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*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

TREASURY BOARD

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

In respect of the Computer Systems Group

Indexed as

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

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

REASONS FOR DECISION

Before: John Mooney, Board Member

For the Applicant: Sean F. Kelly, counsel

For the Respondent: Sarah Godwin, Professional Institute of the Public Service of Canada

Heard at Ottawa, Ontario,
January 12 and 14, March 3 to 6, and May 12 to 14, 2009.

REASONS FOR DECISION

I. Application before the Board

[1] On August 12, 2008, the Treasury Board (“the applicant”) filed an application under subsection 123(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s.2 (“the *PSLRA*”) about matters that may be included in an essential services agreement (ESA) covering positions in the Computer Systems (CS) Group for which the applicant is the employer and the Professional Institute of the Public Service (“the respondent”) is the bargaining agent. The applicant filed with its application a list of positions in the CS Group that it proposed for inclusion in the ESA. The list contained CS positions in the Office of the Chief Electoral Officer, commonly referred to as Elections Canada (EC), Department of Transport, Department of Industry, Department of the Environment, Department of Fisheries and Oceans, Department of Citizenship and Immigration, Department of Foreign Affairs and International Trade, and the Canada Border Services Agency.

[2] The parties agreed that, in the first instance, I would consider and determine the matters before me in the context of EC. At issue before me is the identification of the services provided or the activities performed by the CS Group at EC that will be necessary for the safety or security of the public.

II. Summary of the evidence

[3] The applicant called a single witness, Rockland Kreis, Chief Information Officer (EX-03 group and level) at EC. The respondent also called one witness, Professor Peter H. Russell.

A. Testimony of Mr. Kreis

[4] Mr. Kreis has held his current position since September 2005. He has worked in the federal public service for 33 years. Before working for EC, he worked at Human Resources and Skills Development Canada (HRSDC) as the director of technical platforms (CS-05 group and level). In that position, he was responsible for the provision and support of mainframe server systems. Before that, he was the director of national operations (CS-05 group and level) at the HRSDC, where he provided information technology (IT) services to the National Capital Region. He held several other IT positions at the HRSDC before joining EC.

[5] Mr. Kreis described his current duties. He reports to Marc Mayrand, Chief Electoral Officer, and is a member of EC's Executive Committee. Mr. Kreis is responsible for the provision and support of all IT services, including information management programs, support systems, telecommunication systems, the computer centre, technological planning, special projects and general IT planning. Several directors and one financial officer report to him, including the director of technological services, the director of systems development and client services, the director of telecommunication services, the director of information management services, the director of technology planning and special projects, and the director of field systems. They all occupy CS positions. Mr. Kreis referred me to an organisation chart of EC's IT section that lists the positions that report directly to him (Exhibit E-1). The applicant entered into evidence a conceptual model of EC's IT systems (Exhibit E-4).

[6] There are 44 indeterminate CS positions at EC. The employees in those positions all report to Mr. Kreis. Twenty-seven of those positions are included in the list of positions that the employer proposed for inclusion in the ESA. There are over 13 000 CS positions in the public service.

[7] There are three excluded positions in Mr. Kreis' section: the director of telecommunications services, the director of technology services and the director of systems development and client services.

[8] Mr. Kreis explained that the chief electoral officer is an independent, non-partisan officer or agent of parliament. EC's *Departmental Performance Report* for the period ending March 31, 2008 (Exhibit E-3) sets out EC's mandate, which is as follows (Exhibit E-3, page 9):

- *be prepared at all times to conduct a federal general election, by-election or referendum*
- *administer the political financing provisions of the Canada Elections Act*
- *monitor compliance and enforce electoral legislation*
- *conduct voter education and information programs*
- *provide support to the independent commissions in charge of adjusting the boundaries of federal electoral districts following each decennial census*

- *carry out studies on alternative voting methods and, with the approval of Parliament, test electronic voting processes for future use during electoral events*

[9] Maintaining readiness to conduct electoral events is an important part of EC's mandate. When an election is called at a time other than those fixed in the *Canada Elections Act*, S.C. 2000, c.9 (*CEA*), the government does not consult EC on when to hold the election and does not give EC advance notice of the election date. EC is informed of the election date at the same time as the public, that is, when the Governor in Council issues the election proclamation. Parliament's expectation is that, when an election is called, EC is prepared to conduct it.

[10] Mr. Kreis explained that the *CEA* sets fixed times for elections. Elections must occur at least every four years on the third Monday of October. Since the last general election occurred in October 2008, the next one should occur on the third Monday of October 2012. However, when there is a minority government, as is currently the case, an election can be declared before the time fixed in the *CEA* if the government loses the confidence of the House of Commons.

[11] An election is triggered by a proclamation of the Governor in Council. The proclamation dissolves Parliament and gives EC the authority to conduct the election. The proclamation directs the chief electoral officer to issue an election writ to the returning officer of each electoral district. The proclamation also sets out the election period and the date of the election. The election period must be for at least 36 days. In the January 2006 general election, the election period lasted 55 days.

[12] Mr. Kreis explained that Canada has 308 electoral districts. There are no returning offices between elections but EC employs 32 federal liaison officers who work on different assignments. During an election period, there is a returning officer in each electoral district. The returning officer manages the returning office. Before the election period begins, returning officers work from their homes.

[13] Mr. Kreis explained that, to be ready for an election, EC must complete certain activities by the times set out in the *CEA*. The applicant's representative submitted an election calendar that specifies when certain activities must be completed (Exhibit E-8). For example, EC must mail voter information cards to electors no later than the 24th or 26th day before election day. The *CEA* requires that EC send each candidate and each party a list of electors for each riding by a certain time.

[14] Mr. Kreis testified that, in a fixed time election, EC needs two months to prepare for a “successful” election. Since EC does not know when an election will be called when there is a minority government, electoral readiness is an ongoing activity.

[15] To remain in a perpetual state of preparedness, each year EC carries out two readiness exercises. It sets two target dates for election readiness, one in October and one in February. Those times are chosen because that is when the possibility of a confidence vote in the House of Commons is the greatest. In October, the House of Commons resumes its work, and in February, the government presents its budget. Extra staff is hired for temporary periods and trained for the readiness exercises. EC prepares as if an election were called, and if no election is actually called, then that extra staff is let go.

[16] Mr. Kreis agreed with the comments made on page 34 of the *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (Exhibit E-7). They highlight the difficulty of being prepared for an election when the country is governed by a minority government.

[17] Mr. Kreis described the nine main activities that EC must perform to prepare for an election:

- establish returning offices and additional returning offices in each of the 308 electoral ridings;
- manage the National Registrar of Electors;
- prepare the Special Voting Rules services;
- establish EC’s internal and external call centres;
- establish the elections budget for headquarters and for the 308 electoral ridings;
- prepare the returning office pay system;
- recruit, hire and train new staff and contract professional services;
- manage external suppliers; and
- manage EC’s warehouse.

[18] Mr. Kreis provided more details for each activity. The first step is to establish a returning office in each of the 308 electoral districts. EC must also establish additional

returning offices in electoral districts that cover large geographical areas so that voters won't have to travel long distances. In the last election, there were 122 additional returning offices.

[19] EC cannot establish returning offices between elections. It has to wait until the appointed Governor in Council issues the proclamation before performing those activities. So, between elections, EC identifies potential and additional returning offices. It can approach landlords but cannot sign leases before the election is proclaimed.

[20] Before the election period, EC must prepare to ship supplies to the returning offices and to the additional returning offices. Returning officers receive those supplies at their homes. EC also identifies local suppliers for certain materials, such as voting material and office furniture since EC's warehouse does not stock all the small materials used in elections.

[21] EC must also identify the core staff for each returning office and for each additional returning office, but it cannot hire them before the election period. EC employs 20 to 40 people in each returning office or additional returning office during an election period.

[22] Before the election, EC must also ensure that telephone services will be ready for the returning offices. Each returning office must install 30 telephone lines within 48 hours after the office is opened. EC employees in the telecommunications section work with telephone companies to ensure that the task is carried out properly and within the 48-hour timeframe.

[23] Telephone companies will agree to reserve telephone lines in case an election is called, but they will do so only for 30 days. If the election is not called within that period, EC must make other new arrangements with the telephone companies for another 30-day period to ensure that the telephone lines will be available if an election is called.

[24] Mr. Kreis stated that the following data is downloaded to the field servers when an election is upcoming: the preliminary list of electors for each returning office, the national list of electors, the polling locations, the budget for the returning office and

the landlord information. All of that data is prepared by CS employees working for Mr. Kreis.

[25] Mr. Kreis stated that it would not be possible to conduct a valid election without establishing returning offices and additional returning offices. This entails, as just explained, ordering the necessary supplies for those offices, recruiting staff, establishing telephone services, and buying supplies and furniture. It would not be possible to conduct a valid election without those activities and without the support of CS employees.

[26] Mr. Kreis explained that, before 1998, the list of electors was established through door-to-door enumeration. In 1998, EC established the National Register of Electors. It is a permanent electronic list of electors that contains the names, addresses, genders and dates of birth of Canadians who are eligible to vote and is continually updated. EC has concluded agreements with more than 40 departments and government agencies, as well as provincial agencies, to share information on electors in order to update the register. For example, if an elector moves and allows the Canada Revenue Agency to share that information with EC, EC will change the elector's address in the National Register of Electors to reflect that move. Another example is that, when a department that has an agreement with EC informs EC that a person is deceased, EC will remove that person's name from the National Register of Electors. Each year, EC changes the information of 16 percent to 18 percent of the persons in the National Register of Electors. A statistical report shows that EC made close to 5.9 million changes to the National Register of Electors between the 39th and 40th general elections (Exhibit E-6). That same report shows that EC made more than 1.5 million changes during the 40th general election through information gathered during advance polls, on election day or through the revision process. The revision process entails having EC employees carry out targeted door-to-door visits to verify the accuracy of the list of voters. For example, a targeted visit might occur if there is a new housing development in the riding.

[27] The REVISE system is the computer application that runs the National Register of Electors. Before an election, EC extracts information from the National Register of Electors and tests it. The test takes two weeks. EC then sends each returning officer a preliminary list of electors in his or her electoral district. From then on, the returning officer updates the list.

[28] EC also supports an automated Quality Measurement System that monitors the accuracy and currency of the information contained in the National Register of Electors. For example, the register now covers 94 percent of eligible voters. If the register covered only 75 percent of eligible voters, its validity could be questioned.

[29] The *CEA* requires that EC produce a list of electors for members of parliament and political parties in October of each year.

[30] Mr. Kreis stated that it would not be possible to conduct a valid election without managing the National Register of Electors because it would not be possible to create a list of electors. Consequently, it would not be possible to send the returning officers a list of the electors in each officer's electoral district. CS technicians provide ongoing support for the National Register of Electors.

[31] Mr. Kreis explained what "managing the electoral geography" means. The address of each voter is placed on a geographical electoral map that contains 23 million addresses. The map is sent to each returning officer. Each returning officer examines the map to determine where to locate the poll sites. There are approximately 60 000 voting polls across the country, between 16 and 20 in each electoral district. The site of the voting poll is determined using several factors. Population density is one factor. The goal is that each voting poll is to serve between 400 and 450 voters. The geographical layout of the electoral district is another factor. For example, the returning officer will consider whether voters have to cross a highway to reach the polling site.

[32] Mr. Kreis stated that the CS employees under his direction manage the two geographical databases that produce the maps for electoral purposes. In the January 2006 election, those databases produced close to 70 000 original maps and several other geographical documents. More than a half-million of those maps and other documents were distributed to returning officers and candidates during the election. The CS employees under his direction manage the systems that produce the geographical maps, and it would not be possible to hold a valid election without their work.

[33] Electors can vote by mail. The following groups of electors have either chosen to, or must vote that way: electors who are not present in their electoral districts on elections day or during the advance polls, persons who are hospitalized outside of

their electoral district, the 60 000 members of the Canadian Forces, Canadians who are outside the country during the election period, and persons incarcerated in Canadian prisons. In the last general election, 253 000 persons voted by mail.

[34] Handling voting by mail is a lot of work for EC. It must prepare and mail voting kits to possible electors. In the 2006 general election, EC prepared 253 000 kits. That work is performed in EC's warehouse in Ottawa. Voting by mail also requires many identification procedures, to ensure that the voters are who they claim to be. It takes two months to complete all the preparation work for voting by mail.

[35] The Special Voting Rules service manages elector application forms for voting by mail, maintains the register of electors residing outside Canada and maintains other voter information. Close to 400 persons work for that service, which the CS employees support.

[36] An election would not be valid if it were not possible to vote by mail since more than 250 000 persons would be deprived of their right to vote.

[37] Mr. Kreis stated that preparing a general election also requires establishing internal and external call centres. Internal call centres provide information and assistance about elections to EC employees during an election. Internal call centres handle on average 1200 calls per day during an election period. In the 2006 general election, workers in internal call centres handled 77 000 calls.

[38] External call centres provide information and assistance about elections to the general public. For example, electors may inquire about where to vote. A member of a political party may call for information about limits for election expenses. EC's 1-800 number has an automatic voice-response system. A computer responds to callers' questions. But callers can also ask to speak to an agent if they wish. In the last general election, the automatic voice-response system handled 680 000 calls, while EC agents handled 300 000 calls.

[39] The public can also contact returning offices directly. EC has over 1000 1-800 telephone numbers for returning offices. They handled over one million calls in the last general election.

[40] Mr. Kreis testified that it takes two months to establish the internal and external call centres. EC must negotiate agreements with the telephone companies and install

communications equipment. CS employees under Mr. Kreis' direction perform that work.

[41] Mr. Kreis stated that it would not be possible to conduct a valid election without internal and external call centres. Both EC employees and the general public need information and advice during elections. CS employees set up the systems. It would not be possible to conduct a valid election without their work.

[42] The preparation of an election requires establishing an election budget. There is a separate \$300 million budget for preparing and conducting an election. EC has to establish a budget for its headquarters and one for each returning office and additional returning offices. The budget of each returning office is between \$340 000 and \$360 000. The budget for the pay system for the returning offices is administered through computer systems at headquarters before the election period. Once the election period begins, the pay system is downloaded to the returning offices. The returning officers manage it from then on but payments are still issued by headquarters in Ottawa. That computer system also administers leave authorizations for employees.

[43] Mr. Kreis stated that it takes two months to prepare the budget for an election.

[44] Mr. Kreis testified that it would not be possible to conduct a valid election without establishing a budget. It would not be possible to sign leases, buy equipment and pay workers.

[45] CS employees under Mr. Kreis' supervision work on the management of the budget. For example, they support the systems that do the budget forecasting. It would not be possible to conduct a valid election without their contribution.

[46] The preparation of elections also necessitates hiring and training new staff. For example, the Special Voting Rules service needs 400 employees during the election period. During the election period, EC hires 400 to 600 extra employees in each returning office. EC employs 200 000 people on election day.

[47] Mr. Kreis stated that it was not possible to conduct a valid election without hiring and training new staff. The permanent staff at EC would not suffice. Extra temporary staff is needed for each election.

[48] CS employees work on recruiting and training employees. They support the systems that are used to hire employees. It would not be possible to conduct a valid election without their work.

[49] Mr. Kreis stated that, to prepare and conduct an election, EC must manage external suppliers. His CS employees negotiate contracts and memoranda of understanding with suppliers and support computer systems that communicate with them. For example, EC has an agreement with Canada Post to deliver electoral equipment from EC's warehouse in Ottawa to the returning offices.

[50] EC also has two contracts with IBM. One is for field systems. IBM maintains a warehouse in Markham, Ontario, where it stocks equipment for the returning offices and the additional returning offices. That equipment includes 4500 input devices (such as screens, keyboards and mice), 308 servers and 800 printers along with cables, switches, routers, hubs and data communication equipment used to connect EC's headquarters with the returning offices.

[51] EC has another contract with IBM for professional services for EC's headquarters. Thirty EC employees administer the databases during the election, but 40 more persons are needed. Those extra persons are hired on contract through IBM. EC employees manage the procurement contract and train that extra staff.

[52] EC also has a contract with Allstream. EC hosts a website for voter information, but during an election, it needs more web capacity, which Allstream provides.

[53] EC also has agreements with five telephone companies. Each memorandum of understanding is drafted before an election. During the election, EC needs 1000 1-800 numbers, 8000 phone lines, 6000 telephones and 6000 headsets. The memorandum of agreement provides that the telephones have to be operational within 48 hours from the time the address of the returning office or polling office is given to the telephone company.

[54] Bell Canada hosts the voice-response system, but EC provides Bell Canada with the data and systems necessary to operate it.

[55] Mr. Kreis stated that, during the 39th general election, it took 6 months to perform all the work with suppliers.

[56] Mr. Kreis stated that it was not possible to conduct a valid election without managing external suppliers before the election period. There would be no telephone system to allow employees to communicate among themselves, and there would be no way to provide information to the public.

[57] CS employees support the management of external suppliers, including providers of professional services, and coordinate their activities. For example, they tell IBM when and where to ship technological equipment to returning offices. They give suppliers the criteria they must meet and monitor their work. It would not be possible to conduct a valid election without their work.

[58] Mr. Kreis explained that EC maintains a large warehouse in Ottawa. It contains several types of material used during the election period, such as ballot paper, boxes, information manuals and office supplies. EC uses two systems to manage the warehouse. One manages the inventory. The other manages the system that identifies the material that must be shipped to returning offices. Some material is sent to returning officers' homes shortly after the election is proclaimed. Other material is sent to them later.

[59] Mr. Kreis stated that it was not possible to conduct a valid election without managing the warehouse. For example, there would be no ballots for the elections. Those ballots are printed on special paper, which is kept secure. It is not possible to source those ballots from a commercial supplier for security reasons.

[60] CS employees are responsible for the two systems that manage the warehouse. It would not be possible to conduct a valid election without their work.

[61] Mr. Kreis explained that, when elections are called, EC must perform the following five main activities:

- manage the returning offices and additional returning offices;
- set up and manage public information systems;
- centrally manage and support information and technology systems;
- manage external service providers; and
- produce electoral results.

[62] EC's first main activity during an election period is that it must manage the returning offices and additional returning offices. In order to meet EC's responsibilities in this area, CS employees play a role in the following items:

- the returning officers deliver to the returning offices and additional returning offices the supplies they had received at their homes — CS employees support the system used to order supplies;
- IBM delivers IT equipment to the returning offices and installs them — CS employees give IBM the addresses of returning offices and instructions for shipping and installation;
- EC headquarters sends IT data products to the returning offices — CS employees manage that activity;
- EC works with the telephone companies to set up the telephone lines, including 1-800 numbers, fax lines and data communication lines — CS employees give directions to the telephone companies, coordinate the installation of the telephone lines and test them;
- the returning officers hire between 400 and 600 persons — CS employees support the system used to hire and train this new staff and support the identification of the site to which each new worker will be assigned;
- the returning officers finalize the identification of polling — CS employees support the system used to locate poll sites;
- the returning officers produce a revised list of electors — CS employees support the systems used to produce that list;
- EC prints and mails 23 million voter information cards (the cards inform voters as to where to vote and when) — CS employees support the REVISE system used to print the voter information cards;
- the returning officers accept the nominations of candidates — CS employees support the system used to capture candidate information; and
- EC pays employees — CS employees support the pay system.

[63] Mr. Kreis stated that EC could not conduct a valid election without performing the main activity by carrying out the listed items above.

[64] The second main activity during the election period is setting up and managing public information systems. Mr. Kreis explained that there are three ways that the public can obtain information during the election period as follows: accessing EC's website, accessing EC's voter information services website and accessing EC's telephone voice-response system. The systems are connected to each other.

[65] CS employees ensure that EC's website has increased capacity during the election period. It is a static website: visitors simply access the information that it provides. CS employees negotiate agreements with Allstream, which hosts the web systems. CS employees also monitor website traffic and performance.

[66] Allstream also hosts the voter information system. It is a dynamic website: visitors may ask questions and obtain answers. CS employees monitor the system to ensure that Allstream provides the capacity to operate the website and to ensure that the website is kept secure. During the last election, hackers shut the system down for one hour on election day.

[67] CS employees also support the telephone voice-response system. They ensure that Bell Canada provides the proper capacity and that the 1-800 lines are properly configured.

[68] Mr. Kreis stated that it would not be possible to conduct a valid election without those three systems, which provide the public with the means to communicate with EC. Those systems provide electors with diverse information on the election, such as where and when to vote. In the last general election, EC provided 4.8 million items of information to the public.

[69] The third main activity during the election period is the central management and support of information and technology systems. During the election period, the information systems must change from non-event mode to event mode. In event mode, several information systems are added, such as the voter information systems. The initialization of the systems for event mode is performed at EC headquarters. From that moment, returning officers can communicate with EC headquarters to download critical data. CS employees at headquarters initialize and monitor the systems. Systems are monitored day and night during the election period. CS employees also correct problems as they arise. For example, if the website crashes, CS employees will address the problem.

[70] Mr. Kreis stated that it would not be possible to carry out a valid election without the work of the CS employees that support the central management of the information systems. Returning officers would not be able to access data held at headquarters, electors would not be able to access information on the website and employees could not assign voters to the proper voting polls.

[71] The fourth main activity during the election period is managing external service providers. During the election period, CS employees are the interface between EC users and service providers. For example, if an IT system malfunctions in a returning office, CS employees will verify if the problem lies with EC headquarters or with IBM. If the problem lies with IBM, CS employees will coordinate IBM's efforts to fix it.

[72] Mr. Kreis stated that it would not be possible to conduct a valid election without the work of the CS employees who manage the external service providers.

[73] The fifth main activity during the election period is producing the election results. CS employees are involved in that activity. Before election day, they perform three tests on the information systems. On election day, millions of voters cast their votes. CS employees monitor the election information systems to ensure that the election results are transmitted to EC headquarters, to its website and to the media. If there is a problem, CS employees must determine whether it originates with the returning office or at EC headquarters and must solve it. Mr. Kreis stated that it would not be possible to carry out a valid election without the work of CS employees; it would simply not be possible to produce election results.

[74] Mr. Kreis stated that CS employees are also involved in the post-electoral phase of an election, which is composed of the following three main activities: decommissioning the returning offices and additional returning offices, managing the conversion of the systems from event mode to non-event mode, and monitoring.

[75] Decommissioning the returning offices and additional returning offices involves such things as ensuring unused material is returned to headquarters, ensuring that phone lines are removed and ensuring that voter information is removed from certain information systems. The conversion from event mode to non-event mode includes activities such as incorporating into the National Register of Voters the changes that were made to the voting list during the election period. Monitoring includes activities such as examining the financing of political parties.

[76] Mr. Kreis referred me to a list of 104 IT applications used to prepare and conduct elections (Exhibit E-9). (There are 105 applications in Exhibit E-9, but at the hearing, the applicant deleted application 55 from the exhibit). The list sets out the name of each IT application, its primary business user and a description. That list was prepared for the negotiation of the ESA. EC uses other IT applications. In total, it uses

between 140 and 150 applications. Developing applications is an ongoing activity as IT evolves. Mr. Kreis described in more detail each IT application and the work of CS employees on those applications.

[77] Mr. Kreis stated that, without those 104 IT applications, it would not be possible to produce electoral results that are complete, legitimate and verifiable. That could cause civil unrest because Canadians would not be able to exercise their rights to vote and to be a candidate in an election, rights that are provided in the *Canadian Charter of Rights and Freedoms* (“the Charter”).

[78] Improperly conducting an election could also accidentally result in the disclosure of personal information that EC collects on electors. The importance of securing that personal information was highlighted by the Privacy Commissioner of Canada in the report *Privacy Management Frameworks of Selected Federal Institutions* (Exhibit E-10, at page 16). That report identified four privacy breaches. In one instance in 2006, lists containing the names and addresses of voters were found in the offices of a Tamil Tiger cell. CS employees work on the management of that information. EC has concluded agreements with certain departments that disclose information on electors. CS employees control the transfer of that information and perform risk assessments on those transfers. It would not be possible to ensure the collection and secure exchange of electors’ personal information without the work of CS employees.

[79] Mr. Kreis testified that civil unrest could ensue if the results of an election could not be verified. It could happen if the election results were close or incomplete.

[80] Mr. Kreis testified that ballot boxes were stolen once in each of the 2004 and the 2006 general elections.

[81] Mr. Kreis stated that violence has occurred in other countries when elections were not properly carried out. He referred to the European Union Election Observation Mission’s report on the general presidential elections in Kenya in December 2007 (Exhibit E-11). A lack of transparency in processing and tallying the election results undermined confidence in their accuracy. Because of those irregularities, wide-spread violence broke out after election day.

[82] Mr. Kreis provided another example of a disturbance that occurred due to the improper conduct of an election. He referred me to the European Union Election

Observation Mission's report on the presidential and parliamentary elections in Mexico in July 2006 (Exhibit E-12). The elections were properly conducted but problems arose because the results were close. The losing candidate, Lopez Obrador, refused to accept that Felipe Calderon won the election, and his supporters held protests.

[83] Mr. Kreis stated that, if election results cannot be verified, there is no government, and without a duly elected government, there is no means to pass legislation to deal with emergencies. If it is not possible to verify election results, it is not possible to determine who makes up the government. Without a valid government, it would not have been possible to pass legislation to deal with terrorism, as was done after the September 11, 2001 terrorist attack in New York City. Parliament passed three bills to deal with terrorism (see Exhibit E-13). The *Anti-terrorism Act*, S.C. 2001, c. 41, contained measures designed to identify, prosecute and convict terrorists. The *Public Safety Act*, 2002, S.C. 2004, c. 15, amended several statutes to strengthen the government's ability to protect Canadians. The *Aeronautics Act*, R.S., 1985, c. A-2, was amended to maximize the effectiveness of the aviation security system.

[84] Another example of a situation that needed legislative intervention occurred when Atomic Energy of Canada shut down the Chalk River nuclear reactor. The reactor supplied half the world's medical isotopes for cancer treatment. The government passed legislation to restart the reactor.

[85] Mr. Kreis explained that although subsection 59(1) of the *CEA* authorizes the Governor in Council to withdraw an electoral writ for an electoral district, it is only in specific situations, such as a flood. Mr. Kreis was not aware of any situation where that provision was used to cancel an election. That legislative provision cannot be used in the case of a strike.

[86] In cross-examination, the respondent's representative pointed out to Mr. Kreis that page 5 of EC's *Departmental Performance Report* for the period ending March 31, 2008 (Exhibit E-3) states that eight confidence votes took place in the House of Commons in fiscal year 2007-2008. She asked Mr. Kreis whether EC had been prepared to conduct an election at the times of each of the eight votes. Mr. Kreis answered that EC had not been fully prepared to conduct elections at those times.

[87] The respondent's representative asked Mr. Kreis whether there had been any riots in Quebec after its referendum. Mr. Kreis answered in the negative.

[88] Mr. Kreis stated that an elector can register to vote on election day at the poll.

[89] The respondent's representative asked Mr. Kreis if several of the tasks performed by the applications listed in Exhibit E-9 could be done manually. Mr. Kreis answered in the negative, except for item 71, about validating of election results. Mr. Kreis stated that he supposed that item 71 could be done manually.

[90] The respondent's representative asked Mr. Kreis in cross-examination whether he was familiar with section 131 of the *PSLRA*, which provides the Public Service Labour Relations Board ("the Board") the power to amend an ESA in emergencies. Mr. Kreis answered that he was not aware of that provision.

B. Testimony of Professor Russell

[91] The respondent's representative tendered in evidence Professor Russell's curriculum vitae (Exhibit B-24). Professor Russell summarized his education and experience. He obtained a B.A. in philosophy and history from the University of Toronto in 1955, a B.A. in philosophy, politics and economics from the Oxford University in 1957, and a masters in philosophy, politics and economics from that same university in 1979.

[92] Professor Russell currently holds the following positions at the University of Toronto:

- University Professor;
- Professor Emeritus, Department of Political Science;
- Emeritus Fellow, Trinity College;
- Senior Fellow, Massey College; and
- Co-Chair, Board of Management, Retiree/Senior Scholar Centre.

[93] Professor Russell was, among other things, a professor at the University of Toronto in the Department of Political Science from 1968 to 1996. He was a visiting professor at several universities, including at Harvard University from 1967 to 1968.

[94] Professor Russell has won many awards and distinctions, including being named an Officer of the Order of Canada in 1986.

[95] Professor Russell is a member of several professional associations, including:

- the Canadian Political Science Association (he was the president in 1990 — 1991);
- the International Political Science Association (in 1990 he was an executive member of the Research Committee on Comparative Judicial Studies);
- the Canadian Institute for the Administration of Justice (he was the vice-president for research from 1983 to 1985); and
- the Canadian Law & Society Association (he was vice-president in 1985 — 1986 and president in 1987 — 1988).

[96] Professor Russell was a member of several committees and boards of inquiries in the public service, including:

- The Royal Commission on Certain Activities of the Royal Canadian Mounted Police, for which he was the director of research from 1977 to 1981;
- The Churchill Society for the Advancement of Parliamentary Democracy, for which he was the chairman from 2001 to 2004; and
- The Chinese Academy of Social Science/Royal Society of Canada Project on Democracy from 1992 to 1996.

[97] Professor Russell has written numerous books and articles on political science, democracy and law, including:

- *Two Cheers for Minority Government: The Evolution of Parliamentary Democracy in Canada*, (2008);
- *Parliamentary Democracy in Crisis*, (with Lorne Sisson), (2009);
- *Leading Constitutional Decisions*, (1982);
- *The Administration of Justice in Uganda: Some Problems and Proposals*, (1971);
- *The Future of Social Democracy: Views of Leaders from Around the World*, (2000);
- *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, co-edited with David O'Brien, (2001); and
- *Judicial Power and Canadian Democracy*, co-edited with Paul Howe, (2001).

[98] Professor Russell stated that during his career he has taught about and written about political theory and philosophy. He has written about several subjects, including the Canadian and American constitutions and aboriginal politics, as well as the appointment of judges and the workings of courts in Canada.

[99] Professor Russell stated that he was sort of the chief of staff of the Royal Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police (RCMP), for which he worked for two years. His work consisted of identifying the policy issues raised by gathering information on Canadians and ways of improving security in Canada. One of the main issues was whether Canada needed an agency to collect information on citizens. The RCMP was collecting a large amount of information on ordinary citizens. For example, the RCMP had files on people, including university professors, who had protested against the war in Vietnam. They also had files on members of political parties, union leaders and aboriginal leaders. The Commission's conclusion was that Canada needed an agency to provide intelligence on espionage and terrorism but that there was no need to collect information on ordinary citizens who were not involved in those activities.

[100] Professor Russell testified that he was an expert witness in a case before the Federal Court involving Democracy Watch and Prime Minister Harper. The issue in that case was whether the Prime Minister infringed the provisions of the *CEA* when he called an election in 2008 since the *CEA* prescribes fixed times for elections.

[101] The respondent's representative asked that I qualify Professor Russell as an expert in "political science, including parliamentary democracy, and including parliamentary democracy in a comparative context, including the perception and workings of the Canada Parliamentary systems and the role and prerogatives of the Governor General." The applicant's representative objected on the grounds that Professor Russell was not an expert in all those fields. Given Professor Russell's education and vast experience in government and parliamentary matters, I agreed to qualify Professor Russell as an expert in political science, parliamentary democracy, comparative parliamentary democracy in an international context, and the role and prerogatives of the Governor General of Canada.

[102] Professor Russell explained that Canada's parliament is based on the Westminster model. The party that has a majority of seats in parliament forms the government. The governing party must have the confidence of the House of Commons

at all times. If the governing party loses the confidence of the House of Commons, the leader of that party asks the governor general to dissolve parliament and call an election. The governor general can dissolve parliament, on the advice of the prime minister, but he or she can also designate the leader of another party that has the confidence of the House of Commons to form the government. The purpose of that power of the governor general is to avoid unnecessary elections that could happen, for example, if a prime minister wanted to call another election soon after a recent election. The rationale for that authority is that, if another party has the confidence of the House of Commons, it deserves to have the opportunity to govern the country.

[103] There has been one instance where the governor general refused to follow the advice of the prime minister to call an election. In 1926, Prime Minister Mackenzie King asked Governor General Lord Byng to dissolve parliament and call an election. The governing party did not have a majority in the House of Commons; it was governing through the support of another party. Prime Minister Mackenzie King asked Governor General Lord Byng to dissolve parliament and call an election because he felt that he was losing the support of the other party and wanted to avoid losing a confidence vote. The Governor General refused. He preferred to wait until the fall to allow for a cooling-off period. The Prime Minister resigned to avoid a vote of non-confidence.

[104] Professor Russell explained that the government needs ministers at all times to govern departments. When parliament is dissolved, the governing party continues to govern the country in a “caretaker” mode. When the government is in that mode, it usually limits itself to ordinary business and avoids introducing important policy changes. For example, in 1896, Prime Minister Tupper had been defeated and wanted to make appointments before leaving office, but the governor general of the time, Lord Aberdeen, refused to make the appointments.

[105] Professor Russell explained that the governor general has a reserve power to dismiss the prime minister, although no governor general has ever exercised that power. The governor general might have to do so if a prime minister loses the confidence of the House of Commons and refuses to ask the governor general to call an election.

[106] The governor general summons parliament after an election at the request of the prime minister. Parliament must be summoned within a year. The longest period

during which parliament was not summoned occurred in 1979 when the governor general waited five months.

[107] Before the 1960s, the prime minister would lose the confidence of the House of Commons if he or she lost a vote on any matter. Things are different now. To lose the confidence of the House of Commons, the vote must be about an important matter, such as the budget, the Speech from the Throne or any important matter that indicates that the prime minister cannot carry-on governing the country. Whether or not the prime minister has lost the confidence of the House of Commons is a matter of judgment and common sense.

[108] Professor Russell stated that federal elections were delayed for a year during World War II so as not to hold them in wartime. Another example of a postponed election occurred in the United Kingdom in 2001. Local elections were postponed, because of the spread of hoof and mouth disease, through an act of the Parliament of the United Kingdom (Brief of Authorities, Volume 2, Tab 21). Civil unrest did not result from the postponement of either of those elections.

[109] The respondent's representative asked Professor Russell whether civil unrest would occur in Canada if federal elections were delayed because of hoof and mouth disease. The applicant's representative objected to that question on the grounds that Professor Russell is not an expert on human behavior. I took the objection under advisement. I decided to allow the question because Professor Russell is an expert on such matters because of his background in political science and his vast experience in studying the workings of Canadian democracy. I also allowed the question in the interest of fairness since the applicant's representative asked Mr. Kreis several opinion questions on whether civil unrest would occur if elections were not carried out properly, even though Mr. Kreis is not an expert on that matter. However, I would like to add that Professor Russell's answer is not directly on point. One of the issues in this application is whether civil unrest would ensue if elections were not conducted properly because EC was not ready to proceed with an election, not because of hoof and mouth disease. Professor Russell answered that it would be very implausible that civil unrest would occur if elections were delayed or conducted improperly because of hoof and mouth disease given what we know of Canadians.

[110] Professor Russell testified that he was familiar with the political situation in Kenya. Kenya is an emerging democracy that has undergone recent constitutional

changes. One party dominates that country, which is populated by two main tribes. One tribe was afraid that the government would act against it. All hell broke loose during the 2007 general elections. The United Nations intervened. There was an agreement to share power between the two tribes. The situation in Kenya is very different from Canada. Kenya's democracy is not mature, while Canada has had democracy for 150 years. Canadians are also not prone to violence.

[111] Professor Russell testified that, last year, when the Governor General prorogued parliament, some citizens were angry, but there was no civil unrest. Canadians are very civil. They might protest a government action, but peacefully. Political scientists have noted the peaceful way in which Canadians deal with political issues.

[112] Professor Russell explained that, in Canada, there are several processes available to Canadians who wish to contest the validity of an election. Elections can be contested before the courts, and a candidate in an election can request a recount.

[113] In cross-examination, Professor Russell stated that parliament cannot pass bills once it has been dissolved. However, parliament has delegated many powers to the executive, regulatory powers for example.

[114] The applicant's representative asked Professor Russell whether it was correct that, if there were no way to determine who had won an election, the governor general could not summon parliament, and there would be no way to pass legislation. Professor Russell answered in the affirmative.

[115] In cross-examination, Professor Russell agreed with the applicant's representative that a few riots have happened in Canada. For example, there was a violent riot in Montreal when Maurice Richard was suspended from playing hockey. Professor Russell was also aware of the 1919 riot in Winnipeg because of a general strike. He was not familiar with the riot that occurred in Newfoundland in 1861 because of a constitutional crisis. Nor was he aware of the riot in Montreal in 1832 during a by-election or the riot in the same city in 1849 when outraged Tories attacked Lord Elgin and set fire to the Parliament Buildings. Professor Russell stated that he remembered the riot in Vancouver in 1994 during the Stanley Cup playoffs but that he was not aware of the 1993 riot in Montreal, also during the Stanley Cup playoffs.

[116] Professor Russell also stated in cross-examination that he has never worked for EC or for any provincial body involved in conducting elections.

[117] Professor Russell agreed under cross-examination from the applicant's representative that riots and civil unrest cannot be predicted.

[118] Professor Russell agreed that the riot in Kenya before and after the 2007 elections was violent. He also agreed with the description in Exhibit E-26 of the violence during the 2006 elections in Haiti. That description indicates that the riots resulted in deaths.

[119] Professor Russell stated under cross-examination that he was familiar with the riots in Moldova in 2009. His colleagues travelled to that country to examine the situation. Moldova was once part of the Soviet Union. He generally agreed with the description of the riot in the report prepared by the Office for Democratic Institutions and Human Rights (Exhibit E-19).

[120] Professor Russell specified in redirect that, after the 9/11 terrorist attack, the government took two months to pass legislation on terrorism.

[121] Professor Russell explained that the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), gives the governor general the power to declare an emergency and grants him or her the powers needed to deal with such situations. If parliament is not sitting, the governor general may summon it. The Royal Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police recommended the adoption of emergency legislation.

III. Summary of the arguments

A. For the applicant

[122] The applicant's representative stressed that the issue to be resolved in this application is simple: Is preparing for and conducting a federal electoral event necessary for the safety and security of the public? The applicant's position is that the answer to that question is yes. Therefore, the applicant asks that the Board issue an order declaring that all aspects of the preparation and conduct of a federal electoral event are deemed to form part of the ESA.

[123] The applicant has proposed that 27 CS positions be designated as essential for the safety and security of the public.

[124] Without the work of employees in the CS Group, an election would be incomplete or invalid which would affect the safety and security of the public for the following three reasons:

- A strike of CS employees could cause civil unrest due to chaotic election procedures and/or invalid electoral results.
- Since the strike could reasonably preclude the production of valid electoral results, it would delay the summoning of the House of Commons. Consequently, parliament would not be able to pass legislation to deal with emergencies.
- The strike could reasonably lead to the disclosure of personal information that EC has collected on electors.

[125] Mr. Kreis testified that EC has no control over when an election is called, that it is not consulted before elections, and that it is not notified in advance that an election will be called. Consequently, EC must be in a constant state of readiness for an election. Mr. Kreis also described the consequences of any omission or failure in managing elections.

[126] An election can be divided into three phases: the pre-electoral phase, the electoral phase and the post-electoral phase. The pre-electoral phase consists of nine categories of activities, the electoral phase (that is, the election period) consists of five categories of activities and the post-electoral phase consists of three categories of activities. Mr. Kreis described each phase and showed that CS employees directly or indirectly support all phases.

[127] Mr. Kreis' testimony established that EC needs two months before the proclamation of an election to perform the activities of the pre-electoral phase in order to be ready to conduct a valid electoral event. That is why the preparation time for an election is so important.

[128] The applicant's representative stressed that Mr. Kreis' uncontested testimony showed that the activities in all phases of the conduct of an election are essential for a valid election. Mr. Kreis also testified that a strike by CS employees during any phase of the election could jeopardize the safety and security of Canadians.

[129] The respondent's representative said on several occasions that some of the tasks performed by IT applications can be executed manually. The applicant's representative contended that that argument is not valid since paragraph 123(6)(b) of the *PSLRA* provides that the employer does not have to consider alternate service channels when determining essential services. That provision reads as follows:

123.(6) For the purposes of subsection (5), the number of employees in the bargaining unit that are necessary to provide the essential service is to be determined

...

(b) on the basis that the employer is not required to change, in order to provide the essential service during a strike, the manner in which the employer operates normally, including the normal hours of work, the extent of the employer's use of overtime and the equipment used in the employer's operations.

[130] The applicant's representative argued that subsection 197(1) of the *PSLRA* is not relevant to this application for two reasons. That provision reads as follows:

197. (1) If a strike occurs or may occur during the period beginning on the date of a dissolution of Parliament and ending on the date fixed for the return of the writs at the next following general election and, in the opinion of the Governor in Council, the strike adversely affects or would adversely affect the national interest, the Governor in Council may during that period make an order deferring the strike during the period beginning on the day on which the order is made and ending on the twenty-first day following the date fixed for the return of the writs.

[131] The first reason is that subsection 197(1) of the *PSLRA* only addresses the election period, that is, the period after the election is proclaimed. If a strike occurs one month before an election is called, the Governor in Council could not use that provision to delay the strike. EC would not be prepared for the election since preparation takes two months.

[132] The second reason subsection 197(1) of the *PSLRA* is not relevant to this application is that its reach is too broad to resolve the situation of a strike during an election. The order issued by the Governor in Council to defer the strike would have to cover all 1300 CS employees in the bargaining unit; it could not be limited to the 27 CS positions at EC that the applicant proposed for designation as essential. Issuing an

order under that provision of the *PSLRA* would be much more intrusive than designating 27 CS positions at EC as essential.

[133] The applicant's representative emphasized that, in *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97, the Board stated that ". . . the paramount public interest to be protected in an ESA is the public's safety and security"(at paragraph 176). The Board also stated in that decision that the decisions of the Public Service Staff Relations Board ("the former Board") interpreting the concept of ". . . safety or security of the public . . ." remain relevant for this Board as it considers applications under subsection 123(1) of the *PSLRA* (at paragraph 177). The Board added as follows that it should err on the side of caution when designating essential services (at paragraph 179):

179 . . . First, as indicated in the jurisprudence of the former Board, reinforced by the preamble to the new Act, the Board should err on the side of caution in protecting the safety and security interests of the public; see, for example, Canada (Treasury Board) v. Public Service Alliance of Canada, (Radio Operation Group - Technical category). Second, through a different lens, the Board should take care that it not deprive employees of the right to strike (nor, by doing so, undermine the bargaining agent's ability to conduct effective collective bargaining) unless it is satisfied that the evidence before it establishes a sound basis for declaring a service essential or for determining other matters that may be included in an ESA.

. . .

[134] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55, the Board stated that the first determination that it must make in an application under section 123 of the *PSLRA* is identifying services or activities that are necessary to the safety and security of the public (at paragraph 67). The applicant's representative asked that I use a simplified statement of essential services, such as the following, which was used in that decision:

. . .

106 An ESA, however, need not be cast at the same level of detail as is appropriate for a job description. The latter is a tool created for the primary purpose of classifying a position against a classification standard. The description of an essential service in an ESA exists for a quite different purpose. It needs to be sufficiently specific to identify what

major functions should continue in the event of a strike as well as to facilitate determinations about other required content elements in an ESA — mainly, the final number of positions that will be necessary to provide the essential service should strike action occur. To that end, the Board does not expect that ESAs will necessarily look like a collection of excerpts from classification documents.

107 The Board has concluded that a simplified statement of the essential service is possible and appropriate in this case. . . .

. . .

[135] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 181-02-348 (19970303), the former Board held that the proper functioning of the Federal Court was vital to the public interest. The applicant's representative drew an analogy between the proper functioning of the Federal Court system and the proper functioning of parliament. According to the applicant's representative, both are essential to the safety and security of the public.

[136] In *Treasury Board v. The Professional Institute of the Public Service of Canada (Translation Bargaining Unit - Administrative and Foreign Service Category)*, PSSRB File No. 181-02-28 (19740703), the former Board decided that translators assigned to parliament while it was in session, translators engaged in the translation of public bills and translators assigned to the legal section of the Department of Justice were necessary for the safety and security of the public. That case is right on point since it deals with the workings of parliament, as does this application. The duties of the CS positions proposed in this application are essential to the proper functioning of parliament since CS employees ensure the proper election of members of parliament.

[137] The applicant's representative pointed out that the respondent did not present evidence that would contradict the evidence presented by Mr. Kreis. In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55, the Board indicated as follows that, although the bargaining agent does not need to present evidence that would contradict the employer's evidence, such a decision may be strategically flawed:

. . .

70. . . . The principal burden of proof remains with the employer. It is thus open to the bargaining agent to decide

not to lead evidence in an essential services case. While that decision leaves the Board to determine the outcome based only on the facts adduced by the employer, as tested in cross-examination by the bargaining agent, no formal prejudice attaches to the bargaining agent's approach. Its decision may turn out to be strategically flawed when the Board weighs the final result without the benefit of countervailing evidence, but it is not a failure on the bargaining agent's part to meet a formal onus to prove or disprove a case.

...

[138] In that case, the Board concluded that the uncontradicted evidence of the employer was sufficient to establish that the positions were necessary for the security and safety of the public and decided that it was preferable in that case to err on the side of caution (at paragraphs 102 and 103).

[139] Turning to this application, the applicant's representative argued that there is a reasonable possibility that the safety and security of the public would be threatened if the CS employees at EC went on strike during either the preparation or the conduct of an election. Those employees are directly involved in the activities of those phases of an election or work on the computer equipment that supports those activities.

[140] A strike could cause chaotic election procedures or an invalid electoral result, denying Canadians their right to vote and their right to choose members of parliament, which is fundamental to democratic societies. The applicant's representative referred me to *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, in which the Supreme Court of Canada stressed the importance of the right to vote in our democratic society:

...

104 *All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Canadian Charter of Rights and Freedoms guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.*

...

[141] In *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, the Supreme Court emphasized that the right to vote ensures that each citizen can meaningfully participate in the electoral process (at paragraph 26).

[142] In *Lukaszuk v. Kibermanis*, 2005 ABCA 26, a case dealing with the judicial recount of votes in an election, the Alberta Court of Appeal stressed that “[v]oting is the lifeblood of democracy and courts should be very slow to disenfranchise voters on the basis of a technical non-compliance with voting instructions. . .” (at para 25).

[143] The evidence establishes that irregularities in the conduct of elections have caused civil unrest in Mexico, Kenya, Haiti and Moldova. Professor Russell stated that those riots occurred because of irregularities during the elections. The applicant has also submitted official reports describing those riots. That evidence indicates that there is a reasonable possibility that civil unrest could occur in Canada if an election was not properly carried out.

[144] One cannot assume that riots cannot happen in Canada if elections are not properly carried out. There have been riots in this country before: in Montreal in 1849 when outraged Tories attacked Lord Elgin, in Winnipeg in 1919 during a general strike, in Montreal in 1955 when Maurice Richard was suspended from playing hockey during the Stanley Cup playoffs, in Montreal in 1993 during the Stanley Cup playoffs, and in 1994 in Vancouver, again during the Stanley Cup playoffs. Professor Russell confirmed that those riots occurred. If some citizens in Canada can cause riots for an issue such as a hockey game, one cannot conclude that Canadians would not riot for more important matters such as not respecting their right to vote.

[145] The applicant’s representative pointed out that the respondent’s representative never asked Professor Russell whether civil unrest could occur if chaotic election procedures were followed during an election or if the election results were incomplete. Instead, the respondent’s representative asked Professor Russell if civil unrest would occur in Canada in the event of the spread of hoof and mouth disease which is a different matter.

[146] The second risk, as indicated previously, is that a strike by CS employees at EC could end in election results that are not valid. Without valid election results, it would not be possible to summon parliament after its dissolution. When parliament is dissolved, it cannot pass legislation. Professor Russell confirmed as much. Parliament

would not be able to adopt legislation to respond to unanticipated emergencies that would affect the safety and security of Canadians. Mr. Kreis gave two examples of such emergencies. In 2007, parliament passed legislation in response to the closing of the Chalk River nuclear reactor. The reactor supplied half the world's medical isotopes for cancer treatment. In 2001, parliament passed legislation to deal with terrorism after the attacks of September 11, 2001 in New York City.

[147] Professor Russell confirmed that parliament cannot pass legislation to deal with emergencies when it is dissolved. Passing legislation would have to wait until new members were elected. Professor Russell did not comment on the other risks invoked by the applicant, which are the risk of civil unrest in the event of a chaotic election and the risk of disclosing personal information.

[148] The applicant's representative contended that the *Emergencies Act* is not relevant in this application. That *Act* applies in certain situations, but it does not cover all emergencies that can put Canada at risk. Also the scope of government authority under that *Act* is not as broad as parliament's authority. The government can only do what is contemplated in that *Act*.

[149] Subsection 58(3) of the *Emergencies Act* provides that, if a declaration of emergency is issued when parliament is dissolved, parliament can be summoned. But parliament cannot be summoned if there are no valid election results. It would not be possible to know whom to summon.

[150] The applicant's representative also contended that there is a risk that personal information on electors in the possession of EC could be disclosed if the CS Group went on strike at EC either shortly before or during an election. The Privacy Commissioner of Canada stressed the importance of having proper safeguards against the disclosure of personal information in the audit report *Privacy Management Frameworks of Selected Federal Institutions* (Exhibit E-10). The respondent did not contradict Mr. Kreis' testimony as to the critical role that CS employees play in ensuring the security of personal information during an election and during its wrap-up.

[151] In conclusion, the applicant's representative stated that preparing for and conducting an electoral event is essential for the safety and security of the public. There is a reasonable possibility that a strike during the preparation or conduct of an

election would jeopardize the safety or security of Canadians. Therefore, the applicant's representative asked the Board to declare that the duties of CS employees involved in preparing and conducting a federal electoral event are essential to the safety and security of the public.

B. For the respondent

[152] The respondent's representative delivered oral and written arguments. The following is a summary of both.

[153] The respondent's position is that EC does not provide an essential service. The security of the public would not be affected if elections were delayed or were not properly carried out. If there were no elections, the government could deal with emergencies in a non-legislative manner. Also, section 59 of the *CEA* provides the Governor in Council with the authority to withdraw an election writ. Alternatively, only a small proportion of workers in the CS Group is essential.

[154] One must keep in mind that a strike is not indefinite. Elections may be delayed. Delaying elections does not represent a disenfranchisement of voters or a denial of their right to vote. There are alternative legislative provisions that can address the concerns raised by the applicant, such as the *Emergencies Act*.

[155] The ESA must be determined in the context of a strike. This was highlighted as follows by the Board in *Public Service Alliance of Canada v. Parks Canada Agency*:

...

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

...

[156] Because an ESA is a limitation on the right to strike, it must balance labour rights with other legislative mandates of the government. The right to collective bargaining and the right to strike should be minimally limited, that is, to a level that is just enough to ensure the safety and security of the public. That means that the government will not always be able to meet other statutory mandates during a strike,

even when there is an ESA. This was also highlighted as follows in *Public Service Alliance of Canada v. Parks Canada Agency*:

...

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

...

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

...

[157] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 56, the Board pointed out that a service being important or required by statute does not make it essential within the meaning of the *PSLRA* (at paragraph 53).

[158] The respondent's representative emphasized that the onus of proving that a service is essential rests with the applicant, as the Board pointed out in *Public Service Alliance of Canada v. Parks Canada Agency*, at paragraph 180, in *Public Service*

Alliance of Canada v. Treasury Board (Program and Administrative Services Group), 2009 PSLRB 55, at paragraph 70 and in *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 56, at paragraph 52.

[159] The former Board consistently held that it is important to distinguish between inconvenience to the public and the safety and security of the public. In *Treasury Board v. Public Service Alliance of Canada (Library Science Group)*, PSSRB File No. 181-02-348 (19970303), the former Board held as follows that a service is not essential simply because failing to provide it would constitute an inconvenience to the public:

...

[25] Accordingly, the Board's previous decisions in this area continue to be relevant. As noted by the bargaining agent's representative, a common theme throughout the Board's decisions on safety and security designations has been the importance of distinguishing between inconvenience to the public on the one hand, and safety and security on the other. The designation process represents an attempt to balance the right of employees who are members of a bargaining unit to participate with their fellow employees in what is otherwise a lawful strike, against the need to protect the vital interests of the public. In determining the proper balance, the Board has said that inconvenience is a natural result of a withdrawal of services (otherwise what purpose did those services serve in the first place). In other words, there is no equivalence between inconvenience and "duties ... at any particular time or after any specific period is or will be necessary in the interest of the safety or security of the public".

...

[160] The former Board also held in *Canada (Treasury Board) v. Public Service Alliance of Canada (Radio Operation Group - Technical Category)*, PSSRB File No. 181-02-99 (19790601), that essential services do not include duties that would serve only to protect the employer or the public from economic hardship or inconvenience.

[161] The former Board held in *International Brotherhood of Electrical Workers, Local 2228 v. Canada (Treasury Board) (Electronics Bargaining Unit - Technical Category)*, PSSRB File No. 181-02-16 (19720221), that, while the safety and security of the public may apply to future situations, those situations cannot be abstract or highly speculative.

[162] In *Treasury Board v. Public Service Alliance of Canada (Education Group)*, PSSRB File No. 181-02-235 (19870319), the former Board held that determining essential services should not be based on exceptional circumstances :

. . .

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

[Emphasis in the original]

[163] The former Board stated in *Public Service Alliance of Canada v. Canada (Treasury Board) (Heating, Power and Stationary Plant Operations Group - Operational Category)*, PSSRB File No. 181-02-18 (19720427), that the safety and security of the public is not the same as the public interest. For instance, even if serious damage may be caused to important research projects or valuable works of art, the safety and security of the public is not endangered.

[164] The respondent contended that an employer is obligated to take such measures as are within its competence or authority to ensure the safety or security of the public in the event of a strike, including providing alternative services or authorizing limitations on or the cessation of certain operations. For instance, in *Canada (Treasury Board) v. Public Service Alliance of Canada (Radio Operation Group - Technical Category)*, a case dealing with airport radio operators, the former Board determined that during a strike, aircraft would fly only for emergencies and evacuations or mercy flights. The former Board rejected the possibility that flights would continue as usual.

[165] The safety and security of the public would not be affected if EC were to delay holding an election during a strike. The employer has identified three potential risks should CS workers be permitted to strike, but it has introduced little or no evidence in support of those hypothetical risks. The employer's sole witness, Mr. Kreis, is an employee of the government; he cannot be considered independent. Many of his answers in cross-examination demonstrated that he was unaware of the detailed workings of the electoral process (for example, whether certain work could be

performed manually). He also did not know that section 131 of the *PSLRA* allows the Board to amend an ESA in emergencies.

[166] The employer is asking the Board to take judicial notice of the effects that a strike would have on elections. The respondent's representative argued that the Board cannot take judicial notice of those effects. The threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either so notorious or generally accepted as not to be the subject of debate among reasonable persons or capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. The applicant has not met either criterion. In *R v. Spence*, 2005 SCC 71, the Supreme Court noted that the closer a fact approaches the central issue, the more stringent the proof required (at paragraph 60).

[167] There is no risk of civil unrest if a strike occurs during an election because the election can be delayed. Professor Russell pointed out that, when the government is defeated through a vote of non-confidence in the House of Commons, the Governor in Council is not required to call an election. He or she may ask the minority parties to form a coalition. The Governor in Council can also prorogue parliament and ask the government to continue governing the country.

[168] The applicant provided no evidence as to what might reasonably happen in Canada if an election were delayed. The three risks suggested by the applicant relate only to conducting an election improperly. If an election is delayed, there is no risk of civil unrest. General elections were delayed in Canada in 1926 and during World War II, and there were no riots. Parliament was prorogued for six weeks in 2008 and 2009 without any uprising among the public. There was intense public interest in the question of whether parliament should be prorogued. The country was divided on that issue, but there were no riots or civil unrest even though some persons felt angry and cheated by the decision to prorogue parliament. Local council elections were delayed in the United Kingdom in 2001 because of hoof and mouth disease. No riots occurred there either.

[169] In his testimony, Professor Russell testified that there is no historical tendency of violence amongst Canadians. Canadians have a long history of toleration and peaceful protests. Canada has had tremendous struggles, such as the Quebec referendum on separation, but Canadians protested peacefully. Canadians have been a model in reacting to disruptions in government and the electoral process. They have

never rioted in those contexts. In fact, Canadians are apathetic about politics in Canada. Voter turnout in general elections is at an all-time low as indicated in a document issued by parliament (Exhibit B-6) and an EC study on voter turnout (Exhibit B-7).

[170] The respondent's representative stated that she asked Professor Russell whether civil unrest would occur in Canada if federal elections were delayed because of the spread of hoof and mouth disease. He answered that civil unrest would be very implausible. He added that Canadians were not prone to violence. The question of the respondent's representative was broad enough to cover all situations where an election is delayed.

[171] The respondent's representative pointed out that the only evidence submitted by the applicant to support the proposition that civil unrest would arise if chaotic electoral procedures were carried out was the testimony of Mr. Kreis, who offered his opinion on riots during elections in Mexico and Kenya. Mr. Kreis is not an expert on such matters.

[172] It is true that there were problems during the general elections in Kenya in 2007. A European Union report on those elections (Exhibit E-11) indicates that there was a lack of transparency in processing and tallying the election results, which undermined confidence in their accuracy (see page 1 of the report). However, there can be no reasonable comparison between the situation in Kenya and the situation in Canada. Professor Russell testified that Kenya is an emerging democracy that has recently undergone significant constitutional changes. What happened in Kenya cannot and would not arise if an election were delayed in Canada or if it were held with minimal CS staff.

[173] Nor can the presidential and parliamentary elections in Mexico in 2006 be compared to elections in Canada. The report by the European Union Election Observation Mission indicates that, although there were no serious irregularities in the election process, the losing candidate for the presidency of that country refused to accept a judicial ruling declaring his opponent the winner (Exhibit E-12, page 1). Canada has measures to address irregularities that Mexico does not have. The *CEA* sets out several mechanisms to address irregularities in elections. For example, if election results are close between two candidates, the returning officer may ask for a judicial

recount of the votes. An elector may contest an election before the courts if he or she believes that irregularities or fraud affected its results.

[174] The respondent's representative submitted that the government could deal with emergencies during an election. Professor Russell explained that, when parliament is dissolved, the prime minister and cabinet continue to govern Canada by acting as a caretaker government.

[175] The government can also use the mechanisms set out in the *Emergencies Act* to respond to emergencies during a strike. Section 19 of that statute grants the Governor in Council powers to deal with emergencies.

[176] The respondent's representative pointed out that, even in emergencies, legislative responses occur much later. For example, after the terrorist attack of September 11, 2001, the government only adopted legislation on terrorism two months later.

[177] Subsection 59(1) of the *CEA* provides the Governor in Council with another tool to respond to emergencies during an election. He or she may withdraw a writ for any electoral district if there is a flood or other disaster and it is impracticable to carry out the election. That subsection reads as follows:

59. (1) The Governor in Council may order the withdrawal of a writ for any electoral district for which the Chief Electoral Officer certifies that by reason of a flood, fire or other disaster it is impracticable to carry out the provisions of this Act.

[178] The *PSLRA* also provides the government with the tools needed to deal with an emergency that could arise during a strike. Subsection 197(1) gives the Governor in Council the authority to defer a strike if the situation warrants. The criteria used to determine if a strike should be deferred are broader than the criteria used to determine if a service is essential. Under the authority of subsection 197(1), the Governor in Council may defer a strike in the national interest, while services are only determined to be essential under subsection 4(1) if they are necessary for the safety or security of the public. The wording of subsection 197(1) implies that a strike during an election will not always affect the national interest since it gives the Governor in Council discretion to determine that matter.

[179] The government has examined the issue of whether EC employees should be deprived of their right to strike during an election. The Standing Committee on Procedure and House Affairs recommended in its 13th report that EC staff be designated as employees performing essential services and that they be deprived of their right to strike. The government refused to take such steps and asked the committee to conduct further consultations on that matter in its *Government Response to the Thirteenth Report of the Standing Committee on Procedure and House Affairs* (Exhibit B-2, page 12):

...

A majority of Committee members also recommended that Elections Canada staff be designated as employees performing an essential service and would not have the right to strike (recommendation 1.8). While the government does not disagree that this recommendation would avoid the potential for labour interruptions jeopardizing the conduct of an election, it feels that more consultation with affected stakeholders would be required before implementing such a change. The Government invites the Committee to conduct such consultations should it wish to pursue this issue further.

...

Including CS positions in the ESA and thus depriving CS employees of their right to strike would go against the government's wishes.

[180] The *PSLRA* provides the government with other tools to deal with emergencies during an election. Section 131 of the *PSLRA* gives the Board the authority to amend or suspend an ESA if necessary to deal with an emergency. That provision reads as follows:

131. *Despite any provision in this Division, if either the employer or the bargaining agent is of the opinion that a temporary amendment to an essential services agreement, or its suspension, is necessary because of an emergency but the parties are unable to agree to do so, either of them may, at any time, apply to the Board for an order temporarily amending, or suspending, the agreement.*

[181] The Treasury Board's own *Guidelines for Essential Services Agreements* indicates that section 131 of the *PSLRA* is the appropriate vehicle to address emergency situations (Exhibit B-10):

...

5.3 Suspension of an ESA

In extraordinary or emergency circumstances, in which a strike either needs to be delayed, or its effects temporarily minimized, the employer or the bargaining agent may apply to the PSLRB to temporarily amend or suspend an essential services agreement. The kinds of situations envisaged might include:

- *a public security threat (e.g., September 11, 2001);*
- *a major health or environmental emergency (e.g., Red River flood); or*
- *any other exigent circumstances where federal employees would be needed to be on the job, above and beyond what an essential services agreement would call for.*

...

[182] The right to strike is a *Charter* protected right. Including CS positions in the ESA would deprive those employees of that right and seriously undermine collective bargaining dynamics. The strict parameters of the legislation and case law tell us that the right to strike may be limited only when there are rational concerns for the safety and security of the public. In this application, there are no such concerns.

[183] The respondent's representative emphasized that the Board must consider that it is not business as usual during a strike. There will be compromises, and serious, significant hardship may result.

[184] Alternatively, the respondent's representative submitted that, if the Board were to decide that electoral readiness is essential for the safety and security of the public, it should identify what subset of services is essential. A number of EC's systems are in place primarily for efficiency reasons. Work can be done without them. They include having multiple channels for accessing Elections Canada, the management of the warehouse, the management of electoral geography and the improvements to software associated with closing out the election. Many activities for managing the electoral geography and establishing the regional offices are not essential. In her written arguments, the respondent's representative listed other activities that, in her view, are not essential. She also provided written comments on most of the 104 applications set out in Exhibit E-9.

[185] Only a few activities are essential to electoral readiness, including printing the electoral list as it exists on the day of the strike (but no updates to that list) creating appropriate electoral maps, setting up phone lines, and delivering ballots and other supplies to the returning offices.

[186] It is true that the *PSLRA* provides that the Board should not consider whether alternative personnel are available or whether the employer can change the manner in which it operates when determining the necessary number of employees to provide an essential service. But those restraints do not come into play when the Board determines essential services. Therefore, it is relevant, when identifying essential services, to consider alternative ways of operating.

C. Applicant's reply

[187] The applicant's representative argued that *Canada (Treasury Board) v. Public Service Alliance of Canada (Radio Operation Group - Technical Category)* is not on point. In that decision, which dealt with radio operators, the former Board stated that, in the event of a strike, flights would not continue as usual and that aircraft would not fly except in an emergency. That is not the state of the law today. Paragraph 123(6)(b) of the *PSLRA* provides specifically that, for the purpose of establishing essential services, the employer is not required to change the manner in which it operates normally.

[188] The applicant's representative pointed out that the respondent's arguments on judicial notice are not relevant. The applicant is not asking the Board to take judicial notice of the risks associated with EC's lack of preparedness to conduct an election. The applicant has provided direct and indirect evidence to support its propositions.

[189] The respondent's arguments about delaying an election are not relevant. The situation contemplated by the applicant occurs when an election is proclaimed. The applicant's argument is that, if that happens and EC is not properly prepared to conduct an election, there could be chaotic election procedures, and EC would not be able to provide valid election results. The applicant did not raise the issue of delaying elections.

[190] With respect to the testimony of Professor Russell that Canadians have no tendency to violence, the applicant's representative pointed out that Professor Russell was not aware of the Montreal riot of 1832 and the Newfoundland riot of 1861.

[191] Although subsection 59(1) of the *CEA* provides the Governor in Council with the authority to withdraw an election writ, it can be done only in the situations specified in that provision. Since the examples listed in subsection 59(1) are all natural disasters, the "other disaster" referred to in that subsection would have to refer to a natural disaster. The *ejusdem generis* rule of interpretation provides that an item used at the end of an enumeration should be interpreted as being of the same type as the items that precede it. Therefore, that provision does not cover all the risks that Canadians may face.

[192] The applicant's representative argued that section 131 of the *PSLRA* is not relevant to this application. That section deals with amendments to an ESA. In this case, there is no ESA to amend.

[193] The applicant's representative contended that the respondent's representative made several comments, both verbal and written, including in the table appended to her written arguments, which are not supported by any evidence. For example, the applicant's representative stated that managing geography is not essential, but she did not tender any evidence to support that proposition.

IV. Reasons

[194] The applicant filed an application under subsection 123(1) of the *PSLRA* about matters that may be included in an ESA covering positions in the CS Group for which the applicant is the employer. That provision reads as follows:

123. (1) If the employer and the bargaining agent are unable to enter into an essential services agreement, either of them may apply to the Board to determine any unresolved matter that may be included in an essential services agreement. . . .

. . .

[195] Subsection 4(1) of the *PSLRA* defines "essential service" and "essential services agreement" as follows:

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

"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies

(a) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;

(b) the number of those positions that are necessary for that purpose; and

(c) the specific positions that are necessary for that purpose.

[196] The applicant's contention is that "preparing for and conducting all federal electoral events is an essential service." It also argues that the activities described by Mr. Kreis are needed to properly prepare and carry out an election. The applicant also argues that the 104 IT applications that support the preparation and conduct of an electoral event (Exhibit E-9) are essential for those purposes. The applicant identified the 27 CS positions that support those IT applications.

[197] The respondent argues to the contrary that preparing for and conducting an election are not essential services. Alternatively, it argues that most of the activities described by Mr. Kreis and most of the 104 IT applications listed in Exhibit E-9 are not essential for preparing and conducting an election.

[198] At the hearing, I indicated to the parties that the hearing and my decision would deal only with the issue of whether employees in the CS Group at EC were performing essential services, and if so, what those services were. I would not deal, at this stage of the application, with any other matter that could be included in an ESA, such as the types of positions needed to provide an essential service.

[199] In *Public Service Alliance of Canada v. Parks Canada Agency*, the Board ruled that the principal burden of proof falls on the employer:

...

180. . . . *the Board takes the view that the principal burden of proof under the new Act continues to rest with the employer, as it did in the past when the employer proposed*

to designate positions under the former Act. The employer must place evidence before the Board to convince it that there is a reasonable and sufficient basis for finding, for example, that a service is essential

. . .

[200] The applicant's burden is to prove, on a balance of probabilities, that services delivered or activities performed by employees in the CS Group at EC are necessary for the safety and security of the public within the meaning of subsection 4(1) of the *PSLRA*.

[201] The applicant used the phrase "electoral events." That phrase is not found in the *CEA*. That *Act* governs general elections (subsection 57(1)) and by-elections (subsection 57(1.1)). The purpose of a general election is to elect members to the House of Commons from each electoral district. The purpose of a by-election is to elect a member to the House of Commons from one electoral district. The preparation and conduct of those two types of elections may be very different since their scopes are very different. Obviously, much less work is involved in preparing and conducting a by-election simply because there is only one member to elect to parliament. I was not presented with any evidence on by-elections. Consequently, I will deal only with general elections in this decision, and any comments I make about elections apply only to general elections.

[202] Before addressing the substantive issues raised in this application, I would like to point out that the applicant never asked me to take judicial notice of the risks that would ensue if EC were not prepared to conduct an election, as the respondent's representative contends. The applicant presented evidence to support its arguments.

[203] I would like to point out at the outset that I am satisfied that the nine main activities described by Mr. Kreis to prepare an election and the five main activities to be carried out during the electoral phase of the election (that is, the period that starts with the proclamation of the election and ends on voting day) are necessary for the preparation and conduct of an election. Mr. Kreis described in detail why those activities were necessary and how CS employees support them. For example, establishing internal and external call centres is necessary to provide information to the public during the election period. The respondent did not present any evidence that would contradict the evidence submitted by the applicant. Without those activities and the work of the CS employees that support them, it would not be possible to

conduct an election, or if the election were conducted, there would be risks that it would not be conducted properly. For example, errors could occur in preparing the list of electors or in tallying the election results.

[204] However, there is no convincing evidence that activities carried out during the post-electoral phase of the election, such as decommissioning the returning offices, are necessary to conduct an election. The elections are completed by then, and those activities could wait until the end of the strike.

[205] I am also satisfied from the evidence given by Mr. Kreis that most of the 104 applications listed in Exhibit E-9 are necessary for the preparation and conduct of an election. Mr. Kreis explained in a credible manner why those IT applications were necessary, and the respondent did not present any evidence that would establish the contrary. Without most of those applications, it would not be possible, for example, to exchange information about electors with returning officers and to tally the election results in a timely manner on election day. However, some applications are not necessary, including all applications related to the post-electoral phase of the election since, by then, the election would be completed, and those activities could wait until after the strike. Application 97 in Exhibit E-9, for example, is a system designed to decommission regional offices. That system is not needed during the election period. However, I will not dwell further on those applications that are necessary to carry out an election and those that are not for the reasons set out later in this decision.

[206] The issue to be resolved in this application is not whether the work performed by CS employees on the activities described by Mr. Kreis and the 104 IT applications listed in Exhibit E-9 is necessary to properly prepare for and conduct an election; the issue is whether the activities performed by CS employees in preparing and conducting an election are essential services. In other words, are they activities “. . . necessary for the safety or security of the public or a segment of the public” as contemplated by subsection 4(1) of the *PSLRA*? In my view, they are not. The safety and security of the public would not be threatened if EC were not sufficiently prepared to conduct an election or if it were unable to properly conduct the election.

[207] I would like to emphasize that I believe that elections are the foundation of our democracy. The right to vote is enshrined in section 3 of the *Charter*. In *Haig v. Canada (Chief Electoral Officer)*, the Supreme Court stressed the importance of the right to vote in our democratic society as follows:

...

[64] *The democratic rights contained in ss. 3, 4 and 5 of the Charter are quite explicitly articulated. In his discussion in "Democratic Rights", in G.-A. Beaudoin and E. Ratushny, eds., The Canadian Charter of Rights and Freedoms (2nd ed. 1989), 265, Professor Beaudoin summarizes these rights at p. 266 as:*

The right to choose the government, the right to seek public office, the right to vote periodically, freely and in secret and the right for those elected to sit regularly are the bases of democratic rights.

...

[208] But the fact that elections are important and central to our democracy does not necessarily mean that the safety and security of the public would be threatened if EC were unable to prepare for an election or were unable to conduct it properly.

[209] The applicant's main contention is that, if the activities performed by CS employees to prepare for and conduct an election were not declared essential, there is a reasonable possibility that elections would be flawed by ". . . chaotic election procedures and/or invalid electoral results," if a strike occurred less than two months before an election is declared (because it takes two months to prepare for an election) or during an election. This could cause civil unrest that would affect the safety and security of the public. In my view, that argument is flawed because there would be no "chaotic election procedures" or invalid election results in an election if the government, or more precisely the Governor in Council, simply decided to postpone the election until the strike is over. If EC is not ready to conduct an election because of a strike, the Governor in Council can simply decide to wait until the strike is over before proclaiming the election. As Professor Russell explained, even when the government is defeated in the House of Commons on a confidence vote, the Governor in Council does not have to call an election immediately. There is no convincing evidence that the temporary postponement of the election would affect the safety or security of the public. In fact, the applicant did not argue that such a postponement would affect the safety and security of the public. The applicant did not address that point directly. Its position is that EC has no control over when an election will be called. That is true, but the Governor in Council has full control over those matters. The Governor in Council is part of the Government of Canada, as is the employer. Paragraph 7(1)(e) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, provides that

the Treasury Board (that is, the employer) acts for the Queen's Privy Council for Canada in matters of human resources management. That includes human resources management at EC. The Governor in Council and the employer are parts of the same government.

[210] If the Governor in Council decides to call an election after a strike has begun or if a strike begins during the election period, the Governor in Council has another tool to ensure that a strike does not adversely affect the election. The Governor in Council can defer the strike until after the election if he or she believes that EC is not prepared to conduct it. Section 197 of the *PSLRA* provides that, if the Governor in Council determines that a strike during an election threatens the national interest, he or she can defer the strike. That provision reads as follows:

197. (1) If a strike occurs or may occur during the period beginning on the date of a dissolution of Parliament and ending on the date fixed for the return of the writs at the next following general election and, in the opinion of the Governor in Council, the strike adversely affects or would adversely affect the national interest, the Governor in Council may during that period make an order deferring the strike during the period beginning on the day on which the order is made and ending on the twenty-first day following the date fixed for the return of the writs.

(2) The Minister must cause a report giving the reasons for the order to be tabled in each House of Parliament within the first 10 days on which that House is sitting after the order is made.

(3) No employee organization shall declare or authorize, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of, a strike in respect of a bargaining unit in the period during which the strike is deferred by an order made under subsection (1).

(4) No employee shall participate in a strike in the period during which the strike is deferred by an order made under subsection (1).

[211] To defer the strike, the Governor in Council must first determine that it "... adversely affects or would adversely affect the national interest. . . ." The inability to properly conduct a general election may well meet that criterion. Surely, if that inability would give rise to civil unrest, it would adversely affect the national interest.

[212] The fact that the provision about deferring a strike is in the same *Act* that deals with essential services is significant. An *Act* must be read as a whole. In my view, parliament intended that it be considered that it provided the government with a tailored tool to deal with the effects of a strike on an election when deciding if a service or activity is essential.

[213] The applicant pointed out that section 197 of the *PSLRA* can only be invoked once the election is proclaimed. According to the testimony of Mr. Kreis, the preparation phase of the election takes two months. So, if a strike occurred shortly before the election period, EC would not have sufficient time to prepare even if the strike were deferred. EC would not be able to make up for the time lost because of the strike, before the strike was deferred. In my view, that argument is flawed. If a strike occurred before the Governor in Council proclaimed the election, and the Governor in Council notes that EC is not sufficiently prepared to conduct an election, the Governor in Council may, once the election is proclaimed, use section 197 to defer the strike for as long as EC needs to prepare for and to conduct the election. Section 197 allows the Governor in Council to defer the strike until 21 days after election day. Although there is a minimum 36-day period for conducting an election (paragraph 57(1.2)(c) of the *CEA*), there is no maximum period. If the Governor in Council believes that EC needs two months to prepare for an election and another month-and-a-half to conduct it, he or she may establish a three-and-a-half-month election period and use section 197 to defer the strike until after election day. Of course, that is the worst-case scenario. It supposes that EC is not at all ready when the election writ is dropped. In most cases, EC will be prepared to some extent.

[214] The applicant argues that using section 197 of the *PSLRA* overreaches its scope and is not practical since the Governor in Council would have to defer a strike of all CS employees, not only those working at EC. I do not have to decide that matter but in supposing that the Governor in Council could not tailor the deferral of the strike only to CS employees at EC, which is debatable, the fact that it is not practical does not negate the fact that the Governor in Council has the means that would allow it to deal with a strike that would adversely affect the national interest by threatening the safety or security of the public.

[215] It is interesting to note that the Standing Committee on Procedure and House Affairs recommended in its 13th report that EC staff be designated as employees

performing essential services, but the government refused to take such steps and asked the committee to conduct further consultations on that matter (Exhibit B-2, page 12):

...

A majority of Committee members also recommended that Elections Canada staff be designated as employees performing an essential service and would not have the right to strike (recommendation 1.8). While the government does not disagree that this recommendation would avoid the potential for labour interruptions jeopardizing the conduct of an election, it feels that more consultation with affected stakeholders would be required before implementing such a change. The Government invites the Committee to conduct such consultations should it wish to pursue this issue further.

...

[216] Even if the government decided to hold an election soon after a strike began or during a strike, and it decided not to defer the strike until after the election, there is no convincing evidence that civil unrest would ensue if there were irregularities in the conduct of the election. The applicant contends that there would be civil unrest because of “chaotic procedures” carried out in the election and that EC would not be able to produce valid election results. In my view, if irregularities occurred during the election, the government would use its tools to remedy them. For example, if the results of an election in an electoral district are close, the returning officer may ask for a judicial recount. (section 300 of the *CEA*).

[217] But even if the government could not correct irregularities that could occur during an election, there is still no reasonable and sufficient evidentiary basis to conclude that the safety and security of the public would be affected. There is no cogent evidence that Canadians would react in a violent manner or that any other form of civil unrest would ensue. As Professor Russell stated, Canadians are not prone to violent manifestations. I cannot infer that there would be civil unrest in Canada because other countries, such as Kenya, Haiti, Moldova and Mexico, have had civil unrest during their elections. Those countries cannot form a valid basis of comparison. Their political situations are not the same as Canada’s and they have different histories, social structures, economies, cultures and values. Kenya, for example, as Professor Russell has pointed out, is a new democracy that has recently undergone constitutional changes. Two tribes have been battling for power for years. Canada, on

the contrary, is a peaceful country that has enjoyed democracy for 150 years. In Haiti, political factions have been fighting violently for years. Canada, on the contrary, is politically very stable and peaceful.

[218] Nor can I conclude that violent manifestations during the Stanley Cup playoffs in Canada or during specific incidents such as the 1919 general strike in Winnipeg indicate that there could be violence in Canada if elections were not properly carried out. Those situations were very specific and localized and cannot be compared to an election. There is no common thread between those incidents and conducting an election.

[219] Before leaving this issue, I would like to point out that subsection 59(1) of the *CEA* is not relevant to this case. That subsection gives the Governor in Council the authority to withdraw an election writ in the case of an emergency. That provision cannot be used to cancel an election if EC was not sufficiently prepared to carry it out. Subsection 59(1) grants the Governor in Council the authority to withdraw an election writ only if it is impracticable to carry out an election in any electoral district “. . . by reason of a flood, fire or other disaster” As the applicant’s representative pointed out, the *ejusdem generis* interpretation rule provides that, when the last term of an enumeration is general, it must be interpreted in light of the terms that precede it (see *Mozley and Whiteley’s Law Dictionary*, Butterworths, Tenth Edition). So, in my view, the “other disaster” must be a natural disaster since floods and fires are natural disasters. EC’s lack of preparedness for an election cannot be viewed as an “other disaster” within the meaning of that provision since it is not a natural disaster.

[220] In my view, section 131 of *PSLRA*, which allows the Board to amend an ESA in emergencies, is not relevant to this application. The purpose of this application is to determine whether there are essential services at EC, not whether those services included in an ESA should be changed because an emergency has arisen.

[221] The applicant’s second main contention is that, if EC were unable to properly carry out an election, the government would be unable to deal with emergencies through legislation, as it has done in the past. Parliament passed legislation to deal with the threat of terrorism in the wake of the the 9/11 terrorist attack in New York City and passed legislation to deal with the shutdown of the Chalk River nuclear reactor. According to the applicant, it would not be possible to summons Parliament to adopt legislation because it would not be possible to determine which members were

elected or which party won the election. I do not agree with that proposition. Before addressing that issue, it is important to point out that, generally, the government does not have to pass legislation to deal with emergencies. It has a vast array of delegated powers that enable it to react to such situations, such as calling in the army. In case the usual powers of government are not sufficient, parliament adopted a statute aimed directly at giving the government the authorities it needs to deal with an emergency. Subsection 19(1) of the *Emergencies Act* grants the government powers to deal with public order emergencies, which are defined as threats to the security of Canada that are so serious as to be a national emergency (section 16 of the *Emergencies Act*). Those threats include any “. . . acts of serious violence against persons or property . . .” (section 2 of the *Canadian Security Intelligence Service Act*, R.S. 1985, c. C-23, referred to in section 16 of the *Emergencies Act*). In such cases, the Governor in Council has a wide range of powers, including the authority to make regulations that prohibit public assemblies (subsection 19(1) of the *Emergencies Act*).

[222] In supposing that it was necessary to adopt legislation to deal with an emergency, in my view the argument that parliament could not be summoned because it would not be possible to know who won an election is much too hypothetical and speculative. There is no convincing evidence that it would not be possible to determine the candidates that were elected to the House of Commons. As I have explained earlier in this decision, if irregularities occurred in tallying the election results, for example, the government has means to remedy the situation, such as a judicial recount.

[223] I would like to add one more comment about the *Emergencies Act*. Subsection 58(6) of that *Act* provides that the House of Commons must vote on a motion for the confirmation of a declaration of an emergency. Subsection 58(3) provides that, if the parliament was dissolved, it shall be summoned. The applicant’s representative argued that parliament cannot be summoned if there are no valid election results since it would not be possible to know who to summon. I reject that argument for the reasons set out in the previous paragraph. That situation is too hypothetical.

[224] The applicant’s third main contention is that there is a risk to the safety and security of the public if preparing for and conducting an election is not declared essential because there is a risk that personal information on electors will be disclosed in the event of a strike. CS employees would not be able to protect that information. EC’s National Register of Electors contains the names of electors, their addresses, their

genders and their dates of birth. I would like to point out that half of that information is already public since the names and addresses of most electors can be found in any telephone book. I must reject the applicant's argument because it was not provided with sufficient evidence on how that information risked being disclosed during a strike and how the disclosure of that information would affect the safety and security of the public.

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

(The Order appears on the next page)

V. Order

[226] The Essential Services Agreement (ESA) for the Computer Systems (CS) Group shall not include a provision that identifies an essential service performed by Elections Canada.

[227] The Board remains seized of all matters not agreed to by the parties about other positions in the CS Group.

October 2, 2009.

**John Mooney,
Board Member**