Federal Court of Appeal | Cour d'appel fédérale

Date: 20190301

Dockets: A-235-17
A-236-17

Citation: 2019 FCA 41

CORAM: **NADON J.A.**
GAUTHIER J.A.
GLEASON J.A.

Docket: A-235-17

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

and

FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD

Intervener

Docket: A-236-17

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Heard at Ottawa, Ontario, on November 22, 2018.

Judgment delivered at Ottawa, Ontario, on March 1, 2019.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant seeks to set aside two decisions of the Federal Public Sector Labour Relations and Employment Board (the Board) in *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11 (CSC Reasons) and *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16 (CRA Reasons). In the two decisions, the Board allowed the unfair labour practice complaints brought by the respondent union, finding that the employer in each case had violated the statutory freeze enshrined in section 107 of the *Federal Public Sector Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 (the *FPSLRA*). In reaching these decisions, the Board determined that the complaints had been made in a timely fashion within the meaning of

subsection 190(2) of the *FPSLRA*, which requires that complaints be filed within 90 days of the date on which the complainant knew or ought, in the Board's opinion, to have known of the action or circumstances giving rise to the complaint.

[2] The applicant does not challenge the Board's determinations on the merits of the unfair labour practice complaints but, rather, only its determinations that the complaints were timely under subsection 190(2) of the *FPSLRA*.

[3] By orders of this Court dated January 10, 2018, the Board was granted permission to intervene in these applications. The Board has advanced the argument that its decisions in the instant case are not reviewable in light of the privative clause in subsection 34(1) of the *Federal Public Sector Labour and Employment Board Act*, enacted by the *Economic Action Plan 2013 Act, No. 2*, S.C. 2013, c. 40, s. 365 (the *FPSLREBA*).

[4] These applications were joined for hearing. The original of these Reasons will be placed in Court file A-235-17 and a copy of them in Court file A-236-17.

[5] For the reasons set out below, I conclude that the Board's arguments with respect to subsection 34(1) of the *FPSLREBA* are without merit and that the impugned portions of the Board's decisions are amenable to judicial review. However, I also conclude that the reasonableness standard of review applies and that the Board's determinations in respect of subsection 190(2) of the *FPSLRA* are reasonable. I would accordingly dismiss these applications,

with costs payable by the applicant to the respondent on the basis set out below. I would not award costs against the Board or in respect of the issues raised by it.

I. Background and the Decisions of the Board on Timeliness

[6] It is useful to commence by setting out the facts relevant to the timeliness issue and to summarize the Board's rulings on the issue.

[7] In both cases, at the times relevant to the complaints, the employer and the respondent union were engaged in collective bargaining and the statutory freeze enshrined in section 107 of the *FPSLRA* was in effect. That section provides in relevant part that, after notice to bargain collectively has been given and the collective agreement is still being negotiated, unless the parties agree otherwise, the terms and conditions of employment in force in the bargaining unit on the day notice to bargain was given continue in force and must be respected by the employer and the bargaining agent until either: a) the right to strike or lock-out accrues, where the resolution process includes the right to strike or lock-out, or b) until an arbitral award is rendered, where the resolution process includes arbitration. Thus, at the relevant times, the employers in these cases were prevented from unilaterally altering the terms and conditions of employment of employees in the bargaining units.

[8] In both cases, the employers determined they needed to make changes to employees' hours of work, by reducing them in the case of the Correctional Service of Canada, and by removing certain flexibilities, in the case of the Canada Revenue Agency. Neither obtained the consent of the respondent, the employees' bargaining agent. Both organizations gave advance

notice of the changes they intended to make to the affected employees and to the respondent. The respondent filed unfair labour practice complaints with the Board, alleging a violation of section 107 of the *FPSLRA*. The complaints in both cases were filed more than 90 days after the date the advance notices were given by the employers, but within 90 days of the date the changes were implemented.

[9] In both cases, the Board found the complaints to be timely under subsection 190(2) of the *FPSLRA*. The Board reasoned that the relevant 90-day period commenced on the date the impugned changes were made because the action or circumstance giving rise to the complaint, or to use the Board's words, the "triggering event" that started the running of the 90-day clock, was the change to employees' terms and conditions of employment and not the prior notice of the employers' intent to implement those changes: CRA Reasons at para. 10; CSC Reasons at para. 38. In reaching this conclusion, the Board relied on its previous case law to similar effect, citing *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 and *Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN v. Treasury Board*, 2016 PSLREB 47.

II. Are the Board's Decisions Reviewable?

[10] With this background in mind, I turn now to the Board's contention that its decisions in the present cases are unreviewable. As noted, the Board alleges that this conclusion flows from subsection 34(1) of the *FPSLREBA*. That provision provides that:

Every order or decision of the Board is final and is not to be questioned or reviewed in any court, except in	Les décisions et ordonnances de la Commission sont définitives et ne sont susceptibles de contestation ou

accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.	de révision par voie judiciaire que pour les motifs visés aux alinéas 18.1(4)*a*), *b*) ou *e*) de la *Loi sur les Cours fédérales* et dans le cadre de cette loi.

[11] Paragraphs 18.1(4)(*a*), (*b*) and (*e*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 provide:

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	*a*) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	*b*) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
[…]	[…]
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

[12] The Board submits that the portions of its decisions under review dealing with subsection 190(2) of the *FPSLRA* do not involve its jurisdiction, an alleged violation of procedural fairness or a claim of fraud or perjured evidence. Rather, in accordance with the decisions of this Court in *McConnell v. Professional Institute of the Public Service of Canada*, 2007 FCA 142, 362 N.R. 30 (*McConnell*) and *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, 415 N.R. 77 (*Boshra*), the Board says that its decisions on the timeliness issue involve questions of fact or of mixed fact and law. It asserts that such questions are reviewable under paragraphs 18.1(4)(*c*) and (*d*) of the *Federal Courts Act*, which refer to

errors of law and findings of fact made in a perverse or capricious manner or without regard for the material before the tribunal as grounds of review. Because these grounds are excluded from the purview of subsection 34(1) of the *FPSLREBA*, the Board submits that the impugned portions of its decisions are unreviewable.

[13] Faced with the reality that decisions of this nature made by the Board or by the Canada Industrial Relations Board (the CIRB) are routinely reviewed by this Court despite the presence of subsection 34(1) in the *FPSLREBA* (or of a similar provision in subsection 22(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2), the Board contends that its arguments are nonetheless ones it is entitled to make as it says the issue has not been definitively settled by this Court.

[14] In support of its position, the Board relies on the decisions of the Supreme Court of Canada in *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207 and *Crevier v. Attorney General (Québec)*, [1981] 2 S.C.R. 220, 38 N.R. 541, submitting that the Supreme Court there recognized that it was open to a legislature to limit the grounds of review so long as review for jurisdictional issues is available. The Board also points to statements made by this Court in *Piedmont Airlines Inc. v. United Steel Workers of America*, 2003 FCA 154 at para. 6, 303 N.R. 40; *Kowallsky v. Public Service Alliance of Canada*, 2008 FCA 183 at paras. 5, 7, 379 N.R. 196; *Société des Arrimeurs de Québec v. Canadian Union of Public Employees, Local 3810*, 2008 FCA 237 at para. 18, 381 N.R. 312; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194 at para. 24; *Democracy Watch v. Canada (Attorney General)*,

2018 FCA 195 at para. 5, which it says support its contention that the Board's errors of law, fact or of mixed fact and law are not reviewable.

[15] The Board further submits that its reading of subsection 34(1) of the *FPSLREBA* accords with the subsection's text, context and purpose, particularly in light of the need for expedition and finality in labour relations and the Board's avowed expertise in issues like the application of subsection 190(2) of the *FPSLRA*.

[16] Both the applicant, who represents the employers subject to the *FPSLRA*, and the respondent, the bargaining agent representing the majority of unionized employees subject to the Act, roundly reject the Board's arguments. They say that issues like those that arise in the instant cases are − and should be − subject to review under the deferential reasonableness standard.

[17] They point to *McConnell* and *Boshra* as examples of cases where this Court reviewed decisions identical to those involved in this application under the reasonableness standard. They also note that the case law of this Court recognizes that, for purposes of fitting within the grounds for review listed in subsection 18.1(4) of the *Federal Courts Act*, errors of law or fact that warrant intervention can be characterized as jurisdictional errors within the meaning of paragraph 18.1(4)(*a*) of the *Federal Courts Act*. In support of these arguments, they point to the decisions of this Court in *Canadian Union of Postal Workers v. Healy*, 2003 FCA 380, 311 N.R. 96 (*C.U.P.W. v. Healy*) and *Public Service Alliance of Canada v. Canadian Federal Pilots Association*, 2009 FCA 223, [2010] 3 F.C.R. 219 (*P.S.A.C. v. C.F.P.A.*).

[18] In *C.U.P.W. v. Healy* at para. 22, Evans J.A., who wrote for the Court, noted that:

> […] the grounds of review set out in subsection 18.1(4) overlap to a degree. Thus, a decision based on a finding of fact that is supported by no evidence is liable to be set aside on the ground that it was made either without jurisdiction (*Re Keeprite Workers' Independent Union et al. v. Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. CA); *Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, 494-95) or, possibly, in breach of the rules of natural justice (*R. v. Deputy Industrial Injuries Commissioner, Ex parte Moore*, [1965] 1 Q.B. 456, 488 (Eng. CA); *Minister for Immigration and Ethnic Affairs v. Pochi* (1980), 31 A.L.R. 666, 689 (Aust. Fed. Ct.)).

[19] To similar effect, in *P.S.A.C. v. C.F.P.A.* at paras. 32-33, 35, Evans J.A., again writing for the Court, explained that:

> 32. First, a tribunal will have "acted beyond its jurisdiction" [within the meaning of paragraph 18.1(4)(*a*) of the *Federal Courts Act*] if it had decided incorrectly a legal question for which correctness is the applicable standard of review. Such questions have been labelled "jurisdictional questions" or, to adopt the terminology of Justice Binnie referred to above, "jurisdictional issues". They may include provisions of a tribunal's enabling statute.
>
> 33. Second, even if the question decided by a tribunal is not "jurisdictional" in this sense, but is a "mere" question of law, the Court may nonetheless intervene on an application for judicial review if the tribunal's decision is unreasonable.
>
> […]
>
> 35. Even if its interpretation of section 58 is not subject to review for correctness, the Board will nonetheless have "acted beyond its jurisdiction" if its interpretation is unreasonable. Like other administrative tribunals, the Board is not authorized by Parliament to make a decision that is based on an unreasonable interpretation of its enabling legislation. Fidelity to the rule of law requires that individuals be afforded this minimum protection from the arbitrary exercise of public power by administrative decision makers, whether or not they are protected by a preclusive clause: *Khosa*, at paragraph 42.

[20] The applicant and respondent further submit that the decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*)

largely denude subsection 18.1(4) of the *Federal Courts Act* of content, with the result that decisions of all federal administrative tribunals, including the Board, are reviewable for reasonableness unless one of the exceptions to the application of the reasonableness standard discussed in *Dunsmuir* applies.

[21] In response, the Board disagrees and says that *Dunsmuir* and *Khosa* deal only with the issue of the standard of review to be applied and not to the grounds of review which may be raised. However, the Board also argues that *Dunsmuir* and subsequent case law of the Supreme Court significantly limit the frequency with which jurisdictional issues may be found. The impact, according to the Board, is that many of its decision are unreviewable by virtue of the combined effect of subsections 34(1) of the *FPSLREBA* and 18.1(4) of the *Federal Courts Act*.

[22] I cannot accept the Board's submissions for several reasons.

[23] First, they fly in the face of the myriad decisions of this Court and of the Supreme Court of Canada in which decisions of the Board, the CIRB or their predecessors, involving alleged errors of law, fact or mixed fact and law, have been reviewed under the deferential reasonableness standard (or previously under the patent unreasonableness standard) despite the presence of the privative clauses in subsection 34(1) of the *FPSLREBA* and subsection 22(1) of the *Canada Labour Code*. The 43 cases listed in the Appendix to these reasons have been decided on this basis in the last two years. For each prior year, several additional cases would be added to the list. Thus, contrary to what the Board asserts, this issue *has* been definitively settled by the jurisprudence.

[24] Second, as this Court held in *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79, [2018] 2 F.C.R. 573 at para. 18, the term "jurisdiction", when used in a provision like paragraph 18.1(4)(*a*) of the *Federal Courts Act*, must be understood in its appropriate historical context. This is in accordance with the principles of statutory interpretation, which require a court to have regard to the appropriate context when interpreting legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 221 N.R. 241; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27.

[25] In 1990, when Parliament adopted subsection 18.1 of the *Federal Courts Act*, errors of jurisdiction in Canadian administrative law were understood to include errors of law, in circumstances where the Board was required to offer a correct interpretation, and patently unreasonable legal interpretations, as was noted in *P.S.A.C. v. C.F.P.A.*; see also *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at pp. 1003-1004, 102 N.R. 1. Such errors were also understood to include findings of fact that would be caught by paragraph 18.1(4)(*d*) of the *Federal Courts Act*, as was noted in *C.U.P.W. v. Healy*. Thus, properly read in context, "jurisdictional errors" for purposes of setting forth a ground (as opposed to a standard) of review within the meaning of subsection 18.1(4) of the *Federal Courts Act* include situations where the Board makes an unreasonable legal interpretation or an error of fact within the ambit of paragraph 18.1(4)(*d*) of that Act.

[26] Third, contrary to what the Board asserts, the decisions of the Supreme Court of Canada in *Dunsmuir* and *Khosa* cannot be understood to narrow the range of Board decisions that may be judicially reviewed. Rather, they hold that a common standard of review framework is to be

applied to all federal administrative decision-makers and that, unless one of the exceptions discussed in *Dunsmuir* obtains, the applicable standard of review is reasonableness. This is evident both from the reasons of the majority in *Khosa*, at paragraphs 43 to 51 and from the reasons of Rothstein J. at paragraph 111 in the same case, where he discussed the import of the privative clause found in section 22 of the *Canada Labour Code*. He there wrote as follows:

> Section 22(1) expressly provides for review on questions of jurisdiction, procedural fairness, fraud or perjured evidence, but excludes review for errors of law or fact through express reference to s. 18.1(4) of the [*Federal Courts Act*]. Where the privative clause applies, i.e. with respect to s. 18.1(4)(*c*), (*d*), or (*f*), the court is faced with a tension between its constitutional review role and legislative supremacy. In such cases, the *Dunsmuir* analysis applies. There is no role for the *Dunsmuir* standard of review analysis where s. 22(1) expressly provides for review on questions of jurisdiction, natural justice and fraud. Correctness review applies in these cases.

[27] While the majority in *Khosa* disagreed that the *Dunsmuir* analysis applied only to paragraphs 18.1(4)(*c*) to (*f*) of the *Federal Courts Act*, they did not disagree that issues falling within the purview of paragraphs 18.1(4)(*c*) to (*f*) are subject to the *Dunsmuir* analysis. Thus, when read in their appropriate context, subsection 34(1) of the *FPSLREBA* and subsection 18.1(4) of the *Federal Courts Act* do not preclude review in the instant cases.

[28] Fourth, the cases on which the Board relies enumerated in paragraph 14 of these Reasons do not constitute a binding ruling on this issue. Rather, to the extent these cases may contain passages that might support the Board's interpretation, the Court's comments are made only in passing and do not settle the issue. The relevant authorities, which do settle the issue, are *P.S.A.C. v. C.F.P.A.* and *C.U.P.W. v. Healy*, which, as already noted, directly contradict the Board's arguments. Also relevant are the multitude of cases where this Court has reviewed under

the reasonableness standard decisions like those challenged in this application. Thus, the case law relied upon by the Board is not determinative.

[29] Fifth, contrary to what the Board asserts, its interpretation would not lead to greater expedition. Under the Board's approach, this Court would be required to decide as a preliminary issue what paragraph in subsection 18.1(4) of the *Federal Courts Act* applies to each argument advanced in an application for judicial review and to determine the Court's jurisdiction based on the characterization of issue. This sort of formalistic preliminary question-type analysis harkens back to the now abolished division in judicial review matters that limited review under the former section 28 (as opposed to section 18) of the *Federal Courts Act* to decisions made on a judicial or quasi-judicial basis: see *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at p. 197, 58 N.R. 1 (*per* Wilson J.); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 at pp. 895-902, 100 N.R. 241. This requirement led to convoluted, costly and lengthy debates about the character of a decision under review that did little to advance the substance of litigation, and these requirements were consequently abolished in the 1990 amendments to the *Federal Courts Act*: see *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 8. To adopt the Board's approach would reintroduce similar debates and delays in the judicial review process, which are antithetical to the sound labour relations that the *FPSLRA* is designed to foster. Thus, the Board's interpretation would in fact end up undermining the purpose of the Act.

[30] Finally, contrary to what the Board says, its interpretation runs afoul of the rule of law concerns that provide the constitutional underpinning for judicial review of administrative action by the independent judicial branch: see *Dunsmuir* at paras. 27-29; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at para. 13, 421 D.L.R. (4th) 381. Given recent pronouncements by the Supreme Court of Canada, the scope of jurisdictional issues that arise in administrative law cases is exceedingly limited, if such issues may still even be said to exist at all. Although the category of true questions of jurisdiction was recognized in *Dunsmuir* at para. 59 as attracting correctness review, the Supreme Court has repeatedly emphasized its narrow and exceptional nature: see, for example, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 39; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 26; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3 at para. 32. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 41, 36 Admin L.R. (6th) 1, the Supreme Court cast doubt on the category's future:

> 41. The reality is that true questions of jurisdiction have been on life support since *Alberta Teachers*. No majority of this Court has recognized a single example of a true question of *vires*, and the existence of this category has long been doubted. Absent full submissions by the parties on this issue and on the potential impact, if any, on the current standard of review framework, I will only reiterate this Court's prior statement that it will be for future litigants to establish either that the category remains necessary or that the time has come, in the words of Binnie J., to "euthanize the issue" once and for all (*Alberta Teachers*, at para. 88).

[31] As the Board acknowledges, the recognition that there are few, if any, questions of jurisdiction could result in its decisions being largely unreviewable. This cannot be.

[32] In *Dunsmuir*, the Supreme Court of Canada underscored that judicial review must be available as a constitutional imperative and cannot be ousted by a privative clause. At paragraph 31, Bastarache and LeBel JJ., writing for the majority, stated:

> 31. The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127).

[33] Thus, for all the foregoing reasons, contrary to what the Board asserts, its decisions in the instant cases are amenable to review by this Court.

[34] This conclusion, however, does not mean that subsection 34(1) of the *FPSLREBA* is without impact. To the contrary, it has a vital impact, namely, to indicate that the applicable standard of review is reasonableness and to underscore the considerable deference to be accorded to the Board in respect of decisions of this nature: see *Dunsmuir* at para. 52. This Court and the Supreme Court of Canada have often commented that subsection 34(1) of the *FPSLREBA*'s predecessors have precisely this impact. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at p. 962, 150 N.R. 161, the Supreme Court underlined that the privative clause is a reason "why the decisions of the Board made within its jurisdiction should be treated with deference by the court". Put into modern terms, the Board's decisions are to be reviewed on a reasonableness standard due in part to its being protected by this strict privative clause: *Exeter v. Canada (Attorney General)*, 2014 FCA 251, 465 N.R. 346; *Boshra* at para. 44; *McConnell* at para. 14.

III. Are the Board's Decisions Reasonable?

[35] Thus, the issue becomes whether the Board's decisions in these two cases on the timeliness issue are reasonable.

[36] The applicant submits that the Board's decisions are not reasonable because the Board offered an unreasonable interpretation of subsection 190(2) of the *FPSLRA*. More specifically, the applicant argues that the Board ignored the wording of the subsection, that its interpretation was inconsistent with the purposes of the *FPSLRA* and the objective of the 90-day limitation period enshrined in the subsection and that its interpretation contradicts much of the Board's prior case law, which the applicant submits is to the effect that the 90-day time period starts to run when notice of an intended employer action is given and not from when the action is taken. In support of this last point, the applicant relies on several cases dealing with the commencement of the 90-day period in circumstances other than statutory freeze complaints (for example, *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78; *Bunyan v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 85; *Cuming v. Butcher*, 2008 PSLRB 76; *Éthier v. Correctional Service of Canada*, 2010 PSLRB 7; *Forward-Arias v. Union of Solicitor General Employees*, 2010 PSLRB 81; *Baun v. National Component, Public Service Alliance of Canada*, 2010 PSLRB 127; *Crête v. Ouellet*, 2013 PSLRB 96; *Coulter v. Public Service Alliance of Canada*, 2014 PSLRB 53; *Esam v. Public Service Alliance of Canada (Union of National Employees)*, 2014 PSLRB 90; *Gibbins v. Professional Institute of the Public Service of Canada*, 2015 PSLREB 36).

[37] The applicant also relies on the Board's decisions in *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26 (*Chargehands Association)* and *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)*, 2017 PSLREB 37 (*IBEW*), where the Board heard statutory freeze complaints filed after notice of the impending change was given but before the change was made. The applicant says that the determinations made by the Board in its past decisions are irreconcilable with its timeliness finding in the instant cases.

[38] I disagree with the applicant on all points.

[39] Dealing first with the alleged inconsistency in the Board's case law, I see nothing inconsistent in the Board's determination in the two decisions under review as they are actually consistent with its prior case law and the case law of the CIRB, and of their predecessors, on the issue of when time limits in a statutory freeze complaint start to run (see, for example, *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46; *UCCO-SACC-CSN v. Treasury Board*, 2016 PSLREB 47; *Treasury Board v. PSAC*, 2017 PSLREB 11; see also *Canadian Air Line Pilots Association v. Air Canada, Montreal, Quebec* (1977), 24 di 203 (CLRB); *Vaillancourt v. Treasury Board (Transport Canada)*, [1988] CPSSRB No. 366; *Canadian Union of Public Employees v. Air Alliance Inc.* (1991), 15 C.L.R.B.R. (2d) 288). These cases hold that the relevant time period starts when the impugned change to employees' terms and conditions of employment is made and not when advance notice of the impending change is given.

[40] Treating the statutory freeze cases differently, for purposes of the time period in subsection 190(2) of the *FPSLRA*, from cases dealing with the time period for filing a grievance, is reasonable. As this Court held in *Boshra*, subsection 190(2) of the *FPSLRA* requires that the Board discern what constitutes the action or circumstance giving rise to the complaint and when the applicant knew or ought to have known of the same (at para. 40). There is nothing unreasonable in concluding that the action or circumstance giving rise to a statutory freeze complaint is the impugned change in terms and conditions of employment as section 107 of the *FPSLRA* prevents such changes from being made and paragraph 190(1)(*c*) of the *FPSLRA* provides that a complaint may be made alleging that the employer "has failed to comply with section 107" of the *FPSLRA*. This stands in contrast to grievances, which may challenge employer policies before they are applied; as the respondent notes, sections 208 and 209 of the *FPSLRA* allow for grievances to be filed challenging employer interpretations of the collective agreement. Thus, different results on timeliness issues in the two types of cases are entirely reasonable.

[41] The other cases relied on by the applicant concerning time limits in duty of fair representation complaints or other types of unfair labour practice are fact-specific. Contrary to what the applicant asserts, these cases do not stand for the proposition that in all cases the relevant time period start to run from when the respondent informs the complainant of an intended course of action. Nor are the decisions in *Chargehands Association* and *IBEW* of assistance to the applicant as the Board did not address the issue of timeliness in them.

[42] Thus, the Board's decisions in the instant cases do not contradict its prior case law but, rather, follow such case law and the case law of the CIRB. This strongly points to their being reasonable.

[43] Nor is there anything in the wording of subsection 190(2) of the *FPSLRA* or in its overall policy that would mandate a different conclusion. There is nothing unreasonable in concluding that both the action and circumstance giving rise to a statutory freeze violation is the implementation of the impugned changes to employees' terms and conditions of employment. Moreover, as the respondent rightly notes, there are sound labour relations policy reasons in support of the Board's approach in these cases as allowing the parties additional time to discuss issues when they are bargaining is consistent with sound labour relations.

[44] In any event, it is for the Board and not for this Court to assess how sound labour relations polices are advanced through the interpretation to be given to provisions in the *FPSLRA*. Given the wording of the relevant statutory provisions, the relevant prior case law and the significant deference to be afforded to the Board in cases of this nature, I conclude that its decisions are reasonable.

IV. Proposed Disposition

[45] I would therefore dismiss these applications, with costs, payable by the applicant in favour of the respondent, with the exception of the costs associated with responding to the Board's intervention. I would award no costs for or against the Board or in respect of the issues raised in its intervention.

"Mary J.L. Gleason"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Gauthier J.A."

APPENDIX

Federal Public Sector Labour and Employment Board and its predecessors

1. *Jane Doe v. Canada (Attorney General)*, 2018 FCA 183.
2. *Klos v. Canada (Attorney General)*, 2018 FCA 160.
3. *Canada (Attorney General) v. Fehr*, 2018 FCA 159.
4. *Dias v. Canada (Attorney General)*, 2018 FCA 126.
5. *Kalonji v. Canada (Attorney General)*, 2018 FCA 8.
6. *Canada (Attorney General) v. Canada (Public Service Alliance)*, 2017 FCA 208.
7. *Chopra v. Canada (Attorney General)*, 2017 FCA 176.
8. *Canada (Attorney General) v. Heyser*, 2017 FCA 113, [2018] 1 F.C.R. 245.
9. *Canada (Treasury Board) v. Canada (Public Service Alliance)*, 2017 FCA 111.
10. *Canada (Attorney General) v. Canadian Federal Pilots Association*, 2017 FCA 100.
11. *Jean Pierre v. Canada (Immigration and Refugee Board)*, 2018 FCA 97.
12. *Allen v. Canada (National Research Council)*, 2017 FCA 81.
13. *Canada (Attorney General) v. Féthière*, 2017 FCA 66.
14. *Bernard v. Canada (Revenue Agency)*, 2017 FCA 40.
15. *Bergey v. Canada (Attorney General)*, 2017 FCA 30.
16. *Gandhi v. Canada (Attorney General)*, 2017 FCA 26.
17. *Canada (Attorney General) v. Grant*, 2017 FCA 10.
18. *Jean Pierre v. Clément*, 2016 FCA 308.
19. *Canada (Attorney General) v. Rahmani*, 2016 FCA 249.
20. *Public Service Alliance of Canada v. Canada (Attorney General)*, 2016 FCA 184.
21. *Sather v. Canada (Correctional Service)*, 2016 FCA 149, 32 C.C.E.L. (4th) 132.
22. *Forner v. Canada (Attorney General)*, 2016 FCA 136.

23. *Alexander v. Canada (Attorney General)*, 2016 FCA 132.
24. *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127, 484 N.R. 10.
25. *Canada (Attorney General) v. Dyson*, 2016 FCA 125.
26. *Pierre v. Canada (Border Services Agency)*, 2016 FCA 124, 488 N.R. 176.
27. *Lloyd v. Canada (Attorney General)*, 2016 FCA 115.
28. *Canada (Attorney General) v. Professional Institute of the Public Service of Canada*, 2016 FCA 104.
29. *Canada (Attorney General) v. Association of Justice Counsel*, 2016 FCA 92, [2016] 4 F.C.R. 349, rev'd in part and aff'd in part 2017 SCC 55, [2017] 2 S.C.R. 456.
30. *Baragar v. Canada (Attorney General)*, 2016 FCA 75, 483 N.R. 52.
31. *Pouliot v. Deputy Head (Military Grievances External Review Committee)*, 2016 FCA 54.
32. *Cavanagh v. Canada (Revenue Agency)*, 2016 FCA 27.
33. *Public Service Alliance of Canada v. Canada (Revenue Agency)*, 2016 FCA 8.
34. *Canada (Attorney General) v. Gatien*, 2016 FCA 3, 479 N.R. 382.

Canada Industrial Relations Board

1. *Conseil des Innus de Pessamit v. Michaud*, 2018 FCA 177.
2. *Garda Security Screening Inc. v. General Teamsters, Local Union 979*, 2018 FCA 71.
3. *Canadian Union of Postal Workers v. Lang*, 2017 FCA 223.
4. *Wsáneć School Board v. British Columbia*, 2017 FCA 210.
5. *Fairhurst v. Unifor Local 114*, 2017 FCA 152.
6. *Rogers Communications Canada Inc. v. Metro Cable T.V. Maintenance*, 2017 FCA 127.
7. *Fedex Freight Canada Corp. v. Teamsters Local Union No. 31*, 2017 FCA 78.
8. *Chin Quee v. Teamsters Local #938*, 2017 FCA 62.
9. *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151, 486 N.R. 248.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-235-17
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. PUBLIC SERVICE ALLIANCE OF CANADA AND FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD
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CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	MARCH 1, 2019

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