .
>
> [*Sic* throughout]

[19] The applicant's Notice contained nine questions. I have reviewed those questions and summarized them below, eliminating duplications and editing the questions in order to shorten them (the full Notice is on file with the Board):

. . .

> 1. If the members of the PSLRB exercise jurisdiction that replaces the inherent jurisdiction of the courts (by ss. 209 and 236 of the *PSLRA*) for the adjudication of labour disputes, should the Board members then not have the same individual and institutional independence from the respondent, the Government of Canada as the courts that they replace? If yes, is the failure to have the same independence as courts a breach of sections 7 and 15 of the *Charter*? If the answer is yes, are the relevant provisions of the *PLSRA* of no force and effect?
>
> 2. Is it a breach of the *Charter* (sections 7, 12 and 15) for the Government of Canada, the respondent and a party to labour disputes, to appoint adjudicators to hear those disputes? Is it a breach of the *Charter* for the government to appoint its own employees to hear grievances that are governed by s. 208 of the *PSLRA*, and hence not eligible to be referred to adjudication?
>
> 3. Does the fact that public servants are prevented from having their grievances adjudicated by independent third party adjudicators or arbitrators (as outlined in sections 208, 209, 214 and 236 of the *PSLRA*) conform to the guaranteed *Charter* rights contained in sections 7, 12, 15 and 24?
>
> 4. Is the limitation of the jurisdiction of the PSLRB to adjudicating of s. 209 grievances but not all of s. 208 grievances constitutional or can the Board assume jurisdiction to hear s. 208 grievances about breaches of an employee's *Charter* rights or of the violation of rights, terms and conditions of employment provided by any other Act of Parliament or its subordinate legislation?
>
> 5. Are the time limitations for filing grievances set by the respondent through the PSLRB in the PSLRB regulations to only 30 days constitutional in accordance with sections 7, 12 and 15 of the *Charter*, given that the Government of Canada has legislated for non-public servants a time limit of 90 days within which to file complaints under the Canada Labour Code? Are the PSLRB and the respondent required to provide accommodation by providing additional time for a Grievor who suffers from a disability and in particular for a Grievor who suffers from a disability which the respondent has illegally caused?

> 6. In the absence of a specific statutory reference, does the third final binding level grievance officer (s. 214 of the *PSLRA*) have the power, authority or even the capacity to decide questions of law in grievances submitted under s. 208 of the *PSLRA*? Is the barring of public service employees from access to the courts (s. 236) unconstitutional by virtue of sections 7, 12, 15 and 24?
>
> 7. Is section 236 of the *PSLRA* barring unionized public servants from recourse to the courts constitutional?

[20] In support of his Notice, the applicant made the following submissions. I have excerpted those portions of the Notice that are relevant to the constitutional questions and, to the extent possible, eliminated some of the duplication in his submissions.

. . .

> *2. The Government of Canada in its dealing of complaints by citizens of wrongful government conduct has created the . . . independent Court system which encompasses the Provincial Courts, the Federal Court, Supreme Court and for complaints relating to the application of the Income Tax Act, the Federal Tax Court filled with judges who have lifetime tenure. The Government of Canada has also enacted the Canada Labour Code which provides non-public servant employees with third party arbitrators or adjudicators for resolving their complaints against their employers. Neither the employee nor the employer has any role or power to appoint the arbitrator except by mutual consent nor do they have any influence over the arbitrator particularly on such issues as the dismissal or re-appointment of the arbitrator or adjudicator. They are assured their Charter rights to s. 7 due process and fundamental justice administered by personally and institutionally independent arbitrators or adjudicators.*
>
> *3. This is factually not the case for unionized employees of the Government of Canada. While management employees continue to have the right to recourse to the courts for abuses and/or illegal actions by their superiors, the Government of Canada as employer denies its unionized employees the section 15 right to equal treatment and protection under the law and section 7 right to fundamental justice which is available to all other Canadians who are employed. The Government of Canada has created through ss. 12, 22, 209, 214 and 236 of the PSLRA a redress mechanism which provides for adjudication or binding decision-making by appointed individuals who have an employee-employer relationship with the defending employer, the Government of Canada. Whereas all other Canadians can have access to adjudication of virtually all their employment complaints to either the courts or to*

independent Government created labour boards, tribunals or independent third party arbitrators whose members are appointed by the Government and not appointed by the employer or a party to the complaints. This is factually not the case for Government of Canada unionized employees who are constrained to a grievance redress mechanism created by the employer, the Government of Canada, and filled with appointees by the employer, the Government of Canada and thus who are in an employee-employer type of relationship with the employer.

. . .

4 a) the adjudicators under s. 209 are appointed by the employer, the Government of Canada, through the recommendation of the Minister who requires effectively to have the approval of the Prime Minister of Canada to the Governor in Council and thus have a an employee-employer relationship with the employer, the Government of Canada.

b) s.209 severely limits the type of grievances that can be submitted to the PSLRB for adjudication

c) s.209 does not permit the PSLRA to adjudicate Charter based discrimination or infringement complaints which previously could in theory be adjudicated by a Canadian Human Rights Tribunal or by the Charter's s. 24 recourse to a court of competent jurisdiction

d) the PSLRA in fact by ss. 208, 209, 214 and 236 takes away rights to recourse to the CHRC and CHR Tribunal and legislates away the Constitutional Charter s. 24 right to recourse to a court of competent jurisdiction and replaces with final and binding decision-making by an employee, a public servant appointed by the Deputy Minister whose exercise of aurhority the Grievor is questioning

5. By s. 12 of the PSLRA, PSLRB members are Order in Council appointees whose appointments and re-appointments require the approval of the Minister and effectively the Prime Minister who makes the recommendation for appointment, re-appointment and removal through the Minister of Heritage (who has no expertise in nor any other mandate for labour relations matters) to the Governor in Council. . . . The authority to make senior Government appointments and to terminate them even for cause is what gives the Prime Minister his unique and all encompassing powerful authority within the Government. The Government provides in its legislation the legal fiction that it is the Minister of Heritage who has no expertise nor any other mandate for labour dispute resolution matters, but who effectively exercise the legislated authority under the direction of and with the approval of the

Prime Minister of Canada. The Prime Minister and any Minister so involved in making Order in Council appointments are advised on these Order in Council appointments by the Clerk of the Privy Council with input from other senior Government of Canada officials on the Committee of Senior Officials (COSO) such as the Secretary of the Treasury Board who have a self and collective interest in who becomes a member of the PSLRB. Board members can be removed under s. 22 of the PSLRA by the Minister with the approval of the Prime Minister's recommendation to the Governor in Council for the removal for cause which can be removal for incurring minor administrative transgressions such as excessive travel expenses (case of previous Privacy Commissioner), misuse of government property or funds, nepotism or decision-making differences with the Government of the day (case of Ms Keen Canadian Nuclear Safety Commission). The case of the Prime Minister's removal of Ms Keen on January 15, 2008 was done in the name of the Minister of [Natural]Resources but the Minister publicly acknowledged that it was Prime Minister Harper's PMO and PCO staff acting under his instructions who had arranged without the knowledge of the Minister for the Order in Council of January 15, 2008 (Order in Council 2008-0007) terminating Ms Keen as President of the Canadian Nuclear Safety Commission. The Prime Minister's actions demonstrate the overriding power of the Prime Minister to affect Order in Council appointees and bring into real and not just theoretical question the independence of quasi-judicial tribunals such as the Canadian Nuclear Safety Commission or Boards such as the PSLRB. Ms Keen and Canada's Auditor-General raised these apprehensions of the independence of Order in Council appointees to quasi-judicial tribunals in a parliamentary committee on January 29, 2008. They publicly expressed the same concerns about apprehensions of direct and subtle indirect Government influence or potential to influence decisions made by Order in Council Government of Canada appointees.

6. No member of the PSLRB is sufficiently wealthy enough that it is immaterial to him or her that the Prime Minister would suddenly dismiss them from their Order in Council appointment as was done to Ms Keen in January 2008. Each member of the PSLRB would experience financial disruptions that affect the ability to support family, sustain current lifestyles and maintain financial and pension investment or retirement plans as well as grievous personal embarrassment from having been suddenly and publicly dismissed as all Order in Council appointments and removals are published by law in the Canada Gazette.

7. Section 7 of the Canadian Charter of Rights and Freedoms guaranteeing the right to fundamental justice and section 15

right to equal treatment and protection under the law impose a constitutional constraint on the Government of Canada as an employer who has also the unique ability to draft and legislate the employee complaint redress mechanism of the PSLRA to provide for the highest level of independence of the adjudicator or arbitrator, that is independence because of tenure like the personal and institutional independence of the judiciary and not Order in Council appointees who have an employee-employer relationship with the Government of Canada as is created by s. 12 and s 22 of the PSLRA and whose decisions could be affected by the threat of removal for cause or more likely refusal to re-appoint or to promote a Board member by a Prime Minister who was displeased with their previous decisions?

8. Unionized employees of the Government of Canada are singled out by having only a limited number of grievance matters as set out in s. 209 (1) of the PSLRA that can be referred for adjudication by members of the PSLRB. Unionized employees of the Government of Canada cannot refer to adjudication most major grievance matters such as Charter violations, harassment, discrimination, retaliations against a whistleblower and against an employee who has dared to file complaints. The Government of Canada maintains the position that such grievances cannot be referred to adjudication under section 209 (1) but can only be decided upon by a final grievance level public servant appointed by the Deputy Minister under whose authority the matter was not adequately resolved. The refusal of senior departmental officials including often the Deputy Minister to resolve disputes gives rise to the grievance with the result that the Deputy Minister is often a Respondent to the grievance. The decision of a public servant who has been assigned to be the final level grievance officer by the Deputy Minister is final and binding on the employee under s. 214 of the PSLRA.

9. By contrast, employees who are not employed by the Government of Canada but whose industries are regulated by the Government of Canada have the right to submit under the Canada Labour Code virtually all employment related grievances to independently appointed by Government arbitrators, arbitration boards or the Canadian Industrial Relations Board which is neither appointed nor operates under the influence of either party.

. . .

14. Section 24 of the Charter guaranteed every Canadian the right to recourse to a court of competent jurisdiction for redress of violations of Charter rights. During the debates in Parliament in 1980, 1981 and 1982 it was the expressed will

of Parliament that recourse meant to a court of law, that is, to the independent judiciary and not recourse to a final and binding decision by a government appointed official. This position was strongly endorsed by most Canadians and organizations including the Canadian Bar Association.

15. The Charter is a constitutional instrument included in the Constitution Act 1982 and has Constitutional supremacy under s. 52 of the Constitution Act 1982. None of the Charter's provisions including s 24 can be ousted by an Act of Parliament and the Charter as part of the Constitution of Canada is by s. 52 supreme over any other Act passed by the Parliament of Canada.. Section 236 of the PSLRA seeks to legislate away the s. 24 Charter right to recourse to a court of competent jurisdiction and by ss. 209 and 214 of the PSLRA to replace court adjudication by either the employer, Government of Canada appointed PSLRB or for most s. 208 grievances by a public servant employee appointed by the Deputy Minister of the Department. That employee who has often no legal training and whose career advancement is dependent on the goodwill of the Deputy Minister renders a final and binding decision at the third binding final grievance level of grievance process. Employees appointed to serve as grievance officers frequently have no legal experience nor competence in labour relations law and they cannot be expected to rule on complex legal matters let alone on the constitutionality of Government legal provisions affecting the work place and thus they are frequently guided by the employer's legal and human resources advisors, creating the classic case of the defending employer deciding itself on the merits of grievances from employees.

16. Prime Minister Harper correctly noted in June 2007 this inherent conflict of interest in his speech on the need for Government to create an independent Treaty Claims Commission to provide independent from Government binding decisions on resolving Aboriginal Treaty Claims. Prime Minister Harper publicly acknowledged that Government cannot be both a party or defendant and an adjudicator to a dispute. Third party independent adjudication is required particularly when the courts are ousted from hearing the merits of a grievance. Judicial review which is limited to questions of reasonableness or proper procedures followed in the making of a decision regarding the disposition of a grievance does not provide a clearly unbiased independent third party adjudication of the merits of the grievance. Such independent third party adjudication courts do provide and non-public employees have either through recourse to the courts or to arbitrators appointed by neither one of the parties but by an otherwise non-involved independent third party Government Minister.

. . .

20. The Government of Canada in legislating with regard to their own unionized employees must put into place the highest standards of independence of the adjudicators by transforming the PSLRB into a Federal Labour Court and appoint its current members as Federal Labour Court Judges. PSLRB members by the provisions of the PSLRA replace the inherent jurisdiction of the courts and thus the Board members must have the same high degree of independence from the employer, the Government of Canada as judges have. They must also have the same jurisdiction as the courts and not be limited by the PSLRA to only a few matters that are subject to adjudication as per s. 209. It is neither in conformity with the Charter's s. 7 fundamental justice or s. 15 equality under the law to have unionized employees restricted severely to matters limited to those listed in s. 209 while prohibiting a right to adjudication either by the Board s.214 and the courts s.236 for most matters listed in s. 208 including questions of breaches of Charter rights or of other statutes. No other employee in Canada, unionized or not management or Order in Council have had their ss. 7, 15 and 24 Charter rights legislated away from them as unionized employees have suffered under the present wording of ss. 12, 22, 209, 214 and 236 of the PSLRA. . . . It is also clear the employer the Government of Canada in legislating the PSLRA has imposed an unequal and discriminatory labour relations scheme that singles out unionized employees and subjects them to unusual treatment simply because they are unionized employees by denying them their charter rights to independent third party adjudication which most Canadians in fact enjoy. Such deprivation to independent third party is not consistent with s. 7 right to fundamental justice, s. 12 right not to be subjected to unusual treatment and s. 15 right to be treated equally and to be protected and enjoy the benefits under the law and is not justified by s.1 in a free and democratic society.

21. What I seek in redress for a ruling that indeed ss. 12, 22, 209, 214 and 236 are unconstitutional is also a recommendation to the Prime Minister to amend the PSLRA *so as to provide for a Federal Labour Court, provide for adjudication under s. 209 includes all matters listed in s.208 and remove the archaic and dictatorial and fundamentally unjust provisions of s.214 because the independent Federal Labour Court will have the jurisdiction to adjudicate not just in name only but in actual fact virtually all matters dealing with the public service work place.*

. . .

The time limits for filing grievances that under the PSLRA *the PSLRB established by s. 68 (1) of its regulations provide*

are dramatically less than what the employer the Government of Canada has legislated in the Canada Labour Code *applying to non-governmental employees. This serves to the detriment of unionized public servants who are treated unequally in law in violation of ss. 7, 12 and 15 of the Charter and who are limited unfairly and discriminated against by the employer the Government of Canada in the time that is accorded to them to react to the disturbing or illegal actions by the employer and to organize themselves in a time of stress to file grievances. The restricted time limits serves the interest of the employer the Government of Canada by limiting and treating differently public servants for the purpose of decreasing the likelihood of grievances being filed in time.*

This PSLRB regulation demonstrates an inherent bias in favour of the employer the Government of Canada and a bias against and to the detriment of the employees of Canada by PSLRB members who are appointed by the employer the Government of Canada.

The PSLRB regulation s. 68 (1) is thus unconstitutional in its application to the Grievor by virtue of its violation of Charter principles of s. 7 right to fundamental justice; s. 12 right not to be subjected to unusual treatment and s. 15 right to equal treatment and the full benefit and protection of the law and the right not to be discriminated against. The restrictive time limit is unreasonable and unfair and are not consistent with ss 7, 12, 15 and 52 of the Constitution Act 1982.

. . . The Charter under s. 15 applies to the employer and to the PSLRB and they are both obliged to accommodate the Grievor's disabilities by extending the time limits for him to file his grievances particularly when it is the employer who has caused the employee to suffer his psychiatric injury which disables him. The employer should not be allowed to profit from having caused the Grievor to suffer the psychiatric disability which is well documented . . . because that would violate the Charter ss 7, 12, and 15 principles.

[*Sic* throughout]

IV. Reasons

[21] The application raises two inter-related issues. The first is the constitutionality of various provisions of the *PSLRA*, including the independence of an adjudicator. The second is whether an application for an extension of time should be granted. The issues are inter-related because one of the reasons given for the delay in filing a grievance is that the applicant did not believe the PSLRB to be independent of government. For the reasons set out below, I have concluded that the cited provisions of the *PSLRA* are constitutional and that an adjudicator is sufficiently independent to render a fair and unbiased decision. I have also concluded that it is not appropriate to exercise my discretion to extend the time limits in this case.

[22] The applicant has alleged that his rights under sections 7, 15 and 24 of the *Charter of Rights and Freedoms* (*Charter*) have been infringed by the operation of the *PSLRA:*

> ***7.*** *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> . . .
>
> ***15.*** *(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> . . .
>
> ***24.*** *(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*
>
> . . .

[23] Section 7 of the *Charter* has no application to the circumstances of the grievor. He has not been deprived of his "life, liberty and security of the person". Section 15 of the *Charter* is also not applicable. The duty of accommodation arises out of the *Canadian Human Rights Act*, not the *Charter*. The applicant has not demonstrated that he has been discriminated in any way by the application of the *PSLRA*. With regards to

section 24 of the *Charter*, the Ontario Superior Court of Justice, in its decision dismissing the applicant's statement of claim concluded:

> *A third level grievance officer or an adjudicator can dispense a remedy for a* Charter *breach. The Supreme Court in* Nova Scotia (Workers' Compensation Board) v. Martin, *[2003] S.C.J. No. 54 recently held that statutory tribunals and administrative bodies are entitled to provide remedies for* Charter *breaches. Within the context of arbitration, there is clear authority that adjudicators can decide* Charter *matters and award* Charter *remedies. In* Weber *the Supreme Court has confirmed that labor arbitrators acting under the* PSSRA *and a collective agreement have the legal authority to consider the* Charter *and award a remedy. In the present case the plaintiff's termination of employment can proceed to arbitration. The remainder would be decided by a third level grievance officer.* Charter *relief can be granted in either forum.*

[24] In his submissions, the applicant alleges that he first contacted the PSLRB in August 2007. However, it was not until November 2007 that he made a formal application for an extension of time. The applicant also alleges that these are continuing grievances and that it is arguable that the time limits do not apply. Although the applicant may well have a continuing dispute with the respondent, it is clear that there have been discrete events — such as his termination of employment — that have already crystallized. I find that the applicant's grievances are not continuing grievances.

[25] The applicant did initiate two grievances but did not pursue them through the grievance process. The applicant has admitted that the attempts to grieve were not directly related to his court action. The grievance relating to an alleged denial of a leave of absence with pay was also never pursued and was not supported by his bargaining agent.

[26] The respondent has made a preliminary objection to jurisdiction on the basis that the matters in dispute cannot be referred to adjudication because of the failure of the applicant to file a grievance at the departmental level. I am not dealing with a referral to adjudication in this application. The application is for an extension of time to file a grievance. A grievance cannot be referred to adjudication without first having followed the grievance procedure.

[27] The applicant has submitted that he should not be required to submit a grievance at the departmental level because the respondent will be sitting in judgment of itself. The applicant has mischaracterized the purpose of the grievance process. The grievance process is used for all manner of disputes with the respondent. The grievance process is not designed to be an independent review of the respondent's actions. It is an opportunity for an exchange of information and for discussions of settlement. It is also an opportunity for higher levels of management to review the decision that was made. In cases of termination of employment, it is customary for grievances to be heard only at the final level of the grievance process before being referred to adjudication. There is no right of direct access to adjudication (*Tuquabo v. Canada (Attorney General)*, 2008 FC 563). If I had agreed to grant an extension of time to file a grievance, I would have also directed the applicant to file that grievance at the departmental level, in accordance with the grievance provisions of the relevant collective agreement.

[28] The respondent has noted the recent actions of the federal government with regard to the former chair of the Canadian Nuclear Safety Commission (CNSC) and relied on that situation to support his argument that board members are not independent. The matters in dispute at the CNSC are currently before the courts. I also note that the statutory regime is different under the *PSLRA*.

[29] The applicant has raised as an issue the independence of board members. I understand the applicant to be saying that because the PSLRB now has exclusive jurisdiction over certain disputes it has replaced the role of the courts, and its members should therefore have the same individual and institutional independence as judges. The applicant has also raised the independence of the PSLRB as part of his reasons for the delay in his filing grievances.

[30] In his arguments before the judge in his proceedings, the applicant submitted that the avenues for redress open to him under the *Public Service Staff Relations Act* (*PSSRA*) and the *PSLRA* were not sufficiently independent (paragraph 7 of that decision). The court did not directly address this argument in its reasons for decision. However, it has been addressed implicitly in the final conclusion of the court that it did not have jurisdiction over the matters in dispute. I will address, however, the arguments of the applicant that the grievance processes set out in the *PSLRA* and the *PSSRA* are not sufficiently independent.

[31] The applicant has challenged the constitutionality of section 236 of the *PSLRA*, which purports to deny employees a right of action in the courts for any matter that could be addressed under the *PSLRA*. In *Vaughan*, the Supreme Court of Canada addressed this issue directly and held that Parliament was free to establish a comprehensive legislative reference. Except in cases of whistleblowing, the fact that there is no access to the courts is not a problem. The Ontario Superior Court of Justice has already concluded that the applicant is not a "whistleblower."

[32] The applicant has also challenged the constitutionality of the denial of access to adjudication for certain types of grievances (sections 209 and 214 of the *PSLRA*). The absence of third-party adjudication was addressed in the *Vaughan* decision:

. . .

> *38 . . . I do not accept for reasons already expressed, the central assumption of the appellant's argument that comprehensive legislative schemes which do not provide for third-party adjudication are not, on that account, worthy of deference. It is a consideration, but in the case of the PSSRA it is outweighed by other more persuasive indications of clues to parliamentary intent.*

. . .

[33] The Supreme Court of Canada has accepted the possibility that there may be certain types of disputes that would not have access to any third-party adjudication, including access to the courts. The Court noted that there was no constitutional challenge of the *PSSRA*. However, as demonstrated in both *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 and *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, the courts will give great deference to the statutory scheme designed by Parliament.

[34] The tenure of board members is not "at pleasure," as submitted by the applicant, but is rather the much higher standard of "during good behaviour" with removal only for cause. The *PSLRA* sets out the following provisions for appointment:

. . .

> *Appointment of Members*

> ***18.*** *(1) To be eligible to hold office as a member, a person must*
>
> *(*a*) be a Canadian citizen within the meaning of the* Citizenship Act *or a permanent resident within the meaning of subsection 2(1) of the* Immigration and Refugee Protection Act*;*
>
> *(*b*) not hold any other office or employment under the employer;*
>
> *(*c*) not be a member of or hold an office or employment under an employee organization certified as a bargaining agent;*
>
> *(*d*) not carry on any activity inconsistent with the person's functions; and*
>
> *(*e*) have knowledge of or experience in labour relations.*
>
> . . .
>
> *Non-representative Board*
>
> ***19.*** *(4) Despite being recommended by the employer or the bargaining agents, a member does not represent either the employer or the employees and must act impartially in respect of all powers and functions under this Act.*
>
> . . .
>
> *Tenure*
>
> ***22.*** *(1) Each member is to be appointed to hold office during good behaviour and may be removed by the Governor in Council for cause.*
>
> . . .

[35] The Supreme Court of Canada has reviewed the tenure of members of the Canadian Human Rights Tribunal and concluded that the members of that tribunal are sufficiently independent (*Bell Canada*). There is no significant difference between the Canadian Human Rights Tribunal and the PSLRB in terms of appointment process or tenure, and the conclusion of the Supreme Court is equally applicable to the PSLRB.

[36] The Supreme Court of Canada addressed the argument that a tribunal must have the same degree of independence as the superior courts in the *Bell Canada* case:

. . .

> *29 Bell also argues that the Tribunal is bound by a constitutional principle — the "unwritten principle of judicial independence" — which confers on it the same degree of independence as a court established under s. 96 of the* Constitution Act, 1867*:* Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, *[1997] 3 S.C.R. 3. Bell presents no authority for this argument. As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function.*
>
> . . .

[37] The applicant has claimed that the time limits for filing a grievance set out in the *Regulations* are unconstitutional under section 7 of the *Charter* on the basis that time limits under the *Canada Labour Code* are 90 days. I am assuming from his submissions that he is referring to time limits for referral to adjudication, as the time limit for filing a grievance was established by the applicable collective agreement, not by regulation. The question before me is extending time limits to file grievances, not extending the time limit for referral to adjudication. I therefore do not need to rule on this submission. However, 30 days is a reasonable time limit for a referral to adjudication and is a time limit that applies to all employees in the pubic service. The PSLRB has the discretion to extend the time limit for referral based on established criteria.

[38] I turn now to the application for an extension of time and the established criteria for assessing whether to grant an extension. The board's jurisprudence has established five criteria to consider (see *Schenkman*):

- clear, cogent and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the respondent;
- balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance.

[39] The applicant was aware of his right to grieve under the collective agreement, as he had attempted to grieve some employment matters as early as 1999 and 2000. He was also advised of his right to grieve by the Ontario Superior Court of Justice early in

2006. Furthermore, he admitted in the examination for discovery for his civil claim that he was aware of the grievance process. In the letter he received terminating his employment under the *FAA*, he was also advised of his right to grieve.

[40] The applicant has advanced a number of reasons for his failure to file his grievances within the time limits established under the collective agreement. The main reason given is that he was pursuing a court action and had no faith or trust in the grievance process. He has also raised the matter of his health, including his mental health disability, and the health and subsequent death of his mother.

[41] I have already addressed the independence of the PSLRB above, and I find that there was no basis for his view that an adjudicator was not sufficiently independent to hear his grievance. Not agreeing with the jurisdiction of a tribunal is not an excuse for delays in filing a grievance.

[42] Although he was pursuing matters relating to his employment relationship (before his termination of employment) in the courts, this cannot be considered a compelling reason for failing to file a grievance. It became clear in 2005, when the *Vaughan* decision was issued by the Supreme Court of Canada, that the grievance process was the proper forum for addressing workplace disputes. Early in 2007, the Ontario Superior Court of Justice ruled that his dispute with the respondent did not fit into the exception for "whistleblowers." Yet, the applicant waited until November 2007 to request an extension of time to file a grievance. He alleges that the trauma caused by the court decision was also a reason for his delay in pursuing his grievances. A decision of a court or tribunal that is contrary to the hoped-for outcome is not a cogent or compelling reason for a delay in pursuing rights under a collective agreement.

[43] Some of the health-related concerns raised by the applicant occurred only in 2007, and do not explain the lengthy delay between his termination of employment and his request for an extension of time. Similarly, the ill health and subsequent death of his mother became a concern only in the fall of 2007.

[44] The applicant has also alleged that he requires more time (what he described as "frequent pauses") in dealing with his disputes with the respondent because of his mental health disability. The applicant submits that the PSLRB has a duty to accommodate when considering time limits for those with mental health disabilities.

Certainly, a mental health disability can be a factor considered by the Board in determining whether to provide an extension of time. The duty to accommodate is incorporated into the review by the Board of any application for an extension of time to file a grievance. In this case, the applicant has not demonstrated that his mental health disability prevented him from filing grievances. He was able to function effectively in pursuing his statement of claim in the courts, as well as in writing many letters to the Prime Minister and others.

[45] The applicant has also argued that it takes time to prepare a grievance. Although it may well take time to prepare for a grievance hearing, the preparation of a grievance form is not time consuming. All that is required is a brief description of the matter being grieved and a description of the corrective action requested. Given that the applicant appears to have done extensive preparation for his court case, there is no support for his allegation that he requires time to prepare a grievance or grievances.

[46] The applicant has not provided any cogent or compelling reasons for his delay in filing grievances. Given that he has not met this burden, I do not need to address the remaining criteria. However, I note that the length of the delay is extensive, the respondent did not exercise due diligence and the prejudice to the employer outweighs any injustice to the respondent.

[47] In his final submissions, the applicant asks that I find the respondent in breach of the *Regulations* for its failure to provide grievance forms. There is no evidence that the applicant ever asked for grievance forms. The respondent was advised of his right to grieve his termination of employment, and he did not pursue that avenue. There is no obligation on the part of the applicant to provide grievance forms without being asked.

[48] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[49] The application for an extension of time is dismissed.

October 29, 2008.

Ian R. Mackenzie,
Vice-Chairperson