

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20240515**

**Docket: A-118-23**

**Citation: 2024 FCA 95**

**CORAM: STRATAS J.A.  
MACTAVISH J.A.  
WALKER J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**PUBLIC SERVICE ALLIANCE OF  
CANADA**

**Respondent**

Heard at Ottawa, Ontario, on May 15, 2024.

Judgment delivered from the Bench at Ottawa, Ontario, on May 15, 2024.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**MACTAVISH J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Ottawa, Ontario, on May 15, 2024).**

**MACTAVISH J.A.**

[1] Dental benefits are one of the employment benefits available to government employees, including members of the Public Service Alliance of Canada (PSAC), and their eligible

dependants. These benefits are governed by the Public Service Dental Care Plan (the Dental Plan), the terms of which are negotiated by the parties from time to time.

[2] The most recent iteration of the Dental Plan expired in December of 2021. Shortly thereafter, PSAC gave notice to the Treasury Board (the employer) that it wished to negotiate amendments to the Dental Plan. An exchange of correspondence between the parties then followed. Dissatisfied with the position taken by the employer, PSAC filed a complaint with the Federal Public Sector Labour Relations and Employment Board (the Board) under section 190 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2. It alleged in its complaint that the employer had committed an unfair labour practice contrary to section 106 of the Act by failing to bargain in good faith. The full text of the statutory provisions at issue in this case is attached as an appendix to these reasons.

[3] The employer disputed the Board's jurisdiction to entertain PSAC's complaint, asserting that the duty to bargain in good faith relates only to the negotiation of collective agreements and that the Dental Plan was not a "collective agreement" as defined in the Act. It further submitted that the negotiation of the Dental Plan did not take place under section 105 of the Act, as this allows a bargaining agent or an employer to give written notice to the other side requiring them to commence bargaining collectively with a view to entering into, renewing or revising a collective agreement. According to the employer, section 106 of the Act (which creates the duty to bargain in good faith) also has no application here, as that duty is only engaged once notice to bargain collectively has been given pursuant to section 105. Consequently, the employer argued that the Board lacked jurisdiction to deal with PSAC's complaint and that it should be dismissed.

[4] In the alternative, the employer argued that, in any event, it had not breached its duty to bargain in good faith in this case. The employer has not pursued this issue before us.

[5] In a lengthy and detailed decision, the Board carefully considered the employer's jurisdictional arguments. It accepted that the Dental Plan was not a "collective agreement", as defined in the Act, and that PSAC could not serve a "notice to bargain" under section 105 of the Act with respect to the Plan. The Board further found that the section 106 duty to bargain in good faith was only triggered once a "notice to bargain" had been served in accordance with section 105 of the Act. It also found that, on its face, paragraph 190(1)(b) of the Act only gave the Board jurisdiction to inquire into complaints alleging that a party had failed to comply with the duty to bargain in good faith imposed by section 106 of the Act. The Board acknowledged that there is no provision in section 190 that expressly allowed it to decide complaints with respect to an alleged failure to bargain in good faith where section 106 had not been engaged.

[6] That said, the Board did not accept the employer's contention that the parties negotiate the terms of the Dental Plan outside of the collective bargaining process. Considering the relationship between the Dental Plan and collective bargaining, the Board found as a fact that the Plan exists because the parties negotiated for it through the collective bargaining process. The Board further found that the Dental Plan had been incorporated by reference into the parties' collective agreements (which state that the Plan is "deemed to form part of" these agreements) and that it was "entirely rooted in the collective bargaining process between the parties". The Board also noted that PSAC had served notices to bargain collectively under section 105 of the Act with respect to five of its collective agreements, and that these notices had triggered the

section 106 duty to bargain collective agreements in good faith. Given that the Dental Plan is deemed to form part of these agreements, negotiating its terms during the collective bargaining process meant that these negotiations must also engage the duty to bargain in good faith. These findings led the Board to conclude that having regard to the specific facts of this case, the employer's obligation to bargain in good faith had been engaged, and that the employer had breached that duty.

[7] The Board then went on to consider whether the duty to bargain in good faith would be engaged even if the negotiation of the terms of the Dental Plan took place at a time when the collective agreements between the parties remained in force. In concluding that the duty would be triggered in such circumstances, the Board had regard to numerous factors including the principles of statutory interpretation, the wording of the Act's Preamble, the purpose of the legislation, the constitutional nature of the right to bargain collectively and the relevant jurisprudence.

[8] We agree with the parties that the Board's jurisdictional finding is subject to review on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 16, 65. As the Supreme Court has stated, a reasonable decision is one "based on an internally coherent and rational chain of analysis [...] that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, above at para. 85.

[9] The employer has not demonstrated that the Board's findings that the Dental Plan existed because the parties had negotiated for it through the collective bargaining process, that it had

been incorporated by reference into the parties' collective agreements and that it was "entirely rooted in the collective bargaining process between the parties" were unreasonable. Given these findings, it was reasonably open to the Board to conclude that there was a duty on the part of the employer to negotiate the terms of the Dental Plan in good faith, thus engaging the Board's jurisdiction. This is further supported by the fact that, in this case, the complaint arose in the context of ongoing negotiations with respect new collective agreements between the parties. The Board's decision on the jurisdictional question was thus justified, transparent, and intelligible, and no basis has been established for this Court's intervention.

[10] After concluding that a duty on the part of the employer to bargain in good faith had been established on the facts of this particular case, the Board went on to find that there would be a similar duty on the part of the employer where negotiations with respect to the terms of the Dental Plan take place while collective agreements between the parties are in force. It is not necessary for us to address the reasonableness of the Board's finding on this point as it was *obiter* on these facts, and nothing in these reasons should be taken as agreeing or disagreeing with the Board's finding in this regard.

[11] Consequently, the application will be dismissed. In accordance with the agreement of the parties, PSAC shall have its costs fixed in the amount of \$2,500.00.

"Anne L. Mactavish"

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J.A.

## APPENDIX

### **Notice to bargain collectively**

105 (1) After the Board has certified an employee organization as the bargaining agent for a bargaining unit and the process for the resolution of a dispute applicable to that bargaining unit has been recorded by the Board, the bargaining agent or the employer may, by notice in writing, require the other to commence bargaining collectively with a view to entering into, renewing or revising a collective agreement.

### **When notice may be given**

(2) The notice to bargain collectively may be given

(a) at any time, if 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 this Part; or

(b) if a collective agreement or arbitral award is in force, within the four months before it ceases to be in force.

### **Copy of notice to Board**

(3) A party that has given a notice to bargain collectively to another party must send a copy of the notice to the Board.

### **Effect of Notice**

#### **Duty to bargain in good faith**

106 After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,

### **Avis de négocier collectivement**

105 (1) Une fois l'accréditation obtenue par l'organisation syndicale et le mode de règlement des différends enregistré par la Commission, l'agent négociateur ou l'employeur peut, par avis écrit, requérir l'autre partie d'entamer des négociations collectives en vue de la conclusion, du renouvellement ou de la révision d'une convention collective.

### **Date de l'avis**

(2) L'avis de négocier collectivement peut être donné :

a) n'importe quand, si aucune convention collective ni aucune décision arbitrale n'est en vigueur et si aucune des parties n'a présenté de demande d'arbitrage au titre de la présente partie;

b) dans les quatre derniers mois d'application de la convention ou de la décision qui est alors en vigueur.

### **Copie à la Commission**

(3) Copie de l'avis est adressée à la Commission par la partie qui a donné l'avis.

### **Effet de l'avis**

#### **Obligation de négocier de bonne foi**

106 Une fois l'avis de négociation collective donné, l'agent négociateur et l'employeur doivent sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai éventuellement convenu par les parties :

(a) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and

(b) make every reasonable effort to enter into a collective agreement.

a) se rencontrer et entamer des négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom;

b) faire tout effort raisonnable pour conclure une convention collective.

### **Complaints**

190 (1) The Board must examine and inquire into any complaint made to it that

(a) the employer has failed to comply with section 56 (duty to observe terms and conditions);

(b) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);

(c) the employer, a bargaining agent or an employee has failed to comply with section 107 (duty to observe terms and conditions);

(d) the employer, a bargaining agent or a deputy head has failed to comply with subsection 110(3) (duty to bargain in good faith);

(e) the employer or an employee organization has failed to comply with section 117 (duty to implement provisions of the collective agreement) or 157 (duty to implement provisions of the arbitral award);

(f) the employer, a bargaining agent or an employee has failed to comply with section 132 (duty to observe terms and conditions); or

(g) the employer, an employee organization or any person has

### **Plaintes à la Commission**

190 (1) La Commission instruit toute plainte dont elle est saisie et selon laquelle :

a) l'employeur a contrevenu à l'article 56 (obligation de respecter les conditions d'emploi);

b) l'employeur ou l'agent négociateur a contrevenu à l'article 106 (obligation de négocier de bonne foi);

c) l'employeur, l'agent négociateur ou le fonctionnaire a contrevenu à l'article 107 (obligation de respecter les conditions d'emploi);

d) l'employeur, l'agent négociateur ou l'administrateur général a contrevenu au paragraphe 110(3) (obligation de négocier de bonne foi);

e) l'employeur ou l'organisation syndicale a contrevenu aux articles 117 (obligation de mettre en application une convention) ou 157 (obligation de mettre en oeuvre la décision arbitrale);

f) l'employeur, l'agent négociateur ou le fonctionnaire a contrevenu à l'article 132 (obligation de respecter les conditions d'emploi);

g) l'employeur, l'organisation syndicale ou toute personne s'est



committed an unfair labour practice within the meaning of section 185.

### **Time for making complaint**

(2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

### **Limitation on complaints against employee organizations**

(3) Subject to subsection (4), no complaint may be made to the Board under subsection (1) on the ground that an employee organization or any person acting on behalf of one has failed to comply with paragraph 188(b) or (c) unless

(a) the complainant has presented a grievance or appeal in accordance with any procedure that has been established by the employee organization and to which the complainant has been given ready access;

(b) the employee organization

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented their grievance or appeal under paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than 90 days after the first day on which the complainant

livré à une pratique déloyale au sens de l'article 185.

### **Délai de présentation**

(2) Sous réserve des paragraphes (3) et (4), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon la Commission, aurait dû avoir — connaissance des mesures ou des circonstances y ayant donné lieu.

### **Restriction relative aux plaintes contre une organisation syndicale**

(3) Sous réserve du paragraphe (4), la plainte reprochant à l'organisation syndicale ou à toute personne agissant pour son compte d'avoir contrevenu aux alinéas 188b) ou c) ne peut être présentée que si les conditions suivantes ont été remplies :

a) le plaignant a suivi la procédure en matière de présentation de grief ou d'appel établie par l'organisation syndicale et à laquelle il a pu facilement recourir;

b) l'organisation syndicale a :

(i) soit statué sur le grief ou l'appel, selon le cas, d'une manière que le plaignant estime inacceptable,

(ii) soit omis de statuer sur le grief ou l'appel, selon le cas, dans les six mois qui suivent la date de première présentation de celui-ci;

c) la plainte est adressée à la Commission dans les quatre-vingt-dix jours suivant la date à partir de

could, in accordance with paragraphs (a) and (b), make the complaint.

**Exception**

(4) The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by an employee organization to comply with paragraph 188(b) or (c) that has not been presented as a grievance or appeal to the employee organization, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the employee organization has not given the complainant ready access to a grievance or appeal procedure.

laquelle le plaignant était habilité à le faire aux termes des alinéas a) et b).

**Exception**

(4) La Commission peut, sur demande, statuer sur la plainte visée au paragraphe (3) bien que celle-ci n'ait pas fait l'objet d'un grief ou d'un appel si elle est convaincue :

a) soit que les faits donnant lieu à la plainte sont tels qu'il devrait être statué sans délai sur celle-ci;

b) soit que l'organisation syndicale n'a pas donné au plaignant la possibilité de recourir facilement à une procédure de grief ou d'appel.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-118-23

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. PUBLIC SERVICE  
ALLIANCE OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 15, 2024

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BY:** STRATAS J.A.  
MACTAVISH J.A.  
WALKER J.A.

**DELIVERED FROM THE BENCH BY:** MACTAVISH J.A.

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