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Files: 190-34-309 to 312

Citation: 2001 PSSRB 36

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA and SOCIAL SCIENCE EMPLOYEES ASSOCIATION

Intervenors

Re: Effect of Section 48.1 of the Public Service Staff Relations Act on a Request for establishment of a conciliation board pursuant to section 77 of the Act

Before: Yvon Tarte, Chairperson

Decided without an oral hearing.

[1] The Canada Customs and Revenue Agency Act (CCRA Act), creating the Canada Customs and Revenue Agency (CCRA) as a new separate employer, came into force on November 1, 1999.

[2] On March 24, 2000, the CCRA applied to the Public Service Staff Relations Board (PSSRB) pursuant to section 48.1 of the Public Service Staff Relations Act (PSSRA) which addresses successor rights seeking, among other things, a reconfiguration of the bargaining unit structure into four units: Board file 140-34-17. On March 29, 2000, the Public Service Alliance of Canada (PSAC) and the Professional Institute of the Public Service of Canada (PIPSC) also applied to the PSSRB under section 48.1 (Board files 140-34-18 and 19). The Association of Public Service Financial Administrators (APFSA) and the Social Science Employees Association (SSEA) intervened in these applications.

[3] Section 48.1 of the PSSRA provides:

> *48.1 (1) Where the name of any portion of the Public Service specified from time to time in Part I of Schedule I is deleted therefrom and added to Part II of that Schedule, or where a portion of the Public Service included in a portion of the Public Service so specified in Part I of Schedule I is severed from the portion in which it was included and established as or becomes a part of a portion of the Public Service specified in Part II of that Schedule, a collective agreement or arbitral award that applies to any employees in that portion of the Public Service and that is in force at the time the portion of the Public Service is established as or becomes a part of such a separate employer continues in force, subject to this section, until its term expires.*
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> *(2) An employee organization may apply to the Board for certification as the bargaining agent for the employees affected by a collective agreement or arbitral award referred to in subsection (1), but may so apply only during a period in which an application for certification of an employee organization is authorized to be made under section 31.*
>
> *(3) Where the employees in a portion of the Public Service that is established as or becomes a part of a separate employer are bound by a collective agreement or arbitral award, the employer of the employees, or any bargaining agent affected by the change in employment, may, during the period beginning on the one hundred and twentieth day and ending on the one hundred and fiftieth day after the date on which the portion of the Public Service is established as or becomes a part of the separate employer, apply to the*

Board for an order determining the matters referred to in subsection (4).

(4) Where an application is made under subsection (3) by an employer or bargaining agent, the Board, by order, shall

(a) determine whether the employees of the separate employer who are bound by any collective agreement or arbitral award constitute one or more units appropriate for collective bargaining;

(b) determine which employee organization shall be the bargaining agent for the employees in each such unit; and

(c) in respect of each collective agreement or arbitral award that applies to employees of the separate employer,

(i) determine whether the collective agreement or arbitral award shall remain in force, and

(ii) if the collective agreement or arbitral award is to remain in force, determine whether it shall remain in force until the expiration of its term or expire on such earlier date as the Board may fix..

(5) Where the Board determines, pursuant to paragraph (4)(c), that a collective agreement or arbitral award shall remain in force, either party to the collective agreement or arbitral award may, not later than ninety days after the date the Board makes its determination, apply to the Board for an order granting leave to give to the other party a notice to bargain collectively.

(6) Where no application for an order is made pursuant to subsection (3) within the period specified in that subsection after the date a portion of the Public Service is established as or becomes a part of a separate employer, the separate employer or any bargaining agent bound by a collective agreement or arbitral award that, by subsection (1), is continued in force, may, during the period commencing on the one hundred and fifty-first day and ending on the two hundred and fortieth day after the date the portion of the Public Service is established as or becomes a part of the separate employer, apply to the Board for an order granting leave to give to the other party a notice to bargain collectively.

(7) Where, before the deletion or severance referred to in subsection (1), notice to bargain collectively has been given in respect of a collective agreement or arbitral award binding on employees in what is now established as or has become a part of a portion of the Public Service specified in Part II of Schedule I, who, immediately before the deletion or

severance were part of the Public Service specified in Part I of that Schedule,

(a) the terms and conditions of employment contained in a collective agreement or arbitral award that, by virtue of section 52, are continued in force immediately before the date of the deletion or severance or that were last continued in force before that date, in respect of those employees shall continue or resume in force on and after that date and shall be observed by the separate employer, the bargaining agent for those employees and those employees until the requirements of sections 102 to 104 have been met, unless the employer and the bargaining agent agree otherwise;

(b) on application by the separate employer or bargaining agent for those employees, made during the period beginning on the one hundred and twentieth day and ending on the one hundred and fiftieth day after the date of the deletion or severance, the Board shall make an order determining

(i) whether the employees of the separate employer who are represented by the bargaining agent constitute one or more units appropriate for collective bargaining, and

(ii) which employee organization shall be the bargaining agent for the employees in each such unit; and

(c) where the Board makes the determinations under paragraph (b), the separate employer, or the bargaining agent may, by notice, require the other to commence or recommence collective bargaining for the purpose of entering into a collective agreement.

(8) Before making a determination under subsection (4) or paragraph 7(b), the Board may make such inquiry or direct that such representation votes be taken among the employees to be affected by the determination as the Board considers necessary, and in relation to the taking of any such vote the provisions of subsection 36(3) apply.

[4] The PSAC, PIPSC, APFSA and SSEA were the certified bargaining agents for the employees who were formerly employed by Revenue Canada, the predecessor to the CCRA. As of the coming into force of the CCRA Act these employees became employees of the CCRA. The bargaining agents are essentially seeking a bargaining unit configuration which would allow them to continue to represent the employees for

whom they had previously been certified as bargaining agent. By letter dated January 23, 2001, APSFA advised the PSSRB that it was withdrawing from the proceedings.

[5] The PSSRB's hearing into these applications is continuing and no determination has yet been made regarding what is the appropriate bargaining unit configuration for the employees of the CCRA and who should be their bargaining agent(s).

[6] On February 4, 2000, the PSAC requested the Chairperson to establish a conciliation board pursuant to section 77 of the PSSRA for the following four bargaining units of employees of the CCRA for which it is the bargaining agent: the Program and Administrative Services Group, the Operational Services Group, the Technical Services Group and the Education and the Library Science Group (Board files 190-34-309 to 312). These are bargaining units in relation to which notice to bargain had been given prior to November 1, 1999. In its response of February 16, 2000, the CCRA indicated that the request was premature.

[7] In a letter dated March 1, 2000, the PSSRB advised the PSAC and the CCRA as follows:

> *The Chairperson wishes me to advise you that, pursuant to subsection 76(2) of the PSSRA, he does not intend to act on the request at this time as he is not satisfied that the parties have "bargained sufficiently and seriously with respect to the dispute for which conciliation was requested".*
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> *In addition, the Chairperson has requested me to bring the following matters to the attention of the parties which will have to be resolved before he can proceed further on this request.*
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> - *Our records reveal that prior to November 1, 1999, the date on which the CCRA came into existence as a separate employer, the PSAC had given notice to bargain to the Treasury Board for the bargaining units into which the employees affected by this request for conciliation previously fell. Then on November 1, 1999, the PSAC and the CCRA gave notice to bargain to each other. The question arises as to whether section 48.1 of the PSSRA contemplates that, following the creation of a new separate employer, notice to bargain can be given by either party before the Public Service Staff Relations Board has made a determination under paragraph 48.1(7)(b) of the PSSRA.*

- *Further, does subsection 48.1(7) of the PSSRA contemplate any bargaining between the PSAC and the separate employer from the time the separate employer is established until the time an order is made by the Board on application under paragraph 48.1(7)(b)? In this regard, I refer you in particular to paragraph 48.1(7)(c) of the PSSRA.*

[8] In its submissions of March 10, 2000, the PSAC stated that notice to bargain could be given by either party immediately upon the establishment of the CCRA as a separate employer. The right to serve notice to bargain immediately after the establishment of the new separate employer flows from the transfer of existing bargaining relationships pursuant to section 48.1 of the PSSRA. The rights established by paragraph 48.1(7)(a) of the PSSRA operate automatically and do not depend upon a determination by the PSSRB. The freeze established by paragraph 48.1(7)(a) continues until the existing bargaining agent and the new separate employer have bargained to an impasse. Accordingly, bargaining can and should begin immediately upon the establishment of the new separate employer. This is particularly so in light of the fact that applications initiated under paragraph 48.1(7)(b) could take months to be heard and determined by the PSSRB.

[9] According to the PSAC, applications contemplated in paragraph 48.1(7)(b) of the PSSRA are only initiated where either the separate employer or the bargaining agent believes that the bargaining unit structure which has been transferred by virtue of paragraph 48.1(7)(a) needs to be reviewed and revised. Otherwise, the existing bargaining units and bargaining agents will continue in the normal course. On the other hand, once the PSSRB issues a decision reconfiguring the bargaining units, then pursuant to paragraph 48.1(7)(c) either the employer or the bargaining agent can give notice to bargain in relation to the new bargaining unit structure.

[10] The CCRA, in its letter of March 10, 2000, advised the PSSRB that the PSAC and the CCRA were engaged in collective bargaining and that the CCRA was hopeful that an agreement would soon be reached. Therefore, while the CCRA acknowledged the Chairperson's concerns as set out in the PSSRB's letter of March 1, 2000, the CCRA was of the opinion that they need not be resolved at that time. If the parties were able to reach an agreement, then these issues would be rendered moot.

[11] The CCRA informed the PSSRB by letter dated September 20, 2000, that a collective agreement had been signed by the CCRA and the PSAC, with an expiry date of October 31, 2000.

[12] In a letter dated May 29, 2000, the CCRA requested the appointment of a fact finder pursuant to section 54.1 of the PSSRA after the employees in the Computer Systems Group had rejected the tentative agreement reached between the CCRA and the PIPSC. Notice to bargain in relation to this bargaining unit had not been given prior to November 1, 1999.

[13] In a letter dated May 29, 2000, to the CCRA the PSSRB denied the request, for other reasons, but drew to the CCRA'S attention the two issues previously raised by the PSSRB in relation to the PSAC's request for the appointment of a conciliation board. The PSSRB expressed the opinion that these same questions arise with respect to paragraphs 48.1(4)(a) and (b) of the PSSRA on an application under subsection 48.1(3).

[14] On August 1, 2000, the PSAC served notice to bargain upon the CCRA. In a letter of November 21, 2000, the PSAC again requested the Chairperson to establish a conciliation board for the four bargaining units in question.

[15] In his letter to the PSAC and the CCRA of November 29, 2000, the Chairperson referred to the fact that the PSAC had previously made a similar request for the same groups of employees and that the CCRA had in May requested the appointment of a fact finder for the Computer Systems Group pursuant to section 54.1 of the PSSRA. The Chairperson again raised the questions which had originally been raised in the PSSRB's letter of March 1, 2000. He indicated as well that, with reference to the request for the appointment of a fact finder, these questions also arise with respect to paragraph 48.1(4)(a) and (b) of the PSSRA in relation to an application under subsection 48.1(3).

[16] By letters dated December 4 and 21, 2000, both the PSAC and the CCRA requested a hearing into the matter. In a letter dated January 5, 2001, the PSSRB advised the parties that these questions would be determined on the basis of written submissions. Since they might affect "all parties involved in the proceedings currently

underway pertaining to the application for successor rights Section 48.1 of the Act, each party to these proceedings shall be entitled to file written submissions".

SUBMISSIONS OF THE PSAC

[17] The PSAC submitted that the circumstances are different from when the questions which the PSSRB wishes to have addressed were first raised by it on March 1, 2000. At that time, the PSAC and the CCRA were engaged in their first round of bargaining following the creation of the CCRA as a separate employer. The questions were raised in the context of a transfer under section 48.1 of the PSSRA where notice to bargain had been served previously on the Treasury Board. The parties were, therefore, necessarily interested in continuing with that bargaining in order to conclude a collective agreement.

[18] The parties did successfully conclude a collective agreement at the end of March 2000, with an expiry date of October 31, 2000. In accordance with section 50 of the PSSRA, the PSAC served notice to bargain on the CCRA for these four bargaining units on October 1, 2000. The fact that the parties have successfully negotiated a collective agreement for these employees renders the questions raised by the PSSRB moot.

[19] Specifically, the CCRA is a lawfully established separate employer which has the authority to enter into collective agreements with certified bargaining agents such as the PSAC. The parties have done so in respect of a bargaining unit established by the PSSRB which has not been altered by any order or decision of the PSSRB. Pursuant to sections 56, 58 and 59 of the PSSRA, the collective agreement is therefore binding on the parties. The collective agreement between the PSAC and the CCRA, which expired on October 31, 2000, has the same status as any other collective agreement under the PSSRA and should not be treated any differently.

[20] Accordingly, the PSAC was entitled to serve notice to bargain on the CCRA pursuant to section 50 of the PSSRA without regard to any restrictions which might be contained in section 48.1 of the PSSRA. In view of the fact that all of the other requirements for the appointment of a conciliation board have been met, there is no impediment to the request by the PSAC for the appointment of a conciliation board.

[21] Section 48.1 of the PSSRA establishes successor rights which apply automatically. The Federal Court of Appeal in *Public Service Alliance of Canada and Bombardier Inc. et al.* (Court file A-74-00, December 20, 2000) stated recently in analyzing similar provisions in the *Canada Labour Code* (CLC) at paragraph 3 of its decision:

> *The sections in question form an integral part of the Code's framework … for preserving collective bargaining rights acquired by workers. This framework is designed to ensure that the existing collective bargaining rights of workers, whether they exist by virtue of certification or of a subsisting collective bargaining agreement, are not adversely affected or lost upon the occurrence of certain potentially destabilising events.*

[22] At paragraph 4 of its decision, the Court indicated that the two-fold purpose of successor provisions in the business context is to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination on the sale of a business. In light of the similarity in language between sections 47 and 47.1 of the CLC and section 48.1 of the PSSRA, the principles identified by the Federal Court of Appeal are equally applicable to the PSSRA.

[23] The PSSRB adopted the same approach to the interpretation and application of section 48.1 of the PSSRA in its preliminary decision in *Canada Customs and Revenue Agency v. Association of Public Service Financial Administrators, 2000 PSSRB 75* (140-34-17 to 19) where it stated at paragraphs 15 and 18:

> *…the purpose of successor rights provisions (which, in fact, the very term so indicates) is to maintain and protect the collective bargaining rights of employees upon the sale or transfer of a business or operation from one employer to another. Accordingly, what is generally of concern in successor rights applications is the continuity of existing collective bargaining relationships in order to ensure that employees affected by a change of employers are not thereby denied the previously acquired protections and benefits of collective bargaining.*
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> …
>
> *…clearly, the main purpose of section 48.1 is to maintain the continuity of collective bargaining relationships and to*

> *ensure the protection of the collective bargaining rights of employees and their bargaining agents.*

[24] In fact, under section 48.1 of the PSSRA, as in sections 47 and 47.1 of the CLC, it is not necessary for any party to make application before the PSSRB to engage the successor rights provisions. Where a party does make an application, the PSSRB's authority is limited to dealing with the matters specified in the PSSRA -- essentially matters of bargaining unit appropriateness, bargaining agent representation and the appropriate term of a collective agreement to facilitate the bargaining process once the determination is made. In support of this argument, the PSAC referred to the decision of the Federal Court of Appeal in *Bombardier* (supra) at pages 11 to 14 and to the PSSRB's decision in *Parks Canada Agency v. Professional Institute of the Public Service of Canada,* 2000 PSSRB 109 (140-35-15 and 16) at page 23.

[25] It follows that, in the absence of an order issued by the PSSRB under the provisions of section 48.1 of the PSSRA, the parties subject to successor rights are entitled to all of the benefits of collective bargaining under the PSSRA, including the right to engage in collective bargaining itself.

[26] The PSAC next addressed the question of whether notice to bargain may be given before the PSSRB has issued its determination under paragraph 48.1(7)(b) of the PSSRA. In this case, notice to bargain was served prior to the severance contemplated by subsection 48.1 of the PSSRA. Accordingly, the freeze on terms and conditions of employment during bargaining which had previously been in force by virtue of section 52 of the PSSRA was continued pursuant to paragraph 48.1(7)(a) thereof. In addition, the freeze continues until the existing bargaining agent and new employer conclude a new collective agreement or have bargained to an impasse. In support of this argument, the PSAC referred to the decision of the Federal Court of Appeal in *Bombardier* (supra) at page 14.

[27] Therefore, it must follow that bargaining can and should ensue immediately upon the establishment of the freeze, which is immediately upon the establishment of the new separate employer. Any other interpretation would allow a severance to interfere with the existing collective bargaining rights which are continued by the successor rights provisions contained in the PSSRA, contrary to the plain language of the PSSRA as well as its overall purpose.

[28] In light of the automatic application of section 48.1 of the PSSRA, applications pursuant to paragraph 48.1(7)(b) are only initiated where the new separate employer or any incumbent bargaining agent is of the view that the bargaining unit structure needs to be reviewed and revised. If no such application is made, the existing bargaining agent/bargaining unit structure will continue in the normal course. However, the fact that such an application has been made does not, in any way, alter the existing bargaining agent/bargaining unit structure until such time as the PSSRB makes an order to that effect. For the same reasons, the fact that an application has been made cannot alter the continuation of collective bargaining rights. In these circumstances, there is no doubt that notice to bargain can be initiated by either party immediately upon the establishment of the separate employer.

[29] Therefore, it is lawful for incumbent bargaining agents and the employer to commence collective bargaining immediately upon the establishment of the separate employer. There is no need to await the outcome of proceedings initiated under paragraph 48.1(7)(b). To hold otherwise would deprive the parties of the very rights which section 48.1 of the PSSRA is designed to continue. This is particularly so in light of the practical difficulties involved in adjudicating applications initiated under paragraph 48.1(7)(b). These applications can involve a number of bargaining agents and interveners; furthermore, determining bargaining unit appropriateness often requires extensive evidence regarding the nature of the work performed.

[30] The purpose of paragraph 48.1(7)(c) of the PSSRA is to deal with the situation where the PSSRB makes an order pursuant to paragraph 48.1(7)(b) that results in a new bargaining unit structure. The notice to bargain, which was served prior to the severance and which allowed for continued bargaining prior to the order of the PSSRB, becomes moot as either the parties or the bargaining units have changed. Paragraph 48.1(7)(c) therefore allows the parties to commence or recommence collective bargaining.

[31] In this regard, the PSAC noted the inclusion of the word "recommence" in the English version of paragraph 48.1(7)(c). The equivalent is not present in the French version, nor is similar wording included in the French or English version of the equivalent section in the CLC. The PSAC submitted, therefore, that legislatively the

word "recommence" adds nothing to the meaning of the section except that it deals with the circumstance where the parties had been bargaining previously.

[32] The same principles are equally applicable where notice to bargain was not served prior to the severance and where a party makes an application for an order under subsection 48.1(3) of the PSSRA. The successor rights provided by section 48.1 are automatic. Therefore, the collective bargaining relationship, and all the rights and responsibilities which are part of that relationship, continue in spite of a severance under section 48.1. If the prior collective agreement expires at a time that would normally entitle one of the parties to serve notice to bargain, nothing in section 48.1 would prohibit that action. Indeed, it is possible that no application would be made pursuant to subsection 48.1(3), in which case nothing would be changed except that the separate employer would take the place of the prior employer in negotiations. In any case, the fact of an application under subsection 48.1(3) does not change the right of the parties to engage in collective bargaining under the normal circumstances prescribed in the PSSRA.

[33] Subsection 48.1(5) of the PSSRA applies to the situation where a collective agreement or arbitral award is to remain in force and where the natural expiry date is far enough in the future that the parties would not normally be entitled to serve notice to bargain. This subsection allows the parties to serve notice to bargain prematurely in light of the changed circumstances arising from the severance. However, as this would be an aberration from the normal collective bargaining process under the PSSRA, leave must be sought from the PSSRB before bargaining commences. This allows either party to raise with the PSSRB any concerns which it may have that bargaining would not be appropriate at a premature stage given the change in relationship and employer.

[34] There is nothing in subsection 48.1(5) of the PSSRA which modifies the normal rules governing the service of notice to bargain collectively as specified in section 50 of the PSSRA. Accordingly, where a collective agreement is within the last three months of its term, the parties can serve notice to bargain without seeking leave from the PSSRB pursuant to subsection 48.1(5). It is for this reason that the language of subsection 48.1(5) is permissive and the subsection is therefore only invoked where the parties deem it to be necessary.

[35] Subsection 48.1(6) of the PSSRA applies where no application for an order is made pursuant to subsection 48.1(3). As with subsection 48.1(5), subsection 48.1(6) is permissive and allows for a party to apply to the PSSRB for leave to serve notice to bargain during the period between 150 days following the severance and ending 250 days following the severance. In addition, again as in subsection 48.1(5), subsection 48.1(6) does not in any way modify or alter the normal rules governing the service of notice to bargain as specified in section 50 of the PSSRA.

[36] Subsection 48.1(6) is designed to apply in circumstances where the collective agreements which are binding on the new separate employer following the transfer are due to expire after a substantial period of time following the transfer itself. This subsection enables the parties to have a period of time after the transfer to determine whether a change in bargaining unit structure is necessary, thereby necessitating an application under subsection 48.1(3). If no such application is made, the subsection provides for a limited period during which the parties may seek leave from the PSSRB to serve notice to bargain. As with subsection 48.1(5), this enables the parties to deal with whatever new circumstances might arise as a result of the fact that a separate employer is now responsible for the collective agreement. At the same time, it gives the PSSRB the authority to refuse leave to serve notice to bargain where it is unnecessary or it would be inappropriate to do so having regard to the nature of the relationship, including the interest of the bargaining agent or agents concerned.

[37] As with subsection 48.1(7), there is nothing in either of these provisions which indicates that Parliament intended that the normal bargaining process, as established in other portions of the PSSRA, would be modified or altered. In fact, if Parliament had so intended, clearer language would have been required to deprive the parties of their bargaining rights. Provided the parties are in the position to serve notice to bargain in accordance with section 50 of the PSSRA, section 48.1 does not affect that bargaining process and therefore does not affect any request for a fact finder, conciliation board or other appointment in order to facilitate collective bargaining.

[38] There is no doubt that collective bargaining may and should continue following a severance under section 48.1 of the PSSRA such that, assuming the parties have bargained collectively in good faith but have been unable to reach agreement, a request for the appointment of a conciliation board may be made to and acted upon by the

PSSRB. Nothing in the legislation contemplates the deprivation of collective bargaining rights while matters addressed by section 48.1 are being considered by the PSSRB.

[39] In any case, the most salient factor in this request for the appointment of a conciliation board is that the PSAC and the CCRA are engaged in bargaining following the conclusion of a collective agreement in the post-severance period. This collective agreement should not be treated differently from any other collective agreement under the PSSRA and, as such, all of the elements of the bargaining process, including the right to request the appointment of a conciliation board, remain intact. Issues raised by section 48.1 are, strictly speaking, no longer applicable.

[40] Accordingly, there is no impediment to the appointment of a conciliation board in this case. As a result, the PSAC requests the Chairperson to establish such a board as soon as possible to assist the parties to achieve a collective agreement.

SUBMISSIONS OF THE PIPSC

[41] The PIPSC first reviewed the relevant facts applicable to it. By virtue of the successor rights provisions contained in subsection 48.1(1) of the PSSRA, the collective agreement between the PIPSC and the Treasury Board in respect of the employees in the Computer Systems Group continued in force until its term expired, following the creation of the CCRA as a separate employer on November 1, 1999. The PIPSC selected the conciliation/strike method of dispute resolution for this bargaining unit by letter dated January 28, 2000. Notice to bargain was given by the PIPSC on January 31, 2000, pursuant to section 50 of the PSSRA. In March 2000, the CCRA requested a bargaining unit review pursuant to subsections 48.1(3) and (4) of the PSSRA. In May 2000, after good faith bargaining occurred and the parties were unsuccessful in concluding a collective agreement, the CCRA asked for the appointment of a fact finder pursuant to section 54.1 of the PSSRA.

[42] George Adams states in *Canadian Labour Law*, Second Edition, at paragraph 8.10 that successor rights provisions generally have a two-fold purpose: “to protect the trade union’s right to bargain and to protect any subsisting collective agreement from termination upon the sale”.

[43] In *Canada Customs and Revenue Agency v. Association of Public Service Financial Administrators* (supra), the PSSRB stated at paragraph 18 that “the main purpose of section 48.1 is to maintain the continuity of collective bargaining relationships and to ensure the protection of the collective bargaining rights of employees and their bargaining agents”. The PSSRB also confirmed at paragraphs 14 and 15 that, under the successor rights provisions set out in section 48.1, the transfer of bargaining rights happens automatically upon the creation of the separate employer.

[44] The Federal Court of Appeal in its *Bombardier* decision (supra) referred to the two-fold purpose of successor provisions in the business context: “(1) to protect the trade union’s right to bargain and (2) to protect any subsisting agreement from termination on sale”. The Court also stated that “the existing bargaining rights of the former public service employees automatically continue after the severance”.

[45] Finally in *Parks Canada Agency v. Professional Institute of the Public Service of Canada* (supra) the PSSRB indicated at paragraph 24 that section 48.1 must be interpreted in a broad and purposive way.

[46] Accordingly, the successor rights provisions contained in section 48.1 of the PSSRA apply automatically to ensure the continued protection of the collective bargaining rights of employees and their bargaining agents. Included among these rights are the right to provide a timely notice to bargain for the renewal of a collective agreement and the right to require the opposing party to bargain in good faith (sections 50 and 51 of the PSSRA respectively).

[47] Subsection 48.1(1) of the PSSRA specifies that the collective agreement between the parties “continues in force, subject to this section, until its term expires". The right to provide notice to bargain for renewal of the collective agreement flows directly from the continued existence of the collective agreement. Under subsection 50(2) of the PSSRA, notice to bargain may be given within three months before the collective agreement ceases to operate. The duty to bargain in good faith flows automatically once notice to bargain has been given.

[48] Accordingly, unless section 48.1 alters the pre-existing right to bargain for a renewed collective agreement, there can be no doubt that the continued operation of the collective agreement, as required under subsection 48.1(1), allows either party to serve notice to bargain and to commence good faith negotiations pursuant to sections 50 and 51 of the PSSRA.

[49] As previously stated, the successor rights provisions set out in section 48.1 must be interpreted in a broad and purposive way to ensure that the collective bargaining rights of employees and their bargaining agents are protected. In light of the objectives of successor rights legislation, any legislative restriction on the continuity of collective bargaining rights, such as the right to negotiate a renewed collective agreement on a timely basis, must be explicit and unequivocal.

[50] There is nothing in section 48.1 of the PSSRA that specifically alters the pre-existing statutory right to require good faith bargaining for the timely renewal of a collective agreement. As a result, the PSSRB should not read in any restriction on the right to engage in bargaining for a renewed collective agreement pursuant to section 50 and 51. If Parliament wished to restrict these fundamental rights, it could have expressly included such a restriction in sections 48.1, 50 and 51 of the PSSRA.

[51] In addition, there is nothing inconsistent between the provisions of section 48.1 and the right of either party to the collective agreement to pursue the pre-existing statutory right to compel good faith bargaining for the renewal of a collective agreement on a timely basis.

[52] Subsections 48.1(3) and (4), taken together, allow either the employer or an affected bargaining agent, between 120 and 150 days from the establishment of the separate employer, to seek an order from the PSSRB determining the appropriate bargaining units and the corresponding bargaining agents. In the context of the bargaining unit review, the PSSRB also has the authority to determine whether a collective agreement shall remain in force and, if so, to fix the expiry date.

[53] There is nothing which compels either party to a collective agreement to request an order from the PSSRB pursuant to subsections 48.1(3) and (4) of the PSSRA. To restrict the right of the parties to compel good faith bargaining to renew a collective

agreement within three months of the expiry date of the collective agreement, based on the mere possibility that the PSSRB might be requested to make an order under subsection 48.1(4), would be highly prejudicial to the parties.

[54] Under this restrictive interpretation, if an order is requested from the PSSRB (which thereby suspends the duty to bargain in good faith), the prejudice to the parties will continue, that is the inability to compel negotiations for a new collective agreement until the bargaining unit review is complete and a decision by the PSSRB is rendered. The delays inherent in this process are significant.

[55] In contrast, if good faith bargaining to renew a collective agreement occurs between the parties pending an order under subsection 48.1(4), no prejudice to the parties will have been suffered in carrying out the standard obligations under the PSSRA.

[56] Under subsection 48.1(5) of the PSSRA, where the PSSRB pursuant to paragraph 48.1(4)(c) has determined that a collective agreement will remain in force, either party has 90 days to apply to the PSSRB for an order granting leave to serve notice to bargain collectively. The purpose of this subsection is to allow the parties to renegotiate a collective agreement early in light of the changed labour relations reality. The PSSRB retains a discretion concerning whether to grant leave to bargain early to ensure that any change to the normal rules surrounding the timing of negotiations for a renewed collective agreement will serve a useful labour relations purpose. Nothing in this section restricts the unconditional right of a party to serve notice to bargain within three months of the expiry of the collective agreement.

[57] Under subsection 48.1(6), the PSSRB also has a discretion at the request of a party to allow a notice to bargain to be served early where no order has been made under subsection 48.1(4). Such a request must be made between the 151st and 240th day following the establishment of the separate employer. Again this subsection allows the PSSRB the discretion to permit bargaining for the renewal of a collective agreement earlier than the collective agreement would allow, in order to serve a useful labour relations purpose. Nothing in this subsection removes the unconditional right under sections 50 and 51 of the PSSRA to require renewed collective bargaining where the collective agreement expires within this time period.

[58] Pursuant to the PSSRA notice to bargain collectively was served by PIPSC. The parties have engaged in good faith bargaining and have been unable to reach an agreement. There is nothing in section 48.1 of the PSSRA that restricts the PSSRB from considering a request for the appointment of a fact finder or a conciliation board.

SUBMISSIONS OF THE SSEA

[59] The SSEA submitted that section 48.1 of the PSSRA does not preclude the establishment of a conciliation board. Notice to bargain can be given by a new separate employer or one of the bargaining agents before a determination is made by the PSSRB pursuant to paragraph 48.1(7)(b). Collective bargaining is indeed contemplated after a separate employer is established and prior to the issuance of an order pursuant to paragraph 48.1(7)(b).

[60] The SSEA adopted the submissions of the PSAC in relation to the potential effect of paragraph 48.1(7)(c) of the PSSRA.

[61] The PSSRB has the authority to order the establishment of a conciliation board as requested by the PSAC. In the circumstances of this case, such an order would be a reasonable exercise of the PSSRB's discretion.

SUBMSISSIONS OF THE CCRA

[62] According to the CCRA, the successorship provisions of section 48.1 of the PSSRA do not contemplate collective bargaining pursuant to the other provisions of the PSSRA. Section 48.1 provides for a transitional period within which stability is contemplated and where the parties and the PSSRB may focus on the determinations the PSSRB may be called upon to make.

[63] Prior to the enactment of section 48.1 of the PSSRA in 1996, a severance of a portion of the Public Service from the central administration to a separate employer (from Part I to Part II of Schedule I of the PSSRA) had the effect of nullifying the existence of a collective agreement and revoking the certification of a bargaining agent: *Public Service Alliance of Canada v. National Energy Board* (Board files 142-26-297 to 301); *Council of Graphic Arts Unions of the Public Service of Canada v. Canada Communication Group* (Board files 142-28-302 to 310); *Public Service Alliance of*

Canada v. National Capital Commission (Board files 142-29-312 and 313). The central purpose of section 48.1 is to prevent this from recurring. Subsection 48.1(1) provides that a collective agreement in force upon severance will continue in force beyond severance. Subsection 48.1(7) provides that the terms and conditions of employment continued in force by virtue of section 52 of the PSSRA at the time of severance will continue in force beyond severance.

[64] Nothing needs to be done by the parties after severance to ensure the continuation of a collective agreement or the continuation of the terms and conditions of employment statutorily extended. In fact, if neither party applies to the PSSRB within 120 to 150 days after severance pursuant to subsection 48.1(3) or within 151 and 240 days after severance pursuant to subsection 48.1(6), the provisions of subsection 48.1(1) mandate that the collective agreement will continue in force "until its term expires". Similarly, where terms and conditions of employment are continued in force, subsection 48.1(7) mandates that they will continue in force until the parties have bargained to an impasse.

[65] If a party files an application with the PSSRB under the provisions of section 48.1 of the PSSRA, however, the specific language of these provisions mandates an uneventful transition period. The purpose of the transition period is to allow the parties and the PSSRB to deal with the determinations to be made without also being obliged to bargain collectively and activate the bargaining impasse mechanisms in the PSSRA.

[66] The purpose for which parties affected by a severance may apply to the PSSRB pursuant to subsection 48.1(3) or paragraph 48.1(7)(b) for such matters as the determination of bargaining units is to allow the new separate employer and the bargaining agents to seize the opportunity to make the workplace and labour relations therein more streamlined and efficient. This is what occurred upon the creation of the three new separate employers previously referred to. The parties sought to reduce the number of bargaining units, although not pursuant to the provisions of subsection 48.1 of the PSSRA which was not yet in existence. This has occurred more recently in relation to two new separate employers whose bargaining units have been reduced and consolidated: *Canadian Food Inspection Agency v. Public Service Alliance of Canada* (Board file 140-32-14); *Parks Canada Agency v. Professional Institute of the Public*

Service of Canada, 2000 PSSRB 109 (140-33-15 and 16). It is very difficult to understand how the purpose of providing an opportunity to seek determinations from the PSSRB can be furthered if, at the same time, the parties are compelled to bargain, determine designations for the safety or security of the public, make representations before a conciliation board and perhaps eventually find themselves in a strike situation.

[67] Where a collective agreement is in force upon severance and no application for determinations under subsection 48.1(3) is made in the period of 120 to 150 days and no application is made under subsection 48.1(6) in the period of 151 to 240 days after severance for leave to provide notice to bargain, the collective agreement continues in force "until its term expires" by virtue of subsection 48.1(1). There is no provision in section 48.1 for any party to give notice to bargain prior to the last three months of its operation. This is not surprising in view of the fact that the continuation in force of the collective agreement is automatic and not dependent on the making of an application to the PSSRB. Nothing prevents a party from giving notice to bargain in the last three months of the operation of the collective agreement. However, the notice to bargain need not be acted upon until the period of 120 to 150 days from severance has passed and no application has been made to the PSSRB.

[68] Where a collective agreement is in force upon severance and an application for the determinations under subsection 48.1(3) is made in the period of 120 to 150 days after severance, the PSSRB is required to make determinations. If the PSSRB decides that the collective agreement is to remain in force, the parties must nonetheless apply to the PSSRB for leave to provide notice to bargain, even where the PSSRB has not decreed a premature end to the collective agreement. There is no purpose served in requiring the parties to seek leave of the PSSRB to give notice to bargain in the absence of an explicit recognition that there is otherwise no requirement to bargain.

[69] Where a collective agreement is in force upon severance and no application for the determinations under subsection 48.1(3) is made in the period of 120 to 150 days after severance but an application is made under subsection 48.1(6) in the period of 151 to 240 days after severance for leave to give notice to bargain, the PSSRB may decree a premature end to a collective agreement still in force.

[70] Where the terms and conditions of employment are continued in force upon severance and no application for the determinations under paragraph 48.1(7)(b) is made in the period of 120 to 150 days after severance, then the terms and conditions are continued in force until the parties bargain to an impasse. As there is no collective agreement in force and no application has been made to the PSSRB, nothing prevents a party from seeking to engage bargaining impasse mechanisms that could lead to a legal strike. However, a notice to bargain would not be effective prior to the expiry of the period of 120 to 150 days from severance.

[71] Where the terms and conditions of employment are continued in force upon severance and an application for the determinations under paragraph 48.1(7)(b) is made in the period of 120 to 150 days after severance, and where the PSSRB has made its determinations, the parties do not need the permission of the PSSRB to give notice to bargain: subsection 48.1(7)(c). The PSAC, the PIPSC and the SSEA maintain that the intent of the provisions of section 48.1 is only to affect the normal collective bargaining process to the extent that the provisions specifically encroach upon it. If that were so, then there would be no need for paragraph 48.1(7)(c) as section 50 would dictate that notice to bargain may be given to the new employer within three months of the expiry of the collective agreement.

[72] If, as the bargaining agents allege, the provisions of section 48.1 of the PSSRA are not intended to encroach upon the normal bargaining process, then Parliament has taken the time to state the patently obvious. The contrary must be presumed. The purpose of paragraph 48.1(7)(c) is not to state the obvious. Rather it establishes that collective bargaining may resume its normal course after the PSSRB issues its determinations on an application. By necessary implication, the fact of being in the transition period has the effect of halting the obligation to bargain under the PSSRA or, at the very least, the fact of making an application under section 48.1 has that effect.

[73] The words "commence or recommence collective bargaining" in paragraph 48.1(7)(c) refer to negotiations that would or would not have commenced prior to severance, depending on the time elapsed between the date notice to bargain was given and the date of severance. Thus, in accordance with section 51 of the PSSRA, if 20 days had not elapsed between the giving of notice to bargain and severance, or "within such time as the parties may agree", bargaining would "commence" after the PSSRB

had made its determinations. If, however, bargaining had indeed commenced prior to severance, it would “recommence” after the determinations of the PSSRB.

[74] Another indication that the provisions of section 48.1 of the PSSRA contemplate a halt to the requirement of collective bargaining is found in paragraph 48.1(7)(a) which specifies that “the terms and conditions of employment “ in force before severance “shall continue or resume in force”. The French version is even clearer when it states “ou lient de nouveau si l’article 52 avait cessé avoir effet”. The terms and conditions can only resume in force if they had ceased to have effect. The only way for them to have ceased to have effect is if seven days had elapsed since the delivery of a report of a conciliation board to the Chairperson or seven days had elapsed since the Chairperson’s decision not to appoint a conciliation board: paragraph 102(2)(b) of the PSSRA.

[75] The effect of this provision is to bring back to life terms and conditions of employment that had ceased to apply as a result of a strike. If the effect of subsection 48.1(7) is to put an end to a strike, the notion that there is no obligation to bargain in the transition period follows quite logically. The only conclusion to draw from the words “until the requirements of sections 102 to 104 have been met” is that it refers to a strike in the absence of an application being made to the PSSRB, or a strike after the determinations of the PSSRB have been made, should the bargaining unit in question remain the same.

[76] In light of the purpose underlying subsection 48.1(3) and paragraph 48.1(7)(b) of the PSSRA, it is unlikely that Parliament intended that, in addition to the new separate employer proposing to the PSSRB a bargaining unit structure within 120 to 150 days of its creation, it would be required to engage in collective bargaining in regard to all bargaining units in a position to give notice to bargain.

[77] In the case of the CCRA, 10 of its 13 bargaining units were in a position to provide notice to bargain on November 1, 1999. These 13 bargaining units are represented by six bargaining agents. The Computer Systems Group, represented by the PIPSC, was among the remaining three bargaining units. The collective agreement for this group had April 30, 2000, as the expiry date: Code 303/2000.

[78] If it is the intention of Parliament that the transition period will include the obligation to bargain collectively, then employees of several of the afore-mentioned bargaining units could be in a lawful strike position during the transition period. No bargaining agent before the PSSRB on the applications under section 48.1 is seeking the status quo. Furthermore, the likelihood of the PSSRB's maintaining the status quo is unlikely. Therefore, many of the CCRA's present bargaining units may cease to exist as distinct units as a result of the PSSRB's determinations under subsection 48.1(3) and paragraph 48.1(7)(b) of the PSSRA.

[79] It would be incongruous to require the CCRA to bargain with bargaining agents that may no longer represent CCRA employees, and in relation to bargaining units destined to change or to disappear. Furthermore, the filing of a conciliation board report or the obtaining of the right to strike would probably occur after the proceedings for the determinations of the bargaining units are completed and the parties are awaiting the PSSRB's decision.

[80] Equally incongruous is the prospect that any legal strike that would result from an impasse in bargaining could be put to an end by virtue of the PSSRB's determinations. Logically, a right to strike obtained in regard to a specific bargaining unit would cease to have effect if the composition of the bargaining unit changed. Ultimately, the triggering by the parties of a bargaining impasse mechanism, such as a conciliation board, would be of little value on the eve of a new bargaining unit configuration, which would turn the clock back to zero in the negotiation process: paragraph 48.1(7)(c). Alternatively, even if there is a requirement to bargain collectively in the transition period, it ceases to exist once a party has applied to the PSSRB for determinations pursuant to subsection 48.1(3) and paragraph 48.1(7)(b).

[81] In relation to the fact that a collective agreement between the PSAC and the CCRA was entered into during the transition period, it has been the position of the CCRA that the transition from the central administration to a separate employer would not have a detrimental effect on its employees. The CCRA's actions in giving and receiving notice to bargain on November 1, 1999, were motivated by its determination that its employees not see it as refusing to engage in collective bargaining. A memorandum of settlement which led to the collective agreement between the CCRA and the PSAC was signed on March 31, 2000. At that time, it was clear to all parties

that an obligation to bargain, or lack of it, is not dealt with squarely in the provisions of section 48.1 of the PSSRA. However, one thing is quite clear; in the transition period, there is explicit recognition that the parties may agree to modify existing terms and conditions of employment continued in force pursuant to subsection 48.1(7) and section 52 of the PSSRA.

[82] The process of collective bargaining embarked upon by the parties was not collective bargaining recognized and sanctioned by the PSSRA, with all the rights and privileges arising out of such a process. Nonetheless, because of the effect of subsection 48.1(7) and section 52, the terms and conditions of employment, jointly modified by the parties for the benefit of the employees, are firmly in place as though they were the product of a process recognized and sanctioned by the PSSRA. However, as the process was not collective bargaining within the meaning of the PSSRA, neither party has the right to require the Chairperson to establish a conciliation board.

[83] The fact that the parties have chosen to call the bargaining process one of collective bargaining and call the end product a collective agreement is of no consequence. Whether the collective agreement is a proper collective agreement, jointly modified pursuant to subsection 48.1(7) and section 52, is of no consequence either. Form cannot prevail over substance. To the same extent that the parties may not, by mutual agreement, confer upon the PSSRB a jurisdiction that it does not otherwise possess, the parties cannot by their actions confer upon the PSSRB the authority which it lacks to establish a conciliation board. Furthermore, the CCRA should not be prejudiced for acceding to a request to bargain in a context where to do otherwise would have had grave repercussions for its employees.

[84] The jurisprudence relied upon by the PSAC, the PIPSC and the SSEA can be distinguished. The decision of the Federal Court of Appeal in *Bombardier* (supra) and the decisions of the PSSRB in *Parks Canada Agency v. Professional Institute of the Public Service of Canada* (supra) and *Canada Customs and Revenue Agency v. Association of Public Service Financial Administrators* (supra) deal with different issues; they do not address the issue of the effect of the transition period on the duty to bargain collectively. The extracts from these decisions relied upon by the bargaining agents are obiter dicta and, while the CCRA does not disagree with them as general statements of principle, they do not address the particular issue in dispute here.

[85] Furthermore, the PSSRB should proceed with caution if it is inclined to rely on the extracts from the *Bombardier* decision cited by the PSAC. Not only are these passages made in the context of a decision that has no bearing on the issues before the PSSRB, but there are also statements in that decision that do not support the PSAC's submissions. For example, at paragraph 39 the Federal Court of Appeal states the following: "However, the successorship provisions are meant to be temporary, merely preserving stability and the status quo through a transition period".

REPLY OF THE PSAC

[86] The PSAC and the CCRA are now engaged in their second round of bargaining following the creation of the latter as a separate employer. This second round followed a collective agreement which was concluded in March 2000 with an expiry date of October 31, 2000. Since they engaged in collective bargaining and concluded a collective agreement, there is nothing to prevent the parties from engaging in further collective bargaining in accordance with the provisions of the PSSRA.

[87] The CCRA alleges that, while it did engage in collective bargaining, this process was not real collective bargaining and, in any event, was conducted by the CCRA out of its desire to be a good employer. This approach by the CCRA fails to properly respect and recognize the PSAC's status as a certified bargaining agent and the rights of the employees it represents.

[88] It makes no labour relations sense to deprive the parties of the right and obligation to engage in collective bargaining following a severance, as the successor rights are designed to maintain the status quo in spite of the severance. This is particularly so where the issues to be addressed under section 48.1 may take a considerable period of time to resolve and where there is always a possibility that the existing bargaining unit structure will be maintained following the transfer. The CCRA has not addressed the anomaly which would logically flow from its position: that the right to engage in collective bargaining would be suspended regardless of the length of the transition period and regardless of the fact that the PSSRB may not, in any way, alter the status quo by its determination.

[89] Furthermore, the CCRA's position confirms that it is often necessary to continue to engage in collective bargaining to ensure that there is no negative effect on the employees affected by a transfer or severance pursuant to section 48.1 of the PSSRA. Otherwise, as the CCRA pointed out, employees subject to the transfer could be left behind as a result of the ongoing negotiations on behalf of the union and the old employer. For this reason it is necessary and appropriate to continue to engage in collective bargaining following the transfer. In this way, employees are not deprived of the full entitlement to bargaining agent representation pending any process initiated under section 48.1 of the PSSRA. The CCRA is taking an approach which would deny the substantive right to engage in collective bargaining on a very formal and technical interpretation of section 48.1 which does not respect its central purpose.

[90] The essential difference between the parties turns on their interpretation of the purpose of section 48.1 of the PSSRA. The CCRA views section 48.1 as having a purpose which is no more than to ensure the continuity of collective agreements or terms and conditions of employment beyond severance. This position is not supported by the language of section 48.1. As well, it is fundamentally inconsistent with the jurisprudence of the PSSRB, other labour boards and the Federal Court of Appeal regarding the interpretation and application of successor rights provisions.

[91] It is well established that successor rights are intended to confirm the bargaining agent status of unions on a transfer or severance. This is why such provisions are referred to as "successor rights" provisions. The right which is continued is not simply the extension of the collective agreement or terms and conditions of employment but must necessarily include the right to continue as a bargaining agent. This approach has been unequivocally confirmed by the PSSRB and the Federal Court of Appeal. The CCRA has attempted to distinguish these cases by arguing that they arose in different factual circumstances. The fact remains, however, that the basic principles regarding the interpretation and application of successor rights provisions, as established by these cases, are equally and unequivocally applicable here.

[92] The CCRA admits that there is no doubt that the PSAC continues to be a bargaining agent following the transfer. Continuing bargaining agent status includes all the rights and obligations of being a bargaining agent. This necessarily includes the

right to engage in collective bargaining through the service of notice to bargain and to respond to a notice to bargain served by the successor employer. Clear and unequivocal language would be required to deprive a union of these rights which are necessarily integral to its bargaining agent status. The CCRA cannot point to any section of the PSSRA which would deprive the PSAC of the right to engage in collective bargaining following a transfer.

[93] The CCRA envisages a transition period which follows a severance during which no collective bargaining is allowed unless the parties voluntarily agree to do so. The CCRA relies principally upon the provisions of section 48.1 which allow the parties to seek leave of the PSSRB to give notice to bargain. The CCRA maintains that, as the PSSRB has been given the authority to grant leave to give notice to bargain, it follows that no notice to bargain can be voluntarily served prior to that period.

[94] The PSAC does not accept this position. Paragraph 48.1(7)(c) of the PSSRA addresses the circumstances in which a new bargaining unit structure is created such that the parties may commence or recommence collective bargaining. Subsection 48.1(5) allows the parties to give notice to bargain prematurely in light of the changed circumstances resulting from a severance. Subsection 48.1(6) also allows the parties to address the new circumstances which may arise as a result of the fact that the new separate employer becomes responsible for administering one or more pre-existing collective agreements with a considerable amount of time remaining in their term before expiry.

[95] More importantly, all of these provisions recognize that, in appropriate circumstances following a PSSRB determination, one of the two parties may be genuinely prejudiced by a requirement to commence collective bargaining in light of the changed circumstances. Therefore, these provisions also act as a safety valve which allows the PSSRB to exercise some control over the timing of bargaining to ensure that neither party, particularly the bargaining agent, is compelled to bargain in circumstances where, in light of the change, it may not be in the best interests of the party to do so. Accordingly, these provisions provide mechanisms for dealing with any changes which may result in the event that the bargaining agent status or bargaining unit structure is altered or, if unaltered, warrants early service of notice to bargain.

Notably, the CCRA does not, in any way address the PSAC's interpretations of those sections in it submissions.

[96] In addition, the CCRA's submissions presume that, whenever a severance occurs under section 48.1, there will be a change to the bargaining unit structure and to the bargaining agent status of the former unions. The PSAC submits that there is no evidence that Parliament was addressing this circumstance when enacting section 48.1. Furthermore, such a presumption of fact should not be used to determine how a particular statute ought to be interpreted. Rather, the PSSRA must be taken as it stands and applied to the particular facts which exist in particular cases. In the present case, applications have been made to the PSSRB but until the ruling of the PSSRB ultimately issues, the final bargaining unit/bargaining agent configuration is unknown.

[97] Furthermore, if the position of the CCRA on this aspect is accepted, it creates significant anomalies for those work places where no change in the bargaining unit structure is made following a severance. According to the CCRA, even though no change may be ordered by the PSSRB, collective bargaining between the parties would be held in abeyance for no reason at all.

[98] The CCRA's submissions do not address the serious ramifications of its position where notice to bargain has been given prior to severance, as contemplated in subsection 48.1(7). Depending on when notice to bargain had been given, the parties could have been engaged in collective bargaining for over a year. It makes no sense that such bargaining in respect of the employees who are transferred should cease automatically on the transfer. To hold otherwise would allow the transfer to interfere substantially with the collective bargaining rights under the PSSRA, a finding which is clearly inconsistent with the purposes of section 48.1.

[99] In its submissions, the CCRA refers to the words "recommence" in paragraph 48.1(7)(c) and "resume in force" in subsection 48.1(7). As pointed out by the PSAC in its submissions, the equivalent to the word "recommence" is not found in the French version and, therefore, may just be considered to be an anomaly. In any event, neither of these words or phrases detracts from the position advanced by the PSAC. They

simply address circumstances where the parties had been bargaining previously or where the freeze had expired prior to the severance.

[100] In fact, far from supporting the CCRA's position, these provisions confirm Parliament's intention that bargaining shall be engaged. Paragraph 48.1(7)(a) contemplates two distinct circumstances: 1) where, at the time of the severance, the freeze of terms and conditions of employment pursuant to section 52 of the PSSRA is in effect and 2) where at the time of the severance the section 52 freeze has expired and the employees are in a legal strike position. It is for this reason that the paragraph utilizes the words "in respect of those employees shall continue or resume in force on or after that date". In the latter case, by resuming in force the terms and conditions that were last continued in force before the severance, paragraph 48.1(7)(a) reinstates the freeze, removes the ability to strike and effectively compels the new parties to re-engage in collective bargaining on the basis of their new status. In other words, these provisions simply prevent a situation where the separate employer may be bound by the fact that the former employer has been placed in a strike position. In effect, it enables the new separate employer and the bargaining agent to have a second chance at bargaining.

[101] In this regard, the PSAC notes the reference by the CCRA to the passage in paragraph 48.1(7)(a) referring to "the requirements of sections 102 to 104 [having] been met". The PSAC submits that this provision does not affect the obligation to engage in collective bargaining but simply ensures that a new request for conciliation is made involving the separate employer. This passage therefore confirms the intent of Parliament to provide the separate employer and the bargaining agent with an opportunity to engage in collective bargaining.

[102] The CCRA maintains that it would be odd that it would be required to bargain with the bargaining agents which may no longer represent its employees. This, of course, presumes that the bargaining units would change or disappear – a presumption which cannot dictate the interpretation of this section. In any case, it is not the least bit odd that a newly-established separate employer should deal with all pre-existing bargaining agents in the normal course until the situation is altered by order of the PSSRB.

[103] The PSAC emphasizes that the PSSRB is being called upon to interpret a benefit-conferring statute. This labour relations legislation ought to be interpreted in a manner which achieves its objectives and which does not limit the benefits or rights conferred by it. The CCRA has failed to provide any labour relations purpose for its interpretation of section 48.1 of the PSSRA. To the contrary, its position ignores the fundamental purposes behind successor rights provisions and results in the denial of significant collective bargaining rights without clear and unequivocal language from Parliament.

[104] By contrast, the approach adopted by the PSAC respects the fundamental purpose of the PSSRA while at the same time acknowledging that section 48.1 has its own series of checks and balances to ensure that the severance or transfer is conducted effectively.

Reasons for Decision

[105] It is clear that, after the severance of a portion of the Public Service from Part I and its transfer to Part II of Schedule I of the PSSRA, the effect of the successorship provisions contained in section 48.1 of the PSSRA is: 1) to continue automatically the certification of any bargaining agent for employees of the new separate employer whom the bargaining agent represented prior to the severance and 2) to preserve the employees' negotiated terms and conditions of employment, whether embodied in an existing collective agreement or frozen by virtue of section 52 of the PSSRA, as they existed at the moment of severance. The decision of the Federal Court of Appeal in *Bombardier* (supra), dealing with similar provisions in the CLC leaves no doubt that this is, in fact, the case.

[106] The question in dispute is fairly straightforward. Does section 48.1 contemplate the possibility of bargaining between a bargaining agent, whose certification has been continued, and the new separate employer prior to the PSSRB's making its determinations on an application made under either subsection 48.1(4) or paragraph 48.1(7)(b)?

[107] The position of the PSAC and the other bargaining agents is that, since as stated by the PSSRB in its decision in *Canada Customs and Revenue Agency v. Association of*

Public Service Financial Administrators (supra) at paragraph 15 “the purpose of successor rights provisions… is to maintain and protect the collective bargaining rights of employees” then this must by necessary implication include the right to engage in collective bargaining with the new separate employer as soon as the severance has occurred provided that notice to bargain can be given pursuant to section 50 of the PSSRA.

[108] The PSAC maintains that clear legislative language would be required to deprive the bargaining agent and the employees whom it represents of this fundamental right. No such language is found in section 48.1 of the PSSRA. Furthermore, it makes no sense to require the parties to await the determinations of the PSSRB under subsection 48.1(4) or paragraph 48.1(7)(b), as the case may be, as it is possible that no application will be made under either subsection 48.1(3) or paragraph 48.1(7)(b). Therefore, according to the PSAC, no purpose would be served by requiring the parties to delay collective bargaining.

[109] The CCRA, on the other hand, argues that “the successorship provisions are meant to be temporary, merely preserving stability and the status quo through a transition period”, as stated by the Federal Court of Appeal in *Bombardier* at paragraph 39. This means, therefore, that no bargaining is contemplated between the bargaining agent and the new separate employer until the PSSRB has made its determinations under either subsection 48.1(4) or paragraph 48.1(7)(b), as the case may be. Indeed according to the CCRA, while there is always the possibility that no application will be made to the PSSRB under subsection 48.1(3) or paragraph 48.1(7)(b), nonetheless the parties must await the expiry of the relevant time limits to ensure that in fact that is the case before engaging in collective bargaining.

[110] While section 48.1 of the PSSRA does not explicitly deal with this question, nonetheless having considered its wording as well as the submissions of the parties, I have reached the conclusion that I have no authority to appoint a conciliation board as requested by the PSAC. I do so for the following reasons. Notice to bargain had been given in relation to the employees in the four bargaining units in question prior to November 1, 1999. Therefore, the terms and conditions of employment which had been frozen pursuant to section 52 of the PSSRA before the severance were continued in force after the severance by virtue of paragraph 48.1(7)(a). In my opinion the

legislation does not contemplate bargaining between the PSAC and the CCRA for these employees until the PSSRB has made its determinations under paragraph 48.1(7)(b) regarding the appropriate bargaining unit or units and which bargaining agent or agents shall represent the employees therein.

[111] Any other conclusion could lead to great instability in the work place during the transition period which is, in my opinion, the very opposite of what Parliament intended when it enacted section 48.1, namely, to effect a peaceful transition from one employer to another with minimal disruption to the employees and their bargaining rights. This could not be brought about if, from the moment of severance, the bargaining agent and the new separate employer were engaged in the essentially adversarial process of collective bargaining while, at the same time, the PSSRB was in the process of determining the new bargaining unit configuration. The PSSRB's determinations under paragraph 48.1(7)(b) could very well entail the holding of a representation vote with the accompanying possibility of work place unrest. Furthermore, the bargaining unit or units determined by the PSSRB to be appropriate, as well as the bargaining agent or agents certified to represent them, could very well be different from what existed before the PSSRB's determinations. In addition, the fact that the parties could be in a legal strike position at the same time that the PSSRB renders such a decision would in all likelihood lead to turmoil in the workplace – at least until the dust finally settled. I do not believe that this is what Parliament intended.

[112] Prior to the implementation of section 48.1 of the PSSRA, when a portion of the central administration of the Public Service was transferred from Part I to Part II of Schedule I of the PSSRA, the employees lost all their negotiated terms and conditions of employment as well as the representation of their bargaining agents. I believe that the purpose of section 48.1 is to ensure that this does not happen again. Once the PSSRB renders its determinations under paragraph 48.1(7)(b) in relation to the employees of the CCRA represented by the PSAC, thereby establishing a stable labour relations framework for collective bargaining, then either party can invoke the provisions of paragraph 48.1(7)(c) and give the other notice to bargain.

[113] The same reasoning applies to the CCRA's request for the appointment of a fact finder under section 54.1 of the PSSRA in relation to the employees in the Computer Systems Group who are represented by the PIPSC. At the time of severance there was a collective agreement in force for these employees which was continued in force by virtue of subsection 48.1(1). Its term, however, has since expired. In light of the provisions of section 48.1 of the PSSRA, I conclude that bargaining is not contemplated between the PIPSC and the CCRA for these employees until the PSSRB has rendered its determinations under subsection 48.1(4).

[114] This does not mean that the CCRA and the PSAC or the PIPSC cannot, on joint agreement, alter either the frozen terms and conditions of employment or the provisions of the collective agreement which have been continued in force by virtue of paragraph 48.1(7)(a) and subsection 48.1(1) of the PSSRA respectively. This is exactly what occurred when the CCRA and the PSAC entered into the collective agreement for the four bargaining units in question with an expiry date of October 31, 2000. However, where the employer and the bargaining agent fail to agree, the dispute resolution mechanisms under the PSSRA, such as the appointment of a conciliation board or a fact finder, are not available to them during the transition period.

[115] While it is true that there is always the possibility that following a severance there will be no request by the parties for determinations by the PSSRB under either subsection 48.1(4) or paragraph 48.1(7)(b) of the PSSRA because the parties are content to live with the existing bargaining unit configuration, in fact this has never occurred. Of course, section 48.1 is a relatively new enactment and there have only been a few serverances since it came into force on June 20, 1996. Nonetheless, in dealing with the aftermath of severances which occurred before the coming into force of section 48.1, the PSSRB's determinations have always resulted in some sort of reconfiguration of the bargaining units as they existed before the severance. The same is true for severances which occurred after the coming into force of section 48.1. In any case, I believe that following a severance the parties must await the expiry of the time limits for the bringing of these application under either subsection 48.1 (3) or paragraph 48.1 (7)(b) to ensure that no such application is being made before they can invoke the mandatory requirement to engage in collective bargaining triggered by the giving of notice to

bargain. They must also abide by the requirements of subsections 48.1 (5) and 48.1 (6) where applicable.

[116] For all these reasons, the PSAC's request for the appointment of a conciliation board is denied.

Yvon Tarte,
Chairperson

Ottawa, April 12, 2001.