Date: 20090429

File: 593-02-03

Citation: 2009 PSLRB 56

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 Program and Administrative Services Group

Indexed as
Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)

In the matter of an application for a determination on matters that may be included in an essential services agreement under subsection 123(1) of the *Public Service Labour Relations Act*

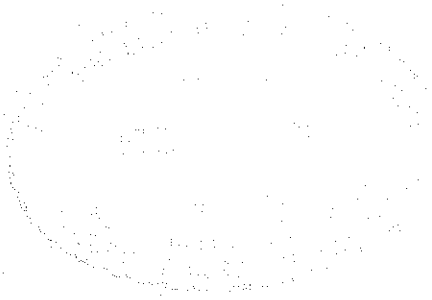
REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Applicant: Helen Berry, counsel

For the Respondent: Caroline Engmann, counsel

Heard at Ottawa, Ontario,
March 18 and 19, 2009.



I. Application before the Board

[1] Between September 21 and 25, 2007, the Public Service Alliance of Canada ("the applicant") filed four separate applications under subsection 123(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*") about matters that may be included in an essential services agreement (ESA) covering positions in the Program and Administrative Services (PA) Group for which the Treasury Board is the employer ("the respondent").

[2] On December 5, 2007, the Chairperson of the Board consolidated all matters related to the ESA for the PA group under PSLRB File No. 593-02-03.

[3] A new collective agreement for the PA Group came into force on January 23, 2009. The Board confirmed that it continues to have jurisdiction to consider an application under subsection 123(1) of the *Act* once a new collective agreement is in force in *Public Service Alliance of Canada v. Treasury Board (Border Services, Program and Administrative Services and Operational Groups)*, 2009 PSLRB 37.

[4] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55, the Board issued its first ruling on matters that may be included in the ESA for the PA Group. That decision identified the services delivered or the activities performed by a PM-01 Citizen Services Officer (CSO) at a Service Canada Centre (SCC) that are necessary for the safety or security of the public.

[5] This is the second substantive decision about the contents of the ESA for the PA Group. At issue here is the identification of the services delivered or the activities performed by a PM-02 Assistant Bankruptcy Analyst (ABA) in the Office of the Superintendent of Bankruptcy Canada (OSB) at Industry Canada that are necessary for the safety or security of the public.

II. Summary of the evidence

[6] The respondent called a single witness, Patricia Alferez, Deputy Superintendent and Executive Director, OSB. The applicant did not call any witnesses. The following is a summary of Ms. Alferez's testimony.

[7] The mandate of the OSB is to ensure that the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (excerpted in Exhibit IC-E-1), is respected and that it is uniformly applied throughout Canada. The OSB is a special service agency within Industry Canada that exercises quasi-judicial functions at arm's length from the department. There are no comparable regulatory entities at the provincial level.

[8] The *Bankruptcy and Insolvency Act* permits individual Canadians and commercial entities facing financial problems to find shelter under the law to arrange their financial affairs. An individual consumer or business who meets the requirements of the statute has the choice of filing for bankruptcy or filing a proposal for bankruptcy. In the case of a debtor who files for bankruptcy, a licensed bankruptcy trustee is assigned responsibility for the assets of the debtor and sells those assets, distributing the proceeds to creditors. Bankruptcy status lasts for a certain defined period. During that period, the debtor must present a budget to the trustee for approval. If the debtor meets all of the imposed requirements, the debtor will subsequently be freed of any remaining debt.

[9] In the case of a proposal for bankruptcy, the debtor makes a proposal to pay part of the accumulated debt. The assigned bankruptcy trustee is not required to dispose of all assets if the implicated creditors have accepted the debtor's proposal to pay part of the monies owed.

[10] The *Bankruptcy and Insolvency Act* stipulates that an "official receiver" must accept and register each bankruptcy filing and each proposal for bankruptcy filing before the filer can benefit from the protection of the statute. The service must be available in the locality of the debtor. If the official receiver does not accept a filing because it is incomplete or it does not conform to regulated requirements, the legal status of the debtor does not change and creditors may seek to seize the debtor's assets.

[11] The incumbent of an ABA position is designated by Order-in-Council to perform the functions of an official receiver. As official receivers, they form an important part of the legal and financial system. The official receiver does not influence the choice made by a debtor to invoke the protection of the *Bankruptcy and Insolvency Act* but, rather, gives legal effect to that choice. As "officers of the court" under the *Bankruptcy and Insolvency Act*, official receivers are responsible to ensure that the provisions of the statute are respected. By ensuring that debtors' decisions are legally implemented,

official receivers have a significant impact on the lives of debtors and creditors and on Canada's economic situation.

[12] After receiving bankruptcy protection, consumers (as opposed to commercial entities) need only go to court in cases where a creditor contests a situation or another party feels ill-served by the consumer's choice and challenges it. If no matter is brought to court, the responsibility for administering the *Bankruptcy and Insolvency Act* falls solely to the official receiver.

[13] A bankruptcy trustee normally transmits a request for bankruptcy or a proposal for bankruptcy to the OSB on behalf of the debtor using the prescribed forms (Exhibit IC-E-2). The official receiver receives the forms and, if they are complete and in order, registers the filing and certifies the assignment of the bankruptcy trustee to take charge of the financial affairs of the debtor.

[14] In fiscal years 2006-07 and 2007-08, the OSB received 106 373 and 109 622 insolvency filings respectively. In the first three quarters of fiscal year 2008-09, filings reached 95 066 (Exhibit IC-E-3). Filings fall into four categories: (1) proposals for bankruptcy from individual consumers; (2) proposals for bankruptcies from commercial entities; (3) "summary bankruptcies" involving individual debtors with less than $10,000 in assets that can be realized; and (4) "ordinary bankruptcies" consisting of business bankruptcies as well as those individual bankruptcies where the debtor has more than $10,000 in assets that can be realized. In the first three quarters of fiscal year 2008-09, there were 17 506 consumer proposals, 2911 commercial proposals, 72 213 summary bankruptcies and 2436 ordinary bankruptcies.

[15] Ms. Alferez described the current work description for the position of ABA (Exhibit IC-E-4). Under "Client/Service Results," she identified the following excerpt as comprising the essential function of an official receiver:

> *Approves summary and ordinary bankruptcies, notices of intention, and commercial and consumer proposals; supervises the administration of summary bankruptcy estates and consumer proposals . . .*

She emphasized that the respondent considers that only one of the listed "key activities" is essential, as follows:

> 1. *Acts as official receiver as to the examination of legal documents required for approval of summary and ordinary bankruptcies, notices of intention, commercial and consumer proposals, receiverships and bankruptcy petitions, in order to ensure their compliance with the Bankruptcy and Insolvency Act and its Rules, and to decide whether or not the file should be accepted.*
>
> . . .

[16] Ms. Alferez indicated that there has never been a situation in the past where the OSB could not offer the services of official receivers to the public. Some official receivers are available every day, including weekends and holidays, to respond to any emergency situation. Even in exceptional circumstances, such as the ice storm in Quebec in 1998, official receivers were required to go to the office and receive filings. While it is possible that a provincial bankruptcy court could act in the place of an official receiver were one unavailable, it has never happened. Ms. Alferez stated that ". . . ours is a legal obligation . . ." and that the consequences for the debtor and creditor of the official receiver's act are legal consequences. According to her, ". . . every party wants his or her rights respected."

[17] Since 2001, an electronic filing system allows trustees to send all documents electronically and also accepts the majority of such filings electronically by applying compliance rules encoded in the system. The system can automatically assess the completeness and compliance of summary bankruptcy and consumer proposal files in 90 percent of cases, allowing official receivers to concentrate on a smaller number of filings. Ordinary bankruptcies and commercial proposals cannot be accepted electronically.

[18] Official receivers very rarely have personal contact with members of the public.

[19] In cross-examination, Ms. Alferez confirmed that other positions at the OSB classified at a higher level perform two other official receiver functions required by the statute.

[20] Concerning the status of official receivers as officers of the court, ABAs do not perform duties that require them to attend court nor do courts directly instruct ABAs.

[21] OSB Directive No. 9R3 (Exhibit IC-BA-1) requires that all new summary and ordinary bankruptcies must be filed electronically. Ms. Alferez reconfirmed that most

of the summary bankruptcy files can be accepted electronically without the intervention of an official receiver. Official receivers, however, still must personally accept some summary bankruptcy files and all ordinary bankruptcy cases.

III. Summary of the arguments

A. For the respondent

[22] The respondent submits that the Board should identify the essential service performed by incumbents of ABA positions as follows:

> *Acceptance for and registration of:*
>
> *Summary administration bankruptcy estates, Division II proposals, ordinary administration bankruptcy estates, division I proposals, partnership assignments, partnership proposals, receiverships and assignments deriving from bankruptcy orders in accordance with the dispositions of the* Bankruptcy and Insolvency Act, *R.S., 1985, c B-3.*

[23] The service described above is necessary to protect members of the public who have a need to resolve their financial problems and who choose the vehicle of insolvency, often as a last resort. Under the *Bankruptcy and Insolvency Act*, the OSB must provide the services of an official receiver in the locality of the debtor. As official receivers, ABAs are the point of access for any member of the public who wishes to exercise the statutory right to file for bankruptcy or to make a proposal for bankruptcy.

[24] In *Irwin (Re) (B.C.C.A.)*, [1994] B.C.J. No. 363 (QL), at para 66, the British Columbia Court of Appeal described the purpose of bankruptcy protection as follows:

> *The objects of the Bankruptcy Act are twofold: to protect the whole body of creditors, and also to enable an honest debtor, who has been unfortunate in business, to secure a discharge which will give him a fresh start and enable him to resume the place in business life for which he is equipped by training and experience. . . .*

[25] The legal benefits of filing for bankruptcy or of making a proposal for bankruptcy are only available once an official receiver has taken the necessary action to accept and register a bankruptcy assignment or to issue a certificate of appointment, as appropriate: see also *Copeland (Re)*, [2001] O.J. No. 3536 (QL).

[26] Until the official receiver has performed the essential service described by the respondent, debtors face financial uncertainty and may find themselves in precarious situations where they are exposed to predatory creditors. The legal act of the official receiver is necessary to regulate a possible or potentially chaotic situation. Members of the public have a need to be safe and secure and expect the OSB, through the agency of ABAs as official receivers, to take the necessary action to provide for their safety and security by giving effect to the protections of the *Bankruptcy and Insolvency Act* to which they are entitled.

[27] The respondent is not required to present specific evidence to describe the experience of members of the public both before and after filing for bankruptcy. The Board is entitled to, and should, take judicial notice of the fact that conditions of financial hardship in a situation of insolvency trigger emotional or psychological issues related to personal safety or security. To quote the respondent in argument, it ". . . does not have to drag in a debtor to describe the experience." The facts of the impact on debtors flow from a general understanding of the linkages between economic conditions and personal safety and security.

[28] The respondent referred the Board to Sara Blake, *Administrative Law in Canada*, 3rd ed., Butterworths, Markham, 2001, for the following description of an administrative tribunal's right to take judicial notice of certain facts:

. . .

> *Ontario and Quebec tribunals, that are required to hold hearings, may take notice of commonly accepted facts and generally recognized facts within their specialized knowledge. Accordingly, facts that are generally recognized within the industry regulated by the tribunal need not be formally proven. A tribunal may take judicial notice of the common and ordinary meaning of words. A local tribunal may take judicial notice of facts known to all who live in the area; for example, local weather conditions and the peculiarities of travelling within the district.*

. . .

[Footnotes omitted]

[29] A "broad and liberal" approach in assessing the terms "safety" and "security" used in subsection 4(1) of the *Act* is consistent with the legislative scheme: see, for example, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42. In this case,

the Board should interpret "security" broadly as encompassing the ". . . economic or financial as well as psychological security" of the debtor. It should view "safety" as encompassing the bankruptcy system in which the regulator provides a safety net to the economic system and financial markets. Investors, lenders and creditors require a consistent, predictable and efficient bankruptcy system to effectively assess their risks and to make decisions about their financial situations.

[30] The Board should not feel constrained by case law under the *Public Service Staff Relations Act* ("the former *Act*") as it takes the required broad and liberal approach to interpreting safety and security. The Board must consider safety and security in the specific circumstances of the service or activity that it is examining: *Aéroports de Montréal*, [1999] CIRB No. 23, at para 21. The paramount concern must be protection of the public interest: see the preamble of the *Act* and also *Atomic Energy of Canada Limited*, [2001] CIRB No. 122, at para 275. The Board should be guided by "[e]xperience and common knowledge" that emergencies occur during a period of strike: *Atomic Energy of Canada Limited*, at para 282.

[31] The respondent offered the following dictionary definitions to guide the Board in assessing the safety or security implications of the work of ABAs as official receivers:

> The Canadian Oxford Dictionary:
>
> ***security*** *. . . the condition of being protected from or not exposed to danger; safety . . . freedom from care, anxiety, worry, doubt, etc. . . . something that provides protection or safety . . . .*
>
> ***safety*** *. . . the condition of being safe; freedom from danger or risks. . . .*
>
> The Oxford English Dictionary, 2nd ed.:
>
> ***safety*** *. . . The state of being safe; exemption from hurt or injury; freedom from danger . . . .*
>
> ***security*** *. . . the condition of being protected from or not exposed to danger; safety. . . . Freedom from doubt; confidence, assurance. Now chiefly, well-founded confidence, certainty. . . Freedom from care, anxiety or apprehension; a feeling of safety or freedom from or absence of danger. . . .*

Le Robert & Collins Super Senior:

***sécurité** . . . to be / feel safe, be / feel secure . . .*

Le Nouveau Petit Robert:

***SÉCURITÉ** . . . État d'esprit confiant et tranquille d'une personne qui se croit à l'abri du danger . . . .*

Le Grand Robert de la langue française:

***SÉCURITÉ** . . . État d'esprit confiant et tranquille de celui qui se croit à l'abri du danger . . . .*

[32] The respondent submitted that the concept of "security" is more engaged in this case, although safety is clearly a dimension of security. From the dictionary definitions above, it is clear that security is a broad concept that includes psychological and subjective elements.

[33] The absence of an official receiver to accept and register a bankruptcy assignment or proposal has real implications for the security of the public. Until the registration is effected by an official receiver, there is uncertainty and perhaps even chaos in the debtor's affairs. Canadians filing for bankruptcy go through a highly emotional and insecure time. They risk the loss of assets. Registering the bankruptcy allows for a return to some order and prevents creditors from harassing them.

[34] The service performed by official receivers has always been offered to the public, even in emergencies such as the ice storm situation described by Ms. Alferez. It is a process that cannot be stopped. The Board may not take into consideration the fact that other persons can perform the service: paragraph 121(2)(*a*) of the *Act*.

[35] The respondent referred the Board to three decisions. It argued that the position of official receiver can be viewed as analogous to the legislative translation positions designated by the Board in *Treasury Board v. Professional Institute of the Public Service of Canada (Translation Group)*, PSSRB File No. 181-02-28 (19740703). It suggested that the Board's treatment of teachers and education councillors in *Treasury Board v. Public Service Alliance of Canada (Education Group)*, PSSRB File No. 181-02-235 (19870319), accepted that dealing with the psychological well-being of members of the public is a consideration in assessing safety and security. It pointed to a decision of the New Brunswick Labour and Employment Board that defined as essential the duties performed by employees who oversee the licensing process for insurance companies,

adjusters, brokers and agents: New *Brunswick (Board of Management) (Re)*, [2005] N.B.L.E.B. No. 4 (QL).

[36] The respondent closed by reemphasizing that registration of bankruptcies and proposals is a legal requirement under the *Bankruptcy and Insolvency Act*. The service performed by ABAs acting as official receivers protects the rights of members of the public, prevents chaos and puts some order back into the affairs of debtors and creditors. The respondent invites the Board to take judicial notice of the fact that financial troubles cause real economic insecurity and, for some members of the public, may have health and other life-threatening implications.

B. For the applicant

[37] The applicant submits that the duties of the ABA position proposed by the respondent as an essential service do not fit the public safety and security criteria of subsection 4(1) of the *Act*. According to the Board's decision in *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97, ("*Parks Canada Agency*"), at paragraph 180, the respondent's onus is to offer evidence that establishes a "reasonable and sufficient basis" for finding that a service is necessary for the safety and security of the public. As outlined in *Treasury Board v. Public Service Alliance of Canada (Education Group)*, at paragraph 26, the evidence should be specific ". . . as to how the continued performance of those duties is necessary for the safety and security of the public," rather than ". . . of a very general nature." The respondent has not met that burden in this case: see also *Atomic Energy of Canada Limited*, at paragraph 298.

[38] The respondent has applied the concept of "taking judicial notice" far too expansively in its argument. The applicant accepts that the Board may take judicial notice of non-controversial facts relating to the condition of the economy. The respondent, however, exceeds the generally recognized bounds for taking judicial notice when it asks the Board to accept as factual the nature and extent of the impact on individuals or businesses of not being able to file for bankruptcy or to make a proposal for bankruptcy. In particular, the Board cannot somehow take judicial notice of the public's alleged psychological needs or of the alleged mental health impact or consequences of filing delays that could occur if official receivers participate in a legal strike. Without sufficient, specific evidence placed before it through witnesses, the Board cannot know what changes occur after a bankruptcy filing, the absence of which might cause a risk to public safety or security.

[39] The Supreme Court of Canada made the following comments about judicial notice in *R. v. Find*, 2001 SCC 32, as noted in *Kankanagme v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1451 at para 11:

. . .

> *. . . judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Because facts judicially noted are not taken under oath or subject to cross-examination, the threshold for the admission of facts by judicial notice is strict. To be admissible, the facts must be either "so notorious or generally accepted as to be not the subject of debate among reasonable persons; or ... capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."*

. . .

[40] The respondent urged the Board not to feel restricted by previous decisions under the former *Act* that examined the concept of public safety or security and to take a "broad and liberal" approach when interpreting those terms. The applicant submits that, nonetheless, the Board did find, in *Parks Canada Agency*, at paragraph 177, that its decisions under the former *Act* ". . . may continue to serve as relevant jurisprudence . . ." in defining ". . . the scope and meaning given to the terms 'safety' and 'security'." The applicant believes that several of those decisions do offer assistance.

[41] In *Treasury Board v. Public Service Alliance of Canada (Library Science Group)*, PSSRB File No. 181-02-348 (19970303) at paragraph 25, the Board distinguished between causing inconvenience to the public, on the one hand, and risking public safety and security, on the other hand. In balancing the need to protect the vital interests of the public and the right of employees to strike, more is required than public inconvenience to justify safety and security designations. To be sure, the absence of ABAs during a strike may cause public inconvenience, but the respondent has not made the case that there would be any risk to public safety or security.

[42] In *Treasury Board v. Public Service Alliance of Canada (Data Processing Group)*, PSSRB File No. 181-02-116 (19800528), at para 30, the Board found that a service that provides an economic benefit only meets the threshold of impacting public safety or

security where economic dependency can be demonstrated. The Board stated as follows:

. . .

> *. . . only the payment provided to that segment of recipients who had such a degree of income dependency that there might be a risk of hazard to their health, if they were deprived of the opportunity to receive the payment to which they were entitled and on which they relied as the only reasonable and reliable source to meet their minimum needs for sustenance could be deemed to fall within the contemplation of section 79 of the Act as being necessary for the safety or security of the recipients. . . .*

. . .

The respondent has not adduced any evidence of income dependency nor, in fact, any concrete evidence as to what happens once a bankruptcy trustee is authorized by a decision of an official receiver to proceed to sell a debtor's assets.

[43] In *Treasury Board v. Public Service Alliance of Canada (Radio Operation Group)*, PSSRB File No. 181-2-99 (19790601), the Board found that duties that are necessary for public safety or security do not encompass those duties that protect the public from economic hardship. The Board wrote as follows at paragraph 12:

. . .

> *. . . We have no hesitation in saying that duties, the performance of which are necessary in the interest of the safety or security of the public, do not encompass such duties as would serve only to permit the Employer to carry on business as usual; nor do they encompass such duties as would serve only to protect the Employer or the public from economic hardship; nor do they encompass such duties as would serve only to prevent inconvenience to the public.*

. . .

[44] The respondent's witness outlined in her evidence that the OSB is mandated by statute to provide the services of an official receiver to individuals and businesses that wish to file for bankruptcy or to make a proposal for bankruptcy. That the services of an official receiver are required under legislation, however, is not a sufficient reason to establish that they are necessary for public safety or security. The Board explicitly

addressed the balancing act that is required in *Parks Canada Agency*, at paragraph 153, as follows:

> ***153.*** *The Board also understands that giving meaning to the right to strike under the new* Act *while respecting the paramount public interest in the delivery of essential services is part of an even broader balancing act. Parliament has assigned to Parks Canada rights and obligations under its mandating legislation and regulations as described by the employer in its submissions. The Board must recognize those rights and obligations while appropriately balancing them against the rights and obligations given to the employer, employees and bargaining agents under the new* Act. *In particular, the Board must assume that Parliament intended the right to strike under the new* Act *to have real meaning even where the exercise of that right may interfere with the ability of Parks Canada to deliver services required under its statutory mandate. It is the essential services features of the new* Act *that serve to reconcile the tensions that can arise between statutory instruments.*

[45] The fact that ABAs working in the capacity of an official receiver serve as "officers of the court" is not relevant. Ms. Alferez testified that ABAs do not attend court and that courts do not contact ABAs directly. She described the role of an officer of the court as conferring on the incumbent a duty to apply the law, but having that duty does not mean that the incumbents' role necessarily has an impact on public safety or security: see *Newfoundland and Labrador Assn. of Public and Private Employees v. Newfoundland and Labrador (Minister of Justice)*, 2007 NLTD 153, at para 32 and 38.

[46] The applicant closed by reasserting that the respondent did not meet its burden to provide sufficient evidence that ABAs perform a service or activity that is necessary for public safety or security within the meaning of the *Act*.

C. <u>Respondent's rebuttal</u>

[47] There is no jurisprudence under the former *Act* that fits squarely the circumstances of an official receiver. Previous decisions do not constrain the Board from looking at the function performed by an official receiver in an open way, with fresh eyes.

[48] The Board's interpretation of security must be broad enough to encompass economic security as understood within the specific context of the service offered to

the public. In this case, there is a reasonable conclusion to be drawn that the absence of the official receiver function would potentially impact public safety and security.

[49] The *Bankruptcy and Insolvency Act* mandates filing to give effect to a bankruptcy or to a proposal for bankruptcy. The practical effect of filing is to take the immediate pressure off the filer. Before filing, it is self-evident that there is chaos. With filing, the legal effect is to make order out of chaos. The consequences for debtors are not a matter of evidence. The situation faced by a debtor requires intervention to address financial consequences that have a serious impact on individuals — an impact of which the Board may take judicial notice. From that perspective, the absence of an official receiver is not a mere inconvenience, as the applicant argues, but a real matter of public safety and security.

IV. Reasons

[50] Following the analytical path outlined by the Board in *Parks Canada Agency*, the first-order determination to be made in this decision is to identify what services delivered or activities performed by a PM-02 ABA in the OSB of Industry Canada are necessary for the safety or security of the public.

[51] In *Parks Canada Agency*, the Board ruled that the principal burden of proof falls to the employer, as follows:

. . .

> ***180.*** *. . . the Board takes the view that the principal burden of proof under the new* Act *continues to rest with the employer, as it did in the past when the employer proposed to designate positions under the former* Act. *The employer must place evidence before the Board to convince it that there is a reasonable and sufficient basis for finding . . . that a service is essential . . . .*

. . .

[52] The respondent proposes that the Board identify the essential service performed by an ABA as follows:

> *Acceptance for and registration of:*
>
> *Summary administration bankruptcy estates, Division II proposals, ordinary administration bankruptcy estates, division I proposals, partnership assignments, partnership proposals, receiverships and assignments deriving from*

> *bankruptcy orders in accordance with the dispositions of the* Bankruptcy and Insolvency Act, *R.S., 1985, c B-3.*

The respondent's burden is to prove to the Board that there is a reasonable and sufficient basis for finding that the above service delivered by an ABA is essential within the meaning of the *Act*.

[53] While the Board is not hesitant to accept that the essential service proposed by the respondent is an important function required by the *Bankruptcy and Insolvency Act*, the importance of the service alone does not qualify it as essential, nor does the fact that it is a statutory requirement. The essential-service provisions of the *Act* provide the legal process and criteria for determining whether any service or activity performed by an employee, whether explicitly required by statute or not, must be continued in the event of a strike. Where it is proven with reasonable and sufficient evidence that those services or activities are necessary for public safety or security, the Board can take action to ensure that they are continued in a strike situation under the authority of an ESA.

[54] In this case, the Board is not satisfied that the respondent has proven that the identified service performed by ABAs in their capacity as official receivers is necessary for public safety or security. The Board's concern is principally founded in the nature of the evidence offered by the respondent to establish its case.

[55] Ms. Alferez was a clear and credible witness who offered helpful testimony that described what ABAs do as official receivers as well as the legal and organizational context within which they provide service to the public. As the applicant did not seriously undermine her testimony in cross-examination nor adduce evidence of its own that might tend to cast it in doubt, Ms. Alferez's evidence must be considered generally uncontradicted.

[56] The problem lies elsewhere. What the evidence given by Ms. Alferez did not satisfactorily or sufficiently establish, in the Board's view, was the linkage between the work done by ABAs as official receivers and public safety or security. The key information that the Board needs for its ruling in this case is the nature and extent of the risk to public safety or security that might reasonably exist if the services of an official receiver were unavailable during a strike. Ms. Alferez testified that the consequences for the debtor and creditor of the official receiver's act of registering a bankruptcy filing and assigning a trustee are legal consequences. She described what

happens legally and procedurally once that act occurs, with the obvious inference that those legal and procedural consequences will be absent if ABAs are unavailable. But how are the legal consequences of the absence of the service performed by the official receiver also adverse consequences for public safety or security?

[57] The respondent argues that public security in this case encompasses economic or financial as well as psychological security. It contends that the actions of the government provide a safety net for the economic system and for financial markets through the regulation of bankruptcies. The respondent also makes claims about the psychological impacts on members of the public that could or would eventuate in the absence of the essential service performed by ABAs.

[58] The Board has previously accepted —as recently reconfirmed in *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55 — that security of the public may include its economic security. The Board has also ruled in at least one case under the former *Act* that a service can be essential to public safety or security because of its impact on the psychological well-being of the clients for that service: see *Treasury Board v. Public Service Alliance of Canada (Education Group)*, at paragraph 27. The question in this case, then, is whether the evidence similarly establishes that the work of ABAs involves either the claimed economic or psychological impacts, or both, that reasonably carry a risk to public safety or security.

[59] Beyond the testimony of Ms. Alferez, the evidence offered by the respondent in support of its position takes neither the form of direct testimony nor supporting documentation. Instead, the respondent argues that the Board should take judicial notice of certain facts — that financial troubles in a bankruptcy case can cause real economic insecurity and that, for some members of the public, the circumstances of insolvency may have health and other life-threatening implications if not addressed through bankruptcy protection. The respondent claims that ABAs bring order to chaos in situations where conditions of financial hardship can trigger emotional or psychological issues related to personal safety or security. It asserts that debtors may be exposed to predatory tactics and harassment by creditors. All of these facts, in effect, can be taken as self-evident — facts legitimately available to the Board by way of its taking judicial notice. Using the respondent's colourful phrase, it ". . . does not have to drag in a debtor to describe the experience."

[60] The evidentiary case that the Board must weigh, therefore, is unusual. To meet its burden of proof, the respondent must provide reasonable and sufficient evidence to demonstrate that the service delivered by an ABA affects the economic and/or psychological security of the public to an extent that justifies declaring that service essential. The central evidence offered by the respondent for that finding, however, is not before the Board in a conventional way. The crux of the respondent's case — as it virtually conceded — requires that the Board instead accept that it can take judicial notice of the economic and psychological impacts that the respondent claims could occur in the absence of official receiver services. In a very real sense, then, the respondent is asking the Board to take judicial notice of the very facts needed to prove its case.

[61] It is not entirely uncommon for a party to ask the Board or an adjudicator to take judicial notice of certain facts. Decision makers under the *Act* and under the former *Act* have considered requests to take judicial notice of facts such as the following: that bargaining agents require members to pay union dues; that granting an extension of time for filing a grievance can prejudice the employer; that a grievor filed an amended statement of claim in a superior court; and that an employer has adopted a policy to grant leave for relocation of a same-sex spouse: *Richmond v. Treasury Board (Correctional Service of Canada)*, 2008 PSLRB 22, *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 81, *Grover v. National Research Council of Canada*, 2006 PSLRB 117, and *Sarson v. Treasury Board (Canadian Grain Commission)*, PSSRB File No. 166-2-25312 (19960301). Normally, the facts at issue have not been the key facts on which the decision maker must rely for the most basic finding in the decision.

[62] In his reference text, *Civil Evidence Handbook*, Carswell, Toronto, at 5.2(a), G.D. Cudmore describes the parameters that govern judicial notice as follows:

> . . .
>
> *Judicial notice may only be taken of facts which are of common and general knowledge, well-established and authoritatively settled, practically indisputable, and where that common, general and certain knowledge exists in the particular jurisdiction. Where a finding erroneously based on judicial notice is critical to the judgment, the erroneous taking of judicial notice constitutes a reversible error.*
>
> . . .

[63] In *Find*, the Supreme Court of Canada offered the following comments on the test that should apply in a criminal case about a court's latitude to take judicial notice of facts:

. . .

> ***48.*** *. . . Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 1055.*

. . .

[64] In the more recent decision in *R. v. Spence*, 2005 SCC 71, the Supreme Court of Canada reconfirmed the approach outlined in *Find*, as follows:

. . .

> ***61*** *. . . the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria. Thus in* Find, *the Court's consideration of alleged juror bias arising out of the repellant nature of the offences against the accused did not relate to the issue of guilt or innocence, and was not "adjudicative" fact in that sense, but nevertheless the Court insisted on compliance with the Morgan criteria because of the centrality of the issue, which was hotly disputed, to the disposition of the appeal. While some learned commentators seek to limit the Morgan criteria to adjudicative fact (see, e.g., Paciocco and Stuesser, at p. 286; McCormick, at p. 316), I believe the Court's decision in* Find *takes a firmer line. I believe a review of our jurisprudence suggests that the Court will start with the Morgan criteria, whatever may be the type of "fact" that is sought to be judicially noticed. The Morgan criteria represent the gold standard and, if satisfied, the "fact" will be judicially noticed, and that is the end of the matter.*

. . .

The Morgan criteria to which the Court refers were set down by Professor E. M. Morgan in "Judicial Notice" (1943-1944), 57 *Harv. L. Rev.* 269. As quoted above in *Find*, Morgan limited the scope of taking judicial notice to facts that are either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or to facts that are (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[65] The Board is not bound by the strict rules of evidence that apply in a criminal case. Under paragraph 40(1)(*e*) of the *Act*, the Board has the authority "to accept any evidence, whether admissible in a court of law or not." The Board's latitude in accepting evidence by way of taking judicial notice is not, however, unlimited. In practice, the "Morgan criteria" have been found to apply to administrative tribunals in much the same fashion that they are used in criminal litigation. In *Kankanagme*, for example, the Federal Court applied the criteria set out in *Find* and found that an administrative tribunal erred in law by taking judicial notice of a certain fact in a situation that did not satisfy the Morgan criteria, despite observing that administrative tribunals are not bound by the stringent evidentiary rules applicable in a criminal case. In *Gosselin v. Canada (Attorney General)*, 2006 FCA 405, the Federal Court of Appeal also found it appropriate to hold an administrative tribunal to relatively strict criteria regarding judicial notice. It based its ruling (at paragraph 16) on the conclusion that there was

> *. . . no evidence on record to the effect that the facts mentioned . . . are so notorious as not to be the subject of dispute among reasonable persons or are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy . . . .*

[66] Because the facts to be judicially noticed in this case are so central to the ruling, the Board finds that it should apply strict criteria in taking judicial notice. As stated in *Spence*, ". . . the closer the fact approaches the dispositive issue, the more [this Board] ought to insist on compliance with the stricter Morgan criteria."

[67] Looking first to the parameters suggested by Cudmore, are the facts asserted by the respondent ". . . of common and general knowledge, well-established and authoritatively settled, [and] practically indisputable . . . ?" Does the claimed ". . . common, general and certain knowledge [exist] in the particular jurisdiction?" The Board finds in the negative on both questions. The inference that an individual debtor

may face economic and psychological stresses is hardly unreasonable in and of itself. It is not, however, ". . . well-established and authoritatively settled . . . common [and] general knowledge" that individual debtors face such a degree of economic insecurity or threat to their psychological well-being as to comprise a genuine risk to their personal safety or security. Where is the threshold? Presumably, many individuals who reach the point of deciding to seek bankruptcy protection have been living in stressful circumstances for some time. Is it necessarily the case that taking the step of filing for bankruptcy signifies that the circumstances have become so severe as to comprise a genuine safety or security risk if the insolvent individuals do not succeed in securing bankruptcy status? Perhaps so, but it can hardly be said to be an authoritatively settled fact. Moreover, if knowledge about the personal dynamics of a bankruptcy situation is indeed common and general, it is common and general among those who have the direct experience of, or work in the field of, bankruptcy. It is not knowledge that forms part of the general and common factual base in the labour relations jurisdiction for which this Board has specialized expertise. On that point, Blake, cited by the respondent, requires that the facts must fall within the "specialized knowledge" of the tribunal. Nor are the facts asserted here by the respondent in any way comparable to the examples of "local weather conditions" and of "the peculiarities of travelling" that Blake uses to illustrate other types of information for which it is appropriate to take judicial notice.

[68] The Board notes further that it is clearly not general and common knowledge exactly how commercial bankruptcy filings relate to public safety and security. The economic and psychological risks that the respondent asserts may have some resonance for a lay understanding of the circumstances that individual members of the public face in bankruptcy, but the respondent does not indicate how those risks translate into the realm of commercial bankruptcy filings. It infers that the security of the broader financial system and of Canadian markets would be in danger if the "safety net" provided by ABAs were absent due to strike action, but surely some testimonial evidence — and probably expert evidence — would be required to support that allegation. It is certainly not "practically indisputable" nor within the specialized knowledge of this tribunal.

[69] Turning to the "Morgan criteria" as confirmed by the Supreme Court of Canada in *Find* and in *Spence*, and by the lower courts in decisions such as *Kankanagme* and *Gosselin*, are the facts asserted by the respondent ". . . either: (1) so notorious or

generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy . . . ?" Once more, the Board must answer both questions in the negative. The very fact that the parties before the Board dispute the safety and security dimensions of the work performed by ABAs as official receivers would seem to indicate that there can be legitimate debate on the matter among reasonable persons. Certainly, the Board takes the view that a reasonable person not involved in this case could legitimately pose questions about the nature and the extent of the safety and security risks that could exist during a strike were the services of ABAs unavailable. Alternatively, if the facts related to the alleged safety or security risks to debtors are truly ". . . capable of immediate and accurate demonstration . . . ," the respondent has not identified the ". . . readily available sources of indisputable accuracy . . ." on which the Board might rely to safely take judicial notice to that effect.

[70] In sum, the Board finds that the facts that the respondent urges it to accept by way of taking judicial notice do not satisfy the "Morgan criteria" or other parameters suggested for taking judicial notice. Without those facts, the Board is left with the testimony of Ms. Alferez. Her evidence, in the Board's view, solidly establishes what ABAs do as official receivers, and why, but does not serve the further purpose of providing a reasonable and sufficient basis for finding that the service delivered by an ABA is necessary for the safety or security of the public.

[71] The Board differentiates this case from its earlier findings in *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group),* concerning CSOs at SCCs. There, too, the Board expressed some significant concerns about the sufficiency of the evidence presented by the respondent to prove the safety and security risks involved. It nevertheless found that the limited evidence that was available to it, buttressed by previous cases immediately on point, permitted it to conclude that the absence of CSOs in the event of a strike poses a reasonable possibility of risk to public safety or security. The Board wrote as follows:

. . .

> ***102.*** *Even though this Board is unable to quantify the extent or immediacy of the potential risk to the economic security of the public based on the evidence before it, it cannot safely conclude that there is no such risk or that the risk is too minor to justify a ruling in favour of the respondent. Although limited and largely indirect, the respondent has*

> *offered evidence that is sufficient to establish the reasonable possibility that the assistance provided by CSOs to at least some members of the public who visit SCCs is necessary for their economic security. The Board can rely, for example, on testimony to the effect that GIS payments are income tested — only those recipients of CPP benefits who have no other source of income or little other income can establish an entitlement — to infer that the basic income security of applicants seeking GIS benefits might be imperilled were barriers placed in the way of the application process. The Board can reasonably infer from the evidence that at least some of the members of the public who interact with CSOs to advance "dire needs" requests face immediate risks to their economic security. Among the large number of clients who seek CSO assistance for EI claims, the Board can reasonably accept that some proportion of that group are persons who have no other immediate income and stand on the brink of serious economic insecurity — a finding consistent with the Board's decisions in* Public Service Alliance of Canada - Clerical and Regulatory Group, Programme Administration Group *and* Data Processing Group. *Similar inferences and conclusions are reasonable for other classes of applicants and benefit recipients.*
>
> ***103.*** *On that basis, and erring on the side of caution, the Board finds that the respondent has met its onus to establish that CSOs provide an essential service.*

. . .

[72] With respect to the proposed essential service performed by ABAs at Industry Canada, the Board does not find on the basis of the evidence presented to it that it can similarly conclude that the absence of ABAs in the event of a strike reasonably poses a comparable risk to public safety or security. Evidence beyond what the respondent provided to the Board would be required to provide a sufficient basis for such a finding. Moreover, the Board does not have the additional benefit in this case of directly relevant jurisprudence that supports the respondent's position, as existed in *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group).* The Board has examined the cases under the former *Act* and from New Brunswick to which it was referred by the respondent and believes that the facts in each case offer sound grounds to distinguish those decisions.

[73] The Board does not reach its conclusions in this decision without reservation. Were this proceeding legally more akin to a fact-finding inquiry, the Board certainly would have wished to press for further information. It might have been helpful, for example, to hear from a bankruptcy trustee about the typical economic circumstances

faced by individuals who file under the *Bankruptcy and Insolvency Act*. Such testimony might have assisted the Board to determine whether insolvent individuals typically experience "economic hardship" — not considered to be a risk to public safety or security by the Board in, for example, *Treasury Board v. Public Service Alliance of Canada (Radio Operation Group)* — or face the type of threat to their basic economic well-being that the Board has elsewhere found to comprise a legitimate risk to the "security of the public." In that vein, it might also have been useful to know whether there are classes of assets owned by insolvent debtors that are exempted from seizure or execution, or sheltered to some degree, to understand the extent of the risk that individuals run if not protected from the "predatory" creditors mentioned by the respondent. In the realm of bankruptcy filings by commercial entities, the Board certainly would have wished for some concrete information to allow it to consider how the stability of markets and of the economy depend upon the orderly operation of the "safety net" afforded by bankruptcy protection. Certainly, businesses fail in the normal course of affairs. Bankruptcy protection presumably allows some commercial enterprises in jeopardy to escape that immediate fate. How do those business dynamics relate to the objective of the *Act* to protect public safety and security? The Board does not doubt that there could be economic consequences if a business were unable to file for bankruptcy in the event of a strike involving ABAs, but are those consequences of such a nature as to compromise public safety or security?

[74] The Board is thus concerned that it did not receive a fuller picture of the risks faced by the individuals and commercial entities who use the services performed by ABAs. However, an application under subsection 123(1) of the *Act* remains an adversarial process, in the final analysis. As confirmed in *Canada Parks Agency*, there is a burden of proof to be met. It is not the Board's role to order the production of further evidence once the parties have closed their respective cases even if the Board believes that its decision could have benefited from such evidence. While the Board has a paramount responsibility to protect the public interest in determining essential services, it must do so respecting the parameters of the adversarial process that Parliament has created under subsection 123(1) of the *Act* for that purpose. That means, in this case, that the Board must rule based on the evidence presented to it.

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

(The Order appears on the next page)

V. Order

[76] The Essential Services Agreement (ESA) for the Program and Administration Group shall not include a provision that identifies an essential service performed by Assistant Bankruptcy Analysts (ABAs) at the Office of the Superintendent of Bankruptcy Canada (OSB) at Industry Canada.

[77] The Board remains seized of all matters not agreed by the parties regarding other positions in the PA Group.

April 29, 2009.

Dan Butler,
Board Member