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Parliamentary Employment and Staff Relations Act

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

HOUSE OF COMMONS SECURITY SERVICE EMPLOYEES ASSOCIATION

Complainant

and

PARLIAMENTARY PROTECTIVE SERVICE

Respondent

and

SENATE PROTECTIVE SERVICE EMPLOYEES ASSOCIATION

Interested party

Indexed as
House of Commons Security Service Employees Association v. Parliamentary Protective Service

In the matter of a complaint under sections 10, 37, and 38 of the *Parliamentary Employment and Staff Relations Act*

Before: Stéphan J. Bertrand, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Sylvain Beauchamp, counsel

For the Respondent: George Vuicic, counsel

For the Interested party: Geneviève Brunet-Baldwin, counsel

Heard at Ottawa, Ontario,
March 29, 2018.

File:
(FPSLREB Translation)

REASONS FOR DECISION

I. Complaint before the Board

1 On March 6, 2017, the House of Commons Security Service Employees Association (SSEA) made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") against the Parliamentary Protective Service (PPS) for refusing to bargain collectively and for bad-faith bargaining, which included a motion for an interim order under ss. 10, 37, and 38 of the *Parliamentary Employment and Staff Relations Act* (R.S.C., 1985, c. 33 (2nd Supp.); *PESRA*).

2 In its March 31, 2017, response, the PPS denied having refused to bargain with the SSEA and alleged that ss. 104 and 108 in Division 10 of the *Economic Action Plan 2015 Act, No. 1* (S.C. 2015, c. 36; "the *2015 Act*") rendered ss. 37 and 38 of the *PESRA* ineffective.

3 On February 27, 2018, the Senate Protective Service Employees Association ("Senate PSEA") requested and obtained interested party status.

4 The SSEA's complaint is allowed, for the reasons that follow. There is no need for a determination on the motion for an interim order since the SSEA withdrew it at the start of the hearing.

5 The hearing in this matter took place on March 29, 2018. The parties presented no testimony, and they agree to the following version of the facts.

6 In 2015, the Parliament of Canada passed the *2015 Act*, which amended the *Parliament of Canada Act* (R.S.C., 1985, c. P-1), creating the PPS, a new parliamentary entity responsible for physical security matters throughout the Parliamentary Precinct and on Parliament Hill. Since June 23, 2015, PPS employees have been divided into three bargaining units: SSEA members, Senate PSEA members, and members of the bargaining unit represented by the Public Service Alliance of Canada who work as scanners and scanner supervisors.

7 On November 19, 2015, the PPS filed a motion with the Board under s. 103(1) of the *2015 Act* for an order confirming that the three existing bargaining units for PPS employees (mentioned earlier) would henceforth constitute a single unit and asked the Board to determine the bargaining agent for this bargaining

unit. This request is still before the Board. The hearing began in November 2017 and will continue in October 2018 and May 2019; the availability of the four counsel involved is the most significant obstacle to a speedy hearing.

8 The *2015 Act* has the following transitional provisions:

…

> ***100. (1)*** *All of the persons who occupy a position within the Senate Protective Service or within the House of Commons Protective Service immediately before the day on which this Division comes into force occupy their position within the* [Parliamentary Protective] *Service on that day.*
>
> ***(2)*** *Nothing in subsection (1) is to be construed as affecting the status of any person who, immediately before the day on which this Division comes into force, occupied a position within the Senate Protective Service or within the House of Commons Protective Service, except that the person, beginning on that day, occupies their position within the* [Parliamentary Protective] *Service.*
>
> ***101. (1)*** *Subject to sections 102 to 113, every collective agreement or arbitral award that applies to an employee who, immediately before the day on which this Division comes into force, occupied a position within the Senate Protective Service or within the House of Commons Protective Service, and that is in force immediately before that day continues in force until its term expires.*

…

9 Before the *2015 Act* came into force, the SSEA and the House of Commons were bound by a collective agreement that was concluded in 2014 and that expired on March 31, 2017, which was kept in force and was implemented by the PPS and the SSEA beginning on June 23, 2015.

10 On February 6, 2017, the SSEA sent the PPS notice to bargain collectively, invoking s. 37 of the *PESRA*, which provides the following:

> ***37 (1)*** *Where the Board has certified an employee organization as bargaining agent for a bargaining unit, the bargaining agent, on behalf of the employees in the bargaining unit, may require the employer affected or the employer may require the bargaining agent, by notice in writing given in accordance with subsection (2), to commence bargaining collectively, with a view to the conclusion of a*

> *collective agreement.*
>
> ***(2)*** *Notice to bargain collectively may be given*
>
> > ***(a)*** *where no collective agreement or arbitral award is in force and no request for arbitration has been made by either of the parties in accordance with the Part, at any time; and*
> >
> > ***(b)*** *where a collective agreement or arbitral award is in force, within the period of two months before the agreement or award ceases to operate.*

11 The SSEA suggested some meeting dates to the PPS and reminded it that under s. 38 of the *PESRA*, it was required to commence bargaining within 20 days of the notice to bargain collectively. Section 38 provides the following:

> ***38*** *Where notice to bargain collectively has been given, the bargaining agent and the officers designated to represent the employer affected shall, without delay, but in any case within twenty days after the notice was given or within such further time as the parties may agree, meet and commence to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement.*

12 On February 8, 2017, the PPS informed the SSEA that it did not intend to act on the notice to bargain collectively. The PPS did not meet with the SSEA to begin collective bargaining. It stressed that the SSEA did not have the capacity to give it notice to bargain collectively in the absence of permission from the Board. It added that the parties could not bargain due to the uncertainty around the appropriate bargaining unit and bargaining agent while awaiting the Board's determination in that respect (the application under s. 103(1) of the *2015 Act*).

13 On March 27, 2018, the SSEA filed an amended complaint in which it asked the Board to allow it, if necessary, to give the PPS notice to bargain collectively under s. 37 of the *PESRA* and to order the PPS to comply with its obligations under s. 38 of the *PESRA* on receipt of the notice.

II. Summary of the arguments

A. For the SSEA

14 According to the SSEA, the PPS's position is not legally credible. Section 38 of the *PESRA* clearly provides three obligations that flow from sending

notice to bargain collectively. First is the requirement that the parties meet within 20 days of the notification. Second is the requirement to start collective bargaining in good faith within the same time. Third is the ongoing obligation to make every reasonable effort to conclude a collective agreement.

15 The SSEA emphasized that the Supreme Court has stated several times that freedom of association encompasses the right to collective bargaining and that this right cannot be compromised, except to the extent that it can be justified under s. 1 of the *Canadian Charter of Rights and Freedoms* (Schedule B of the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*"). In support of that argument, the SSEA referred me to *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391 at paras. 98 to 100, *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3 at paras. 66 and 67.

16 The SSEA's view is that the right of its members to collective bargaining is guaranteed by law under ss. 37 and 38 of the *PESRA* and constitutionally under s. 2(d) of the *Charter*. According to it, the PPS's position and conduct not only compromises ss. 37 and 38 of the *PESRA* but also constitutes a substantial infringement of the freedom of association protected by s. 2(d) of the *Charter*.

17 The SSEA maintained that the PPS's position is unfounded that the *2015 Act* renders ss. 37 and 38 of the *PESRA* ineffective. It added that not only does that law in no way render ss. 37 and 38 ineffective, it also reinforces the right to collective bargaining in certain circumstances and should be interpreted in accordance with the *Charter*.

18 According to the SSEA, the only provision of the *2015 Act* that clearly provides that a notice given under s. 37 of the *PESRA* can be invalidated is s. 106, which applies when notice to bargain collectively was given before that Act came into force, which is not so in this case and that in any event should be narrowly construed. Therefore, the SSEA maintained that since the *2015 Act* contains no provision other than s. 106, which is about notice to bargain collectively given before the *2015 Act* came into force, expressly rendering ss. 37 and 38 ineffective, it is clear that the legislator did not intend to render

ineffective the *PESRA*'s collective bargaining regime, except in the single case specifically set out. Had the legislator intended such an extreme effect of constitutional law, it would have expressed it clearly and specifically.

19 Additionally, the SSEA suggested that the *2015 Act* reinforces the right to bargain collectively by, under s. 105(1), giving the parties an additional opportunity to exercise their right to bargain collectively when one of them wishes to amend the structure of bargaining units. Section 105(1) of the *2015 Act* provides the following:

> ***105. (1)*** *If no application for an order under subsection 103(1) is made within the period specified in subsection 103(2), the Service or any bargaining agent bound by a collective agreement or arbitral award that is continued in force under subsection 101(1) may apply to the Board for an order granting leave to give to the other party, under section 37 of the* Parliamentary Employment and Staff Relations Act*, a notice to bargain collectively.*

20 According to the SSEA, therefore, the legislator granted the parties the right to ask the Board for permission to give the other party notice to bargain collectively at a time other than the customary time frames set out in s. 37 of the *PESRA*. If no application under s. 103 of the *2015 Act* is made within the prescribed time frames, the parties may ask the Board for leave to make an application to bargain collectively before the period set out in s. 37 of the *PESRA*. Whether or not an application has been made under s. 103 of the *2015 Act*, each party retains its rights under ss. 37 and 38 of the *PESRA*, within the time frames set out in s. 37.

21 Finally, the SSEA maintained that any interpretation of the *2015 Act* must favour the full implementation of its constitutional right to collective bargaining and that ss. 37 and 38 of the *PESRA* must be applied, since they constitute the statutory embodiment of that constitutional right.

22 As indicated, the SSEA asked the Board to order the PPS to immediately comply with its obligations under s. 38 of the *PESRA*. In the alternative, it asked the Board for leave to give the PPS notice to bargain collectively under s. 37 of the *PESRA* and for an order that the PPS comply with its obligations under s. 38 of the *PESRA* on its receipt of the notice. As for the issue of potential damages, the SSEA asked that I retain jurisdiction on this issue

in the event the complaint is allowed.

B. <u>For the Senate PSEA</u>

23 The Senate PSEA indicated that it invoked and supported the SSEA's arguments.

24 It also asked me to consider certain additional arguments. First, it referred to the meaning and the scope of s. 113(1)(d) of the *2015 Act*, which provides as follows:

> ***113. (1)*** *The provisions of Part I of the* Parliamentary Employment and Staff Relations Act*, and any rules or regulations made under that Act, apply to, or in respect of, the following and any matter related to the following:*
>
> …
>
> ***(d)*** *a collective agreement or arbitral award that is continued in force under subsection 101(1) ….*

25 According to the Senate PSEA, it is clearly apparent that ss. 37 and 38 of the *PESRA* continue to apply with respect to a collective agreement that is continued in force under s. 101(1) of the *2015 Act*, which is so in this case. Therefore, in no way are those sections deprived of effect.

26 Second, the Senate PSEA referred me to the meaning and scope of s. 115 of the *2015 Act*, which provides the following:

> ***115.*** *The provisions of Division I of Part I of the* Parliamentary Employment and Staff Relations Act *and any rules or regulations made under that Act, as they read immediately before the day on which this Division comes into force, continue to apply in respect of any complaint made under that Division before that day that relates to the Senate Protective Service or the House of Commons Protective Service.*

27 According to the Senate PSEA, it is clearly apparent that ss. 37 and 38 of the *PESRA* continue to apply with respect to the complaint at issue in this case.

28 Third, the Senate PSEA also referred me to the meaning and scope of s. 104(1) of the *2015 Act*. According to the Senate PSEA, the legislator in no way required a party to a collective agreement to obtain the Board's leave before

giving notice to bargain collectively under s. 37 of the *PESRA*, except when the Board has decided that a collective agreement will remain in force following an application made under s. 103 of the *2015 Act*, which is not so in this case.

29 The Senate PSEA does not seek redress since it did not make the complaint with respect to the PPS; it is acting only as an interested party to this dispute.

C. <u>For the PPS</u>

30 The PPS's position can be summarized as follows. First, it maintained that in accordance with the *2015 Act*, a party to a collective agreement must obtain the Board's leave before giving notice to bargain collectively under s. 37 of the *PESRA*, which the SSEA did not do.

31 Second, the PPS maintained that it would be premature and illogical to start bargaining before the Board determines the appropriate bargaining unit and bargaining agent for the employees involved. It argued that its duty to bargain collectively is suspended until the Board decides the merits of its consolidation request.

32 The PPS recognized that the *2015 Act* does not explicitly address the current situation, which is when an application under s. 103(1) is made for a determination of the makeup of bargaining units when the collective agreement kept in force by that Act expires after the deadline for making an application referred to in s. 103(1) but before the Board determines the application. According to it, the existence of such a legislative vacuum in the *2015 Act* should be interpreted in light of the legislative context and the legislator's intent.

33 The PPS maintained that when read together, ss. 104 and 105 of the *2015 Act* clearly set out that a party to a collective agreement cannot give notice to bargain collectively without the Board's leave and that it is evident that the legislator intended to prevent a party from giving notice to bargain collectively before the Board decides an application made under s. 103(1). According to the PPS, notice to bargain collectively given after an application is made but before the Board decides it constitutes a situation analogous to those set out in ss. 104 and 105 of the *2015 Act* and therefore cannot be filed without the Board's leave, once the Board has rendered its decision on the application.

34 The PPS asked that I conclude that the legislator's intent was that all issues about the structure of bargaining units and the bargaining agent be resolved before collective bargaining starts.

35 According to the PPS, it would not be consistent to allow the SSEA, like the other two associations, to move forward and give notice to bargain collectively without the Board's permission in the context of the unification of Parliamentary security and the transitional provisions in the *2015 Act*. Allowing the SSEA to bargain collectively without the Board's leave would lead to consequences incompatible with the purpose of that *Act*. In support of its arguments, the PPS referred me to paragraph 27 of *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (Appendix 6), and to page 494 of *R. v. Nabis*, [1975] 2 SCR 485 (Appendix 4), two Supreme Court of Canada decisions.

36 The PPS also maintained that even had the SSEA obtained the Board's leave to give notice to bargain collectively, any collective bargaining would be futile and superficial in the absence of the Board's decision as to the composition of the bargaining unit or units, the identification of the applicable collective agreement, and the determination of the bargaining unit's bargaining agent.

37 Additionally, the PPS's view was that the provisions of the *2015 Act* that apply do not have to be interpreted in accordance with the *Charter*, since they are not legislative provisions that lend themselves to divergent interpretations. Instead, that Act did not foresee this situation. Therefore, in the absence of real ambiguity, the Board cannot use *Charter* values to fill the legislative vacuum. Instead, it must rely on the legislator's intent.

38 The PPS requested a declaration that the SSEA does not have the capacity to give notice to bargain collectively without the Board's approval and that its duty to bargain collectively is suspended until the Board rules on the application under s. 103(1) of the *2015 Act*.

D. <u>The SSEA's reply</u>

39 According to the SSEA, this is a refusal to bargain collectively by the PPS, nothing more. The *2015 Act* in no way prevents the PPS from bargaining collectively and does not obligate the SSEA to obtain the Board's permission to

give notice to bargain collectively under s. 37 of the *PESRA* in the circumstances that apply. Although the Act aims to create a single protective service for Parliament and thus improve the coordination of the security response on Parliament Hill, it in no way merges the existing bargaining units; nor does it suspend the duties and obligations of the parties to the collective agreement that is in force. An application under s. 103 of the *2015 Act* entails no such suspension.

40 The SSEA also stressed that rendering ss. 37 and 38 of the *PESRA* ineffective implies rendering ineffective its ss. 46 to 49, which involve dispute resolution, as well as ss. 50 and 51, which involve requesting arbitration, since those sections apply only in the case of a failure of collective bargaining, which the SSEA has been deprived of. So, not only are the employees that the SSEA represents being deprived of the right to strike under s. 73 of the *PESRA*, they are also being deprived of the rights to bargain collectively and to arbitration as long as the Board has not decided the PPS's consolidation request. According to the SSEA, this is a flagrant attack on its members' constitutional rights guaranteed by the *Charter*.

41 Finally, the SSEA maintained that there is no legal vacuum in this situation and that even if one exists, it is not up to the Board to fill it. Instead, its role is limited to interpreting the laws that apply to this dispute.

III. Reasons

42 Sections 37 and 38 of the *PESRA* allow the parties to begin collective bargaining and create the following three obligations: (1) the obligation for the parties to meet within 20 days of the notice to bargain collectively, (2) the obligation to start negotiating in good faith, and (3) the ongoing obligation to make every reasonable effort to conclude a collective agreement.

43 In this case, it must be determined whether the *2015 Act* effectively states that the Board's leave is necessary so that one party to the collective agreement can give notice to bargain collectively under s. 37 of the *PESRA* and whether the obligation to bargain collectively that flows from s. 38 is suspended while awaiting the Board's decision on the request to consolidate the PPS bargaining units.

44 I concur with the allegations of the SSEA and the Senate PSEA that there is no legislative or legal vacuum in this case and that even if one existed, it is not for the Board to fill it; instead, its role is limited to interpreting the laws that apply to this dispute.

45 The Supreme Court of Canada's insights about the need to use a modern method of statutory interpretation that harmonizes with the spirit and intent of the statute as well as with the legislator's intent are certainly not in dispute. Nevertheless, my view is that it would be imprudent to associate the legislator's intent to create an integrated security service in the Parliamentary Precinct and on Parliament Hill to ensure uniform interventions in the event of threats with the intention to consolidate the three existing bargaining units and to render ineffective the legislative provisions dealing with the parties' right to bargain collectively and the corresponding obligations.

46 The *2015 Act* sets out more than once that the collective agreement in question should be kept in place (see, for example, ss. 101(1) and 113(1)(d)) and in no way renders ineffective ss. 37 and 38 of the *PESRA*, except in a specific case (see s. 106), which does not apply in this case. Section 106 deals with the lapse of a notice to bargain collectively that was given before the *2015 Act* came into force.

47 In this situation, the fact that the PPS filed a motion under s. 103(1) of the *2015 Act* in no way obligated the SSEA to obtain the Board's leave before taking advantage of s. 37 of the *PESRA*. Section 104 of the *2015 Act* is of no help to the PPS, since the Board has not yet ruled on its application, much less heard the parties' arguments on this subject:

> ***104. (1)*** *Either of the parties to a collective agreement or arbitral award that remains in force by reason of an order made under paragraph 103(1)*(c) *may apply to the Board for an order granting leave to give to the other party, under section 37 of the* Parliamentary Employment and Staff Relations Act*, a notice to bargain collectively.*
>
> [Emphasis added]

48 I cannot subscribe to the PPS's arguments that the legislator's intent was to obligate the parties to obtain the Board's leave before giving notice under s. 37 of the *PESRA* in this situation because it provided for that in ss. 104

and 105 of the *2015 Act*. Although the legislator chose to put this obligation in some provisions of that Act, the fact remains that it did not choose to do it for all circumstances, as shown in s. 108(b) of the *2015 Act.*

> ***108.*** *If a notice to bargain collectively is given before the day on which the Division comes into force,*
>
> **(a)** *on application by the Service or bargaining agent, made during the period beginning 120 days after the day on which this Division comes into force and ending 150 days after that day, the Board must make an order determining*
>
> ***(i)*** *whether the employees of the Service who are represented by the bargaining agent constitute one or more units appropriate for collective bargaining, and*
>
> ***(ii)*** *which employee organization is to be the bargaining agent for the employees in each such unit; and*
>
> **(b)** *if the Board makes the determination under paragraph* (a)*, the Service or the bargaining agent may, by notice given under section 37 of the* Parliamentary Employment and Staff Relations Act*, require the other to commence collective bargaining for the purpose of entering into a collective agreement.*

49 It is clear that in the situation described in s. 108 of the *2015 Act*, the legislator did not choose to impose on the parties the obligation to obtain the Board's leave before giving notice to bargain collectively under s. 37 of the *PESRA*. Therefore, the legislator was aware that some situations would require such leave and that others would not. It chose not to include such leave in this situation.

50 Had the legislator wanted to suspend collective bargaining after an application was made under s. 103 of the *2015 Act*, it could have done so unequivocally, but it did not. This type of situation was perfectly foreseeable. In any event, the legislator did not choose to legislate that notice to bargain collectively under s. 37 of the *PESRA* could not be given after an application under s. 103(1) of the *2015 Act* was made.

51 It is important to note that the PPS's application was made in 2015 and that it has not yet been fully heard. Although the collective agreement in question continues in force, the fact remains that since March 2017, the

employees involved have been deprived of the possibility of bargaining for better working conditions and that they could continue to be for a long time to come if I accept the PPS's position. This cannot be the result that the legislator had in mind when drafting the wording of s. 103 of the *2015 Act*, and it does not accord with the Supreme Court's insights in *Health Services and Support - Facilities Subsector Bargaining Assn.* in terms of making efforts to reach an agreement while avoiding undue delays. My view is that in this situation, an interpretation that favours continuing collective bargaining during the period of uncertainly is in perfect harmony with the spirit and intent of the *2015 Act* and with the legislator's intent.

52 As for the PPS's argument that any collective bargaining at this stage is futile and superficial, I cannot subscribe to it; it rests on highly speculative and unverifiable considerations. It seems to me perfectly plausible that the parties could begin talks that would eventually bear fruit, as long as they in good faith and the parties make reasonable efforts.

53 For the reasons stated earlier, I conclude that the *2015 Act* does not specify that the Board's leave is necessary for a party to a collective agreement to give notice to bargain collectively under s. 37 of the *PESRA*.

54 I also conclude that in this situation, the duty of a party to a collective agreement to bargain collectively is in no way suspended while awaiting the Board's decision on a request for consolidation under s. 103 of the *2015 Act*.

55 For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

56 The complaint is allowed.

57 The Board orders the Parliamentary Protective Service to comply with the terms of s. 38 of the *Parliamentary Employment and Staff Relations Act* immediately on receipt of this decision.

58 The SSEA asked for judicial and extrajudicial fees incurred as part of these proceedings as well as punitive damages of $100 000.00 as redress. I remain seized of the issue of potential damages associated with this complaint. The Board will suggest a timetable to the parties to hear their arguments on the redress so that I can decide this issue, if necessary.

October 10, 2018.

FPSLREB Translation

Stéphan J. Bertrand,
a panel of the Federal Public Sector
Labour Relations and Employment Board