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Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant (File No. 593-33-09) and Respondent (File No. 593-33-10)

and

PARKS CANADA AGENCY

Respondent (File No. 593-33-09) and Applicant (File No. 593-33-10)

Indexed as
Public Service Alliance of Canada v. Parks Canada Agency

In the matter of applications for determinations on matters that may be included in an essential services agreement under subsection 123(1) of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson,
and Dan Butler and John Mooney, Board Members

For the Public Service Alliance of Canada: Andrew Raven, counsel

For the Parks Canada Agency: Caroline Engmann, counsel

Heard at Ottawa, Ontario,
August 11 to 14, 2008.

I. Applications before the Board

[1] This decision addresses two applications relating to matters that may be included in an essential services agreement (ESA) filed under subsection 123(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the new *Act*"). Both applications relate to the same bargaining unit for which the Parks Canada Agency ("Parks Canada") is the employer and the Public Service Alliance of Canada (PSAC) is the bargaining agent.

[2] On May 5, 2008, the bargaining agent filed an application with the Public Service Labour Relations Board ("the Board") in which it described the determination that it sought from the Board as follows (PSLRB File No. 593-33-09):

. . .

> *PSAC and Parks Canada Agency ("Parks Canada") have been engaged in consultations and negotiations regarding the positions to be listed in an ESA since December 2007. Parks Canada has proposed that a total of 1,385 positions be included in the ESA, approximately 35% of the bargaining unit. PSAC has rejected this position.*
>
> *The inability to conclude an ESA is based on a fundamental disagreement regarding essential services at Parks Canada. PSAC takes the position that many of the services, facilities and activities ("services") of Parks Canada do not constitute essential services pursuant to subsection 4(1) of the* PSLRA. *This is particularly so where many of the services relate solely to the public's use of Parks Canada parks, sites and areas for recreational purposes. Parks Canada has not accepted this position. So long as this fundamental issue remains unresolved, it presents a continuing impediment to the completion of an ESA.*
>
> *Given this disagreement between the parties, PSAC applies to the Board for a ruling on this important issue. Based on its position, the PSAC disputes 1102 of the positions identified by Parks Canada as necessary for the safety and security of the public. . . .*

. . .

[3] On May 6, 2008, the employer filed an application with the Board in which it made the following submission (File No. 593-33-10):

. . .

> *Parks Canada and PSAC have been unable to enter into an ESA to date. The unresolved matter for determination by the PSLRB is as follows: Parks Canada has specifically identified positions for inclusion in the ESA. All these positions are of a type necessary for Parks Canada to provide essential services. A list of the positions will be sent to the PSLRB shortly.*
>
> *. . . at the time of this application, there is no agreement on any positions to be included in the ESA. Parks Canada requests that the PSLRB determine this matter and deem these positions to be part of an ESA.*

. . .

[4] In its application, the employer further requested that the Board hold the matter in abeyance. The employer indicated that it had filed its application in order to respect the applicable time limit in the new *Act* but asserted that the parties should be given further time to pursue voluntary discussions in light of ". . . previous good progress made by the parties."

[5] On May 12, 2008, the employer filed with the Board the detailed list of positions that it proposed should be included in the ESA, as promised in its original application.

[6] On May 7, 2008, the Registry of the Board conveyed to the parties the Chairperson's direction, under the circumstances, that they submit their arguments in writing regarding the application of subsection 123(2) of the new *Act*. That subsection reads as follows:

> *(2) The Board may delay dealing with the application until it is satisfied that the employer and the bargaining agent have made every reasonable effort to enter into an essential services agreement.*

[7] In response, the bargaining agent submitted that the Board should not delay dealing with the applications because a ruling was required on the fundamental issue of whether recreational services constitute essential services before any progress could be made in further direct discussions. The employer reiterated its opposite view that both applications should be held in abeyance pending further direct discussions and possible mediation by the Board.

[8] On May 28, 2008, the Registry informed the parties of the Board's decision on the application of subsection 123(2) of the new *Act* as follows:

. . .

> *. . . the Board has determined that the parties have made reasonable efforts to enter into an ESA agreement. In particular, the inability of the parties to agree on a fundamental issue – the definition of "essential services" under the* PSLRA *-- is an impediment to an agreement on an ESA. Accordingly, there is no reason to delay in dealing with the application.*

. . .

[9] This panel of the Board has been assigned to hear and determine both applications filed under subsection 123(1) of the new *Act*.

[10] As a result of several pre-hearing conferences and exchanges of correspondence, the parties agreed, and the Board accepted, that it would in the first instance consider and determine the matters before it in the context of two Parks Canada organizational units: the Yukon field unit and the Pukaskwa National Park of Canada ("Pukaskwa"). At the hearing, the employer requested that the Board limit the scope of the initial hearing to Pukaskwa, without opposition from the bargaining agent. The Board granted the request.

[11] The initial hearing into the two applications under subsection 123(1) of the new *Act* will serve as a test case. Guided by its findings based on the evidence concerning Pukaskwa, the Board anticipates that the parties will resume direct negotiations for an ESA covering the full bargaining unit. The Board will remain seized of the two applications before it, in the event that it is called upon to make further determinations.

[12] Two witnesses testified on behalf of the employer, and the bargaining agent called no witnesses.

II. The statutory framework

[13] The new *Act*, in force since April 1, 2005, contains provisions regarding essential services that differ from those contained in the previous legislation, the *Public Service Staff Relations Act* ("the former *Act*"). As this decision is the first

opportunity for the Board to interpret and apply the essential services provisions of the new *Act*, it is appropriate to set the context for what follows by briefly reviewing several of the new *Act*'s principal features.

[14] The new *Act* requires that an ESA be in force as a necessary precondition to employees exercising their right to strike (paragraph 194(1)(*f*)). The new *Act* obligates the parties to negotiate an ESA where the certified bargaining agent has chosen conciliation, with the right to strike, as the process for the resolution of a collective bargaining dispute in accordance with section 103. The role of the Board is to determine any disputes resulting from that negotiation process over matters that may be included in an ESA.

[15] Subsection 4(1) of the new *Act* defines "essential services" and an "essential services agreement" as follows:

> *"essential service" means a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public.*
>
> . . .
>
> *"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies*
>
> *(*a*) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;*
>
> *(*b*) the number of those positions that are necessary for that purpose; and*
>
> *(*c*) the specific positions that are necessary for that purpose.*

[16] Division 8 of Part 1 of the new *Act*, spanning sections 119 through 134, describes the rights and obligations of the parties regarding essential services and the Board's role in determining disputes over matters that may be contained in an ESA.

[17] Section 120 of the new *Act* stipulates that the employer has the exclusive right to determine the "level" at which essential services are to be provided to the public. That section reads as follows:

> ***120.*** *The employer has the exclusive right to determine the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided. Nothing in this Division is to be construed as limiting that right.*

[18] In the event that the parties reach an impasse over a matter that may be included in an ESA, subsection 123(3) of the new *Act* grants the Board that authority to resolve the dispute as follows:

> *(3) After considering the application, the Board may determine any matter that the employer and the bargaining agent have not agreed on that may be included in an essential services agreement and make an order*
>
> *(*a*) deeming the matter determined by it to be part of an essential services agreement between the employer and the bargaining agent; and*
>
> *(*b*) deeming that the employer and the bargaining agent have entered into an essential services agreement.*

[19] The new *Act* requires the Board to observe a number of conditions when it makes an order pursuant to subsection 123(3). Those conditions are expressed in subsections 123(4) through (7) as follows:

> *(4) The order may not require the employer to change the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided.*
>
> *(5) The Board may, for the purpose of identifying the number of positions that are necessary for the employer to provide an essential service, take into account that some employees in the bargaining unit may be required by the employer to perform those of their duties that relate to the provision of the essential service in a greater proportion during a strike than they do normally.*
>
> *(6) For the purposes of subsection (5), the number of employees in the bargaining unit that are necessary to provide the essential service is to be determined*
>
> *(*a*) without regard to the availability of other persons to provide the essential service during a strike; and*

> *(b) on the basis that the employer is not required to change, in order to provide the essential service during a strike, the manner in which the employer operates normally, including the normal hours of work, the extent of the employer's use of overtime and the equipment used in the employer's operations.*
>
> *(7) If the application relates to a specific position to be identified in the essential services agreement, the employer's proposal in respect of the position is to prevail, unless the position is determined by the Board not to be of the type necessary for the employer to provide essential services.*

[20] The effective date and duration of an ESA are addressed respectively in sections 124 and 125 of the new *Act*:

> ***124.*** *The essential services agreement comes into force on the day it is signed by the parties or, in the case of an essential services agreement that the employer and the bargaining agent are deemed to have entered into by an order made under paragraph 123(3)(b), the day the order was made.*
>
> ***125.*** *An essential services agreement continues in force until the parties jointly determine that there are no employees in the bargaining unit who occupy positions that are necessary for the employer to provide essential services.*

III. Summary of the evidence

A. National Parks of Canada mandate and policies

[21] Douglas Stewart, Director General, National Parks of Canada, has worked within the National Parks system since 1977 (Exhibit E-2). He testified that the mandate of Parks Canada is to preserve, protect and present nationally significant natural and cultural areas. He referred the Board to the *Parks Canada Agency Act*, S.C. 1998, c. 31, and the *Canada National Parks Act*, S.C. 2000, c. 32. Mr. Stewart testified that Parks Canada is the largest custodian of federal government land in southern Canada and the second largest in northern Canada, managing over 275 000 square kilometres of national parks and national park reserves.

[22] The *Parks Canada Guiding Principles and Operational Policies* (Exhibit E-1, tab 2) set out the vision, mandate and operating principles for the organization. Mr. Stewart testified that Parks Canada provides basic and essential services for the public, which he characterized as ". . . providing the stage on which recreation can occur":

. . .

> *7. Appropriate Visitor Activities*
>
> *Opportunities will be provided to visitors that enhance public understanding, appreciation, enjoyment and protection of the national heritage and which are appropriate to the purpose of each park and historic site. Essential and basic services are provided while maintaining ecological and commemorative integrity and recognizing the effects of incremental and cumulative impacts.*

. . .

[23] Mr. Stewart testified that intrinsic hazards in the lands administered by Parks Canada pose risks to the public. The same section referenced above also states as follows:

. . .

> *There are inherent dangers associated with some natural and cultural features and public activities. Therefore, risk management programs involving others are developed by Parks Canada for the safety of visitors. Public safety considerations are built into planning and design processes. Priority is placed on accident prevention, education and information programs designed to protect visitors, in ways consistent with the commemorative and ecological integrity of heritage places. Visitors are encouraged to learn about any risks associated with heritage places and to exercise appropriate self-reliance and responsibility for their own safety in recreational or other activities they choose to undertake.*

. . .

[24] The *Public Safety Management Directive* (Exhibit E-1, tab 3) provides direction to Parks Canada staff on the provision of public safety services in the national parks. It defines "public safety" as follows in guiding principle 7:

. . .

> *. . . a coordinated effort to ensure that visitors to parks, canals and sites have a positive experience while minimizing the potential for suffering or loss. Public safety deals with the measures employed to reduce the risk of an incident occurring or to protect visitors from a hazard; and measures*

> *to be implemented in the event that an incident develops requiring emergency response capabilities.*
>
> . . .

[25] Mr. Stewart described the role of Parks Canada in public safety as comprising three elements: prevention, monitoring and intervention (including search and rescue). The *Public Safety Management Directive* in the section entitled *Guiding Principles*, sets out Parks Canada's public safety responsibilities in public safety in the following terms:

> . . .
>
> ***Parks' Responsibilities:***
>
> ***Prevention***
>
> *2. The existence of a park search and rescue capability does not itself constitute an adequate response to any public safety problem. Parks Canada will place a high priority on providing comprehensive incident prevention and visitor risk management programs to minimize the potential for loss.*
>
> *3. Parks' highest priority will be to prevent incidents caused by faulty design or the poor condition of its facilities by planning, operating and maintaining facilities so as to eliminate unusual dangers or when this is not feasible, to warn park users of the nature of these risks and how to avoid them.*
>
> . . .
>
> *5. Parks Canada will minimize the potential for injuries to park users participating in park sponsored visitor programs by considering public safety in the planning, design and management of these programs and by providing safety oriented leadership in their delivery.*
>
> *6. Parks Canada will place high priority on providing information and advice to assist park users in selecting and planning recreational activities which match their levels of physical fitness, technical ability, provisioning and equipment.*
>
> *7. Park users will be encouraged to develop the skills and experience required to participate in recreational activities safely.*

Search and Rescue

8. Parks Canada will provide land and marine search and rescue services in the national parks to minimize the number of fatalities and the extent of injuries and human suffering of people who are lost and/or in distress.

9. Types and levels of services for search and rescue will vary in each park. Parks Canada will, where possible, ensure that park users understand the limitations of what assistance could be provided in the event they are involved in an incident.

10. Consistent with the principle that park users are expected to be self-reliant and responsible for their own safety, levels of service for search and rescue in each park will:

a) Focus on providing basic services for recreational activities Parks Canada encourages through the provision of facilities and visitor programs described in the park's Interim Management Guidelines, Park Management Plan and associated Sub-Activity and Area Plans; and

b) Vary in direct proportion to levels of use and frequency of public safety incidents.

. . .

12. Parks Canada will cooperate with other search and rescue agencies to provide improved levels of search and rescue service it national parks and on lands and marine areas adjacent to the parks.

. . .

Prevention:

Facility Inspection

48. Visitor facilities will be inspected on a regular basis to identify unusual dangers . . .

. . .

51. All park employees, volunteers and the employees of our partners who are responsible for the operation of a park facility will promptly close that facility or close off an area within that facility they suspect is unsafe for public use. They will immediately report the closure of the facilities to the appropriate supervisor who will notify the Manager responsible for the facility maintenance and repair and the Superintendent or designate.

> ***Hazard Monitoring Programs***
>
> *52. Natural hazards exist which are difficult for visitors to assess due to the complexity of local factors (e.g. backcountry avalanche hazard, unfamiliar local weather conditions, effects of tide and wave action). Where such environmental conditions create a significant hazard to visitors beyond what they can be expected to anticipate and prepare for themselves and where the level of visitation warrants it, Parks Canada will monitor natural hazards and provide visitors with up to date information on the nature and degree of the hazard involved.*
>
> . . .

[26] The *National Parks General Regulations* (SOR/78-213) provide the authority for a park superintendent to require mandatory registration for any activity that, in the superintendent's opinion, may present a hazard to the park user (subsection 6(1)). The *Public Safety Management Directive* under the section entitled *Hazard Monitoring Program*, states, at paragraph 63, that a superintendent may implement a mandatory registration system "where practicable" and where there is a need to:

> . . .
>
> *a) Inform each visitor in advance of the natural hazards associated with backcountry use and of limitations on the park's search and rescue capability; or*
>
> *b) Ensure the park staff has accurate information about visitors and their travel plans.*
>
> . . .

[27] Voluntary registration programs are also in place and are ". . . encouraged in parks where visitation is high and multiple points of entry exist" (*Public Safety Management Directive*, paragraph 64).

[28] Mr. Stewart outlined that the physical conditions in a given park are in a constant state of change, mostly because of weather conditions, and that it is important to monitor those conditions and provide information to park users. The unpredictable presence of wildlife in many parks requires that both food and garbage be secured. There is also a risk of forest fires.

[29] Mr. Stewart stated that the "monitoring" and "intervention" elements of public safety are seamless. He testified that it was "everyone's job" to constantly monitor and

assess risks. Parks Canada employees observe and correct situations. They educate park visitors, thereby heading off potential problems. “Prevention” typically involves a visitor information service and interpretation services along with park wardens. The visitor information service employees provide pre-trip information to visitors as well as information on changing park conditions. They also have responsibility for monitoring campgrounds. The maintenance employees conduct assessments of facilities and undertake remediation.

[30] In the backcountry, monitoring is typically performed by wardens as well as by trail crews. Trail crews are responsible for maintaining trails, but they also monitor natural hazards, including wildlife. The resource conservation staff monitors fire hazards.

[31] The *Emergency Services Directive* (Exhibit E-1, tab 5) provides further guidance for addressing emergencies that affect public safety, ranging from severe weather to man-made disasters such as oil spills.

[32] Mr. Stewart also testified about his experience as a manager responsible for visitor programs at the Rideau Canal during the most recent strike at Parks Canada in August 2004. In the particular circumstances of that strike where employees stopped work on an off-and-on basis, the normal pattern of use of the Rideau Canal was disrupted and the public lost confidence in the availability of services. Access to sanitation facilities, groceries and medication became issues for boaters stranded between locks.

[33] Mr. Stewart offered his view that the employer had very limited tools available to prevent public access to a national park. He referred to the following section of the *Public Safety Management Directive* (Exhibit E-1, tab 3) that stipulates the only conditions under which a park could be closed to the public:

> *62. Pursuant to the National Parks General Regulations, the Superintendent will:*
>
> > *a) Prohibit recreational activities or single events which, could lead to circumstances where other visitors or members of the park search and rescue organization could be exposed to unnecessary risk; or*

> *b) Temporarily close or restrict visitor access to areas of a park when, in his opinion, it is too hazardous for use by visitors.*
>
> . . .

[34] As an example, Mr. Stewart outlined that on one occasion Parks Canada ordered the closure of a trail loop in Kluane National Park when an aggressive grizzly bear was nearby, without any absolute assurance that the public would obey. He testified that Parks Canada was obliged in such situations to respond to all resulting search and rescue requirements.

[35] In cross-examination, Mr. Stewart testified that a notice is posted when a trail is closed and that a warden or other employee is assigned to the trail head to warn the public. Wardens are also deployed to "sweep" the trail to advise the public of the requirement to leave the area. Asked about the recent closing of Auyuittuq National Park in Nunavut (Exhibit BA-1), Mr. Stewart confirmed that people were evacuated from the park and that a large area of the park was closed.

[36] Mr. Stewart summarized the process agreed to by the bargaining agent and Parks Canada to consult on, and negotiate, an ESA at the local and national levels as outlined in their *Framework for Essential Services Agreement* (Exhibit E-5, tab I-4).

B. Pukaskwa

[37] Robin Heron has been the park manager at Pukaskwa since 2004 (Exhibit E-6). Pukaskwa is in northern Ontario, along the shore of Lake Superior and near the town of Marathon. At 1878 square kilometres (Exhibit E-1, tab 1), it is the largest national park in Ontario, with an employee complement of approximately 35, including staff excluded from the bargaining unit. Pukaskwa is largely a wilderness park, with a small campground at the northern end and only about two kilometres of public roads (Exhibit E-7). Park visitors mostly use the 60 kilometre coastal hiking trail (approximately a five- to ten-day hiking trip) or the coastal canoe or kayaking route (approximately a five-day canoeing route) or canoe on the White River. Other users gain access through logging roads at the park's backcountry boundary.

[38] Wildlife in the park includes black bears, lynx and moose. Periodic forest fires are natural to the park's ecosystem. Pukaskwa has an active fire program that involves both monitoring wildfires and conducting controlled burns.

[39] Members of two nearby First Nations have a right of access to the park, including the right to exercise treaty rights (hunting, fishing and trapping) within the park.

[40] In 2007, Pukaskwa counted 7773 registered visits. Attendance over the past ten years has ranged from a low of 6645 visits to a high of 11 083 visits (Exhibit E-8, tab 1). Voluntary registration of park visitors is the practice at Pukaskwa, but unregistered visits occur because of the number of access points to the park. The only entrance kiosk is at the northern entrance to the park. Visitors who enter there after operating hours may neglect to register. When visitors access the park through other points, including the shoreline of Lake Superior, they are asked to register by telephone, but not all visitors comply. The position of Visitor Services Attendant (position no. 4669) is responsible for ensuring that all park visitors have the necessary safety information and for providing orientation to registered users, particularly those users registered to visit the backcountry.

[41] All national parks are required to prepare a visitor risk management plan. The risk management plan for Pukaskwa was prepared in 1998 (Exhibit E-8, tab 2). Ms. Heron testified that there had been no changes in the hazards in the park since the plan was prepared. The plan identifies four types of park users: campers; day users; backcountry wilderness adventurers; and organized groups. For the period from 1989 to 1996, 86 percent of visitors were campground or day users and only 14 percent used the backcountry (Exhibit E-8, tab 2). Ms. Heron indicated that park users face a number of risks: slips and falls on uneven terrain; Lake Superior currents and water temperature; black bears (in the backcountry); forest fires; and water-borne diseases in the campground water supply and the administration building.

[42] Ms. Heron testified that the risk prevention program at Pukaskwa seeks to educate visitors about the key hazards in the park, including encounters with black bears. Visitors are also given advice about campfires. The park maintains a monitoring program to record safety incidents that occur.

[43] According to Ms. Heron, the Resource Conservation Specialist (position no. 4676) collects data from remote weather stations in the park and interprets that data to identify high-risk areas for fire. He or she also patrols the park by air, mostly using a helicopter service provided by a private contractor, and assesses whether to allow wildfires to continue to burn or to suppress them. The 2007 *Fire Management*

Plan Pukaskwa National Park (Exhibit E-8, tab 3) describes the important role of fire in the park's ecosystem. After decades of fire suppression, the *Plan* calls for the reintroduction of a "natural fire regime" while noting that the probability of high intensity uncontrollable fires has increased.

[44] The fire protection goals set out in the plan include protecting park visitors, park facilities and neighbouring lands. Fire prevention relies on public education and awareness, including backcountry orientation sessions, as well as the fire danger sign at the park entrance, which is adjusted daily. Prevention also relies on law enforcement through the use of patrols during periods of elevated fire danger and the enforcement of the Ontario *Forest Fires Prevention Act* by Resource Conservation employees. Ms. Heron testified that "smoke patrols" are conducted either by the resource conservation specialist or by the members of the fire crew. Any sightings of potential fires are reported to the resource conservation specialist, who then decides how to proceed. There are three seasonal fire crew positions at Pukaskwa, and the park can access other Parks Canada resource, as necessary. Fire-related duties are also contained in the job descriptions of the park's wardens.

[45] Parks Canada has an agreement with the Ontario Ministry of Natural Resources for cooperative data sharing as well as joint fire protection (Exhibit E-8, tab 4). The agreement identifies a common area of fire detection and suppression within five kilometres of either side of the park boundary, creating a ten-kilometre "cooperation zone."

[46] The employer proposed the Resource Conservation Specialist position (no. 4676) for inclusion in the ESA. The written rationale provided by Ms. Heron during the local ESA discussions (Exhibit E-5, tab 1-F) describes the position's responsibility to coordinate fire suppression activities near visitor facilities and its responsibility for ". . . fire detection, measurement of fire indices for preparedness and responding to wildfires." The employer did not propose the fire crew positions for inclusion in the ESA.

[47] Pukaskwa's *Bear Management Plan* was revised in February 2008 (Exhibit E-8, tab 5). The plan describes human-bear conflict as having become "a serious concern" at page 5:

. . .

> *As opportunistic omnivores, bears are frequently attracted to non-natural food sources, becoming conditioned to human foods and garbage in campgrounds and residential areas. These bears may also lose their natural aversion to people and pose a threat to public safety.*

. . .

[48] The plan states that for bear management to be successful, the involvement and cooperation of all park employees is required, although the primary responsibility for overall bear management belongs to the Park Warden II (position no. 4647). The employer has proposed this position for inclusion in the ESA.

[49] The *Bear Management Plan* sets out in detail the roles and responsibilities of the various staff involved in bear management. The bear management warden is responsible for overseeing and coordinating all field operations and management decisions relevant to bear management. The warden also provides recommendations to the manager, Resource Conservation, on a number of matters, including recommendations for such day-to-day bear management decisions as capture, release and destruction and posting warnings. The warden also makes recommendations to the superintendent to close an area or trail temporarily, after consultation with the park ecologist and the manager, Resource Conservation. He or she ensures closure and warning signs are posted and removed and that traps are checked and maintained as required.

[50] Other park wardens also are given roles and responsibilities under the *Bear Management Plan*. A warden may act as the duty warden and will consult with the supervisor on bear-related issues and occurrences in the absence of the bear management warden. Wardens may also assist the bear management warden in capturing, immobilizing and dispatching bears when required. Wardens are tasked with conducting patrols throughout the park to monitor food and garbage storage deficiencies. All wardens receive and record reports of bear encounters from the public. All wardens also convey information to members of the public and park staff on bear management matters. The visitor service staff provides accurate information to the public about bears and bear management. Visitor service employees receive and record reports of bear encounters and notify the duty warden immediately of any reported bear occurrences. Campground and trail crew personnel are responsible for

removing litter and cleaning sites in the campground and along park trails as well as collecting garbage. They are also responsible for receiving and recording reports of bear encounters from the public.

[51] The employer proposed that two Maintenance Worker II positions (Exhibit E-5, tabs 1-A and 1-B) be included in the ESA. The rationale for including the positions was as follows:

. . .

> *This position ensures campsites and day use areas are kept clean and free of garbage (to prevent illness and bear/human conflict). The position also ensures that structures and facilities are maintained to prevent injury to the public.*
>
> . . .
>
> *. . . Due to the number of camping areas and their geographic distance from each other, two Maintenance Worker positions . . . are needed . . . .*
>
> . . .

[52] The employer has also proposed three positions for inclusion in the ESA based on water quality monitoring and management. Ms. Heron testified that there are two sources of water in the park. The first source is at the campsite, using water from Lake Superior from May to the end of September. The second source is a well used for the administration building and for Park users in the winter months. Ms. Heron stated that there is a risk of water-borne disease in both water sources and that regular monitoring and testing of water quality is conducted. She testified that the water sources have had to be shut down because of public health concerns at least once a year, sometimes more frequently. Federal guidelines and Ontario regulations require that operators of water treatment, sewage treatment and water distribution systems be fully trained and licensed. The Water/Wastewater Operator position (no. 10545; Exhibit E-5, tab 1-I) is responsible for monitoring water and sewage facilities and collecting samples for testing. The Maintenance Worker II position (no. 9315) has basic training to collect water samples. The Trail and Grounds Foreman position (no. 4664; Exhibit E-5, tab 1-G) is responsible for operating the sewage truck. All of these positions were proposed for inclusion in the ESA by the employer.

[53] For emergencies in the backcountry, park staff must respond either by water or helicopter. The main boat used by Pukaskwa for rescues is large, due to the heavy wave conditions on Lake Superior, and has a heated cabin because of the risk of hypothermia for visitors pulled from Lake Superior. Staff in two positions have the necessary qualifications to operate the boat: Park Warden II (position no. 9927), and Trail and Grounds Foreman (position no. 4664). The trail and grounds foreman performs duties directly related to the operation, running and maintenance of the boat and related equipment (Exhibit E-5, tab 1-G).

[54] Public safety incidents at Pukaskwa are addressed using the Incident Command System. The Parks Canada *Emergency Services Management Directive* (Exhibit E-1, tab 5) sets out roles and responsibilities in the event of an emergency. The incident commander takes charge of field activities during an emergency situation and, as such, is responsible for assessing the situation, conducting initial briefings, activating the emergency services plan, coordinating staff activity, and managing incident operations (Exhibit E-1, tab 5, paragraph 24). The incumbent of the Park Warden II position (no. 9927) is trained to act as the incident commander.

[55] Ms. Heron testified that when employees, usually the park wardens, travel into the backcountry to conduct a search and rescue, they always travel in pairs, for safety reasons. Three park warden positions have thus been identified by the employer as required positions for emergency situations — the incident commander and two responding wardens.

[56] Ms. Heron referred to the review of public safety incidents from 1989 to 1996 in the *Visitor Risk Management Plan* (Exhibit E-8, tab 2) and described recent examples of safety-related incidents at Pukaskwa (Exhibit E-8, tab 7).

[57] The employer and the bargaining agent signed a *Framework for Essential Services Agreement* (Exhibit E-5, tab 4) in June 4, 2007. The agreement set out the roles and responsibilities of both the employer and the bargaining agent at local and national levels. The agreement provides that the final approval for an ESA rests with the national level of both the employer and the bargaining agent (section 5.1). The agreement also sets out the notification procedures once an ESA has been signed.

IV. Summary of the arguments

[58] Both the employer and the bargaining agent provided written outlines of their arguments and made oral submissions.

A. For the employer

[59] The employer submits that the Board must decide whether the following positions at Pukaskwa meet the requirements set out in subsection 4(1) of the new *Act* and should, as a result, be included in an ESA: two Maintenance Worker II positions, three Warden II positions, one Resource Conservation Specialist position, one Trail and Grounds Foreman position, one Visitor Services Attendant position and one Water and Wastewater Operator position (Exhibit E-5, tabs 1-A to 1-I). The employer contends that all the positions are necessary for the safety and security of the public and that together they constitute a "critical mass" of positions for Pukaskwa. While the incumbents of those positions do perform duties that support recreational users of the park's facilities, that fact is irrelevant to the inquiry before the Board.

[60] The employer explained that Parks Canada has a statutory mandate to protect and present Canada's national and cultural heritage and to preserve the ecological and commemorative integrity of the sites under its control for present and future generations.

[61] Parks Canada has extensive legislative obligations with respect to safety and security under the *Canada National Parks Act* and its regulations. Those statutory instruments comprise a complete and comprehensive legislative code for parks, reserves and historic sites. They confer a wide range of authorities and responsibilities on Parks Canada covering such diverse subjects as wildlife and domestic animal control, garbage handling, campsite maintenance, water and sewage systems, commercial activities, recreational and commercial fishing, and fire protection.

[62] The geophysical and biophysical characteristics of the lands within the custody of Parks Canada carry inherent risks and hazards for public safety and security. As outlined in Mr. Stewart's testimony, many risks and hazards are natural, but some are triggered by human activity. They are dynamic and changing. To protect the public against those risks and hazards, Parks Canada has developed and implemented a public-safety management strategy with three main components: prevention, monitoring and intervention (including search and rescue) (Exhibit E-1, tab 3). The

positions that the employer has proposed for inclusion in the ESA support those activities.

[63] The employer argued that Parliament has determined that it is in the national interest to provide Canadians with an opportunity to enjoy Canada's special places. National parks are dedicated to the people of Canada for their benefit. Parks Canada provides the platform upon which the public can exercise its right to engage in cultural, recreational, learning and other activities in natural parks. As a general principle, subject to legislative prohibitions, Parks Canada cannot impede the public's access to, and use of, those areas. In that sense, the employer argued that it is irrelevant to say that visiting Pukaskwa is not essential. Parliament has decided that people are free to go to the park whenever they want. As the custodian of Pukaskwa, Parks Canada must ensure that people are safe when in the park.

[64] The employer submitted that Parks Canada does not have a legislative mandate to close a national park. A park superintendent may only ". . . [t]emporarily close or restrict visitor access to areas of a park when, in his opinion, it is too hazardous for use by visitors" (Exhibit E-1, tab 3). The employer's counsel asked that the Board find that Parks Canada cannot impede public access to, and use of, Pukaskwa.

[65] The employer also asked the Board to find that, in practice, it is impossible to close Pukaskwa given the numerous uncontrolled points of access available to visitors along the coast and through logging roads in the backcountry, as made clear in Ms. Heron's evidence. Furthermore, she testified that aboriginal treaties confer to members of First Nations a right of access to the park that must be respected.

[66] The employer emphasized that paragraph 121(2)(*a*) of the new *Act* specifies that, in determining the number of employees in the bargaining unit that are necessary to provide essential services, the Board must not give regard to the availability of other persons to provide the essential services. For example, the Board should not inquire as to whether a manager, instead of the visitor services attendant, could provide safety and security information to visitors. Paragraph 121(2)(*a*) reads as follows:

> ***121.*** *(2) For the purposes of subsection (1), the number of employees in the bargaining unit that are necessary to provide the essential service is to be determined*
>
> *(*a*) without regard to the availability of other persons to provide the essential service during a strike;*

[67] According to the employer, the applications before the Board raise five main issues. First, is the employer required by law to cease its operations in the event of a work stoppage? The employer submits that the applicable legislation and jurisprudence indicate that the employer is not required to do so. The purpose of the new *Act* is to ensure that operations continue in the event of a strike.

[68] Second, are there concerns for public safety or security in Parks Canada's operations? The employer contends that Parks Canada does have a public safety mandate by virtue of its custodianship of land, as explained above.

[69] Third, can public safety concerns be resolved by the closure of areas, infrastructures and facilities within a national park? The employer takes the position that they cannot.

[70] Fourth, to what extent, if any, is the parties' *Framework for Essential Services Agreement* (Exhibit E-5, tab I-4) relevant to the Board's inquiry? In the employer's view, the *Framework for Essential Services Agreement* is not relevant nor does the Board have jurisdiction over it. Negotiation of the *Framework for Essential Services Agreement* occurred in the context of an unsuccessful effort by the parties to conclude an ESA. The Essential Services Review Forms (Exhibit E-5, tab 1-A to 1-I) flowed from that effort and were used as information-gathering tools. The rationales provided in those forms are relevant to this application. The Board, however, is not bound by those rationales and must make its decision on the whole of the evidence presented at the hearing.

[71] Fifth, which party has the burden of proof, and what is the appropriate standard of proof? The employer contends that the nature of the inquiry before the Board is not adversarial. As the Board must determine matters relating to the "safety and security of the public," notions of burden and standard of proof will not aid its inquiry. On the issue of burden of proof, the employer added that, as a general principle, the onus of proof rests primarily on the party that asserts a claim, but the application of the principle is not automatic and is often subject to change as circumstances demand (Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at 3:2400 and 3:2500). In these applications, the employer accepts that it has an initial onus to demonstrate that the positions proposed for inclusion in the ESA have duties that are ". . . necessary for the safety and security of the public or a segment . . . " of it. Given the legislative framework in particular subsection 123(7) of the new *Act*, and the principles

established by the jurisprudence, the standard of proof ought to be a deferential one. The employer met its initial onus when it provided sufficient evidence that the duties of the positions proposed for inclusion in the ESA relate to the safety and security of the public. The burden then shifts to the bargaining agent, which must demonstrate why those positions are not essential for the safety and security of the public. With respect to specific positions proposed for inclusion in the ESA, subsection 123(7) provides that the employer's proposal in respect of a specific position prevails " . . . unless the position is determined by the Board not to be of the type necessary for the employer to provide essential services." That provision makes sense as it is the employer who has the knowledge to make such a determination. The employer is not held to prove the basis for its proposals on a balance of probabilities**.**

[72] The employer argued that the *Interpretation Act,* R.S.C. 1985, c. I-21, should guide the Board in interpreting the provisions of the new *Act*. Section 10 of the *Interpretation Act* provides that provisions of an act must be interpreted according to their true intent and meaning. Many cases support that proposition. For example, the Supreme Court of Canada stated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para 26, that the words of a legislative text must be read in their ordinary sense harmoniously with the scheme of the legislation and the intention of the legislature. The Board should adopt an interpretative approach to the provisions of the new *Act* that recognizes and carries out the intent of Parliament and that is consistent with the legislative scheme set forth in the new *Act* with respect to essential services.

[73] The employer stated that it is well accepted that the legislative history of a statute provides relevant and useful context in ascertaining the intent of Parliament. The Supreme Court of Canada has recognized in several decisions that reviewing the legislative history of a statute is a valid and appropriate exercise. For example, see *Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27, at para 31 to 35. In *Castillo v. Castillo,* 2005 SCC 83, at para 22, the Supreme Court of Canada reiterated that parliamentary debates and similar material may be considered in legislative interpretation as long as they are relevant and reliable and not assigned undue weight.

[74] Lucienne Robillard, the sponsoring minister for Bill C-25, in which the new *Act* has proposed, along with other *Acts*, provided useful insight during the second-reading debate into the legislative intent underlying the new *Act*'s approach to essential services, as follows:

. . .

> *In case of a labour dispute and should public service employees exercise their right to strike, Canadians want to be reassured that they can rely on the government for the programs and services they need.*
>
> *The proposed bill would ensure that all essential services would be provided during a strike. The government would have the right to establish the level of essential services that are needed to ensure public safety or security.*
>
> *However, consistent with the new approach of partnership, the government and the bargaining agents together would determine the number of positions needed to provide these services.*
>
> . . .
>
> [House of Commons Debates, Official Report (Hansard), Friday, February 14, 2003]

[75] Appearing before the Standing Committee on Government Operations and Estimates to which Bill C-25 was referred, Nycole Turmel, National President of the bargaining agent, testified that:

. . .

> *The essential services provisions of the new legislation broaden the definition of essential services and give the employer the exclusive right to determine the level of essential services required and the frequency with which these services are to be provided.*
>
> . . .
>
> *Furthermore, the Public Service Labour Relations Board cannot take into account whether there is managerial staff available and able to provide the essential services, nor can it require the employer to change hours of work or use overtime in order to facilitate the delivery of such services.*
>
> . . .

> *We accept that some form of an essential services provision is inevitable. . . .*
>
> . . .
>
> [Testimony of Nycole Turmel, 37th Parliament, 2nd Session, Standing Committee on Government Operations and Estimates, March 25, 2003]

[76] Michel LeFrançois, General Counsel, Human Resources Modernization Task Force, the body which developed Bill C-25, stated the following before the same committee:

> . . .
>
> *. . . it is very important to distinguish between the level of service and what is an essential service. In the absence of an agreement between union and employer, it is up to the Public Service Staff Relations Board to determine what is an essential service. Once that is decided, it is up to the employer alone to determine the level of service.*
>
> . . .
>
> [Testimony of Michel LeFrançois, 37th Parliament, 2nd Session, Standing Committee on Government Operations and Estimates, May 7, 2003]

[77] The employer contends that the effects of the former *Act* and the new *Act* with respect to "essential services" are largely the same. Some nomenclature has changed, but the test remains whether the duties of a position are necessary for the present and future safety or security of the public. As the language used to define "essential services" in the two *Acts* is identical, the principles established in the jurisprudence under the former *Act* continue to apply: a proposition supported in *Treasury Board v. Professional Institute of the Public Service of Canada*, 2008 PSLRB 55.

[78] The employer submitted that the following principles from the jurisprudence under the former *Act* continue to be relevant and must be taken into account in deciding the issues in the applications before the Board:

- Positions are identified as essential, not employees.

- There need only be a possibility that the duties have an impact on the safety or security of the public, if unperformed, to make them essential: *International Brotherhood of Electrical Workers, Local 2228 v. Canada (Treasury Board) (Electronics Bargaining Unit – Technical Category)*, PSSRB File No. 181-02-16 (19720221). The positions identified for inclusion in the ESA by the employer envisage possible future hazards. Position no. 9927, Park Warden II (Exhibit E-5, tab 1-E), for example, should be identified in the ESA because the summary of duties of that position indicates that its incumbent is required to respond to emergencies by operating a vessel. As a further example, the Water/Wastewater Operator position (Exhibit E-5, tab 1-I) is necessary to maintain the park's two water treatment systems for the safety of staff even if there are no visitors to the park.

- When called upon to determine what conditions might arise in the course of a strike that might endanger the safety or security of the public, the Board ought to err on the side of caution: *Canada (Treasury Board) v. Public Service Alliance of Canada, (Radio Operation Group – Technical Category)*, PSSRB File No. 181-02-99 (19790601).

- Duties need not have an immediate safety or security impact on the public. The impact may occur sometime in the future: *International Brotherhood of Electrical Workers, Local 2228 v. Canada (Treasury Board) (Electronics Bargaining Unit – Technical Category).*

- The word "public" should be read broadly and include people as a whole, including public servants: *Public Service Alliance of Canada v. Treasury Board (Heating. Power and Stationary Plant Operation Group)*, PSSRB File No. 181-02-173 (19850221). In these, the word "public" should include employees of the park and unexpected guests and visitors.

- Loss of or damage to property falls within the concept of safety or security of the public: *The CSL Group Inc. v. Canada*, [1997] 2 F.C. 575 (F.C.); affirmed *The CSL Group Inc. v. Canada*, [1998] 4 F.C. 140 (F.C.A.). In the case of Parks Canada, if an accident occurred during a strike, the employer could be held liable in tort for damages resulting from the accident.

[79] In *The Queen v. Canadian Air Traffic Control Association,* [1982] 2 F.C. 475, the Federal Court of Appeal established another important principle under the former *Act* — that the duties of employees proposed for designation should not be analyzed in the context of a strike. The Federal Court of Appeal found that the Public Service Staff Relations Board ("the former Board") was empowered to designate employees based on their duties only at the time a designation is made. The employer drew the Board's attention to the following passages from the decision:

. . .

> ***10*** *It is also clear, in my view, that section 79 merely empowers the Board to designate employees or classes of employees on the basis of their duties as they exist at the time the designation is made. The nature of those duties at that time is, therefore, the only factor which the Board may take into account in carrying out its functions under section 79. All employees "whose duties consist in whole or in part of duties the performance of which . . . is or will be necessary in the interest of the safety or security of the public" must be designated by the Board even if the presence at work of all those employees may not be necessary for the satisfactory performance of those duties. It follows that the Board may not discriminate between employees having similar duties by designating only a few of them. It also follows that the Board may not make a designation on the basis of the duties that, in its view, an employee should be required to perform in the event of a strike. It also follows that the Board does not have the power, under section 79, to determine, as it has done in this case, the number of employees that should be required to stay at work, in the event of a strike, so as to provide the public with the minimum level of services required in the interest of public safety. The authority of the Board under section 79 is merely to determine the employees or classes of employees who, at the time the determination is made, have duties of the kind described in section 79. The law, in this respect, is clear and, in my view, requires no interpretation.*

. . .

> ***20*** *The sole duty of the Board pursuant to subsection 79(1) is to determine, before a conciliation board has been established, what employees or classes of employees in the bargaining unit are, at the date the matter is being determined, performing duties which are necessary for the safety and security of the public. Neither the wording of the subsection taken by itself nor in the context of the Act as a whole contemplates that such a determination is to be made on the basis of the safety and security necessities of the public only in a strike situation. It follows that the subsection*

> *does not authorize the Board to designate duties to be performed or the extent of services to be rendered in the event of a strike. The words of the section are clear, unambiguous and unequivocal and do not require an interpretation which enlarges the ambit of the Board's duty for the implementation of the direction contained therein. The Board's fundamental error was in arrogating to itself a power which the section did not confer upon it.*
>
> . . .

The decision of the Federal Court of Appeal was affirmed by the Supreme Court of Canada in *Canadian Air Traffic Control Assn. v. Canada (Treasury Board)*, [1982] 1 S.C.R. 696.

[80] According to the employer, the *Canadian Air Traffic Control Assn.* decisions remain good law under the new *Act*. Including the phrase ". . . is or will be, at any time, necessary for the safety or security of the public" in the definition of "essential service" in subsection 4(1) of the new *Act* in effect codifies the *Canadian Air Traffic Control Assn.* decision. That decision also established that the former Board could not determine the level of service to be provided to the public. The Board's statutory mandate was limited to determining whether any of the duties of an employee proposed for designation were necessary for public safety or security at the time the designation was proposed.

[81] The employer referred the Board to a number of decisions interpreting the essential services provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2, that it contends are also relevant to the issue of safety and security of the public; for example, *Aéroports de Montréal*, [1999] CIRB No. 23; *Nav Canada,* [2002] CIRB No. 168; and *Serco Facilities Management Inc. v. Public Service Alliance of Canada*, [1999] N.J. No. 201.

[82] In *Aéroports de Montréal*, the Canada Industrial Relations Board (CIRB) decided the activities that had to be maintained in the event of a strike by firefighters at airports. The CIRB set out the test for determining which services are essential to the safety and health of the public as follows:

> . . .
>
> *[21] . . . The Board is therefore responsible for determining, based on the specific circumstances of each*

> *case, which services are essential to the safety and health of the public in the event of a work stoppage. The essential test is as follows: "to the extent necessary to prevent an immediate and serious danger to the safety or health of the public" (emphasis added).*
>
> *[22] This means that the Board must take into account public safety or health at all times, and not only in the context of emergencies, rescues or other humanitarian acts. In the current circumstances, air travel is essential to thousands of people every day, and not merely for recreational purposes. The Board therefore feels that the continuation of essential services cannot paralyse aviation services for passengers by forcing them to remain where they are or overburdening other services or airports regardless of the consequences. The fact that the continuation of passenger services has a commercial impact does not mean it must be concluded that an airport must be closed down.*
>
> *[23] Nor is this generalization based on the business as usual theory. Rather, it is based on the fact that public safety and health come first and that it should be anticipated that emergencies are by nature unpredictable in terms of when and where they occur. Emergencies may occur in respect of humanitarian flights, rescues, essential supplies, air evacuation or normal flights, since the airport exists for all of those services. . . .*
>
> . . .

Parallel to the situation examined in *Aéroports de Montréal*, the employer argued that visitors, employees and members of First Nations all have a right of access to Pukaskwa and a right to be protected while they are there.

[83] In *Nav Canada,* at paragraph 230, the CIRB dealt with the extent of activities that must be carried out in the event of a strike. The CIRB stated that the ". . . carrying on of business as usual should only be possible to the extent . . . necessary to protect the safety . . . of the public from immediate and serious danger."

[84] In *Serco Facilities Management Inc.*, at paragraph 31, the Trial Division of the Newfoundland Supreme Court held that the *Canada Labour Code* did not require the employer to identify each and every individual service that must be continued during a strike. Rather, it was sufficient to identify the positions within the bargaining unit that must be continued to maintain the required services. The employer pointed out that Parks Canada cannot anticipate in its application everything that might occur.

Ms. Heron provided rationales for each specific position at Pukaskwa that must be included in the ESA based on common sense. For example, she testified that a minimum of three park wardens is needed to monitor the park — one warden stays at the command post to coordinate in the event of a safety risk while the two other wardens deploy to investigate the hazard.

[85] In *Avalon East School Board*, [2001] Nfld. L.R.B.D. No.5, the issue was whether maintenance workers in a school were necessary for the health, safety or security of the public. The union argued that since teachers were not performing essential duties, and since it was not necessary to keep the school open, there was no need for maintenance workers. The Newfoundland Employment and Labour Relations Board, relying on the *Canadian Air Traffic Control Assn.* decisions, decided to the contrary that some maintenance workers were necessary for the safety and security of the public even in a situation where teachers were on strike and the schools were not open to students.

[86] In closing, the employer asked that the Board issue an order:

- declaring that the public safety prevention, monitoring and intervention activities in place at Pukaskwa are necessary for the safety and security of the public or a segment of it;
- deeming that all nine positions identified by the employer at Pukaskwa National Park be part of an ESA; and
- declaring that the employer is not required to cease its operations during a work stoppage and that it is up to the employer to determine whether it wants to maintain its operations during a work stoppage.

B. <u>For the bargaining agent</u>

[87] The bargaining agent submitted that these applications raise a threshold issue that must be resolved for the parties to continue their negotiations towards an ESA. The parties disagree as to whether recreational services, facilities and activities at Parks Canada constitute “essential services” as defined by section 4 of the new *Act*. The bargaining agent maintains that they do not, as the discontinuance or closure of recreational services for park visitors will not jeopardize the safety or security of the public.

[88] The bargaining agent contended that the fact that Parks Canada has a legislative mandate to provide Canadians access to parks is not relevant. Parks Canada can close a park for any reason related to health and safety. There is no legislative provision that provides that Parks Canada cannot close Pukaskwa.

[89] The bargaining agent maintains that the new *Act* significantly alters the framework for identifying situations in which the safety or security of the public may be jeopardized. The focus of the new *Act*, unlike the former *Act*, is on essential services. Instead of asking whether the regular duties of a position include a safety or security element, the Board under the new *Act* must determine whether the discontinuance of services provided by the employer would result in a risk to public safety.

[90] The new *Act* requires the establishment of an essential service agreement that identifies, pursuant to subsection 4(1), ". . . positions in the bargaining unit that are necessary for the employer to provide essential services." A two-stage analysis is required. First, does the employer provide an essential service? Second, which positions are necessary for the employer to provide the essential service? That two-stage analysis was explained by Mr. LeFrançois in his testimony before the Standing Committee on Government Operations and Estimates (quoted earlier).

[91] The bargaining agent submits that Parks Canada has the onus of establishing that it provides essential services that are necessary for the safety and security of the public. The employer seeks to restrict the rights of certain employees to participate in a strike by claiming it provides an essential service that is necessary for the safety or security of the public. There is nothing self-evident in such a claim. Therefore, the employer must satisfy the Board on a balance of probabilities that its employees are necessary for the provision of an essential service. The bargaining agent contends that decisions of the former Board under the former *Act* clearly support the point: *Public Service Alliance of Canada v. Treasury Board (Heating, Power and Stationary Plant Operations Group)*, PSSRB File No. 181-02-32 (19741105); *Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board (Ship Repair Group - West Coast),* PSSRB File No. 181-02-182 (19850109); *Treasury Board v. Public Service Alliance of Canada (Education Group)*, PSSRB File No. 181-02-235 (19870319); and *Canada (Treasury Board) v. Public* Service *Alliance of Canada (Radio Operation Group – Technical Category)*, PSSRB File No. 181-02-99 (19790601). The bargaining agent also referred the

Board to *Canadian National Railway Company,* [2005] CIRB No. 314, at para 31, and *Atomic Energy of Canada Ltd.,* [2001] CIRB No. 122, at para 297 to 299, both decisions under the *Canada Labour Code*.

[92] Further on the burden of proof, the bargaining agent argued that, in the event that the employer establishes that it provides an essential service, the Board must then examine the specific positions proposed by the employer for inclusion in an ESA to determine whether they are necessary for the provision of that essential service. The bargaining agent acknowledges that, under the new *Act,* the employer's proposal with respect to a specific position is to prevail unless the Board determines that the position is not of the type necessary to provide essential services (subsection 123(7)). That subsection establishes a reverse onus. However, the employer retains the onus for establishing the type and number of positions required to provide the essential service at a particular level. Its proposal with respect to a specific position will prevail only where it has cleared the above two hurdles. As was the case under the former *Act,* both parties share an obligation to provide convincing evidence to the Board in support of their positions. See *Canada (Treasury Board) v. Public* Service *Alliance of Canada (Radio Operation Group – Technical Category)*, at para 14; and *Atomic Energy of Canada Ltd.*, at para 297.

[93] The bargaining agent maintains that, for a service, facility or activity of the Government of Canada to constitute an essential service, the ultimate impact of the withdrawal of that service must be a risk to public safety or security. Recreational services provided by Parks Canada do not meet that test since they can be discontinued without jeopardizing public safety or security. Accordingly, employees who perform duties related to safety and security that are required only in the event that Parks Canada is providing recreational services to the public do not provide essential services. As such, these positions should not be included in an ESA.

[94] According to the bargaining agent, the framework for determining whether a position should be included in an ESA under the new *Act* varies greatly from the regime under the former *Act*. As a result, certain conclusions found in the jurisprudence under the former *Act,* and specifically the conclusions in the *CATCA* decisions, must be reconsidered.

[95] The new *Act* introduces the notion of an "essential service" for the first time in federal public service labour legislation. Under the new *Act,* a position will be included

in an ESA only where it is necessary for the provision of an essential service. Where the former *Act* merely sought to identify a safety or security element in an employee's regular duties, subsection 4(1) of the new *Act* significantly changes the analysis by requiring an examination of the underlying service that these duties ultimately support. The principles of statutory interpretation establish that there is a strong presumption that such change in statutory language is purposeful. As noted in Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (2002), at 473, ". . . the foremost purpose of an amendment is to bring about a substantive change in law. . . ."; see also *Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board (Ship Repair Group)*, at para 2.

[96] In the bargaining agent's view, the analysis required under the new *Act* must begin with a determination of whether the particular service, facility or activity provided by the Government of Canada is necessary for the safety or security of the public. Only after it is determined that the employer provides an essential service will there be any analysis of whether the individual positions in question are necessary to provide that service. In this context, the distinction between identifying an essential service and setting the level at which the essential service will be provided is important, as stated by Mr. LeFrançois in his testimony quoted above.

[97] The significance of the new *Act*'s focus on essential services is highlighted by the recent decision of the New Brunswick Court of Appeal in *Canadian Union of Public Employees, Local 1253 v. New Brunswick (Board of Management),* 2006 NBCA 10 (*CUPE*). The public service labour legislation in New Brunswick was also amended to shift from a focus on whether a designated employee's duties were at any time necessary for the health, safety or security of the public to a focus on whether the position was required for the provision of an essential service. *CUPE* addressed the question of whether custodians responsible for cleaning schools provided an "essential service" within the meaning of section 43.1 of the New Brunswick *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The New Brunswick Labour and Employment Board (NBLEB) had initially found that the services were essential since there was no requirement in law that schools be closed in the event of a strike. The New Brunswick Court of Appeal overturned the NBLEB's decision, finding that its conclusion on this point was patently unreasonable. The Court of Appeal explained as follows:

. . .

> ***17*** *. . . the Board's decision hinges on a single premise or assumption: schools will remain open if the custodians go on strike. The Board reasoned that this is so because there is no legal requirement that schools close in the event of strike action and, as well, students are entitled to an education and, indeed, obligated to attend school. In my respectful view, this assumption is a false one. . . . Realistically speaking, if school custodians were to strike, it is more likely than not that schools would ultimately close. Furthermore, common sense would lead one to conclude that such closures could occur without impacting on the health of those directly affected: students, staff and teachers. . . .*

. . .

[98] The New Brunswick Court of Appeal explained that the focus on "essential services" required the NBLEB to ask a narrower question than the one set out under the previous legislation:

. . .

> ***21*** *. . . In effect, the Board is approaching the issue by asking a broad question rather than the narrow one mandated by s. 43.1. The broad question is as follows: Are custodians required to perform duties that may impact on the health of the public? If that is the proper question, the answer is obvious and the Board's decision must stand. But if we reformulate the question, so as to narrow its ambit, the answer is neither immediate nor self-evident. The narrow question is: What is the ultimate impact on the public interest if the employer is no longer able to provide the service which the custodians offer? In short, the narrow question forces the Board to examine the ultimate effect which a withdrawal of services would have on the public interest as it relates to the matter of health, safety or security.*
>
> ***22*** *. . . Note that s. 43.1 speaks in terms of the Board identifying the services to be provided by members of the bargaining unit that at "any particular time are or will be necessary in the interest of the health, safety or security of the public." In my view, the quoted phrase requires the Board to approach the designation issue in terms of the ultimate impact a strike would have on the public interest as defined in the* Act. *In other words, the Board must, at the very least, pose the narrow question. Otherwise, the right of school employees to strike may well become illusory. . . .*

. . .

[99] The bargaining agent argues that, as in New Brunswick, the appropriate question to ask under the new *Act* is whether the ultimate effect of a strike would be to prevent services that are necessary for the safety and security of the public from being delivered. Framing the question in this manner supports the policy objectives behind collective bargaining, the right to strike and the provision of necessary and essential services to the public as set out in the new *Act*. In these applications, the Board must ask whether the withdrawal of recreational services provided by Parks Canada would jeopardize the safety or security of the public.

[100] The bargaining agent submits that some of the jurisprudence under the former *Act* established principles regarding what constitutes the safety and security of the public that continue to apply under the new *Act*.

[101] One of the more important principles is that collective bargaining rights for public service employees must not be undermined simply because they result in an inconvenience to the public. Inherent in the right to strike, which has been accorded to those employees, is the right to place pressure on their employer to make bargaining concessions. While this right is to be limited where its exercise will place the safety or security of the public in jeopardy, this limitation must be narrowly construed. As Professor Paul Weiler forcefully argued in *Reconcilable Differences* (Toronto: The Carswell Company, 1980), at 240:

> . . .
>
> *If we cannot accept the cold-blooded logic of collective bargaining, let us be candid about what we are doing. If we tell a school union that in order to secure concessions from the school board they can go on strike, as long as they do not interrupt the delivery of education — or we tell other government unions that they can strike but they cannot disturb the welfare of the public — then we are really telling these unions that they will not have an effective lever with which to budge a recalcitrant government employer from the bargaining position to which it has committed itself. We do leave the public employees with the right to unionize, to try to persuade their employer to improve their contract offers — with the right to collective "begging" as some unionists derisively put it — but we do not give them collective bargaining in the true sense of the word.*
>
> . . .
>
> [Cited in *Canadian Union of Public Employees, Local 1253 v. New Brunswick (Board of Management)*, at para 22]

[102] On the issue of the effect of a strike on the employer, the bargaining agent also referred the Board to *Treasury Board v. Public Service Alliance of Canada (Library Science Group)*, PSSRB File No. 181-02-348 (19970303); and *Public Service Alliance of Canada (PSAC) v. Canada (Treasury Board)* (F.C.A.), [1988] F.C.J. No. 821, (QL).

[103] Strikes involve economic sanctions. There are no judicial decisions that support the proposition that security of the public includes security for the employer against damages, as the employer argues. In *The CSL Group Inc. v. Canada*, at para 61, 64 and 65, cited by the employer, the Federal Court in fact held the contrary view. In *Public Service Alliance of Canada v. Canada (Treasury Board) (Heating, Power and Stationary Plant Operations Group - Operational Category)*, PSSRB File No. 181-02-32 (19741105), the former Board squarely addressed the question as follows at para 30:

. . .

> *. . . serious damage may be caused to important research projects, valuable works of art and pieces of equipment and so on, if the temperature and humidity are not maintained at a proper level. The parties may wish to confer and reach an understanding as to the ways and means to insure conservation of important functions and assets. However, the Board's jurisdiction under section 79 of the Act is limited to the determination of employees whose duties consist in whole or in part of duties the performance of which is or will be necessary in the interest of the safety and security of the public. The Board has no authority to exceed the jurisdiction conferred upon it by section 79 of the Act.*

. . .

[104] The bargaining agent submits that the right to strike is an integral part of the collective bargaining process and should be limited only to the minimum level required to ensure the safety and security of the public, a conclusion repeatedly endorsed by the CIRB: *NAV Canada*, [2002] CIRB No. 168, at para 226 to 228; *Nav Canada*, [2007] CIRB No. 375, at para 142; and *Canadian National Railway Company*, [2005] CIRB No. 314, at para 32. That conclusion also accords with the position expressed by former Chief Justice Dickson in *Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at 369 and 370, as follows:

. . .

> *Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. A. W. R. Carrothers, E. E. Palmer and W. B. Raynor,* Collective Bargaining Law in Canada *(2nd ed. 1986), describe the requisites of an effective system of collective bargaining as follows at p. 4:*
>
> > *. . . From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.*
>
> *The Woods Task Force report at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:*
>
> > *408. Strikes and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.*
>
> . . .
>
> *At page 175 the Report notes that the acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike. And at p. 176, it is said, "The strike has become a part of the whole democratic system".*
>
> . . .

[105] The bargaining agent stressed that there is an important distinction between situations that result in an inconvenience to the public or economic hardship to the employer and those that jeopardize the safety and security of the public. As the former Board held in *Treasury Board v. Public Service Alliance of Canada (Library Science Group)*:

> . . .
>
> *. . . a common theme throughout the Board's decisions on safety and security designations has been the importance of distinguishing between inconvenience to the public on the one hand, and safety and security on the other. The designation process represents an attempt to balance the right of employees who are members of a bargaining unit to participate with their fellow employees in what is otherwise a lawful strike, against the need to protect the vital interests of the public. In determining the proper balance, the Board has*

> *said that inconvenience is a natural result of a withdrawal of services (otherwise what purpose did those services serve in the first place). . . .*
>
> *In the Board's view, this concept was not diminished or supplanted as a result of the decision by the Supreme Court of Canada in the CATCA case (supra). . . .*
>
> . . .
>
> [Emphasis in the original]

See also *Canada (Treasury Board) and Public Service Alliance of Canada (Radio Operation Group - Technical Category)*, at para 12 and 13.

[106] A second important principle in conducting an essential services analysis is that, as was the case under the former *Act*, a legislative mandate to provide services does not alter the fact that the right to strike will only be removed where doing so is essential for the "safety and security of the public": *Treasury Board v. Public Service Alliance of Canada (Library Science Group)*, at para 11 to 14 and 26; *CSL Group Inc. v. Canada*, at para 64 to 65; and *Canada (Treasury Board) v. Public Service Alliance of Canada (Radio Operation Group - Technical Category),* at para 12 to 13.

[107] A third principle is that the specific duties of a position must be considered in the context of the organization in which they are found. Accordingly, the question of what constitutes an essential service will lead to different results depending on whether the service in question involves airports, maintenance of military equipment, life-saving medical supplies, court services, or recreational services available at national parks; see *Treasury Board v. Public Service Alliance of Canada* (*Library Science Group).*

[108] The bargaining agent added that, although the Board should err on the side of caution when the consequences of allowing certain employees to strike are unclear, the employer must lead convincing and specific evidence demonstrating the important safety and security role of the services it provides; see *Treasury Board v. Public Service Alliance of Canada (Education Group).*

[109] A further principle is that decisions about essential services should not be based on exceptional circumstance in which employees may be required to perform a

specific duty. The former Board held in *Treasury Board v. Public Service Alliance of Canada (Education Group)*, as follows:

. . .

> *. . . we do not believe that an employee should be designated and thereby deprived of the right to strike on the basis of duties that his employer might hypothetically require him to perform in the event an extraordinary situation should arise. To hold otherwise would dictate the designation of virtually every employee in the Public Service. . . .*

. . .

[110] In summary, according to the bargaining agent, the Board must first determine whether the employer provides an essential service to the public; that is, a service that is necessary for its safety and security. Secondary services may also involve safety and security functions but will constitute essential services only where the ultimate impact of their removal will be to jeopardize the safety and security of the public. It is only after determining that essential services exist that the Board must go on to determine whether the positions proposed for inclusion in an ESA are necessary to provide the level of service set by the employer.

[111] The bargaining agent then applied the proposed framework to Parks Canada. In its view, the recreational services provided by Parks Canada, which include facilities and support for hiking, camping, mountaineering and other similar activities, are not necessary for the safety or security of the public. Accordingly, positions that are required to support these recreational services should not be included in an ESA unless they are necessary for the provision of some other essential service. That is the case regardless of whether the employees in those positions have duties that relate to safety and security when recreational services are being provided.

[112] The bargaining agent also maintains that activities in support of Parks Canada's broader mandate to preserve Canada's cultural heritage and ecological integrity do not affect the safety or security of the public. Given the language in the new *Act,* it cannot be sustained that those activities constitute essential services.

[113] Parks are not essential services. They can be evacuated. There is a difference between positions that support a park that is open to visitors and a park that is closed.

[114] The bargaining agent stated that the Board does not have the jurisdiction to declare that, in the event of a work stoppage, the employer is not required to cease its operations and that it is up to the employer to determine whether it wants to maintain its operations during a work stoppage.

[115] The bargaining agent maintained that the rationale found in the Essential Services Position Review forms (Exhibit E-5, tab 1) form the basis for the Board's decision.

[116] The two maintenance worker positions (Exhibit E-5, tabs 1-A and 1-B) do not include performing essential services. The bargaining agent drew a parallel between the maintenance worker in these applications and the custodians in *CUPE.* In that decision, the New Brunswick Court of Appeal held that custodians responsible for cleaning schools did not perform an essential service.

[117] The employer proposed three warden positions for inclusion in the ESA. The bargaining agent agreed to position no. 9927 (Exhibit E-5, tab 1-E) because the incumbent of that position can operate a vessel for marine operations. If the park closes, there is also a need for a compliance function. The incumbent of that position can ensure that the park is vacated.

[118] However, the bargaining agent disagrees with the employer with respect to the two other park warden positions (Exhibit E-5, tabs 1-C and 1-D). Those positions were included for public safety issues in the context of a park that is open to the public. If the public is not permitted to enter the park, there is no safety issue to be addressed.

[119] The bargaining agent contended that the Resource Conservation Specialist position (Exhibit E-5, tab 1-F) should not be included in the ESA. The incumbent of that position coordinates fire suppression activities near visitor facilities but is not part of a fire crew. The bargaining agent commented that issues related to risk of fire must not be considered since the employer did not propose any firefighter position for inclusion in the ESA.

[120] The Trail and Grounds Foreman position (Exhibit E-5, tab 1-G) should not be included in the ESA since there is no need for the duties of this position if the park is closed. The same is true for the Visitor Services Attendant position (Exhibit E-5,

tab 1-H). The incumbent of that position provides information to persons entering the park. There is no need for such information if the park is closed.

[121] There is also no need for the Water/Wastewater Operator position (Exhibit E-5, tab 1-I) if the park is closed.

[122] The employer believes that the regime for essential services has not changed, while the bargaining agent takes the view that it has. The Board may decide to give guidance on the principles underlying the new *Act* and then ask the parties to sort out the finer details of the ESA.

C. Employer's rebuttal

[123] The employer argued that *CUPE*, must be distinguished because it was based on different legislation. In New Brunswick, employers have the authority to lockout employees, a right employers do not have under the new *Act*. The result in the federal public service is that, during a strike, the employer must keep employees on strength even though there is no work for them. Mr. Stewart testified that during the last strike at Parks Canada, employees working on the Rideau Canal were on strike one day, back at work the next day, and on strike again on the following days. That pattern resulted in the employer having to pay workers who had no work since there was a decrease in the number of visitors to the Rideau Canal due to the uncertainty caused by the rotating strike action.

[124] *CUPE* must also be distinguished because the labour relations legislation in New Brunswick was amended following the Supreme Court of Canada decision in *CATCA*. The adoption of the new *Act*, on the other hand, did not have the effect of reversing the conclusions of the Supreme Court of Canada regarding essential services.

[125] The employer reminded the Board that the employer never contended that Parks Canada should conduct business as usual during a strike. The employer recognizes that employees have a right to strike. In the event of a strike, Parks Canada will be operating at a lesser capacity, which is different than business as usual. The employer's submission is quite conservative; it asks only that nine positions be included in the ESA.

[126] The employer pointed out that the situation in these applications is also quite different than the one considered in *CUPE.* That decision dealt with school custodians.

An employer can control access to a school because a school can be closed; Pukaskwa is a different matter. Since Pukaskwa is not enclosed, Parks Canada cannot ensure that visitors will not enter the park. It also cannot control entry into the park by members of First Nations, given their treaty right of access.

[127] The employer submitted that even if the park were closed, the employer has the obligation to ensure that the safety of the pubic is assured. Safety issues would remain. For example, Parks Canada needs to ensure that bears do not wander into adjacent communities. Parks Canada must maintain a capacity to respond to the safety issues that may arise.

[128] No inferences can be drawn from the fact that the employer did not include fire crew positions in the ESA even though the organization chart shows that Pukaskwa has such positions (Exhibit E-9). The employer included positions in the ESA that would address potential hazards.

[129] The employer does not agree with the proposition that the Board must base its analysis on the rationale found in the Essential Services Position Review forms (Exhibit E-5, tab 1). The Board must base its findings on the whole of the evidence, including the testimony of the witnesses and the evidence adduced at the hearing.

[130] On the issue of burden of proof, the employer submitted that it has met its onus. It has provided evidence as to the type of positions to be included in the ESA, as well as to the specific positions that should be included in that agreement.

V. Reasons

[131] Through their two applications under subsection 123(1) of the new *Act*, the parties are asking the Board to determine matters that may be included in an ESA in the factual context of Pukaskwa. The submissions of the parties indicate that they agree on only one substantive matter in that context — the identification of position no. 9927, Park Warden II (Exhibit E-5, tab E), as a position that is necessary for the employer to provide an essential service. From the total Pukaskwa staff complement of 35 positions, the employer has identified 8 other positions that it contends are necessary to provide essential services (Exhibit E-5, tabs A to D and F to I). The bargaining agent disagrees.

[132] The parties frame the dispute in different ways. The bargaining agent urges the Board to rule on a "fundamental issue." It asks, "Does the provision of support for recreational services by Parks Canada constitute an essential service, viewed through the example of Pukaskwa?" The bargaining agent submits that that fundamental issue lies at the crux of the dispute between the parties and that it must be resolved before further ESA negotiations can productively proceed. For its part, the employer defined the dispute in its application as a matter requiring the Board to rule whether certain specifically identified positions perform essential services. In its argument, the employer went further proposing a definition of the essential services that apply at Pukaskwa and asking the Board to declare that the employer is not required to cease operations during a work stoppage.

[133] Earlier, the Board indicated that the two Pukaskwa applications serve as a "test case." It is a test case in two ways. First, as previously stated, the Board's findings based on Pukaskwa may assist the parties to negotiate the ESA for the full bargaining unit. Second, the Board hopes, through its findings in this initial decision about essential services under the new *Act*, to provide guidance on the nature of the determinations that it makes, the appropriate analytical path to follow and some principles of interpretation that should apply. For those purposes, the Board has found that the two Pukaskwa applications offer a sound initial test case.

A. What has changed under the new *Act*?

[134] Section II of this decision briefly described the statutory framework for addressing essential services under the new *Act*. For the Board and for the labour relations community under the new *Act*, it is vital to understand what has changed and what the changes reveal about the legislator's intent. The changes are substantive and not merely a change in form. Rather than amending the previous statute, the legislator has written an entirely new law with many new provisions in the area of essential services. Given the nature and extent of the changes, the Board must presume that those changes are purposeful; that is, that the legislator intended that there be a substantively different approach under the new *Act* compared to the scheme under the former *Act*; see *Sullivan and Driedger on the Construction of Statutes*, at 472.

[135] The key provision of the former *Act*, as amended in 1992, was subsection 78(1). Under that provision, the Chairperson of the former Board could not act upon a request to establish a conciliation board to resolve a collective bargaining dispute until

the designation status of every position in the bargaining unit was determined. A "designated position" under the former *Act* was a position determined to perform duties that were ". . . necessary in the interest of the safety or security of the public." The former *Act* referred to those duties as "safety or security duties." The full text of subsection 78(1) read as follows:

> ***78.*** *(1) The Chairperson shall not, pursuant to a request under section 76 in respect of a bargaining unit, act under subsection 77(1) or (2) until the position of each employee in that bargaining unit, in accordance with section 78.1 or 78.2,*
>
> *(*a*) has been designated as having duties consisting in whole or in part of duties the performance of which at any particular time or after any specified period is or will be necessary in the interest of the safety or security of the public; or*
>
> *(*b*) has been determined as not having the duties described in paragraph (*a*).*

[136] Before the 1992 amendments, the former *Act* used the concept of "designated employees" rather than "designated positions." The governing provision was otherwise substantially the same in its effect and read as follows:

. . .

> ***79.*** *(1) Notwithstanding section 78, no conciliation board shall be established for the investigation and conciliation of a dispute in respect of a bargaining unit until the parties have agreed on or the Board has determined pursuant to this section the employees or classes of employees in the bargaining unit (hereinafter in this Act referred to as "designated employees") whose duties consist in whole or in part of duties the performance of which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public.*

. . .

[137] The former *Act*, as amended in 1992, established a two-stage dispute resolution procedure when the parties disagreed on the designation status of positions. At the first stage, a three-member designation review panel appointed in the same manner as a conciliation board reviewed the positions in dispute and made ". . . non-binding recommendations in writing to the parties as to whether the positions have safety or security duties" (subsection 78.1(9)). If an impasse persisted after a designation review

panel made recommendations, the former *Act* authorized the former Board to make a binding ruling, as stipulated in section 78.2 as follows:

> ***78.2*** *(1) Where, after considering the recommendations of a designation review panel, the parties continue to disagree on whether any positions have safety or security duties, the employer shall, not later than notice day, refer the positions in dispute to the Board.*
>
> *(2) The Board shall review the positions in dispute and, after giving each party an opportunity to make representations, determine if the positions have safety or security duties.*
>
> *(3) Where the Board determines that none of the positions in dispute have safety or security duties or that some do not, the Chairperson shall send a statement of the determination to the parties.*
>
> *(4) Where the Board determines that some or all of the positions in dispute have safety or security duties, the Board shall designate those positions as having those duties and the Chairperson shall send a notice of the designation to the parties.*
>
> *(5) Subject to section 78.4, a determination of the Board under subsection (3) or (4) is final and conclusive for all purposes of this* Act.

[138] Through its decisions, the former Board developed a body of jurisprudence defining "safety or security" duties in a variety of factual contexts. In 1982, the Supreme Court of Canada issued a decision that directly affected the course of the former Board's jurisprudence: *CATCA*. In that decision, the Supreme Court of Canada upheld a Federal Court of Appeal judgment that had set aside a ruling of the former Board interpreting the "designated employees" provisions of the former *Act*: *The Queen v. Canadian Air Traffic Control Association,* [1982] 2 F.C. 475; and *Canadian Air Traffic Control Assoc. v. Canada (Treasury Board) (Air Traffic Control Group)*, PSSRB File No. 181-02-134 (19810127).

[139] The *CATCA* decision turned in part on the interpretation of the phrase in subsection 79(1) of the former *Act* ". . . duties the performance of which at any particular time or after any specified period is or will be necessary in the interest of the safety or security of the public. [emphasis added]" The Supreme Court of Canada

summarized the former Board's approach to determining designated employees in the pre-*CATCA* era as follows:

. . .

> *. . . It considered that its duty under s. 79 was to determine the number of employees of each class in the bargaining unit which would be needed in order to provide the services necessary to ensure the safety of the air services that, in the event of a strike, must be maintained in the interest of the safety or security of the public. On that basis, it proceeded to enumerate the various duties that, in the event of a strike, would be required to be performed by different classes of employees in the unit in the interest of the safety or security of the public and it determined the number of employees of each class, in each work location, that would have to perform those duties in the event of a strike. . . .*

. . .

The Supreme Court of Canada also noted that the former Board ". . . assumed the authority to determine what level of air services was necessary to be provided in order to ensure the safety or security of the public," quoting from the lower court judgment as follows:

. . .

> *The Board went on to say that implicit in making its determinations as to the number or classes of air traffic controllers needed for "designation" in the instant case, is the requirement that it make a decision as to the level of services by air traffic controllers that are necessary to be maintained at federal government regulated airports in order to ensure the safety or security of the public in the event of a lawful strike by members of the unit.*

. . .

[140] The Supreme Court of Canada confirmed the Federal Court of Appeal's ruling that the former Board was in error when it interpreted the former *Act* by defining safety or security duties in the context of a strike situation. According to both courts, the words ". . . at any particular time or after any specified period . . ." required that the Board instead determine what duties were necessary for the safety and security of the public as of the date that the matter was before the Board. The Supreme Court summarized its interpretation of the requirements of the former *Act* as follows:

. . .

> *The sole duty of the Board pursuant to subsection 79(1) is to determine, before a conciliation board has been established,* what employees or classes of employees *in the bargaining unit are, at the date the matter is being determined* performing duties *which are necessary for the safety and security of the public. Neither the wording of the subsection taken by itself or in the context of the Act as a whole contemplate that such a determination is to be made on the basis of the safety and security necessities of the public only in a strike situation.*
>
> . . .
>
> *. . . the task of the Board when called upon to make a determination under subs. 79(3) is to consider those employees and classes of employees in the bargaining unit who have been designated by the employer, and to decide whether the performance of their stipulated duties as employees is necessary for public safety or security.*
>
> *The whole procedure provided for in s. 79 occurs prior to the establishment of a conciliation board. I can find nothing in the section to indicate that the function of the Board is to determine, if conciliation should fail, what services normally provided by employees in the bargaining unit are, in the event of strike action, necessary to be continued in the interest of public security or safety, and the section contains no reference to any power in the Board to designate the duties of employees necessary in the interest of the safety or security of the public during a strike.*
>
> . . .
>
> *. . . The Board is called upon to make a determination before a conciliation board has been established. Strike action can only occur if the conciliation procedure has been followed and has failed. . . . The wording of the section does not call upon the Board to determine what employees should be designated employees if conciliation fails and a strike occurs. The purpose of the section is to determine, in advance of conciliation, what employees in the bargaining unit are precluded from going on strike.*
>
> . . .

[141] Critically, the Supreme Court of Canada also confirmed in *CATCA* that the former Board's authority did not extend to determining the level at which services

were to be provided to the public in the event of a strike. Its decision on that issue reads in part as follows:

. . .

> *It is apparent . . . that the Board construed s. 79 as giving to it the authority to determine what level of air services should be provided in Canada in the interest of the safety or security of the public. It was that level of service which the Board should ensure would be provided in the event of a strike by the air controllers and it was the task of the Board under s. 79 to designate such employees in the bargaining unit as would be necessary for the performance of the duties necessary to provide that level of service.*
>
> *With respect, I do not agree with that construction of the section, nor do I regard s. 79 as having been enacted for that purpose. . . .*

. . .

[142] The essential effect of the ruling in *CATCA* was to require the Board to respect the employer's determination of the level of services to be provided to the public and to designate any employee (or later, any position) who, in the normal course of affairs, performed a safety or security duty to any degree, not just a critical number of employees (or positions) required to ensure public safety or security during a strike.

[143] Under the new *Act*, the concept of a "designated employee" or "designated position" has disappeared. It has been replaced by the concept of an "essential service" determined in the context of an "essential service agreement" negotiated by the parties. As noted earlier, subsection 4(1) defines an "essential service" as follows:

. . .

> *"essential service" means a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public.*

. . .

[144] The Board's role has also been redefined under the new *Act*. Subsection 123(3) now mandates the Board to determine "any matter" regarding the content of an ESA that has not been agreed to by the parties. Subsection 123(3) further authorizes the

Board to deem both that any ruling that it makes forms part of an ESA and that the parties have entered into such an agreement. That subsection reads as follows:

> ***123.*** *(3) After considering the application, the Board may determine any matter that the employer and the bargaining agent have not agreed on that may be included in an essential services agreement and make an order*
>
> *(*a*) deeming the matter determined by it to be part of an essential services agreement between the employer and the bargaining agent; and*
>
> *(*b*) deeming that the employer and the bargaining agent have entered into an essential services agreement.*

[145] Subsection 4(1) of the new *Act* also provides guidance as to the matters that may be included in an ESA as follows:

> *"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies*
>
> *(*a*) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;*
>
> *(*b*) the number of those positions that are necessary for that purpose; and*
>
> *(*c*) the specific positions that are necessary for that purpose.*

[146] In their submissions, the parties take clearly different views of the meaning and significance of the changes to the legislative framework described above. The bargaining agent argues that the new framework reorients the focus of analysis to determining what services are essential for public safety or security in a strike situation, in effect returning to the pre-*CATCA* approach. According to the bargaining agent, the basic question to be posed is, "If a service is not provided during a strike, would it affect the safety or security of the public?" The bargaining agent summarized that perspective in its written submissions as follows:

> . . .
>
> *. . . the appropriate question to be asked under the* PSLRA *is whether the ultimate effect of a strike would be to prevent services that are necessary for the safety and security of the*

> *public from being delivered. Framing the question in this manner supports the policy objectives behind collective bargaining, the right to strike, and the provision of necessary and essential services to the public, as set out in the* PSLRA. . . .
>
> . . .

[147] The employer counters that the approach under the new *Act* is substantially the same as under the former *Act* as interpreted by the *CATCA* decision. The litmus test remains defining what duties are necessary "at any time" for the safety and security of the public. For the employer, inclusion of the phrase "at any time" in the definition "essential service" in subsection 4(1) of the new *Act* requires that the status of a service must be evaluated in the same fashion required under the former *Act* by the *CATCA* decision. According to the employer, the essential services features of the new *Act* have in fact purposely codified the ruling in *CATCA*. Section 120 of the new *Act*, for example, has reinforced the finding in *CATCA* that the exclusive right to determine the level of service belongs to the employer. Section 120 reads as follows:

> ***120.*** *The employer has the exclusive right to determine the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided. Nothing in this Division is to be construed as limiting that right.*

[148] Which viewpoint correctly interprets the new *Act*? The Board believes that the answer to that question can be found through an examination of the structure and wording of the new *Act* itself.

[149] The employer cites the *Interpretation Act* and decisions of the Supreme Court of Canada — for example, *Bell ExpressVu Limited Partnership v. Rex* — to the effect that the Board must give the provisions of the new *Act* their ordinary meaning and read those provisions harmoniously with the overall legislative scheme and with the intent of the legislator. The Board concurs. The principal rule for statutory interpretation applies, as quoted in *Rizzo & Rizzo Shoes Ltd.*, at para 21 (quoting E. A. Driedger, *Construction of Statutes*, 2nd ed., 1983, at 87):

> . . .
>
> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the*

> *scheme of the Act, the object of the Act, and the intention of Parliament.*
>
> . . .

Applying those rules, the Board is satisfied that the new essential services features of the statute can be coherently interpreted and that it is unnecessary to go beyond that analysis to determine the intent of the legislator.

[150] The starting point for the analysis is recognizing two fundamental elements. First, the new *Act* reconfirms the right of employees to strike under a defined set of circumstances. Second, the new *Act* expresses the paramount importance of the public interest in the scheme of labour relations. It associates good labour relations with improving the ability of the public service to serve and protect the public interest, as revealed in the preamble as follows:

> . . .
>
> *the public service labour-management regime must operate in a context where protection of the public interest is paramount;*
>
> *effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;*
>
> . . .

[151] The essential services features of the new *Act* balance the right of employees to strike and the right of the public to receive necessary safety and security services. It is a balancing act intended for the specific eventuality of a public service strike and for no other scenario. Protecting the right to strike as part of the required balance is not an end in and of itself. Rather, protecting the right to strike is necessary to give effect to the regime of collective bargaining embodied under the new *Act* in Part 1, Divisions 6 to 11. Part of that regime is the right given to a bargaining agent, on behalf of the employees that it represents, to choose conciliation with the right to strike as the dispute resolution option in the event of a collective bargaining impasse (section 103).

[152] The bargaining agent cites the comments of (then) Chief Justice Dickson of the Supreme Court of Canada in *Public Service Employment Relations Act (Alta.)* to support

the proposition that the nexus between free collective bargaining and the freedom to strike requires that the latter right be limited only "to the minimum level required" to ensure the safety and security of the public. The Board does not take issue with those comments, although it does note that Chief Justice Dickson's comments were offered as a dissenting opinion in a case where the majority of the Supreme Court found that the right to strike was not protected by the *Canadian Charter of Rights and Freedoms*. The constitutional status of the right to strike, however, is not in any way at issue in this decision. It is sufficient to recognize that the legislator clearly established a right to strike in the new *Act*. It is thus part of the Board's responsibility to give real meaning to that right, as qualified by other provisions of the new *Act*.

[153] The Board also understands that giving meaning to the right to strike under the new *Act* while respecting the paramount public interest in the delivery of essential services is part of an even broader balancing act. Parliament has assigned to Parks Canada rights and obligations under its mandating legislation and regulations as described by the employer in its submissions. The Board must recognize those rights and obligations while appropriately balancing them against the rights and obligations given to the employer, employees and bargaining agents under the new *Act*. In particular, the Board must assume that Parliament intended the right to strike under the new *Act* to have real meaning even where the exercise of that right may interfere with the ability of Parks Canada to deliver services required under its statutory mandate. It is the essential services features of the new *Act* that serve to reconcile the tensions that can arise between statutory instruments.

[154] The link between the concept of essential services and the possibility of strike action is practically apparent in the basic mechanics of the new *Act*:

- The essential services provisions apply only to bargaining units for which the bargaining agent has specified conciliation with the right to strike as the dispute resolution option in the event of a collective bargaining dispute (section 119).
- The time limits by which the employer must give notice to the bargaining agent that it considers that there are employees in positions that are necessary to provide essential services are delimited with reference to the date that notice to bargain is given in respect of a bargaining unit on the conciliation-strike route (section 122).

- The time limit for the receipt of a request from a party to the Board to determine an unresolved matter in an ESA is directly linked to the initiation of conciliation or the establishment of a public interest commission when the real possibility of strike action becomes apparent (subsection 123(1)).
- Where there are outstanding issues regarding an ESA, an employee organization may not declare or authorize a strike unless an ESA is in force (paragraphs 194(1)(*f*) through (*j*)).

[155] While the former *Act* also exhibited some of the same link — for example, the timing link between finalizing designated positions and submitting an application to establish a conciliation board — it lacked any of the detailed provisions centred on the mandatory conclusion of an ESA that are a defining feature of the new *Act*. Some of those new provisions, in the Board's view, remove any doubt that the issue before the parties and before the Board is, in fact, "What are essential services in the event of a strike?"

[156] Subsections 121(1) and (2) of the new *Act*, for example, use the words "during a strike" — words completely absent from the designations provisions of the former *Act* — no less than three times, as follows:

> ***121.*** *(1) For the purpose of identifying the number of positions that are necessary for the employer to provide an essential service, the employer and the bargaining agent may agree that some employees in the bargaining unit will be required by the employer to perform their duties that relate to the provision of the essential service in a greater proportion during a strike than they do normally.*
>
> *(2) For the purposes of subsection (1), the number of employees in the bargaining unit that are necessary to provide the essential service is to be determined*
>
> (a) *without regard to the availability of other persons to provide the essential service during a strike; and*
>
> (b) *on the basis that the employer is not required to change, in order to provide the essential service during a strike, the manner in which the employer operates normally, including the normal hours of work, the extent of the employer's use of overtime and the equipment used in the employer's operations.*
>
> [Emphasis added]

The same references to "during a strike" reappear six more times in total in subsections 123(5) and (6) and in 127(5) and (6).

[157] To be sure, it is not just the appearance of the words "during a strike" that is important. It is also crucial that the provisions in which those words appear address circumstances that have little or no application outside the context of a strike.

[158] Consider, for example, the language of subsection 121(1) of the new *Act*, repeated in subsections 123(5) and 127(5). That language contemplates that some employees may perform duties ". . . in a greater proportion during a strike than they do normally." It provides that the parties and the Board are entitled to take that possibility into account in determining the content of an ESA. In the Board's opinion, there would be no reason to do so if the intent of the legislator in those provisions was to replicate the "business as usual" model flowing from the *CATCA* decision. The new *Act*'s wording clearly distinguishes between what might happen "during a strike" from what occurs "normally." In that wording, the legislator recognizes the reality that something different may have to occur in the event of a work stoppage — it may be necessary or appropriate to adjust the assignment of duties such that fewer employees are performing essential duties but are performing more of those duties than would "normally" be the case.

[159] Similarly, paragraph 121(2)(*a*) contains language, repeated in paragraphs 123(6)(*a*) and 127(6)(*a*), that alludes to the possibility — and then precludes the parties or the Board from considering the possibility in determining the content of an ESA —that other employees outside the bargaining unit might be deployed to perform bargaining unit work. Once again, that language does not suggest that the legislator was contemplating a "business as usual" model. The context in which the availability of others outside the bargaining unit to perform safety or security duties becomes an issue is in a strike situation. Considering what can occur during a strike situation, the legislator has stated in effect that the parties and the Board cannot reach outside the bargaining unit for resources to give effect to the balancing act between the right to strike and the delivery of essential services.

[160] As a final example, the new *Act* distinguishes between the "types of positions" that are necessary for the employer to provide essential services, the "number of those positions" and the "specific positions" that are necessary. In the Board's opinion, those distinctions are meaningful only if the legislator intended that the parties or the Board

may identify in an ESA a subset of the positions in a bargaining unit that perform duties that relate to the provision of an essential service rather than all of the positions that perform duties that relate to the provision of an essential service. The new *Act* does not state that all positions that belong to the "types of positions" necessary for essential services must be "specific positions" in an ESA. The new *Act*, in the Board's view, allows for the separate determination of the "number of positions" that are ". . . necessary to provide the essential service[s] . . ." and the "specific positions" comprising that number that should be identified in an ESA. In that sense, the structure of the new *Act* once more is consistent with a model that assumes that essential services are to be determined within the context of a strike situation. The legislator has contemplated a situation where the workforce is reduced — to some negotiated or Board-ordered "number of positions" and/or list of "specific positions" that can be less than the universe of positions of the type found to perform duties that relate to the provision of an essential service — to give real meaning to the right to strike but not to the point where the employer is constrained from delivering necessary essential services.

[161] The Board believes that the intent of the legislator is thus clear. The Board finds that the appropriate initial question to pose in framing an ESA is, "What services are necessary for public safety or security in the event of a strike?"

[162] In their submissions, both parties referred the Board to parliamentary debates or committee proceedings for further guidance about the intent of the new *Act*. While the Board is cognizant that it may be appropriate in some cases to refer to such sources for assistance, it does not believe that it is necessary to do so in this decision. The language of the new *Act*, in the Board's view, does not exhibit the type of imprecision or ambiguity that might create a pressing need to look elsewhere for guidance. Even were it necessary to canvass other sources, the Board does not find that the sources cited by the parties provide significant additional insight. To be sure, the relevance or reliability of two of the sources is questionable. In *Reference re Firearms Act (Can.)*, 2000 SCC 31, the Court states (para 17) that evidence from parliamentary debates and proceedings may be used to assist in the interpretation of a statute provided that the evidence is relevant and reliable and that it is not given undue weight. First, Ms. Robillard's speech of February 14, 2003, in the House of Commons, quoted by the employer, is cast in general terms and does not address specific provisions of the essential services section of the legislation. The relevance of her comments to the interpretative issues discussed in this

decision is thus debatable. Second, the submission to the parliamentary committee of Public Service Alliance of Canada President Turmel, cited by the employer, provides a bargaining agent's perspective, but that perspective certainly cannot be used as a reliable indication of the intent of the government. That leaves Mr. LeFrançois' remarks to the standing committee, mentioned by both parties. They include a statement that the Board must determine essential services where the parties fail to agree, but the Board believes that its right to do so is apparent from the legislative scheme itself, as will be indicated later in this decision.

[163] The Board also believes that case law from other jurisdictions is of limited assistance in interpreting the essential services provisions of the new *Act*. The scheme for essential services in the new *Act* appears to be unique compared to the provisions of other federal and provincial statutes brought to the Board's attention. The new *Act* shares some features found in other labour laws but contains elements that are significantly different. The *Canada Labour Code*, for example, uses different wording — "an immediate or serious danger to the safety or health of the public" — to define essential services. The CIRB also determines services that must be maintained during a strike with the explicit authority to decide the level at which services are performed. Those differences are substantial and suggest that case decisions under the *Canada Labour Code* may not readily inform determinations that the Board is required to make under the new *Act*. Similarly significant distinctions can be drawn between the new *Act* and most provincial public sector labour laws.

[164] The Board nevertheless does wish to note the situation in New Brunswick, discussed at some length by the bargaining agent. In its 2006 decision in *CUPE*, the New Brunswick Court of Appeal considered the significance of the legislator's decision to replace provisions for the designation of employees in the provincial public service labour relations statute, modelled directly on the former *Act* at the federal level, with a new framework that focuses on whether a position is required to provide an essential service. At issue was a finding of the NBLEB that school custodians provided an essential service and were thus precluded from participating in a lawful strike. The New Brunswick Court of Appeal found that the NBLEB's determination was patently unreasonable. In addition to two other grounds for reversing the NBLEB's decision, the court did not agree that the NBLEB could interpret the essential services provisions of the revised statute as if the *CATCA* decision continued to apply. The New Brunswick Court of Appeal wrote as follows:

. . .

> ***21*** *My final ground for holding that the Board's decision fails to withstand the review standard of patent unreasonableness rests on an understanding that the Board's approach is inconsistent or incompatible with the purpose underscoring s. 43.1 of the* Act. *I say this because the assumption that schools will remain open in the event of a strike is simply a reversion to the type of reasoning that the Federal Court of Appeal adopted in* CATCA. *In effect, the Board is approaching the issue by asking a broad question rather than the narrow one mandated by s. 43.1. The broad question is as follows: Are custodians required to perform duties that may impact on the health of the public? If that is the proper question, the answer is obvious and the Board's decision must stand. But if we reformulate the question, so as to narrow its ambit, the answer is neither immediate nor self-evident. The narrow question is: What is the ultimate impact on the public interest if the employer is no longer able to provide the service which the custodians offer? In short, the narrow question forces the Board to examine the ultimate effect which a withdrawal of services would have on the public interest as it relates to the matter of health, safety or security.*
>
> ***22*** *It is apparent to me that the Board has never addressed the essential services issue in terms of it being an interpretative problem. If it did it would have to ask whether s. 43.1 of the* Act *was adopted for the purpose of reversing the analytical approach advocated in* CATCA. *In my view, that was the intention of the Legislature. Note that s. 43.1 speaks in terms of the Board identifying the services to be provided by members of the bargaining unit that at "any particular time are or will be necessary in the interest of the health, safety or security of the public." In my view, the quoted phrase requires the Board to approach the designation issue in terms of the ultimate impact a strike would have on the public interest as defined in the* Act. *In other words, the Board must, at the very least, pose the narrow question. Otherwise, the right of school employees to strike may well become illusory. . . .*

. . .

[165] The Board finds apposite elements in the analysis in *CUPE*, although recognizing that the provisions of the amended New Brunswick statute reviewed in *CUPE* differ from the new *Act* in some respects. The employer, for example, points out that the New Brunswick employers covered by that law have the right to lock out employees. Whether or not that difference is significant — a questionable proposition in this Board's view — the point remains that the provincial legislature amended the law to

replace the designations approach modeled after the former *Act* with a focus on essential services. The New Brunswick Court of Appeal found that that amendment purposefully changed the regime. Most saliently, it was convinced that the shift to a requirement to determine essential services carried with it a requirement to focus on how a withdrawal of services might affect public safety or security in the event of a strike. Crucially, the New Brunswick Court of Appeal came to that conclusion even though the amended law defined essential services using some of the same words that had previously led the Supreme Court of Canada in *CATCA* in a different direction. To be specific, subsection 43.1(3) of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, reads in part as follows:

. . .

> ***43.1****(3) Within seven days after the receipt by the Board of the notice referred to in subsection (1) the Board shall in consultation with the employer and the bargaining agent establish time limits within which the employer and the bargaining agent shall endeavour to reach agreement identifying*
>
> > *(*a*) the services provided by the bargaining unit that <u>at any particular time are or will be necessary</u> in the interest of the health, safety or security of the public,*
>
> . . .
>
> [Emphasis added]

[166] There is little obvious difference between the phrase ". . . at any particular time are or will be . . ." in the language of the New Brunswick law examined in *CUPE* and the phrase ". . . at any particular time or after any specified period . . ." in the former *Act* that captured the attention of the Supreme Court of Canada in *CATCA*. Clearly, the continued presence of such wording in the amended New Brunswick legislation did not deter the New Brunswick Court of Appeal from finding that the *CATCA* interpretation no longer applied when deciding essential services.

[167] The foregoing point provides some secondary support for this decision. The employer argues that the inclusion of the phrase "at any time" in the definition of an essential service in subsection 4(1) of the new *Act* signifies the intent of the legislator that the effect of the *CATCA* decision continues under the new *Act* and that determining what constitutes an essential service should <u>not</u> be made by considering

the dynamics of a strike situation. For the employer, the phrase "at any time" has exactly the same effect as the words ". . . at any particular time or after any specified period . . ." in the former *Act*.

[168] The Board accepts that the presence of the words "at any time" would otherwise appear to echo the language of the former *Act* but, on balance, respectfully disagrees with the employer about its significance. It does so in light of the New Brunswick Court of Appeal decision in *CUPE* but primarily because of the logic of the legislative scheme for determining essential services in the new *Act* itself, viewed in its entirety. As stated earlier, the Board is required to give to the specific words of a provision of the new *Act* a meaning that is consistent with the statutory framework as a whole and with its intent. Examining the essential services provisions of Division 8 of the new *Act* as a working whole, the Board finds that the words "at any time" in the definition of an "essential service" should not be given the interpretation that the employer urges. As the analysis immediately preceding has shown, key determinations under the new *Act* about the content of an ESA — perhaps most importantly, identifying the number of positions and the specific positions that perform safety or security duties — must be made taking into consideration circumstances that prevail or could prevail "during a strike," not in the "normal" course of affairs. Many of the specific provisions of the new *Act*, in the Board's view, reveal the legislator's intent that an ESA serve the unique purpose of creating the conditions under which employees may exercise their right to strike without jeopardizing the capacity of the employer to protect public safety and security during a strike. In contradistinction, the employer's interpretation of the words "at any time" takes us to a different scenario rooted in a legislative scheme that no longer exists. It would require the Board to define essential services without factoring in the dynamics of a strike situation.

[169] In the Board's view, such an approach is inconsistent with the intent of the new *Act*. The legislator changed the basic substance of the statute rather than amend what previously existed. Parliament configured the new *Act* around the construct of an ESA that, in the Board's opinion, is meaningful only in the context of a strike. The Board believes then that the words "at any time" in the definition of "essential services" must be interpreted in that context. Given the essential purpose of an ESA, the Board must analyze the nature of essential services as they pertain to the possibility of a strike situation. For consistency, it must read the words "at any time" as referring to "at any time" that an ESA may have effect; that is, at any time during a strike.

[170] The Board believes that the employer has tacitly accepted that approach elsewhere in its submissions in this case. In its written outline of its arguments, the employer refers to the positions that it has identified as performing safety or security duties ". . . as a reasonable critical mass in the context of Pukaskwa National Park. [emphasis added]" The employer has also stipulated that it is not "business as usual" in the event of a strike. The notion of a "critical mass" of positions performing safety or security duties outside the context of "business as usual" connotes an approach that has purposely examined what might occur in a strike situation and identified essential services and the positions required to perform those services accordingly. To be sure, the detailed evidence given by Ms. Heron, the Pukaskwa Park manager, bore no indication that she construed her task as identifying all positions in the bargaining unit that have safety or security duties "at any time" in the normal course of affairs. Had that been the case, it can readily be inferred from her evidence that other additional positions could or should have been identified. To cite only one example, none of the three fire crew positions (Exhibit E-9) are "specific positions" proposed by the employer despite Ms. Heron's testimony that those positions are normally involved in addressing the fire risk at Pukaskwa. The only position identified is the supervising Resource Conservation Specialist (position no. 4676, Exhibit E-5, tab F). During a strike, according to Ms. Heron, the incumbent of that position can perform the required fire monitoring and response coordination duties, calling as necessary on other Parks Canada resources or, for fires in the designated "cooperation zone," on provincial government resources under the terms of an agreement with the Ontario Ministry of Natural Resources (Exhibit E-8, tab 4).

[171] This conclusion is also supported by the application of another rule of statutory interpretation: "where the same word is used on multiple occasions in a statute, one is to give the same meaning to that word throughout the statute": *Francis v. Baker*, [1999] 3 S.C.R. 250. Also see *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, and *Driedger on the Construction of Statutes* (3rd ed. 1994), at 163. The Supreme Court of Canada articulated the rule slightly differently, but with the same effect, in *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at 400: ". . . unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an *Act*. . . ."

[172] The phrase "at any time" appears in the definition of "essential service" (s. 4), and also appears in section 120 of the *Act*. Section 120 sets out the employer's right to

determine the level at which an essential service is to be provided "at any time". The determination of the level of an essential service only arises in the context of a strike. It is clear that section 120 is only applied by the employer when it puts its mind to what level of service is required during a strike, and therefore clear that the phrase "at any time" in that section is to be interpreted as "at any time" in the event of a strike. Subsection 123(4) the *Act* states that the Board's order may not require the employer to change the level at which an essential service is to be provided "at any time, including the extent to which and frequency with which the service is to be provided." It is clear from the context of this provision that "at any time" means "at any time" in the event of a strike because the Board's order only applies in the context of a potential strike situation. Therefore, in order to consistently interpret the phrase "at any time" in the *Act*, it must be interpreted as "at any time" in the event of a strike. There is nothing in the context of the provisions that would indicate that a different interpretation for the same phrase was intended. If Parliament had intended different interpretations for the same phrase, it would have clearly stated so in the definition section of the *Act*.

[173] If, contrary to the finding in this decision, the Board were required to interpret the new *Act* in accordance with the *CATCA* decision, it would have to decide which services are essential in the normal course of affairs. That said, the Board would nevertheless be bound to make other determinations about the content of an ESA respecting specific provisions of the new *Act*, such as paragraphs 123(5) and (6). Those provisions, as discussed earlier, direct the Board's attention squarely to the dynamics of a strike situation. Moreover, given the way that the *Act* frames and treats other content elements of an ESA (the "number of positions" that perform essential services and the "specific positions" comprising that number), the Board could still identify a subset of the positions in a bargaining unit that perform safety or security duties for inclusion in an ESA rather than all the positions that are of the "type of positions" that perform safety or security duties.

[174] The Board concludes that, in light of the substantive changes in the new *Act* taken as a whole and what those changes reveal of the legislator's intent, the principal question that must be posed in addressing an application under subsection 123(1) is, "What services are necessary for public safety or security in the event of a strike?"

B. <u>What has not changed under the new *Act*?</u>

[175] Although the new *Act* departs significantly from the former *Act* in its approach to the maintenance of safety and security duties during a strike and in the authorities given to the Board to address disputes regarding that issue, not everything has changed.

[176] First and foremost, "safety or security of the public" remains the key concept at the heart of the new *Act*. If anything, the new *Act*, through its preamble, has provided more explicit direction that the "protection of the public interest" is the paramount object of the law. Given that preamble and the definition of an "essential service" in subsection 4(1), it is clear that the paramount public interest to be protected in an ESA is the public's safety and security.

[177] To the extent that decisions of the former Board interpreted the same concept of "safety or security of the public", those decisions may continue to serve as relevant jurisprudence for this Board as it considers applications under subsection 123(1) of the new *Act*. Among the subjects from previous decisions whose treatment by the former Board should remain of interest are the definition of who constitutes the "public" and the scope and meaning given to the terms "safety" and "security."

[178] The Board also believes that issues related to the burden and standard of proof in determining essential services do not substantially differ from the situation under the former *Act*, with one specific exception. With respect to the general approach that should apply, the bargaining agent argues that the employer must lead ". . . convincing and specific evidence demonstrating the important safety and security role of the services it provides." In its submissions, the employer takes a somewhat different tack, as follows:

. . .

> *25. The nature of the inquiry before the Board is not adversarial. The Board has been called upon to determine matters relating to the "safety and security of the public" therefore notions of burdens and standards of proof will not aid the inquiry. . . .*

. . .

> *27. The Employer accepts that in this case the initial onus on the Employer is to demonstrate to the Board that the positions that have been identified for inclusion in an ESA perform duties that are "necessary for the safety and security of the public or a segment of it". It is submitted that given the legislative framework and in particular subsection 123(7) of the* PSLRA*, and the established jurisprudential principles, the standard of proof ought to be a deferential one.*
>
> *28. Once the Employer has met this initial onus, the burden must then shift to the Bargaining Agent, who is, in effect, asserting that the identified positions are not "necessary for the safety and security of the public or a segment of it" to demonstrate why these positions are not essential.*
>
> . . .

[179] The Board accepts that an application under subsection 123(1) of the new *Act* launches a process that in some respects resembles a fact-finding inquiry more than a classic adversarial proceeding. The Board's primary role is not to decide which adversary is right but rather to determine an outcome in the public interest. The context and the legislative framework require that the Board's inquiry proceed cautiously in two respects. First, as indicated in the jurisprudence of the former Board, reinforced by the preamble to the new *Act*, the Board should err on the side of caution in protecting the safety and security interests of the public; see, for example, *Canada (Treasury Board) v. Public Service Alliance of Canada, (Radio Operation Group – Technical category)*. Second, through a different lens, the Board should take care that it not deprive employees of the right to strike (nor, by doing so, undermine the bargaining agent's ability to conduct effective collective bargaining) unless it is satisfied that the evidence before it establishes a sound basis for declaring a service essential or for determining other matters that may be included in an ESA.

[180] Balancing the need for caution in both respects, the Board takes the view that the principal burden of proof under the new *Act* continues to rest with the employer, as it did in the past when the employer proposed to designate positions under the former *Act*. The employer must place evidence before the Board to convince it that there is a reasonable and sufficient basis for finding, for example, that a service is essential, that a certain "type of position" performs that service or that a certain "number of positions" belong to that type.

[181] The Board does not agree that the burden of proof at some point shifts formally to the bargaining agent, as suggested by the employer, nor that the Board should adopt a "deferential" standard of proof in assessing the employer's position, as the employer also urges. To be sure, the Board may take a deferential posture in determining the content of an ESA, but the appropriate form of deference — in light of the preamble of the new *Act* — is to the public interest rather than to the employer. Moreover, showing deference to the public interest is certainly not the same as placing a reverse legal burden on the bargaining agent to disprove what the employer proposes.

[182] Subsection 123(7) of the new *Act* expresses a specific and exceptional rule concerning the burden of proof that the Board must observe. It reads as follows:

> ***123.*** *(7) If the application relates to a specific position to be identified in the essential services agreement, the employer's proposal in respect of the position is to prevail, unless the position is determined by the Board not to be of the type necessary for the employer to provide essential services.*

Subsection 123(7) requires that the Board accept the employer's proposal to include specific positions in an ESA unless the Board finds that those positions do not belong to the type of positions that provide an essential service. In any particular application, it will be up to the Board to examine the weight of the evidence presented by both parties — or the absence of specific evidence — to determine whether there is any basis for departing from the presumption in favour of the employer's proposal expressed in subsection 123(7). If no such basis exists, the employer's proposal to identify specific positions will be accepted. The bargaining agent characterizes the effect of subsection 123(7) as establishing a reverse burden of proof. However, the Board notes that the plain wording of the provision does not say so, unlike other provisions elsewhere in the *Act* where the onus is specifically reversed; see, for example, subsection 191(3).

C. <u>The analytical path</u>

[183] Once a party has filed an application under subsection 123(1) of the new *Act* within the stipulated time limits, and the Board is satisfied, under subsection 123(2), that the parties ". . . have made every reasonable effort to enter into an essential services agreement," the Board's mandate under subsection 123(3) is to determine ". . . any matter that the employer and bargaining agent have not agreed on that may be included in an essential services agreement and make an order . . . ."

[184] The scope and type of issues to be determined by the Board will depend on the nature of the unresolved matters identified by the parties. The determinations required of the Board may well involve different levels of analysis, from the more general to the very detailed. In some applications, the primary identification of essential services may be in question. In other applications, the definition of essential services might be agreed upon but, for example, the identification of the specific positions performing those services may be in dispute. Many different types of disputes can be expected to come before the Board.

[185] In the context of this first essential services decision under the new *Act*, the Board ventures to outline a general analytical path to guide determination of ESA matters based on the intent and architecture of the statute.

[186] The first-order issue for any ESA is the identification of essential services. While subsection 4(1) of the new *Act* does not explicitly mention that issue as forming part of the content of an ESA, the content that is mentioned in subsection 4(1) cannot be determined in the absence of identified essential services. As indicated previously, the elements of content for an ESA listed in the new *Act* are the following:

> . . .
>
> *(a) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;*
>
> *(b) the number of those positions that are necessary for that purpose; and*
>
> *(c) the specific positions that are necessary for that purpose.*
>
> . . .

To decide the "type of positions," the "number of those positions" and the "specific positions" that are necessary to provide essential services, there must be a prior determination made of what comprises the essential services performed by employees in a bargaining unit.

[187] Under subsection 123(3) of the new *Act*, it is the Board's role to decide which services are essential when the parties have not agreed on that matter. The Board's authority to do so is inherent to the exercise of its powers under subsection 123(3). Significantly, when the legislator intended to grant to the employer the authority to

make a determination, as opposed to the Board, it did so clearly and explicitly, for example, in section 120 and, in a qualified fashion, in subsection 123(7). The absence of any provision stating that it is the employer's duty to determine the services that are essential thus reinforces the conclusion that the responsibility belongs statutorily to the Board. (As noted earlier, Mr. LeFrançois' comments also support the point.)

[188] The parties in this case do not dispute the Board's authority to determine essential services. The bargaining agent's application explicitly requests that the Board make such a determination, although it states its request in the negative (i.e., that the Board rule that the provision of support for recreational services is not an essential service). In the written outline of its argument, the employer for its part asks the Board to issue an order ". . . declaring that the public safety prevention, monitoring and intervention activities . . . are necessary for the safety and security of the public . . . ."

[189] Once essential services are determined, the next matter to be decided under the legislative framework is the "level of service." Section 120 of the new *Act* grants the employer exclusive authority to determine "level of service." The Board clearly can have no role in that determination.

[190] Section 120 of the new *Act* provides only a limited indication of the meaning of the term "level of service." According to that provision, it ". . . includ[es] the extent to which and the frequency with which the service is to be provided." What else might be included in "level of service" may well be driven by the context of a case. The Board is concerned, however, to recognize and safeguard the distinction made in the new *Act* between "essential service" and "level of service" and between the different decision-making authorities that apply to each. The employer's determination of "level of service" should not serve as a surrogate for, or otherwise dictate, the first-order decision about essential services, whether made bilaterally by the parties in ESA negotiations or by the Board pursuant to an application under subsection 123(1) of the new *Act*.

[191] The framework of the new *Act* suggests a logical order for determining the remaining elements of content for an ESA. With the "essential services" and "level of services" decided, the analysis turns in order to the "type of positions," the "number of those positions" and the "specific positions" that are necessary to provide essential services at the determined level of service. It may be that an ESA will not, and need not, explicitly deal with all three elements. At minimum, the "specific positions" that are

necessary to provide essential services must be identified to give effect to the ESA. Depending on the case, the parties or the Board may be able to turn directly to that element without explicitly making prior decisions about the type and number of required essential service positions. More likely, where the dispute on the surface appears to focus only on determining "specific positions," the positions taken by the parties on that matter will reveal implicit assumptions or tacit agreements about the "type of positions" and the "number of those positions." Should the matter of "specific positions" be before the Board, the Board may need to "unpack" those assumptions and tacit agreements and, as necessary, issue orders based on its own determinations.

D. Pukaskwa findings

[192] The two applications before the Board leave all the elements of an ESA for Pukaskwa in dispute, other than the identification of one specific position. Following the analytical path outlined above, the first determination to be made by the Board is what essential services, if any, operate in the factual context of Pukaskwa.

1. What essential services operate at Pukaskwa?

[193] The bargaining agent asks the Board to find that the provision of support for recreational services does not constitute an essential service at Pukaskwa. The employer asks for a declaration that the public safety prevention, monitoring and intervention activities in place at Pukaskwa are essential services.

[194] The difference in the positions taken by the parties reflects a basic disagreement over what should occur at Pukaskwa in the event of a strike. The bargaining agent contends that the employer can close Pukaskwa during a work stoppage. In determining essential services, therefore, the Board should assume the park's closure. The employer states that it has no authority to close the park. Moreover, it argues that the public will continue to access Pukaskwa despite any steps to restrict entry and despite any strike action. The Board must decide essential services accordingly.

[195] The principal onus at the initial stage in this case lies with the employer. It must demonstrate a reasonable and sufficient basis in evidence for its proposal concerning the essential services that should be maintained at Pukaskwa. The Board notes that the employer has not proposed that the provision of support for recreational activities is an essential service at Pukaskwa. To the contrary, the employer contends that the fact

that positions at Pukaskwa support recreational activities for the public is irrelevant to its application. In at least a technical sense, therefore, the Board does not need to find whether support for recreational services is essential. That proposition has not been placed before the Board by the employer nor does the employer have an onus to disprove the bargaining agent's contention that support for recreational services is not essential. In its decision, the Board's task is to declare the services that it finds to be essential, not those services that are non-essential. Logically, the "non-essential" elements of work are those that are not specifically identified in an ESA.

[196] That said, the Board recognizes that members of the public are primarily in the park for recreational purposes, whatever the situation. By proposing a "critical mass" of specific positions for inclusion in an ESA, the employer has recognized that Pukaskwa will operate at a reduced level of services in the event of a strike. Presumably, some or many of the duties that will not be performed during a strike under the employer's proposal are indeed "non-essential" recreational services. It may nonetheless be the case that any services that are maintained will still, in some general sense, support recreational activities because they are linked to the presence of the public in the park — a presence predicated for the most part on recreational usage. The issue is definitional. What are "recreational services?" If "recreational services" are broadly defined, the employer's proposal can probably be said to include elements supporting public recreation. If more narrowly defined, there is reason to suggest that the employer largely accepts that business as usual — the business of supporting recreation — will not continue during a strike to any substantial extent, a position not altogether dissimilar to what the bargaining agent proposes.

[197] The bargaining agent argues in effect that the requirement to identify essential services can be largely eliminated if the park is closed. It contends that the employer has the authority to do so. On the latter point, the Board concurs. If, as the authorities cited by the employer disclose, a park superintendent may "[t]emporarily close or restrict visitor access to areas of a park when, in his opinion, it is too hazardous for use by visitors" (Exhibit E-1, tab 3), it follows that a park superintendent may close all areas of the park if he or she deems the circumstances too potentially hazardous to permit public access during a strike. Moreover, the Board notes that the *National Parks General Regulations* (SOR/78-213) do appear to contemplate the possibility of a park closure. Section 7 reads as follows:

> *RESTRICTED AND PROHIBITED ACTIVITIES, USES AND TRAVEL*
>
> ***7.*** *(1) The superintendent may, where it is necessary for the proper management of the Park to do so, designate certain activities, uses or entry and travel in areas in a Park as restricted or prohibited.*
>
> *(2) Notice of a restriction or prohibition referred to in subsection (1) shall be posted by the superintendent at park warden offices and information bureaus in the Park or at entrances to the Park.*
>
> *(3) A notice posted in accordance with subsection (2) shall include*
>
> *(*a*) a description of the activity or use to which the restriction or prohibition applies;*
>
> *(*b*) the extent of restriction, where an activity or use is being restricted;*
>
> *(*c*) a description of the area to which the restriction or prohibition of entry or travel in that area applies; and*
>
> *(*d*) a map of the area in which the restriction or prohibition, applies, where that area is not the total area of the Park.*
>
> *(4) No person shall engage in an activity or use or enter and travel in an area that has been designated as restricted or prohibited pursuant to subsection (1) otherwise than in accordance with the terms and conditions prescribed in a permit issued under subsection (5).*
>
> . . .
>
> [Emphasis added]

[198] It is not within the Board's authority, however, to order the closure of Pukaskwa in the event of a strike. The employer may choose to close Pukaskwa as part of the exercise of its exclusive authority under section 120 of the new *Act* to determine the level at which essential services will be performed. The Board may not abrogate that authority.

[199] Even were the employer to formally close Pukaskwa during a strike, the evidence provided by Ms. Heron, essentially uncontradicted, is sufficient to establish that the public can still enter the park through backcountry roads, along the lengthy coast or

perhaps through the main entrance itself during the hours that it is unmanned. The issue of a right of access to the park by virtue of aboriginal treaty is also salient. At the very least, no evidence was placed before the Board that the employer could lawfully interfere with the presence in the park of those First Nations' members to whom treaty rights apply, even if the park is formally closed to the rest of the public. As a practical matter, the Board is thus satisfied that it must determine essential services for Pukaskwa bearing in mind the possibility that members of the public will be in the park during a strike, regardless of how reduced in numbers. It was not disputed that Parks Canada employees who are in Pukaskwa during a strike must also be considered to form part of the "public". The staff component present in the park can be expected to consist of employees excluded from the bargaining unit, employees in the bargaining unit in specific positions identified as essential (such as the agreed position no. 9927, Park Warden II) and other employees in the bargaining unit who do not participate in strike action for whatever reason (e.g., a partial strike of park personnel).

[200] For the same reason that the Board may not order the closure of the park during a strike, the Board also cannot accede to the employer's request that the Board declare that the employer is not required to cease its operations during a work stoppage. Here again, how the employer exercises its authority regarding level of service under section 120 of the new *Act* is not for the Board to stipulate once the Board determines the essential services that must be maintained.

[201] Based upon a strike scenario where some members of the public are nonetheless in Pukaskwa, what are the risks to public safety that must reasonably be considered by the Board in deciding the essential services that must be performed? Much of the relevant evidence specific to Pukaskwa placed before the Board by the only on-site witness, Ms. Heron, also stands uncontradicted. The bargaining agent did not so much dispute the types of public safety risks that Ms. Heron described or that the documents portraying safety risks at Pukaskwa disclosed as it argued that those risks either disappear or do not require identification of more than the single Park Warden II position agreed by the parties if the park is closed.

[202] The employer describes the relevant essential services as follows: ". . . the public safety prevention, monitoring and intervention activities in place at Pukaskwa . . . ." The Board finds that description too general to be practically useful for inclusion in the ESA and broader than what the specific evidence before the Board justifies. As

depicted in documents such as Parks Canada Bulletin 4.4.3, *Public Safety Management* (Exhibit E-1, tab 3), and Management Directive 3.1.3, *Public Safety Measures for National Historic Sites and Historic Canals* (Exhibit E-1, tab 4), there are a significant number of activities that can plausibly be included under the rubric of "prevention, monitoring and intervention," but not all will necessarily operate in each park or in the same way. The evidence specific to Pukaskwa adduced by the employer suggests that it is more appropriate to state essential services with greater precision. In doing so, the Board must err on the side of caution so that the public interest is adequately protected. At the same time, it must also define essential services with a sufficient degree of precision to facilitate the eventual identification of specific essential positions. Precision also serves the goal of reducing the possibility that an essential service too broadly defined may result in the unnecessary removal of the right to strike from other employees.

[203] The Board finds that there is reasonable evidence specific to Pukaskwa sufficient to justify addressing four types of risks to public safety in determining essential services: the risk associated with forest fires; the risk that a member of the public in the park or in the waters off the park will become lost, will sustain a serious injury, will encounter a dangerous bear or will otherwise require urgent assistance or rescue; the risk of contamination of the water supply; and the risk associated with animal-human conflicts.

[204] With respect to the fire risk, the evidence indicates that Parks Canada may use resources other than those identified in an ESA for fighting a fire at Pukaskwa but that it does need at minimum to maintain a capacity to monitor fire risks in the park and to coordinate a response to any fire that is detected.

[205] Given the continuing possibility that members of the public will be present in Pukaskwa during a strike or transiting in the waters immediately offshore, Parks Canada must be in a position to react to the contingency of individuals sustaining an injury, becoming lost, encountering a dangerous bear or finding themselves otherwise in need of urgent assistance or rescue. Pukaskwa thus requires the capacity to coordinate an urgent intervention and to carry out that intervention on a timely basis. An appropriate intervention in response to a specific incident may necessitate the use of equipment requiring special skills or specialized knowledge about effective search and rescue procedures. In particular, the Pukaskwa evidence establishes that the

capacity to pilot a park vessel to conduct a water-borne rescue, and to maintain that vessel, are required skills that must be available on a contingent basis.

[206] The evidence established that there are two water treatment facilities on site at Pukaskwa. At minimum, maintaining a safe water supply for members of staff who are on site during a strike or for other members of the public who may use that supply is an essential service.

[207] In the Board's view, an additional risk associated with bear-human conflict at Pukaskwa is the possibility that bears will be drawn to locations frequently used by the public if garbage is not properly handled at those locations. The risk is both the immediate contingency of a dangerous bear-human encounter as well as the possibility that a bear may become habituated to entering sites frequently used by the public in search of food, thus creating future risks.

[208] On the foregoing basis, the Board finds that the following essential services apply at Pukaskwa:

- monitoring forest fire hazards for the purpose of identifying situations that require a response, and coordinating that response;
- coordinating and implementing search and rescue efforts where a member of the public in the park or in the waters proximate to the park becomes lost, sustains an injury, encounters a dangerous bear or requires other urgent assistance;
- piloting and maintaining the search and rescue vessel;
- ensuring the integrity of the water supply in the park's public facilities; and
- ensuring the proper handling and storage of garbage to reduce the risk of dangerous animal-human conflicts.

[209] The Board wishes to note that, in determining the essential services at Pukaskwa during a strike, it gave no weight to the evidence adduced by the employer concerning the previous conduct of strike activity affecting the Rideau Canal or any other Parks Canada site. In its view, such evidence is not probative for the determinations that the Board must make in these applications.

2. Level of service and other determinations

[210] Under section 120 of the new *Act*, it is the employer's responsibility to determine the level at which the essential services described above will be delivered to the public during a strike. Determining the "level of service" is the next step in the analytical path that the Board has described for deciding the content of an ESA.

[211] The employer has submitted that "business as usual" will not continue at Pukaskwa during a strike. It represents its proposal as providing a "critical mass" of positions necessary to deliver essential services to the public in the event of a strike. Those comments, taken together with Ms. Heron's testimony on the reasons she identified specific positions for the ESA, might reasonably allow the Board to infer the employer's position on the level of essential services at Pukaskwa.

[212] The Board nonetheless takes the view that it should not normally attempt to infer the "level of service" from the employer's evidence or from its submissions. The risk in doing so is to misconstrue the employer's intentions and thus potentially infringe on its exclusive rights under section 120 of the *Act*. The logic of the *Act* instead suggests that the employer should itself directly and explicitly determine the required "level of service." Here, we encounter an obvious dilemma. The employer cannot do so without knowing how essential services are finally and authoritatively defined. If, as in this case, the parties have not agreed on the definition of essential services, the Board's determination prevails. Until the employer knows the Board's decision, it is not in an unconditional position to exercise the authority given to it under section 120. Following the analytical path outlined earlier, the other determinations necessary for establishing the full content of the ESA — the "type of positions," the "number of those positions" and the "specific positions" that are necessary to provide essential services at the determined level of service — require that the level of service be known, or not be at issue.

[213] A two-stage intervention by the Board may thus be required in some, or many, cases. At the first stage, the Board defines essential services if the parties cannot agree. The employer then determines the level at which those services will be delivered based on the Board's decision. At the second stage, the Board's attention turns to any unresolved matters concerning the "types of positions," the "number of those positions" and the "specific positions" to be identified in the ESA, all in light of the Board's definition of essential services and of the employer's determination of the

"level of service." It is conceivable that the two stages may be combined in some proceedings where, for example, the Board's determination of what is an essential service is the same as the employer's submissions.

[214] In these proceedings, the Board has concluded that a two-stage process is appropriate. The Board finds that it should suspend further consideration of the applications before it to provide the employer the opportunity to determine and explicitly state the required level of service based on the Board's definition of essential services at Pukaskwa. The employer's determination of "level of service" should be consistent with the application that it filed with the Board. The parties then should reopen negotiations to determine whether they can agree on the "types of positions," the "number of those positions" and the "specific positions" to be identified in the ESA, given the Board's definition of essential services and the employer's determination of the "level of service." If the negotiations do not succeed in establishing the remaining content of the ESA for Pukaskwa — or if the remaining content of the ESA for Pukaskwa is agreed but some matters remain unresolved for the rest of the bargaining unit — the Board will reconvene to receive further evidence and submissions as required.

[215] During the course of the proceedings, the Board asked the parties for their submissions on the impact of the framework agreement (Exhibit E-5, tab I-4) that governed the process for determining an ESA. After reviewing the agreement and the submissions, the Board has concluded that the agreement relates solely to the process the parties have agreed to follow and does not have any relevance for the Board's determinations.

[216] In its submissions, the employer raised the issue of the liability of the employer in the event of property loss or damage during a strike (referring to the *CSL* decision). In the absence of any evidence relating to loss of property or damage to property, the Board declines to make any findings on this issue.

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

(The Order appears on the next page)

VI. Order

[218] The Board declares that the following essential services apply at Pukaskwa and are deemed to form part of the ESA:

- monitoring forest fire hazards for the purpose of identifying situations that require a response, and coordinating that response;
- co-ordinating and implementing search and rescue efforts where a member of the public in the park or in the waters proximate to the park becomes lost, sustains an injury, encounters a dangerous bear or requires other urgent assistance;
- piloting and maintaining the search and rescue vessel;
- ensuring the integrity of the water supply in the park's public facilities; and
- ensuring the proper handling and storage of garbage to reduce the risk of dangerous animal-human conflicts.

[219] The Board directs the employer to determine the level at which the foregoing essential services will be delivered to the public in the event of a strike and to so inform the bargaining agent within 30 days of the date on which this decision is issued.

[220] The Board further directs the parties to resume negotiations and to make every reasonable effort to negotiate the remaining content of the ESA for Pukaskwa and the content of the ESA for the rest of the bargaining unit.

[221] The Board will remain seized of all other matters that may be included in the ESA should any issues remain in dispute following direct negotiations.

November 24, 2008.

Ian R. Mackenzie,
Vice-Chairperson

Dan Butler,
Board Member

John Mooney,
Board Member