Date: 20060428

Files: 542-02-1
542-02-2
525-02-1

Citation: 2006 PSLRB 45

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

FEDERAL LAW OFFICERS OF THE CROWN (542-02-1)
Applicant
and
TREASURY BOARD
Employer

ASSOCIATION OF JUSTICE COUNSEL (542-02-2)
Applicant
and
TREASURY BOARD
Employer

TREASURY BOARD (525-02-1)
Applicant
and
PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA
Bargaining Agent

Indexed as
Federal Law Officers of the Crown v. Treasury Board of Canada, Association of Justice Counsel v. Treasury Board of Canada and Treasury Board of Canada v. Professional Institute of the Public Service of Canada

In the matter of applications for certification under section 54 of the *Public Service Labour Relations Act*, and
In the matter of an application for review of a bargaining unit under section 70 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Yvon Tarte, Chairperson; Sylvie Matteau, Vice-Chairperson and Dan Quigley, Board Member

For the Federal Law Officers of the Crown: Donald K. Eady, Counsel

For the Association of Justice Counsel: C. Michael Mitchell, Counsel, Marisa Pollock, Counsel

For the Professional Institute of the Public Service of Canada: Michel Gingras, Negotiator

For the Treasury Board: Michel LeFrançois, Counsel

Heard at Ottawa, Ontario,
November 30, December 1, 2, 5 and 6, 2005.
Written submissions filed December 22, 2005 and January 13, 2006.

Background

[1] Prior to the coming into effect of the *Public Service Labour Relations Act*, S.C., 2003, c. 22 (*PSLRA*) on April 1, 2005, all lawyers in the Department of Justice (DOJ) were automatically excluded from the process of collective bargaining [see definition of "managerial or confidential position" in the *Public Service Staff Relations Act*, R.S., 1985, c. P-35 (*PSSRA*)]. With the coming into effect of the *PSLRA*, the former Public Service Staff Relations Board (PSSRB) was dissolved and replaced by the Public Service Labour Relations Board (PSLRB). The automatic exclusion of DOJ lawyers is no longer contained in the *PSLRA*. Therefore, all lawyers of the federal public sector over which the PSLRB has jurisdiction may, subject to the normal exclusionary rules, bargain collectively.

[2] In March 1969, the PSSRB issued a certificate to the Professional Institute of the Public Service of Canada (PIPSC) as the bargaining agent for the Law Group (LA). Although general in its description of the bargaining unit, the certificate in reality covered only a small number of employees who worked in the field of law outside the DOJ. The PIPSC certificate was last amended by the PSSRB in 1999 (Board File No. 142-2-130). At the present time, there are approximately 100 members in the PIPSC LA bargaining unit.

[3] Because of the operation of section 49 of the transitional provisions of the *PSLRA*, found in ss. 36 to 66, legal officers of the DOJ were not automatically included in the PIPSC LA bargaining unit once the *PSSRA* was repealed and the *PSLRA* came into force. Employee organizations wishing to represent legal officers of the DOJ must therefore proceed by way of application for certification under section 54 of the *PSLRA*.

Applications before the Board

[4] On April 1, 2005, the Federal Law Officers of the Crown (FLOC) filed an Application for Certification to represent:

> *All lawyers and students-at-law of the Department of Justice who are employed at, or who report to, the Ontario Regional Office, save and except those lawyers and students-at-law employed in Ottawa, Directors and Deputy Directors and those above the rank of Directors and Deputy Directors.*

[5] Shortly thereafter and on the same day, the Association of Justice Counsel (AJC) filed an Application for Certification to represent:

> *All legal officers employed in the Department of Justice Canada Law Group, save and except those who are not employees within the meaning of subsection 2(1) of the* Public Service Labour Relations Act.

[6] The Treasury Board as employer replied to both applications for certification on April 11, 2005, stating that neither of the proposed bargaining units was appropriate for collective bargaining. The employer argued that the appropriate bargaining unit should consist of all federal public service employees in the LA group for which the Treasury Board is the employer.

[7] Given its position, the employer further requested that the PSLRB revoke the certificate issued by the PSSRB to the PIPSC for the LA group (paragraph 2 above).

[8] In view of the employer's position, the PIPSC applied for intervener status in the applications for certification and formally opposed the Treasury Board's request for the revocation of its certificate.

[9] On July 26, 2005, the parties were advised of the Board's decision to consolidate these matters for hearing.

Pre-hearing conference

[10] A pre-hearing conference on these matters was held on November 3, 2005. At this conference it was decided that the parties would present their cases in the following order: Federal Law Officers of the Crown, Association of Justice Counsel, Professional Institute of the Public Service of Canada and Treasury Board.

[11] It was also agreed by all parties and stipulated for the record that the applicants FLOC and AJC were "employee organizations" within the meaning of the *PSLRA*.

[12] On the basis of the documentation filed with the two Applications for Certification and the agreement of all parties, the Board finds that both the FLOC and the AJC are "employee organizations" under the *PSLRA* for the determination of these matters.

Summary of the evidence

Evidence presented by the FLOC

[13] The FLOC presented two witnesses in support of its application: Fergus O'Donnell, an officer and member of the Executive Council of the Federal Lawyers Association of Greater Toronto (the FLAG, which later became the FLOC), until his appointment as Deputy Director, Regional Prosecution Services, in 2004, and Christopher K. Leafloor, President of the FLOC and one of its founding Council members.

[14] Mr. O'Donnell, a lawyer with the DOJ since 1987, reviewed the history of the FLOC, which was created in February 2005. Its predecessor organizations were the Ontario Justice Lawyers Association (the OJLA) and subsequently the Federal Lawyers Association of Greater Toronto (FLAG). The FLAG existed from 2001, when it was created to replace to OJLA, until February 2005, when it became the FLOC.

[15] The witness explained that until 1990, lawyers working in Toronto were paid based on the national single rate of pay applicable to all DOJ lawyers. In June 1990, the employer approved an increased salary scale for DOJ lawyers working out of the Toronto Regional Office, now the Ontario Regional Office (ORO). This salary differential has been maintained for the past 15 years.

[16] This different salary scale was put in place in response to an acute retention and recruitment problem in that region. Since that time, lawyers working in Toronto have been paid at a higher rate of pay than lawyers anywhere else in the country. Although it was initially meant to be a non-recurring allowance, it was in fact repeated in the following years.

[17] In the fall of 2000, Arbitrator William Kaplan issued an award (Exhibit 8) in favour of Ontario Provincial Crown attorneys. Their salaries were increased by 30%, thereby creating a gap of the same magnitude between DOJ lawyers and their provincial counterparts, whose salaries had traditionally been used as a comparator.

[18] In the witness's words, the award energized the Toronto DOJ lawyers. It became clear to them that parity with Provincial Crown Attorneys would become their goal. The first step to achieve parity was to create a structure to represent them and put forward their request to the management of the DOJ. The OJLA was created. Its

membership comprised the non-managerial lawyers and articling students of the Toronto office. Fully 90% of lawyers and students who were eligible became members of the OJLA.

[19] In 2001, concerned that there could be confusion with its name and the fact that its membership was limited to Toronto area lawyers working for the federal government, the OJLA changed its name to the FLAG. At the same time, a parallel association was born: the AJC. In June 2001, the AJC held a referendum to seek support from all DOJ lawyers.

[20] There were discussions at the time in the ORO as to the advantages and disadvantages of joining forces with a larger association. In the witness' opinion, some factors were at play in these discussions; namely, the fact that it was perceived that the pay differential was about to disappear and that the employer was moving to merge the two pay scales. In this context, the executive of the FLAG decided to recommend that its members support the AJC in the referendum conducted by the latter. Approximately 90% of the FLAG membership voted in the referendum, and of that number, some 95% voted in favour of the AJC.

[21] In September 2001, the DOJ published the "Hay Group Report". This created more confusion because it concluded that Toronto was a different market from the rest of the country. In this context, maintaining the differential was becoming viable again. The AJC challenged the methodology and the accuracy of the Report. The AJC's position was that there should be only one national rate of pay.

[22] Following the June 2001 vote, and throughout that summer, there had been a flurry of emails when Toronto area lawyers realized that the AJC favoured a national rate of pay. The witness testified that, as a result of that debate and the conclusions of the Hay Report, he and other FLAG officers began to reconsider their position to support the AJC.

[23] The Hay Report confirmed that the Toronto market was different and that the Toronto differential was viable. It was clear for the FLAG that an argument could be made for parity with Ontario Crown Attorneys in the Toronto area, representing some 200 lawyers, but not for the whole of Canada, representing some 2,000 lawyers.

[24] In the witness's opinion, the positions of the FLAG and the AJC were irreconcilable. The rate of pay is a core issue. Toronto area lawyers believe that the rationale for the pay differential is strong. They work in a different market and their cost of living is different than in other parts of the country. Therefore, according to them, they are in a much better position as a group to insist on and obtain parity with Ontario Crown Attorneys.

[25] It appeared, at the same time, that the employer was about to recognize the existence and appropriateness of this differential. In the witness's and other FLAG officers' opinion, parity with Ontario Crown attorneys for all DOJ lawyers across Canada was not a realistic bargaining goal. It meant an increase of almost 50% to the rate of pay for lawyers other than those in the Toronto area. As a result, a new ballot was conducted by the FLAG in December 2001. The result was 147 to 7 against the AJC.

[26] Following the December 2001 survey, the FLAG took the position that the DOJ management should deal directly with them and not with the AJC with respect to lawyers working in the ORO. The latter did not, in their view, represent their interests. Mario Dion, Associate Deputy Minister, DOJ, informed the FLAG that he would keep communicating with the AJC given the overwhelming support it had received in the June 2001 referendum. This became a concern for Toronto lawyers who now felt that the AJC could not properly represent them.

[27] Other factors raised concerns on the part of the ORO lawyers and the FLAG. In June 2002, the DOJ agreed to pay to some of the ORO lawyers an 8% Toronto Market Competitive Allowance (TMCA), in addition to the existing regional rate of pay. The AJC was not in agreement with this payment and communicated its concerns to the DOJ.

[28] On June 10, 2003, the AJC sent a letter to the DOJ management objecting to the payment of regional rates of pay to Toronto lawyers. This letter proposed redistributing the 2003 TMCA across the board to all federal lawyers and was clearly contrary to the interests of the ORO lawyers. The FLAG officers were neither informed in advance nor consulted in respect of this letter.

[29] The TMCA was not paid out in 2003. It also became apparent that the DOJ was concerned with the lack of support for the AJC from lawyers working in Toronto.

[30] In February 2004, the AJC presented to the DOJ management a compensation submission for that year. In March 2004, the AJC met with Toronto area lawyers to present that submission to them. According to the witness, the meeting became very vocal and heated. The AJC presented its national rate of pay strategy and declined to take back or apologize for its letter of June 10, 2003.

[31] The witness was not aware of any consultations on the part of the AJC with the FLAG with respect to any of the compensation proposals made by the AJC since 2001. The AJC favoured immediate parity with Ontario Crown attorneys for all DOJ lawyers; a goal which the witness believes is unrealistic. By June 2002, FLAG had already decided that the AJC was committed to act against the interests of the ORO Lawyers.

[32] Mr. Leafloor has been with the DOJ since 2003. He works in the Public Law Section at the ORO. Mr. Leafloor was a founding member of the FLOC in February 2005 and is currently serving as its President. The FLOC has approximately 300 members.

[33] Mr. Leafloor testified that the AJC's position, favouring one national rate of pay at par with Ontario Crown Attorneys, was unrealistic and would not be sustainable with the employer as only about 10% of DOJ lawyers work in the ORO.

[34] Several emails were generated at the ORO and across the country following the 2004 compensation submission. The ORO lawyers became more and more isolated from other lawyers.

[35] The *Babcock* decision of the British Columbia Superior Court (*Babcock et al. v. Attorney General (Canada),* 2005 BCSC 513), regarding a claim for parity with the ORO lawyers filed by DOJ lawyers working in British Columbia, contributed to the schism. Some emails were insulting to ORO lawyers and lawyers in other regions.

[36] In December 2004, the AJC met with the FLOC to discuss representation on the Governing Council of the AJC and its executive. It was not clear, however, how members of the FLOC could be appointed to the AJC executive, as that there were no vacancies at that time. There were no further discussions on the issue.

[37] Mr. Leafloor testified that it is his belief that the AJC will not represent the best interests of the ORO lawyers and that its strategy will, to the contrary, act to the detriment of the FLOC members. The AJC has never indicated a willingness to advocate the interests of the ORO lawyers. Although it has the best chance of

obtaining parity with its provincial counterparts, the FLOC represents only about 10% of the DOJ lawyers.

[38] Membership support for the FLOC within the ORO is at 90%, a clear indication of the wishes of the ORO lawyers in terms of representation. In his opinion, the AJC never truly made any attempt to communicate with and understand the ORO lawyers and their situation.

[39] Mr. Leafloor acknowledged that the AJC, if certified as the sole bargaining agent for the LA group, would be legally bound to fairly represent all its members.

Evidence presented by the AJC

[40] The AJC called one witness to testify, Patrick Jetté, a criminal litigator from Montreal.

[41] The AJC was formed in July 2001 following a national referendum of DOJ lawyers held in June 2001. Mr. Jetté was elected as President of the AJC in February 2002 after an election in January 2002 to form the AJC's first permanent Governing Council. Mr. Jetté testified that in March 2002 he and other AJC officials met with Morris Rosenberg, Deputy Minister, and Mario Dion, Associate Deputy Minister, DOJ, in an attempt to open the channels of communication.

[42] On April 3, 2002, Mr. Jetté sent an e-mail message to DOJ lawyers across Canada following a meeting held on March 28, 2002 between Mr. Dion and the AJC executive.

[43] At that meeting, Mr. Dion advised the AJC that a three-year deal on compensation had been agreed to by the DOJ and the Treasury Board, and that the DOJ had obtained an 8% lump-sum payment for lawyers located in Toronto. According to Mr. Jetté, Mr. Dion felt that this 8% lump-sum payment [later to be known as the Toronto Market Competitive Allowance (TMCA)] might be contentious, as the Treasury Board's position was that there was presently no recruitment or retention problem in Toronto. Therefore, Mr. Dion felt that the Treasury Board might refuse the request from the DOJ. Despite this, the Treasury Board agreed to the TMCA.

[44] Mr. Jetté testified that although the 8% TMCA was eventually awarded to lawyers in Toronto, he was not sure if the funding came from the DOJ or from the Treasury Board. He also testified that the AJC did not object to the TMCA.

[45] After receiving a number of questions from lawyers across the country, Mr. Jetté sent another message on April 17, 2002, to DOJ lawyers to further clarify what had been discussed at the meeting with Mr. Dion. Mr. Jetté informed them that the AJC had had no input into the three-year compensation deal reached by the Treasury Board and the DOJ. He also stated that the AJC's position with respect to the TMCA was that it favoured a single national rate of pay for all lawyers.

[46] Mr. Jetté testified that although he had no personal involvement with the preparation of the AJC's 2001 compensation proposal, he knew that there were three major steps to the proposal:

1. the salaries of all lawyers outside the Toronto area would be topped to the current Toronto pay scale;

2. the pay rates of the Ontario Crown Attorneys would be the next maximum rate of pay for all DOJ lawyers; and

3. all DOJ lawyers would receive an 11% market adjustment increase.

[47] As well, an annual merit increase of 4.6% for lawyers who met expectations and 7% for lawyers who exceeded expectations would be added to the three steps.

[48] Mr. Jetté acknowledged that the FLAG also made a compensation proposal to the employer on behalf of lawyers working in the ORO, to which the AJC did not object.

[49] Mr. Jetté referred to an e-mail that he sent on July 9, 2002, to all DOJ lawyers in Toronto explaining that the AJC and the FLAG had the same goal: to achieve wage parity with the Ontario Crown Attorneys. He also commented on the decision by the Treasury Board to pay the 8% TMCA as a lump-sum payment rather than an adjustment to salary, which would have negative pension implications for lawyers in general.

[50] Mr. Jetté stated that he was attempting to show the Toronto lawyers the big picture; that through the AJC they would have strength in numbers; they would have a strong mandate that would include a single national rate of pay for all lawyers; and that the AJC had already dealt with non-compensation issues such as harassment, appeals and grievances for Toronto lawyers.

[51] In a letter dated June 10, 2003, to Brent DiBartolo, then Assistant Secretary, Treasury Board Secretariat, Labour Relations and Compensation, Operations Division, Mr. Jetté stated that the AJC would prefer that the TMCA (representing 8% of payroll for a total of approximately $2 million) be expanded for distribution to lawyers across the country in the form of a 1% increase for those who attained a merit level of meets or exceeds requirements. It was the AJC's position that it would be more equitable for all lawyers to receive a 1% increase rather than the Toronto lawyers receiving the 8%.

[52] Mr. Jetté stated that he made a mistake in his letter to Mr. DiBartolo. He should have asked that the Treasury Board award an 8% increment to lawyers across the country as opposed to dividing the 8% slated for Toronto lawyers. He stated, however, that it was his belief that his letter had no influence on the employer's decision to cancel the TMCA.

[53] Mr. Jetté stated that he learned from his mistake and developed a new compensation proposal. The 2004 compensation proposal had input from every level in the LA Group and although he did not chair the committee drafting the proposal, he was a member of the committee and provided input.

[54] Mr. Jetté described a meeting he convened on March 11, 2004, in Toronto, during which the AJC's 2004 compensation proposal was presented to the ORO lawyers in attendance. In particular, he stated that the slide "A Commitment to Toronto" was an attempt at reconciliation to Toronto lawyers for the letter he had sent to Mr. DiBartolo. He stated that the Toronto lawyers would not suffer a loss of the gains they had made to the rest of the lawyers across the country. The AJC would negotiate the same percentage increase for everyone. The increase in the percentage for Toronto lawyers would include the Toronto differential. A subsequent meeting was held that evening but only a handful of Toronto lawyers attended. Mr. Jetté felt that this commitment to Toronto was a demonstration of the AJC's maturing as an organization.

[55] On December 22, 2004, Mr. Jetté met, at his request, with the FLAG's executive and a campaign organizer hired by the AJC to discuss the possibility of the AJC and the FLAG joining forces. Mr. Jetté offered the FLAG an opportunity to have a permanent seat on the AJC's Governing Council but that offer was never accepted by the FLAG.

[56] Although Mr. Jetté was uncomfortable discussing the AJC's bargaining strategy with the employer at this hearing, he did state that the AJC's Governing Council had discussed regional rates of pay and terminable allowances. However, at this point in time the 2004 compensation proposal was parity with the Ontario Crown Attorneys.

[57] Mr. Jetté noted that, although the AJC's current bargaining strategy is contained in the 2004 compensation proposal, as with anything else, there is no guarantee that this strategy might not change in the future. The AJC's goal is to seek equal compensation for work of equal value with the Ontario Crown Attorneys, which has been a historical comparator. If the AJC is certified by the PSLRB, a decision on whether to pursue the conciliation/strike or arbitration route would then be made. He also stated that, although the AJC is not constitutionally bound to have the membership determine the bargaining mandate, it is the AJC's position to consult with lawyers across the country to determine a collective bargaining mandate.

[58] When asked whether there was any hostility toward the ORO lawyers by lawyers in the rest of the country, he stated absolutely not. It is his belief that if the AJC is certified it could represent the interests of all lawyers, including lawyers in Toronto, as their goals are one and the same. The problem is that the FLOC does not believe that the AJC can achieve its goal of group-wide parity with the Ontario Crown Attorneys.

[59] In cross-examination by the FLOC, Mr. Jetté explained that, according to the AJC Constitution, each region elects representatives to the Governing Council. The formula is for every 75 lawyers in a region one representative can sit on the Governing Council, with a maximum of three representatives per region. There are presently 43 representatives on the Governing Council, with 22 representatives from the National Capital Region (NCR). The Executive Board is then elected by the 43 representatives. The Executive Board increased its membership from four to seven following a constitutional amendment. On December 4, 2004, the FLAG was offered a position on the Executive Board by Mr. Jetté but it declined the offer. The ORO is entitled to three representatives on the AJC's Governing Council and there is presently one vacancy.

[60] Any collective agreement would be ratified by the AJC members on a 50% plus one model. Under the AJC's Constitution, no regional veto is permitted.

[61] Mr. Jetté agreed that the AJC's Application for Certification was for all non-excluded lawyers at the DOJ. He stated that the AJC had no intention of raiding the

lawyers represented by the PISPC, although he believes that one national bargaining unit representing all lawyers would be the best case scenario. He stated that the AJC's Constitution would have to be amended in order to represent the DOJ lawyers that are presently in the PIPSC's bargaining unit.

[62] Mr. Jetté believes that the Hay Report produced for the DOJ was flawed with inaccurate and outdated information. He agreed that the Hay Report did not make a convincing argument for parity with the Ontario Crown Attorneys' rates for all lawyers across Canada.

[63] Mr. Jetté agreed that the 2001-2002 compensation proposal described the work duties of regional lawyers as being different from the work duties of lawyers in the NCR. He believes that the work performed by the Toronto lawyers is no different than the work performed by other lawyers in regional offices across the country.

[64] The TMCA for lawyers in the ORO has not been endorsed by lawyers working in Vancouver and Montreal as lawyers there feel that they are also affected by special market forces and are underpaid.

[65] Mr. Jetté believes that having both the FLOC and the AJC trying separately to achieve parity with the Ontario rates weakens the bargaining position of both groups.

[66] Mr. Jetté agreed with the PIPSC's representative that the AJC salaries are based on a "performance pay" regime as opposed to a "lock step" salary progression system as found in the current PIPSC collective agreement.

[67] Mr. Jetté stated that the AJC and the FLOC have the same goals; however, the FLOC does not believe that the AJC can attain them. He is convinced that, as a united national bargaining unit, the AJC will have the opportunity to negotiate successfully with the DOJ and the Treasury Board, an opportunity that neither the AJC nor the FLOC have had to date.

[68] Mr. Jetté repeated that the AJC has learned from its mistakes and that its more recent proposals take nothing away from the ORO group.

[69] Mr. Jetté stated that it is now the position of the AJC that it wishes to represent all lawyers in the LA group in a service wide bargaining unit.

Summary of the arguments

[70] The parties were asked to provide written arguments the full texts of which are on file. What follows are short summaries of the salient points of those submissions and replies. The full text of the submissions is on file with the Board.

Main Submissions

For the FLOC

[71] In order to satisfy section 57 of the *PSLRA*, an employee organization need only apply for an appropriate bargaining unit and not the most appropriate bargaining unit.

[72] The appropriate question then is whether the FLOC's proposed bargaining unit shares a community of interest. The question is not whether another proposed bargaining unit structure would also have an equal or greater community of interest.

[73] The FLOC submits that, based on the standard factors set out in *United Steelworkers of America v. Usarco Limited*, [1967] OLRB Rep. 526, the proposed ORO bargaining unit shares a community of interest.

[74] With respect to subsections 57(2) and (3) of the *PSLRA*, the FLOC believes that the employer has in fact established an occupational group or sub-group when it established a special rate of pay for Toronto area lawyers. It then follows that the FLOC's proposed bargaining unit is co-extensive with the employer's occupational groups or subgroups.

[75] In the alternative, should the Board find that the FLOC's proposed bargaining unit is not co-extensive with the employer's occupational groups or subgroups, then the Board should find that the inclusion of the ORO lawyers in a national bargaining unit would not permit the satisfactory representation of those lawyers. For that reason, a national bargaining unit would not be appropriate for collective bargaining.

[76] Finally, the employer's request for review of the PIPSC bargaining unit structure is premature and should be dismissed. The employer has adduced no evidence to show that the status quo bargaining unit is unworkable.

[77] In conclusion, the FLOC believes that the creation of two bargaining units for DOJ lawyers will not result in undue fragmentation or create any threat to future sound labour relations.

For the AJC

[78] The bargaining unit proposed by the FLOC is not co-extensive with the occupational groups or subgroups established by the employer. The LA group as defined in the Canada Gazette (vol. 133, N° 13, March 27, 1999) contains no subgroup.

[79] Since the FLOC's proposed unit is not an occupational group or subgroup, it can only be certified if to do otherwise would not permit the satisfactory representation of its members. The FLOC has not shown that its members would not receive satisfactory representation within a service-wide unit.

[80] The Board should be concerned with the fragmentation and multiplicity of bargaining units. All lawyers in the LA group share a strong community of interest.

[81] In the alternative, the AJC submits that even if the ORO lawyers constitute an occupational subgroup for the purposes of the *PSLRA*, the unit proposed by the FLOC is not appropriate for collective bargaining.

[82] With respect to the PIPSC bargaining unit, the AJC argues that it is not co-extensive with the employer's occupational groups or subgroups.

[83] Even if it were an occupational subgroup, there is no evidence that the PIPSC members could not be satisfactorily represented within a service-wide bargaining unit.

For the PIPSC

[84] In its submission, the PIPSC argued that all lawyers employed by the Treasury Board should be part of a single bargaining unit.

[85] Should the Board decide to create a single service-wide bargaining unit, its members must be given a choice as to the selection of bargaining agent. The PIPSC wishes to have its name appear on the ballot, should a vote be ordered.

[86] Conducting a vote in this case will ensure a minimum democratic foundation to build upon for whomever is the eventual bargaining agent for the LA group. Conducting a vote in this case would be consistent with the former Board's practice of imposing the democratic process in initial certification instances.

For the employer

[87] The employer requests that the Board determine that the appropriate bargaining unit in this case consists of all employees in the LA group.

[88] In the employer's view, neither the FLOC, the AJC or the PIPSC has satisfied the burden of proof upon them to establish that a service-wide bargaining unit co-extensive with its law occupational group would not permit satisfactory representation of all of its members.

[89] The *PSLRA* provides that upon certification, bargaining units shall be co-extensive with the employer's occupational group structure, unless such would not provide for satisfactory representation.

[90] There is no authority for the proposition that the ORO lawyers constitute an occupational subgroup. The employer has created a number of subgroups for other occupational groups but not for the LA group as is clearly evidenced by Exhibit 10.

[91] The Board's inclination, recognizing the perils of fragmentation, has always been towards service-wide units.

[92] The evidence suggests that the work of the ORO lawyers is substantially similar to the work of other DOJ lawyers, particularly those who work in other regional offices.

[93] The DOJ is a functionally integrated department with, at its apex, one Minister of Justice and the Attorney General of Canada.

[94] There is little reason to doubt the AJC's resolve and ability to vigorously defend the interests of all lawyers in the LA group, including those who work in the ORO. The best possible light that may be put upon the FLOC's application for certification is that it is premature.

[95] The employer has no preference as to which employee organization should represent a service-wide unit and therefore takes no position with respect to the PIPSC's request for a representation vote. The Board should, however, consider whether a vote would serve to foster cohesion in the bargaining unit or have the contrary effect.

Reply submissions

For the FLOC

[96] The FLOC's proposed bargaining unit meets the statutory requirements of the *PSLRA* and should be certified. The other proposals would not result in the satisfactory representation of the ORO lawyers.

[97] The FLOC maintains that the ORO lawyers constitute an occupational subgroup, a position it alleges is supported by Board jurisprudence.

[98] Both the AJC and the employer are wrong in their approach to the FLOC's application as it is an initial application for certification and not a request to fragment an existing bargaining unit.

[99] In the absence of evidence that the FLOC's proposed unit is not viable, its application cannot be said to be premature.

[100] Finally, the acrimonious history between the FLOC and the AJC and the latter's failure to properly advocate on behalf of the ORO lawyers, means that their interests cannot be satisfactorily represented in the AJC's proposed unit.

For the AJC

[101] The AJC continues to assert that the ORO lawyers do not constitute a subgroup within the meaning of sections 57 and 70 of the *PSLRA*.

[102] The AJC, the PIPSC and the employer all agree that there should be a service-wide bargaining unit for all lawyers in the LA group who share a strong community of interest.

[103] Finally, there is no compelling rationale for ordering a representation vote should the Board determine that a service-wide bargaining unit is appropriate in these matters. To the contrary, a vote would not only be a waste of public resources, it would be inconsistent with sound labour relations policy.

For the PIPSC

[104] The PIPSC's position calling for a service-wide bargaining unit avoids fragmentation or multiple units of employees sharing an identical classification and group.

[105] The PIPSC reiterates its position that all lawyers in the LA group should be in a single bargaining unit whose representation should be determined by a vote.

For the employer

[106] Subsection 57(4) of the *PSLRA* makes it clear that the Board may determine a bargaining unit in these cases where composition is not identical to the units proposed in the applications for certification presented by the FLOC and the AJC.

[107] The FLOC's submissions or community of interest are misguided. It is not for the parties opposed to the position of the FLOC to establish that an ORO bargaining unit would not provide satisfactory representation.

[108] The FLOC's position is contrary to the *PSLRA* and if adopted would favour and encourage fragmentation.

[109] The employer recognizes that history of certification and collective bargaining is a relevant factor in determining community of interest. There is, however, no such history between DOJ lawyers and the employer.

[110] There is nothing in the *PSLRA* to suggest that there can be any other classification than the one that results from the employer's exclusive prerogative to classify. The FLOC's submission confuses the concepts of classification and pay determination.

[111] The Board has no basis on which to conclude that a service-wide unit could not provide satisfactory representation to the ORO lawyers as collective bargaining for DOJ lawyers has yet to occur.

Reasons

[112] The Board's powers in dealing with applications for certification and the review of the structure of existing bargaining units are contained in sections 54, 57 and 70 of the *PSLRA* which read as follows:

. . .

> *54. Subject to section 55, an employee organization that seeks to be certified as bargaining agent for a group of employees that it considers constitutes a unit appropriate for collective bargaining may apply to the Board, in accordance with the regulations, for certification as bargaining agent for*

> *the proposed bargaining unit. The Board must notify the employer of the application without delay.*
>
> . . .
>
> *57. (1) When an application for certification is made under section 54, the Board must determine the group of employees that constitutes a unit appropriate for collective bargaining.*
>
> *(2) In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board must have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.*
>
> *(3) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.*
>
> *(4) For the purposes of this Part, a unit of employees may be determined by the Board to constitute a unit appropriate for collective bargaining whether or not its composition is identical with the group of employees in respect of which the application for certification was made.*
>
> . . .
>
> *70. (1) If the Board reviews the structure of one or more bargaining units, it must, in determining whether a group of employees constitutes a unit appropriate for collective bargaining, have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.*
>
> *(2) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.*
>
> . . .

[113] In determining whether a group of employees constitutes an appropriate unit for collective bargaining, the Board must have regard to the employer's classification of those employees. It must also establish bargaining units that are co-extensive with

the occupational groups or subgroups created by the employer unless doing so would not permit satisfactory representation of the employees within the unit.

[114] It is interesting to note that three of the four parties to these applications favour the establishment of a service-wide bargaining unit that would include all lawyers in the LA group for which the Treasury Board is the employer. Only the FLOC diverges from this position by requesting the creation of a bargaining unit for all ORO lawyers with the exception of those who work in Ottawa.

[115] The first question to be resolved is whether the unit proposed by the FLOC constitutes an occupational subgroup. Clearly, it does not.

[116] The FLOC argues its proposed unit constitutes an occupational subgroup because of the pay differential or allowance most of its members receive.

[117] As shown in Exhibits 10 and 22, the employer has not created an LA subgroup as it has for other occupational groups. The existence of a regional rate of pay for some ORO lawyers does not have the effect of creating an occupational subgroup. Other than for issues of compensation, the FLOC and AJC groups are functionally identical. This is unlike the situation in *PIPSC v. Canadian Nuclear Safety Commission* (2004 PSSRB 19) relied upon by the FLOC. In that case the employer's classification system was by pay bands which in turn could roughly be divided between administrative and professional functions.

[118] Having concluded that the FLOC's proposed bargaining unit does not belong to an occupational subgroup, the question then becomes whether the Board should conclude that the FLOC bargaining unit is appropriate for collective bargaining because a service-wide unit would not permit the satisfactory representation of ORO lawyers.

[119] Faced with a legislative framework that mandates the determination of bargaining units that are co-extensive with the employer's occupational groups and subgroups, unless doing so would not permit satisfactory representation of employees, the FLOC is confronted with a difficult task in attempting to prove that a service-wide bargaining unit would not permit the satisfactory representation of its membership.

[120] Within the legislative framework of the *PSLRA*, the new Board continues to disapprove of fragmentation and multiplicity of bargaining units. The Board holds the view, as did the former Board (*PSAC v. NCC*, 142-29-312 and 313 and *Parks Canada*

Agency v. PIPSC, 2000 PSSRB 109, at para. 127), that sound labour relations require broad-based bargaining units whenever possible.

[121] Lawyers in other regional markets, be they Montreal, Calgary or Vancouver, may well argue that market forces are equally at play in their milieu. That fact does not, in itself, justify the creation of separate bargaining units. In *Canada Customs and Revenue Agency, Professional Institute of the Public Service of Canada and Public Service Alliance of Canada v. Association of Public Service Financial Administrators and Social Science Employees Association* (2001 PSSRB 127, paras. 531 and 535), the Board expressed the view which it continues to hold that:

. . .

> *Market value is subject to supply and demand as well as fads; it is not stable nor reliable. Many groups of workers can find themselves in demand at any given time; this is not justification for fragmentation of the labour force of one employer. . . .*
>
> *The purpose of collective bargaining is to group employees on the one side to counter the economic power of the employer and achieve a collective agreement for the benefit of all.*

. . .

[122] The evidence of conflict between the FLOC and AJC at a time when both are vying for certification does not establish that a service-wide bargaining unit would lead to the unsatisfactory representation of the ORO lawyers. The Board does not find compelling the evidence of conflict that was presented, especially in a situation where collective bargaining has yet to take place for DOJ lawyers. The Board, in reaching its conclusion, also notes that both the FLOC and the AJC aim for the same objective: parity with Ontario Crown Attorneys. The Board, therefore, concludes that a single service-wide bargaining unit composed of all lawyers in the LA group for which the Treasury Board is the employer is the only appropriate bargaining unit.

[123] Having so concluded, the only question left to be dealt with is whether to hold a representation vote.

[124] The documentation filed with the Board shows that a service-wide bargaining unit for lawyers in the LA group for which the Treasury Board is the employer would number 2,600. The AJC has provided evidence of membership for 1,482 DOJ lawyers

which represents 57% of the total possible membership at the time the applications were made.

[125] Pursuant to section 64 of the *PSLRA*, the Board must certify an applicant employee organization where it is satisfied that a majority of employees in the bargaining unit wish that the applicant represent them as their bargaining agent. The Board is satisfied that a majority of lawyers in the LA group wish to have the AJC as their bargaining agent.

[126] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[127] The Board hereby orders that an appropriate bargaining unit in these cases be composed of all lawyers in the LA group for which the Treasury Board is the employer who are not excluded from collective bargaining by law or determination of the Board.

[128] The Board hereby certifies the AJC as the bargaining agent for the bargaining unit described in the preceding paragraph.

[129] The certificate issued to the PIPSC in 1969 and subsequently amended is hereby revoked.

[130] A certificate naming the AJC as the bargaining agent for the bargaining unit described in paragraph 127 will issue in due course.

[131] The AJC as bargaining agent for the LA group shall pursuant to section 103 of the *PSLRA* notify the Board of the collective bargaining process it wishes to use for the resolution of disputes with the employer.

April 28, 2006.

Yvon Tarte,
Chairperson

Sylvie Matteau,
Vice-Chairperson

Dan Quigley,
Board Member