Date: 20041223

Files: 161-32-1304

Citation: 2004 PSSRB 181

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

SERGEY MELNICHOUK

Complainant

and

CANADIAN FOOD INSPECTION AGENCY

Respondent

RE: Complaint under Section 23 of the *Public Service Staff Relations Act*

Before: Ian R. Mackenzie, Board Member

For the Complainant: Dougald Brown, Counsel

For the Respondent: Richard Fader, Counsel

Heard at Ottawa, Ontario,
September 8, 2004.

[1] Dr. Sergey Melnichouk filed a complaint under section 23 of the *Public Service Staff Relations Act* (*PSSRA*) against the refusal of his employer, the Canadian Food Inspection Agency (CFIA), to accept a grievance. Dr. Melnichouk attempted to grieve the failure of the employer to accept a complaint under the CFIA staffing recourse policy. The employer refused to accept the grievance, relying on section 91 of the *PSSRA,* and argues that Dr. Melnichouk's proper remedy is an application for judicial review.

[2] In the complaint dated February 23, 2004, Dr. Melnichouk alleges that the CFIA failed to comply with section 74 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993*, and with section 91 of the *PSSRA* by refusing to hear his grievance. Dr. Melnichouk requests that the Board issue an order that the CFIA comply with section 91 of the *PSSRA* and section 74 of the *P.S.S.R.B. Regulations and Rules of Procedure, 1993*, and hear his grievance on its merits.

[3] Dr. Melnichouk was unable to attend the hearing. Counsel for the bargaining agent, Dougald Brown, advised me that the complainant agreed to have the hearing proceed in his absence.

[4] The parties prepared an agreed statement of facts (Exhibit 1) with attachments (tabs A through E). The employer called one witness.

EVIDENCE

Agreed Statement of Facts

> ***Staffing Recourse at Canadian Food Inspection Agency***
>
> *1. On April 1, 2003 the Canadian Food Inspection Agency ("CFIA") implemented a new staffing recourse policy. This policy governs disputes that arise as the result of staffing decisions at the CFIA. A copy of this policy is attached as exhibit "A" to this agreed statement of facts.*
>
> *2. This staffing policy states that a staffing recourse process will be terminated in the event that any of the following conditions are met:*
>
> *a. The complainant withdraws the complaint by written notice to the delegated or Level 3 manager;*

b. The staffing decision giving rise to the complaint has been rescinded;

c. The Statement of Complaint fails to provide clear and complete information following the Disclosure of Information; or

d. The complainant fails to cooperate in the staffing recourse process, unless due to circumstances beyond his/her control or reasons approved by management (e.g. approved sick leave), by:

i. Failing to participate in the Disclosure of information,

ii. Failing to participate in the Discussion of the Complaint, or

iii. Failing to participate in the Review of the Complaint.

3. The staffing policy also states that the Level 3 Manager has the authority to terminate a staffing recourse process. For a recourse process in Phase I, the delegated manager may provide a written recommendation of termination to the Level 3 Manager. The delegated manager will notify the complainant, in writing, within 5 days of the completion of disclosure, that the staffing recourse process is recommended for termination.

4. The CFIA staffing policy requires the delegated manager to complete disclosure of all information relevant to the complaint within 10 days of the presentation of a Statement of Complaint. The delegated manager must also advise the complainant of any areas of the Statement of Complaint which are unclear or incomplete. Following this 10-day period, the complainant may amend his or her Statement of Complaint within 5 days.

Staffing Complaint by Dr. Melnichouk

5. Dr. Melnichouk is currently employed by the Canadian Food Inspection Agency ("CFIA") as a VM-01.

6. In 2003, he applied for a different position at the CFIA in selection process 03-ICA-CC-IND-D101 for the position of VM-02. His application was unsuccessful.

7. *As a result, Dr. Melnichouk orally requested that the deadline to file a Statement of Complaint be extended, pursuant to the CFIA staffing policy, until he had the opportunity to review the post-board report. This request was denied.*

8. *The period for presentation of a Statement of Complaint was from October 2, 2003 to October 17, 2003. Dr. Melnichouk then filed a Statement of Complaint on October 15, 2003. Attached as Exhibit "B" to this agreed statement of facts is a copy of Dr. Melnichouk's Statement of Complaint.*

9. *On October 22, 2003, R. Cathy Werstuk, Inspection Manager, Northeast Region (the "delegated manager") wrote to Dr. Melnichouk and informed him that his complaint would not be accepted into the formal complaint/grievance process because:*

> *You did not provide the specific information which is required by the policy, in particular, "an explanation of why he/she considers that the staff process or decision did not respect the CFIA's statutory obligations and/or staffing policies and/or staffing values.*

Attached as Exhibit "C" to this agreed statement of fact is a copy of the October 22, 2003 letter.

10. *R. Cathy Werstuk is not a Level 3 manager, but only a delegated manager.*

Grievances filed after October 22, 2003

11. *On November 7, 2003 Dr. Melnichouk filed a grievance pursuant to section 91 of the* Public Service Staff Relations Act *in response to the October 22, 2003 letter. Attached as Exhibit "D" to this agreed statement of facts is a copy of Dr. Melnichouk's grievance.*

12. *The CFIA consistently refused to grant Dr. Melnichouk a hearing into his grievance. At the first, second, and third levels of the grievance process, the CFIA relied on the provision in section 91 of the* Public Service Staff Relations Act *that no grievance may be heard in respect of which an administrative procedure for redress is provided in or under an Act of Parliament. Attached as Exhibit "E" to this agreed statement of acts is an email of Ken Graham dated*

> *December 8, 2003 in response to the grievance at the third level.*

Staffing Recourse Policy

[5] The following is a summary of the Staffing Recourse Policy (Exhibit 1, tab A). The time limit for filing a complaint under the staffing recourse process is determined by the delegated manager. Time limits can be shortened or extended by written agreement of the complainant and the delegated manager. After the presentation of a complaint, the delegated manager initiates disclosure and provides access to "pertinent information" in accordance with CFIA's Staffing Guidelines on "Disclosure of Staffing Information" (Exhibit 1, tab A). The delegated manager also advises the complainant of any areas of the statement of complaint that are unclear or incomplete. This disclosure process is completed within 10 days of the complaint. The complainant then has five days to provide an amended statement of complaint. At this point, if the delegated manager considers the statement of complaint to be incomplete, he or she will recommend that the staffing recourse process be terminated. If the complaint is considered to be complete, it will proceed to the next step: "Discussion of the Complaint".

[6] The "Discussion of the Complaint" stage of staffing recourse may involve a series of discussions and can be in a variety of forms, including teleconferences, exchange of written materials, e-mails or face-to-face meetings. The complainant may choose to be "assisted" by a bargaining agent representative or by another individual. The policy specifies that the choice of an assisting individual will not incur costs for CFIA except as specified by a governing collective agreement or CFIA policy. Within five days of the conclusion of the discussion stage, the delegated manager will present the staffing recourse decision, in writing, to the complainant.

[7] The complainant can request a review of the delegated manager's decision by that manager's Level 3 Manager if the staffing recourse process has not been terminated. The grounds for a request for review are: that the complainant does not consider the complaint resolved by the staffing recourse decision or that the delegated manager has failed to cooperate in the staffing recourse process. The complainant can choose to be assisted by a bargaining agent representative or by another individual.

[8] The staffing recourse process moves to the final level – Independent Third Party (ITP) Review of the Complaint – if either the complainant or the Level 3 Manager chooses not to attempt mutual resolution of the complaint, or a mutual resolution of the complaint has not been reached. The ITP is chosen from a list agreed to by the employer and the bargaining agent. The complainant can choose to be assisted by a bargaining agent representative or by another individual.

[9] The ITP findings are deemed to be the final staffing recourse decision "except in cases where the Level 3 Manager considers the ITP findings to be based on errors of fact or omission." In such cases, the Level 3 Manager can make recommendations to the President of the CFIA to review the findings. The President then reviews the ITP findings and presents the final staffing recourse decision to the complainant and the Level 3 Manager.

Additional Evidence

[10] Lauraine Anderson is the Senior Corporate Advisor, Corporate Staffing, in the Human Resources Branch of CFIA and has occupied this position since 1998. Her duties include developing staffing-related policies, interpreting policies and providing specific case advice. She provided an overview of the staffing policy (Exhibit 1, tab A). She testified that the specific corrective measures available in a staffing complaint are not dictated by the policy. The corrective measures can include cancellation of the staffing process or reassessment of the candidates. Through reassessment, it is possible that the complainant could be appointed to the position.

[11] Ms. Anderson testified that it was her understanding that Dr. Melnichouk did receive post-selection feedback from Cathy Werstuk by telephone during the time that a complaint could be made. In cross-examination, she agreed that if a manager terminates a complaint, there is no further remedy under the recourse policy.

[12] On February 16, 2004, Dr. Melnichouk filed a judicial review application of Ms. Werstuk's decision to terminate the complaint process (Exhibit E-3). On April 20, 2004, the application was stayed by the Federal Court pending the result of this complaint under the *PSSRA*. The employer did not object to the application for the stay of proceedings. In correspondence to the Board (April 21, 2004), Mr. Brown advised that the complainant sought judicial review solely to preserve his right to do so in the event that he was unsuccessful in his complaint to the Board.

SUBMISSIONS

Argument for the Complainant

[13] Mr. Brown submitted that the issue in this complaint is one of statutory interpretation. Subsection 91(1) of the *PSSRA* sets out the circumstances under which an employee of the CFIA is entitled to file a grievance. The issue is whether the CFIA staffing recourse policy is "an administrative procedure for redress provided for in or under an Act of Parliament." Mr. Brown argued that the French text refers to "le régime," which refers to a specific regime under an Act of Parliament. Both the French and English texts are equally authoritative.

[14] Mr. Brown argued that there was no dispute that the staffing recourse mechanism was not part of the *CFIA Act*, nor is it a regulation, nor is it a directive issued under a statutory power to make directives. The *CFIA Act* does not mention staffing recourse. Subsection 13(1) of the *CFIA Act* gives the authority to the President of the CFIA to appoint, displacing the role of the Public Service Commission (PSC) under the *Public Service Employment Act* (*PSEA*). Subsection 13(2) gives the authority to the President of the CFIA to set the terms and conditions of employment. Unlike the *Canada Customs and Revenue Agency Act (CCRA Act)* (subsection 54(1)), there is no mandatory direction from Parliament to establish a recourse mechanism. When, as in the *CCRA Act*, Parliament directs a new agency to develop a staffing recourse policy, it is not hard to infer the legislative intent that this would displace the grievance process. It is also not hard to infer that the CCRA recourse policy is an administrative procedure for redress "in or under" a federal statute. Such is not the case under the *CFIA Act*.

[15] Mr. Brown submitted that legislation should not be interpreted in a way that restricts existing statutory rights unless there is a clear legislative intent to accomplish that result. He referred me to a decision of the British Columbia Court of Appeal: *Re British Columbia Teachers' Federation et al. v. Attorney-General for British Columbia et al.* (1985), 23 D.L.R. (4th) 161. In particular, he referred me to a decision of the Supreme Court of Canada referenced in the decision: *Morguard Properties Limited v. City of Winnipeg* (1983), 3 D.L.R. (4th) 1. Justice Estey stated that the courts must look for express language in the legislation before concluding that rights have been reduced. He also concluded that this principle becomes "even more important and generally operative in modern times because the Legislature is guided and assisted by

a well-staffed and ordinarily very articulate Executive." Mr. Brown submitted that had Parliament intended to take away the right to file a grievance, it would have been the simplest thing to say so in the legislation. If it had been the intent of Parliament to put the CFIA under a mandatory obligation to create a staffing recourse process, it would have done so, as in the CCRA legislation. The decision of this Board in *Dhudwal v. Canada Customs and Revenue* Agency, 2003 PSSRB 116, (where the Board concluded that the staffing recourse process at the CCRA was provided for "under an Act of Parliament") is easily distinguishable.

[16] Similarly, the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27, can also be distinguished. In that decision, the issue was whether the human rights complaint process under the *Canadian Human Rights Act* (*CHRA*) displaced the right to grieve under the *PSSRA*. The Court stated that the courts had consistently taken the view that Parliament intended to remove from the normal grievance process "certain specialized areas which it was thought should be dealt with under the administrative process set out in the legislation governing those particular areas". The Court was referring to administrative processes expressly set out in legislation.

[17] Mr. Brown submitted that the examination of whether the remedy was a "real" one, as set out in *Boutilier* (*supra*), was irrelevant. The analysis never gets to the point of assessing whether the recourse process provides real redress unless and until it is determined to be a process "in or under an Act of Parliament".

[18] Mr. Brown also submitted that the decision in *Re Public Service Staff Relations Act (Canada) v. Cooper*, [1974] 2 F.C. 407, was distinguishable because the Court of Appeal was examining a recourse mechanism enshrined in legislation.

[19] Mr. Brown noted that the *Federal Courts Act* (*FCA*) contained a similar provision (section 23) that grants jurisdiction to the Court if a claim is "under an Act of Parliament". This phrase has been interpreted by the Federal Court. In *Bensol Customs Brokers Limited et al. v. Air Canada,* [1979] 2 F.C. 575 (C.A.), the Court concluded that the Act of Parliament must be the "source of the plaintiff's rights". In this case, it cannot be said that *CFIA Act* is the source of the complainant's rights. Dr. Melnichouk's rights under the staffing recourse policy are not derived from any Act of Parliament. The policy does not derive force from legislation. Mr. Brown also

referred me to *Canadian Pacific Limited v. United Transportation Union,* [1979] 1 F.C. 609 (C.A.).

[20] Mr. Brown argued that the staffing recourse policy was promulgated purely incidentally to the power to appoint employees. There was no indication that Parliament expressly required the CFIA to issue a policy that would replace the statutory grievance right. In this case, the CFIA is simply issuing a recourse policy on the basis of its general powers. The CFIA is a creature of statute and everything it does can be traced back to some statutory authority or grant of power. That, however, does not make the recourse policy an administrative procedure within the meaning of section 91 of the *PSSRA*. The problem with the employer's argument, that with the exercise of incidental statutory power an employer can promulgate a recourse mechanism, is that then any employer could unilaterally issue a recourse policy that would replace the statutory right to grieve. Mr. Brown submitted that it was not the intention of the *PSSRA* to allow employers to take away the right to grieve on the basis of such broad statutory powers.

Argument for the Respondent

[21] Mr. Fader argued that the *PSSRA* provides for an important but limited right to grieve in section 91. The limitation is that there cannot be another administrative procedure in or under an Act of Parliament. The French text is clearly consistent with the English text.

[22] Mr. Fader stated that the decisions in *Boutilier* (*supra*) and *Cooper* (*supra*) dealt with situations where the recourse was "in" an Act of Parliament. The issue here, as well as the issue in *Dhudwal* (*supra)*, is different from that in *Boutilier* and *Cooper*. The issue is the interpretation of the more embracing wording of "under" an Act of Parliament.

[23] Mr. Fader submitted that section 13 of the *CFIA Act* is the source jurisdiction for the staffing recourse policy. The policy itself points to the source of its authority. The authority to appoint contained in subsection 13(1) pulls staffing out of the *PSEA* and puts it under the authority of the President of the CFIA. The very detailed staffing regime under the *PSEA* is pulled out from under the *PSEA* and put under the CFIA. The wide grant of authority has implied the authority to grant recourse procedures. The language in the subsection is unconstrained.

[24] Mr. Fader noted that a recent decision by the Federal Court (*Forsch v. Canada (Canadian Food Inspection Agency),* [2004] F.C.J. No. 619 (T.D.)) was determinative. The Court determined that the staffing recourse policy was "made pursuant to the broad legislative authority to appoint employees, found in subsection 13(1) of the CFIA Act". Since the staffing recourse policy was made pursuant to this legislative authority, this means that it is an administrative procedure under an Act of Parliament. It is mere semantics if "made pursuant to" is perceived as different from "under an Act of Parliament".

[25] Mr. Fader noted that decisions made under the staffing recourse policy are subject to judicial review, and the complainant sought judicial review in this case. Just because Dr. Melnichouk's complaint was dismissed for lack of particulars does not mean that the jurisdiction of another tribunal (the PSSRB) is thereby enlarged. If the complainant disagrees with the result, his recourse is judicial review. The complainant's judicial review application (Exhibit 3) contains no suggestion that the policy was not developed in accordance with the legislation and no suggestion that there is no lawful authority for the policy. The application recognizes that it is statutory in nature and not merely administrative.

[26] Mr. Fader submitted that the employer was not suggesting that employees' "rights were being stripped", as suggested by counsel for the complainant. There is another administrative procedure available and the review of that procedure is under the Federal Court and not the PSSRB. Mr. Fader referred me to *Cooper* (*supra*).

[27] Mr. Fader submitted that the staffing recourse process does provide for a "real remedy" as required by *Boutilier* (*supra*). Mr. Fader also referred me to *Kehoe v. Treasury Board (Human Resources Development Canada*), 2001 PSSRB 9.

[28] Mr. Fader argued that the decision of this Board in *Dhudwal* (*supra)* was "on all fours" with this complaint. The legislation governing the CCRA is very similar to the legislation governing the CFIA. In *Dhudwal*, the Board member concluded that the staffing recourse process was established under section 54 of the *CCRA Act* and that this staffing recourse did provide an administrative procedure for redress. The only possible distinction between the two statutes is a distinction without a difference. In the *CCRA Act,* there is a specific reference to recourse, whereas there is no specific reference in the *CFIA Act*. However, when Parliament took staffing out from under the *PSEA* and put it with the President of the CFIA, this was a wide and unfettered grant of

authority that implied that the President has the authority to create a recourse system. This is bolstered by the decision in *Forsch* (*supra*). The findings in the *Forsch (supra)* decision lead inescapably to the conclusion that the Staffing Recourse Policy is an administrative procedure under an Act of Parliament.

[29] Mr. Fader noted that I was not bound by the B.C. Court of Appeal decision in *British Columbia Teachers Federation et al.* (*supra*). He also submitted that when one has a complete code, one cannot look into a more general grant of authority and purport to find the authority to override the complete code. In this case, we do not have a complete code but have a wide grant of legislative authority under the *CFIA Act*.

[30] Mr. Fader submitted that section 91 of the *PSSRA* is a limitation on the right to grieve and that the "law is always speaking" and will continue to apply to new administrative processes for redress, as noted in *Boutilier* (*supra*).

[31] Mr. Fader argued that *Bensol Customs Brokers Limited et al.* (*supra)* and *Canadian Pacific Limited* (*supra*) were not applicable, as those cases referred to a claim under an Act of Parliament, whereas in this case we were dealing with a "process" under an Act of Parliament.

[32] Mr. Fader concluded by submitting that the complaint should be dismissed.

Reply Argument of the Complainant

[33] Mr. Brown noted that the employer had argued the exact opposite of its position in this complaint in the *Forsch (supra)* decision. In that case, the employer argued that the ITP tribunal did not have an enabling statute, being the creature of the policy.

[34] Mr. Brown submitted that any act of a statutory body must have its source in a statute; otherwise, the act is considered *ultra vires*. This is the conclusion that Justice Mosley reached when he stated that the staffing tribunal was "generally the creature of subsections 13(1) and (2) of the CFIA Act". Justice Mosley also noted that the policy was created by the will of the employer. Mr. Brown submitted that the decision can be read with different shadings. At the end of the day, any doubt or ambiguity should be guided by the fundamental principles of statutory interpretation. If it is unclear, or if Parliament has not spoken with clarity, then pre-existing statutory rights should not be disturbed.

REASONS FOR DECISION

[35] This complaint is about the employer's refusal to accept a grievance that Dr. Melnichouk wants to file against his manager's decision to disallow his staffing complaint; in effect, the grievance is against the application of the employer's staffing complaint policy. The employer's position is that the appropriate recourse for Dr. Melnichouk is an application for judicial review. Dr. Melnichouk has filed a judicial review application, but I am satisfied that this was done only to protect his rights should he not be successful in his complaint to this Board.

[36] The *CFIA Act* provides:

> *HUMAN RESOURCES*
>
> ***12.*** *The Agency is a separate employer under the* Public Service Staff Relations Act.
>
> ***13.*** *(1) The President has the authority to appoint the employees of the Agency.*
>
> *(2) The President may set the terms and conditions of employment for employees of the Agency and assign duties to them.*
>
> *(3) The President may designate any person or class of persons as inspectors, analysts, graders, veterinary inspectors or other officers for the enforcement or administration of any Act or provision that the Agency enforces or administers by virtue of section 11, in respect of any matter referred to in the designation.*

[37] Dr. Melnichouk's collective agreement (Exhibit 2) sets out the broad parameters of the right to grieve:

> *D6.05 Subject to and as provided in Section 91 of the* Public Service Staff Relations Act, *an employee who feels that he or she has been treated unjustly or considers himself aggrieved by an action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance…*

[38] The right to grieve is also set out in the *PSSRA* and the *P.S.S.R.B. Regulations and Rules of Procedure, 1993*:

(*PSSRA*):

> ***91.*** *(1) Where any employee feels aggrieved*
>
> *(a) by the interpretation or application, in respect of the employee, of*
>
> > *(i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or*
> >
> > *(ii) a provision of a collective agreement or an arbitral award, or*
>
> *(b) as a result of any occurrence or matter affecting the terms and conditions of employment of the employee, other than a provision described in subparagraph (a)(i) or (ii),*
>
> *in respect of which no administrative procedure for redress is provided in or under an Act of Parliament, the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Act.*

(*P.S.S.R.B. Regulations and Rules of Procedure, 1993*):

> *74.(1) Where an employee presents a grievance at any level in the grievance process in accordance with section 71 or 73, other than a grievance that relates to classification, the authorized representative of the employer at that level shall provide the employee with a reply, in writing, to the grievance, no later than on the fifteenth day after the day on which the grievance was presented at that level.*

[39] The right to grieve is an essential element of the labour relations regime set out in the *PSSRA*. Parliament has provided that this right can be taken away under certain specific situations: where another recourse mechanism is "provided in or under an Act of Parliament" (*PSSRA*, section 91).

[40] The issue for me to determine is whether the CFIA staffing recourse policy is provided for "under an Act of Parliament." The Supreme Court of Canada has endorsed what has been called the "modern principle" of statutory interpretation as the preferred approach to statutory interpretation:

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*
>
> (Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), cited in *Bell Expressvu Limited Partnership v. Rex,* 2002 SCC 42.)

[41] This preferred approach is supported by section 12 of the *Interpretation Act,* which states that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

[42] In *Cooper* (*supra*), the Court concluded that where a recourse mechanism in or under an Act of Parliament exists, an employee has no right to grieve but must rather submit his or her complaint "to the authority which has, under the appropriate statute, the power to deal with it". In *Boutilier* (*supra*), the Court summarized the jurisprudence on the legislative intent of section 91 of the *PSSRA*:

> [The Federal Court] *has consistently taken the view that Parliament, by the language used in the section, intended to remove from the normal grievance procedures under the PSSRA certain specialized areas which it was thought should be dealt with under the administrative process set out in the legislation governing those particular areas…*

[43] From these two cases, it can be concluded that in order for section 91 of the *PSSRA* to be engaged, the other "authority" (in this case, the staffing complaints policy) must derive its power from a statute and the other administrative process must be set out in the legislation (in this case, the *CFIA Act*).

[44] The Federal Court has recently examined the CFIA's staffing complaint policy and its relationship to the *CFIA Act* in *Forsch* (*supra*). This decision is a judicial review application of a decision by the staffing tribunal established pursuant to the staffing complaint policy. However, the findings of Justice Mosley on the legal foundation of the tribunal are relevant to an analysis of whether the tribunal is provided for "under an Act of Parliament". Interestingly, the employer submitted in *Forsch* (*supra*) that the staffing tribunal did not have an enabling statute and was "a creature of the Policy". Justice Mosley disagreed:

> *[T]he tribunal whose decision the court is asked to review has no governing rules enacted pursuant to legislation, but rather exists as a written, public policy, created and administered by the will of the employer, the CFIA, as part of its authority to appoint employees through subsection 13(1) of the CFIA Act. I disagree with the respondent's contention that the tribunal exists without an enabling statute, as it is generally the creature of subsections 13(1) and (2) of the CFIA Act.*
>
> *… In my opinion, the legislative intent of subsection 13(1) of the CFIA Act is to grant to the employer, the CFIA, control and autonomy in the manner in which it appoints its employees and deals with complaints in relation to such appointments. This subsection ousts the application of the appointment provisions of the PSEA to the CFIA. The recourse mechanism for staffing complaints, provided by the Policy, is one way in which the CFIA has decided, on its own accord, to exercise this control and therefore should be accorded some deference.*
>
> *However, while the CFIA was not required by legislation to establish this tribunal, or even the Policy for that matter, it nonetheless has done so and it should be expected to abide by its own, established guidelines …*

[45] Justice Mosley also states that the staffing tribunal was "formed by way of a Policy rather than pursuant to express statutory authority". The conclusion to be drawn from this analysis is that the staffing recourse mechanism was not established by way of "express statutory authority" and was not required by the Act to be established.

[46] Counsel for the respondent argued that the staffing complaint policy was "pursuant to" the *CFIA Act*, thereby triggering the section 91 exception to the right to grieve. In effect, he was arguing that a recourse process "pursuant to" an Act of Parliament is equivalent to a recourse process "provided for under" an Act of Parliament within the meaning of section 91. It is a basic public law principle that all powers exercised by the Executive derive from Acts of Parliament (other than a few prerogative powers of the Crown that are not at play here). The principle is that the lawful authority for all actions taken by the Executive derives from Parliament and not from the Executive itself (see Jones and de Villars, *Principles of Administrative Law*, Third Edition, 1999). Therefore, all government action is "pursuant to" some statutory authority. In this way, the staffing complaint policy is "pursuant to" the *CFIA Act*. However, this is not the same as saying that the staffing complaint policy is an

administrative process for redress "provided under an Act of Parliament", within the meaning of s.91 of the *PSSRA*.

[47] Given the central importance of the statutory right to grieve in the federal public service labour relations regime, any removal of that right should be done explicitly.

[48] This is the approach taken by Parliament in the *CCRA Act*, which has an express statutory authority for the establishment of a staffing recourse mechanism (see *Dhudwal* (*supra*)).

[49] This interpretation also conforms with the principle enunciated by the Supreme Court that the removal of statutory rights requires express statutory language: *Morguard Properties Ltd* (*supra*). In an earlier Supreme Court of Canada case (*Goodyear Tire and Rubber v. T. Eaton Co.* [1956] S.C.R. 610), the Court stated:

> *...a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.*

[50] Consequently, the phrase "provided under an Act of Parliament" should be interpreted narrowly.

[51] I find that to be considered as "provided under an Act of Parliament", the Act must provide the express statutory authority to establish a recourse mechanism.

[52] This interpretation is the most harmonious with the scheme and object of the *PSSRA*, and the intention of Parliament. If "pursuant to" was equivalent to "provided under", the right to grieve under the *PSSRA* could become essentially meaningless: an employer could introduce redress procedures for a range of matters, including discipline, because of the employer's statutory authority to set the terms and conditions of employment (for example, as in subsection 13(2) of the *CFIA Act*) and displace its employees' right to grieve under the *PSSRA*. Parliament must only have intended the right to grieve to be removed where there was an express provision for another administrative procedure for redress – either directly in the statute itself, or an administrative procedure expressly referred to in the statute (as was done by Parliament in the *CCRA Act*). As there is no express authority under the *CFIA Act* to establish a recourse procedure, I have determined that the CFIA's "Staffing Recourse

Policy" does not constitute an administrative procedure for redress provided under an Act of Parliament, within the meaning of s.91 of the *PSSRA*.

[53] I have considered the submission of counsel for Dr. Melnichouk on the line of *Federal Courts Act* cases that have interpreted "claims" under an Act of Parliament (*Bensol Customs Brokers Limited et al.* (*supra*) and *Canadian Pacific Limited* (*supra*). I am not persuaded that this line of cases is relevant here, as the provision in the *Federal Courts Act* refers to "claims", whereas section 91 of the *PSSRA* refers to an "administrative process for redress".

[54] In conclusion, the section 23 complaint of Dr. Melnichouk is allowed. The employer is hereby ordered to hear Dr. Melnichouk's grievance.

Ian R. Mackenzie,
Board Member

OTTAWA, December 23, 2004.