PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No. 02-052

Decision No.

IN THE MATTER OF A MOTION TO IMPOSE A TIME BAR

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA

APPLICANT

AND:

CANADIAN CORPS OF COMMISSIONAIRES, NEW BRUNSWICK AND PEI DIVISION INC.

RESPONDENT

COUNSEL FOR THE APPLICANT	**J. Gordon MacKay, QC.**
COUNSEL FOR THE RESPONDENT	**David W. Hooley, QC., and P. Alanna Taylor and Karen A. Campbell**

DECISION

Background

The decision of this Board dismissing the Applicant's Application for Certification on the basis of a lack of majority of support was issued on the 13th day of February, 2002. The initial pleadings filed by Mr. Hooley and the written decision of the Board were silent on the remedy of time bar. Subsequent to the close of the hearing and the oral notification of the dismissal of the Application, Mr. Hooley wrote a letter to the Board requesting a time bar. Mr. MacKay wrote to the Board in strong opposition to the consideration of Mr. Hooley's request.

There was a hearing convened on the 17th day of July, 2002, pursuant to a document filed by the Respondent and titled "APPLICATION FOR RECONSIDERATION AND/OR THE RESPONDENT'S RIGHT TO BE HEARD ON A TIME BAR ARISING FROM THE DECISION OF THE PRINCE EDWARD LABOUR RELATIONS BOARD DATED THE 23RD DAY OF JANUARY, 2002". Following submissions from Counsel on preliminary matters, with counsel for each party indicating that judicial review on this point of law was imminent, the Board ruled that it would proceed with the Application for Reconsideration, and ruled that it lacked jurisdiction to proceed to reopen the initial hearing and hear arguments on the issue of a time bar pursuant to

section 13(7) of the *Labour Act*. The Canadian Corps of Commissionaires New Brunswick and PEI Division Inc., hereinafter referred to as "the Corps", applied to the Prince Edward Island Supreme Court in a matter of judicial review on the issue of whether the Prince Edward Island Labour Board had jurisdiction to hear the request for the issuance of a time bar pursuant to section 13(7) of the *Labour Act*.

The hearing of that matter was conducted on the 6th day of September, 2002, and an oral decision was issued from the Court on the 13th day of September, 2002. The Court ruled that the Board had improperly interpreted its empowering legislation and was incorrect in its analysis and conclusion that it did not have the jurisdiction to hear and determine the Corps' request for a time bar pursuant to section 13(7) of the *Labour Act*. The matter was referred back to the Board for further consideration in accordance with the reasons and order of Chief Justice DesRoches.

On the 19th day of September, 2002, the Board conducted a hearing on the sole issue of whether the Board should exercise its discretionary powers to issue a time bar for a minimum of thirteen months as requested by the Corps.

Cases Considered

1. ***CAW Canada v. Garden Province Meats (1985) Inc., and UFCW, Local 1252, Intervenor*** (unreported, 1 March 1999, Prince Edward Island Labour Relations Board);

Statutes Considered

1. ***Labour Act,*** *R.S.P.E.I. 1988 Cap. L*-1, sections 13(7).

2. ***Employment Standards Act,*** *R.S.P.E.I. 1988 Cap. E*-6.2, Minimum Wage Order and Minimum Wage/Overtime/Call in/Piecework.

Texts Considered

1. ***Ontario Labour Relations Board Law and Practice***, Sack and Mitchell, (Toronto, Butterworths 1985), pp. 276, 277

Evidence

At the hearing on September 19, 2002, Mr. Derek Wayne Hunter, CEO of the Canadian Corps of Commissionaires, New Brunswick and PEI Division Inc., testified on behalf of the Respondent.

The Respondent tendered into evidence Exhibit R-12, being a composite exhibit of some seventeen (17) pages consisting of excerpts from newsletters and posters and various other documents. Tendered as Exhibit R-13 was a printed copy of an e-mail from Dave Blanco to Derek Hunter dated Wednesday, the 26th day of January, 2002.

The Applicant, the Public Service Alliance of Canada, called no evidence in response to this motion for the imposition of a time bar.

Issues

The sole issue before the Board in this motion is whether, given the written decision on the 13th day of February, 2002, to dismiss the Application for Certification, the Board should exercise its discretionary powers to impose a time bar upon the Applicant, the Public Service Alliance of Canada.

Decision

This Board has given careful consideration to the evidence presented and the submissions advanced by the respective Parties in relation to their respective positions on the motion for the imposition of a time bar to preclude the bringing of further certification applications.

The Board is granted the discretionary power to impose time bars on unsuccessful applications for certification pursuant to section 13(7) of the *Labour Act* which reads:

> *(7) If the board is not satisfied that the applicant trade union is entitled to be certified under this section, it shall dismiss the application and may designate the length of time that must elapse before the same applicant may make a new application.*

In the Reasons for Decision of Chief Justice DesRoches, dated September 13, 2002, in regards to the Board's powers under section 13(7) of the *Labour Act*, it was stated that:

> *[27] In this case the Board does have the express power to reconsider its decision. That being said, however, the Board is not being asked to reconsider its decision to dismiss PSAC's application. It is being asked to consider another issue entirely, an issue which flows directly from its decision to dismiss PSAC's application. I view the question posed in this case from three different aspects.*
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> *[28] In the first place, s. 13(7) does not require the filing of an application for a time bar to trigger the jurisdiction of the Board in that respect. The Board has jurisdiction whether or not such relief is requested. Indeed s. 13(7) clearly empowers the Board to impose a time bar in its discretion on its own initiative. That said, such relief normally would be considered as the result of a request.*
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> *[29] Secondly, if I am incorrect and a request for a time bar is required, then such a request was made verbally by counsel for the Corps on January 23, 2002, and again in writing on January 24, 2002. Even if it can be said that the Board was* ***functus officio*** *once its decision was rendered, s. 23 of the* ***Labour Act Regulations*** *requires all decisions to be made in the form of an order under the hand of the CEO. Therefore, the Board's decision was not "made" until February 13, 2002, more than two weeks after the Corps' requests for the Board to consider imposing a time bar had been made. At that time, therefore, the Board clearly had jurisdiction to entertain the requests for a time bar.*

[30] Finally, the third aspect may be somewhat simplistic but, in my opinion, the Page: 7 Board did not lose jurisdiction to consider the imposition of a time bar even when it issued its written decision on February 13.

[31] The provisions of s. 13(7) relating to a time bar are engaged ***only*** *when the Board is not satisfied that the applicant trade union is entitled to be certified and dismisses the application. The dismissal of the application is a condition precedent to the Board's having jurisdiction to impose a time bar. To accept that the Board's decision to dismiss PSAC's application in this case resulted in it becoming functus with respect to the issuance of a time bar is not acceptable. If that was the case, the second part of s. 13(7) would be rendered nugatory. The dismissal is a prerequisite to the Board having jurisdiction to deal with the time bar issue.*

[32] Counsel for PSAC has made the argument that it would be procedurally unfair to his client for the Board now to impose a time bar under s. 13(7) of the ***Act****, the matter not having been raised by the Corps in its reply to the application. This argument may well have merit, but in my view it does not go to the question to be decided on this judicial review; that is, whether or not the Board has the* ***jurisdiction*** *to impose such a time bar. Having jurisdiction to do something and doing it are two different things. Again as Justice Cheverie stated in* ***Polar Foods International Inc.****, once it is determined the Board has the power to order the remedy, then that remedy can only be reviewed on the standard of patent unreasonableness. However, the question of jurisdiction must be reviewed on the standard of correctness. It may well be the issue of procedural unfairness and the fact that the Corps did not request the imposition of a time bar in its response are factors the Board will want to take into account in deciding whether or not to impose a time bar under s. 13(7).*

[33] It has been stated by both counsel for PSAC and by counsel for the Board that the imposition of a time bar is an extraordinary remedy. That may be so, however, the extraordinariness of the remedy does not oust the jurisdiction of the Board to impose it. Again, that is a factor the Board may wish to take into consideration in determining whether or not to impose a time bar in this case.

[34] For these reasons, I find the Board improperly interpreted its empowering legislation. In my opinion, the Board was incorrect in its analysis and conclusion that it did not have the jurisdiction to hear and determine the Corps' request for a time bar under s. 13(7) of the ***Act****. This matter is referred back to the Board for further consideration in accordance with the opinion expressed in these reasons. My finding that the Board has jurisdiction to hear the Corps' request for issuance of a time bar pursuant to s. 13(7) of the* ***Labour Act*** *does not, in any way, impact upon the Board's discretion as to whether or not a time bar ought to be issued in this case.*

In the text by Sack and Mitchell, *Ontario Labour Relations Board Law and Practice,* at pages 276 and 277, the author writes:

> *. . . The Board may bar an unsuccessful applicant from further applications or the Board may refuse to entertain a new application by the unsuccessful applicant or by any of the employees affected by an unsuccessful application or a person or trade union representing such employees for up to ten months from the date of the dismissal of the unsuccessful application: s. 103(2)(i).* [996] *Though it is not bound to do so,* [997] *the Board generally imposes a bar for a period of six months where the employees' desires have been tested by a representation vote and the application for certification is dismissed because of lack of employee support.* [998] *However, dismissal of a certification or termination application is not considered by the Board as constituting in itself a ground for refusing to entertain a subsequent application.* [999] ***Apart from situations where a representation vote has been taken or where the union attempts to withdraw its application to avoid an unsuccessful vote, the Board is very reluctant to impose a bar or to refuse to entertain a subsequent application and will exercise its power under s. 103(2)(i) only in exceptional circumstances, as where there have been numerous unsuccessful applications made in a short period of time.*** [1000] *Where several applications are made the Board, under s. 103(3)(a), will treat the subsequent application as having been made on the date of making the original application; however, this will not operate to review a bar which has already elapsed.* [1001] *Finally, the Board will not refuse to entertain a new application within six months if it is made by another union, even if the other union be the international or another local of the union whose application was previously dismissed.* [1002] ***(emphasis added)***

The sole decision of this Board in which the request for this remedy has, to date, been granted in an unfair labour practice complaint in the ***CAW Canada v. Garden Province Meats (1985) Inc., and UFCW, Local 1252, Intervenor*** decision dated March 1, 1989. That case involved extensive proven instances of intimidation and coercion which were widespread and occurred over an extended period of time and necessitated police authority intervention. The Board in that case granted a six month time bar citing it as an extraordinary remedy.

In every case that comes before it the Board must balance interests and rights, and in most of those cases there are four sets of interests and rights to be balanced with the underlying, paramount intent of promoting harmonious labour relations within the Province. Two of those sets of interests and rights are those of organizations, being the Applicant Union and the Respondent Company/Employer. The other two sets are individuals' interests and rights, being those of the employees that desire representation and those who do not want representation through collective bargaining. On the basis of these authorities cited and quoted above, this Board is of the opinion that it is quite trite law that the imposition of a time bar is an exercise of a discretionary power that is described and specifically regarded as an "extraordinary remedy". It is a remedy granted only in exceptional circumstances.

The Board has noted the evidence and pleadings of the Respondent in its Intervention and Reply. Particular consideration has been given to the additional evidence presented in support of this motion and placed before the Board in regards to the motion through the testimony given by Mr. Derek Hunter and the exhibits tendered as outlined above. Counsel for the Respondent reminded the Board of the allegations of improper conduct and the intimation of unfair labour practices being alleged in the Reply to the initial Application for Certification. These "material irregularities" were alleged in respect to one of the work sites and were alleged to have occurred in the course of the organizing drive. Not that it is a determinative factor, nonetheless, it must be noted that the pleadings and the submissions made throughout the hearing of the Application for Certification are entirely silent on the issue of the imposition of a time bar.

The activities of the managerial team, as described by Mr. Hunter, were the types of activities that would be required and were not out of the ordinary. In fact, under cross-examination, Mr. Hunter, at several junctures, quite directly admitted that, the very financial losses referred to in direct testimony were not attributable to Union activity. He further conceded that other financial considerations, which had been identified in direct examination involving historical declines in hours billed, were not a consequence of Union activity.

There is no evidence of general unrest or conflict in the workplace. There is evidence of inquiries of management by employees. Mr. Hunter's evidence on the rate of those inquiries indicate they were significant, but, in this Board's opinion, they would can not be characterized as exceptional. There is no evidence that would support the contention that there is a need for a "cooling off" period in order to foster harmonious labour relations. In terms of the impact, on this particular Respondent, the impact was and is not exceptional.

Upon considering all this evidence, the Board finds that the impact of the activities of the Applicant Union, including all of the Union's organizing drive, the Application for Certification, the hearing process, and on into the post decision period, were what would be expected circumstances and were not at all exceptional. The circumstances that arose were what this Board considers expected in the ordinary course of an organizing drive and there being a respondent that has, once served an Application for Certification, made the managerial decision to oppose the Application for Certification. The circumstances of this case in no way approximate a set of circumstances that would invoke the imposition of an "extraordinary remedy" of the nature being sought by the Respondent. In this instance there was a single application for certification with seven months elapsing from the date of the application to the date of the dismissal, there was no representation vote, the application was dismissed not withdrawn, there was no early withdrawal to avoid a vote, and there is no evidence that would give rise to a concern for a need for calming of the workplace or a "cooling off" period.

In summary, the Board finds that the evidence discloses that the effects of the organizing drive, the subsequent Application for Certification, the hearing process, and the post decision events resulted in no more than what would be considered usual circumstances for any Respondent who had decided to oppose such an Application. The circumstances of this case do not warrant the exercise of the Board's discretionary power to impose time bar. The motion made on the part of the Respondent for a time bar is denied. The Board so rules.

Robert R. MacArthur
Chair

Brian Moriarty
Member

Brendon McGinn
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 19th day of September, A.D., 2002, and issued under the hand of its Chief Executive Officer on the 23rd day of September, A.D., 2002.

Roy J. Doucette
Chief Executive Officer