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File: 448-SC-10

Citation: 2008 PSLRB 100

Parliamentary Employment and Staff Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

SENATE OF CANADA

Respondent

Indexed as
Public Service Alliance of Canada v. Senate of Canada

Complaint under section 10 alleging a violation of
section 38 of the *Parliamentary Employment and Staff Relations Act*

REASONS FOR DECISION

Before: Marie-Josée Bédard, Vice-Chairperson

For the Complainant: David Yazbeck, counsel

For the Respondent: Carole Piette, counsel

Heard at Ottawa, Ontario,
October 16, 2008.

I. Complaint before the Board

[1] The Public Service Alliance of Canada (PSAC or "the complainant") filed a complaint against the Senate of Canada ("the respondent"), alleging that it had engaged in bad faith bargaining and, particularly, in receding-horizon bargaining in violation of section 38 of the *Parliamentary Employment and Staff Relations Act* (*PESRA*).

II. Summary of the evidence

[2] The complaint relates to proposals and discussions that occurred during collective bargaining for the renewal of the collective agreement between the PSAC and the Senate of Canada for the Operational Group that expired on September 30, 2007 ("the collective agreement"). Specifically, the dispute relates to proposals and discussions that took place with respect to the following provisions of article 13 of the collective agreement:

. . .

13.10 - *When operational requirements permit, the Employer will grant leave without pay to an employee for the purpose of attending contract negotiations meetings on behalf of the Alliance.*

13.11 - *When operational requirements permit, the Employer will grant leave without pay to a reasonable number of employees to attend preparatory contract negotiations meetings.*

. . .

13.15 - *Provided the Alliance gives the Employer sufficient advance notice, the Employer will grant leave with pay to a maximum of three (3) employees for the purpose of attending contract negotiations meetings on behalf of the Alliance. The Alliance agrees to reimburse the Employer an amount equivalent to the daily rate of pay of each employee who is granted leave under this clause plus salary-related benefits costs in the amount of fifteen and one-half percent* ***(15.5%)*** *for each day the employee is granted leave under this clause.*

13.16 - *Provided the Alliance gives the Employer sufficient advance notice, the Employer will grant leave with pay to a maximum of three (3) employees for the purpose of attending preparatory contract negotiations meetings. The Alliance agrees to reimburse the Employer an amount equivalent to*

> *the daily rate of pay of each employee who is granted leave under this clause, plus salary related benefits costs in the amount of fifteen and one-half percent (15.5%) for each day the employee is granted leave under this clause.*
>
> . . .

[3] At the outset of the hearing, counsel for both parties filed an Agreed Statement of Facts, which contains the following:

> . . .
>
> 1. *The Public Service Alliance of Canada is the bargaining agent for employees in the Operational Group of the Senate of Canada. A certificate was issued by the Public Service Labour Relations Board (the PSLRB) on May 8, 1987.*
>
> 2. *Since that time, the PSAC (the 'Union') and the Senate of Canada (the 'Employer') have entered into five collective agreements. The latest collective agreement is attached as Document 1. Notice to bargain was served by the Union on September 27, 2007.*
>
> 3. *The parties have held nine (9) collective bargaining sessions on the following dates: December 4, 2007 and January 17th, February 5th, 20th and 21st, April 16th and 22nd, May 5th and June 10th, 2008.*
>
> 4. *On December 4, 2007, the parties tabled their respective proposals for the sixth round of collective bargaining. Attached as Document 2 and Document 3 are copies of the initial bargaining proposals made by the Employer and the Union respectively.*
>
>   *As part of its package, the Employer sought various modifications to Article 13. The changes sought were as follows:*
>
>   . . .
>
>   13.15 *Provided the Alliance gives the Employer sufficient advance notice, the Employer will grant leave with pay to a maximum of three (3) employees for the purpose of attending contract negotiations meetings. The Alliance agrees to reimburse the Employer an amount equivalent to the daily rate of pay of*

*each employee who is granted leave under this clause, plus salary related benefits costs in the amount of ~~fifteen and one-half~~ **twenty** percent (~~15.5%~~ **20%**) for each day the employee is granted leave under this clause.*

*13.16 Provided the Alliance gives the Employer sufficient advance notice, the Employer will grant leave with pay to a maximum of three (3) employees for the purpose of attending preparatory contract negotiations meetings. The Alliance agrees to reimburse the Employer an amount equivalent to the daily rate of pay of each employee who is granted leave under this clause, plus salary related benefits costs in the amount of ~~fifteen and one-half~~ **twenty** percent (~~15.5%~~ **20%**) for each day the employee is granted leave under this clause.*

5. *On January 17, 2008, the Employer explained its rationale with respect to the changes sought to Article 13. The Union indicated that it was seeking status quo on Articles 13.01 through 13.13. The Union advised that it would get back to the Employer on clauses 13.08, 13.15 and 13.16.*

6. *On February 5, 2008, the Employer advised the Union that its proposal on Article 13.15 and 13.16 was driven by the increased costs in benefits. The Employer advised that it would provide a costing analysis for the Union's consideration as a result of a request from the Union.*

7. *On February 20, 2008, the Employer provided an analysis of the costs of benefits. (Document 4). The Union advised that it would look at the benefits cost analysis provided.*

8. *On February 21, 2008, the Employer indicated it was prepared to withdraw its proposals for Article 13.08 and 13.13 but that it was maintaining its position on its other Article 13 proposals. The Union advised that it wanted status quo on Article 13, given it had been in the collective agreement for a long time and the Union saw no need to change it.*

9. *On April 16, 2008, the Employer advised that it was maintaining its proposals on 13.01 through 13.06, was prepared to withdraw its proposals for 13.08 and 13.13*

and was waiting for a response from the Union on Article 13.15 and 13.16. Later on that day, the Union advised it was not prepared to consider an increase in the benefit costs reimbursement.

10. *On April 22, 2008, the parties focused their attention on issues surrounding seniority.*

11. *On May 5, 2008, the Employer informed the Union that given its position on Article 13.15 and 13.16, the Employer would be tabling a proposal to delete clauses 13.15 and 13.16.*

12. *On May 7, the Union's negotiator . . . provided the Employer's negotiator . . . with the following e-mail (Document 5):*

> *. . . I left you a voicemail on Monday afternoon after Senate bargaining and I have not heard back, thus this email. Since the parties' first session in December of last year, the Senate has proposed to modify 13.15 and 13.16 of the parties' Agreement by increasing the amount reimbursed by the Union from 15.5% to 20% for benefit costs when employees are granted leave with pay for contract negotiations meetings.*
>
> *In the seven bargaining sessions since our first meeting the Union has not agreed to this proposal and has advocated for status quo in this regard. On Monday the Senate indicated at the bargaining table that, if the Union will not agree to its proposal to increase the amount that the Union reimburses under 13.15 and 13.16, then the Senate will table a new language modifying 13.15 and 13.16 so that the leave granted under said sections would no longer be leave with pay but instead leave without pay. This is to notify you that if your client proceeds with this course of action the Union will be filing an unfair labour practice complaint with the PSLRB maintaining that the new demand constitutes bargaining in bad faith and receding horizon bargaining on the part of the Senate.*
>
> . . .

13. *On May 8, 2008,* [counsel for the respondent] *responded as follows (Document 6):*

. . .

> *I have reviewed the Union's position with my client and can advise you as follows:*
>
> *1. You state in your e-mail that in the seven bargaining sessions since the parties' first meeting, the Union has advocated status quo. This is inaccurate. Since our first meeting, the Employer has sought the Union's position on the provisions in question. The Union's response has always been that you would have to get back to us on the issue. Finally, after numerous requests from the Employer, the Union stated its position on the matter on April 22, 2008 at which time the Union advised that it was advocating status quo. At our next and final day of negotiations, the Employer advised that it would be tabling a proposal to delete the provisions in question as the PSAC does not appear ready to cover the reasonable payroll costs incurred by the Employer in keeping employees on the payroll during unpaid union business leave.*
>
> *2. We fail to see how the Employer's position on this matter could be remotely construed as bad faith bargaining. Clearly it is not.*
>
> *3. We can advise you that your threat of filing an unfair labour practice complaint will not in any way influence the Employer's stance on this matter.*

. . .

14. *The June 2, 2008 bargaining date was cancelled by the Union because the Union's chief negotiator . . .was double booked on that date and was required to attend at another bargaining session.*

15. *On June 10, 2008, the Employer explained its rationale in tabling the removal of clauses 13.15 and 13.16. The Employer advised that Article 13.10 and 13.11 of the collective agreement provided for leave without pay for contract negotiations and preparatory contract negotiations meetings. Article 13.15 and 13.16 were provisions for pay with subsequent reimbursement by PSAC. The Employer explained that it wished to recover increased benefits costs from the Union. As the Union*

was not prepared to consider an increase in cost recovery for benefits, the Employer was tabling the deletion of the salary continuation provisions. The PSAC could pay the employees directly. The Respondent tabled the following (clauses 13.10 and 13.11 also reproduced below for information purposes):

> ~~*13.15 Provided the Alliance gives the Employer sufficient advance notice, the Employer will grant leave with pay to a maximum of three (3) employees for the purpose of attending contract negotiations meetings on behalf of the Alliance. The Alliance agrees to reimburse the Employer an amount equivalent to the daily rate of pay of each employee who is granted leave under this clause plus salary related benefits costs in the amount of fifteen and one-half percent (15.5%) for each day the employee is granted leave under this clause.*~~
>
> ~~*13.16 Provided the Alliance gives the Employer sufficient advance notice, the Employer will grant leave with pay to a maximum of three (3) employees for the purpose of attending preparatory contract negotiations meetings. The Alliance agrees to reimburse the Employer an amount equivalent to the daily rate of pay of each employee who is granted leave under this clause, plus salary related benefits costs in the amount of fifteen and one-half percent (15.5%) for each day the employee is granted leave under this clause.*~~

16. *This is the first bad faith bargaining complaint filed by the Union against the Employer.*

. . .

[*Sic* throughout]

[Emphasis in the original]

III. Summary of the arguments

A. For the complainant

[4] The complainant alleges that the respondent did not fulfill its duty to negotiate in good faith and that it did not make every reasonable effort to conclude a collective agreement when it improperly changed its proposals with respect to clauses 13.15 and 13.16 of the collective agreement. The complainant characterized the respondent's behaviour as being inconsistent with the goal of achieving an agreement and as corresponding to receding-horizon bargaining.

[5] Counsel for the complainant outlined the underlying principles of the duty to bargain in good faith and submitted that the duty aims to facilitate rational discussion throughout the bargaining process. He added that although the bargaining process can be tough and hard, it still has to aim at facilitating rational discussion. Each party has an obligation to enter into rational discussion with the intention of entering into an agreement. During their discussions, both parties should strive to find a middle ground between their opposing interests, and a party should not table a proposal that it should know the other party could never accept. Moreover, a party cannot create a "receding horizon" by changing the initial scope of the negotiation on an issue in midstream by withdrawing an initial proposal and substituting a more restrictive one. Fundamental changes of position during the course of negotiations must be justified by compelling evidence and a significant change in circumstances.

[6] Counsel for the complainant submitted that, in assessing a situation, the Public Service Labour Relations Board ("the Board") must consider the context within which the complaint was filed (including the history of the bargaining relationship between the parties), the behaviour of the parties and the impact of their actions on the bargaining process. The Board must assess whether the respondent's conduct was conducive to rational discussions and whether its conduct assisted the parties to resolve the issue. The Board must also assess whether the respondent's conduct was destructive to the bargaining process.

[7] With respect to history and context, counsel for the complainant outlined that this complaint is the first bad faith bargaining complaint filed in the history of bargaining between the parties. The parties have been dealing with each other since 1987 and have always been able to reach agreements in the past. From the

complainant's perspective, its filing of a bad faith bargaining complaint illustrates the seriousness of the issue.

[8] Counsel for the complainant also suggested that the proposals it tabled at the outset of the bargaining process were not numerous and that those proposals did not seek major changes to the collective agreement. In contrast, counsel for the complainant characterized the respondent's proposals as numerous and stated that they brought forward several requests to revisit major issues that questioned long-established principles.

[9] With respect to article 13 of the collective agreement, which is central to the dispute, counsel for the complainant suggested that it was clear from the proposals it tabled at the outset of the bargaining process that the complainant was not seeking any changes to article 13 and that, therefore, it wished to maintain the status quo regarding provisions of article 13.

[10] Counsel for the complainant insisted on the importance of clauses 13.15 and 13.16 of the collective agreement, which allow up to three employees to be involved in the bargaining process. Those provisions facilitate the involvement of those employees in the bargaining process by providing a salary continuation mechanism when they attend preparatory and negotiation meetings. Counsel for the complainant explained that the complainant, being a large employee organization, has its own employees who act as negotiators at different bargaining tables. Those negotiators are assisted by members of the bargaining unit, whose involvement in the bargaining process is important for several reasons: they are a valuable resource because of their knowledge of the workplace, they are directly affected by the collective agreement, they act as conduits to the members of the bargaining unit, and their presence provides credibility to the entire collective bargaining process.

[11] Counsel for the complainant argued that the original modifications to clauses 13.15 and 13.16 of the collective agreement that the respondent sought did not question the principles outlined in the clauses; nor did they question the salary continuation mechanism. The scope of the issue that was to be discussed at the negotiation table was clearly limited to the amount that the bargaining agent reimburses to the employer to cover salary-related benefit costs when employees leave for negotiation purposes. The respondent was seeking to increase the percentage of the daily rate of pay used to cover salary-related benefits from 15.5 to 20 percent. In

the words of counsel for the complainant: "[t]hat was the basis, the floor on which the parties were negotiating."

[12] Counsel for the complainant suggested that until May 5, 2008, the bargaining process with respect to article 13 of the collective agreement had progressed normally and adequately. The respondent tabled its proposal on December 4, 2007, and the complainant advised that it would respond to the suggested changes to clauses 13.15 and 13.16. On February 5, 2008, the respondent explained that its proposal was driven by the increased cost of benefits. The complainant then requested a cost analysis, which the respondent provided for the complainant's consideration at the February 20, 2008 session. On February 21, 2008, the complainant advised that it wished to maintain status quo regarding article 13. On April 16, 2008, the respondent advised that it was waiting for the complainant's position with respect to its proposal on clauses 13.15 and 13.16. On the same day, the complainant reiterated that it wished to maintain status quo regarding those clauses and advised that it was not prepared to consider an increase in benefit-cost reimbursement.

[13] The complainant argued that the bargaining process broke down on May 5, 2008, when the respondent reacted to the complainant's refusal to consider an increase in benefit-cost-reimbursement by advising that it would table a proposal to delete clauses 13.15 and 13.16 of the collective agreement. Counsel for the complainant submitted that the respondent's position in suggesting the deletion of clauses 13.15 and 13.16 differed completely from its original proposal and constituted a major change in the scope to the issue in dispute. The respondent's new position implied restrictions with respect to employees' right to leave for bargaining purposes that do not exist in the clauses in dispute and that were unforeseen in the initial proposal.

[14] Counsel for the complainant argued that the respondent's conduct as of May 5, 2008, was not compatible with the duty to bargain in good faith.

[15] Counsel for the complainant said that the complainant's negotiator flagged the seriousness of the issue, when on May 7, 2008, he sent an email to the respondent's negotiator. In his email, he notified her that he considered that ". . . the new demand constitute[d] bargaining in bad faith and receding horizon bargaining on the part of the Senate . . ." and that the complainant would file a bad faith bargaining complaint

with the Board if the respondent persisted in its position and tabled a proposition to delete clauses 13.15 and 13.16 of the collective agreement.

[16] Counsel for the complainant argued that the respondent reacted improperly to that email. On receiving the complainant's email, the respondent had an opportunity to return to the bargaining table to try to work out the issue with the complainant or to put the discussion back on track, but instead, the respondent maintained its position. On June 10, 2008, the respondent tabled its proposal to delete clauses 13.15 and 13.16 of the collective agreement and explained the rationale behind its revised position, which is outlined in paragraph 15 of the Agreed Statement of Facts as follows:

> *15. . . . The Employer advised that Article 13.10 and 13.11 of the collective agreement provided for leave without pay for contract negotiations and preparatory contract negotiations meetings. Articles 13.15 and 13.16 were provisions for pay with subsequent reimbursement by PSAC. The Employer explained that it wished to recover increased benefits costs from the Union. As the Union was not prepared to consider an increase in cost recovery for benefits, the Employer was tabling the deletion of the salary continuation provisions. The PSAC could pay the employees directly. . . .*
>
> . . .

[17] Counsel for the complainant suggested that that explanation reveals that the respondent minimized the importance of the rights contained in clauses 13.15 and 13.16 of the collective agreement by characterizing them as being solely salary continuation provisions. Counsel for the complainant argued that apart from the salary continuation mechanism, there was a "huge" difference between clauses 13.15 and 13.16 on the one hand and clauses 13.10 and 13.11 on the other hand. Deleting clauses 13.15 and 13.16 would imply a whole host of new factors with respect to employees' leave. Counsel for the complainant outlined that under clauses 13.15 and 13.16, leave for up to three employees was unconditional, provided that the employer received sufficient advance notice. Conversely, leave under clauses 13.10 and 13.11 depends on the operational requirements of the employer. Insisting that he was not suggesting that the respondent would use clauses 13.10 and 13.11 for improper purposes, counsel for the complainant submitted that should the bargaining agent have to rely on clauses 13.10 and 13.11, it would become easier for the employer to disallow employees' participation in the bargaining process.

[18] Counsel for the complainant submitted that the substitution of the respondent's initial proposal with a more restrictive revised proposal in reaction to the complainant's refusal to agree with an increase in benefit-cost recovery constituted bad faith bargaining and receding-horizon bargaining.

[19] Counsel for the complainant submitted that the position taken by the respondent was extreme and that the substitution of the initial proposal with a more restrictive one was inconsistent with the duty to facilitate rational discussion. The respondent's conduct was not conducive to rational discussion and did not contribute to the quality of the discussions.

[20] Counsel for the complainant suggested that the duty to bargain in good faith would have demanded that the respondent take a different path that would have been aimed at pursuing discussions on the matter or putting the matter aside for a time. Instead, the respondent took a drastic position that changed the parameters of the negotiations by introducing changes that were much more restrictive than the changes that it had originally sought. Counsel for the complainant summarized the respondent's conduct in the following manner: "The employer said, since you are not prepared to agree with us, we will make it worse for you."

[21] Counsel for the complainant argued that the respondent's change of position corresponded to receding-horizon bargaining, given that it was clear for both parties at the beginning of the negotiations that clauses 13.15 and 13.16 of the collective agreement would remain in the collective agreement. In substituting its initial proposal with a far more restrictive one, the respondent changed the scope of the negotiation. Counsel for the complainant submitted that the second position was completely different and that it constituted a "major" change to the dispute. He further submitted that the respondent did not have a compelling reason to justify its change of position. He argued that the "dislike" of the complainant's position with respect to the respondent's initial proposal could not be construed as valid justification for such a drastic change of position. Counsel for the complainant also submitted that the respondent's conduct and its change of position were destructive to the bargaining process.

[22] Counsel for the complainant referred to the following authorities to support his arguments: *United Electrical, Radio and Machine Workers of America v. DeVilbiss (Canada) Limited*, C.L.R.B.R. File No. 1124-75-U (19760309); *National Association of*

Broadcast Employees and Technicians v. CKLW Radio Broadcasting Limited (1977), 23 di 51 (C.L.R.B.); *Ontario Nurses' Association v. The Board of Health of Haliburton Kawartha, Pine Ridge District Health Unit and H.E. Good,* [1977] OLRB Rep. 65; *Local 1979 Retail Clerks International Union Affiliated with the Canadian Labour Congress, AFL-CIO v. Wilson Automotive (Belleville) Ltd.,* [1980] OLRB Rep. 1136; *Eastern Provincial Airways Ltd. v. Canadian Air Line Pilots' Association*, 3 CLRBR (NS) 75; *United Steelworkers of America, Local 9011 v. Radio Shack Division of Tandy Electronics Limited*, [1985] OLRB Rep. 1789; *Public Service Alliance of Canada v. The Treasury Board,* PSSRB File No. 148-02-196 (19910916); *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *Maritime Employers Association v. Syndicat des débardeurs, Local 375 of the Canadian Union of Public Employees*, [1999] CIRB no. 26; *Global Television (Global Lethbridge, a Division of Can West Global Communication Corp.) v. Communications, Energy and Paperworkers Union of Canada*, 2004 FCA 78; *Ontario Labour Relations Board Law and Practice*, 3rd ed., Sack Mitchell Price, Butterworths, January 2006; and Georges W. Adams, *Canadian Labour Law*, 2nd ed., Release No. 31, June 2008.

B. <u>For the respondent</u>

[23] The respondent offered a different interpretation and characterization of the discussions and exchange relating to article 13 of the collective agreement during the bargaining process and replied to the complainant's allegations.

[24] Like counsel for the complainant, counsel for the respondent submitted that the duty to bargain in good faith involves an obligation on the parties to enter in and maintain serious negotiations with the intent of entering into a collective agreement. That obligation requires the parties to explain their respective positions and favour rational and informed discussions.

[25] Counsel for the respondent submitted that the respondent did exactly that. From the outset of the negotiations, the respondent provided the rationale for the change it was seeking with respect to clauses 13.15 and 13.16 of the collective agreement. Counsel for the respondent outlined that on December 4, 2007, the parties tabled their respective proposals. During the following bargaining session, on January 17, 2008, the respondent highlighted that the proposals sought an adjustment to benefit-cost reimbursement to reflect the increase in those costs, which it wished to recover. On February 20, 2008, the respondent provided the complainant with a

detailed breakdown of the increase in benefit costs. The complainant's response to the proposal was firmly negative.

[26] Counsel for the respondent argued that it was the intransigence of the complainant's response that triggered the change in the respondent's position. Faced with that intransigent position, the respondent proposed another means to avoid absorbing the increase in benefit costs by proposing the deletion of the salary continuation mechanism. From the respondent's perspective, the abolition of the salary continuation mechanism would not change the underlying principle under which the types of leave under clauses 13.15 and 13.16 of the collective agreement are without pay, and would simply imply that the complainant would pay the employees directly. Counsel for the respondent submitted that the respondent had explained the rationale for its change of position.

[27] Responding to the complainant's allegation that the respondent did not engage in rational discussion by tabling its new proposal, counsel for the respondent suggested that it was the complainant that did not encourage rational and informed discussion, first by taking an intransigent position with respect to the initial proposal and second by filing a complaint instead of a counter-proposal. The complainant could have tabled a modified version of clauses 13.10 and 13.11 of the collective agreement, proposed another percentage increase or found another way to pursue the discussions. Counsel for the respondent argued that the complainant's attitude could not be qualified as a rational and an informed way of bargaining.

[28] Counsel for the respondent submitted that the Board should be cautious in assessing whether the respondent was making every reasonable effort to reach an agreement or whether it was avoiding entering into an agreement. Counsel for the respondent submitted that the Board's intervention should not be easily obtained and that the Board must distinguish between surface bargaining and hard bargaining. Counsel for the respondent submitted that the evidence in this case cannot lead to a determination of surface bargaining.

[29] With respect to the concept of receding-horizon bargaining, counsel for the respondent argued that this type of bargaining occurs when a party, late in the bargaining process, introduces a major new proposal that is disruptive to the framework of the bargaining. Counsel for the respondent submitted that the jurisprudence has developed criteria that have to be examined to make a

determination of receding-horizon bargaining. The Board must assess whether the respondent's actions were meant to destroy the framework of the bargaining. The Board must also examine the magnitude of the change and the timing of the change of position. The Board should also consider the history of the bargaining relationship between the parties to determine whether there is a pattern of unfair bargaining.

[30] Counsel for the respondent submitted that the context in which it tabled its revised proposal cannot lead to a conclusion of receding-horizon bargaining. Counsel for the respondent argued that, faced with the intransigence of the complainant's position, the respondent reformulated its tactics and had a cogent rationale for its revised proposal. The complainant's position in response to the respondent's initial proposal justified the respondent's change of position. The revised proposal aimed at achieving the original objective of not absorbing the increase in benefit costs. In that particular context, the respondent revised its position on the same subject matter far before the eleventh hour. The revised proposal did not imply a completely new proposal on a new subject but was merely a continuum. Counsel for the respondent argued that the revised proposal corresponds to the industry standard and, therefore, that it could not have been a shock to the complainant nor could it have been characterized as detrimental to the bargaining process. In support of its point of view, counsel for the respondent referred to 21 collective agreements within the public service that do not contain salary continuation provisions. Counsel for the respondent also insisted that if clauses 13.15 and 13.16 of the collective agreement were so important to the complainant, it should have tabled a counter-proposal. The respondent further argued that the complainant did not attempt to find the middle ground by categorically saying "no."

[31] Counsel for the respondent referred to the following cases in support of her arguments: *Fashion Craft Kitchens Inc. v. C.J.A., Local 3054*, [1979] O.L.R.B. Rep. 967*; G.A.U., Local 12-L v. Graphic Centre (Ontario) Inc.*, [1976] O.L.R.B. Rep. 221; *United Food and Commercial Workers Union, Local 401 v. Gateway Casinos G.P. Inc.*, 2008 CanLII 51130 (AB L.R.B.)*; United Food and Commercial Workers, Local Union No. 401 v. Ferraro's Limited,* [1992] Alta. L.R.B.R. 379; *Ontario Nurses' Association v. The Board of Health of Haliburton Kawartha, Pine Ridge District Health Unit and H.E. Good,* [1977] O.L.R.B. Rep. 65; *Finning (Canada) a Division of Finning International Inc. v. International Association of Machinists and Aerospace Workers, Local Lodge 99,* [2005] Alta. L.R.B.R. 356; and *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369.

IV. Reasons

[32] I must determine if the respondent breached its duty to bargain in good faith under section 38 of the *PESRA*, which states the following:

> ***38.*** *Where notice to bargain collectively has been given, the bargaining agent and the officers designated to represent the employer affected shall, without delay, but in any case within twenty days after the notice was given or within such further time as the parties may agree, meet and commence to bargain collectively in good faith and make every reasonable effort to conclude a collective agreement.*

[33] That provision is consistent with duty to bargain in good faith provisions that have been adopted by other jurisdictions in Canada. The jurisprudence from Canadian labour boards has established principles that circumscribe the duty to bargain in good faith and that guide labour boards in their assessments of bad faith bargaining complaints. Both parties cited several cases that provide a good overview of the applicable principles, which I summarize as follows.

[34] The underlying principle of the duty to bargain in good faith is to foster a sound and effective collective bargaining process. The duty to bargain in good faith has been defined with respect to the manner in which the parties conduct themselves within the bargaining process. The parties must enter into serious, open and rational discussions with the real intent of entering into a collective agreement. That obligation implies that the parties act in a manner that is conducive to a full exchange of positions.

[35] In *CKLW Radio Broadcasting Limited*, the Canada Labour Relations Board referred to the following excerpt from *Canadian Industries Limited*, [1976] O.L.R.B. Rep. 199, which offers a useful description of the duty to bargain in good faith:

> . . .
>
> *. . . the Board made it clear that satisfaction of the duty to bargain in good faith depends on the manner in which negotiations are conducted, and not upon the content of the proposals brought at the bargaining table. . . .*
>
> . . .
>
> *The conduct of the negotiations is not only judged in terms of mutual recognition but also in terms of quality of discussions. This latter factor is somewhat broader in its application,*

> *extending to those situations where there may be present the common objective of entering into collective agreement, but where there is absent any willingness to discuss how that common objective might be reached.*
>
> . . .

[36] The duty to bargain in good faith imposes obligations with respect to the bargaining process, but it does not imply that the parties must succeed and effectively enter into a collective agreement. However, it requires that the parties undertake the bargaining process seriously and honestly, with the intent of entering into a collective agreement. As the Supreme Court stated in *Royal Oak Mines Inc*, ". . . a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions . . . ." However, the duty to bargain in good faith does not preclude hard bargaining, and it is important to distinguish between surface bargaining and hard bargaining.

[37] The Board must be circumspect in its assessment of a bad faith bargaining complaint. The Board is not an instrument to be used to resolve bargaining impasses or modulate the balance of power that may exist between parties. The Board must be cautious not to unduly interfere in the bargaining process and not to undermine the parties' freedom to negotiate and develop their negotiation tactics. As a general principle, the Board must not assess the reasonableness of the positions taken by the parties. However, the Board must not hesitate to intervene when it determines that the behaviour of a party amounts to bad faith or prevents informed and rational discussions. Moreover, the Board must assess the content of the positions taken by one party when those positions are allegedly illegal, contrary to policy or otherwise disruptive to the bargaining process and the decision-making capability of the other party. To make a determination of the parties' behaviour, the Board must consider the bargaining relationship between the parties and the context of the negotiations.

[38] In *Royal Oak Mines Inc.*, the Supreme Court interpreted the duty to bargain in good faith and determined the standards that should be applied in assessing the behaviour of the parties. The Court also identified situations in which the content of proposals could be determinative of a breach of the duty to bargain in good faith, as follows:

. . .

> *XLII. Section 50(a) of the Canada Labour Board has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*
>
> *XLII. Section 50(a)(ii) requires the parties to "make every reasonable effort to enter into a collective agreement". It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of "reasonable effort" must be assessed objectively, the Board must by reference to industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith.*

. . .

[39] In *CKLW Radio Broadcasting Limited*, the Canada Labour Relations Board outlined the role of a labour board seized of a bad faith bargaining complaint:

. . .

> *The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of*

> *power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion. At the same time, the Board must ensure that one party does not seek to undermine the other's right to engage in bargaining or act in a manner that prevents full, informed and rational discussion of the issues.*
>
> . . .

[40] The duty to bargain in good faith must be viewed within the reality of collective bargaining, which does not take place in a static context. The context evolves over time and can be affected by external and internal factors. The duty to bargain in good faith does not require that the parties be confined to frozen positions. The parties must have the latitude to adjust their behaviour with respect to the evolution of time and context. However, the duty to bargain in good faith imposes limits on the manner in which the parties can modulate their tactics and positions. The jurisprudence has clearly determined that a party cannot, by its conduct, undermine the decision-making capability of the other party. The limits to the parties' latitude have been defined through the often-referred-to concept of receding horizon bargaining.

[41] Receding horizon bargaining occurs when a party, late in the bargaining process, introduces or withdraws a complete subject matter or introduces a clearly unacceptable demand, thus constituting a major change in the scope of the dispute. Such late changes demand compelling justification. However, to warrant the Board's intervention, the change of position must be construed as being disruptive of the bargaining process and of the decision-making capability of the other party. In a sense, the conduct must reveal an intention not to enter into an agreement.

[42] In *Gateway Casinos GP Inc.*, the Alberta Labour Relations Board provided an overview of the concept and made a review of the jurisprudence on that matter as follows:

> . . .
>
> *49. What I take from the Ontario cases is that the branch of that Board's bad faith bargaining jurisprudence that prohibits certain late changes in bargaining position is either synonymous with, or very closely allied to, the concept of "receding horizon" bargaining. It is aimed at the most destructive bargaining practices, those that are inconsistent*

> *with a desire to enter into a collective agreement at all. Making a punitive, clearly unacceptable new demand at a time when an agreement appears imminent (Wilson automotive) is one example. Adding significant additional subjects to the bargaining table late in bargaining, either by raising genuinely new demands (Graphic Centre (Ontario)) or reneging on agreed items (Fashion Craft Kitchen), also usually discloses intent not to reach an agreement.*
>
> *50 The Alberta cases referred to in argument are in my opinion consistent with a restricted view of the prohibition against unjustified late changes in bargaining position . . . All o these cases, like the Ontario cases, involve the addition or removal of a complete subject of bargaining, and thus a major change to the scope of the dispute. . .*
>
> *51 Good faith bargaining absolutely demands that the parties know the scope of the issues in dispute. Bargaining tactics that gravely undermine or render futile a party's effort to comprehensively consider and formulate its position will offend the Code unless there are compelling contrary considerations. Adding new or resurrected issues to the table late in bargaining "destroys the decision making framework because it threatens to undo all of the bargaining that preceded it, bargaining that comprised many finely tuned judgments about priorities and acceptable trade-offs. It betrays intent to subvert what has already been accomplished in bargaining and delay or prevent the conclusion of an agreement.*
>
> *52 In my opinion, however, the prohibition against late changes in bargaining position that "destroy the decision making framework" should be, and is, limited to the unjustified introduction of major new subjects into the bargaining. It should not be used to preclude a party from proposing a significant different approach on a known subject of bargaining in order to break an impasse.*

. . .

[43] In *Finning (Canada) a Division of Finning International Inc.*, the Alberta Labour Relations Board defined the applicable factors in determining whether a change destroys the decision-making framework:

. . .

> *25 Whether changes in position are destructive enough to warrant intervention (one phrase used is whether the changes "effectually destroy the decision making framework") depends on many factors. Two very important*

> *factors are the magnitude of the changes and the stage of the bargaining at which they are introduced. Boards are most likely to find a breach of the bargaining duty where one or more completely new proposals on major items are introduced at the point where a collective agreement has almost been reached. It is in these circumstances that labour boards demand "compelling justification" for the change in position. Short of the point where a collective agreement has almost been reached, a change in position must represent a major expansion or redefinition of the bargaining dispute before intervention by the Board is advisable.*
>
> . . .

[44] In *Wilson Automotive (Belleville) Ltd.*, the Ontario Labour Relations Board also defined the type of alterations in position that are considered inconsistent with the desire to enter into an agreement, as follows:

> . . .
>
> *7 . . . However, the Board's view as expressed in the Pine Ridge District Health Unit case, supra, cannot be taken as a carte blanche to alter one's bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making framework necessary for collective bargaining would be contrary to section 14 of the Act. (See the Graphic Centre (Ontario) Inc. case [1976] OLRB Rep. May 221). Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to change in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.*
>
> . . .

[45] Applying the principles that were developed with respect to the duty to bargain in good faith to the facts at hand, I conclude that the respondent's conduct fell within the boundaries of good faith bargaining.

[46] The history of bargaining between the parties demonstrates that neither party has a pattern of bad faith bargaining, nor do they have a pattern of filing complaints of

bad faith bargaining. The parties have a long-standing relationship and have demonstrated over time their ability to reach agreements. Therefore, I consider that the complainant did not file its complaint spontaneously and frivolously and I acknowledge that it considered the issue to be serious.

[47] I will now examine the context and the course of events that led to the complaint.

[48] I find that examining the content of the clauses of the collective agreement that were at issue is relevant to understanding the proposals that were tabled and the manner in which the parties conducted themselves. Clauses 13.15 and 13.16 allow employees leave to prepare for bargaining and to participate in bargaining, and allow them to benefit from a salary continuation mechanism when they are granted that leave. However, the clauses also provide that the cost of the leave is ultimately covered by the bargaining agent. The salary continuation mechanism includes both a reimbursement of salary and a reimbursement of the benefit costs to the employer. Those costs were originally calculated at 15.5 percent of the employee's daily rate.

[49] The respondent tabled an initial proposal to amend clauses 13.15 and 13.16 of the collective agreement to recover the increase in benefit costs that it did not want to absorb. The rationale underlying the proposal was clearly explained early in the bargaining process, and the respondent provided the complainant with the cost analysis on which it based its request.

[50] The complainant was free to choose the manner in which it wished to reply to the respondent's request to recover the increase in benefit costs, but in taking the position that it did not want to consider any increase in benefit-cost recovery, it could not reasonably expect that the respondent would simply drop the subject. I also consider that the complainant could reasonably have expected a reaction from the respondent. In reaction to the complainant's position, the respondent changed its original position and tabled a proposition to delete clauses 13.15 and 13.16 of the collective agreement. The complainant suggests that by doing so, the respondent acted in bad faith and entered into receding-horizon bargaining. For the following reasons, I do not agree.

[51] I recognize that when it tabled its initial proposal to change clauses 13.15 and 13.16 of the collective agreement, the respondent did not question the right of the

employees to benefit from the leave nor did it seek the elimination of the salary continuation mechanism. I agree with the complainant that the revised proposal tabled by the respondent is substantively different from its original position. However, I believe that the behaviour of the respondent and the content of the revised proposal have to be placed in context.

[52] Faced with the complainant's refusal to consider any increase in benefit-cost recovery, the respondent decided to propose the elimination of the salary mechanism to reach its objective of not assuming the increase of the benefit costs related to the leave. That objective had clearly been put on the table at the beginning of the discussions. Also, the respondent clearly explained the reason for its change in position. In her email dated May 8, 2008, counsel for the respondent indicated that the respondent would be tabling a proposal to delete clauses 13.15 and 13.16 of the collective agreement, ". . . as the PSAC does not appear ready to cover the reasonable payroll costs incurred by the Employer in keeping employees on the payroll during unpaid union business leave . . . ." On June 10, 2008, the respondent explained the rationale to its revised proposal at the table, indicating that it wished ". . . to recover increased benefits costs from the Union" and that it was "proposing the deletion of the salary continuation provisions . . . ."

[53] I believe that striking clauses 13.15 and 13.16 of the collective agreement and leaving the parties to rely solely on clauses 13.10 and 13.11 of the collective agreement with respect to leave of employees for preparation and negotiation purposes went beyond the mere deletion of the salary continuation provision, namely by imposing conditions with respect to the right to benefit from such leave. However, I believe that the respondent's intent in tabling the deletion of those provisions was limited to the elimination of the salary continuation provision. That intent was clearly communicated to the complainant. As stated in paragraph 15 of the Agreed Statement of Facts, "[a]s the Union was not prepared to consider an increase in cost recovery for benefits, the Employer was tabling the deletion of the salary continuation provisions. The PSAC could pay the employees directly."

[54] In that context, I believe that the respondent redesigned its approach in order to attain its initial objective and to provoke a reaction. The respondent may not have chosen the best strategy by proposing the complete deletion of clauses 13.15 and 13.16 of the collective agreement, but the evidence does not lead me to conclude that

by tabling its revised proposal, the respondent acted in bad faith or intended to compromise the negotiation process.

[55] I can understand that the complainant might have been irritated by the respondent's change of position, but I can also understand that the respondent wanted to redefine its tactics, considering the complainant's rigid response to the respondent's initial proposal. I consider that both parties took rigid positions that did not favour dialogue and that led to an impasse. In a sense, neither party strove to find a middle ground between their opposing interests, both of which were legitimate. However, I do not consider that, in the circumstances, the respondent's change of position can be characterized as bad faith or that it compromised or undermined the complainant's decision-making capability.

[56] I do not consider that the respondent's conduct discloses an intent to not reach an agreement. Neither do I consider that the respondent entered into surface bargaining. I believe that the respondent's tabling of the revised proposal was more in the nature of an unfortunate way to redesign its tactics and insist on the importance of the matter.

[57] Although the revised proposal was substantively different from the initial proposal, the change of position, in the context, was not of such a magnitude to allow me to conclude that receding-horizon bargaining took place. The revised proposal did not involve adding or removing a new subject matter to or from the table. The revised proposal, although more restrictive than the initial, was tabled in a continuum. The subject of the salary continuation provision and the respondent's desire to recover the increase in costs related to the leave were on the table from the beginning of the negotiations. Through its revised proposal, the respondent meant to achieve the same objective of not assuming the costs related to the leave. The context had evolved with the position taken by the complainant, and the respondent proposed a different approach on a known subject. Although the revised position enlarged the scope of the dispute with respect to the subject, in the circumstances I do not consider that it amounts to a major change to the scope of the dispute. Moreover, the change did not occur at a time where an agreement seemed imminent. The evidence shows that the parties had had nine bargaining sessions, but the evidence does not establish that the parties were close to an agreement. The parties were clearly at an impasse with respect

to the issue, but I do not believe that the decision-making capability of the complainant was compromised.

[58] With respect to the content of the revised proposal, I do not consider that it is the Board's role to assess the reasonableness of the propositions and, in any event, I do not consider that the proposal could be characterized as unacceptable or unreasonable to the extent that it compromised the entire bargaining process.

[59] In summary, I do not consider that the respondent engaged in conduct that destroyed, or had the predictable effect of destroying, the complainant's decision-making framework. On the other hand, I understand the complainant's reaction and irritation, and I believe that both parties would benefit from adopting a more open approach to the issue and to their negotiations in general, which would facilitate a sound dialogue and effective bargaining. The history of the bargaining relationship between the parties shows that they have been able to reach agreement in the past, and I hope that they will make a fresh start and take a new approach to their dispute.

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

(The Order appears on the next page)

V. Order

[61] The complaint is dismissed.

November 28, 2008.

Marie-Josée Bédard,
Vice-Chairperson