Date: 20160704

File: 550-18-10

Citation: 2016 PSLREB 60

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

AJAY LALA

Applicant

and

UNITED FOOD AND COMMERCIAL WORKERS CANADA, LOCAL 401

Respondent

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Intervenor

Indexed as
Lala v. United Food and Commercial Workers Canada, Local 401, and Staff of the Non-Public Funds, Canadian Forces

In the matter of an application for revocation of certification under section 94 of the *Public Service Labour Relations Act.* Interim decision on the timeliness of the application.

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Applicant: Himself

For the Respondent: Robert Szollosy, counsel

For the Intervenor: Adrian Scales, Staff of the Non Public Funds, Canadian Forces

Decided based on written submissions filed March 31, 2016 and April 1, 2016.

I. Application before the Board

[1] Section 22 of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013. C. 40, S. 365) provides that the Public Service Labour Relations and Employment Board ("the Board") may decide any matter before it without holding an oral hearing. Having reviewed all the material on file, the Board is satisfied that the documentation before it is sufficient for it to decide this matter without holding an oral hearing.

II. Nature of the application

[2] On October 26, 2015, Ajay Lala ("the applicant") filed an application for revocation of certification under section 94 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) with respect to a bargaining unit for which the respondent, United Food and Commercial Workers Canada, Local 401("the bargaining agent"), was certified. The reason recited in support of the application was that the employee organization no longer represented a majority of the employees in the bargaining unit.

[3] On September 26, 1985, the bargaining agent was certified by the Public Service Staff Relations Board (PSLRB) as the bargaining agent for all employees in the operational category employed at Canadian Forces Base Edmonton, Alberta ("CFB Edmonton"), except managers and category II employees.

[4] The employer is Her Majesty in Right of Canada as represented by the Staff of the Non-Public Funds, Canadian Forces, CFB Edmonton.

[5] The bargaining unit includes employees who work at the CFB Edmonton mess halls, fitness centre, hockey arena, CANEX Expressmart, liquor and retail stores, and golf and curling clubs.

[6] The bargaining agent and the employer were parties to a collective agreement, which commenced on July 1, 2012 and expired on June 30, 2015 ("the collective agreement"). The bargaining agent provided the employer with notice to bargain on March 4, 2015.

[7] On March 14, 2016, the Board wrote to the parties advising them that during the course of its deliberations with respect to issues raised by the bargaining agent to dismiss the application on a preliminary basis, which is the subject of another interim

decision dated July 4, 2016, an issue had arisen with respect to the timeliness of the application for revocation.

[8] The letter listed the facts relevant to the timeliness issue that the Board believed were not in dispute, recited ss. 94 and 55 of the *PSLRA*, and advised the parties that it was aware of the decisions of its predecessor, the *PSSRB*, the Canada Labour Relations Board (CLRB), which was the predecessor to the Canada Industrial Relations Board (CIRB), and other labour relations boards that dealt with the timeliness of revocation applications.

[9] In particular, there is conflicting jurisprudence of the *PSSRB* interpreting virtually identical statutory language in the *PSSRA* that restricted applications for revocation to the last two months of an existing collective agreement yet permitted applications for certification and displacement to not only the last two months of a collective agreement but up until such time as a new collective agreement was signed.

[10] The Board requested that the parties make submissions on the timeliness of the application by no later than March 24, 2016. Each party was then given an opportunity to respond to the initial submissions by no later than April 1, 2016.

[11] By letter dated March 21, 2016, the deadline for the submissions was extended to April 1, 2016, and for the responses to April 8, 2016.

[12] On March 31, 2016, the applicant filed its submissions.

[13] On April 1, 2016, the employer filed its submissions.

[14] On April 1, 2016, the bargaining agent advised the Board that it would not make submissions on the timeliness issue.

III. The current statutory provisions

[15] On June 16, 2015, the *PSLRA*'s revocation provisions were amended by the *Employees' Voting Rights Act* (S.C. 2014, c. 40; "the *EVRA*") to read as follows:

…

> ***94 (1)*** *Any person claiming to represent at least 40% of the employees in the bargaining unit bound by a collective agreement or an arbitral award may apply to the Board for a*

> *declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of the employees in the bargaining unit.*
>
> ***(2)** The application may be made only during the period in which an application for certification of an employee organization may be made under section 55 in respect of employees in the bargaining unit.*
>
> …

[16] Section 55 of the *PSLRA* sets out the times in which applications for certification may be made.

[17] The collective agreement was for a term in excess of two years but was not for an indefinite term.

[18] In the case of a collective agreement with a term of more than two years but not an indefinite term, s. 55(2) provides as follows:

> ***55(2)** if a collective agreement, or an arbitral award, with a term of more than two years applies in respect of any employees in the proposed bargaining unit for which an employee organization is seeking to be certified as bargaining agent, the application for certification may be made only*
>
> ***(a)** after the commencement of the twenty-third month of its term and before the commencement of the twenty-fifth month of its term;*
>
> ***(b)** during the two month period immediately before the end of each year that the agreement or award continues to be in force after the second year of its term; or*
>
> ***(c)** after the commencement of the last two months of its term*

IV. Is the application timely?

[19] The timeliness of the application gives rise to the reconciliation of different interests.

[20] The first is that under s. 5 of the *PSLRA*, employees are free to join employee organizations of their choice and to participate in their lawful activities. When the employees in a bargaining unit conclude that the certified bargaining agent no longer represents a majority of them, they may apply to the Board for a revocation of the bargaining agent's certification pursuant to s. 96.

[21] The competing interest is that there should be a measure of stability in the relationship between the employer, the bargaining agent and the employees in the appropriate bargaining unit when that relationship is governed by a collective agreement. Parliament has addressed how the reconciliation of these interests is to be achieved in the provisions of the *PSLRA*, which have changed and evolved over time.

V. Submissions on the timeliness issue

A. For the applicant

[22] The applicant submits that his application was made in good faith. He believed that he was acting in accordance with the appropriate timelines.

B. For the bargaining agent

[23] The respondent bargaining agent made no submissions with respect to the timeliness of the application; nor did it reply to the submissions of the applicant or the employer.

C. For the employer

[24] On the facts, the application for revocation was filed after the collective agreement expired and before a new collective agreement was entered into.

[25] In *Bell Express Vu Limited Partnership v. Rex,* [2002] 2 S.C.R. 559, the Supreme Court of Canada affirmed Elmer Driedger's formulation of the approach to interpreting the statutes, as follows: "Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." It also stated that in the federal context, Mr. Driedger's approach is reinforced by s. 12 of the *Interpretation Act*, (R.S.C. 1985, c. 1-21) as follows: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[26] These principles should guide the analysis of the *PSLRA*.

[27] Labour law and policy across Canada recognize an employees' right to select a bargaining agent of their choice, and the legislation provides comprehensive processes

for employees to exercise that right. The most commonly referenced provisions relate to application-for-certification processes and procedures.

[28] A significant component of labour and social policy includes bargaining unit members' right to apply to revoke the certification of their bargaining agent. Accordingly, labour legislation affords them the right to decertify their bargaining agent in accordance with prescribed rules and regulations. A "raiding" bargaining agent may also apply to displace an existing or certified bargaining agent and certify members of the bargaining unit in specific circumstances that are often parallel to the right to decertify.

[29] Section 94 of the *PSLRA* affords bargaining unit members the right to revoke the certification of their bargaining agent in circumstances in which a person claiming to represent at least 40% of the employees in the bargaining unit bound to a collective agreement or arbitral award may apply to the Board for a declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of employees in the bargaining unit. The application may be made only during the period in which an application for the certification of an employee organization may be made under s. 55.

[30] Upon obtaining evidence of the mandated threshold of support among bargaining unit members, an applicant may file an application for revocation of certification.

[31] To ensure labour relations stability in a workplace, the *PSLRA* establishes the timeframe within which an application for revocation of certification is timely.

[32] Subsection 55(2) states that an application for certification may be brought if a collective agreement with a term in excess of two years applies to employees in the proposed bargaining unit for which an employee organization is seeking to be certified.

[33] Pursuant to s. 55(2) (c), an application is timely "… after the commencement of the last two months of its term…", and continues beyond the expiration of the collective agreement. It is notable that that section does not state that the period in which to file an application for revocation of certification is timely only during the last months of the collective agreement's term.

[34] After notice to bargain is given a collective agreement continues to apply to its signatories beyond its expiration by virtue of s. 107 of the *PSLRA* which continues in force each term and condition of employment included in the collective agreement until a new collective agreement is entered into, an arbitral award is rendered or a legal strike could be declared or authorized.

[35] The language of ss. 55(2)(c) and 107 renders an application for the revocation of certification timely from the commencement of the last two months of the term of the collective agreement until one of the events discussed in the last paragraph occurs.

[36] If Parliament had intended to limit the open period to the last two months of a collective agreement's operation, it would have included clear language in the *PSLRA* which delineate that period. There is no language in the *PSLRA* that restricts filing an application for revocation of certification to the last two months of a collective agreement's term.

[37] There is a difference between a collective agreement that "applies" and one that is "in force". As noted, a collective agreement and its terms apply beyond its negotiated term of operation pursuant to s. 107 of the *PSLRA*. A collective agreement is in force during its term of operation as negotiated by the parties to it. The difference between a collective agreement that "applies" versus one that is "in force" is amplified by the use of the terms elsewhere in the *PSLRA*. As an example, s. 194(1)(b) of the *PSLRA* provides that no employee organization or officer of an employee organization can authorize a strike nor can employees in a bargaining unit participate in a strike if *" a collective agreement* applying *to the bargaining unit is* in force*…"*

[Emphasis added]

[38] A strike is not legal when a collective agreement applying to the parties is in force. The *PSLRA* recognizes that there is a distinction between the two terms. A collective agreement can continue to apply to its signatories despite not being in force.

[39] Reference must also be made to s. 105(2) of the *PSLRA*, the section that mandates when notice to bargain collectively may be given, as follows:

105 (2)…

> ***(a)*** *at any time, if no collective agreement or arbitral award is in force and no request for arbitration has been made by either of the parties in accordance with this Part: or*
>
> ***(b)*** *if the collective agreement or arbitral award is in force, within the 12 months before it ceases to be in force.*
>
> [Emphasis added]

A notice to bargain can be issued either when a collective agreement is in force, meaning during its negotiated term, or after it is no longer in force, meaning, after its negotiated term has expired**.** An examination of past legislation that served as a precursor to the *PSLRA* reinforces the argument.

[40] Section 42 of the *PSSRA*, which contained the revocation of certification provisions, provided that when a collective agreement or an arbitral award was in force in respect of a bargaining unit, any person claiming to represent a majority of the employees in that bargaining unit could apply for a revocation of certification.

[41] Subsection 2 provided that in the case of a collective agreement with a term of more than 2 years the application could be brought only after the commencement of the 23rd month and before the 25th month, during the 2-month period immediately preceding the end of each year that it continue to operate after the second year of its operation, or after the commencement of the last 2 months of its operation.

[42] A collective agreement that "was in force" pursuant to s. 42 of the *PSSRA* had a term that had not expired. Therefore, and, in accordance with s. 42(2)(b) of the *PSSRA*, an application was timely when it was filed within the last two months of the collective agreement's term.

[43] Effect must be given to the language that the drafters used when modifying s. 55 of the *PSLRA*. Parliament could have included the term "in force" in that section, but it did not. It could have done so with the benefit of knowing its interpretation based on case law interpretations of that term under the *PSSRA*. Parliament chose instead to use the term "*applies*".

[44] Furthermore, labour relations policy mandates an expansive interpretation of the *PSLRA*. A narrow interpretation of its s. 55 would restrict the right of employees to

choose the bargaining agent of their choice and would restrict the right of unions applying for certification. An expansive interpretation is consistent with social and labour relations policy.

[45] Based on that, the employer suggests that a revocation-of-certification application is timely as long as a collective agreement applies, and the application is filed at any time after the commencement of the last two months of the collective agreement's term.

[46] This application was filed after the commencement of the last two months of the collective agreement's term. It continued to apply to the employer and the bargaining agent on October 26, 2015, the date on which the application was filed. As no renewal collective agreement was signed by the application filing date, the application is timely.

VI. Discussion and analysis

The facts are not in dispute. The bargaining agent and the employer are parties to a collective agreement that was ratified on December 1, 2012, and that expired on June 30, 2015. The bargaining agent provided the employer with a notice to bargain on March 4, 2015.

[47] On October 26, 2015, the applicant filed an application for revocation of certification pursuant to s. 94 of the *PSLRA*.

A. Legislative and jurisprudential evolution

1. *PSSRB* decisions under the Provisions of the *PSSRA*'s provisions

a. Timeliness of applications for revocation

[48] In *Lansey and Public Service Alliance of Canada* a decision of the *Public Service Staff Relations Act*, [1987] C.P.S.S.R.B. No.40, the former board had to interpret the revocation of certification provisions of the-then *Public Service Staff Relations Act* which were set out in section 41 and which read in part as follows:

> ***41(1)*** *Where a collective agreement or an arbitral award is in force in respect of a bargaining unit, any person claiming to represent a majority of the employees in that bargaining unit may in accordance with subsection (2) apply to the Board for a declaration that the employee*

> *organization certified as bargaining agent for that bargaining unit no longer represents a majority of the employees therein.*
>
> **(2)** an application under subsection (1) may be made
>
> *(a) where the collective agreement or arbitral award is for a term of not more than two years, only after the commencement of the last two months of its operation;*
>
> *(b) where the collective agreement or arbitral award is for a term of more than two years, only after the commencement of the twenty-third month of its operation and before the commencement of the twenty-fifth month of its operation, during the two-month period immediately preceding the end of each year that it continues to operate after the second year of its operation, as the case may be; and*
>
> *(c) where the collective agreement provides that it will continue to operate after the term specified therein for a further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or with a view to the making of a new collective agreement, at any time permitted by paragraph (a) or (b), as the case may be, or during the two-month period immediately preceding the end of each year that the agreement continues to operate after the term specified therein.*
>
> …

[49] The *PSSRB* accepted the argument of the incumbent bargaining agent that the opening clause in s. 41(1) "[w]here a collective agreement or an arbitral award is in force in respect of a bargaining unit…" was a condition precedent that had to be satisfied before an applicant could bring an application for revocation. As the collective agreement in that case had expired it found that the application was not timely.

[50] The *PSSRB* stated the following at page 14: "Since the language of subsection 41(1) is so clear, there is really little point in our questioning whether this condition precedent fulfils any useful labour relations function or in speculating as to Parliament's intention in enacting it."

[51] In *Danyluk v. United Food and Commercial Workers Union, Local No.* 832 2004 *PSSRB* 76 the Public Service Staff Relations Board followed the reasoning in *Lansey*. Save for a renumbering of the section in the *Public Service Staff Relations Act* to section 42 the language in the section was identical to that considered in *Lansey*.

[52] However, the *PSSRB* came to the opposite conclusion when called upon to interpret similar language with respect to applications for certification and applications for displacement (Raids).

b. <u>Timeliness of applications for certification under the *PSSRA*</u>

[53] The *PSSRB* rejected the argument that an application for certification could be filed only during the period that a collective agreement was in force in interpreting those sections of the *PSSRA* that governed the time in which an application for certification could be made.

[54] In *Professional Institute of the Public Service of Canada v. Treasury Board, PSSRB* File No. 142-02-286 (19881214), [1988] C.P.S.S.R.B. No. 361 (QL), the Professional Institute of the Public Service of Canada (PIPSC) applied for certification for employees in the Auditing Group. Since its original certification, the intervenor, the Public Service Alliance of Canada (PSAC), had been the bargaining agent. A collective agreement entered into between the employer and the PSAC and that had been extended by the *Public Sector Compensation Restraint Act*, had expired on April 20, 1987.

[55] The PIPSC applied for certification on June 24, 1988, after the collective agreement had expired. The PSAC and the employer in that case signed a new collective agreement on August 19, 1988.

[56] The PSAC argued that because the application was filed after the collective agreement expired, it could not be received.

[57] Sections 27 and 30(2) of the *PSSRA* then read in part as follows:

> **27**. *An employee organization seeking to be certified as bargaining agent for a group of employees that it considers constitutes a unit of employees appropriate for collective bargaining may, subject to section 30, apply in the manner prescribed to the Board for certification as bargaining agent for the proposed bargaining unit.*
>
> …
>
> ***30.*** *(2) Where a collective agreement or an arbitral award is in force and is for a term of more than two years, an employee organization may apply to the Board for certification as bargaining agent for any of the employees in*

> *the bargaining unit to which the agreement or award applies only*
>
> (a) *after the commencement of the twenty-third month of its operation and before the commencement of the twenty-fifth month of its operation;*
>
> (b) *during the two month period immediately preceding the end of each year that the agreement or award continues to operate after the second year of its operation; or*
>
> (c) *after the commencement of the last two months of its operation.*

[58] The PSAC argued that because s. 27 of the *PSSRA* was made subject to section 30, and as s. 30 referred to a collective agreement or an arbitral award being in force, an application could be filed only during the existence of a collective agreement and during the periods specified in the collective agreement.

[59] The PSAC referred to what it considered the analogous situation contemplated by the *PSLRA* for applications for revocations of certification in which it is clear that a collective agreement must be in force when the application is filed. It argued that the legislative scheme for an application under s. 27 of the *PSSRA* subject to the provisions of s. 30 was identical to that in the case of an application for revocation under s. 41, as the *PSSRB* had concluded in *Lansey*.

[60] The PIPSC argued that there was no such precondition for a displacement application and that section 30 provided an open period for a displacement application to be made during the existence of a collective agreement at certain specified times but also clearly allowed for an application to be filed after the expiry of the collective agreement

[61] The PSSRB dismissed the timeliness objection and stated at paragraph 34 as follows:

> ***34.*** *The Board is of the opinion that the precondition found in section 41 of the Act, dealing with applications for revocation of certificates issued by the Board, does not apply to applications for certification under section 27… It is only when a collective agreement is in force that the provisions of section 30 apply and the time for filing applications under section 27 is conditioned. In the instant case, the application was filed after the collective agreement had expired and before a new collective agreement had been entered into.*

> *The application is, therefore, timely. The intervener's [sic] objection on the ground that the application was untimely is thus denied.*

2. Consequences of conflicting jurisprudence decided under the *PSSRA*

[62] As a result of this conflicting jurisprudence, bargaining agents who wished to file displacement applications could do so during the last two months of the term of an existing collective agreement right up until the signing of a new collective agreement, yet employees seeking to revoke the certification of their bargaining agent were restricted to the period immediately prior to the expiration of the collective agreement despite the fact that the statutory language with respect to the open period was virtually identical.

3. Amendments to the *PSSRA* and its re-naming to the *PSLRA* effective April 1, 2005

[63] The *PSSRA* was amended and was renamed as the *PSLRA* and proclaimed in force on April 1, 2005.

[64] The provisions dealing with the revocation of certification were amended and re-enacted in ss. 94 and 55. The language of s. 94 read as follows at the time:

> *94 (1) Any person claiming to represent a majority of the employees in a bargaining unit bound by a collective agreement or an arbitral award may apply to the Board for a declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of the employees in the bargaining unit.*
>
> *(2) The application may be made only during the period in which an application for certification of an employee organization may be made under section 55 in respect of employees in the bargaining unit.*

[65] The provisions dealing with the times in which applications for certification could be made were also amended and were enacted in s. 55 (2), as follows:

> ***55 (2)** If a collective agreement, or an arbitral award, with a term of more than two years applies in respect of any employees in the proposed bargaining unit for which an employee organization is seeking to be certified as bargaining agent, the application for certification may be made only*

> ***(a)*** *after the commencement of the twenty-third month of its term and before the commencement of the twenty-fifth month of its term;*
>
> ***(b)*** *during the two-month period immediately before the end of each year that the agreement or award continues to be in force after the second year of its term; or*
>
> ***(c)*** *after the commencement of the last two months of its term.*

4. <u>Amendments to the *PSLRA* by of the *EVRA* effective June 16, 2015</u>

[66] As noted earlier, on June 16, 2015, the *PSLRA*'s revocation provisions were amended by the *EVRA* and now read as follows:

…

> ***94(1)*** *Any person claiming to represent at least 40% of the employees in the bargaining unit bound by a collective agreement or an arbitral award may apply to the Board for a declaration that the employee organization that is certified as the bargaining agent for the bargaining unit no longer represents a majority of the employees in the bargaining unit.*
>
> ***(2)*** *The application may be made only during the period in which an application for certification of an employee organization may be made under section 55 in respect of employees in the bargaining unit.*

…

[67] The *EVRA* did not amend s. 55 of the *PSLRA*. It is identical to the provision as set out earlier in this decision.

5. <u>Summary of the statutory amendments</u>

[68] Before 2005, ss. 41 and 42 of the *PSSRA* set out the time frames in which applications for revocations of certification could be made.

[69] As a result of the 2005 amendments the sections of the *PSLRA* dealing with revocation of certification have been completely reworded and restructured.

[70] The opening clause of the section that read "[w]here a collective agreement or an arbitral award is in force" has been deleted from the opening words of the section.

[71] The section now describes the circumstances in which employees may apply for revocation of certification namely that any person claiming to represent at least 40% of the employees in the bargaining unit bound by a collective agreement may apply to the Board for a declaration of revocation of certification.

[72] The legislative draftsperson drafting sections 41 and 42 of the *Public Service Staff Relations Act* had used a conditional clause. This clause was interpreted by the previous board to mean that the action in the main clause i.e. the bringing of the application for revocation could only take place after the condition had been fulfilled.

[73] The legislative draftsperson has not used a conditional clause in the drafting of section 94.

[74] The time in which an application for a declaration of revocation may be made is no longer found in a section specifically dealing with revocation but rather in s. 55 of the *PSLRA,* which establishes the times in which applications for certification and displacement may be made.

[75] Section 30 dealing with time limits in the *PSSRA* referred to collective agreement or an arbitral award being in force, s. 55 now refers to a collective agreement or arbitral award applying in respect of any employees in the bargaining unit.

6. Legislative evolution

[76] In *Gravel v. City of St. Léonard,* [1978] 1 S.C.R. 660 at 667, Mr. Justice Pigeon concluded that legislative evolution may be relied upon by decision makers to assist with interpretation: "Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it."

7. Presumptions of interpretation

[77] Ruth Sullivan, in her text *Sullivan on the Construction of Statutes*, Sixth Edition, states as follows at page 662:

> *It is presumed that amendments to the wording of the legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, to change the law. A legislature would not go to the trouble and expense of amending a provision without any reason.*

[78] She also states the following at page 205:

> *The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts and with mastery of existing law, common law and the Civil Code of Québec as well as ordinary statute law, and the case law interpreting statutes.*

[79] While it is appreciated that the presumptions are not absolute and that they may be rebutted based on knowledge brought to the legislature's attention, I conclude that it is appropriate in the circumstances of this case to apply them.

[80] There is a presumption of interpretation that the legislature was aware of the conflicting jurisprudence of the *PSSRB* when the legislature enacted the *PSLRA* in 2003, that restricted revocation applications to the two months prior to the expiration of the collective agreement, while bargaining agents could apply for certification or displacement during the two months prior to the expiration of the collective agreement right up until the signing of a new collective agreement.

[81] The legislature completely reformulated the revocation provision deleting the reference to the necessity of a collective agreement being in force and severed from the section the provision dealing with the time frames in which an application for revocation could be brought and linked the provision to the general provisions that set out the times in which applications for certification and displacement could be brought.

[82] In my view in so doing the legislature is presumed to have changed the law with respect to revocation applications, treating them in the same manner as certification and displacement applications by establishing a uniform open period for all types of applications.

[83] Section 55 of the *PSLRA* establishes the time frames in which an application for certification or displacement may be brought. It also governs the times in which an application for revocation may be made. It was also amended in 2005 not in terms of the time frames in which applications for certification may be brought but in that the reference to a collective agreement being in force was deleted. The section now speaks of a collective agreement or arbitral award applying to employees in the bargaining unit. It was the predecessor s. 30 in the *PSSRA* to s. 55 that was interpreted by the

previous board as not constituting a precondition for the bringing of a displacement application.

[84] I agree with this rationale. The purpose of s. 94 and 55 is to establish an open period during which employees may elect to replace their existing bargaining agent or to decertify their bargaining agent.

[85] In my view, the recital of these circumstances does not constitute the establishment of conditions precedent to the bringing of an application. The legislature in section 94 is just describing the factual circumstances and in section 55, the operative provisions, establishing the time frames for the open period when application for certification, decertification or revocation may be made.

[86] Whether the legislature speaks of a collective agreement being in force of the parties being bound by a collective agreement or whether a collective agreement applies the legislature is describing one of the circumstances that triggers the start of an open period.

[87] Of interest is that the language of the *Canada Labour Code* using virtually identical terms has never been interpreted as establishing conditions precedent to the bringing of an application of certification, displacement or revocation, the jurisprudence of which I will review in the next section.

[88] I conclude based on the *Act* as amended that the legislature is presumed to have intended to change the law to remove any precondition for the bringing a revocation application.

8. Interpretation of s. 55, time frames for revocation applications

[89] Does s. 55 of the *Act* restrict the bringing of applications of revocation, certification or displacement to the last two months of the collective agreement?

[90] Disputes have arisen as to the interpretation of the analogous provisions of the *Canada Labour Code* that specify when applications for certification or displacement may be made. The Board is not aware of any previous decisions of this or its predecessor boards on this issue.

[91] Section 55 provides that if a collective agreement or an arbitral award with a term of more than two years applies for which an employee organization is seeking to be certified, the application for certification may be made only after the commencement of the 23rd month of its term and before the commencement of the 25th month of its term; during the 2 month period immediately before the end of each year that the agreement or award continues to be in force after the second year of the term; or after the commencement of the last two months of its term.

B. Comparative analysis with the Canada Labour Code's revocation provisions

[92] The revocation provisions in both the *Canada Labour Code* and the *Public Service Labour Relations Act* are very similar in terms of structure and the wording of their operative provisions.

[93] Section 38(1) of the *Code* provides in part as follows:

> ***38 (1)*** *If a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent at least 40% of the employees in the bargaining unit may subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.*
>
> ***(2)*** *An application for an order pursuant to subsection (1) may be made in respect of a bargaining agent for a bargaining unit,*
>
> > ***(a)*** *where a collective agreement applicable to the bargaining unit is in force, only during a period in which an application for certification of a trade union is authorized to be made pursuant to section 24 unless the Board consents to the making of the application f or the order at some other time…*
>
> …

[94] Both provisions link the timeliness of a revocation application to the time in which an application for certification may be made to the respective boards. They parallel each other, and the language is virtually identical, save for the fact that the *Code* refers to a three-month open period and the *PSLRA* to a two-month open period.

[95] The *Code* provides in s. 24(2) that a trade union may apply for certification as follows:

> ***24 (2)****…*

…

> ***(c)*** *where a collective agreement applicable to the unit is in force and is for a term of not more than three years, only after the commencement of the last three months of its operation and*
>
> ***(d)*** *where a collective agreement applicable to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only*
>
> ***(i)*** *during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and*
>
> ***(ii)*** *after the commencement of the last three months of its operation.*

[96] There is a consistent body of jurisprudence from the CLRB and the CIRB concluding that an application for certification may be brought during the commencement of the last three months of operation and at any time after that up until a new collective agreement is entered into.

[97] In *Bell Canada, [1979] 2 Can L.R.B.R. 429,* Claude Foisy, Vice-Chairperson, CLRB, had to deal with the timeliness of an application for certification to displace an existing bargaining agent after the collective agreement had expired. At that time the *Code* read as follows:

> ***124 (2)*** *An application by a trade union for certification as the bargaining agent for a unit may be made*
>
> *…*
>
> (c) *where a collective agreement relating to the unit is in force and is for a term of not more than 2 years only after the commencement of the last 3 months of its operation.*

[98] Vice-Chairperson Foisy stated as follows at page 5 of the decision:

> *"As we stated earlier, it is our opinion that section 124 (2) (c) does not have the effect of limiting the time during which an application for certification may be filed to the last three months that a collective agreement is in operation. Section 124 (2) (c) speaks of the period after the commencement of the three months and not during the three months. An application for certification may therefore be filed at any time*

> *after the last three months during which a collective agreement is in operation and until the date on which the agreement is renewed…"*

[99] To confirm his interpretation of s. 124(2)(c), Vice-Chairperson Foisy then referred to s. 124(2)(d), which read as follows at that time:

> (*d) Where a collective agreement relating to the unit is in force and is for a term of more than two years, only*
>
> *(i) after the commencement of the twenty-second month of its operation and before the commencement of the twenty-fifth month of its operation,*
>
> *(ii) during the 3 month period immediately preceding the end of each year that the collective agreement continues to operate after the 2nd year of its operation or*
>
> *(iii) after the commencement of the last 3 months of operation*

[100] In their text *Canada Labour Relations Board Policies and Procedures*, Mr. Foisy, Daniel Lavery, and Luc Martineau, in the section dealing with the timeliness of applications for certification, state as follows with respect to situations of a collective agreement with a three-year term.

…

> *In this situation an application can be made after the commencement of the last three months of the term of the agreement. In fact, this means that the application can be made at any time from that date until the collective agreement is renewed and is not confined to the last three months…*

…

[101] In *Delta Air Lines Inc.* (1988), 73 di 13 (CLRB 673), Vice-Chairman, CLRB, Hugh R. Jamieson confirmed that when a collective agreements is for a term of less than three years, applications for certification can be brought after the commencement of the last three months of the collective agreement and after that until a new collective agreement has been entered into.

[102] He stated as follows at page 13 of the decision:

> *The union argued that the words "only after the commencement of the last three months of its operation" in*

section 124 (2) (c) should be interpreted by the Board to mean, "only during the last three months of its operation." The union said that to hold otherwise would be to allow employers to drag out collective bargaining, delaying the signing of a collective agreement with the hopes of obtaining a decertification application from the employees.

The Board in the past rejected similar arguments to that of the A.T.E. and has consistently taken the view that section 124(2)(c) means exactly what it says. Where collective agreements are for a term of less than three years, applications for revocation and for certification for that matter, as both are governed by section 124(2)(c), can be brought after the commencement of the last three months of a collective agreement and thereafter until a new collective agreement has been entered into…. This interpretation of the board is supported by the construction of section 124(2)(d) which refers to time limits where a collective agreement is in force and is for a term of more than three years:

> *"124(2) states that an application by a trade union for certification as the bargaining agent for a unit may be made*
>
> *…*
>
> *(d) where a collective agreement relating to the unit is in force and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation, and thereafter, only*
>
> *(i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and*
>
> *(ii) after the commencement of the last three months of its operation."*
>
> *…*

If the legislators had intended to create a three month window preceding the termination of collective agreements during which applications for revocation would only be permitted as the A.T.E. suggests there would have been no need for clause (ii) of section 124(2)(d). The "window of opportunity" would have already been established by clause (i).

[103] That ratio applies with equal vigour in my view to the interpretation of s. 55(2) of the *PSLRA*, which it structurally parallels. If an application for certification could be brought only during the two-month period before the end of each year that a collective agreement continued to be in force after the second year of its term, there would be no need for s. 55(2)(c).

[104] As Graham Clarke stated in his text *Clarke's Canada Industrial Relations Board,* referring to *Bell Canada, at I- 8-16.1*:

> "…*the use of the terms after and during in different places confirms the interpretation of section 24 (2)(c) that a certification application may be filed at any time following the last 3 months of a collective agreement and not just during those last 3 months."*

[105] Again the use of the terms "after" and "during" in s. 55 parallels that of the language used in s. 24(2) of the *Code*, leading to the conclusion that an application for certification may be filed at any time following the last two months of the collective agreement and not just during those two months.

[106] From a policy point of view the state of the law prior to the 2003 amendments with contradictory conclusions with respect to the open period for applications for certification and displacement on the one hand and revocation on the other in my view was problematic based on the language of the statute.

[107] The state of the law also resulted in a potentially untenable situation as employees would be restricted to filing applications to decertify to the period immediately prior to the expiry of the collective agreement and denied the right to apply for decertification should their bargaining agent cease to represent their interests during the negotiation process.

[108] In my view it was the intention of Parliament to create a stable period during the life of the collective agreement, free from applications for displacement or revocation as set out in s. 55. To limit the open period however to just two months at the end of the collective agreement would mean that employees who wish to change their bargaining agent or to bring an application for decertification would have to wait out not just the negotiation process but another two years or longer until they could make an application.

[109] I conclude that an application for revocation may be brought not just during the last two months of the collective agreement but at any time thereafter up until the signing of a new collective agreement.

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

(The Order appears on the next page)

VII. Order

[111] For all of the foregoing reasons, I conclude that the application for revocation is timely.

July 4, 2016.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board