

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N

ASSOCIATION OF JUSTICE COUNSEL

Applicant
(Responding Party)

and

ATTORNEY GENERAL OF CANADA

Respondent
(Moving Party)

MOVING PARTY'S FACTUM

March 29, 2019

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INDEX

Part I	OVERVIEW	2
Part II	FACTS	3
Part III	ISSUES	9
Part IV	LAW AND ARGUMENTS	9
	A. The “Eligible Person” under Section 182 of the <i>FPSLRA</i> , which was the Binding Conciliation Board, Was a “Federal Board, Commission or Other Tribunal”	
	(i) The <i>FPSLRA</i> , a federal statute, conferred the jurisdiction and powers that the Binding Conciliation Board exercised	
	(ii) The Parties’ MOA did not confer jurisdiction and powers on the Binding Conciliation Board	
	a. Determining process is not equivalent to conferring jurisdiction and powers	
	b. The Section 182 Binding Conciliation Process mirrored the <i>FPSLRA</i> interest arbitration process	
	c. The <i>FPSLREB</i> administered the Section 182 Binding Conciliation Process like it does for typical <i>FPSLRA</i> interest arbitration processes	
	d. The Binding Conciliation Board could not exceed <i>FPSLRA</i> -granted jurisdiction and powers since the statute—not the Parties’ collective agreement—governed	
	e. Parliament did not intend to exclude Section 182 eligible persons from section 2 of the <i>FCA</i> like it has in other Acts	
	B. The Ontario Superior Court of Justice Does Not Have Jurisdiction to Determine this Application and It Should Therefore be Dismissed	
Part V	ORDER SOUGHT	21
SCHEDULE “A”	LIST OF AUTHORITIES	22
SCHEDULE “B”	EXCERPTS OF RELEVANT STATUTES, REGULATIONS, & BY-LAWS	23

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PART I – OVERVIEW

1. The Association of Justice Counsel (the “Applicant” or the “AJC”) seeks an Order from this Court quashing the decision of the “Binding Conciliation Board” made pursuant to section 182 of the *Federal Public Sector Labour Relations Act* (the “FPSLRA”).

Treasury Board v. Association of Justice Counsel, 2018 CanLII 119222 (the “Decision”),
Moving Party’s Book of Authorities (“MPBA”), Tab 1.
S.C. 2003, c. 22, s. 2.

2. This Court has no jurisdiction to hear and determine this Application, nor to provide the relief sought, because the Binding Conciliation Board constitutes a “federal board, commission or other tribunal” under section 2 of the *Federal Courts Act* (“FCA”). Pursuant to section 18 of the FCA, the Federal Court has exclusive jurisdiction to issue the Order sought in this Application.

R.S.C. 1985, c. F-7, ss. 2 and 18.

3. The Attorney General of Canada brings this Motion pursuant to Rule 21.01(3)(a) of the *Rules of Civil Procedure* (“*Rules*”) to have the Application dismissed, and in the alternative, permanently stayed, because this Court has no jurisdiction over the subject matter of the Application.

R.R.O. 1990, Reg. 194, R. 21.01(3)(a).

PART II – FACTS

4. The Treasury Board of Canada (“Treasury Board” or the “Employer”) is the employer for employees in the Core Public Administration (“CPA”) of the federal public service.

Affidavit of Ted Leindecker sworn on the 14th day of February 2019 (“Affidavit of Ted Leindecker”), at para 2, Moving Party’s Motion Record (“MPMR”), Tab 2.

5. The AJC is the certified bargaining agent for the Law Practitioner (“LP”) group. The employees represented by the AJC are included in the CPA.

Affidavit of Ted Leindecker, *supra* para 4, at para 3, MPMR, Tab 2.

6. Between May, 2014 and December, 2016, the AJC and the Treasury Board Secretariat (“TBS”) (collectively the “Parties”) engaged in negotiation sessions to renew the LP collective agreement which had expired on May 9, 2014. The AJC served Notice to Bargain on January 9, 2014, and the last negotiation session was held on December 20, 2016. The negotiations were not successful.

Affidavit of Ted Leindecker, *supra* para 4, at paras 4 and 17, MPMR, Tab 2, Exhibit “A”.

7. The Parties’ collective bargaining regime, including the process for dispute resolution in the event that the Parties are not able to successfully negotiate a collective agreement, is legislated in the *FPSLRA* and is administered by the Federal Public Sector Labour Relations and Employment Board (“FPSLREB”).

8. At the time that the AJC served its Notice to Bargain, there was only one statutory dispute resolution method available to it under the *FPSLRA*, being conciliation/strike. Binding arbitration was, at that time, reserved to bargaining units with a high percentage of workers who were designated as essential services, or who had the consent of the Treasury Board to proceed in that fashion. With conciliation/strike, the Parties would have submitted the terms and conditions of employment on which they could not agree to a Public Interest Commission, which would make non-binding recommendations to the Parties with respect to the disputed terms and conditions of employment. If the Parties still could not agree, the members of the bargaining unit could strike.

Affidavit of Ted Leindecker, *supra* para 4, at paras 9-10, MPMR, Tab 2.

9. In June, 2016 the President of the Treasury Board wrote to heads of bargaining agents, including the AJC, and explained that the Federal Government was going to make changes to the dispute resolution provisions in the *FPSLRA* to undo some of the changes that the previous government had made in 2013, including restrictions to accessing binding arbitration. Until such time as the amendments were brought into force, bargaining agents could remain on the conciliation/strike path, switch to arbitration under section 104(2) of the *FPSLRA*, or choose “binding conciliation” pursuant to section 182 of the *FPSLRA* (the “Section 182 Binding Conciliation Process”).

Affidavit of Ted Leindecker, *supra* para 4, at paras 11-14, MPMR, Tab 2, Exhibit “B”.

10. The AJC notified TBS in August, 2016 that it had chosen to switch to the Section 182 Binding Conciliation Process. In making this selection, the President of the AJC wrote that “the concept of ‘binding conciliation’ pursuant to s. 182 of the PSLRA is intended to provide a process that

is substantively the same as arbitration under the old PSLRA,” which is what the AJC was seeking.

Affidavit of Ted Leindecker, *supra* para 4, at para 15, MPMR, Tab 2, Exhibit “C”.

11. On or about January 18, 2017, the AJC reported that negotiations had reached an impasse. The AJC wanted to proceed to resolve all outstanding matters through the Section 182 Binding Conciliation Process. The AJC provided a draft memorandum of agreement detailing a proposed process for TBS’s review and consideration. In drafting the proposed agreement, the AJC indicated again that its intention was to “replicate the prior arbitration process to the extent possible, on the understanding that ‘binding conciliation’ under s. 182 was intended as a way to give the parties access to the prior arbitration procedure.” The AJC’s legal counsel also sent a copy of the proposed agreement to the FPSLREB for review.

Affidavit of Ted Leindecker, *supra* para 4, at para 19, MPMR, Tab 2, Exhibit “D”.

12. After making mutually-agreed revisions, the Parties finalized a memorandum of agreement on the Section 182 Binding Conciliation Process in March 2017 (the “MOA”).

Affidavit of Ted Leindecker, *supra* para 4, at para 20, MPMR, Tab 2, Exhibits “E” and “F”.

13. The MOA between the Parties sets out the process to be followed in terms of initiating the request for final and binding determination (paragraph 2(a)), exchanging lists of issues and proposals (paragraphs 2(b) to (f)), appointing members of the Binding Conciliation Board, the process to follow if the Parties cannot agree on a Chairperson, remuneration of Board members, and eligibility to be a member (paragraphs 2(g) to (k)). Other paragraphs set out the process to deal with objections to matters being referred to the Board (2(l)), Board procedure (2(m)), factors for the Board to consider in making its decision (2(n)), the fact that the decision

of the Chairperson would be the decision of the Board (2(o)), and the role of the FPSLREB in assisting with administrative support and the associated costs (2(p) to (q)).

Affidavit of Ted Leindecker, *supra* para 4, at para 20, MPMR, Tab 2, Exhibits “E” and “F”.

14. The “whereas” clauses in the introduction in the MOA set out the facts that led up to the MOA’s creation, such as:

- (a) The agreement of the President of the Treasury Board to the Parties using section 182 of the *FPSLRA* to access, to the extent possible, the final and binding arbitration option that was available to the Parties until 2013 and the AJC’s intention to do that;
- (b) The fact that the AJC had, after receiving the letter from the President of the Treasury Board, switched its method of dispute resolution from conciliation/strike to binding conciliation under section 182; and
- (c) The Parties’ wish to refer certain terms and conditions of employment for final and binding determination pursuant to section 182.

MPMR, Tab 2, Exhibit “E”.

15. Shortly after the MOA was finalized, the AJC sent TBS and the FPSLREB a Notice of Binding Conciliation. The Notice requested that the Parties establish a Binding Conciliation Board in accordance with article 2(a) of the MOA, for a final determination of the matters that the AJC deemed had reached impasse during negotiations. The Notice outlined the terms and conditions of employment under the LP collective agreement that remained in dispute.

Affidavit of Ted Leindecker, *supra* para 4, at para 21, MPMR, Tab 2, Exhibit “G”.

16. The FPSLRB was engaged in the Section 182 Binding Conciliation Process. The FPSLRB responded to TBS's request that the FPSLRB appoint a mediator to assist the Parties with their remaining issues pursuant to section 108 of the *FPSLRA*. While the FPSLRB rejected TBS's request to appoint a mediator because the AJC had objected to such an appointment, correspondence from the FPSLRB stated that it would appoint a mediator if the Parties filed a joint request in the future seeking such an appointment.

Affidavit of Ted Leindecker, *supra* para 4, at paras 22 to 25, MPMR, Tab 2, Exhibits "H," "I," "J," "K".

17. TBS advised the FPSLRB that it was selecting Jean-François Munn to act as the Employer's nominee on the Conciliation Board pursuant to article 2(g) of the MOA.

Affidavit of Ted Leindecker, *supra* para 4, at para 26, MPMR, Tab 2, Exhibit "L".

18. The Chairperson of the FPSLRB would be tasked with nominating a Chairperson for the Conciliation Board if the Parties could not agree. The Parties would be required to accept the person that the Chairperson of the FPSLRB nominated (Article 2(i)). On April 20, 2017, correspondence was sent to the Dispute Resolution Services Coordinator at the FPSLRB regarding a request for assistance with selecting a Chairperson. In response to the AJC's nominee request for an additional day for the Parties to agree on a Chairperson, the FPSLRB Dispute Resolution Services Coordinator stated that "the Dispute Resolution Services have no authority in this matter as we are simply administering the MOA between the Bargaining Agent and the Employer." However, the Coordinator agreed that "[s]hould the parties agree on a third member and chairperson of the Binding Conciliation Board prior to a nomination by the Chairperson of the PSLREB, we will inform her accordingly."

Affidavit of Ted Leindecker, *supra* para 4, at para 27, MPMR, Tab 2, Exhibit "M".

19. When the Parties agreed on the nomination of the Chairperson for the Conciliation Board on April 20, 2017, they informed the FPSLREB of such agreement. The Conciliation Board comprised: Serge Brault – Chairperson, jointly selected by the Parties; Jean-François Munn – Employer Nominee, appointed by TBS; and Paul Cavalluzzo – Bargaining Agent Nominee, appointed by the AJC.

Affidavit of Ted Leindecker, *supra* para 4, at para 27, MPMR, Tab 2, Exhibit “M”.

20. The Parties participated in a mediation session facilitated by the Binding Conciliation Board members on July 5, 2017. The FPSLREB Dispute Resolution Services Coordinator had previously contacted the Parties regarding the scheduling of the mediation, and informed the Parties of the rooms that the FPSLREB had booked for them.

Affidavit of Ted Leindecker, *supra* para 4, at paras 30-33, MPMR, Tab 2, Exhibits “O,” “P”.

21. The Parties were unable to reach a mediated settlement. Subsequently, on October 16, 2017, the Parties filed submissions and met for conciliation to discuss the outstanding issues. The Parties presented final arguments to the Conciliation Board on October 25, 2017.

Affidavit of Ted Leindecker, *supra* para 4, at paras 29, 34-37, MPMR, Tab 2, Exhibits “N,” “Q,” “R,” “S,” “T”.

22. Chairperson Brault rendered the Binding Conciliation Board’s final decision on the Parties’ outstanding issues on July 10, 2018, and later forwarded to the Parties additional comments from the nominees. The Parties signed a new collective agreement for the LP group on November 7, 2018.

The Decision, *supra* para 1, MPBA, Tab 1.

Affidavit of Ted Leindecker, *supra* para 4, at paras 40 and 42, 43, MPMR, Tab 2, Exhibits “W,” “X,” “Y”.

PART III – THE ISSUES

23. The issues on this Motion are:

- (a) Whether an “eligible person” acting under section 182 of the *FPSLRA* is a “federal board, commission or other tribunal” for the purposes of the *FCA* such that the Federal Court has exclusive jurisdiction, under section 18 of the *FCA*, to hear a judicial review application concerning a determination made by such a person; and
- (b) Whether this Court has jurisdiction to hear this Application.

PART IV – LAW AND ARGUMENTS

A. The “Eligible Person” under Section 182 of the *FPSLRA*, which was the Binding Conciliation Board, Was a “Federal Board, Commission or Other Tribunal”

- (i) **The *FPSLRA*, a federal statute, conferred the jurisdiction and powers that the Binding Conciliation Board exercised**

24. By reason of section 18 of the *FCA*, the Federal Court has exclusive jurisdiction to hear judicial review applications concerning decisions taken by a “federal board, commission or other tribunal.” That term is defined in section 2 of the *FCA* as meaning a person or body “having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament.” No other court may hear judicial review proceedings concerning bodies that fall within this category.

FCA, supra para 2, ss. 2 and 18.

25. Over the years, the courts have provided guidance as to what constitutes a federal board, commission or other tribunal under section 2.

26. The Supreme Court of Canada in *Canada (Attorney General) v. Telezone Inc.* has said that “[t]he definition of ‘federal board, commission or other tribunal’ in the Act is sweeping” and that “[t]he federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between.”

2010 SCC 62 at para 3, MPBA, Tab 2.

27. In *Cree Regional Authority v. Canada (Federal Administrator)*, the Federal Court of Appeal held that it is the source of the body’s jurisdiction or powers, not the body’s document of appointment that determines whether the body is a federal board under section 2.

[1991] 3 FC 533 at paras 33-34, MPBA, Tab 3.

28. The Federal Court repeated this message in *Oceanex Inc. v. Canada (Transport)*, where it quoted from the decision in *Anisman v. Canada (Border Services Agency)*, to say that it is the “source of the tribunal’s authority, and not the nature of the power exercised or the body exercising it” that is the “primary determinant of whether it falls within the definition. The test is simply whether the body is empowered by or under federal legislation...”

2018 FC 250 (“Oceanex”) at para 200, MPBA, Tab 4.

2010 FCA 52 at paras 29-30, MPBA, Tab 5.

29. The Court in *Oceanex* further clarified that “conferred by or under an Act of Parliament of Canada” means that an Act of Parliament has to be the source of the jurisdiction of powers that are being conferred.

***Oceanex*, supra para 28, at para 201.**

30. In *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, the Federal Court of Appeal found that “powers conferred by or under an Act of Parliament” is “particularly broad,” and emphasised that the key issue is determining whether a litigant has access to the Federal Court’s “power of review in connection with a legislative provision ... by which Parliament sought to make the federal government subject to the Court’s superintending and reforming power.” The Court in that case found no reason to try to distort the usual meaning of the words or strive to divest them of practical meaning.

1995 CarswellNat 673 at paras 7-8, MPBA, Tab 6.

31. In the case at bar, the dispute resolution process that the AJC chose to resolve its dispute with the Treasury Board over the LP’s terms and conditions of employment was the one that is available under section 182 of the *FPSLRA*.

32. Section 182 of the *FPSLRA* gave rise to the Binding Conciliation Board’s legal jurisdiction and legal powers, which are attributes that lie beyond the control of either the TBS or AJC. For example, neither Party could unilaterally withdraw from the process once it had begun (section 182(3)). Regardless of what the Parties may have preferred, the final determination of the Binding Conciliation Board was binding and was deemed automatically to be incorporated into the collective agreement (section 182(5)). The *FPSLRA* also regulated the eligibility of the Chairperson of the Conciliation Board as decision-maker (section 182(6)). These are fundamental jurisdictional limits on the powers to be exercised by the Binding Conciliation Board that both define the outer limits of the Parties’ authority to control the Section 182 Binding Conciliation Process, and impose legal consequences on the outcome of that process.

FPSLRA, supra para 1, s. 182.

33. Once a term or condition of employment is referred to an “eligible person” under subsection 182(1) of the *FPSLRA*, the jurisdiction and powers that the person acting under the alternative dispute resolution process set out under section 182 derive from the *FPSLRA*. Neither the agreement to refer a term or condition of employment, nor the selection of the person by the Parties, nor the process that the Parties agree to, create the jurisdiction and powers of the person. His or her jurisdiction and powers are created by the legislation.

34. The conferral of jurisdiction and powers to the Chairperson of the Binding Conciliation Board under section 182 of the *FPSLRA* brings the Binding Conciliation Board within the definition of a “federal board, commission or other tribunal.” The Parties echoed this conferral of jurisdiction and powers in Article 2(h) of the March MOA, stating that “the Chairperson of the Binding Conciliation Board shall be the ‘eligible person’, as that term is used in s. 182 of the *PSLRA*,” and in Article 2(o) that “The decision of the Chairperson of the Binding Conciliation Board in respect of the matters in dispute is the decision of the Binding Conciliation Board.”

MPMR, Tab 2, Exhibit “E”.

(ii) **The Parties’ MOA did not confer jurisdiction and powers on the Binding Conciliation Board**

35. The Parties did not create the Binding Conciliation Board with the MOA nor confer any jurisdiction or powers through the MOA. While the Parties were free to negotiate the process to be followed, and did so with the MOA, the jurisdiction and powers were derived from the statute.

a) Determining process is not equivalent to conferring jurisdiction and powers

36. With the AJC’s choice to switch from conciliation/strike to the Section 182 Binding Conciliation Process, the Parties were able to refer their outstanding collective bargaining issues “to any eligible person for final and binding determination *by whatever process* the employer and the bargaining agent agree to” (emphasis added). The Parties were responsible for establishing the details of the process that would be in place in the event of an impasse in bargaining occurring—as detailed in the MOA—but these processes would still have to be consistent with the requirements of the *FPSLRA*.

37. As confirmed in *Professional Association of Foreign Service Officers v. Treasury Board* (“*PAFSO*”), while the Parties enjoy more freedom to determine *process* under section 182, this “does nothing to change the substantive nature of the legislation with regard to dispute resolution and therefore the factors which Parliament clearly intended to have considered apply.”

2013 PSLRB 110 at paras 57-58, MPBA, Tab 7.

b) The Section 182 Binding Conciliation Process mirrored the FPSLRA interest arbitration process

38. The AJC’s statements regarding the Section 182 Binding Conciliation Process reflect the Parties’ intention that the Binding Conciliation Board would consider, along with any other factors that it considered relevant, the factors considered by arbitration boards that existed in the legislation prior to 2013 (Article 2(n) of the MOA). The addition of this clause, however, was not jurisdiction conferring.

MPMR, Tab 2, Exhibit “E”.

39. The Conciliation Board characterized itself as an interest arbitration board, and noted that it was relying on the factors in section 148 of the *FPSLRA* that arbitration boards must consider in making its determination.

The Decision, *supra* para 1, at paras 49-53, MPBA, Tab 1.

40. Further, both the FPSLREB and the Federal Court have treated the section 182 dispute resolution tool as essentially a parallel process of interest arbitration to that set out in Division 9 of the *FPSLRA*, and have suggested that an eligible person under section 182 is required to consider the same factors as an arbitration board constituted under that Division.

41. In *PAFSO*, the Professional Association of Foreign Service Officers challenged TBS's proposed conditions for agreeing to binding conciliation under section 182 of the *FPSLRA* on the basis that the conditions breached the duty to bargain in good faith in section 106 of the *FPSLRA*.

***PAFSO, supra* para 37, at para 52, MPBA, Tab 7.**

42. The FPSLREB confirmed that an "eligible person" under section 182 is required to consider the factors set out in section 148 of the *FPSLRA*. The comments in *PAFSO* suggest that while section 182 contemplates mutual agreement to a process for binding conciliation, it remains in substance a legislated dispute resolution process:

Section 182 specifies that the parties may refer any term or condition for final and binding determination "by whatever process" they may agree (emphasis added). The key word in this phrase is "process". This is confirmed by subsection 182(2) which confirms that if the "process" under section 182 is agreed to by the parties, the "process" for dispute resolution that was chosen prior to negotiations remains in place. The use of the word "process" a second time in the same section of the Act is significant particularly in reference to what is truly a process under the Act. The mutually agreed upon process under section 182 is just that, a process for dispute resolution, and does nothing to

change the substantive nature of the legislation with regard to dispute resolution and therefore the factors which Parliament clearly intended to have considered apply.

PAFSO, supra para 37, at para 58, MPBA, Tab 7.

43. Moreover, throughout the decision in *PAFSO*, the FPSLREB referred to the process under section 182 interchangeably as a “final and binding determination” and as “arbitration.”

PAFSO, supra para 37, MPBA, Tab 5.

44. Section 182 was again characterized as an arbitration process in *Public Service Alliance of Canada v. Canada (Attorney General)*. That decision arose from a judicial review of a final offer vote directed by the Minister of Canadian Heritage under section 183 of the *FPSLRA*. The Federal Court referred to the process under section 182 as a process of “arbitration.”

2013 FC 918 at para 74, MPBA, Tab 8.

45. The source of the Binding Conciliation Board’s jurisdiction is section 182, and the powers and guidelines which permit it to exercise that jurisdiction are those found in the *FPSLRA*. The Binding Conciliation Board’s powers and jurisdiction are analogous to those exercised by arbitration boards under Division 9 of the *FPSLRA*. The authority of an eligible person under section 182 to issue a final and binding determination of all unresolved terms and conditions of employment is simply another form of a federally legislated dispute resolution process.

c. The FPSLREB administered the Section 182 Binding Conciliation Process like it does for typical FPSLRA interest arbitration processes

46. Article 2 of the March MOA detailed the process that the Parties agreed would be followed in the referral of issues to the Conciliation Board. The Director of Dispute Resolution Services of the FPSLREB was to be given copies of notices and proposals that the Parties were going to (and did) exchange: Articles 2 (a), (c), (d), (f). As had been stated in the letter sent from the

President of the Treasury Board in June 2016, “if any disputes arise with respect to the administration of the ‘binding conciliation’ process either party may apply to the Chair of the PSLREB, or their designate, for a timely resolution of the issue(s).” Article 2(l) of the March MOA on “jurisdictional objections” further granted the Conciliation Board with the power to rule on objections that either party raised regarding a matter being referred to the Conciliation Board for final and binding determination.

MPMR, Tab 2, Exhibits “B” and “E”.

47. The Parties also detailed how the FPSLREB would provide support to administer the Section 182 Binding Conciliation Process. For instance, Articles 2(p) and 2(q) state:

(p) The Dispute Resolution Services of the Public Service Labour Relations and Employment Board Secretariat will assist in the administration of the process, including the provision of reasonable administrative support to the Binding Conciliation Board as it may require, mediation facilities as may be requested, and facilities including hearing rooms, meeting rooms, and simultaneous interpretation.

(q) The Public Service Labour Relations and Employment Board will assume responsibility for the cost of administering the process in accordance with its own and other applicable federal government financial policies, including the cost of meeting rooms, simultaneous interpretation and other incidental costs normally absorbed by the PSLREB for comparable dispute resolution processes.

MPMR, Tab 2, Exhibit “E”.

48. The financial and administrative involvement of the FPSLREB weighs in support of the Binding Conciliation Board being a “federal board, commission, or other tribunal.” With the FPSLREB assuming “responsibility for the cost of administering the process in accordance with its own and other applicable federal government financial policies” like it does for “comparable dispute resolution processes,” the government maintained control and responsibility for a key element of the finances relating to the Section 182 Binding Conciliation

Process. With the FPSLREB being kept informed of notices and proposals, and with the Chairperson of the FPSLREB retaining the power to nominate a Chairperson for the Conciliation Board if one could not be agreed on, the Conciliation Board was not operating at arm's length from the federal government's existing dispute resolution processes.

49. As held in *PAFSO*, the FPSLREB has the power under section 192 of the *FPSLRA* to order parties to participate in binding conciliation:

65 The complainant asks that, in addition to providing a declaration that the respondent is guilty of bargaining in bad faith, I order the parties to participate in final and binding determination under section 182, and that I strike out the offensive provisions of the respondent's agreement to participate in final and binding determination under section 182. Counsel for the respondent argues that I have no such jurisdiction. My remedial authority in cases of complaints under section 190 of the Act rests in section 192(1):

192. (1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of ...

I also note section 192(2) which reads as follows:

Person acting on behalf of employer

(2) If the order is directed to a person who has acted or purported to act on behalf of the employer, the order must also be directed to the Secretary of the Treasury Board in the case of the core public administration and, in the case of a separate agency, to its deputy head.

66 By strict interpretation of section 192, I find that I have the authority to provide the complainant with the declaration that they demand. I would also have the authority to make any other order that I consider necessary. However, I do not believe that it is conducive to good labour relations to order parties to participate in final and binding determination when such arbitration is voluntary in the first place.

PAFSO, supra para 37, at paras 65-66, MPBA, Tab 5.

d. The Binding Conciliation Board could not exceed FPSLRA-granted jurisdiction and powers since the statute—not the Parties' collective agreement—governed

50. Chairperson Brault exercised the power to make a final and binding determination of all unresolved terms and conditions of employment that were the subject of the Parties'

negotiations. These terms and conditions were referred to the Binding Conciliation Board through the AJC's Notice of Conciliation and were detailed in the Parties' respective proposals.

51. The decision of the Binding Conciliation Board under review demonstrates that Chairperson Brault was exercising jurisdiction arising from and limited by the *FPSLRA*. In response to the sixth issue referred for final determination, the AJC took the position that the issue had not been negotiated prior to the referral, and that the Binding Conciliation Board therefore lacked jurisdiction to determine the issue as a result of section 150(2) of the *FPSLRA*.

The Decision, *supra* para 1, at paras 45-48, MPBA, Tab 1.

52. The Binding Conciliation Board accepted this argument and declined to make a determination on the sixth issue which was referred.

The Decision, *supra* para 1, at paras 76-78, MPBA, Tab 1.

53. The Conciliation Board's powers were not derived from the Parties' collective agreement. In *Association of Radio and Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Corporation ("CBC")*, the Supreme Court of Canada held that an arbitration board created and empowered by the collective agreement between the parties was not a "federal board, commission or other tribunal" within the meaning of section 2 of the *FCA*. The majority held that "the powers of a board of arbitration in a labour dispute must be determined from the provisions of the collective agreement. It is there, and only there, that the powers of the board are defined." *CBC* is therefore distinguishable from the facts at bar. First, the board in *CBC* was dealing with a grievance arbitration, while here the Binding Conciliation Board's task was in essence interest arbitration—defining the terms of the agreement between the Parties, as opposed to interpreting and applying agreed-upon terms. Second, as has been made

clear, the powers of the eligible person acting under section 182 of the *FPSLRA*—the Binding Conciliation Board Chairperson—are defined not in the Parties’ collective agreement but in a federal statute.

[1975] 1 SCR 118 at p. 124, MPBA, Tab 9.

e. Parliament did not intend to exclude Section 182 eligible persons from section 2 of the FCA like it has in other Acts

54. The *FPSLRA* does not contain an explicit statement carving out *FPSLRA* collective bargaining dispute resolution processes from the definition of a “federal board, commission or other tribunal.” This is to be contrasted with carve-outs that exist in other Acts of Parliament including, but not limited to, the following:

- (a) Subsection 58(3) of the *Canada Labour Code*: “*For the purposes of the Federal Courts Act, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.*”
- (b) Subsection 9(4) of the *Physical Activity and Sport Act*: “*For the purposes of the Federal Courts Act, the Centre or an arbitrator or mediator who provides services under the auspices of the Centre is not a federal board, commission or other tribunal within the meaning of that Act.*”
- (c) Subsection 266(1) of the *Greenhouse Gas Pollution Pricing Act*: “*A provincial official or body that exercises a power or performs a duty or function under a regulation made under subsection 263(1) is not a federal board, commission or other tribunal for the purposes of the Federal Courts Act.*”

Canada Labour Code, R.S.C. 1985, c. L-2, s. 58(3).

Physical Activity and Sport Act 2003, c. 2, s. 9(4).

Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186, s. 266(1).

55. Parliament would have included in the *FPSLRA* a similar provision if it intended that an eligible person's final and binding determination under section 182 was not to be captured under section 2 of the *FCA*.

B. The Ontario Superior Court of Justice Does Not Have Jurisdiction to Determine this Application and It Should Therefore be Dismissed

56. Pursuant to section 106 of the *Courts of Justice Act*, this Court may stay a proceeding on such terms as are considered just. Rule 21.01(3)(a) provides that this Application may be dismissed on the grounds that this Court has no jurisdiction over the subject matter at issue.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106.

Rules, supra para 3, R. 21.01(3)(a).

57. As the Supreme Court of Canada has explained:

7 Rule 21.01(3)(a) permits a defendant to seek a stay or dismissal of the action on the basis that the court has 'no jurisdiction over the subject matter of the action'. Thus, when another forum — an arbitration panel, a tribunal or another court — has the exclusive jurisdiction to deal with the claim, the Ontario Superior Court of Justice will not take jurisdiction, based upon agreement or statute.

Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd., 2012 SCC 9 at para 7, MPBA, Tab 10.

58. The Federal Court clearly has exclusive jurisdiction over the subject matter of the Application, which seeks to judicially review the Section 182 Binding Conciliation Board Decision. For the reasons explained above, the Binding Conciliation Board is a federal board, commission or other tribunal under section 2 of the *FCA*. This Court is without jurisdiction to hear and determine the Application and to grant the Relief sought.

PART V – ORDER SOUGHT

59. For all the above reasons, the Attorney General of Canada requests that this Application be dismissed, and in the alternative, that a permanent stay be issued.

60. The Attorney General of Canada seeks its costs for this Motion on a substantial indemnity basis, plus HST.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of March, 2019.

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SCHEDULE "A"

LIST OF AUTHORITIES

1.	<i>Treasury Board v. Association of Justice Counsel</i> , 2018 CanLII 119222
2.	<i>Canada (Attorney General) v. TeleZone Inc.</i> , 2010 SCC 62
3.	<i>Cree Regional Authority v. Canada (Federal Administrator)</i> , [1991] 3 FC 533
4.	<i>Oceanex Inc. v. Canada (Transport)</i> , 2018 FC 250
5.	<i>Anisman v. Canada (Border Services Agency)</i> , 2010 FCA 52
6.	<i>Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works & Government Services)</i> , 1995 CarswellNat 673
7.	<i>Professional Association of Foreign Service Officers v. Treasury Board</i> , 2013 PSLRB 110
8.	<i>Public Service Alliance of Canada v. Canada (Attorney General)</i> , 2013 FC 918
9.	<i>Association of Radio and Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Corporation</i> , [1975] 1 SCR 118
10.	<i>Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.</i> , 2012 SCC 9

SCHEDULE “B”

EXCERPTS OF RELEVANT STATUTES, REGULATIONS, & BY-LAWS

Section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7

Definitions

2 (1) In this Act,

...

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; (office fédéral)

...

Section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of habeas corpus ad subjiciendum, writ of certiorari, writ of prohibition or writ of mandamus in relation to any member of the Canadian Forces serving outside Canada.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Section 106 of the *Courts of Justice Act*, R.S.O., 1990, c. C.43.

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Section 148 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2**Making of Arbitral Award****Factors to be considered**

148 In the conduct of its proceedings and in making an arbitral award, the arbitration board must take into account the following factors, in addition to any other factors that it considers relevant:

- (a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;
- (b) the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the arbitration board considers relevant;
- (c) the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;
- (d) the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
- (e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.

Section 182 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2**Alternate dispute resolution process**

182 (1) Despite any other provision of this Part, the employer and the bargaining agent for a bargaining unit may, at any time in the negotiation of a collective agreement, agree to refer any term or condition of employment of employees in the bargaining unit that may be included in a collective agreement to any eligible person for final and binding determination by whatever process the employer and the bargaining agent agree to.

Alternate process applicable only to terms referred to it

(2) If a term or condition is referred to a person for final and binding determination, the process for resolution of a dispute concerning any other term or condition continues to be conciliation.

Agreement not unilaterally changeable

(3) Unless both parties agree, the referral of a term or condition to a person for final and binding determination remains in force until the determination is made.

Form of determination

(4) The form of the final and binding determination must, wherever possible, permit the determination to be

(a) read and interpreted with, or annexed to and published with, a collective agreement dealing with other terms and conditions of employment of the employees in the bargaining unit in respect of which the determination applies; and

(b) incorporated into and implemented by any instrument that may be required to be made by the employer or the relevant bargaining agent in respect of the determination.

Binding effect

(5) The determination is binding on the employer, the bargaining agent and the employees in the bargaining unit and is deemed to be incorporated into any collective agreement binding on the employees in the bargaining unit in respect of which the determination applies or, if there is no such agreement, is deemed to be such an agreement.

Eligibility

(6) A person is not eligible to be appointed as a person who makes a final and binding determination under this section if the person has, at any time during the six months before their date of appointment, acted in respect of any matter concerning employer-employee relations as solicitor, counsel or agent of the employer or of any employee organization that has an interest in the term or condition referred for final and binding determination.

Subsection 58(3) of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

For the purposes of the *Federal Courts Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.

Subsection 9(4) of the *Physical Activity and Sport Act*, S.C. 2003, c. 2.

For the purposes of the *Federal Courts Act*, the Centre or an arbitrator or mediator who provides services under the auspices of the Centre is not a federal board, commission or other tribunal within the meaning of that Act.

Subsection 266(1) of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s 186.

A provincial official or body that exercises a power or performs a duty or function under a regulation made under subsection 263(1) is not a federal board, commission or other tribunal for the purposes of the *Federal Courts Act*.

Rule 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194.

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action; ...

ASSOCIATION OF JUSTICE
COUNSEL
Applicant (Responding Party)

-and- ATTORNEY GENERAL OF CANADA
Respondent (Moving Party)

Court File No. DC-18-00002431

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

PROCEEDING COMMENCED AT
OTTAWA

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