**Date:** 20090324

**Files:** 593-02-02, 03 and 04

**Citation: 2009 PSLRB 37**

*Public Service Labour Relations Act*

Before the Public Service Labour Relations Board

BETWEEN

**PUBLIC SERVICE ALLIANCE OF CANADA**

Applicant

and

**TREASURY BOARD**

Respondent

In respect of the Border Services, Program and Administrative Services and Operational Groups

Indexed as
*Public Service Alliance of Canada v. Treasury Board (Border Services, Program and Administrative Services and Operational Groups)*

In the matter of applications for determinations on matters that may be included in essential services agreements under subsection 123(1) of the *Public Service Labour Relations Act*

## REASONS FOR DECISION

***Before:*** Marie-Josée Bédard, Vice-Chairperson, and Dan Butler and Renaud Paquet, Board Members

***For the Applicant:*** Andrew Raven, counsel

***For the Respondent:*** Caroline Engmann, counsel

Decided on the basis of written submissions filed February 27, 2009.

## Applications before the Board

[1] This decision considers the jurisdiction of the Public Service Labour Relations Board ("the Board") to continue to determine matters that may be included in an essential services agreement (ESA) after a collective agreement for a bargaining unit has been renewed by the parties and has come into force.

[2] On September 18, 2007, the Public Service Alliance of Canada ("the applicant") filed an application (PSLRB File No. 593-02-02) under subsection 123(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*"), relating to matters that may be included in an essential services agreement covering positions in the Border Services (FB) Group for which the Treasury Board is the employer ("the respondent").

[3] Between September 21 and 25, 2007, the applicant filed four separate applications (originally, PSLRB File Nos. 593-02-03 and 06 to 08) under subsection 123(1) of the *Act* relating to matters that may be included in an essential services agreement covering positions in the Program and Administrative Services (PA) Group for which the respondent is the employer.

[4] On September 21 and 24, 2007, the applicant filed two separate applications (PSLRB File Nos. 593-02-05 and 04 respectively) under subsection 123(1) of the *Act* relating to matters that may be included in an essential services agreement covering positions in the Operational Services (SV) Group for which the respondent is the employer.

[5] On November 16, 2007, the applicant requested that the Board consolidate the four applications for the PA Group into one file and that it expand the file to include the entire PA bargaining unit. The applicant also requested that the Board consolidate the two applications for the SV Group into one file and that it expand the file to include the entire SV bargaining unit. The respondent indicated to the Board on November 26, 2007 that it agreed with the applicant's requests. On December 5, 2007, the Chairperson of the Board granted the requests. The Board closed PSLRB File Nos. 593-02-06 to 08 and consolidated all matters related to an ESA for the PA Group under PSLRB File No. 593-02-03. The Board closed PSLRB File No. 593-02-05 and consolidated all matters related to an ESA for the SV Group under PSLRB File No. 593-02-04.

[6] In January 2009, the members of the PA, FB and SV Groups ratified the terms of settlement for new collective agreements. By February 6, 2009, the parties had signed new collective agreements for all three bargaining units.

[7] The Board has an obligation to satisfy itself that its jurisdiction is unimpaired when faced with new circumstances that might raise an issue concerning its authority. This is the first time that the Board has before it applications under subsection 123(1) of the *Act*, filed while collective bargaining was underway, and outstanding after negotiations concluded. While neither party has questioned the Board's authority to continue to address the applications, it might be argued that the conclusion of new collective agreements renders the matters before the Board moot or otherwise affects the Board's authority to proceed. The Board has decided on its own initiative that it should examine its jurisdiction in the circumstances to determine whether the matters in dispute properly remain before it.

[8] The Board, therefore, asked the parties for their submissions on the following question:

> *With new collective agreements in force, does the Board continue to have jurisdiction under subsection 123(1) of the Act to consider the applications?*

[9] The Chairperson of the Board has appointed this panel of the Board for the sole purpose of determining the issue of jurisdiction.

**Reasons**

[10] Both parties filed written submissions on February 27, 2009 in response to the Board's request. In their submissions, the parties agree without reservation that the Board continues to have jurisdiction over the outstanding applications. These reasons incorporate the views of the parties without summarizing their submissions in detail. The written submissions are on record at the Board.

[11] The situation before the Board is uncomplicated. The bargaining agent has not withdrawn the applications that it filed under subsection 123(1) of the *Act*. The parties agree that there are unresolved matters that may be included in an ESA for each of the PA, FB and SV Groups and submit that the Board must address those matters until they are resolved. If there were an impediment to the Board's continued jurisdiction to do so, it would have to be found in one or more provisions of the *Act*, the effect of which

deprives the Board of jurisdiction once the parties execute a new collective agreement. Neither party believes that the *Act* includes any such provision.

[12] As long as ". . . the process for the resolution of a dispute applicable to the bargaining unit is conciliation" (section 119 of the *Act*), the essential service provisions of the *Act* apply. According to the Board's records, the dispute resolution route applicable to the PA, FB and SV Groups remains conciliation.

[13] The bargaining agent placed applications before the Board under subsection 123(1) of the *Act*, which reads as follows:

> ***123.*** *(1) If the employer and the bargaining agent are unable to enter into an essential services agreement, either of them may apply to the Board to determine any unresolved matter that may be included in an essential services agreement. The application may be made at any time but not later than*
>
> > *(*a*) 15 days after the day a request for conciliation is made by either party; or*
> >
> > *(*b*) 15 days after the day the parties are notified by the Chairperson under subsection 163(2) of his or her intention to recommend the establishment of a public interest commission.*

Subsection 123(1) stipulates that either party may ask the Board to determine an unresolved matter about an ESA "at any time." [emphasis added] The legislator's use of the phrase "at any time," viewed in context, indicates that he or she contemplated the possibility that a dispute concerning an ESA could arise and trigger the Board's jurisdiction anytime before or during collective bargaining. The only condition established by the legislator is that an application under subsection 123(1) must be filed not later than either of the dates outlined in paragraphs 123(1)(*a*) and (*b*). There is no controversy in this case that the applications were timely and that they were properly filed under subsection 123(1).

[14] As argued by the respondent, the only provision in the *Act* that allows the Board to delay consideration of an application is stated in subsection 123(2), which reads as follows:

> ***123.*** *(2) The Board may delay dealing with the application until it is satisfied that the employer and the*

> *bargaining agent have made every reasonable effort to enter into an essential services agreement.*

The Board has had no reason to date to consider invoking subsection 123(2).

[15] No subsequent provision in the *Act* states that a proceeding properly launched under subsection 123(1) at any time ends once a collective agreement is signed. Absent such a provision, an analysis of the essential services provisions of the *Act* considered in their entirety strongly supports the finding that the Board must address all unresolved matters raised in the applications before it. In the applicant's words, "[t]he *PSLRA* says nothing . . . to indicate that anything other than a resolution of [the unresolved ESA] issues should bring these processes to an end." Echoing that position, the respondent argues that ". . . until the parties conclude an ESA or the Board deems that the parties have entered into an ESA, the Board retains jurisdiction on a section 123 application despite the signing of a collective agreement."

[16] Under the *Act*, the effective date and duration of an ESA need not coincide with the term of a collective agreement. Section 124 independently governs the coming into force of an ESA:

> ***124.*** *The essential services agreement comes into force on the day it is signed by the parties or, in the case of an essential services agreement that the employer and the bargaining agent are deemed to have entered into by an order made under paragraph 123(3)*(b)*, the day the order was made.*

[17] Sections 125 through 128 of the *Act* provide that an ESA continues in force beyond the term of a collective agreement either until employees in the bargaining unit no longer perform essential services or until the ESA is revised in accordance with the *Act*:

> ***125.*** *An essential services agreement continues in force until the parties jointly determine that there are no employees in the bargaining unit who occupy positions that are necessary for the employer to provide essential services.*
>
> ***126.*** *(1) If a party to an essential services agreement gives a notice in writing to the other party that the party giving the notice seeks to amend the essential services agreement, the parties must make every reasonable effort to amend it as soon as possible.*

> *(2) If a collective agreement or arbitral award is in force, the notice may be given at any time except that, if a notice to bargain collectively has been given with a view to renewing or revising the collective agreement, the notice may only be given during the 60 days following the day the notice to bargain collectively was given.*
>
> ***127.** (1) If the employer and the bargaining agent are unable to amend the essential services agreement, either of them may apply to the Board to amend the essential services agreement. The application may be made at any time but not later than*
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> > *(*a*) 15 days after the day a request for conciliation is made by either party; or*
> >
> > *(*b*) 15 days after the day the parties are notified by the Chairperson under subsection 163(2) of his or her intention to recommend the establishment of a public interest commission.*
>
> . . .
>
> *(3) The Board may, by order, amend the essential services agreement if it considers that the amendment is necessary for the employer to provide essential services.*
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> . . .
>
> ***128.** An amendment to an essential services agreement comes into force on the day the agreement containing the amendment is signed by the parties or, in the case of an amendment made by order of the Board. . . . under subsection 127(3), the day the order was made.*

[18] The foregoing provisions clearly envisage that an ESA is permanent, that it has its own life and that the parties may negotiate amendments to it at any time. On timely and proper application by a party, the Board will be similarly seized of disputes over unresolved matters that arise during amendment negotiations. The respondent drew the Board's attention in particular to the effect of section 125 of the *Act* when it argued as follows:

> . . .
>
> *. . . That Parliament clearly intended that an ESA of a permanent nature be established can be gleaned from the entirety of the provisions in Division 8 but even more so, in section 125 which provides that an ESA, once signed, continues in force until the parties jointly determine that there are no longer employees in the bargaining unit who*

> *occupy positions that are necessary for the employer to provide essential services.*
>
> . . .

[19] In summary, the parties submit that the essential services provisions of the *Act*, read in their entirety, make it evident that the disposition of a proceeding properly commenced under subsection 123(1) does not depend on the outcome of collective negotiations — a different process — or on the status of the collective agreement. The respondent summarized that conclusion as follows:

> . . .
>
> *If Parliament's intent was that a permanent ESA be concluded in order to protect the public interest and the Board is given jurisdiction under sections 36 and 123 to assist the parties to conclude an ESA, then it is submitted that the conclusion of a collective agreement does not affect the Board's jurisdiction to consider and decide an application under section 123. The Board must fully exercise its jurisdiction to its logical conclusion, namely, the creation of an ESA between the parties . . . .*
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> . . .

[20] The Board endorses the conclusion without reservation.

[21] The Board also endorses the arguments made by the respondent, in particular, on the issue of mootness. The respondent submitted in part as follows:

> . . .
>
> *One possible underlying assumption of the Board's jurisdictional question is that the PSAC's applications have been rendered moot by virtue of the conclusion of the collective agreements. The Employer submits that the question of mootness does not arise in this case for all of the reasons outlined above. Nonetheless, if mootness is an issue, the Employer respectfully submits that the PSAC's applications are not moot. In the alternative, if the Board finds that the applications are moot, the Employer respectfully requests that the Board exercise its discretion to consider them.*
>
> *The application of the principle of mootness is not automatic. In* Borowski[1]*, the leading case on the doctrine of mootness, the Supreme Court of Canada set out a two-stage analysis for its application. First, the court must determine whether there remains a "live controversy"; if there is a "live*

> *controversy" between the parties, then the matter is not moot, otherwise, if the court finds that the matter is moot, it must then move on to the second stage of the analysis. At the second stage of the analysis, the court must examine the basis upon which it should exercise its discretion to hear or decline to hear the case. At the second stage of the analysis, the court must consider three criteria: collateral consequences; concern for judicial economy; and sensitivity to court's adjudicative role as opposed to that of the legislative branch.*
>
> *In accordance with the* Borowski *test, it is submitted that the PSAC applications are not moot. There remains a "live controversy" between the parties regarding matters that may be included in an ESA. Whereas the urgency to conclude an ESA may have diminished by virtue of the signing of the collective agreements, there remains now, and in the foreseeable future, a real live issue regarding the contents of an ESA.*
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> . . .
>
> [Footnote in the original: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342]

[22] The respondent submitted decisions of the Canada Industrial Relations Board (CIRB) to support the view that a labour board must resolve essential services issues coming before it to the full extent provided under the statute, whenever those issues arise: see *Greater Moncton Airport Authority Inc.*, [1999] CIRB no. 12, and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) v. Marine Atlantic Inc.*, [2008] CIRB no. 431. The applicant referred the Board to CIRB case law that found that the CIRB maintains jurisdiction to address the question of essential services even where the parties have reached a collective agreement: see Re *Nav Canada*, [2007] CIRB no. 374, and *Re Nav Canada*, [2003] CIRB no. 214.

[23] In *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97, the Board expressed reservations about the value of case law from other jurisdictions as an aid to interpreting the unique regime for maintaining essential services established by the *Act*. This panel nonetheless concurs with the parties that the general thrust of the cited decisions under the *Canada Labour Code* tends to lend further support to the proposition that the Board's jurisdiction persists in these applications.

[24] In addition to what the provisions of the *Act* require of the Board, the Board subscribes strongly to the view that it will contribute to the ". . . fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment" — an important purpose stated in the preamble to the *Act* — by retaining jurisdiction over the applications. Simply put, the Board finds that it makes good labour relations sense for it to continue to work on these matters. Rather than leaving the unresolved content of the ESAs to another time, particularly when a bargaining impasse might be imminent, the Board's continuing intervention now should assist the parties to conclude the ESAs in advance of the next round of negotiations, removing a burdensome requirement at that time. Once in force, the Board hopes that the ESAs will continue to be useful instruments for some time and that any future applications to modify them will be limited in scope and will be amenable to timely resolution.

[25] The applicant argued to a similar effect as follows:

. . .

> *. . . the objectives of the* Act *. . . seek an expeditious determination of these matters. As was evidenced in the present applications, significant time is often required for the parties to gather the information necessary to negotiate an ESA and proceed through this process. Parliament could not have intended for the time invested by the parties in this process to be lost, only to begin again at the expiry of the next collective agreement.*
>
> *Given the complexities in this process and Parliament's recognition that the Board may need to deal with substantial issues of dispute between the parties, it makes no labour relations sense that all these efforts would automatically terminate once a collective agreement is signed. In each case, the impasse between the parties preventing the establishment of an ESA, which necessitated the assistance of the Board, continues to exist.*

. . .

[26] For all of the above reasons, the Board is satisfied that it retains jurisdiction to determine the matters in dispute concerning the ESAs for the PA, FB and SV Groups and that it serves the purpose of the *Act* that it do so. The Board finds that the execution of new collective agreements by the parties has not affected its jurisdiction

or altered its statutory responsibility to address the unresolved matters that may be included in the ESAs for the three bargaining units covered by the applications.

[27] With this ruling, the mandate of this panel of the Board is concluded. Each of the three applications will be heard and determined separately by the Board Member appointed by the Chairperson or his delegate for that purpose.

[28] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

**Order**

[29] The Board declares that it retains jurisdiction to consider the applications.

[30] The applications will proceed separately.

March 24, 2009.

**Marie-Josée Bédard,**
**Vice-Chairperson**

**Dan Butler,**
**Board Member**

**Renaud Paquet,**
**Board Member**