COURT OF APPEAL OF NEW BRUNSWICK

COUR D'APPEL DU NOUVEAU-BRUNSWICK

29/06/CA

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1253

APPLICANT

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE BOARD OF MANAGEMENT

RESPONDENT

SYNDICAT CANADIEN DE LA FONCTION PUBLIQUE, SECTION LOCALE 1253

REQUÉRANT

- et -

SA MAJESTÉ LA REINE DU CHEF DE LA PROVINCE DU NOUVEAU-BRUNSWICK, REPRÉSENTÉE PAR LE CONSEIL DE GESTION

INTIMÉE

Canadian Union of Public Employees, Local 1253 v. Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Board of Management, 2006 NBCA 101

Syndicat canadien de la fonction publique, section locale 1253 c. Sa Majesté la Reine du chef de la Province du Nouveau-Brunswick, représentée par le Conseil de gestion, 2006 NBCA 101

CORAM:
The Honourable Justice Turnbull
The Honourable Justice Larlee
The Honourable Justice Robertson

CORAM :
L'honorable juge Turnbull
L'honorable juge Larlee
L'honorable juge Robertson

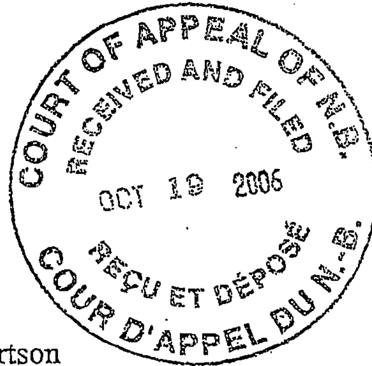
Application to review a decision of the Labour and Employment Board:
December 15, 2005

Application heard:
June 13, 2006

Judgment rendered:
October 19, 2006

Reasons for judgment by:
The Honourable Justice Robertson

Concurred in by:
The Honourable Justice Turnbull
The Honourable Justice Larlee


COURT OF APPEAL OF N.B.
RECEIVED AND FILED
OCT 19 2006
REÇU ET DÉPOSÉ
COUR D'APPEL DU N.-B.

Requête en révision d'une décision de la Commission du travail et de l'emploi :
Le 15 décembre 2005

Date d'audition de la requête :
Le 13 juin 2006

Jugement rendu :
Le 19 octobre 2006

Motifs de jugement :
L'honorable juge Robertson

Souscrivent aux motifs :
L'honorable juge Turnbull
L'honorable juge Larlee

Counsel at hearing:

For the appellant:
Robert D. Breen, Q.C.

For the respondent:
Annie Robichaud

THE COURT

The application for judicial review is allowed, the decision of the Labour and Employment Board is set aside, and the matter is remitted to the Board in accordance with the reasons for judgment.

Avocats à l'audience :

Pour l'appelant :
Robert D. Breen, c.r.

Pour l'intimée :
Annie Robichaud

LA COUR

Accueille la requête en révision, annule la décision de la Commission du travail et de l'emploi et renvoie l'affaire à la Commission suivant les motifs de l'arrêt.

The judgment of the Court was delivered by

ROBERTSON J.A.

[1] The Labour and Employment Board was asked to decide whether custodians responsible for cleaning schools provide an "essential service", within the meaning of s. 43.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. That provision empowers the Board to designate, in advance, those employees in a bargaining unit who are precluded from participating in a lawful strike. Section 43.1 also simplifies the Board's task to the extent that an "essential service" is cast in terms of one that is "essential in the interest of the health safety or security of the public." The Board gave a positive response to the question posed. Consequently, the right of these civil servants to strike is curtailed. In response to the Board's decision, the applicant union filed an application for judicial review for which the Court of Queen's Bench refused to fix a hearing date. Pursuant to Rule 69.04(2) of the *Rules of Court*, the Chief Justice directed that the application be heard in the Court of Appeal. His reasons are now reported at *Canadian Union of Public Employees, Local 1253 v. New Brunswick (Board of Management)*, [2006] N.B.J. No. 122 (QL). For these reasons the proceeding comes to us as an application, not an appeal.

[2] It is unnecessary to write lengthy reasons with respect to the review standard applicable to the Board's decision. The jurisprudence often speaks of an "essential service" determination as one involving a question of fact. If that were so, the applicable review standard would be "palpable and overriding error". But I do not think that the interpretation and application of s. 43.1 of the *Act* can be said to involve a question of fact alone. While I agree that the essential service issue is fact driven, in truth, it involves a question of mixed law and fact and in some instances a question of law alone (*e.g.*: Who is the "public"?). In either case, however, the applicable review standard must be "patent unreasonableness". I readily accept that the Board is an expert tribunal, whose decisions are protected by a full privative clause, and that the interpretative issue is tied to the Board's enabling statute. Moreover, the issue is one over which the Board

possesses a relative expertise. Applying the pragmatic and functional approach articulated by the Supreme Court and having regard to the jurisprudence of this Court, the proper review standard has to be patent unreasonableness: see *Canadian Union of Public Employees, Local 2745 v. New Brunswick (Board of Management)* (2004), 269 N.B.R. (2d) 141 (C.A.), [2004] N.B.J. No. 110 (C.A.)(QL), 2004 NBCA 24, and *New Brunswick (Board of Management) v. Dunsmuir* (2006), 297 N.B.R. (2d) 151 (C.A.), [2006] N.B.J. No. 118 (C.A.)(QL), 2006 NBCA 27.

[3] The more difficult aspect of this case is the application of the patently unreasonable standard of review. I am acutely aware that it is all too easy for a reviewing court to pay lip-service to the tenets of the deference doctrine and interfere with a tribunal decision in circumstances where the court views the outcome as unacceptable. Bearing in mind that potential folly, I am still convinced that the Board's decision is patently unreasonable. I am not suggesting that its decision is "absurd" or "irrational". Elsewhere this Court has stated that those adjectival descriptions of this review standard are demeaning to tribunal members and inconsistent with what the Supreme Court has been saying and doing over the last 15 years: see *Doucet-Jones v. New Brunswick (Board of Management)* (2004), 274 N.B.R. (2d) 237 (C.A.), [2004] N.B.J. No. 345 (C.A.)(QL), 2004 NBCA 65, and *The Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation, District 15 (Toronto), Owen Shime, Q.C., A.S. Merritt and L.A. Jones*, [1997] 1 S.C.R. 487, [1997] S.C.J. No. 27 (QL).

[4] There are three reasons why I conclude that the Board's decision is patently unreasonable. First, the Board's ultimate conclusion is tied to a <u>false</u> assumption: schools will remain open if custodians go on strike. Second, the Board's reliance on other Board decisions to justify the adoption of the assumption is misplaced. Those decisions are distinguishable on substantive grounds. Third, the Board's approach to the designation issue is incompatible with the purpose underscoring s. 43.1 of the *Act*. As will be explained at para. 20 of these reasons, the Board addressed the essential services issue by posing a broad question when the amended legislation calls for a narrow one. Admittedly, the Board's approach is compatible with the Federal Court of Appeal's

decision in *Re The Queen In Right of Canada and Canadian Air Traffic Control Association (No. 2)* (1981), 128 D.L.R. (3d) 685 (F.C.A.), aff'd [1982] 1 S.C.R. 696, [1982] S.C.J. No. 36 (QL) (hereafter *CATCA*). However, as will be explained, s. 43.1 was introduced as a 1990 amendment to the *Act* for the purpose of reversing that decision. Prior to that date, the relevant provision was found in s. 50 of the *Act*. In short, it is because of the Board's flawed reasoning and its failure to appreciate the purpose of s. 43.1 of the *Act* that I am prepared to hold that its decision is patently unreasonable.

[5] To better appreciate the legal issues surrounding the Board's decision, an overview of the Board's earlier jurisprudence is required. Specifically, I focus on decisions involving school employees: custodians, teaching assistants and student attendants. This historical analysis allows us to examine the *Act* as it read prior to the 1990 amendment. As well, it allows us to examine the impact of *CATCA* and the Legislature's reason for adopting the amendment. The text of s. 43.1 and s. 50 are found in Appendix "A" to these reasons.

[6] The first pertinent decision of the Board was rendered in 1980 and is commonly referred to as the *MacLean* decision: *Re Province of New Brunswick and C.U.P.E., New Brunswick Council of School Board Unions (1980)*, N.B.L.L.C., Part II, 14011. In that case, the Board was dealing with the predecessor to s. 43.1 of the *Act*. At that time, s. 50 was the pertinent provision, but it did not speak of employees whose duties qualified as an essential service. Rather, the question to be asked was whether members of the bargaining unit performed duties that were necessary in the interest of the health, safety or security of the public. A positive response to that question meant that the Board could designate the employees who would be unable to exercise their right to strike. The employees with respect to whom the employer sought designations were "support staff" within the schools and school board offices. More importantly, the Board rejected the employer's argument that designations should be made on the basis of the employer's intention to keep schools open. Of course, in the present case, this is the very assumption that the Board accepted and applied. In the *MacLean* decision, the Board accepted the following working premise at page 14014:

> Designations should not serve to prevent inconvenience to the public, nor should they permit the Employer to carry on business as usual. The public would be affected by any strike. However, it is only where the strike affects the health, safety or security of the public that designations be made.

[7] In the *MacLean* decision, the Board concluded that there was no legal obligation to keep schools open during a lawful strike and, correlatively, that schools could close without impacting on the heath, safety or security of those mostly affected (students). Although the Board's decision does not expressly state that "support staff" includes custodians, one can reasonably infer as much from its analysis. I say this because the Board did agree that if schools were to remain open, it would be necessary to maintain heat and a degree of sanitation services in the interest of the health, safety or security of the students. However, the Board went on to hold that that reasoning did not apply with respect to other services supplied by other support staff. The Board also acknowledged that while the employer would suffer from the inconvenience of an unscheduled school closure, such inconvenience would not affect the health or safety interests of the public. In effect, the Board focused on the ultimate impact that a strike by support staff would have on the public (students). Accordingly, the Board refused to designate any of the support staff for strike purposes.

[8] Following the release of the *MacLean* decision, the Federal Court of Appeal released its decision in *CATCA*. That decision involved the designation of air traffic controllers as employees who performed duties that were necessary in the interest of public safety or security, as provided for under s. 79(3) of the federal *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35. Substantively, there was no difference between that provision and s. 50 of the New Brunswick legislation, other than the provincial legislation also embraces duties that are necessary in the interests of public health. The federal employer sought to have nearly all of Canada's air traffic controllers (1,782 of the 2,169) designated as performing duties necessary to public safety with a view to avoiding a nation-wide strike. The designation request was made on the assumption that normal commercial air services would be maintained during a strike. However, the union argued

that the designations should be based on the assumption that, in the event of a strike, air traffic would be reduced to flights necessary to ensure the safety or security of the public (emergency air traffic). Applying that assumption, the number of air traffic controllers needed would have been greatly reduced (272 and 151 alternates). The federal board accepted the union's argument. Consequently, the board effectively determined the level of air service that would be available during a strike. Subsequently, the board's decision was successfully appealed to the Federal Court of Appeal. Specifically, it was found that s. 79(3) did not authorize the board to designate the duties to be performed or the extent of services to be rendered in the event of a strike. The employer retained the right to make that determination. Rather, the board's duty was limited to determining which employees in the bargaining unit were performing duties that were necessary to the safety or security of the public as of the date of the board hearing. It was on this basis that the Federal Court of Appeal remitted the matter to the board for a re-determination. Not surprisingly, it subsequently ruled that all of the air traffic controllers had to be designated, as all were required to perform duties that were necessary in the interest of public safety: *The Canadian Air Traffic Control Association and Her Majesty in right of Canada as represented by the Treasury Board* (1981), P.S.S.R.B., file # 181-2-134.

[9] Shortly after the release of the Federal Court of Appeal's decision in *CATCA*, but before the Supreme Court affirmed that decision, the New Brunswick Board was called on to decide whether certain school custodians should be designated as "necessary" under s. 50 of the *Act* (hereafter referred to as the 1981 decision). Unlike the custodians involved in the present case, who are responsible for cleaning schools, the designations sought in the 1981 decision involved 141 custodians responsible for the maintenance of heating equipment. Applying the *CATCA* decision, the Board held that it could not determine the level of service to be provided in the event of a strike and, therefore, the only question was whether the duties being performed were necessary in the interest of public safety. Against this legal framework, the Board had no difficulty in deciding that this group of custodians provided a necessary service. Finally, the Board took the opportunity to comment on the effect that *CATCA* would have had on the earlier *MacLean* decision. In short, the Board acknowledged that it would have decided the case

differently had the reasoning in *CATCA* been applied. The union's application for judicial review was dismissed on the basis that deference was owed to the Board's decision: see *Province of New Brunswick v. Canadian Union of Public Employees, New Brunswick Council of School Board Unions* (1981), 37 N.B.R. (2d) 631, and *Canadian Union of Public Employees, New Brunswick Council of School Board Unions, Local 1253 v. Province of New Brunswick* (1982), 38 N.B.R. (2d) 133 (Q.B.), [1982] N.B.J. No. 70 (Q.B.)(QL).

[10] In 1990, the *Act* was amended to emphasize the negotiation of essential service agreements and, in the absence of an agreement, to give the Board the explicit authority to determine both the services to be maintained and the level of service: S.N.B. 1990, c. 30, s.7. Today, s. 43.1(5) deems s. 43.1(3) applicable such that the Board may be required to make three separate determinations. First, it must determine, in the absence of an agreement, whether the employees offer an essential service in the sense that it is necessary in the interest of the health, safety or security of the public. Second, if it is found that the employees do provide an essential service, it is incumbent on the Board to determine the level of service to be provided in the event of a strike. Third, the Board must decide which positions in the bargaining unit are to be designated. For example, in the present case, the respondent employer asks that 80% of the nearly 1000 school custodians be prohibited from engaging in a lawful strike. First, however, the employer had to persuade the Board that school custodians provide an essential service. As noted and should be evident, the 1990 amendment had the effect of reversing the Federal Court of Appeal and the Supreme Court's confirmatory decisions in *CATCA*. Implicit in all of this is the reality that the Board is no longer obligated to assess the essential services issue as of the date of the designation hearing and the Board is no longer restrained from determining the level of service to be maintained during a strike. In other words, the Board must now consider what impact the strike will have on the public and designate only those who are necessary in the interest of public health, safety or security. I shall come back to these points shortly.

[11] Beginning in 1993, the Board dealt with a number of essential service designations involving teaching assistants and student attendants. Initially, the Board ruled that both groups of employees do not provide an essential service. Subsequently, the Board declared that both groups perform duties necessary to the health or safety of the public. I discuss the pertinent decisions for two reasons. First, the respondent employer maintains that it would be illogical to designate teaching assistants and student attendants as providing an essential service but not school custodians. Second, the Board relied on two of its earlier precedents to support the decision presently under review.

[12] In 1993, the Board issued a unanimous plenary decision declaring that teaching assistants and student attendants do not provide an essential service within the meaning of s. 43.1 of the *Act*. The Board ruled that the services provided by members of the bargaining unit were not necessary in the interest of the health, safety or security of the public for one reason. The services provided by these employees were held to be incidental to the educational services provided to the public and, correlatively, that any services which are incidental to education services are not necessary in the interest of public health safety or security: *New Brunswick (Board of Management) v. Canadian Union of Public Employees, Local 2745*, [1993] N.B.P.S.L.R.D. No.2 (QL).

[13] In 1998, a single member of the Board declined to apply one aspect of the 1993 precedent. That member held that student attendants (not teaching assistants) provided an essential service because their attendance was necessary to the health, welfare and security of a select group of students. He ruled that when properly viewed the service being provided by student attendants fell with in the category of health services as opposed to educational services. From the decision, it appears that student attendants are required to provide medical and mobility assistance to handicapped students, while teaching assistants do not share those responsibilities: *New Brunswick (Department of Finance) (Re)*, [1998] N.B.L.E.B.D. No. 6 (QL).

[14] In 2002, a single member of the Board held that the duties performed by both teacher assistants (1,454 employees) and student attendants (39 employees)

qualified as an essential service. As a matter of fact, the member held that teaching assistants are required to do more than assist teachers in the classroom. They may also be required to look after the physical needs of some of the students and, therefore, should be classified in the same manner as student attendants. It was on this basis that the Board's 1993 decision was not followed. While the 2002 decision was quashed on judicial review, it was reinstated following an appeal to this Court. Unlike the reviewing judge, we held that the Board's decision was not patently unreasonable: *New Brunswick (Board of Management) (Re)*, [2002] N.B.L.E.B.D. No. 13 (QL), rev'd *Canadian Union of Public Employees, Local 2745 v. New Brunswick (Board of Management)* (2003), 263 N.B.R. (2d) 147 (Q.B.), [2003] N.B.J. No. 195 (Q.B.)(QL), 2003 NBQB 199, rev'd (2004), 269 N.B.R. (2d) 141 (C.A.), [2004] N.B.J. No. 110 (C.A.) (QL), and 2004 NBCA 24.

[15] Against this jurisprudential background, I turn to the present case. The reasoning of the single member of the Board is not complicated. No one questions the Board's finding that the withdrawal of custodial services would expose the public to a health hazard. Indeed, the jurisprudence consistently recognizes that the withdrawal of cleaning services within a public institution will ultimately lead to unsanitary conditions that present an unacceptable risk to the health of the public. As well, no one takes issue with the Board's interpretation of the word "public". It includes students, staff and teachers who work in the schools. Note, however, that parents of school-aged children are not members of the public for the purposes of s. 43.1 of the *Act*. It is easy to forget that although schools may have to close because of unsanitary conditions, the impact which that decision has on parents falls into the category of "inconvenience". More importantly, s. 43.1 of the *Act* was not drafted with a view to accommodating the educational concerns of parents.

[16] The Board's formal reasoning with respect to the essential services determination turns initially on the Board's reasoning in its 1998 decision involving the designation of student attendants under s. 43.1 of the *Act* and its subsequent 2002 decision. In that earlier decision, the Board observed, at paragraph 13, that "there is no

requirement in law that the schools be closed if a strike of members of CUPE, Local 2745 was in progress." In the present case, the Board observed that "if schools remain open, all students have the right to attend". Finally, the Board went on to cite the provisions of the *Education Act,* S.N.B. 1997, c. E-1.12, that require children to attend school. From there, the Board offers the following analysis found at paragraph 16 of its decision:

> These sections of the legislation plainly set out the importance placed on children attending public schools in this province when they are open. From the perspective of a child over the age of five, attendance at school is obligatory, unless excused. It is precisely this latter point upon which the question turns. Indeed various District Education Councils within the Province, with the approval of the Minister of Education, can decide whether a school will remain open or be closed. The point being that the presence, or absence, of the "public" upon school property is not a matter determined by the Union, or indeed by this Board. The expectation is that in the event of a strike by the custodians, the schools will likely remain open and the students and other members of the public will be present.
>
> [Emphasis is that of Robertson J.A.]

[17] As stated at the outset, the Board's decision hinges on a single premise or assumption: schools will remain open if the custodians go on strike. The Board reasoned that this is so because there is no legal requirement that schools close in the event of strike action and, as well, students are entitled to an education and, indeed, obligated to attend school. In my respectful view, the assumption is a false one. As the Board reasoned in the *MacLean* decision, there is no legal obligation on school boards or the Minister of Education to keep schools open so that students receive the education to which they are entitled. Indeed, s. 6(2) of the *School Administration Regulation,* N.B. Reg. 97–150, adopted under the *Education Act*, contradicts that thesis. That provision authorizes the Minister to close schools for any reason that the Minister considers sufficient. Subsection 6(3) goes on to authorize the Minister to delegate that power to local district education councils. Realistically speaking, if school custodians were to strike, it is more likely than not that schools would ultimately close. Furthermore, common sense would lead one to conclude that such closures could occur without

impacting on the health of those directly affected: students, staff and teachers. This is the conclusion reached by the Board in the *MacLean* decision. In my view, its logic is as sound today as it was over 25 years ago.

[18] It has not escaped me that if we were to accept the Board's premise that schools must remain open, because of the right of children to obtain an education, then the right of teachers to strike would be nullified. Yet, it is well known that teachers do not provide an essential service within the meaning of s. 43.1 of the *Public Service Relations Act* and, therefore, they retain the right to strike that is provided for under the *Act*. Recall that an essential service is defined as one that is essential in the interest of the "health, safety or security of the public". It is understandable that parents and members of the public would look upon the provision of educational services as being essential in the broad sense of that word. However, the task of the Board is to interpret and apply the law as set out in the *Act*.

[19] My second reason for holding that the Board's decision fails to withstand the most deferential of review standards is tied to the Board's reliance on two of its earlier precedents dealing with the designation of teaching assistants and student attendants. Those decisions are invoked to support the application of the assumption that schools would remain open during a strike (see the 1998 and 2002 Board decisions discussed above). In my respectful view, reliance on the two earlier precedents is misplaced. I accept the proposition that, if teacher assistants and student attendants were to strike, schools would remain open. This is certainly true with respect to student attendants who are responsible for the welfare of physically or emotionally challenged school children. If these employees were to withdraw their services, the void would have to be filled by the teaching staff. If that option were not viable then the affected students would have to remain home. But in either case there would be no need to close the school. It is understandable that the Board would be concerned with the possibility that the affected children would opt to remain in school, thereby forcing the teachers to assume the duties being performed by student attendants. If that were to occur, arguably the health or safety of this group of students would be compromised. As the Board is

guided by the principle that it should err on the side of caution, it is understandable that it would declare that these employees perform an essential service within the meaning of the *Act*. I recognize that the Board has applied the same reasoning in the context of teacher assistants. It is a question of fact whether this group of school employees performs duties that overlap with those performed by student attendants. But as that determination raises a question of fact, it is unnecessary to comment further on the Board's finding.

[20] My point is simply this. The Board's reliance on the two earlier precedents is misplaced. Not only do the duties of school custodians differ from those offered by the two other groups of employees, there is also a difference when it comes to assessing the impact a strike would have on the student population (public) in each situation.

[21] My final ground for holding that the Board's decision fails to withstand the review standard of patent unreasonableness rests on an understanding that the Board's approach is inconsistent or incompatible with the purpose underscoring s. 43.1 of the *Act*. I say this because the assumption that schools will remain open in the event of a strike is simply a reversion to the type of reasoning that the Federal Court of Appeal adopted in *CATCA*. In effect, the Board is approaching the issue by asking a broad question rather than the narrow one mandated by s. 43.1. The broad question is as follows: Are custodians required to perform duties that may impact on the health of the public? If that is the proper question, the answer is obvious and the Board's decision must stand. But if we reformulate the question, so as to narrow its ambit, the answer is neither immediate nor self-evident. The narrow question is: What is the ultimate impact on the public interest if the employer is no longer able to provide the service which the custodians offer? In short, the narrow question forces the Board to examine the ultimate effect which a withdrawal of services would have on the public interest as it relates to the matter of health, safety or security.

[22] It is apparent to me that the Board has never addressed the essential services issue in terms of it being an interpretative problem. If it did it would have to ask

whether s. 43.1 of the *Act* was adopted for the purpose of reversing the analytical approach advocated in *CATCA*. In my view, that was the intention of the Legislature. Note that s. 43.1 speaks in terms of the Board identifying the services to be provided by members of the bargaining unit that at "any particular time are or will be necessary in the interest of the health, safety or security of the public." In my view, the quoted phrase requires the Board to approach the designation issue in terms of the ultimate impact a strike would have on the public interest as defined in the *Act*. In other words, the Board must, at the very least, pose the narrow question. Otherwise, the right of school employees to strike may well become illusory. Professor Weiler made this point forcefully in his text, Paul Weiler, *Reconcilable Differences* (Toronto: The Carswell Company, 1980) at page 240:

> If we cannot accept the cold-blooded logic of collective bargaining, let us be candid about what we are doing. If we tell a school union that in order to secure concessions from the school board they can go on strike, as long as they do not interrupt the delivery of education – or we tell other government unions that they can strike but they cannot disturb the welfare of the public – then we are really telling these unions that they will not have an effective lever with which to budge a recalcitrant government employer from the bargaining position to which it has committed itself. We do leave the public employees with the right to unionize, to try to persuade their employer to improve their contract offers – with the right to collective "begging" as some unionists derisively put it – but we do not give them collective bargaining in the true sense of the word.

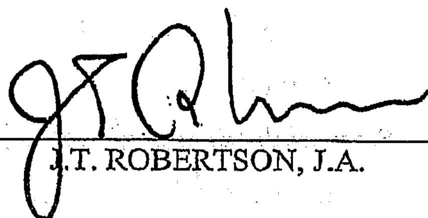
[23] It has not escaped me that the Board has decided a number of cases involving the designation of employees who provide an essential service and, in each instance, the Board has gone on to examine the ultimate impact which their right to strike would have on the health, safety or security of the public, if that right were exercised. As far as I am aware, until the present case, the Board has never approached the designation issue in the broad terms outlined in the Board's decision. The case of ferry workers (engineers and deckhands) in the employ of the Province is on point.

[24] In *New Brunswick Government (Re)*, [1996] N.B.L.E.B.D. No. 8 (QL), the evidence indicated that all of the ferries in question were utilized by police, fire and ambulance vehicles. While the Board noted that the evidence of usage by these vehicles was not substantial, the Board applied its policy of exercising caution when assessing the risk of harm to the public. In the circumstances, the Board went on to hold that these ferry employees offered an essential service within the meaning of s. 43.1 of the *Act*. In reaching that conclusion, the Board did not hesitate to assess the essential services issue in terms of identifying the ultimate impact a strike would have on the public interest. See also *New Brunswick (Board of Management) (Re)*, [2005] N.B.L.E.B.D. No. 4 (QL), holding that deputy sheriffs provide an essential service as do licensing renewal officers with the Superintendent of Insurance. However, payroll clerks in the employ of the Province or those responsible for Medicare payments to doctors do not: see *New Brunswick (Board of Management) (Re)*, [2003] N.B.L.E.B.D. No. 40 (QL). By contrast, clerks responsible for processing and paying worker's compensation claims were found to be performing an essential service: *New Brunswick (Workplace Health, Safety, and Compensation Commission) v. C.U.P.E., Local 1866* (1998), 44 C.L.R.B.R. (2d) 283. In *New Brunswick (Board of Management) (Re)*, [2005] N.B.L.E.B.D. No. 16 (QL), the Board held that resident and design engineers responsible for the administration of construction contracts do not provide an essential service, while those responsible for evaluating materials in road construction do.

[25] I wish to acknowledge the one precedent that the respondent employer could have cited in support of its argument that the Board's decision is not patently unreasonable. In *Avalon East School Board and Canadian Union of Public Employees, Local 1560* (2001), 73 C.L.R.B.R. (2d) 161, the Labour Board of Newfoundland and Labrador held that a group of school custodians qualified as "essential employees". That decision was upheld on judicial review and, subsequently in the court of appeal: see (2002), 216 Nfld. & P.E.I.R. 173 (S.C.T.D.), [2002] N.J. No. 202 (S.C.T.D.)(QL), aff'd by (2003), 230 Nfld. & P.E.I.R. 173 (C.A.), [2003] N.J. No. 255 (C.A.)(QL), 2003 NLCA 46, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 501.

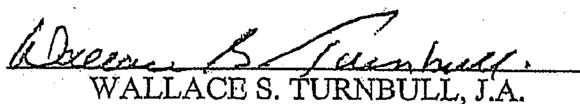
[26] The present case differs in one material respect from the Newfoundland and Labrador decision. As the Newfoundland and Labrador Board noted, both the New Brunswick and federal legislation were amended following the release of the Supreme Court's decision in *CATCA*. The legislature of Newfoundland and Labrador has seen fit to do nothing in that regard. This explains why the board decision emanating from Newfoundland and Labrador was able to withstand the review standard of patent unreasonableness. Finally, it has not eluded me that the Newfoundland decision supports the argument that the 1990 amendment to our Act had the effect of reversing the *CATCA* decision.

[27] For these reasons, I would allow the application for judicial review, set aside the Board's decision and remit the matter to the Board on the understanding that the school custodians in question do not perform an essential service within the meaning of s. 43.1 of the *Act*.



J.T. ROBERTSON, J.A.

WE CONCUR:



WALLACE S. TURNBULL, J.A.

M.E.L. LARLEE, J.A.

APPENDIX "A"

Public Service Labour Relations Act,
R.S.N.B. 1973, c. P-25

43.1(1) In relation to any bargaining unit the employer may, within the time limits established under subsection (2), by notice in writing advise the Board and the bargaining agent for the relevant bargaining unit that the employer considers in whole or in part the services provided by the bargaining unit to be essential in the interest of the health, safety or security of the public.

43.1(2) A notice under subsection (1) may be given

(a) where an employee organization is certified under this Act as the bargaining agent for a bargaining unit and no collective agreement or arbitral award is in force in relation to the bargaining unit, within twenty days after the date of the certification of the employee organization as the bargaining agent for the bargaining unit, or

(b) where a collective agreement or arbitral award is in force, at any time during the term of the agreement or award except within the period of six months before the agreement or award ceases to operate.

43.1(3) Within seven days after the receipt by the Board of the notice referred to in subsection (1) the Board shall in consultation with the employer and the bargaining agent establish time limits within which the employer and the bargaining agent shall endeavour to reach agreement identifying

ANNEXE « A »

Loi relative aux relations de travail dans les services publics,
L.R.N.-B. 1973, c. P-25

43.1(1) Relativement à une unité de négociation l'employeur peut, dans les délais établis en vertu du paragraphe (2), aviser par écrit la Commission et l'agent négociateur de l'unité de négociation pertinente que l'employeur estime essentiels à l'intérêt de la santé, de la sûreté et de la sécurité du public, en tout ou en partie, les services fournis par l'unité de négociation.

43.1(2) Un avis en vertu du paragraphe (1) peut être donné

a) lorsqu'une association d'employés est accréditée en vertu de la présente loi en qualité d'agent négociateur d'une unité de négociation et qu'aucune convention collective ou sentence arbitrale n'est en vigueur relativement à l'unité de négociation, dans les vingt jours qui suivent la date d'accréditation de l'association d'employés en qualité d'agent négociateur de l'unité de négociation, ou

b) lorsqu'une convention collective ou une sentence arbitrale est en vigueur, en tout temps pendant la durée de la convention ou de la sentence sauf pendant la période de six mois qui précède la date à laquelle la convention ou la sentence cesse d'être applicable.

43.1(3) Dans les sept jours suivant la réception par la Commission de l'avis prévu au paragraphe (1), la Commission doit avec l'avis de l'employeur et de l'agent négociateur établir les délais dans lesquels l'employeur et l'agent négociateur doivent s'efforcer de parvenir à un accord identifiant

(a) the services provided by the bargaining unit that at any particular time are or will be necessary in the interest of the health, safety or security of the public,

(b) the level of service to be maintained by the bargaining unit for the purpose of ensuring the delivery of the services referred to in paragraph (a), and

(c) the positions in the bargaining unit to be designated positions for the purpose of ensuring the delivery of the services referred to in paragraph (a).

43.1(4) If the employer and the bargaining agent are able to reach agreement in relation to the matters referred to in subsection (3) within the time limits established under subsection (3), the terms of the agreement shall be jointly communicated by the parties to the Board and the Board shall forthwith issue an order to the parties in accordance with the terms of the agreement.

43.1(5) If the employer and the bargaining agent are unable to reach agreement in relation to the matters referred to in subsection (3) within the time limits established under subsection (3), the Board, after affording each of the parties an opportunity to present evidence and make representations, shall determine the matters.

a) les services fournis par l'unité de négociation qui en tout temps déterminé sont nécessaires ou qui le seront dans l'intérêt de la santé, de la sûreté ou de la sécurité du public,

b) le niveau de service à maintenir par l'unité de négociation aux fins d'assurer la délivrance des services visés à l'alinéa a), et

c) les postes de l'unité de négociation devant être des postes désignés aux fins d'assurer la délivrance des services visés à l'alinéa a).

43.1(4) Si l'employeur et l'agent négociateur sont capables de se mettre d'accord relativement aux questions visées au paragraphe (3) dans les délais établis en vertu du paragraphe (3), les conditions de cet accord doivent être communiquées conjointement par les parties à la Commission et la Commission doit délivrer immédiatement une ordonnance aux parties conformément aux conditions de l'accord.

43.1(5) Si l'employeur et l'agent négociateur sont incapables d'aboutir à un accord relativement aux questions visées au paragraphe (3) dans les délais établis en vertu du paragraphe (3), la Commission, après avoir donné à chacune des parties l'occasion de présenter des preuves et de faire des représentations, doit décider des questions.

The Predecessor to s. 43.1

50(1) Notwithstanding section 49, the Chairman shall not appoint a conciliation board until the parties have agreed on or the Board has determined pursuant to this section the employees or classes of employees in the bargaining unit to be designated employees whose duties consist in

Article ayant précédé l’article 43.1

50(1) Nonobstant l’article 49, le président ne doit pas désigner une commission de conciliation avant que les parties ne se soient mises d’accord ou que la Commission n’ait pris une décision, conformément au présent article, au sujet des employés ou catégories d’employés de l’unité de

whole or in part of duties the performance of which at any particular time is or will be necessary in the interest of the health, safety or security of the public.

négociation qui doivent être considérés comme employés désignés dont les fonctions sont en tout ou en partie des fonctions dont l'exercice à un moment particulier est, ou sera, nécessaire pour la santé ou la sécurité publique.