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File: 125-2-89

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

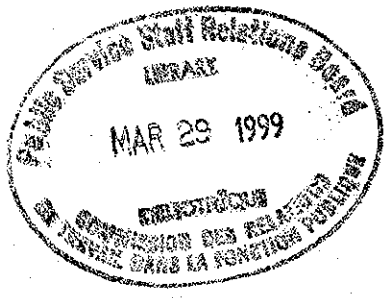
PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

BROOKFIELD LEPAGE JOHNSON CONTROLS

Respondent



RE: Request for Review under Section 27 of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson
Philip Chodos, Vice-Chairperson
Marguerite-Marie Galipeau, Deputy Chairperson

For the Applicant: Andrew Raven, Counsel

For the Respondent: Daniel Black, Counsel

Decided without an oral hearing

In early August, 1998, the Public Service Alliance of Canada (PSAC) presented a reference under section 99 of the *Public Service Staff Relations Act* (*PSSRA*). The statement of particulars filed by the PSAC as part of its section 99 reference indicated that it was the certified bargaining agent for employees involved in the property management of Federal Government buildings across Canada. The PSAC further alleged that, on 28 May 1998, the respondent, Brookfield Lepage Johnson Controls (BLJC), became a successor employer by operation of section 47.1 of the *Canada Labour Code* (*CLC*).

By way of remedy, the PSAC requested, inter alia, that the Public Service Staff Relations Board (PSSRB) issue an order declaring BLJC a successor employer, in accordance with section 47.1 of the *CLC*.

In response to the applicant's section 99 reference, the respondent argued that it and its employees fell outside the jurisdiction of the *CLC*. The respondent further submitted that the PSSRB had no jurisdiction to entertain the section 99 reference in the absence of a finding that section 47.1 of the *CLC* is applicable to BLJC.

By letter dated 10 November 1998, the PSSRB advised the parties to the section 99 reference that it was of the view that any determination as to whether a group of employees is subject to the provisions of Part I of the *CLC* had to be made by the Canada Labour Relations Board (CLRB), now the Canada Industrial Relations Board (CIRB), and that, consequently, no hearing would take place with respect to the section 99 reference mentioned until such time as the CLRB/CIRB had in fact determined whether the employees in question are subject to Part I of the *CLC*.

By letter dated 13 November 1998, the PSAC asked the PSSRB that its decision of 10 November 1998 be reconsidered in accordance with the provisions of sections 21 and 27 of the *PSSRA*.

In keeping with the novel nature of the matter and the fact that the parties were not given a full opportunity to present their views on the issue, the PSSRB agreed to review its decision and asked the parties to submit written arguments, which follow.

Arguments Presented by the PSAC

This is further to the Board's letter of November 17, 1998 and shall constitute the submissions of the Public Service Alliance of Canada in connection with the above matter.

The Decision under Review

1. *By its Decision of November 10, 1998, the Board ruled, in paragraph 2 thereof, that "a determination as (to) whether a group of employees is subject to the provisions of part I of the Canada Labour Code may only be properly made by the Canada Labour Relations Board".*

2. *This finding raises no difficulties of interpretation. By its Decision, the Public Service Staff Relations Board has ruled that it is without authority to determine whether it has the jurisdiction to consider and rule upon the reference to the Board initiated by the Alliance pursuant to section 99 of the PSSRA.*

3. *By letter dated November 13, 1998, the Applicant, PSAC, requested that the Board reconsider this ruling in accordance with the powers of the Board under sections 27 and 21 of the Act. The reasons advanced in support of this request were essentially that the Board's Decision of November 10, 1998, was arrived at without notice to the parties and without affording them an opportunity to advance written or oral submissions on the issue thereby breaching principles of natural justice and procedural fairness. As well, PSAC maintained that the Board's decision to decline jurisdiction was contrary to the express provisions of section 47.1(b) of the Code.*

The Board's Power to Reconsider this Decision

4. *The language of section 27 of the PSSRA is clear on its face and permits the Board, in its discretion, to "review, rescind, remand, alter or vary any decision or order made by it...".*

5. *To the knowledge of the Applicant, the Board has not identified an exhaustive list of circumstances which may appropriately trigger a section 27 review. However, it is the position of the Alliance that, at a minimum, the Board's discretion should be exercised in favour of granting a review when any of the following circumstances, either alone or together, are present.*

(a) Whenever a material change of circumstances has occurred between the date of the original decision and the request for review such that the propriety or correctness of the Board's decision is called into question;

(b) Whenever important questions of policy or principle are involved – including important questions of jurisdiction, and the Board has reason to believe that the original decision warrants reconsideration; and

(c) Whenever there has been a serious error in the process leading up to the delivery of the original Board decision. Such serious process error would include circumstances where the decision under review is rendered by the Board in violation of principles of procedural fairness and natural justice or where, for any other reason, proper input from any of the parties affected has been denied.

6. *The question of the proper approach to a labour board's powers of review has been addressed by the Canada Labour Relations Board and the Public Service Staff Relations Board. In the specific context of section 27 of the PSSRA, the Public Service Staff Relations Board noted as follows in the case of Public Service Alliance of Canada and Treasury Board, PSSRB File 125-2-83, dated December 9, 1997, at paragraphs 17 and 18:*

> *"Applications under section 27 (previously section 25 of the Act) have been the subject of relatively few Board decisions. In one of these decisions, Public Service Alliance of Canada and Treasury Board dated December 18, 1995 (supra), the Board made the following observations:*
>
> > *In the Board's view, section 25 was not designed to enable an unsuccessful party to reargue the merits of its case. The purpose of section 25 was rather to enable the Board to reconsider a decision either in the light of changed circumstances or so as to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where some other compelling reason for review exists. It would be not only inconsistent with the need for some finality to proceedings, but also unfair and burdensome to a successful party to allow the unsuccessful one to try to shore up or reformulate arguments that had already been considered and disposed of.*

The Board notes that this approach to section 25 of the Act is very much in line with that taken by the Ontario Labour Relations Board in relation to its statutory power "if it considers it advisable to do so, [to] reconsider any decision". In Lorain Products (Canada) Ltd. [1978] OLRB Rep. March 262, at page 263, the Ontario Board explained its understanding of the purpose of this power in these terms:

> *The Board having regard to the labour relations chaos which would result if there were not some finality to its decisions has been loathe to reconsider where the parties have been afforded a full and fair hearing unless the party seeking reconsideration can show that it has uncovered new evidence which could not have been obtained with reasonable diligence and adduced at the initial hearing and which, if adduced, would have a material and determining effect on the decision of the Board. The parties to the Board proceedings are entitled to rely upon the decisions of the Board in the knowledge that they are final and conclusive unless evidence of the type referred to above is uncovered (See re Detroit River Construction Ltd. case, 63 CLLC 16, 260 at p. 1117, York University case, [1976] OLRB Rep., April 187, Ottawa Journal case, [1977] OLRB Rep. Sept. 549). The Board does not permit reconsideration for the purpose of allowing a party to repair the deficiencies in its case or to reargue the merits of its case.*

The Canada Labour Relations Board has similarly refused to reconsider decisions it has rendered unless satisfied that good reasons exist for doing so. According to Dorsey, Canada Labour Relations Board: Federal Law and Practice (1983), at page 300:

> *The Board provides an avenue to seek review where there is a serious disagreement with the Board's "interpretation of the Code or its policy". It also wishes to provide a quick, inexpensive avenue to correct errors that may be the grounds for judicial review; to allow the introduction of evidence not brought forward in the original proceeding for "good and sufficient reasons"; to reconsider a Board order that has had "unanticipated consequences in its application"; and to review decisions that turn*

> *on conclusions of law (e.g., "constitutional jurisdiction or interpretation of extraneous statutes").*
>
> *This list of reasons and grounds for internal review is not exhaustive. The Board is still in the process of evolving its procedure and has not foreclosed the possibility of new grounds to support an application for review in the nature of an appeal.*

The undersigned wholeheartedly agrees that the Board should be very cautious about inviting a reconsideration of its decisions. It should be a hallmark of labour relations board decisions that they are rendered expeditiously; leaving the door wide open to a review of earlier decisions goes against that grain and undermines the objective of finality in the resolution of disputes. Having said this, however, the Board must be cognizant of the indisputable fact that section 27 does serve an important purpose in allowing the Board to reconsider decisions, where there are appropriate reasons for doing so. Where these reasons exist, the Board has not hesitated to uphold a request for a review under section 27, even in the absence of new evidence or a change of circumstances; see for example the Board's recent decision in Public Service Alliance of Canada and Treasury Board and the Professional Institute of the Public Service of Canada (board files 125-2-68 to 70). If the Board were to do otherwise, it would be effectively rendering the provisions of section 27 nugatory and without any meaning. Furthermore, in some circumstances a review under section 27 may actually assist in expediting the resolution of the dispute by providing, in the words of former Canada Labour Relations Board Vice-Chairman Dorsey "a quick, inexpensive avenue to correct errors that may be the grounds of judicial review"."

7. *In the respectful submission of the Alliance, the present circumstances justify the Board's exercise of its authority under section 27 of the PSSRA. To begin with, although the Respondent employer made clear its position that the provisions of the Canada Labour Code were inapplicable to its operation on the basis that the work in question was provincially regulated, at no time did the Respondent advance the position before the PSSRB that the Board was without jurisdiction to rule on the validity of the Respondent's division of powers defence.*

8. *In fact, by its Statement of Position, forwarded to the Board under cover of its letter of August 31, 1998, the Respondent expressly requested that the Board render a decision, declare that the labour relations of the Respondent fell outside of the jurisdiction of the Canada Labour Code and dismiss the section 99 reference for this reason. Notably, at no time did the Respondent submit that the jurisdictional issue was one which could only be ruled upon by the Canada Labour Relations Board as was the conclusion reached in the PSSRB's Decision of November 10, 1998.*

9. *Accordingly, in the respectful submission of the Alliance, the parties were not afforded any reasonable opportunity to address the issue which led to the Board's Decision under review herein and, for this reason alone, the section 27 review is justified.*

10. *Moreover, it is apparent that the legal issue raised by this proceeding is the jurisdiction of the Public Service Staff Relations Board to entertain references and grievances engaged by operation of subsection 47.1(b) of the Code in circumstances where a jurisdictional division of powers defence is raised by the Respondent. To the knowledge of the Alliance, this is a matter of first impression for the Board. As important issues of policy and jurisdiction are raised here, the exercise of the Board's authority under section 27 is further justified.*

The Correctness in Law of the Board's Ruling of November 10, 1998

11. *Subsections 47.1(a) and (b) provide as follows:*

> *(a) the terms and conditions of employment contained in a collective agreement or arbitral award that, by virtue of section 52 of the Public Service Staff Relations Act, 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 corporation or business, as employer, the bargaining agent for those employees and those employees until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the employer and the bargaining agent agree otherwise;*

(b) the Public Service Staff Relations Act applies in all respects to the interpretation and application of any term or condition continued or resumed by paragraph (a);

12. *These provisions are absolutely clear. In any case where the successor provisions of section 47 and section 47.1 of the Code are alleged to be engaged, violations of terms and conditions of collective agreements extended by section 52 of the PSSRA must be addressed and ruled upon by the Public Service Staff Relations Board and the Public Service Staff Relations Board only.*

13. *Where a jurisdictional challenge is raised by a respondent employer, whether it be in response to an individual employee grievance or a section 99 reference, that jurisdictional issue must be considered by an adjudicator appointed under the PSSRA or, in the case of section 99 references, by the PSSRB itself. Parliament has mandated that the Public Service Staff Relations Board is the only statutory tribunal with jurisdiction to rule upon this section 99 reference. As such, the PSSRB must consider the legal validity of any jurisdictional challenge and render a ruling on it.*

14. *Moreover, there is nothing in the Code which provides that the CLRB has exclusive jurisdiction over the constitutional issues raised in the present application. Had Parliament intended that the jurisdiction of one Board be paramount over the other, it could have expressed such an intention in clear terms. For example, section 11(1.1) of the Financial Administration Act provides that Part II of the Code applies to the public service but that the PSSRB has the sole jurisdiction to determine any matters arising under that Part.*

15. *On this basis, the PSSRB must approach the jurisdictional challenge raised in this case on the same basis and in the same manner as if a Respondent employer maintained that a particular grievor was not an "employee" for purposes of the PSSRA, or if it was alleged that section 47.1 was not engaged by reason of the transfer in question occurring prior to the freeze generated by section 52. In all of these instances, the merits of the jurisdictional challenge can only be considered and ruled upon by the Public Service Staff Relations Board.*

16. *Notably, the Respondent employer did not suggest otherwise until subsequent to the Board's Decision of November 10, 1998.*

17. *Finally, to whatever extent the provisions of subsection 47.1(b) may appear curious given that the Public Service Staff Relations Board will be called upon to determine the applicability of the Canada Labour Code over a particular work, undertaking or business, the fact remains that this provision has expressed the will of Parliament and, as indicated, Parliament's intention is abundantly clear.*

Deferral to the CLRB

18. *For the reasons noted above, there is only one statutory tribunal which has the legal authority to rule upon the allegations advanced by the Alliance in this section 99 reference alleging a breach by the Respondent of provisions of the subject collective agreement. That statutory tribunal is the Public Service Staff Relations Board.*

19. *There is nothing in the Canada Labour Code or the Public Service Staff Relations Act which gives the PSSRB the discretion to defer ruling on this important question of law until the Canada Labour Relations Board has examined the issue. In the submission of PSAC, it makes no legal or labour relations sense that a matter would be put before the PSSRB, that the PSSRB would defer ruling on the challenge to its jurisdiction, remit the legal issue to the CLRB for its determination and, depending upon the view adopted by the CLRB, resume or not resume hearings on the merits of the grievance and/or reference.*

20. *In this regard, it is trite law that "labour relations delayed are labour relations defeated and denied". See, Journal Publishing Co. of Ottawa v. Ottawa Newspaper Guild Local 205, (May 17, 1977), [1977] O.J. No. 8 (Ont. C.A.) at paragraph 4. As the Board and the Respondent are aware, applications to the CLRB for relief under subsection 47.1(c) of the Code may not be initiated until a least 120 days, or approximately four months, have elapsed after the subject transfer from the federal public service to the successor employer. In these circumstances, the Alliance has great difficulty understanding what possible labour relations purpose would be served in requiring employees and bargaining agents to delay the efficient adjudication of their grievances and references for a period of four months until such time as an application to the CLRB could be presented.*

21. *It is well known that privatization initiatives within the reach of section 47 and section 47.1 of the Code are invariably disruptive to the work environment and introduce significant elements of uncertainty among*

affected employees as to their collective bargaining rights. Such is the case here. The essence of this section 99 reference is the allegation that this employer has effectively ignored the Public Service Alliance of Canada as bargaining agent for those employees whose jobs were transferred from the federal public service to the Respondent. Parliament could not have intended that the grievance and adjudication machinery enshrined in the Public Service Staff Relations Act should be called to a halt at the instance of any respondent employer advancing a division of powers defence.

Conclusion

22. *For these reasons, it is the respectful submission of the Alliance that the Board should:*

    (a) Reconsider its Decision of November 10, 1998;

    (b) Find that its preliminary determination that "whether a group of employees is subject to the provisions of Part I of the Canada labour Code may only be properly made by the Canada Labour Relations Board" is wrong in law;

    (c) Declare that the Board may rule upon the jurisdictional challenge raised by the Respondent as requested by the Respondent in its submissions of August 31, 1998; and

    (d) Proceed with the hearing originally scheduled for January 20 to 22, 1999 at Ottawa.

Arguments Presented by BLJC

Brookfield LePage Johnson Controls ("BLJC") replies to the submissions of the Public Service Alliance of Canada ("PSAC") as follows (in accordance with the paragraph numbers and headings used in PSAC's December 16, 1998 submissions).

The Decision Under Review

1. *BLJC agrees.*

2. *BLJC disagrees. The Public Service Staff Relations Board (the "PSSRB") did not rule that it was without authority to determine whether it has the jurisdiction to consider and rule upon the reference to the PSSRB initiated by PSAC pursuant to section 99 (the "Section 99 Reference") of the Public Service Staff Relations Act (the "PSSRA"). Rather, the PSSRB chose to defer to the Canada Labour Relations*

Board (the "CLRB") to make the determination as to whether or not this group of employees is subject to the provisions of Part I of the Canada Labour Code (the "Code").

3. *In effect, the PSSRB's November 10, 1998 decision adjourned the hearing of the Section 99 Reference. The principles of natural justice and procedural fairness were not violated by the PSSRB in adjourning the hearing. There is no requirement under the PSSRA or the P.S.S.R.B. Regulations and Rules of Procedure (the "Rules") that the PSSRB provide notice to the parties or invite the parties to make written or oral submissions respecting the adjournment of a matter before the PSSRB.*

   Assuming, without conceding, that the PSSRB has jurisdiction to answer the question of whether or not BLJC is a corporation or business to which Part I of the Code applies, the PSSRB's decision to defer to the CLRB to answer this question is not contrary to the express provisions of subsection 47.1(b) of the Code. BLJC agrees that the PSSRB is the only statutory tribunal with jurisdiction to rule upon the Section 99 Reference, pursuant to subsection 47.1(b) of the Code. However, subsection 47.1(b) has no application unless BLJC is subject to part I of the Code. Subsection 47.1(b) of the Code does not confer jurisdiction on the PSSRB to determine whether or not BLJC is subject to Part I of the Code. If the CLRB determines that BLJC is subject to Part I of the Code, subsection 47.1(b) of the Code will operate to confer jurisdiction on the PSSRB to rule upon the Section 99 Reference.

The Board's Power to Reconsider the Decision

4. *BLJC agrees.*

5. *(a) PSAC has not submitted that there has been any material change of circumstances between the PSSRB's November 10, 1998 decision and the request for review.*

   (b) BLJC disagrees that an issue respecting the constitutional jurisdiction of the PSSRB constitutes grounds under section 27 of the PSSRA for reconsideration of a decision of the PSSRB.

   (c) The PSSRB did not commit any serious error in the process leading up to the delivery of its November 10, 1998 decision. The November 10, 1998 decision was not rendered in violation of the principles of

procedural fairness and natural justice. The PSSRB has no obligation to invite the parties to make written or oral submissions to avoid committing a serious error in the process leading up to the delivery of a decision where the effect of the PSSRB's decision is merely to adjourn a hearing before it.

6. *In the Professional Institute of the Public Service of Canada, the PSSRB allowed an application for reconsideration of its decisions in the absence of new evidence or a change of circumstances because the decisions in question concerned provisions and procedures in the PSSRA that had been substantially revised and that had not previously been addressed by the PSSRB. Furthermore, the decisions in that case concerned the safety and security designation procedure under the PSSRA which the PSSRB held to be "of critical importance to the proper functioning of the [PSSRA]." Finally, the parties in that case had come to an agreement as to a more efficient process than that set out in the decisions being reconsidered.*

   The factors which prompted the PSSRB to allow the application for reconsideration in the Professional Institute case are not present in the instant case. First, the revisions in this case (i.e., the amendment to section 47 and the addition of section 47.1) have been made to the Code, which is the CLRB's "home statute", not to the PSSRA. Furthermore, the PSSRB's decision in this case is, in effect, merely an adjournment of the hearing of the Section 99 Reference, not a decision on an issue of critical importance to the proper functioning of the PSSRA. Finally, there is no agreement between the parties in this case on "a more efficient process".

7. *BLJC disagrees that the circumstances of this case justify the exercise of the PSSRB's authority under section 27 of the PSSRA to review its November 10, 1998 decision. The fact that BLJC did not advance the position before the PSSRB that the PSSRB was without jurisdiction to rule on the constitutional jurisdictional issue is irrelevant to the exercise of the PSSRB's discretion to adjourn the hearing of Section 99 Reference. The PSSRB has the authority under the Rules to adjourn a hearing without consulting the parties to the hearing.*

8. *BLJC agrees. However, for the four (4) reasons referred to in BLJC's submissions to the PSSRB dated December 15, 1998, BLJC submits that the PSSRB's decision to defer to the CLRB to make the determination as to whether this*

group of employees is subject to the provisions of Part I of the Code was reasonable and correct.

9. *BLJC submits that the PSSRB was under no duty, statutory or otherwise, to afford the parties any opportunity to address the constitutional jurisdictional issue before deciding to adjourn the hearing of the Section 99 Reference. The fact is that the PSSRB has not made any decision with respect to the constitutional jurisdictional issue.*

10. *Assuming, without conceding, the PSSRB has jurisdiction to answer the question of whether or not BLJC is a corporation or business to which Part I of the Code applies and regardless of whether or not this is a matter of first impression of the PSSRB, the fact remains that it makes both legal and labour relations sense, in the circumstances of this case, for the PSSRB to defer to the CLRB to answer this question, for the four (4) reasons outlined in BLJC's submissions dated December 15, 1998.*

The Correctness in Law of the Board's Ruling of November 10, 1998

11. *BLJC agrees.*

12. *The PSSRB's November 10, 1998 decision does not require the CLRB to address and rule upon alleged violations of terms and conditions of any collective agreement extended by section 52 of the PSSRA. The PSSRB has merely deferred to the CLRB the question of whether or not BLJC is a corporation or business to which Part I of the Code applies, such that section 47 and 47.1 of the Code apply in these circumstances to BLJC. If the CLRB's answer is "yes", then the PSSRB will address and rule upon the alleged violations.*

13. *Parliament's mandate respecting the PSSRB's jurisdiction to rule upon the Section 99 Reference only applies if section 47 of the Code applies to BLJC. The PSSRB has no jurisdiction to rule upon the Section 99 Reference until such time as a decision is made as to whether or not section 47 applies to BLJC. The PSSRB may only rule upon the Section 99 Reference if BLJC is a corporation or business to which Part I of the Code applies. The PSSRA does not stipulate that only the PSSRB, and not the CLRB, can decide whether or not BLJC is a corporation or business to which Part I of the Code applies.*

14. *BLJC agrees. However, there is nothing in the Code or the PSSRA which provides that the PSSRB has exclusive jurisdiction over the constitutional issues raised in the Section 99 Reference. Furthermore, the fact that Parliament chose to grant the PSSRB sole jurisdiction to determine any matters arising under Part II of the Code, but not under Part I of the Code, is compelling support for the proposition that the CLRB has jurisdiction to determine, in the context of the Section 99 Reference, whether or not BLJC is a corporation or business to which Part I of the Code applies.*

15. *The question of whether or not BLJC is a corporation or business to which Part I of the Code applies is a very different question than that of whether or not (a) a particular grievor was an "employee" for the purposes of the PSSRA, or (b) section 47.1 of the Code was engaged because the transfer in question occurred prior to the freeze generated by section 52 of the PSSRA. BLJC submits that, before these questions can be addressed, the question of whether or not the employer is a corporation or business to which Part I of the Code applies must first be answered. If the employer is not subject to Part I of the Code, the issue of whether or not the grievor was an "employee" is irrelevant. If the employer is not subject to Part I of the Code, then a "deletion or severance" within the meaning of sections 47 and 47.1 of the Code has not taken place and it is irrelevant when the freeze was generated by section 52 of the PSSRA. It is a condition precedent to the PSSRB's jurisdiction to consider these questions that a determination be made that the employer is a corporation or business to which Part I of the Code applies.*

16. *The fact that BLJC did not advance the position before the PSSRB that the PSSRB was without jurisdiction to rule on the constitutional jurisdiction issue is irrelevant to the exercise of the PSSRB's discretion to adjourn the hearing of the Section 99 Reference. Furthermore, the PSSRB's decision to adjourn the hearing was reasonable and correct for the four (4) reasons referred to in BLJC's submissions dated December 15, 1998.*

17. *BLJC agrees that it "appears curious" why the PSSRB would be called upon to determine the applicability of the Code over a particular work, undertaking or business. Surely that is the responsibility of the CLRB, not the PSSRB. In reality, subsection 47.1(b) of the Code does not call upon the PSSRB to determine the applicability of the Code over a particular work, undertaking or business. Subsection 47.1(b) calls upon the PSSRB to consider and*

rule upon the Section 99 Reference, only if subsection 47.1(b) of the Code applies to BLJC.

Deferral to the CLRB

18. *While the PSSRB may be the only statutory tribunal with authority to rule upon the allegations advanced by PSAC in the Section 99 Reference, the PSSRB is not the only statutory tribunal with authority to rule upon the jurisdictional question of whether or not BLJC is a corporation or business to which Part I of the Code applies. In fact, the CLRB is best suited to answer this jurisdictional question, because the question:*

    (a) arises under the CLRB's "home statute", the Code;

    (b) falls within the express powers of the CLRB, under paragraph 16(p)(i) of the Code; and

    (c) has already been put before the CLRB.

19. *The Rules grant the PSSRB the discretion to adjourn a hearing which is before it. Furthermore, it makes both legal and labour relations sense for the PSSRB to defer to the CLRB to rule on the question of constitutional jurisdiction because:*

    (a) the CLRB is best suited to answer a question which arises under its "home statute"; and

    (b) it would be enormously inefficient to have two tribunals deal independently with the same question, with the risk of conflicting decisions being issued.

20. *If "labour relations delayed are labour relations defeated and denied," then BLJC questions why PSAC would be in favour of a process which could result in:*

    (a) the PSSRB ruling that Part 1 of the Code applies to BLJC but the CLRB ruling that it does not, or vice versa; and

    (b) the PSSRB ruling that Part I of the Code applies to BLJC but a Québec Labour Commissioner ruling that provincial labour laws apply to BLJC (see Tab 1), or vice versa.

    These results would cause chaos, confusion and interminable delays. In contrast, allowing the CLRB, the statutory tribunal best suited to rule on the constitutional jurisdictional question, the time to consider this issue

carefully will ensure that labour relations are neither delayed nor defeated.

21. *Any disruption to the work environment and introduction of significant elements of uncertainty among BLJC's affected employees is the direct result of PSAC's Section 99 Reference and PSAC's correspondence to BLJC's employees. Significantly, PSAC's Section 99 Reference is aimed at gaining bargaining rights in a situation where even PSAC does not believe that it retains bargaining rights. BLJC relies upon a "Policy Statement by Nycole Turmel to the House of Commons Standing Committee on Human Resources Development on Bill C-19 (An Act to amend the Canada Labour Code Part 1)" dated March 26, 1998 (a copy of which is attached hereto at Tab 2), wherein PSAC's National Executive Vice-President states the following (at p. 3):*

> *"As well intentioned as we believe them to be, the successor rights provisions of both the Code and the Public Service Staff Relations Act are incapable of protecting workers who are transferred to private companies in a majority of situations.* ***Hence, over 500 workers with the Department of Public works and Government Services are being forced to certify under provincial labour codes despite the fact that their work is being transferred to a single company. Situations like these are not protected by the amended Section 47, and will more than likely be repeated with increasing regularity in the months and years ahead."*** *[Emphasis added.]*

22. *For all of the foregoing reasons, BLJC submits that the PSSRB should:*

    (a) refuse PSAC's application for reconsideration of the November 10, 1998 decision;

    (b) defer to the CLRB to answer the question of whether or not BLJC is a corporation or business to which Part I of the Code applies, for the four (4) reasons referred to in BLJC's submissions dated December 15, 1998;

    (c) adjourn the hearing of the Section 99 Reference until such time as the CLRB has decided whether or not BLJC is a corporation or business to which Part I of the Code applies; and

(d) if the CLRB rules that the BLJC is not a corporation or business to which Part I of the Code applies, dismiss the Section 99 Reference.

Reply of the PSAC

Further to the Board's letter of December 16, 1998, the following shall constitute the submissions in reply of the Public Service Alliance of Canada to the response of Brookfield Lepage Johnson Controls ("BLJC"), dated December 15, 1998.

Jurisdiction of the PSSRB

1. BLJC asserts, at paragraphs 15 to 17 of its submission, that this matter falls within the express powers of the Canada Labour Relations Board ("CLRB") as a result of paragraph 16(p)(i) of the Canada Labour Code ("the Code"). The Alliance submits that section 16 of the Code cannot be read to confer exclusive jurisdiction to the CLRB in the circumstances of the present case. Section 16 clearly provides that the powers listed are exercisable 'in relation to any proceeding before it'. As the jurisdiction over the section 99 reference herein is within the authority of the PSSRB, any jurisdictional challenge raised in this proceeding cannot be 'in relation to any proceeding before [the CLRB]'.

2. Moreover, as set out at paragraph 14 of its submission of December 16th, the Alliance asserts that, had Parliament intended that the jurisdiction of one Board be paramount over the other, it could have expressly stated such an intention. Parliament's recognition of the continuing authority of the PSSRB with respect to matters arising under the present collective agreement is expressly stated in section 47.1 of the Code and renders BLJC's assertions in this regard clearly untenable.

3. In addition, contrary to BLJC's assertion at paragraphs 16-17, it is the position of the Alliance that the decision of the Supreme Court of Canada in Canada (Attorney General) v. Public Service Alliance of Canada has no bearing on the present case. In that case, the Supreme Court determined that the application of the PSSRA could not be extended such as to bring employees of a third party contractor, performing services in prisons operated by Correctional Services Canada, within the definition of employee in the Act. The Court held that only the Crown, through the Public Service Commission, could establish such an employment relationship. This is clearly not the case here. In contrast, Parliament has, through section 47 and 47.1 of the Code, expressly stated its

intention to extend the application of the PSSRA in certain circumstances.

4. Given its importance, the Alliance repeats its submission that Parliament has established one tribunal to deal with matters related to the subject matter of the Alliance's section 99 reference and that is the PSSRB.

5. In light of the foregoing and its submissions of December 16th, the Alliance submits that the PSSRB is entitled to address any jurisdictional challenge raised by BLJC in this proceeding.

Applications for Certification under a Provincial Statute

6. The Alliance rejects BLJC's assertion, at paragraph 21, that the filing of an application for certification in a province is an admission by the Alliance that Part I of the Code does not apply in the circumstances of this case. The factual circumstances involving the Alliance's application in Québec are not identical to the factual circumstances of the Code proceeding and, in any case, there may be doubt about the constitutional character of the work. The CLRB itself has expressly recognized the merit in such action where there may be doubt over the constitutional jurisdiction of the work performed by the employees in question. See, for example, Johnston Terminals and Storage Ltd., [1980] 2 Can.L.R.B. 390, affd [1982] 2 F.C. 549 (C.A.).

Conclusion

7. For these reasons, it is the respectful submission of the Alliance that the Board should grant the relief requested in its submission of December 16th, 1998 and reschedule dates for the conduct of a hearing into this matter.

Reasons for Decision

In order to decide this matter, it is important to examine certain provisions of the *CLC*, which, to some extent, have been alluded to by the parties:

2. In this Act,

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,

(d) a ferry between any province and any other province or between any province and any country other than Canada,

(e) aerodromes, aircraft or a line of air transportation,

(f) a radio broadcasting station,

(g) a bank,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage or two or more of the provinces,

(i) a work, undertaking or business outside the exclusive legislative authority of the legislature of the provinces, and

(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act.

PART I

...

INDUSTRIAL RELATIONS

...

3. (1) In this Part,

...

"Board" means the Canada Industrial Relations Board established by section 9.

...

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

...

16. The Board has, in relation to any proceeding before it, power

...

(p) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether

...

(i) a person is an employer or an employee,

(ii) a person performs management functions or is employed in a confidential capacity in matters relating to industrial relations,

(iii) a person is a member of a trade union,

(iv) an organization or association is an employers' organization, a trade union or a council of trade unions,

(v) a group of employees is a unit appropriate for collective bargaining,

(vi) a collective agreement has been entered into,

(vii) any person or organization is a party to or bound by a collective agreement, and

(viii) a collective agreement is in operation.

...

47.(1) Where the name of any portion of the public service of Canada specified from time to time in Part I or II of Schedule I to the Public Service Staff Relations Act is deleted and that portion of the public service of Canada is established as or becomes a part of a corporation or business to which this Part applies, or where a portion of the public service of Canada included in a portion of the public service of Canada so specified in Part I or II of Schedule I to that Act is severed from the portion in which it was included and established as or becomes a part of such a corporation or business,

(a) a collective agreement or arbitral award that applies to any employees in that portion of the public service of Canada and that is in force at the time the portion of the public service of Canada is established as or becomes a part of such a corporation or business continues in force, subject to subsections (3) to (7), until its term expires; and

(b) the Public Service Staff Relations Act applies in all respects to the interpretation and application of the collective agreement or arbitral award.

(2) A trade union 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 a trade union is authorized to be made under section 24.

(3) Where the employees in a portion of the public service of Canada that is established as or becomes a part of a corporation or business to which this Part applies are bound by a collective agreement or arbitral award, the corporation or business, as 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 of Canada is

established as or becomes a part of the corporation or business, 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 a corporation or business or bargaining agent, the Board, by order, shall

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

(b) determine which trade union 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 corporation or business,

(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 sixty days after the date the Board makes its determination, apply to the Board for an order granting leave to serve on 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, the corporation or business, as employer of the employees, 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 tenth day after the date the portion of the public service of Canada is established as or becomes a part of the corporation or business, apply to the Board for an order granting leave to serve on the other party a notice to bargain collectively.

(7) Where the Board has made an order pursuant to paragraph (4)(c), this Part applies to the interpretation and application of any collective agreement or arbitral award affected thereby.

(8) An arbitral award that is continued in force by virtue of subsection (1) is deemed to be

(a) part of the collective agreement for the bargaining unit to which the award relates, or

(b) where there is no collective agreement for the bargaining unit, a collective agreement for the bargaining unit to which the award relates.

for the purposes of section 49, and this Part, other than section 80, applies in respect of the renewal or revision of the collective agreement or entering into a new collective agreement.

47.1 Where, before the deletion or severance referred to in subsection 47(1), notice to bargain collectively has been given in respect of a collective agreement or arbitral award binding on employees of a corporation or business who, immediately before the deletion or severance, were part of the public service of Canada,

(a) the terms and conditions of employment contained in a collective agreement or arbitral award that, by virtue of section 52 of the Public Service Staff Relations Act, 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 corporation or business, as employer, the bargaining agent for those employees and those employees until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the employer and the bargaining agent agree otherwise;

(b) the Public Service Staff Relations Act applies in all respects to the interpretation and application of any term or condition continued or resumed by paragraph (a);

(c) on application by the corporation or business, as employer, or the 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 corporation or business who are represented by the bargaining agent constitute one or more units appropriate for collective bargaining, and*
>
> *(ii) which trade union shall be the bargaining agent for the employees in each such unit;*
>
> *(d) where the Board makes the determinations under paragraph (c), the corporation or business, as employer, or the bargaining agent may, by notice, require the other to commence collective bargaining under this Act for the purpose of entering into a collective agreement; and*
>
> *(e) this Part, other than section 80, applies in respect of a notice given under paragraph (d).*

It is clear, from reading sections 47 and 47.1 of the *CLC*, that their application in any given situation is contingent on whether a portion of the Public Service of Canada has become part of a business to which Part I of the *CLC* applies.

Sections 47 and 47.1 apply only to employees who are employed on or in connection with the operation of a federal work, undertaking or business as defined by the *CLC*. In making its argument, it appears that the applicant has chosen to refer to subsections 47.1(a) and (b) in isolation, without reference to the fact that section 47.1 applies only to deletions or severances which fall under section 47(1), which, in turn, applies only to businesses covered by Part I of the *CLC*.

Furthermore, the "Board" referred to in section 47 can only be the Canada Industrial Relations Board mentioned in section 3 of the *CLC*. Therefore we conclude that the legislative intent is that the CIRB is the appropriate tribunal to interpret its own legislation and determine whether a corporation or business is covered by Part I of the *CLC*. Without such a determination, the applicant's section 99 reference cannot be entertained by the PSSRB.

Even if we were to assume that the PSSRB has concurrent jurisdiction with the CIRB to determine if BLJC's enterprise constitutes a federal work, undertaking or business as defined by the *Canada Labour Code*, we are of the view that, even then it

would be preferable to defer to the CIRB's concurrent authority and therefore to adjourn for the time being a decision in the PSAC's section 99 reference in order to avoid the possibility of conflicting decisions which in the end could be to the detriment of all parties involved.

Accordingly, for the reasons noted above, this application is dismissed.

Yvon Tarte
For the Board

OTTAWA, March 24, 1999