



Public Service Labour Relations Board

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*Public Service
Labour Relations Act*



Before the Public Service
Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

TREASURY BOARD

Respondent

Indexed as

Public Service Alliance of Canada v. Treasury Board

In the matter of an application for a determination on a matter that may be included in an essential services agreement under subsection 123(1) of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Renaud Paquet, Board Member

For the Applicant: Andrew Raven, counsel

For the Respondent: Sean F. Kelly, counsel

Heard at Ottawa, Ontario,
September 16 and 17 and November 2 to 4, 2009.

I. Application before the Board

1 On September 18, 2007, the Public Service Alliance of Canada ("the applicant") filed an application under subsection 123(1) of the *Public Service Labour Relations Act* ("the Act"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, about matters that may be included in an essential services agreement (ESA) covering positions in the Border Services Group bargaining unit ("the bargaining unit") for which the applicant is the bargaining agent and the Treasury Board ("the respondent") is the employer. All employees in the bargaining unit work at the Canada Border Services Agency (CBSA).

2 The issue before me is to determine which services provided, or activities performed, by some employees in the bargaining unit are necessary for the safety or security of the public. This application is limited to the

position of Border Services Officer (BSO). The bargaining unit is composed of approximately 8200 employees, and approximately 7000 of those are BSOs.

3 In November 2007, with the assistance of the Public Service Labour Relations Board's ("the Board") mediation services, the parties tried to negotiate an ESA. They agreed to pursue the negotiations, and they asked the Board to place this application in abeyance. The Board agreed. In January 2009, the parties ratified the terms of a new collective agreement for the bargaining unit. On February 6, 2009, the parties signed the new collective agreement. Following that signing, the Board decided on its own initiative to examine its jurisdiction because it could have been argued that the conclusion of the collective agreement had rendered the matters before the Board moot or otherwise have affected its authority to proceed. In *Public Service Alliance of Canada v. Treasury Board (Border Services, Program and Administrative Services and Operational Groups)*, 2009 PSLRB 37, the Board decided that it had jurisdiction to determine the matters in dispute concerning the ESA for the bargaining unit.

4 Decision 2009 PSLRB 37 was issued on March 24, 2009. The Board held a pre-hearing conference with the parties on May 20, 2009 to address preliminary issues and to discuss their availability for hearing dates. Hearing dates were set. It was also decided that the parties would agree on the work sites that would be used to illustrate the essential nature of BSOs' services to the public. In that respect, the parties agreed to use three different CBSA service districts in British Columbia, namely, the Vancouver International Airport District, the Metro Vancouver District and the Pacific Highway District.

II. Summary of the evidence

5 The respondent called Stuart James MacPherson, Michael D. Hryciuk and Kim R. Scoville as witnesses. Mr. MacPherson has been the director of operational preparedness at the CBSA since December 2002. He started working for the CBSA's predecessor organization in 1981. Mr. Hryciuk is the acting director for the CBSA Metro Vancouver District. He started working for the CBSA's predecessor organization in 1989. Mr. Scoville has been the director for the CBSA Pacific Highway District since October 2007. He started working for the CBSA's predecessor organization in 1984. For many of those years, he occupied management positions at the Vancouver International Airport District. The respondent also adduced 27 documents. The applicant did not call any witness but adduced two documents.

A. Role and activities of the CBSA

6 The CBSA is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, while meeting all requirements under the program legislation. The CBSA performs border operations related to customs and immigration and related to food, plant and animal programs. The CBSA is also accountable for administering international trade agreements and collecting duties and taxes on imported goods.

7 The CBSA has 14 000 employees; half are BSOs. CBSA service points process about 95 million travellers, 12 million commercial shipments and 32 million courier shipments per year. Most services are provided at 60 land border crossings operating 24 hours a day, 59 land border crossings operating less than 24 hours a day, 13 international airports, 4 immigration detention centres, 3 international mail centres and 3 marine operations at the major container ports of Halifax, Montreal and Vancouver.

8 To fulfill its mandate, the CBSA works closely with other government agencies such as the Canadian Food Inspection Agency, Health Canada, Transport Canada and Citizenship and Immigration Canada, with which the CBSA shares some administrative responsibilities. The CBSA also works closely with law enforcement organizations such as the Royal Canadian Mounted Police, local or provincial police forces, the Canadian Security Intelligence Service, and enforcement organizations from other countries.

9 Considering the volume of goods and persons entering Canada every year, the CBSA cannot examine every good and person in detail. To better focus its inspection and examination work, the CBSA relies on intelligence-based decision-making tools. Intelligence encompasses initiatives related to collecting, analyzing, distributing and sharing information about threats to national security, including terrorism, human trafficking, war crimes, organized crime, smuggling, fraud and irregular immigration. The CBSA also operates a national risk-assessment centre to facilitate the fast flow of information on high-risk travellers and goods before they arrive at the border. Live-scan electronic fingerprint systems, marine remote-operated vehicles, vehicle and cargo inspection systems, ion mobility spectrometry, radiation detection technology, detector dog teams, and scientific analysis are also used by the CBSA to facilitate inspecting and examining people and goods entering Canada.

10 To facilitate the efficient and timely import of goods, the CBSA has put in place pre-approved programs such as NEXUS and FAST, which are joint Canada-USA programs or initiatives; "Custom Self Assessment" for approved importers, carriers or registered drivers importing low-risk goods; and "Partners in Protection", in cooperation with private industry, to enhance border security.

B. CBSA points of service

11 Goods and people may enter Canada by road, train, sea or air. The CBSA's points of service are set accordingly. As mentioned earlier, the parties agreed that the evidence to illustrate the work of BSOs at points of service would come from British Columbia, namely, the Vancouver International Airport District, the Metro Vancouver District and the Pacific Highway District.

12 The Vancouver International Airport District operations employ approximately 300 BSOs in the following three areas: traffic operations, air cargo and airside, and special enforcement operations. The Vancouver International Airport District processes an annual average of 4.5 million passengers entering Canada, 70 percent coming from the USA. In 2008-2009, it processed 3.9 million courier shipments, 477 633 commercial releases and 4000 small aircraft arrivals. Those examinations led to enforcement activities including seizing narcotics, weapons and currencies illegally brought to Canada. Most passengers and goods only pass through primary inspection before being allowed to enter Canada, but some are referred to secondary inspection for further enquiries. At primary inspection in traffic operations, BSOs review the identities of persons and their written declarations and conduct brief interviews. At secondary inspection, they conduct more in-depth interviews. BSOs may then use tools such as intelligence databases, contraband detection equipment or other technical devices. The process might differ in air cargo, where BSOs can count on sophisticated equipment. The purpose of examination is always the same: control the border to protect Canadian society and its economy by preventing the entry of people and goods that pose potential risks to Canada.

13 Approximately 350 BSOs work at the Pacific Highway District in the following 5 ports of entry: Aldergrove, Boundary Bay, Douglas, Huntington and Pacific Highway. The last 2 ports of entry are divided into the following 2 sections: commercial operations and traffic operations. Between September 2008 and September 2009, the Pacific Highway District processed 9 440 371 people, 4 655 484 private vehicles and 473 633 commercial vehicles. As at the Vancouver International Airport District, those examinations led to enforcement activities including seizing narcotics, weapons and currencies illegally brought to Canada. The value of all goods seized in that period is estimated at \$123 million, including significant seizures of cocaine and opium. BSOs' examinations also led to 12 000 people being returned to the USA by enforcing the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. As at the Vancouver International Airport District, most people and goods only pass through primary inspection, but some are referred to secondary inspection for further enquiries.

14 Approximately 200 BSOs work at the Metro Vancouver District in the following 4 "offices": the CBSA mail centre, Warehouse and Waterfront Operations, the Container Examination Facility, and Traveller and Import Processing.

15 The CBSA Metro Vancouver mail centre is one of three CBSA mail centres in Canada. The CBSA receives mail from Canada Post and examines it before it is released. BSOs use a series of systems, tools and devices to facilitate the primary inspection of approximately 10 million mail items annually. In 2008, BSOs made 1952 seizures for an estimated total value of \$5.6 million. Those included narcotics, child pornography, weapons, material to enhance explosions, counterfeit credit cards, Gamma-Butyrolactone, unapproved drugs, etc.

16 BSOs in the other four offices of the Vancouver Metro District perform inspections and examinations at several locations, including the following: the Port of Vancouver, the Port of Prince Rupert, Amtrak trains, cruise ships, warehouses and container sites. They examine people, including crew members, and goods entering Canada by sea and by train. BSOs working at warehouses and waterfront operations examine annually the equivalent of 1 million 20-foot containers. During the 2009 season, those in Cruise Ship Operations examined 418 000 passengers and 188 000 crew members. Every year, they seize or refuse entry of an important amount of illegal goods, and they refuse entry to people who should not enter Canada.

C. Role and responsibilities of BSOs

1. Border protection mandate

17 BSOs are at the frontline of the CBSA's program delivery in carrying out its border protection mandate. They are directly involved in administering over 90 pieces of legislation that govern the admissibility of people and goods into and out of Canada. They prevent people who should not be admitted from entering Canada. They prohibit illegal goods from entering the country. They also protect food and the environment by stopping the

import of prohibited or hazardous products.

18 A national generic work description applies to all BSOs. Its key activities read as follows:

Conducts inspection, examination and verification of travellers, goods and conveyances to reach release or entry decisions and decides appropriate action when non-compliance is suspected or encountered.

Provides a first response capability with powers to arrest and/or detain individuals suspected of having committed offences under various Acts of Parliament.

Works with and establishes, develops, and maintains collaborative relations, interactions and exchange [sic] with client, stakeholder organizations and law enforcement agencies to maintain border integrity and security.

Analyzes data and information to be included in databases for use in client service, risk management and the targeting of people and/or goods. Provides information, through sessions, technical workshops and outreach activities to travelers [sic], importers and exporters to educate them concerning the legislation, regulations, and procedures of the CBSA and other government departments/agencies to encourage voluntary compliance and to respond to enquiries, concerns and service complaints.

19 The evidence presented at the hearing supports the statement that all BSOs inspect, examine and verify travellers and goods in reaching release-or-entry decisions and in detecting violation of the law. All BSOs also provide a first-response capability with their powers to arrest or detain individuals suspected of having committed offences under the law. Those key activities of their work description are directly related to protecting the Canadian border. To efficiently perform their protection role, BSOs maintain collaborative working relationships with clients, stakeholders and law enforcement agencies. The evidence also supports that BSOs analyze data and information in order to make release-or-entry decisions. That analytical work helps them to better target people or goods.

20 The second statement of the fourth key activity of the work description relates to providing information to the public or to stakeholders through sessions, technical workshops and outreach activities. According to the witnesses, those educative outreach activities are not normally performed by BSOs but rather by managers. It would benefit the CBSA if BSOs performed those duties, but they simply do not have time.

21 To perform their protection duties, BSOs regularly complete briefing notes, technical reports, client files, statements and seizure reports. Those documents are written shortly after incidents occur or facts become known. This is important because it allows information stored on computers to be up to date or legal action to be taken.

2. Assessing and collecting duties and taxes

22 The CBSA collects large sums of money every day in duties and taxes. In fiscal year 2008-2009, the CBSA collected a daily average of \$11 060 000 in customs duties, \$41 890 000 in GST/HST, \$3 390 000 in tobacco and alcohol taxes, and \$292 624 in provincial taxes and fees. In most cases, BSOs are not involved in assessing or collecting those duties and taxes.

23 A large part of the cross-examination of the respondent's witnesses was directed to the involvement of BSOs in assessing and collecting duties and taxes. Essentially, they are law enforcement officers, and their role is to protect the border, not to collect duties and taxes. However, occasionally they assess and collect duties and taxes.

24 Mr. MacPherson testified that BSOs have little involvement in tax assessment and collection, and that it is impossible to quantify how much time they spend on it, as they do it while performing their protection duties. Furthermore, Mr. MacPherson testified that, when a collection is made at a port of entry, it is done by a cashier, classified at the CR-04 group and level. The CBSA did not propose that those cashier functions be included in the essential services agreement covering that particular bargaining unit.

25 Mr. Hryciuk testified that BSOs performing examination work for the CBSA Metro Vancouver mail center, the Amtrak trains or cruise ships could occasionally or exceptionally be involved in tax assessments or collections

if no clerks or cashiers are available or on site. Mr. Scoville testified that BSOs working at the Vancouver International Airport District or at the Pacific Highway District could also occasionally or exceptionally assess or collect taxes, even if they do not normally perform that work.

III. Summary of the arguments

A. For the respondent

26 The respondent argued that all services delivered by or activities performed by BSOs at the CBSA are necessary for the safety and security of the Canadian public. The duties and responsibilities of BSOs are paramount in and essential to ensuring the safety and security of the public and the integrity of the Canadian border.

27 Significant evidence was presented to support the position that the essence of the BSO position is protecting the border. BSOs secure the border to prevent inadmissible goods and people from entering Canada.

28 BSOs target and identify threats and inspect, examine and verify travellers, goods and conveyances in reaching release-or-entry decisions. To perform those security functions, they need to write reports in a timely fashion and to maintain collaborative relationships with law enforcement agencies. All of this is essential to the security of Canada.

29 The evidence is clear that BSOs assess and collect taxes and duties in exceptional circumstances. It is not part of their job description. It happens rarely and, when it does happen, the amount of time spent doing it is negligible. Other CBSA employees are responsible for assessing and collecting taxes and duties. In certain work locations, BSOs could exceptionally be involved in those activities when other CSBA employees are not on site.

30 Most of the time, when BSOs begin to inspect or examine people or goods they do not know if they are inspecting or examining illegal goods or people who have done something illegal. At all times, their mandate is to protect the country. The evidence demonstrates that there is a risk to the safety and security of Canada if BSOs do not perform their work. They protect Canada against the entry of illicit drugs, non-approved drugs, terrorists, criminals, members of organized crime, counterfeit goods, false credit cards, child pornography, illegal weapons, firearms, currencies obtained from crime, contaminated foods and animals, and other goods prohibited in Canada.

31 The respondent referred me to the following decisions: *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97; *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55; *Treasury Board v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 128; *Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board (Ship Repair Group – West Coast)*, PSSRB File No. 181-02-182 (19850109); and *Tobin v. Canada (Attorney General)*, 2009 FCA 254.

B. For the applicant

32 The applicant accepts that the essential services performed by BSOs are those designed to protect Canadians from threats to their safety and security. Those services necessarily include the security functions identified by the evidence presented by the witnesses, but exclude, among other things, all services and functions related to revenue administration, including assessing, calculating and collecting duties, taxes, fees and fines.

33 In 2008 PSLRB 97, the Board held that, in determining essential services, it must balance the rights of employees to participate in lawful strike action with the legitimate safety and security needs of the public. The Board has established that it will not be business as usual during a strike. For example, in *Treasury Board v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 120, the Board held that the need to protect the right to strike could even delay a general election.

34 In 2008 PSLRB 97, the Board held that essential services should be precisely identified and that it is important to recognize and safeguard the distinction between "essential service" and "level of service." To maintain that distinction, any essential service identified by the Board must be narrowly and precisely defined such that the level of service pertains only to the specific duties that are necessary for the safety or security of the public.

35 In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 56, the Board stated that a service designated as important or that is required by statute is not

necessarily an essential service. Moreover, the safety or security of the public does not generally include economic hardship to the public or the employer.

36 In 2009 PSLRB 128, the Board considered the extent to which the CBSA's services are essential to the safety or security of the public. The Board rejected the broad definition of essential services proposed by the respondent, concluding that duties such as customs and excise matters were not related to the safety or security of the public. The Board should conclude the same in this case. It should also exclude from the essential services definition BSOs' functions related to maintaining collaborative relations with clients and stakeholders, analyzing data and information for inclusion in databases, outreach and information activities, and administrative duties, including writing reports and briefing notes.

37 The applicant proposed the following as the essential services performed by BSOs at the CBSA:

Land Borders, Marine, Rail and Airports

- a. *Conducting primary inspection, examination and verification of travelers, goods and conveyances to reach release or entry decisions and decide appropriate action when non-compliance is suspected or encountered. Referral to secondary inspection **only** when safety or security of the public is a potential risk (ie., not for economic reasons, such as the collection of duty or taxes).*
- b. *Provide a first response capability with powers to arrest and/or detain individuals suspected of having committed offences under various Acts of Parliament related to safety or security of the public.*

Postal Program

- c. *Conducting primary inspection of mail to determine if there is any risk to safety or security of the public. Referral to secondary inspection **only** when safety or security of the public is potentially at risk (ie., not for economic reasons, such as the collection of duty or taxes).*

[Emphasis in the original]

38 The applicant referred me to the following decisions: *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 181-02-99 (19790601); *CSL Group Inc. v. Canada*, [1997] 2 F.C. 575 (T.D.); *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 181-02-32 (19741105); *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 181-02-116 (19800528); *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 181-02-348 (19970303); and *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 181-02-235 (19870319).

IV. Reasons

39 The parties were unable to enter into an ESA for employees in the bargaining unit. The applicant filed an application under subsection 123(1) of the *Act* to have the Board determine those services delivered by or activities performed by BSOs that are essential services. Subsection 123(1) reads as follows:

123. (1) *If the employer and the bargaining agent are unable to enter into an essential services agreement, either of them may apply to the Board to determine any unresolved matter that may be included in an essential services agreement.*

40 Subsection 4(1) defines "essential service" and "essential services agreement" as:

"essential service" means a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public.

"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies

(a) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;

(b) the number of those positions that are necessary for that purpose; and

(c) the specific positions that are necessary for that purpose.

41 In 2008 PSLRB 97, the Board established an analytical path for addressing disputes about essential services under the *Act*. The first-order issue is precisely identifying which services are essential for the safety or the security of the public. Once essential services are identified, the next matter is the level of service, the determination of which rests with the employer. Following the employer's determination of the level of service, the Board may be called, in the absence of an agreement between the parties, to determine the type, number and specific positions necessary to provide essential services at the level set by the employer.

42 This decision is limited to the first-order issue of the analytical path stated in 2008 PSLRB 97, namely, identifying essential services or, in other words, providing a precise definition of the essential services that BSOs perform.

43 For the respondent, that identification is fairly simple as follows: everything that BSOs do is necessary for the safety and security of the Canadian public. For the applicant, activities related to assessment of duties, taxes, fees and fines, to collecting money, to collaborative relations with clients or stakeholders, to outreach activities or to writing reports are not essential services.

44 In 2008 PSLRB 97, the Board ruled that the burden of proof falls on the employer (the respondent in this case) to prove that there is a reasonable and sufficient basis for finding that some or all of the services delivered or the activities performed by the employees are essential within the meaning of subsection 4(1) of the *Act*.

45 The evidence adduced by the respondent in this case is unequivocal: the main duties of BSOs are to protect the Canadian society from inadmissible goods and people. That evidence shows that those main duties are necessary for the safety or security of the public. In the eventuality of a strike, those main duties must continue to be performed; otherwise, the safety or security of the public would be at risk. The parties agree on this, and this is not at issue in this decision.

46 What are at issue are the other duties that BSOs perform from time to time. Even if it is not possible to establish how often or at what frequency BSOs perform those other duties, the evidence shows that they perform them occasionally. Those other duties could be summarized as follows:

- Assessing and collecting duties, taxes, fees and fines.
- Providing information, through sessions, technical workshops and outreach activities to travellers, importers and exporters to educate them and to encourage voluntary compliance; respond to enquiries, concerns and service complaints.

The respondent adduced no evidence showing that those duties are necessary for the safety or security of the public. Consequently, they are not essential services. The evidence showed that, under normal circumstances, the role of BSOs is not to assess or collect taxes, although they do so occasionally. The respondent's witnesses testified that BSOs never perform the educative outreach activities listed above. Rather, those duties are performed by managers who participate in technical workshops or outreach activities. This might be the case in the work locations for which evidence was presented, but I find it difficult to believe that BSOs across the country never perform those duties, considering that they are listed as a key activity of their national work description.

47 The evidence showed that BSOs analyze data and information for inclusion in databases for further use in client service, risk management and targeting people or goods. The evidence also showed that BSOs complete briefing notes, technical reports, client files, statements and seizure reports. Those documents are written shortly after incidents occur or facts become known. The applicant does not agree that those duties are essential services. I disagree with the applicant, and rather, I agree with the respondent's witnesses, who testified that those duties are an intrinsic part of the protection functions performed by BSOs. To reach release-and-entry decisions, and to decide appropriate action, they rely on databases and intelligence information that must be constantly updated. It would pose a potential risk to the safety or security of the public if BSOs stopped writing reports, analyzing data and updating information contained in databases.

48 In summary, services delivered and activities performed by BSOs that are related to inspecting, examining and verifying travellers, goods and conveyances are essential services. Inspections, examinations and verifications are performed to protect the public against inadmissible people and goods. Writing reports and updating databases are parts of those activities. The same applies to maintaining effective relations and interactions with clients, stakeholders and law enforcement agencies. However, the activities related to assessing and collecting duties, taxes, fees and fines, and those related to educative and outreach activities, are not necessary to the safety or security of the public.

49 The Board does not use a single, unique model to identify essential services. In 2008 PSLRB 97, it held that essential services should be precisely identified. In 2009 PSLRB 128, it identified essential services in a five-line statement. In 2009 PSLRB 55, it relied on a more detailed statement. In this case, for greater certainty, I believe that it is useful to state both those services that are necessary and not necessary to the safety and security of the public.

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

V. Order

51 The essential services agreement for the bargaining unit will include the following provision:

The following services delivered or performed by Border Services Officers are necessary for the safety or security of the public:

1. Conducting inspections, examinations and verifications of travellers, goods and conveyances to reach release-or-entry decisions and deciding appropriate action when non-compliance is suspected or encountered.
2. Providing a first-response capability with powers to arrest or detain individuals suspected of having committed offences under various Acts of Parliament.
3. Maintaining effective relations, interactions and exchanges with clients, stakeholder organizations and law enforcement agencies to maintain border integrity and security.
4. Analyzing data and information for inclusion in databases for use in client service, risk management and targeting people or goods to maintain border integrity and security.
5. Completing briefing notes, technical reports, client files, statements and seizure reports to update databases to maintain border integrity and security.

For greater certainty, the following services delivered or performed by Border Services Officers are not necessary for the safety or security of the public:

1. Assessing and collecting duties, taxes, fees and fines.
2. Completing briefing notes, technical reports, client files and statements not related to maintaining border integrity and security.
3. Providing information, through sessions, technical workshops and outreach activities to travelers, importers and exporters to educate them concerning the legislation, regulations and procedures of the CBSA and other government departments/agencies to encourage voluntary compliance and to respond to enquiries, concerns and service complaints.

November 20, 2009.

**Renaud Paquet,
Board Member**