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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Marie-Josée Bédard, adjudicator

For the Bargaining Agent: Andrew Raven, counsel

For the Employer: Harvey Newman, counsel

Heard at Ottawa, Ontario,
September 2, 2008.

I. Policy grievance referred to adjudication

[1] This decision addresses an objection raised by the employer to the jurisdiction of an adjudicator to hear a policy grievance referred to adjudication by the Public Service Alliance of Canada ("the bargaining agent") under subsection 220(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"). Subsection 220(1) reads as follow:

> ***220.*** *(1) If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.*

[2] The grievance filed August 31, 2007, challenges an accommodation policy introduced by the Canada Border Services Agency (CBSA) in the course of the arming strategy for its border services officers. The grievance alleges that the policy breaches the non-discrimination clause of the collective agreement. The grievance reads as follows:

> *1. The bargaining agent grieves that the CBSA Accommodation Strategy for Arming and Control and Defence Tactics ("the Policy"), implemented effective July 27, 2007, is, on its face, unreasonable, arbitrary and discriminates against employees contrary to Article 19 of the PA (FB) collective agreement. This includes, but it is not limited to, the following aspect of the Policy:*
>
> *a) the Policy states that Control and Defence Tactics (CDT) and successful completion of its arming program are mandatory and are essential in order to fulfill the functions of a Border Service Officer. However, the employer has not established these as a bona fide occupational requirement of the position. Accordingly, the PSAC states that the CBSA may not apply the Policy unless and until it has first established that its CDT and arming programs meet the legal standard of being reasonably necessary and in doing so, explicitly consider other less restrictive alternatives to the policy;*
>
> *b) the Policy states that the duty to accommodate requires the employer to consider opportunities elsewhere within the CBSA. Where no such opportunities are identified, the employee will be terminated. The employer's characterization of its*

obligations to accommodate as limited to the CBSA is arbitrary and, on its face, will lead to discriminatory treatment of employees requiring accommodation;

c) the Policy states that the timeframe for implementation of this strategy will be eighteen months. This contradicts previous CBSA statements that the transition period for moving to an armed workforce will be ten years and targets persons who are, or may be, in receipt of accommodation and this inconsistency has created confusion and strife among the membership and constitutes discriminatory, arbitrary and unreasonable conduct.

2. The PSAC further grieves that the implementation of this policy has resulted in arbitrary, unreasonable and discriminatory treatment of employees contrary to Article 19 of the PA (FB) collective agreement. This includes, but is not limited, to the following aspects of the Policy:

a) the statement that CDT and arming programs are required for Border Service Officers has resulted in confusion among the membership and problematic and discriminatory treatment of members by managers;

b) those aspects of the Policy that apply to employees who are currently being accommodated, or may in the future need to be accommodated, are discriminatory in that the Policy fails to take into account individual circumstances;

c) without having established the CDT and arming programs as bona fide occupational requirements, the Policy directly and expressly discriminates against individual employees by applying this standard to those who have sought, or will seek, accommodation, but are not applying this same standard to other employees.

3. The PSAC respectfully requests that the Board:

a) Declare that the Policy is discriminatory, arbitrary and unreasonable;

b) Order that the Policy be rescinded;

c) Direct the CBSA to demonstrate that the CDT and arming programs constitute a bona fide occupational requirement of the Border Service Officer position;

d) Declare that the Treasury Board, as the employer, has a duty to accommodate to the point of undue

hardship that extends beyond the authority of the Department, CBSA;

e) Order the Treasury Board and the CBSA to comply with Article 19 of the collective agreement and, in so doing, address any and all of the institutional and individual impacts of its discriminatory, arbitrary or unreasonable conduct; and

f) Such other relief as the PSAC may request and the Board may allow.

[3] Clause 19.01 of the collective agreement reads as follows:

> ***19.01*** *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted.*

[4] On November 20, 2007, the bargaining agent filed a notice with the Canadian Human Rights Commission in which it stated that all the prohibited grounds of discrimination provided in the *Canadian Human Rights Act* (*CHRA*), were involved. On March 28, 2008, the Canadian Human Rights Commission informed the Board that it would participate if a hearing was held on the merits of the grievance.

[5] In a letter sent to the Public Service Labour Relations Board ("the Board"), the employer articulated its objection to the jurisdiction of an adjudicator as follows:

. . .

> *It is the Employer's position that the above-noted policy grievance does not meet the definition of policy grievance in section 220(1) as it relates to the CDT Strategy which does not form part of the collective agreement and which applies only to Border Services Officers and not to the whole PM bargaining unit (copy attached). Therefore, the CDT Strategy is not a grievable matter and as a consequence, cannot be referred to adjudication. In addition, although the policy grievance is characterized as a violation of article 19 (no discrimination) of the collective agreement, in fact it is challenging the CDT Strategy which is not a grievable matter and therefore is not adjudicable.*

. . .

II. Summary of the evidence

[6] The bargaining agent filed 10 exhibits on consent and did not call any witnesses. The employer called one witness, Calvin Christiansen, Director, Arming Division, Operations Branch, CBSA, who is responsible for the implementation of the arming initiative and related strategies.

[7] In order to provide background information, counsel for the bargaining agent referred on consent to *Treasury Board (Canada Border Services Agency) v. Public Service Alliance of Canada,* 2007 PSLRB 22, in which the Board created a new bargaining unit for the Border Services (FB) and modified the Program and Administrative Services (PA) bargaining unit to exclude positions that were allocated to the FB bargaining unit. In that decision, the Board also certified the Public Service Alliance of Canada as bargaining agent for the FB bargaining unit and declared that the PA collective agreement continued to be in force for employees in the FB group. This collective agreement still applies today to the employees of the FB group.

[8] There is no real dispute with respect to the relevant facts that led to the filing of the grievance.

[9] The arming initiative of border services officers was launched in 2006. Different groups of employees will be armed. Among them are the border services officers who work at land and marine ports of entry, regional intelligence officers, criminal investigators, and inland enforcement officers. It was also established that other groups of employees are not expected to be armed, such as border services officers assigned to postal operations and airports. When the initiative is fully implemented, approximately 4450 employees in the bargaining unit will be armed. Although the parties could not agree on the exact number of employees in the bargaining unit who will be affected by the arming initiative, they agreed that between 56 and 71 percent of the employees will be armed and are likely to be affected by the policy at issue.

[10] Within the arming strategy, the employer introduced the *Arming and Control and Defense Tactics (CDT) and Arming Programs*. The firearm training program, which includes the *CDT* training, consists of a three-week course that employees must successfully complete before they can be assigned to an armed position. They must also maintain proficiency throughout the duration of their assignment to an armed position.

[11] The employer has adopted a phase-in approach and intends to implement the arming initiative over a period of 10 years. Up to now, the arming of current border services officers has been done on a voluntary basis, and 500 officers have successfully completed the firearms training program and have been deployed to different locations.

[12] In July 2007, the employer introduced the contested policy: *Accommodation Strategy Relating to Arming and Control and Defence Tactics (CDT)* ("the policy"). The policy addresses accommodating employees who are unable to undergo or successfully complete the firearm training program.

[13] In the policy, the employer states that the *CDT and Arming Programs* are mandatory, but acknowledges the inability of some employees to undertake the training for reasons related to prohibited grounds of discrimination. The employer also recognizes that those employees must be accommodated.

[14] The policy states how the employer perceives the scope of its duty to accommodate:

> . . .
>
> ***The Duty to Accommodate***
>
> . . .
>
> *By law, the CBSA is obliged to make every reasonable effort, short of undue hardship, to accommodate an employee who legitimately falls into one or more of the above categories. This means that, where an accommodation is warranted, it is the Agency's obligation to accommodate the impacted employee, short of undue hardship, in a position or grouping of duties that are commensurate with the employee's current duties. Where duties at an equivalent level are not identified, the Agency is obliged to consider positions or duties that are classified at a lower level. It should be noted that in cases where lower level duties are identified, the accommodated employee is not entitled to salary protection.*
>
> *The CBSA must first consider opportunities for accommodation at the employee's present workplace. If no opportunity is identified, there is an obligation to consider opportunities elsewhere in the CBSA beginning with ports or offices within the District or geographical area where the affected employee is assigned. If an opportunity is identified,*

> *an offer must be made. If no opportunities are identified, or if the employee refuses the alternative offer, the employee will be terminated for non-disciplinary reasons, as they do not meet the conditions of employment and they cannot be accommodated up to the point of undue hardship.*

. . .

[15] The objective of the policy is set out as follows:

> *The objective of the CDT/Arming accommodations strategy is to:*
>
> *1) lay out a framework and set of criteria to guide regional management in determining which duties or grouping of duties are appropriate for employees needing accommodation;*
>
> *2) identify a framework for decision-making that will be followed by management in all accommodation cases;*
>
> *3) determine a course of action that will be taken to review and validate those accommodation situations that currently exist with respect to the CDT program;*

. . .

III. Summary of the arguments

A. For the employer

[16] Counsel for the employer argued that the issue raised in the grievance is not an appropriate matter for a policy grievance filed under subsection 220(1) of the *Act*.

[17] Counsel for the employer outlined that the legislator introduced the policy grievance with the adoption of the *Act*, which came into effect on April 1, 2005. Under the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*"), the concept of a policy grievance did not exist, although a party could make a "referral" to the Board under section 99 of the former *Act* when seeking the enforcement of an obligation arising out of a collective agreement where the obligation could not be enforced through an individual grievance. According to the employer, the policy grievance is designed to be restrictive, and individual grievances should remain the general rule. A policy grievance should be viewed as an exception within the statutory regime provided in the *Act* and should be limited in its scope.

[18] Counsel for the employer submitted that the grievance filed by the bargaining agent does not meet the conditions set out in subsection 220(1) of the *Act*, since the

issue raised does not relate to a collective agreement dispute and does not relate to the bargaining unit generally.

[19] With respect to the first condition, counsel for the employer argued that subsection 220(1) of the *Act* confines a policy grievance to collective agreement issues. The matter at issue has to be ". . . in respect of the interpretation or application of the collective agreement . . . ." If a policy has not been incorporated in the collective agreement, it does not form part of the collective agreement and is therefore not subject to adjudication under subsection 220(1) of the *Act*. Since the policy challenged in this case has not been incorporated in the collective agreement, it cannot be challenged through a policy grievance.

[20] In support of his argument, counsel for the employer referred to Rootham, *Labour and Employment Law in the Federal Public Service* (2007), at 305:

. . .

> . . . *Since many public sector collective agreements incorporate Treasury Board policies (especially the* Terms and Conditions of Employment Policy*), policy grievances could be brought as the result of the interpretation of those Treasury Board policies incorporated into collective agreements. . . .*

. . .

[21] Counsel for the employer also submitted that the legislator did not intend that the introduction of the policy grievance open the door for every policy adopted by an employer to become subject to adjudication, or that the policy grievance become a vehicle challenging every policy under article 19 of the collective agreement on a generic basis, without factual context. Such a liberal interpretation would result in a proliferation of litigation and would have serious implications for human resources management.

[22] Counsel for the employer added that the application of the policy could eventually give rise to individual grievances being filed by employees alleging that they have been adversely impacted by the policy, although the actual impact of the accommodation policy on individuals is speculative at this point.

[23] With respect to the second condition set by subsection 220(1) of the *Act*, counsel for the employer argued that the expression "'the bargaining unit generally" means the whole bargaining unit, and not a portion of it, even if it is a large portion. The language used by the legislator clearly indicates that the matter at issue must affect all of the employees in the bargaining unit and not just a portion of the employees. A policy grievance is intended to be limited to challenging policies that apply to virtually all of the employees in the bargaining unit, although counsel for the employer conceded that there could be material exceptions. Matters affecting a portion of the employees in the bargaining unit must be raised through either an individual or group grievance.

[24] Counsel for the employer submitted that in the present case a significant number of employees will not be subject to the arming initiative and are therefore not likely to be affected by the policy at issue. Consequently, the matter raised in the grievance cannot be said to relate to the "bargaining unit generally," and is therefore not subject to a policy grievance.

[25] To support his proposition, counsel for the employer again referred to Rootham, at 304:

. . .

> *The real question for adjudicators will be what constitutes a matter that "relates to either of them or to the bargaining unit generally." In the private sector, there is a fairly broad discretion for unions to bring policy grievances. . . .*
>
> *However, the use of the term "the bargaining unit generally" may be interpreted to limit the scope of policy grievances so that only matters that affect the entire bargaining unit may be the subject of a policy grievance. Also, section 232 of the* PSLRA *explicitly limits an adjudicator's remedial jurisdiction in policy grievances. Where the matter could have been the subject of an individual or group grievance, the adjudicator may only grant declaratory relief and may not grant damages or other individual relief as in the private sector. This may incline the Board to take a more limited view of what constitutes a proper policy grievance.*
>
> *In* Canadian Broadcasting Corp. and National Association of Broadcast Employees and Technicians*, the*

arbitration panel set out the four general classifications of grievances:

> *a) individual employee grievances where the subject-matter of the grievance is personal to the employee;*
>
> *b) group grievances where a number of employees with individual grievances join together in filing their grievances. This type of grievance is really an accumulation of individual grievances;*
>
> *c) union or policy grievances where the subject-matter of the grievance is of general interest and where individual employees may or not be affected at the time that the grievance is filed;*
>
> *d) there is a hybrid type of grievance which is a combination of the policy grievance and the individual grievance. In this type of situation, although one individual may be affected, he may be affected in a way that is of concern to all members of the bargaining unit. Thus, the individual case may grieve on the basis of how he is particularly affected while the union may also grieve citing the individual as an example of how certain conduct may affect the members of the bargaining unit generally.*

The use of "all members of the bargaining unit" as interchangeable with "members of the bargaining unit generally" in the fourth example may support the proposition that a policy grievance under the new PSLRA *must affect the entire bargaining unit, and not just some portion thereof. However, it is also clear that the impact on bargaining unit members could be speculative or predicated on some future event — meaning that the entire bargaining unit need not have suffered actual harm yet. . . .*

. . .

[26] Counsel for the employer also referred to the definition of the word "general" as found in *The Shorter Oxford English Dictionary* (1978): "pertaining to all, or most, of the parts of a whole; completely or approximately universal within implied limits . . . Concerned with the whole . . . Not specifically limited in application; applicable to a whole class of objects, cases, or occasions." The word "generally" for its part is defined as follows: "so as to include all; as a whole, collectively . . . Universally; with respect to all or nearly all." *Le Nouveau Petit Robert* (2002), defines "*général*" as follows: "*Qui s'applique, se réfère à un ensemble de cas ou d'individus . . . Qui s'applique à l'ensemble*

ou à la majorité des cas ou des individus d'une classe . . . Qui s'intéresse, réunit sans exception tous les individus, tous les éléments d'un ensemble." Counsel for the employer stated that these definitions imply the idea of the totality of a group and not a portion of a group. The same idea must be retained in the context of subsection 220(1) of the *Act.*

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

[27] Counsel for the bargaining agent argued that this matter was appropriately filed as a policy grievance under subsection 220(1) of the *Act.*

[28] The bargaining agent does not agree with the employer's proposition that only policies incorporated into the collective agreement are subject to adjudication. Counsel for the bargaining agent submitted that, although the employer is entitled to adopt and implement policies, that power must always be exercised in a manner consistent with the collective agreement. Any policy introduced by the employer, whether incorporated into the collective agreement or not, is subject to adjudication if it allegedly violates a provision of the collective agreement.

[29] When a grievance alleges that the employer's policy violates a provision of the collective agreement on its face, that grievance may be filed as a policy grievance under subsection 220(1) of the *Act*. In this case, the bargaining agent alleges that by introducing and implementing the policy at issue, the employer violated article 19 of the collective agreement. Counsel for the bargaining agent argued that nothing supports a more restrictive application of article 19 or suggests that it does not provide a substantive right on a stand-alone basis. To the contrary, article 19, which reflects the *CHRA*, clearly provides substantive rights that have a quasi-constitutional status. On that matter, counsel for the bargaining agent referred to *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42. He submitted that not permitting a bargaining agent to file a policy grievance against a policy that is allegedly discriminatory would offend human rights principles. He also referred to *Barr and Flannery v. Treasury Board (Department of National Defence),* 2006 PSLRB 85, where the adjudicator retained jurisdiction with respect to grievances challenging the employer's policy solely under the non-discrimination provision of the applicable collective agreement.

[30] Moreover, the *Act*, as opposed to the former *Act*, expressly gives the Board jurisdiction to hear matters relating to human rights and empowers it to interpret and apply the *CHRA.*

[31] Counsel for the bargaining agent argued that a restrictive interpretation of subsection 220(1) of the *Act*, limiting the employers' policies that can be challenged to those policies incorporated in the collective agreement, would be contrary to the intent and purpose of the *Act*. This argument was articulated as follows in the "Outline of Legal Submissions" that counsel for the bargaining agent provided to me in support of his oral arguments:

. . .

> *14. Were the employer's restrictive interpretation of policy grievances under subsection 220(1) adopted, employers could insulate any violation of a collective agreement from adjudication merely by implementing policies outside the collective agreement. This cannot be consistent with the purpose or intent of the* PSLRA*, as such an interpretation would permit the employer to violate terms and conditions it has negotiated with the bargaining agent merely by introducing a new policy subsequent to negotiation of the collective agreement.*
>
> *15. PSAC submits that, in the context of labour relations, justice would be ill-served if management could simply hide behind its authority to implement policies in order to bypass a full assessment of the compliance of its actions with the collective agreement, as provided for under the* PSLRA*. Such a conclusion would be untenable and would run entirely contrary to the purpose and intent of the* PSLRA *in general, and of subsection 220(1) in particular.*

. . .

[32] Counsel for the bargaining agent submitted that the *Act* clearly contemplates the possibility for a bargaining agent to challenge a policy by filing a policy grievance when the bargaining agent alleges that the policy per se violates the collective agreement and contemplates the possibility for employees to challenge the impact of the application of the policy through an individual or a group grievance. Section 232 of the *Act* clearly provides for specific and different remedies when the two recourses coexist with respect to the same matter.

[33] With respect to the employer's second argument, counsel for the bargaining agent submitted that, since the grievance alleges that the policy violates article 19 of the collective agreement, which is a provision of the collective agreement that applies to the entire bargaining unit, the dispute relates to the bargaining unit generally. He insisted that it is the policy itself that is at stake, and that, at this point, individual circumstances are secondary.

[34] Counsel for the bargaining agent also submitted that the employer's proposition, which is that unless a subject matter affects every employee in the bargaining unit it cannot give rise to a policy grievance, is unreasonable and is much too restrictive to serve the purpose of policy grievances. The expression "the bargaining unit generally" must be interpreted in a manner consistent with labour relations principles, with the jurisprudence and with the intent and purpose of the *Act.* Should the employer's interpretation be adopted, it would almost eliminate the possibility for a bargaining agent to file a policy grievance.

[35] With respect to the broad labour relations jurisprudence, counsel for the bargaining agent referred to Brown and Beatty, *Canadian Labour Arbitration,* 4th ed., at para 2:3124:

. . .

> *A policy grievance is usually considered to be one that does not depend upon the behaviour of an individual employee, or one that does not affect a specific individual. As indicated, policy grievances have been described as union or policy grievances where the subject-matter of the grievance is of general interest and where individual employees may or may not be affected at the time that the grievance is filed.*

. . .

[Emphasis added]

[36] Counsel for the bargaining agent submitted that there is no indication in the jurisprudence that the matter at issue must affect every member of the bargaining unit. He referred specifically to the following cases: *International Union of Electrical Workers, Local 549, v. Sylvana Electric (Canada) Ltd.* (1972), 24 L.A.C. 361; *St. Joseph's Hospital v. SEIU, Local 204* (1997), 65 L.A.C. (4th) 160; and *Governing Council of University of Toronto v. CUPE, Local 3902-Unit 3* (2006), 150 L.A.C. (4th) 409. Relying on

that jurisprudence, counsel for the bargaining agent articulated the following argument in his "Outline of Legal Submissions":

. . .

> *30. In each of these cases, it is clear that policy grievances are regarded as a mean to address matters of concern to the bargaining unit generally, in the sense that they raise issues that may affect any number of individual bargaining unit members, or the bargaining unit as a whole. Given the foregoing jurisprudence, it is PSAC's submission that "the bargaining unit generally" should be interpreted to mean the bargaining unit* broadly*, though not necessarily* comprehensively*. In the present case, PSAC submits that the issue of whether the Strategy is discriminatory constitutes a matter overriding interest to the union concerning the interpretation and application of a specific provision of the collective agreement, namely Article 19, as it may broadly affect members of the FB bargaining unit.*

. . .

[37] Counsel for the bargaining agent argued that the expression "the bargaining unit generally" should be interpreted in a manner consistent with the principles of statutory interpretation and with the purpose and intent of statutory labour relations regimes, which support the proposed interpretation of "the bargaining unit generally" as referring to the bargaining unit <u>broadly</u>. In this instance, the policy will apply to a majority of the employees in the bargaining unit.

[38] Counsel for the bargaining agent referred to section 232 of the *Act*, which clearly contemplates the possibility of a policy grievance being filed in situations concerning only certain individuals within the bargaining unit. In light of the presumption of coherence in statutory interpretation, it would then be absurd to interpret "the bargaining unit generally" noted in subsection 220(1) leading to the requirement that the policy grievance concerns all the members of the bargaining unit.

[39] Counsel for the bargaining agent also referred to other sections of the *Act* in which the legislator refers specifically to portions of or the totality of the members in the bargaining unit by using the terminology "the employees in a bargaining unit," "a majority of the employees in a bargaining unit" or "all of the employees in the bargaining unit," rather than using the broader expression "the bargaining unit generally." If the legislator intended policy grievances to be limited to matters affecting

all of the employees in the bargaining unit, the legislator would have stated it as clearly as in other provisions of the *Act*. Subsection 220(1) of the *Act* does not state "all of the employees in the bargaining unit," and was drafted to include a large scope of policy grievances as means of resolving disputes between employers and bargaining agents.

[40] Counsel for the bargaining agent also relied on the French version of subsection 220(1) of the *Act*, which states "*l'unité de négociation de façon générale*," which, according to the *Collins-Robert French-English/English-French Dictionary*, 6th ed. (2002), "*façon*" meaning "way" or "manner" and "*générale*" meaning "generally speaking" or "as a general rule." These definitions are consistent with "the bargaining unit generally" in the English version interpreting to mean "broadly" or "in a general sense" rather than "the bargaining unit comprehensively."

[41] Counsel for the bargaining agent contended that the bargaining agent's role as a "watchdog" of the integrity of the collective agreement gives it a personal interest when a policy on its face contradicts the collective agreement. Therefore, such a matter should be considered as relating to "the bargaining unit" within the meaning of subsection 220(1) of the *Act*.

[42] In conclusion, counsel for the bargaining agent proposed that subsection 220(1) of the *Act* should be viewed "as providing a mechanism for addressing on a principle level matters of broad concern to the members of the bargaining unit." The possibility of seeking a declaratory ruling and avoiding the filing of individual grievances is in both parties' interests, and is consistent with the *Act* and with labour relations principles.

C. Employer's rebuttal

[43] Counsel for the employer submitted that I should be very cautious when considering private sector jurisprudence since, dispute resolution regimes in the private sector are different from the public service statutory regime. He also distinguished the jurisprudence referred to by counsel for the bargaining agent from the case at hand as relying on the language of the respective collective agreements, which is different than the language used by the legislator in subsection 220(1) of the *Act*.

[44] Counsel for the employer insisted that the adoption of a broad interpretation allowing every policy not incorporated into the collective agreement to be subject to adjudication would lead to a proliferation of litigation, would have grave impacts on human resources practices and would restrict the employer from issuing guidelines and policies.

IV. Reasons

[45] This case raises the question of whether the bargaining agent can rely on subsection 220(1) of the *Act* to challenge a policy introduced by the employer that will affect a large portion of the employees in the bargaining unit, on the basis that the policy is inconsistent with a provision of the collective agreement.

[46] For the reasons detailed below, I conclude that the matter at issue was properly presented in accordance with subsection 220(1) of the *Act*, and that I have jurisdiction to consider the merits of the grievance pursuant to section 221 of the *Act*.

[47] The concept of "policy grievance," along with the concept of "group grievance," was introduced by the *Act,* which came into effect on April 1, 2005.

[48] The introduction of two new types of grievances in addition to the individual grievances raises the questions of how the legislator intended the new grievances' structure to operate and the intended scope of each type of grievance, including, more specifically, the policy grievance.

[49] Subsection 220(1) of the *Act* reads as follows:

> ***220.****(1) If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of <u>the interpretation or application of the collective agreement</u> or arbitral award as it <u>relates to either of them or to the bargaining unit generally</u>.*
>
> [Emphasis added]

[50] The French version reads as follows:

> ***220.****(1) Si l'employeur et l'agent négociateur sont liés par une convention collective ou une décision arbitrale, l'un peut présenter a l'autre un grief de principe portant sur <u>l'interprétation ou l'application d'une disposition de la</u>*

> *convention collective ou de la décision relativement a l'un ou l'autre ou a l'unité de négociation de façon générale.*
>
> [Emphasis added]

[51] I do not agree with the employer's proposition that subsection 220(1) or any other provision of the *Act* suggests that policy grievances should be used as an exception. Individual grievances are likely to be more frequent than policy grievances by reason of their respective natures. However, in my view, the formulation of the *Act* in general and the language of the provisions pertaining to the three types of grievances do not suggest any hierarchy or level of importance among the different types of grievances. Moreover, section 232 of the *Act* clearly contemplates the possibility of there being a policy grievance and an individual grievance on the same matter, with the remedies being specific for each type of grievance. However, the legislator imposed specific conditions that must be satisfied for each type of grievance.

[52] A policy grievance filed under subsection 220(1) of the *Act* must satisfy the following conditions:

- it must relate to the interpretation or application of the collective agreement or arbitral award; and
- the issue must relate either to the bargaining agent or to the employer, or to the bargaining unit generally.

[53] With respect to the first condition, I conclude that the issue in the present case relates to the interpretation or application of a provision of the collective agreement, namely article 19. I do not agree with the employer's proposition that a policy is not subject to adjudication if it is not incorporated into the collective agreement.

[54] Within its general right to manage, the employer is empowered to adopt and implement policies unilaterally. However, the discretion of the employer's action is limited by the provisions of the collective agreement. The compliance of employer policies with the collective agreement has generally been viewed as being adjudicable. Brown and Beatty, at para 4:1520, addresses the subject as follows:

. . .

> *Even where such rules do not form part of the agreement, it is now generally conceded that in the absence of specific language to the contrary in the collective agreement, the*

making of such rules lies within the prerogative or initiative of management, and arbitrators have held this to be so whether or not an express management's rights clause exists reserving the right of management to direct the workforce. However, this rule-making power is neither absolute nor without limitation. Rather, as summarized in KVP Co.*, a number of principles relating to this power have now become universally accepted among arbitrators. These principles provided that:*

I — Characteristics of Such Rule

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. *it must not be inconsistent with the collective agreement.*

2. *it must not be unreasonable.*

. . .

Reformulated, these criteria may be said to require that any plant rules which are unilaterally promulgated must not be inconsistent with the terms of the collective agreement, their enforcement not be unreasonable, and they must be brought to the attention of those intended to be regulated by them.

. . .

With respect to the first requirement, arbitrators have uniformly held that a unilaterally promulgated rule must not violate an express provision in the collective agreement, unless overridden by legislation. . . And to determine whether the rule infringes upon subject-matters occupied by a provision of the collective agreement, the arbitrator must compare the rule with the terms of the collective agreement. . . .

. . .

[55] Every policy adopted by an employer, whether incorporated into the collective agreement or not, is subject to adjudication if the dispute relating to the policy concerns its compliance or consistency with the collective agreement. In my view, this is precisely what section 220 of the *Act* contemplates.

[56] In this case, the bargaining agent alleges that the policy introduced by the employer violates the non-discrimination clause (article 19) of the collective agreement. This is clearly a matter ". . . in respect of the interpretation or application

of the collective agreement . . . ," and the grievance, therefore, meets the first condition of subsection 220(1) of the *Act*. I do not see how and why article 19 could not be viewed as a stand-alone clause, given that human rights matters clearly involve substantive rights. Clause 19.01 reflects the provisions of the *CHRA* by setting out prohibited grounds of discrimination and other employer actions. Moreover, paragraph 226(1)g) of the *Act* empowers an adjudicator to interpret and apply the *CHRA*, and subsection 220(2) clearly contemplates the possibility for a policy grievance to be filed with respect to matters raising human rights issues. In *Parry Sound (District) Social Services Administration Board*, the Supreme Court of Canada reaffirmed the substantive character of human rights and clearly stated that the employer's management rights were limited by human rights provisions in the collective agreement and in the legislation, and were subject to adjudication. Although the Supreme Court was interpreting the Ontario human rights legislation, the principles outlined by the Court are relevant to interpret article 19 of the collective agreement:

. . .

> *23 . . . Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the* Human Rights Code *and other employment-related statutes. . . . .*

. . .

> *28 . . . [T]his means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. . . .*

. . .

> *51 . . . Recognizing the authority of arbitrators to enforce an employee's statutory rights substantially advances the dual objectives of: (i) ensuring peace in industrial relations; and (ii) protecting employees from the misuse of managerial power.*

. . .

[57] I now come to the second statutory condition set out in subsection 220(1) of the *Act* and conclude, for the reasons that follow, that the matter at issue relates to the "bargaining unit generally" and therefore meets the condition.

[58] In my view, the phrase ". . . as it relates to . . . the bargaining unit generally," should be interpreted as referring to matters that are of a general interest to the community that forms the bargaining unit, without requiring that every employee in the bargaining unit be affected by the policy. When the issue concerns the content of a policy, as opposed to a situation where an employee or a group of employees feel aggrieved by the application of a policy in respect of him or them in a given set of circumstances, the issue is of a general interest to the community that forms the bargaining unit, and should be considered to be related to the "bargaining unit generally."

[59] I consider this interpretation consistent with the purpose and intent of the *Act*, with the specific language used by the legislator in subsection 220(1), and with labour relations principles and jurisprudence.

[60] The preamble of the *Act* is helpful to understanding the purpose and object of the *Act*. As dictated by section 13 of the *Interpretation Act*: "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object."

[61] The preamble of the *Act* states:

. . .

> *Recognizing that*
>
> . . .
>
> *the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;*
>
> *the Government of Canada recognizes that public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;*
>
> *commitment from the employer and bargaining agents to mutual respect and harmonious labour-management*

> *relations is essential to a productive and effective public service;*

. . .

[62] The provisions of the *Act,* and specifically subsection 220(1), should be interpreted in light of the commitments, principles and objectives outlined in the preamble.

[63] With the enactment of Part 2 of the *Act*, Parliament established three types of grievances, which constitute a comprehensive code for bringing up labour relations rights disputes between the employer, bargaining agents and employees, in particular those arising out of the interpretation or application of a collective agreement or arbitral award. It can be inferred from the enactment of two new types of grievances, the group and the policy grievance, that it was apparently Parliament's intention to replace the existing redress provisions through which the resolution of workplace disputes could be addressed and adjudicated, by more practical (group) and timely (policy) vehicles for the enforcement of rights arising under the collective agreement. I believe that, in light of the preamble to the *Act*, those provisions should be interpreted liberally, in a manner consistent with section 12 of the *Interpretation Act*, which reads as follows:

> ***12****. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*

[64] An accessible adjudication system for disputes that arise from the collective agreement or an arbitral award is important to ensure respectful and sound labour-management relations, and is consistent with an ". . . . efficient resolution of matters arising in respect of terms and conditions of employment . . ." within a context of ". . . mutual respect and harmonious labour-management relations . . ." Those principles suggest a liberal interpretation of the scope of a policy grievance and of the expression "the bargaining unit generally." In *Parry Sound (District) Social Services Administration Board*, at para 50, the Supreme Court of Canada reiterated the importance of an efficient disputes resolution system: ". . . As this Court has repeatedly recognized, the prompt, final and binding resolution of workplace disputes is of fundamental importance, both to the parties and to society as a whole. . . ."

[65] When a policy or another employer's action is challenged on the basis that it contravenes a provision of the collective agreement on its face, it is in the interest of all parties that the matter be resolved promptly, on a principle basis. In that regard, the French designation of "grief de principe" is revealing of the objective of this provision. It is also interesting to note that section 221 of the *Act* provides that a policy grievance may be referred directly to adjudication, whereas individual and group grievances may be referred to adjudication only after they have been presented up to and including the final level in the grievance process. Moreover, I do not believe it would be efficient or fair for employees to have to be adversely impacted by a policy before it could be subject to adjudication. Section 232 of the *Act* clearly implies that the legislator intended that a policy could be challenged on a principle basis through a policy grievance with suitable remedial authority given to the adjudicator, without the parties having to wait for the individual impacts arising from the application of the policy. This procedure can also avoid a multiplicity of proceedings and favours an early consideration and adjudication of the alleged violation of the collective agreement resulting from management actions which affect its employees broadly.

[66] A liberal interpretation of the expression ". . . as it relates to . . . the bargaining unit generally" — meaning matters that are of a general interest to the community that forms the bargaining unit — is also consistent with the language used in the *Act*. Had the legislator intended that policy grievances be limited to policies or situations affecting all of the employees in the bargaining unit, the legislator would have stated it clearly by using language such as "relates to all of the employees in the bargaining unit" or "to the bargaining unit in totality" or "to the entirety of the bargaining unit." The use by the legislator of a more general language supports a less restrictive scope for policy grievances than suggested by the employer.

[67] Limiting the possibility of challenging a policy through a policy grievance to policies or situations that apply to all of the employees in a bargaining unit would seriously limit the usefulness of this dispute-resolution vehicle, especially when we consider the large scope of several bargaining units in the federal public sector, which Parliament is presumed to have been aware of, and would, in my view, undermine the objectives of the *Act.*

[68] My understanding of the purpose of a policy grievance is to provide a forum through which issues relating to the application and interpretation of provisions of the

collective agreement or an arbitral award are resolved on a principle basis. As I stated earlier, this is reinforced by section 232 of the *Act* which provides the adjudicator with declaratory powers and the ability to issue a compliance order, but no mention is made of individual redress. In such a context, I do not see the relevance of distinguishing between those policies affecting all of the employees in the bargaining unit and those affecting only a portion of the employees in the bargaining unit: the number of employees potentially affected is irrelevant to the determination of whether the employer is in principle in breach of the collective agreement. I cannot think of any policy reason why Parliament would have required that every employee included in a bargaining unit necessarily had to be affected by an employer action before a policy grievance could be presented.

[69] The interpretation that I propose for the phrase ". . . [that the matter] relates to the bargaining unit generally" is also more consistent with the French version of subsection 220(1) of the *Act*, which refers to ". . . [matters that relate] *à l'unité de négociation de façon générale*." The legislator did not state that the matter had to relate to "*toute l'unité de négociation*" or to "*tous les fonctionnaires au sein de l'unité de négociation."* Clearly, what is intended here is that the matter must relate to an alleged violation of the collective agreement in principle, as opposed to a situation involving an aggrieved employee seeking specific corrective action by way of an individual (or group) grievance.

[70] That interpretation is also consistent with the state of the jurisprudence with respect to policy grievances. On that matter, I rely on the extract from Brown and Beatty referred to by counsel for the bargaining agent, and on the authors, Blouin and Morin of *Droit de l'arbitrage de grief*, 5th ed. (2000), who, at page 169, offer a useful definition of policy grievance, which they refer to as a union grievance:

> [Translation]
>
> . . .
>
> ***III.43*** *– A grievance by a union, in its capacity as a representative, relates to matters that affect the interests of the community of employees included in the bargaining unit. Thus, a grievance about compliance with procedures regarding position posting, promotions or transfers or the establishment of an employer policy on a working condition, to name only a few examples, can be filed as a union grievance. Such initiatives are based on the union's duty as a*

> *signatory and administrator of the collective agreement to ensure the full application of each provision of that agreement for the benefit of the collective interest. . . .*
>
> . . .
>
> [Emphasis added]

[71] The employer relied on the decision in *Canadian Broadcasting Corp.* I believe that it is important to keep in mind that the issue in that case was different from the one in this case and that the question of whether a policy grievance could be filed with respect to a policy affecting only a portion of the employees in the bargaining unit was not at issue. The policy at issue in *Canadian Broadcasting Corp.* clearly applied to all of the employees in the bargaining unit, and the only issue to be determined was whether the policy could be challenged through a policy grievance rather than through individual grievances. I believe that the terminology used by the arbitrator in defining and distinguishing the individual and group grievances from the policy or hybrid type of grievances and more specifically the use of "all members of the bargaining unit" as interchangeable with "members of the bargaining unit generally" must be viewed in light of the context of the grievance at issue. The situation in that case did not require any nuance with respect to the definition of a "policy grievance", since the question relating to the policy affecting a portion of employees of the bargaining unit as opposed to the totality of the employees in the bargaining unit was not at issue. Therefore I do not believe that the reference by the arbitrator to the expression "that is of concern to all members of the bargaining unit" can be read to provide support to a proposition requiring that in all circumstances, a policy grievance should be limited to subject-matters that concern all the employees in the bargaining unit.

[72] My interpretation of subsection 220(1) of the *Act* leads me to conclude that I have jurisdiction to consider the merits of this case.

[73] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[74] The employer's objection to my jurisdiction is dismissed.

[75] The parties will be contacted by the Board's Registry to schedule a continuation of the hearing on the merits of this policy grievance.

October 16, 2008.

Marie-Josée Bédard,
adjudicator