

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

STAFF OF THE NON-PUBLIC FUNDS, CANADIAN FORCES

Employer

RE: Request for Arbitration
Administrative Support and Operational Categories

Before: Yvon Tarte, Chairperson

For the Bargaining Agent: Brenda A. Dagenais

For the Employer: Catharine Rogers

Decided without an oral hearing

DECISION

On July 22, 1999, the Public Service Alliance of Canada (PSAC) pursuant to subsection 64(1) of the *Public Service Staff Relations Act* (PSSRA) requested arbitration of a dispute affecting all employees of the Staff of the Non-Public Funds, Canadian Forces (SNPF) in the Administrative Support Category and the Operational Category employed at the Canadian Forces Base, Petawawa.

In a letter dated August 6, 1999, the SNPF objected to the jurisdiction of the Public Service Staff Relations Board (PSSRB) to entertain this request for arbitration on the ground that "[l]egal recourse to arbitration is not available to the Parties at this point in time...".

Following an exchange of correspondence with the parties, the PSSRB advised the PSAC and the SNPF on October 22, 1999, of its intention "to make a determination on the jurisdictional issue raised in this matter on the basis of the written submissions of the parties". The PSSRB also invited them to forward any additional submissions which they wished to make by a certain date.

The following facts are not in dispute. On June 30, 1997, the PSSRB certified the PSAC as bargaining agent for the bargaining unit in question: Board file 125-18-74. Pursuant to subsection 38(1) of the PSSRA, the PSAC selected arbitration as the applicable dispute resolution process. Notice to bargain collectively was given for this bargaining unit under subsection 50(1) of the PSSRA on December 24, 1997. The parties met and negotiated on several occasions between March 5 and May 22, 1998.

The relevant statutory provisions are the following. The *Budget Implementation Act, 1996*, suspended arbitration as a dispute resolution process under the PSSRA for three years from June 20, 1996, by adding section 62 thereto which provides:

62. (1) *The operation of sections 64 to 75.1 is suspended during the period of three years following the coming into force of this section.*

(2) *Where the operation of sections 64 to 75.1 is suspended pursuant to subsection (1), section 43 of the Interpretation Act applies, with such modifications as the circumstances require, as if the suspended provisions had been repealed.*

(3) During the period in which the operation of sections 64 to 75.1 is suspended, this Act shall be read, with such modifications as the circumstances require, without any references to arbitration as a process for the resolution of a dispute and any similar references to arbitration, except in respect of existing arbitral awards.

Effective June 17, 1999, the Budget Implementation Act, 1999, replaced subsection 62(1) of the PSSRA, as previously enacted, with the following:

62. (1) The operation of sections 64 to 75.1 is suspended

(a) in the case of any portion of the public service of Canada specified in Part I of Schedule I or any separate employer designated under subsection (4), with respect to a dispute in relation to collective bargaining commenced by notice to bargain collectively given during the period beginning on the day on which this section, as it read immediately before the coming into force of section 19 of the Budget Implementation Act, 1999, came into force and ending on June 20, 2001; and

(b) in the case of any other separate employer, during the period beginning on the day on which this section, as it read immediately before the coming into force of section 19 of the Budget Implementation Act, 1999, came into force and ending on June 20, 1999.

It also added subsection 62(4) to the PSSRA which reads:

(4) The Governor in Council may, by order, designate any separate employer for the purposes of paragraph (1)(a).

Section 43 of the Interpretation Act provides:

43. Where an enactment is repealed in whole or in part, the repeal does not

(a) revive any enactment or anything not in force or existing at the time when the repeal takes effect,

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offence committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d),

and an investigation, legal proceeding or remedy as described in paragraph (e) may be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

Position of the SNPF

The SNPF's position is, essentially, that the term of the collective agreement for this bargaining unit expired and notice to bargain was given during the period when arbitration as a dispute resolution process was suspended under the PSSRA, that is, prior to June 17, 1999. Furthermore, the SNPF is in the process of having itself designated by the Governor in Council for the purposes of paragraph 62(1)(a) of the PSSRA. Therefore, arbitration is not available as a dispute resolution process to the PSAC for this bargaining unit for this round of bargaining. Furthermore, section 43 of the *Interpretation Act* does not assist the PSAC as the "Bargaining Agent had not accrued any rights or privileges with respect to the current renewal of this Collective Agreement prior to either the previous or the current suspension of arbitration".

Position of the PSAC

The PSAC submitted that the only dispute resolution process which it has specified for this bargaining unit under subsection 37(1) of the PSSRA is the referral thereof to arbitration. The suspension of arbitration as a dispute resolution process contained in the *Budget Implementation Act, 1996*, was a temporary one which came to an end on June 17, 1999, insofar as it applied to separate employers. The right to arbitration was not repealed; rather, it was suspended for a specified period of time. It revived on June 17, 1999, except as otherwise provided in the *Budget Implementation Act, 1999*. As the SNPF has not yet been designated by the Governor in Council pursuant to subsection 62(4) of the PSSRA for the purposes of paragraph 62(1)(a) thereof, the application of sections 64 to 75.1 of the PSSRA has resumed in force for this bargaining unit.

Although the date on which notice to bargain was given is relevant for the purposes of paragraph 62(1)(a) of the PSSRA, it is not mentioned in paragraph 62(1)(b) thereof. As paragraph 62(1)(b) applies here, the date on which notice to bargain was given is irrelevant. At the time the PSAC requested arbitration on July 22, 1999, it acted in accordance with its rights as provided expressly and implicitly in paragraph 62(1)(b). Furthermore, the Chairperson has a mandatory obligation under the PSSRA to act on that request.

Reasons for Decision

Section 62 of the PSSRA as enacted by the Budget Implementation Act, 1996, suspended arbitration as a dispute resolution process for a period of three years, from June 20, 1996. During that three year period, the only dispute resolution process available to the SNPF and the PSAC for this bargaining unit was the referral thereof to conciliation. On June 17, 1999, the Budget Implementation Act, 1999, amended section 62 by replacing subsection 1 thereof and adding subsection 4. Subsection 62(1) of the PSSRA, as amended, restored arbitration as a dispute resolution process for all separate employers which have not been designated under subsection 62(4). Since the SNPF has not yet been designated under subsection 62(4) of the PSSRA, it is unnecessary for me to determine what the effects of such a designation would be on this dispute.

In effect, what I must determine is the effect of the repeal of subsection 62(1) of the PSSRA on the facts of this case. The SNPF submits that the term of the collective agreement expired and notice to bargain was given during the period of the suspension of arbitration. Therefore, referral to arbitration is not available to the parties as a dispute resolution process for this round of bargaining. On the other hand, the PSAC submits that, because the request for arbitration was made after the expiration of the suspension of arbitration insofar as it applies to separate employers, the Chairperson has a mandatory obligation to act on that request.

In *Driedger on the Construction of Statutes*, Third edition, by Ruth Sullivan, the author states at page 525:

... *The rule governing repeals was stated by Lord Tenterden in Surtees v. Ellison:*

...when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.

The effect of this rule was to preclude the application of repealed legislation to circumstances and events occurring prior to repeal. Anything that was at past and closed upon repeal was effectively abandoned. Persons charged with offences were free to go; persons entitled to benefits lost their entitlement. For obvious reasons, the common law position proved unacceptable and was displaced by statute.

Therefore, under the common law rule, the PSAC's position would prevail. However, the common law rule has been modified by section 43 of the *Interpretation Act* which provides for the survival of repealed legislation for some purposes. In particular, paragraph 43(c) specifies that the repeal does not "affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed". The effect of this provision is summarized in *Driedger* at page 526 in the following terms:

... In short, the repealed law continues to apply to pre-repeal facts for most purposes as if it were still good law.

The interpretation of a provincial statutory provision virtually identical to paragraph 43(c) of the federal *Interpretation Act* was considered by the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706. In so doing, Vancise J.A. stated at page 727:

... the courts have established two criteria or factors which will help to determine whether a right is acquired, accrued or accruing. First, one must establish a tangible or particular legal right, the right cannot be abstract, it must be more than a possibility, more than a mere expectation; and, secondly, establish that the right was sufficiently exercised or solidified before the repeal of the enactment to justify its protection.

Applying these principles to the facts of this case, I am satisfied that, when notice to bargain was given on December 24, 1997, which was during the period when arbitration was suspended as a dispute resolution process for the SNPF, the parties had a tangible legal right to refer their dispute to conciliation if they were unable to resolve it themselves. Prior to the repeal of the suspension, the parties met on several occasions to discuss their differences. I believe this meets the second criterion

mentioned by Vancise J.A. Accordingly during this round of bargaining, the parties are obliged to proceed under the repealed provisions of subsection 62(1) of the PSSRA and the only dispute resolution process available to them is the referral thereof to conciliation. Therefore, the objection of the SNPF to my jurisdiction to appoint an arbitration board is valid and the PSAC's request for arbitration is dismissed.

**Yvon Tarte,
Chairperson**

OTTAWA, December , 1999.