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File: 561-02-360

Citation: 2009 PSLRB 102

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Complainant

and

TREASURY BOARD

Respondent

Indexed as
Professional Institute of the Public Service of Canada v. Treasury Board

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, Vice-Chairperson

For the Complainant: Isabelle Roy, counsel

For the Respondent: Stephan Bertrand, counsel

Heard at Ottawa, Ontario,
May 26 and 27, 2009.

I. Complaint before the Board

[1] The Professional Institute of the Public Service of Canada ("PIPSC" or "the bargaining agent") filed an unfair labour practices complaint alleging that the Treasury Board ("the employer") bargained in bad faith, in contravention of paragraph 190(1)(*b*) of the *Public Service Labour Relations Act* (*PSLRA*). This complaint is about the bargaining for a collective agreement for the Computer Systems (CS) group.

[2] The complaint was filed on November 25, 2008, in relation to a final offer from the employer and the events surrounding that final offer. The grounds of the complaint are as follows:

. . .

> 2. *This complaint is brought in relation to the current round of collective bargaining between the CS group and the Employer, Her Majesty in right of Canada, as represented by the Treasury Board ("the Employer" or "the Treasury Board").*
>
> 3. *On November 18, 2008, the Honourable Vic Toews, President of the Treasury Board, advised the Institute that the Employer had decided to present a final offer to unions consisting in a total salary increase of 6.8% over 4 years beginning in 2007-8, as follows: 2.3% in the first year and 1.5% in each of the subsequent years.*
>
> 4. *Prior to making this "offer" known to the bargaining agent, the President of the Treasury Board made it public in a statement to the media.*
>
> 5. *This announcement was followed by the Government declaring, in its Speech from the Throne delivered on November 19, 2008, its intention to table legislation purporting to limit wage increases in the public sector.*
>
> 6. *The "offer" in question had not been put before each individual bargaining table prior to the announcement. The Institute negotiator for the CS Group was contacted by the Treasury Board negotiator on Friday November 21, 2008, to get reaction on the "final offer" put forth by the Treasury Board. There was no openness to negotiate any further in relation to monetary demands.*
>
> 7. *The impugned "offer" comes before any meaningful bargaining between the parties on salary proposals.*

> *At the time of filing this complaint, the "offer" described in Minister Toews's letter had still not been the subject of any negotiations.*
>
> *8. The Employer has presented this "offer" with no intention of engaging in meaningful bargaining, though it is fully aware that the offer put forward is unacceptable to the bargaining agent.*
>
> *9. The Employer's "offer" constitutes bad faith bargaining and is inconsistent with the Employer's duty to "make every reasonable effort to enter into a collective agreement".*
>
> *10. The Employer is attempting to create a context of fear and panic amongst Institute members in order to pressure them into accepting conditions of employment the Employer knows are unreasonable. The Employer has, in effect, cast a chill over the bargaining process overall.*
>
> *11. The Employer's actions, in purporting to present a final offer to the employees of the core public administration, constitute bad faith bargaining and are contrary to its obligation to make every reasonable effort to enter into a collective agreement, in violation of s. 106 and thus para. 190(1)(b) of the* Public Service Labour Relations Act.

. . .

[3] In its complaint, the PIPSC sought the following corrective action:

> 1. *A declaration that the Employer has engaged in an unfair labour practice … by bargaining in bad faith.*
> 2. *An order requiring the Employer to engage in meaningful bargaining over all terms and conditions required to enter into a collective agreement, including salary increases.*
> 3. *An order requiring the Employer to publicly rescind its offer contained in the letter of November 18, 2008; and*
> 4. *Such further and other order as this Board may consider appropriate.*

[4] The parties reached a tentative collective agreement on April 8, 2009, which was ratified by the PIPSC on May 19, 2009. At the hearing, the PIPSC stated that it was seeking only a declaratory order.

[5] The parties submitted an agreed statement of facts and an agreed book of documents (Exhibit J-1). Two witnesses testified for the PIPSC, and one witness testified for the employer.

A. Preliminary objection on mootness

[6] At the commencement of the hearing, the employer raised a preliminary objection. The employer submitted that the complaint was now moot, as the parties had entered into and ratified a collective agreement. I heard the submissions of both parties and dismissed the objection at the hearing. I have summarized below the submissions of the parties and the reasons for the ruling that I gave at the hearing.

[7] The employer referred me to the following provisions of the *PSLRA*:

> ***106****. After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> *(*a*) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*
>
> *(*b*) make every reasonable effort to enter into a collective agreement.*
>
> *. . .*
>
> ***190****. (1) The Board must examine and inquire into any complaint made to it that*
>
> *. . .*
>
> *(*b*) the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith);*
>
> *. . .*
>
> ***192****. (1) If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> *. . .*

[8] Counsel for the employer submitted that in the present circumstances of a ratified collective agreement there is no need for an order from the Public Service Labour Relations Board ("the Board") since there is no order "necessary in the circumstances" (subsection 192(1) of the *PSLRA*). A declaration is not needed to meet the requirements of the duty-to-bargain section of the *PSLRA*, as an agreement has already been reached. There is no need to proceed with this complaint as a dozen other identical cases were filed by the bargaining agent, some of which will likely require guidance from the Board.

[9] Counsel for the employer referred me to the leading case on mootness: *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342. In that decision, the court established the following two-step analysis:

1) Is there a live controversy between the parties?

2) If there is no live controversy, should the tribunal exercise its discretion to hear the case?

[10] Counsel for the employer submitted that there was no live controversy and that my discretion should not be exercised to hear the matter. There will be other situations where the parties cannot reach an agreement, and the Board can then determine the issue in an adversarial context.

[11] Counsel for the employer stated that a declaration was not severable from the original complaint. The declaration requested was related to the other corrective measures in the original complaint. The purpose of a declaration is to address conduct that is preventing the parties from achieving the objectives of the *PSLRA*. Those purposes have been achieved. The purpose of an unfair labour practice complaint is not to hold one party accountable after the objectives of the statute have been achieved and the collective agreement signed. The *raison d'être* for the complaint has disappeared. It is not the objective of the unfair labour practices provisions of the *PSLRA* to embarrass or punish one party.

[12] Counsel for the PIPSC submitted that it was not possible to come to a conclusion on whether the matter was moot without delving into the merits of the complaint. She also submitted that I should focus on the particularity of the labour relations context. She referred me to *Brant Haldimand-Norfolk Catholic School Board*

(2001), 70 C.L.R.B.R. (2d) 266 (OLRB). In that decision, the Ontario Labour Relations Board (OLRB) stated that the approach in *Borowski* did not provide much guidance in the labour relations context. The OLRB held that discretion should be exercised in light of the purpose of the labour relations statute itself. In conclusion, the OLRB stated at paragraph 42 that a purely declaratory result may be appropriate: "Such declaration may clarify the parties' relationship and avoid a recurrence of work place disputes."

[13] Counsel for the bargaining agent also referred me to *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency,* 2008 PSLRB 78. In that case, a request for arbitration had been made after a bad faith complaint was filed. The Board member concluded that the role of the board was to examine the situation as it existed at the time of the complaint. If the complaint before the Board had been heard last week, the employer could not have made its objection.

[14] Counsel for the PIPSC submitted that the *Expenditure Restraint Act,* S.C. 2009, c.2, s.393, had removed a number of collective bargaining rights from the *PSLRA*. One thing not removed from the *PSLRA* was the power to determine bad faith complaints. The parties are in a long relationship that will continue. Guidance can be offered to the parties. This is not the first time that such events have happened, and it will likely not be the last. The PIPSC should not be prevented from seeking a declaration simply by virtue of the government ". . . putting a legislative gun to the union's head."

[15] In reply, counsel for the employer noted that, in the *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency* case, no agreement was in place. This was a critical distinction. There are options under the *Expenditure Restraint Act*. Bargaining agents can still exercise a right to strike. Negotiators do not pass legislation. The introduction and passage of legislation is left to Parliament. It is not the mandate of the Board to interfere with the right of Parliament to introduce legislation.

[16] At the hearing, I dismissed the objection and gave the following reasons for my ruling.

[17] This complaint relates to the events of November 2008. It is not the role of the Board to make any rulings on the legislative process. I did not understand the submissions of the PIPSC to be that I should make a ruling on the introduction of legislation.

[18] I agree that a more nuanced approach to the doctrine of mootness is required when dealing with labour relations matters, where there is usually an ongoing relationship. At this time, there is no “live” bargaining issue between the parties to the CS collective agreement. However, I found that it was appropriate to exercise my discretion in the present circumstances for the following reasons.

[19] An adversarial context does remain, as there are other almost identical complaints involving the same parties (but different bargaining units).

[20] A decision on this complaint will have some practical effect on the rights of the parties as it may provide guidance for the other complaints that are yet to be scheduled.

[21] Hearing the case is a prudent use of resources, as the parties would likely make identical submissions at some future hearing and both the Board and the parties were ready to proceed.

[22] The events at issue were of a brief duration. Being able to schedule a hearing within the period between the alleged bad faith actions and the signing of an agreement will often be difficult. Events such as the ones at issue in this complaint are always likely to happen quickly, and a failure to exercise discretion would result in very few, if any, chances to hear a complaint.

[23] A declaration, or a decision not to issue a declaration, may clarify the parties’ relationship and assist in their future interactions.

[24] Collective bargaining is a dynamic process, and settlements happen for all sorts of reasons. Generally, settlements should be encouraged because they do bring some stability to labour relations. A blanket refusal by the Board to hear disputes that arise in collective bargaining because of an intervening settlement could have the unintended consequence of a party declining to reach an agreement until the Board comes to a final determination on the dispute. That is not in the interest of good labour relations.

II. <u>Summary of the evidence</u>

[25] The parties prepared an agreed statement of facts, which reads as follows:

. . .

1. *On August 27, 2007, the Professional Institute of the Public Service of Canada ("The Institute") served its notice to bargain to the Employer.*

2. *The Treasury Board ("Employer") and the Institute exchanged proposals on or about September 13, 2007.*

3. *The parties concluded 6 rounds of negotiations, as follows:*

    a) *October23 & 24, 2007;*
    b) *November 20, 21 & 22, 2007;*
    c) *January 22, 23 & 24, 2008;*
    d) *February 19, 20 & 21, 2008;*
    e) *April 8, 9 & 10, 2008;*
    f) *June 2, 2008.*

4. *The Institute tabled its pay demands in the February round of bargaining, more particularly on February 21, 2008.*

5. *The Employer responded to the Institute pay demands in the June round of negotiations, more particularly on June 2nd, 2008.*

6. *On July 29, 2008, the Institute requested the establishment of a Public Interest Commission (PIC).*

7. *The Employer suggested that the parties proceed to mediation first and the PSLRB directed the parties to attempt mediation and placed the PIC request in abeyance. This mediation, which was scheduled for late November, never occurred.*

8. *On November 18, 2008, Carl Trottier (TBS) called Walter Belyea, Section Head, Negotiations and National Employment Relations at the Institute to forewarn him that the employer would be providing a final offer later that same day.*

9. *November 18, 2009, a final offer from the Employer was delivered to the Institute at approximately 3:00 p.m.*

10. *That same day, the Treasury Board issued a news release announcing that final offers had been tabled with bargaining agents for the core of public administration.*

11. *On November 19, 2008, the Speech from the Throne was delivered. It stated the Government's intention to table legislation "to ensure sustainable compensation growth in the federal Public Service."*

> 12. *On November 23, 2008, Walter Belyea attended at the Treasury Board offices to meet with Carl Trottier. At this meeting, Mr. Trottier discussed outstanding issues regarding all PIPSC groups and also discussed the potential coming into force of the Expenditure Restraint Act and its implications.*
>
> 13. *Between November 25, 2008 and November 27, 2008, some Institute bargaining units employed by the Treasury Board and the Employer met in an attempt to reach collective agreements. The Treasury Board representatives in attendance were Kevin Marchand and Marc Thibodeau. Institute representatives were Walter Belyea and Michel Gingras.*
>
> 14. *A representative of the CS Group sat in on the discussion for the first day, but indicated that he attended as an observer only. On the second day, he was a party to the negotiation.*
>
> 15. *The Government's Economic and Fiscal Statement was delivered by the federal Finance Minister in the House of Commons on November 27, 2008.*
>
> 16. *The Finance Minister delivered his Budget speech on January 27, 2009. Shortly thereafter, the* Budget Implementation Act *(Bill C-10) was introduced in Parliament.*
>
> 17. *The Bill received Royal Assent on March 12, 2009.*
>
> 18. *The CS Group and the Employer reached a tentative agreement on April 8, 2009, which included receiving the legislated maximum economic increases of 2.3% (2007), 1.5% (2008) and 1.5% (2009).*
>
> 19. *The agreement was ratified by the CS Group on May 19th 2009. The parties have agreed to sign the C.A. on June 17, 2009.*

[26] Walter Belyea is Section Head for Negotiations and National Representation at the PIPSC and supervises all PIPSC negotiators. His counterpart at the Treasury Board was Carl Trottier. Mr. Belyea testified that the two of them agreed to meet throughout the bargaining process to discuss broad topics, to take stock of the negotiations and to provide a "heads-up" on particular problems that could arise at the bargaining table.

[27] Michel Gingras has been a negotiator with the PIPSC since 1998. He was the spokesperson for the CS group during the relevant times and is also the spokesperson

for other PIPSC groups. Marc Thibodeau was the negotiator for the Treasury Board, and his responsibilities included the CS Group.

[28] The previous collective agreement between the parties expired on December 21, 2007. The bargaining agent developed its proposals for the next collective agreement in April or May 2007. The early bargaining sessions in 2007 (see agreed statement of facts at paragraph 25 of this decision) resolved some of what Mr. Gingras characterized as the "petty issues." The parties moved on to the "nitty gritty" issues in 2008. The PIPSC tabled its pay demand on February 21, 2008, and the employer tabled its response on June 2, 2008. Mr. Thibodeau described the negotiation sessions before June 2, 2008 as professional and not adversarial as well as being solution oriented. There were no subsequent bargaining sessions.

[29] Mr. Gingras testified that money was not a key issue in the negotiations, although it was important. He testified that this was clearly expressed to the employer. The key issues for the PIPSC included career development, job security and contracting out. Mr. Thibodeau testified that some of the employer's key objectives in the round of bargaining were a different minimum for callback pay, limitations on reimbursements for travel while on overtime and the electronic format for the collective agreement as the default form of distribution.

[30] Mr. Gingras stated that the initial pay demand from the PIPSC was a 4.7% per year increase over two years. The pay demand was based on the increase in pay for similar groups in Alberta. The employer's counter-offer of June 2, 2008 was 1.2% in each year. Mr. Gingras testified that the employer could not explain why it was proposing that increase. Mr. Thibodeau testified that he provided the employer's policy framework for salary increases (the policy is similar to the criteria established for arbitration boards under the *PSLRA*). In cross-examination, Mr. Gingras testified that, although the policy framework was provided, no explanation was given for the offer. Mr. Gingras testified that, for the PIPSC, one of the difficulties with the employer's pay position was that it was unrealistic relative to the market rate. He testified that Statistics Canada was reporting increases in salaries for professionals of 4% or more, and that the overall salary increases in Canada were in the 3% to 4% range. Mr. Thibodeau testified that the employer's proposal reflected the lowest settlement rate on the list of settlements across the country.

[31] The last bargaining session was June 2, 2008. The PIPSC requested the establishment of a Public Interest Commission (PIC) on July 29, 2008. The Board directed the parties to attempt mediation. The mediation was scheduled for late November. In cross-examination, Mr. Gingras testified that there was no reason to meet with the employer before November unless the Treasury Board's negotiator ". . . had a new story to tell." Mr. Gingras stated that he had not changed his position and that there would be no point in meeting unless the employer was prepared to change its position.

[32] On November 15, 2008, Mr. Thibodeau sent the following email to Mr. Gingras (Exhibit J-1, tab 3) asking if he and his bargaining team were interested in resuming discussions in an effort to reach a settlement:

> . . .
>
> *The reason for my email is to find out, given the dire economic conditions, you and your team would be interested in resuming discussions in an attempt to reach a settlement for the CS Group.*
>
> *I believe that we have every reason to be concerned by the Minister of Finance's recent speech on the state of the economy and its possible impact on our mandates. I've attached a link to the speech in case you haven't seen it. …*
>
> *Based on the Minister's speech, authorities of the Department of Finance are saying that, given the difficult economic period that we have now entered into, they are looking for cost containment and predictability of expenditures for the period 2007/08 to 2010/11.*
>
> *A similar message was also published on Friday in The Ottawa Citizen as well as The Globe and Mail.*
>
> *Although we have scheduled dates for the mediation later this month, there's nothing that prohibits us from having a discussion and evaluating the current situation in the best interests of the CS Group.*
>
> *I will be contacting you on Monday to discuss further. In the meantime you can always reach me by email or by phone…*

[33] Mr. Thibodeau testified that the economy was deteriorating quickly, and he was trying to resolve matters as soon as possible, in light of recent developments. Mr. Gingras characterized the email as the employer ". . . trying to cover its butt." The PIPSC received similar emails for its other bargaining units. He testified that he replied

to a similar email relating to another PIPSC group that there was "no way in hell" that the PIPSC would participate in such an exercise and that these were not free negotiations. He testified that he did not bother to reply to the email from Mr. Thibodeau on the CS Group. In cross-examination, Mr. Gingras testified that the email did not tell him that Mr. Thibodeau was going to improve his offer.

[34] Mr. Belyea testified that on the following Monday morning, November 18, 2008, he received a call from Mr. Trottier to "forewarn" him that the employer would be providing a final offer later that day (see the agreed statement of facts, at paragraph 25, item 8). The final offer (Exhibit J-1, tab 1) was delivered to Mr. Gingras at the PIPSC office by Kevin Marchand, a negotiator for the employer, at approximately 15:00. The employer's final-offer document contained proposals on the duration of the agreement, the pay rates, the dues check-off and the grievance procedure. Mr. Thibodeau testified that the objective of the final offer was to ensure the predictability of expenditures on collective agreements. He stated that, in light of the difficult economic times, the employer proposed a package that contained a few elements that were not controversial. Time was of the essence in reaching an agreement, Mr. Thibodeau testified, and in his view, the final offer conveyed that.

[35] On the same day, at approximately 16:00, the Treasury Board Secretariat issued a news release that contained a statement by the President of the Treasury Board (Exhibit J-1, tab 2). The statement set out the government's approach to public service wages ". . . in a time of fiscal restraint" as follows:

. . .

> *A responsible approach to public sector compensation is even more critical during a time of economic uncertainty and tight fiscal circumstances.*
>
> *Given the urgent need to ensure predictability in public sector wages, we are presenting final offers to the bargaining agents of the core public administration.*
>
> *These offers strike the right balance: responsible, predictable spending and fair compensation. They are fair to employees and to taxpayers.*
>
> *The final offers represent a total increase of 6.8% over 4 years as follows: 2.3% in the first year, 1.5% in year two, 1.5% in year 3 and 1.5% in year four, for four-year contracts beginning in 2007-08.*

> *My officials have made attempts with our bargaining agents to achieve a responsible outcome for public sector compensation in light of the current economic uncertainty and remain available for further discussion.*

[36] Mr. Gingras testified that the PIPSC did not have an opportunity to communicate the contents of the final offer to its members before the release of the Treasury Board President's statement. The PIPSC had a conference call with group leaders, negotiators and key union politicians to discuss next steps. The PIPSC thought that there was sufficient time and was aiming to have a meeting between its president and senior Treasury Board officials around December 8, 2008. Mr. Belyea testified that in discussions with Treasury Board officials, the president was told that there was no time for discussion.

[37] Mr. Belyea testified that the PIPSC was flooded with emails from its members. Mr. Belyea described the mood of the members as "panicked." They were saying that the PIPSC had better sign an agreement or risk getting no increase. He testified that the final offer had a chilling effect on negotiations.

[38] Mr. Gingras testified that the final offer told the PIPSC that the employer was not going to budge and that it was a case of "take this or die," referring to an expression of the conquistadors ("Believe in my god or I will kill you."). He testified that the final offer did not address the real issues at the bargaining table.

[39] On November 23, 2008, Mr. Belyea met with Mr. Trottier to discuss outstanding issues and the implications of the proposed *Expenditure Restraint Act* (see the agreed statement of facts, at paragraph 12). Mr. Belyea testified that Mr. Trottier told him that the government was contemplating legislation but that he, Mr. Trottier, did not know the contents of the proposed legislation. He told Mr. Belyea that the parties had until November 27, 2008 to reach a deal. Mr. Belyea testified that the only way that the PIPSC could meet that timeline was to have a central bargaining session. A bargaining session was scheduled for November 25 and 26, 2008, the dates that had initially been set aside for mediations.

[40] The PIPSC became aware of a deal reached between the Treasury Board and the Public Service Alliance of Canada (PSAC) on Monday, November 24, 2008. Part of the reported tentative agreement included a payment of a $4000 lump sum to approximately 70% of bargaining unit members in exchange for the withdrawal of pay

equity complaints that had been filed against the employer by the PSAC. Mr. Belyea testified that the PSAC and the Treasury Board had been "furiously" negotiating at the end of the previous week and over the weekend. The PSAC negotiator was not returning his calls. Mr. Gingras testified that the lump-sum payment was a "bribe" and that the PIPSC was ". . . not going to be treated like second-class citizens." In cross-examination, Mr. Gingras alleged that senior-level officials of the Treasury Board have subsequently admitted that the amount of the lump-sum was ". . . a rabbit pulled out of a hat" because it was not based on any data. Mr. Belyea testified that, in its initial press release, the PSAC characterized the payment as a "signing bonus." Mr. Thibodeau testified that it was explained to the PIPSC that the payment was for a settlement of pay equity complaints.

[41] On November 25 and 26, 2008, the parties met at a central table to address the collective agreements of a number of PIPSC bargaining units (see the agreed statement of facts, at paragraph 25, item 13). Two representatives from each bargaining unit were at the table. Mr. Belyea was the chief spokesperson. Mr. Gingras and another negotiator also attended.

[42] On the first day, the PIPSC tabled a proposal in response to the employer's final offer (Exhibit J-1, tab 4). The proposal accepted the employer's salary offer. It also included proposed changes to the Workforce Adjustment Directive, a dependent contractor provision, a provision for term employees, changes to the grievance procedure, an expedited adjudication provision, changes to the acting-pay provision, a change to the marriage leave provision, a harassment provision, and a proposal to integrate terminable allowances into base pay. In addition, the proposal included specific demands for particular groups.

[43] Mr. Gingras testified that the PIPSC was willing to accept the employer's wage offer ". . . because we had a gun pointing at our heads."

[44] The CS Group was not included in the proposal because it had decided not to participate. In his testimony, Mr. Gingras stated that the conclusion of the CS Group was that there was nothing in it for them. The CS Group attended as an observer on the first day of negotiations.

[45] The PIPSC tabled a revised proposal on November 26, 2008 that included the CS Group (Exhibit J-1, tab 5). The proposal accepted the employer's proposals on the

duration of the collective agreement and on salary increases. Common to all groups was a proposal for a "one-time professional allowance" of $2500 for all employees not in receipt of a terminable allowance. Mr. Gingras testified that the CS Group decided to participate on the second day to be eligible for the proposed allowance. Mr. Belyea testified that the CS Group wanted to include an additional proposal on job security, but he refused to do so because he felt that it would be bargaining in bad faith.

[46] Mr. Gingras testified that PIPSC did not put a dollar value on its non-monetary proposals. In re-examination he was asked whether there would have been any cost to the employer in implementing these proposals. He replied: "possibly yes, possibly no."

[47] Mr. Gingras testified that the Treasury Board's negotiators were surprised by the counter-offer. They took it under advisement and spoke to their principals at the Treasury Board. Their response was that they were only able to accept the proposed change to the marriage leave provision. Mr. Belyea testified that Mr. Thibodeau told him that he could not deal with the bargaining agent's other issues. Mr. Thibodeau testified that he was not expecting a proposal for an allowance and that ". . . was not in the sandbox of what was possible."

[48] Mr. Gingras testified that at the time of the final offer and the central table negotiations there was no direct knowledge about what would be contained in the impending legislation, although rumours were "flying." He testified that the PIPSC was told that the legislation would roll back any "achievements." He also testified that the employer was not willing to entertain anything other than what was in its final offer. He stated that, in collective bargaining, money is the key leverage item in reaching an agreement.

[49] Mr. Thibodeau sent an email to Mr. Belyea on November 27, 2008, asking for an update (Exhibit J-1, tab 8). The following day, Mr. Belyea responded as follows: ". . . Sharpen your pencils: without a new offer to close the gap there is no real interest." Mr. Belyea testified that the PIPSC felt that it had attempted to meet the employer's key issue, and it was expecting the employer to meet some of the PIPSC's issues.

[50] The mediation process resumed in January 2009 and led to the signing of a tentative agreement on April 8, 2009. The tentative agreement was ratified by the CS Group on May 19, 2009.

[51] Mr. Gingras testified that the PIPSC mistrusted the employer's position from "day one". He stated that the final offer was a direct attack on the union and that there was no free collective bargaining. He testified that it was impossible to get PIPSC members motivated to strike in the face of the *Expenditure Restraint Act.* Consequently signing the agreement was the only option open to the PIPSC. Mr. Belyea described the impact of the events as poisoning the relationship between the parties.

III. Summary of the arguments

A. For the bargaining agent

[52] The PIPSC submitted that this complaint is about the employer's conduct before the imposition of wage restraint legislation. In particular, the complaint relates to the manner in which the employer made its November 18, 2008 offer and the positions it took following that offer.

[53] At the central bargaining sessions, it was clear that the economic increases were not negotiable. Any starting point for a settlement had to include the stated economic increases of the employer. The employer was not willing to entertain any meaningful discussion and had no openness beyond its final offer. The employer had removed the key leverage in contract negotiations — salary. In the words of Mr. Gingras, the employer said, "[t]ake this or you die." The ability of the PIPSC to freely negotiate stopped when the final offer was delivered. Mr. Belyea testified that the final offer had a "chilling effect" on negotiations. There was no time to consult with the PIPSC bargaining teams and with members. There was no time to advise members of what was happening after the Treasury Board President's public statement had already been made. The employer did not establish that there was any urgency.

[54] The PIPSC knew and understood the key objective of the employer (predictability) and made efforts to address that key objective. The PIPSC had hoped that the employer would make efforts to address its key objectives. The final offer did not contain any of the key priorities of the CS Group.

[55] The basic principle of the duty to bargain in good faith starts with a recognition of the bargaining agent and the quality of the discussions at the bargaining table. To assess the duty it is necessary to consider the totality of the experiences that existed at the time. The key issues of the parties were known, and the final offer of the employer did not contain those issues. The employer proposed wage increases that were without

rationale and that the employer knew were not acceptable. In the Speech from the Throne on November 19, 2008, the government announced its intention to pass legislation. The PIPSC had lived through prior restraint periods and was not naïve about what was likely to happen. The details of the legislation were not known, and there was very little time to conclude a collective agreement. There were constantly shifting timelines.

[56] Over the weekend of November 22 and 23, 2008, the PSAC received an extra monetary amount for its members. There was haste on the part of the employer to make it public. There was a climate of uncertainty, but nothing substantive limited the ability of the employer to move beyond its final offer. The mandate given to the negotiators for the employer did not allow them to go beyond the final wage offer. However, nothing prevented the employer from sending someone to the table with a mandate to bargain in good faith.

[57] The PIPSC made concessions in its counter-offer, but the employer made no effort to move from its position. The Public Service Staff Relations Board (PSSRB) allowed a complaint of bad faith bargaining in similar circumstances in the following case in 1991: *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 148-02-196 (19910916) ("1991 *PSAC*"). In that case, the government issued a "public service restraint policy." The PSSRB held that the insistence of the employer on "conditions precedent" to negotiating terms and conditions of employment was incompatible with the duty to bargain in good faith. That decision also noted that the Treasury Board was no different from any other employer when it came to the duty to bargain in good faith. In the present case, the employer acted in bad faith when it set the wage increases in its final offer as a condition to the conclusion of a collective agreement.

[58] Bad faith will be found where a party has put forward a position without any attempt to justify or explain it, where there has been no serious discussion of the issue and where "the atmosphere created is one of 'take it or leave it and bloody well face the consequences'" (*Canadian Commercial Corporation* (1988), 74 di 175 cited in *Iberia Airlines of Spain* (1990), 80 di 165, CLRB no. 796, upheld by the Federal Court of Appeal [1991] F.C.J. No. 146 (QL). That well describes the final offer made by the employer in this case.

[59] The news release announcing the employer's final offer is also evidence of bad faith. The employer's manner of sharing its final offer with the public was meant to undermine the PIPSC's role, to undermine the employees' morale and to have a direct impact on CS employees (*Brewster Transport Company Limited* (1986), 66 di 1, CLRB no. 574).

[60] The employer did not offer any explanation for its bargaining decision. It fully capitalized on the uncertainty, the fear and the speculation to arrive at its goal of limiting wages. If the employer takes wage increases away from the bargaining table, one cannot reasonably expect good faith bargaining. The right to strike all but disappears when wages cannot be negotiated. The employer did not make every reasonable effort to enter into an agreement.

[61] In making its final offer, the employer was acting in bad faith. The offer itself shows bad faith as well as the manner in which it was introduced. The employer acted in bad faith when it made its offer public shortly after sharing it with the bargaining agent.

[62] Counsel for the PIPSC submitted that I should issue a declaration that the employer breached its duty to bargain in good faith.

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

[63] Counsel for the employer submitted that this case is about whether it is necessary, in these circumstances, to issue a declaration. It is not necessary to address other circumstances or future circumstances. This complaint is also not about the constitutionality of the *Expenditure Restraint Act*. There were several statements from Mr. Belyea about the legislation in his evidence that are clearly not relevant. It is not the Board's role to correct any deficiencies or to change the interpretation of that legislation.

[64] There is no doubt that the proposed legislation at some point affected the negotiations. The legislation was designed to address expenditures such as pay. It is not the first time that legislation has been introduced for that purpose.

[65] Before the central bargaining session, a few things had already occurred. Mr. Thibodeau had sent an email raising these issues (Exhibit J-1, tab 3). There had been conversations between Mr. Trottier and Mr. Belyea as well as discussions at the

senior levels of both the PIPSC and the employer. The Speech from the Throne also outlined what was to come. To ignore the context and bargain above and beyond what the employer was prepared to offer would have been a waste of time and would have been bad faith bargaining.

[66] The actions of the employer were done in its role as an employer and should not be confused with the actions of Parliament. The employer's actions at the relevant times never undermined the ability of the parties to negotiate. The fact that the PIPSC did not get what it wanted does not mean that the parties did not negotiate. The employer abandoned its key issues, which is a distinguishing fact from the case law cited by the PIPSC.

[67] There was no evidence that there was a refusal to meet or a refusal to conclude a collective agreement. Some issues were addressed, some issues were considered and not addressed — that is the nature of collective bargaining.

[68] The complaint was filed on November 25, 2008, but most of the examples given to support its claim of bad faith bargaining occurred after that date. The period to consider in this complaint is between November 18 and 25, 2008.

[69] Mr. Gingras used the phrase "take it or die" to describe the employer's final offer. You do not die if you do not get the offered economic increase. The right to strike is still an option. The counter-offers of the PIPSC accepted the employer's wage offer. Mr. Gingras also testified that money was not a key issue for the PIPSC. The PIPSC stated that the employer was not prepared to move from its position. However, the final offer was designed to do precisely that, as key issues of the employer were dropped.

[70] The PSAC settlement included a payment in exchange for the withdrawal of pay equity complaints that were hanging over the employer's head. The PIPSC did not have similar complaints.

[71] In the 1991 *PSAC* decision, no agreement was reached by the parties. It is clearly different here.

[72] In *Brewster Transport Company Limited,* a meeting was held with employees to influence bargaining. In this case, Parliament was informing the public about what it was doing to address the economic situation. The employer was not directly contacting

CS employees, and there was no intended message to employees to influence bargaining.

[73] None of the employer's actions, especially those actions between November 18 and 25, 2008, amount to bad faith bargaining. The complaint should therefore be dismissed.

C. Reply of the bargaining agent

[74] The duty to bargain in good faith is a continuing obligation, and a complaint of bad faith bargaining can include events subsequent to the filing of a complaint (*Iberia Airlines of Spain*).

[75] At the time the final offer was made, there was no legislation. There was an uncertain political context, and legislation was treated as a *fait accompli* by the parties.

[76] Counsel for the employer claimed that the employer dropped key issues. The wage increase was the main issue for the employer, which was not dropped.

[77] The press release was issued by the Treasury Board Secretariat and was not a statement from Parliament.

IV. Reasons

[78] This complaint concerns bargaining that occurred in the shadow of impending wage restraint legislation. The constitutional validity of that legislation is being challenged in the courts and is not a matter within the jurisdiction of the PSLRB in this complaint. This complaint relates specifically to the final offer tabled by the employer and the subsequent negotiations that occurred in November 2008.

[79] The complaint was filed by the PIPSC on November 25, 2008. The employer has argued that, as a result, I am limited to examining the bargaining process only to November 25, 2008. The duty to bargain in good faith is a continuous and ongoing duty. Therefore, the Board can examine the entire collective bargaining process and consider all the relevant facts to determine whether the ongoing duty to bargain in good faith has been respected. That does not mean that the complaint is an open-ended one. The focus of the examination by the Board will still be on the grounds for the complaint set out by the PIPSC in its complaint (at paragraph 2 of this decision). The PIPSC has filed a complaint against the tabling of a final offer by the

employer. The bargaining that took place after that final offer is relevant to an assessment of whether the final offer met the requirement of bargaining in good faith.

[80] Counsel for the employer submitted that the statement by the Treasury Board President on November 18, 2008 was a statement of Parliament. However, an examination of the statement shows that he was speaking on behalf of the employer (". . . we are presenting final offers. . .").

[81] It was clear from the PIPSC negotiators' testimonies for the bargaining agent that the collective bargaining in this round of negotiations was frustrating — even more frustrating than usual. However, frustration does not necessarily result in a finding of bad faith. For the reasons set out below, I have concluded that the employer's final offer and the manner in which it was presented did not constitute bad faith bargaining.

[82] Section 106 of the *PSLRA* establishes the following two elements in the duty to bargain in good faith: a) the duty to meet and commence to bargain collectively in good faith, and b) the duty to "make every reasonable effort" to enter into a collective agreement. It is the second element that is at issue in this complaint.

[83] The duty to bargain in good faith requires a commitment from each side to ". . . honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions" (*Royal Oak Mines Inc. v. Canada (Labour Relations Board),* [1996] 1 S.C.R. 369, at paragraph 41). The parties must first enter into bargaining in good faith (measured on a subjective standard) and must also make a reasonable effort to enter into an agreement (measured on an objective standard). The making of a reasonable effort to enter an agreement can be ascertained by a labour board looking at comparable standards and practices within the particular sector (*Royal Oak Mines Inc.*):

. . .

> *It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.* [para. 42]

. . .

[84] The duty to bargain in good faith does not impose an obligation to reach an agreement. It imposes an obligation on each party to intend to reach a collective agreement and to make every reasonable effort to achieve that goal (*Canadian Union of Public Employees (CUPE) v. Labour Relations Board (N.S.) et al.*, [1983] 2 S.C.R. 311, at 340). If the intent of a particular bargaining proposal or position is to avoid reaching an agreement or to destroy the collective bargaining relationship, a breach of the duty to bargain in good faith will be found. Merely participating in bargaining is not sufficient to meet the duty to bargain in good faith. Good faith must be demonstrated in the conduct of those negotiations (*Royal Oak Mines Inc.*).

[85] As noted by the Supreme Court in *CUPE,* a party rarely proclaims its intention to avoid reaching an agreement. It often requires a labour board to ascertain whether a party has engaged in "hard bargaining" or "surface bargaining." A finding of "surface bargaining" will usually result in a finding of bad faith. A finding of "hard bargaining" will not. Hard bargaining is ". . . the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms" (*CUPE*). Surface bargaining occurs when ". . . one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship" (*CUPE*). The important distinction is in the underlying intention or objective of the bargaining. In *Royal Oak Mines Inc.*, the Supreme Court quoted with approval the finding in *Iberia Airlines of Spain* that the employer's bargaining position was ". . . inflexible and intransigent to the point of endangering the very existence of collective bargaining" and therefore a breach of the duty to bargain in good faith. As noted by the Supreme Court in CUPE, "[t]he dividing line between hard bargaining and surface bargaining can be a fine one." The question to answer is the following: Did the employer demonstrate through its proposals and actions an intention not to enter into a collective agreement?

[86] The failure to provide a rationale or reason for a particular proposal can also lead to a finding of bad faith bargaining (*Iberia Airlines of Spain*).

[87] In the 1991 *PSAC* case, the PSSRB found that the employer had made the acceptance of the wage restraint policy a precondition of bargaining. The employer had not dropped any of its own demands nor accepted any of the PSAC's non-wage proposals in exchange. The Board stated the following: "The insistence on conditions precedent to negotiating terms and conditions of employment at the bargaining table

is incompatible with the requirement to make every reasonable effort to negotiate a collective agreement."

[88] Nevertheless, there is no obligation for the parties to continue bargaining when further discussions are no longer fruitful: "[o]nce such a point is reached, a breaking off of negotiations or the adoption of a 'take it or leave it' position is not likely to be regarded as a failure to bargain in good faith" (Carter, England and Etherington, *Labour Law in Canada*, Butterworths, 2002, at 302).

[89] In assessing whether there has been bargaining in good faith, it is necessary to apply the principles set out above to the particular circumstances of the bargaining relationship at issue. I have set out below the relevant facts that support my overall conclusion that the employer has not engaged in bargaining in bad faith.

[90] It is clear that the negotiations between the parties were no longer fruitful in the period proceeding November 18, 2008, which was demonstrated by the request for a PIC by the PIPSC in July as well as by the employer's request for mediation. In such a case, tabling a final offer or a "take it or leave it" proposal is not bargaining in bad faith. Although mediation might have assisted the parties in reaching an agreement, it is clear that by their actions the parties demonstrated that they no longer believed that they should continue negotiations. In their testimonies, both negotiators agreed that before the tabling of the final offer there was no point in having any further negotiations. The PIPSC has stated in its complaint that there had not been any meaningful discussion on wages before the final offer. From the agreed statement of facts prepared by the parties, it is clear that there were no negotiation sessions scheduled after the tabling of the employer's reply to the PIPSC's pay demands on June 2, 2008. There does not appear to have been any discussion on salary issues after the employer replied to the PIPSC's wage demands. I am not questioning the judgment of the negotiators that further discussion would not have been fruitful. I am just noting that, to have meaningful discussions, there have to be scheduled negotiation sessions.

[91] The employer's final offer was not ". . . so far from the accepted norms. . ." that it must be considered unreasonable (*Royal Oak Mines Inc.*). The wage increase proposal in the final offer was higher than the employer's original wage increase offer. The employer was not demanding significant rollbacks or concessions from the bargaining

unit. The same wage offer was made by the employer to all bargaining agents and for all bargaining units.

[92] The employer's position was not ". . . inflexible and intransigent to the point of endangering the very existence of collective bargaining" (*Iberia Airlines of Spain*). In addition, the employer did not insist on "conditions precedent" before continuing with collective bargaining (1991 *PSAC*). The employer had dropped most of its key objectives in its final offer. The employer participated in negotiations on November 25 and 26, 2008, and discussed all the issues on the table. The employer indicated its willingness to accept one of the PIPSC's proposals on changes to the marriage leave provision in the collective agreement. In its counter-offer, the PIPSC explicitly recognized that the employer's wage proposal was the basis for any resolution. The PIPSC, through its counter-offer, accepted any "condition precedent" that might have been implied in the employer's final offer.

[93] The employer provided some rationale or justification for its position in bargaining (*Iberia Airlines of Spain*). That rationale was set out in the email from Mr. Thibodeau on November 15, 2008 and in the November 18, 2008, statement by the Treasury Board President. The stated rationale was to ensure "predictability" in expenditures. In my view, it is not appropriate for the Board to examine the merits of the rationale. There was no evidence that the rationale was made in bad faith.

[94] The PIPSC argued that providing a lump-sum payment in a collective agreement with one bargaining agent demonstrated that the employer could have provided a similar payment to the PIPSC. The publicly stated purpose of the lump-sum payment to some PSAC bargaining units was to resolve outstanding pay equity complaints. There is no obligation for the employer to bargain the same issue for all bargaining units. Separate bargaining units exist because different groups have different needs and concerns. In addition, the PIPSC did not provide evidence of bad faith on the part of the employer in reaching that settlement. On its face, the lump-sum payment was addressing a particular concern that did not exist for the CS group, and it does not constitute bargaining in bad faith.

[95] The press release issuing a statement from the Treasury Board President was not an improper interference with collective bargaining by the employer. As noted in *Brewster Transport Company Limited,* in determining whether the employer is communicating legitimately with its employees, the Board must examine the nature,

object and circumstances of the communication. The object must be to inform employees of the employer's position, and there must not be any "overt or obvious elements" that are designed to circumvent the bargaining process (*Brewster Transport Company Limited*). The communication of the Treasury Board President was not directed specifically to the employees of the CS bargaining unit. I accept that events were moving quickly and that the employer wanted to advise the public of its intended course of action. Of course, any statement to the public will also be communicated to the employees of the bargaining unit, and it cannot escape scrutiny simply because it was not addressed to the employees directly. The statement set out the employer's position and provided its justification for that position. There was no obvious attempt to circumvent collective bargaining. In fact, the statement indicates that "officials" are available to discuss compensation. The press release was issued after the tabling of the final offer. In addition, the PIPSC knew earlier in the day on November 18, 2008 that a final offer was coming. While the timing of the press release so soon after the tabling of the final offer was not ideal and perhaps not very helpful for collective bargaining, there is no evidence that it was intended to directly influence collective bargaining.

[96] The PIPSC also argued that the lack of sufficient time to come to an agreement demonstrated that the employer was bargaining in bad faith. In *Brewster Transport Company Limited* the bargaining agent was given less than a day to respond to the employer's offer. I agree that the parties must be allowed sufficient time for rational discussion. In this case, the timelines were tight, but not unreasonable. In any event, it was the PIPSC that decided not to continue the negotiations. The employer asked for a status report on November 27, 2008 and was told that the PIPSC had no real interest in continuing the negotiations.

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

(The Order appears on the next page)

V. Order

[98] The complaint is dismissed.

August 21, 2009.

Ian R. Mackenzie,
Vice-Chairperson