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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,
July 6 to 8, 2009.

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 (“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 of Canada (PIPSC or “the respondent”) is the bargaining agent. Along with its application, the applicant filed a list of positions in the CS Group that it proposed should be included in the ESA. The list contained CS positions in the Office of the Chief Electoral Officer (commonly referred to as Elections Canada), 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 (CBSA).

[2] The parties agreed that I would consider and determine the issue for one department or agency at a time. The first organization was Elections Canada. I rendered my decision on that matter on October 2, 2009. This decision deals only with the CBSA. At issue before me is identifying the facilities and the services provided, or the activities performed, by employees in the CS Group at the CBSA that are necessary for the safety or security of the public.

II. Summary of the evidence

[3] The applicant called two witnesses, David MacRae, Director of Traveler Operations at CBSA, and Norman Bryon, Director of Data Management and Data Warehouse, Technology Services, also at CBSA. The respondent also called one witness, David Calvert, Negotiator, PIPSC.

A. Testimony of Mr. MacRae

[4] Mr. MacRae testified for the applicant. He has worked for the CBSA for 30 years. He has been in his current position since 2004. Before that, he was the chief of Traveler Operations at the Ambassador Bridge in Windsor for nine years and the chief of Operational Services at the regional office in Windsor for two-and-a-half years.

[5] In his current position, Mr. MacRae reports to the regional director general. He manages the access of people and goods at the border. There are one hundred

twenty-eight employees that report to him, including 110 border services officers, 9 first-level superintendents, 2 chiefs of operations and 3 clerks. The applicant's representative referred me to the CBSA's organization chart (Exhibit E-1). Mr. MacRae works in "Regional Reporting" in the "Operations" branch shown on that chart. The applicant's representative tendered into evidence another CBSA organization chart (Exhibit E-2).

[6] Mr. MacRae described the CBSA's mandate. The CBSA is responsible for ensuring the safety and security of Canadians by managing the access of people and goods, including animals and plants, to and from Canada. It ensures that access to and from Canada meets legislative requirements.

[7] One hundred million travelers and 13 million commercial shipments arrive in Canada each year. The CBSA has over 1200 locations across the country, including at 119 border crossings, 14 international airports, 27 rail sites, 12 ferry terminals, 3 postal processing plants and 3 detention facilities. The CBSA also employs 45 migration integrity officers that work at missions outside of Canada. Their job is to prevent the entry into Canada of undesirable persons before they enter the country.

[8] The CBSA employs more than 14 000 employees, including 6400 border services officers.

[9] Threats to the safety and security of Canadians include the entry into Canada of undesirable persons such as terrorists and members of crime organizations.

[10] Ensuring the safety and security of Canadians includes handling threats to the environment. The CBSA prevents the entry into Canada of invasive species that threaten Canada's ecological balance, such as the gypsy moth. Another threatening species is the emerald ash borer bug. When it was introduced to Canada, it wiped out ash trees in certain parts of this country.

[11] Ensuring the safety and security of Canadians also includes managing threats to the food chain. The CBSA prevents the entry into Canada of communicable diseases, such as the hoof and mouth disease, which was introduced in Canada in the 1950s via an infected sausage from Europe. The CBSA also monitors persons who enter Canada and have diseases. For example, the CBSA is carefully monitoring persons entering Canada who have contracted the H1N1 flu virus.

[12] The CBSA uses its intelligence systems to identify high-risk persons and cargo and to ensure that regulations are met. Border services officers inspect shipments for dangerous chemicals, biological material, explosives and nuclear material.

[13] Border traffic contributes to the prosperity of Canada and to the health and safety of Canadians. Shipments to Canada include medical supplies and weapons for the military. Canada does not manufacture weapons for its military; it imports them. Their entry into Canada must be done efficiently to ensure Canada's prosperity.

[14] The CBSA must balance openness and scrutiny. It must keep the border open for legitimate trade but must shut it down to organized crime, terrorists and goods that threaten the health and security of Canadians. It must secure the border while simultaneously facilitating legitimate trade and travel.

[15] Because of the sheer volume of people and goods that cross the border, the CBSA has to rely on intelligence interdiction and enforcement systems which are risk management systems that enable the CBSA to concentrate on travelers and goods that pose a risk to Canadians. The CBSA uses those systems to optimally place employees and technology to control the border. For example, when a shipment enters Canada, the CBSA gathers the information it has on the shipper, such as its history and whether it is linked to organized crime. That allows the CBSA to focus on those shippers that pose the greatest risk to the safety and security of Canadians.

[16] Persons entering Canada and posing a threat to the nation are held in detention facilities until a decision is made either to let them enter Canada or to return them whence they came.

[17] The CBSA works in partnership with other departments and agencies to ensure national security. Those partners include the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service, the National Parole Board and the Correctional Service of Canada. The CBSA is the partnership's delivery arm and its on-the-ground service agent.

[18] The CBSA administers more than 90 acts, regulations and international agreements, many on behalf of other departments and agencies, including the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), the *Criminal Code*, R.S.C. 1985, c. C-46, the

Immigration and Refugee Protection Act, S.C. 2001, c. 27, the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Explosives Act*, R.S.C. 1985, c. E-17.

[19] The CBSA's Departmental *Performance Report for 2007-2008* (Exhibit E-4) sets out its strategic outcome, which is the "[e]fficient and effective border management that contributes to the security and prosperity of Canada" (at page 10). That strategic outcome is composed of four program activities: Access, Security, Science and Technology-based Innovation, and Corporate Management and Direction.

[20] The "Access" program activity involves ensuring the lawful flow of people and goods across Canadian borders while promoting compliance with border legislation. The program sub-activity "Trade" ensures that importers and exporters comply with legislation. The program sub-activity "Goods" entails working on moving goods across the border, such as identifying the conditions that have to be met and the required certificates. For example, the CBSA prevents the entry into Canada of prohibited goods, such as automatic firearms, motor vehicles and baby strollers, that do not meet Canadian standards. The program sub-activity "People/Travelers" includes the methods by which people enter the country. The CBSA denies access to persons who pose a risk to Canada, such as members of organized crime, persons involved in war crimes and terrorists.

[21] The "Security" program activity ensures the safety and security of Canada through effective border management. The program sub-activity "Intelligence" covers collecting, analyzing and sharing intelligence on threats to national security. The CBSA has hundreds of intelligence officers and thousands of border services officers who exchange information through information technology (IT) systems to ensure that correct decisions are made.

[22] The security program sub-activity "Enforcement" ensures compliance with border legislation. As the CBSA fact sheet *Managing Access to Canada* (Exhibit E-6) explains, it includes preventing undesirable persons from entering Canada, such as illegal migrants, criminals and terrorists. The CBSA assesses information from a wide variety of sources to support decisions on applicants at overseas missions to screen migrants and cargo. Migration information officers verify visas abroad by canvassing information from several sources in the CBSA's computer systems. The CBSA's *Report on Plans and Priorities for 2009-10* (Exhibit E-5) states that the risk assessment

program activity “. . . pushes the border out . . .” meaning it seeks to identify high-risk people and goods as early as possible before they arrive in Canada (page 18).

[23] Mr. MacRae explained that the 12 activities listed on page 5 of a booklet concerning and published by the CBSA (Exhibit E-3) relate either to securing the Canadian border or to managing access of people and goods to and from Canada. The first bullet of that list states that the CBSA administers 90 items of legislation about the CBSA and other departments and agencies that govern the admissibility of people and goods to and from Canada. The CBSA is the eyes, ears and delivery wing of Canadian departments and agencies. The CBSA's main tool to administer those items of legislations is its information systems which inform officers about what and who may be admitted to Canada and about any associated conditions.

[24] A statistical fact sheet about the CBSA states that, on average, each day, 263 647 travelers are processed into Canada and 16 984 trucks enter the country (Exhibit E-7). In the 2007-2008 fiscal year, the CBSA processed 96.5 million travellers and 13.1 million commercial goods. That same year, the CBSA made 10 870 drug seizures and seized 5700 weapons and \$39.6 million in currency.

[25] Mr. MacRae stated that, if the CBSA were unable to manage the access of people and goods to and from Canada, the risk of dangerous people and goods entering Canada would rise. For example, goods that do not meet Canadian safety standards or that impact the food chain would enter the country.

[26] The second activity listed on page 5 of Exhibit E-3 states that the CBSA establishes how people and goods move across our borders. That bullet describes the mechanism of how people report goods. If the CBSA were unable to establish how people and goods cross our borders, it would create an unreasonable risk to the safety and security of Canadians.

[27] The third activity listed on page 5 of Exhibit E-3 states that the CBSA detains persons who pose a danger to the public, who are unlikely to appear for proceedings or whose identities are uncertain. Mr. MacRae explained that the CBSA may arrest or detain a person. For example, it would arrest a person who smuggles drugs or explosives into the country. It would detain a person when it does not have enough information on whether to arrest the person. For example, the CBSA would detain a person if it were not certain whether his or her identification papers were valid. A

statistical fact sheet on arrests and detentions made by the CBSA in fiscal year 2008-2009 shows that, in that year, the Customs section made 4439 arrests and detained 3051 persons and that the Immigration section made 7979 arrests and detained 14 362 persons (Exhibit E-8).

[28] Mr. MacRae stated that the CBSA plays a lead role in identifying missing children that cross the border. When a child is identified as missing, a lookout indication is placed in the system. That information is provided by law-enforcement partners. As indicated in the CBSA's *Report on Plans and Priorities for 2009-2010* (Exhibit E-5, page 5), it recovered 72 missing children and returned them to their parents in that fiscal year.

[29] The fourth activity listed on page 5 of Exhibit E-3 states that the CBSA removes persons for whom a removal order has been issued. The priority is criminals, persons posing a threat to national security and persons involved in organized crime and crimes against humanity. The CBSA is the enforcement arm that removes persons who have entered Canada illegally or under false pretences. The CBSA escorts them out of the country after due process. The key tools used to identify those persons are the intelligence and information systems. The CBSA's *Departmental Performance Report for 2007-2008* indicates that it removed over 12 000 persons in that fiscal year (Exhibit E-4, page 13). Fourteen percent of the removals were high-priority persons, that is, persons involved in organized crime, war crimes or terrorism. That report also indicates that the CBSA prevented 361 persons complicit in or involved in war crimes from entering Canada (at page 41).

[30] Mr. MacRae stated that the safety and security of Canadians would be threatened if the CBSA were unable to remove dangerous persons from the country. The CBSA relies on its information systems when it performs those activities.

[31] The fifth activity listed on page 5 of the booklet about the CBSA is the prohibition of the entry into Canada of illegal goods. Mr. MacRae explained that the CBSA prevents the entry into the country of guns, drugs and explosives and goods that do not meet Canadian standards. The key tools of that activity are the information systems that provide intelligence and risk management strategies to border services officers.

[32] Mr. MacRae stated that, if the CBSA were unable to prevent illegal goods from entering the country, the risks of all the drugs seized becoming available and of the crime associated with those drugs rising would increase. The proceeds of that crime would then feed other crimes.

[33] The sixth activity listed on page 5 of Exhibit E-3 states that the CBSA ensures food safety and protects the environment by not allowing prohibited or hazardous products to enter Canada. Mr. MacRae explained that goods have to meet safety and packaging standards. For example, there are standards to ensure that butane lighters do not explode. The intelligence systems are the key tools used in protecting the food chain and the environment. The CBSA's fact sheet indicates that, in the 2007-2008 fiscal year, there were 33 108 barred importations of soil, plants and plant products, as well as 58 865 interceptions of meat and meat products and animals and animal products (Exhibit E-7).

[34] Mr. MacRae stated that, if the CBSA were unable to prevent the entry of hazardous products into Canada, there would be significant threats to the Canadian food and health systems.

[35] The 11th activity listed on page 5 of Exhibit E-3 states that the CBSA investigates and prosecutes those who contravene Canada's laws. The CBSA's information systems are key tools used in that activity. The Departmental *Performance Report for 2007-2008* indicates that the CBSA investigated 490 criminal cases and that it laid 1100 charges in that fiscal year (Exhibit E-4, page 50). There was a 91 percent conviction rate for cases that proceeded to criminal court.

[36] Mr. MacRae stated that the CBSA would not be able to perform the first six activities and the eleventh activity listed on page 5 of Exhibit E-3 without its computer systems because of the immense volume of information that it must process. The computer networks are critical to managing those activities.

[37] In cross-examination, Mr. MacRae stated that the CBSA's mandate is not limited to securing the Canadian border. The CBSA also promotes Canadian businesses, administers anti-dumping and anti-subsidy legislation, and offers border coordination services for organizers of international events being offered in Canada, as indicated in the booklet about the CBSA (Exhibit E-3, page 5).

[38] The respondent's representative asked Mr. MacRae to describe the CBSA's second strategic outcome, which is: "[l]egitimate travelers and goods move freely and lawfully across our borders" (at page 7 of the *Report on Plans and Priorities for 2009-10*, Exhibit E-5). Mr. MacRae explained that that strategic outcome has four program activities. Program activity "Trade" ensures that the Canadian economy and business community gain maximum benefits from the administration of international and regional trade agreements (at page 30). The program activity "Recourse" provides the business community and individuals with fair and timely reviews of trade program decisions and enforcement-related actions (at page 32). Program activity "Internal Services" is a group of related activities that is administered to support the needs of programs and other corporate obligations (at page 33) which include management and oversight, legal services, and communications.

[39] Mr. MacRae added that border services officers may also perform work that is not related to security, such as collecting duties on goods imported into Canada.

[40] Mr. MacRae stated that CS employees do more than work on security systems at the border. They also work on corporate systems.

[41] CS employees maintain the systems, perform trouble shooting and find electronic solutions to problems that arise. They also contribute to the development of the computer systems that support border security and access of people and goods to and from Canada.

[42] CS employees also work on computer systems that are not included in Exhibit E-9, which is a list of 38 applications and systems and is included as an appendix to this decision, such as the "Postal Program," which deals with clearing shipments into Canada, and the "Advanced Commercial Information" (ACI) system, which helps identify threats to the health and safety of Canadians. Both systems are described in Exhibit B-2.

B. Testimony of Mr. Bryon

[43] Mr. Bryon testified for the applicant. He started working in the federal public service in 1981 and at the CBSA in 1984. He has worked in his current position since January 2002, except for last year, when he accepted a one-year assignment to another

position. He was the director of IT and Client Services from 1996 to 2002. Before that, he held several different positions at the CBSA.

[44] Mr. Bryon reports to the director general and chief technology officer of Technical Services at the CBSA, as indicated in the directorate's organization chart (Exhibit E-1). The organization chart indicates that the Information Technology Infrastructure and Service Management section in which Mr. Bryon works is part of the Innovation, Science and Technology directorate.

[45] Mr. Bryon manages a staff of 120. Except for his assistant, all the employees that report to him are either CS employees or computer consultants. Mr. Bryon's responsibilities include providing all the databases and database-related workloads for most of the CBSA systems, which are the foundation for the reporting performed by any statistical systems and for the data warehouse infrastructure. He also manages the secure networks and systems used in the intelligence environment at the secret and top-secret levels.

[46] Mr. Bryon stated that the CBSA employs 648 CS employees. It proposes that 125 of them, or 19 percent, be identified as providing essential services.

[47] Mr. Bryon explained that Exhibit E-11 lists the computer equipment which is used to ensure the safety and security of Canadians that CS employees at the CBSA use in their work. The list of equipment is the same as the list in Exhibit E-9, but Exhibit E-11 also indicates the program activity and sub-activity that each piece of equipment supports. Those program activities and sub-activities listed on page 2 of Exhibit E-11 are as follows:

Program activities

a. Securing the Canadian border; and

b. Managing the access of people and goods (including food, plants and animals) to and from Canada.

Program sub-activities

1. Administering, on behalf of the Government of Canada departments and agencies, over 90 pieces of legislation that govern the admissibility of people and goods into and out of Canada;

2. Establishing how people and goods move through the Canadian Border;

3. *Detaining people who are a danger to the public, persons who will likely not show for proceedings and persons whose identity is uncertain;*

4. *Removing people who are inadmissible to Canada, including those involved in terrorism, organized crime, war crimes or crimes against humanity;*

5. *Interdicting illegal goods so that they do not enter the country;*

6. *Protecting food safety and the environment by stopping prohibited or hazardous products; and*

7. *Investigating and prosecuting those who contravene Canadian law.*

[48] Mr. Bryon stated that Exhibit E-11 was prepared for this hearing. The program activities and sub-activities that are listed in that exhibit are taken from the CBSA's Departmental *Performance Report for 2007-2008* (Exhibit E-4). The program sub-activities are also listed in the booklet about the CBSA (Exhibit E-3).

[49] Mr. Bryon described the program sub-activities listed in Exhibit E-11. An example of the legislation mentioned in program sub-activity 1 is the *Immigration and Refugee Protection Act*, which prohibits certain people from entering Canada. The CBSA is responsible for stopping those persons from entering the country.

[50] With respect to program sub-activity 2, Mr. Bryon explained that the CBSA prevents people and goods that pose a risk to Canadians from entering the country and that it determines what happens to those people or goods if they do try to enter Canada.

[51] Mr. Bryon explained that, with respect to program sub-activity 3, the CBSA has systems that flag persons who pose a risk to the safety or security of Canadians. It also has systems that trace the movements of people in Canada that are subject to prosecutions.

[52] With respect to program sub-activity 4, Mr. Bryon explained that the CBSA is responsible for removing persons that are inadmissible to Canada.

[53] Mr. Bryon stated that, with respect to program sub-activity 5, that the CBSA has risk-management systems that help it stop illegal goods from being loaded in other countries for shipment to Canada.

[54] With respect to program sub-activity 6, Mr. Bryon stated that the CBSA has systems that help track hazardous material before it arrives in Canada. If it does arrive in this country, the CBSA has established methods to handle the goods to prevent damaging material from spreading.

[55] Mr. Bryon explained that, with respect to program sub-activity 7, the CBSA's computer systems contain information on persons who have contravened our laws. Those systems help with investigating and prosecuting those people.

[56] Mr. Bryon explained that a computer program is a way of communicating with a machine; it is the language used to write instructions that allow a machine to perform certain operations. There are lines-of-business programs that encode business rules, such as specifying what to do with a specific information item or to whom it should be forwarded. CS employees write those programs. There are also programs that run components like databases. CS employees write some of those programs, and the CBSA purchases others.

[57] The 125 CS employees that the applicant wants to include in the ESA also write database codes which instruct computers on how to process data and on how to handle a problem. They also write programs for servers. Those programs tell the servers what to do and how to operate in different circumstances.

[58] A network is the wiring that facilitates communications between electronic devices, for example between computers. A telephone system is an example of a network.

[59] A mainframe is a very large computer that handles millions of transactions per second. A server is a smaller computer used for tasks in smaller environments, like handling office email.

[60] Mr. Bryon stated that the CBSA uses 118 computer applications. Exhibit E-9 lists 38 of them. Those computer applications include infrastructure, programs, databases, monitoring systems, networks, units and hardware such as mainframes and servers. He is very familiar with the equipment since he has worked with most of it. To facilitate his presentation, he introduced a document that provides a short description of all the items listed in Exhibit E-9 and in the same order (Exhibit E-12).

[61] Mr. Bryon did not write the descriptions of the items listed in Exhibit E-9 found in Exhibit E-12, but he agrees with them. The items listed in Exhibit E-9 are primarily supported by employees in the CS Group at the CBSA. Some of those items are supported by CS employees at the Canada Revenue Agency.

[62] Mr. Bryon described the first 10 items in Exhibit E-9 and how they support the program activities and sub-activities listed in Exhibit E-11. ACROSS, item 1 in Exhibit E-9, is a group of programs, databases, equipment, networks and media. That system captures and processes information about 40 000 daily shipments that are proposed for entry into Canada. It indicates what goods are entering the country, how they are entering and their intended uses. The information is provided to the CBSA by many sources, including shippers, importers, and several departments and agencies. That information allows field staff to target high-risk shipments. ACROSS also processes export data that is used to assess the security of goods leaving the country.

[63] Mr. Bryon testified that ACROSS supports the two program activities listed in Exhibit E-11 by operating a risk management environment that attempts to identify goods that should not enter the country. ACROSS gathers information on goods before they enter Canada. That risk management determines known or safe entities versus unknown or unsafe entities. For example, if a ship is loaded in Hong Kong with a hundred containers, the shipper makes a list that specifies each container's content, specified use, receiver and delivery method. ACROSS records that information, stores it and processes it through several risk-management algorithms. In some cases, the shippers are told that the shipment will not be allowed to enter Canada because it is deemed unsafe or illegal. As much as possible, the CBSA tries to prevent the entry of unsafe goods into Canada instead of dealing with those matters in this country.

[64] Another example is transport by truck. ACROSS stores information on trucks, shipments and drivers. If the goods being transported pose a risk, they are either barred from entering Canada or are flagged for further inspection when they arrive.

[65] Mr. Bryon stated that ACROSS supports program sub-activities 1 and 2 in Exhibit E-11. It informs officers about the goods that can enter the country, what they can be used for and how they should be handled. For example, legislation provides that military hardware can be imported into Canada but that it must be shipped in a certain manner. ACROSS provides that information to border services officers.

[66] Mr. Bryon stated that ACROSS supports program sub-activities 3 and 4 listed in Exhibit E-11. Goods that enter Canada must be associated with a business and a person. ACROSS uses a risk management system and a risk profiling system to detect risks. For example, if an importer who normally imports food into Canada by rail to an address in Toronto changes and imports Italian tiles by truck to an address in Montreal, ACROSS will identify and flag that shipment because something is different. That information will be sent to a risk assessment centre for further action.

[67] Mr. Bryon stated that ACROSS supports program sub-activities 5 and 6 listed in Exhibit E-11 by listing illegal goods and hazardous products. It flags them for interception at the border.

[68] ACROSS supports program sub-activity 7 in Exhibit E-11 by allowing the CBSA to track persons who perform illegal activities, such as drug smuggling, and to gather information for prosecuting those persons.

[69] Item 2 in Exhibit E-9, "Advanced Commercial Information," (ACI) is a means of transmitting data electronically to the CBSA. For example, shippers report their shipments through the ACI before departing.

[70] The ACI is part of ACROSS. Therefore, it supports programs activities and sub-activities 1 to 7 in Exhibit E-11 for the reasons given for ACROSS.

[71] Mr. Bryon described item 3 in Exhibit E-9, "Automated Targeting Systems" (ATS-1 and TITAN). It is a group of systems and programs that applies a risk algorithm to information fed to ACROSS. It highlights unusual activities of persons and goods. The CBSA's systems do not operate independently. ACROSS initiates other systems which gather information on a person or on goods. The information gathered is fed to a risk algorithm. For example, the information about a shipment coming into Canada by boat would include information on the nature of the shipment and the address of the company that is importing the goods. That information would be submitted to five or six systems and then condensed and managed electronically. A shipment may have 300 or 400 containers, and each container may have 1 to 15 destinations. It takes a lot of business logic and power to process all that information to decide whether the goods should be allowed to enter the country. All the analysis must be completed within 48 hours. That information is forwarded to a risk assessment officer in the National Risk Assessment Centre, who decides whether to let the shipment enter the

country. The system would alert the assessment officer if there were something unusual about the shipment.

[72] Mr. Bryon stated that the ATS-1 and TITAN support the two program activities and the seven sub-activities listed in Exhibit E-11 for the same reasons given for items 1 and 2 in Exhibit E-9.

[73] Item 4 in Exhibit E-9, “Commercial Risk Scoring Analysis” (CRSA), provides an automated risk assessment of all incoming cargo shipments before they arrive in Canada. It is another piece of the risk algorithms. It is also part of the ACI and is linked to ACROSS. The CRSA supports the two program activities and the seven sub-activities listed in Exhibit E-11 for the same reasons given for items 1 and 2 in Exhibit E-9. The only difference between the ACI and the CRSA is that the latter deals only with goods, while the ACI can also process information about people.

[74] Item 5 in Exhibit E-9, “Customized Commercial Systems” (CCS), is the prime source of information for identifying persons and goods. Importers send their information to the CBSA through this system. It works interdependently with ACROSS. The CBSA has two technologies to send information: ACROSS and the CCS. The CCS is simply a different transmission method; it is a different format for transmitting information. It processes information received from a shipper, merges that information, translates it to a different format and sends it to ACROSS. The CCS supports the two program activities and the seven sub-activities listed in Exhibit E-11 for the same reasons given for items 1 and 2 in Exhibit E-9.

[75] Mr. Bryon described CANPASS, item 6 in Exhibit E-9. CANPASS is both a program and a system that supports the program. Item 6 refers to the system. CANPASS allows low-risk persons to pass customs in an expedited manner so that personnel at airports can focus their attention on higher-risk individuals. Participants of that program are pre-screened through background checks. The CANPASS system is an automated border clearance system that uses iris-recognition biometric technology to verify the identities of people at airports. Participants in the program receive a swipe card that contains biometric information about their eyes. When those persons present themselves at airports, a computer scans their irises to ensure that it matches the iris information contained in their cards. Pre-screened participants of the program are allowed entry into the country without the usual checks. For example, they might be allowed to bypass the primary inspection line at customs.

[76] The CANPASS system is also used to store information about travelers. It records the information from the swipe card and stores it in large computer systems. That information includes the identity of the traveler, the date and time of the flight and the airport. That information will be linked with information about the flight that is provided by the airlines as the planes take off. So, when a person arrives in Canada from another country, the CBSA has a record of the person's identity, how he or she bought the flight ticket, where they are coming from and when they left the country of origin.

[77] Mr. Bryon testified that the CANPASS system supports the two programs activities in Exhibit E-11. It contributes to securing the Canadian border and managing the access of people and goods by increasing border crossing efficiency through an expedited process for low-risk persons and allowing border services officers to deploy their resources on high-risk individuals.

[78] The CANPASS system supports program sub-activities 1 to 3 and 7 in Exhibit E-11. It supports program sub-activity 1 by allowing the CBSA to prevent the entry into Canada of persons and goods for which legislation prohibits entry. The CANPASS supports program sub-activity 2 by establishing how persons move through customs. It supports program sub-activity 3 by flagging persons who may pose a risk to the security of Canadians and who should be detained. It supports program sub-activity 7 by gathering information that could form part of the chain of evidence for prosecuting persons who infringe laws.

[79] Mr. Bryon described "Enforcement Library," item 7 in Exhibit E-9. That application provides online access to enforcement and intelligence-related information such as intelligence reports and manuals about drug concealment methods and about drug identification. It contains, like a library, all the information that is useful to the CBSA. It also contains information on the documentation required to bring goods into Canada. Border services officers use this information to perform their work. For example, the Enforcement Library has information on where drugs were found on certain airplanes. That information may be useful for later searches of that specific plane. Another example is modifications to planes performed by the manufacturers. That information, which may be in the Enforcement Library, helps border services officers perform searches on those planes. The CBSA also uses the information for training purposes.

[80] Mr. Bryon testified that the Enforcement Library supports the two program activities in Exhibit E-11. It contributes to securing the Canadian border and managing the access of people and goods by providing border services officers with the information they need to prevent the entry into Canada of illegal passengers or goods.

[81] The Enforcement Library supports program sub-activity 1 in Exhibit E-9 by specifying the types of documents required for the entry into the country of persons and goods. The Enforcement Library supports program sub-activity 2 by informing border services officers about how to treat people and goods as they arrive for entry into Canada. For example, it tells them how to determine if a computer contains pornography and how to handle the person carrying the computer if that turns out to be the case.

[82] The Enforcement Library supports program sub-activities 3 and 4 in Exhibit E-11 by providing information on persons and goods. For example, it helps in determining if a person entering Canada has false identification papers. If so, the person may be detained or returned to his or her country of origin.

[83] The Enforcement Library supports program sub-activity 5 in Exhibit E-11 by providing border services officers with information about people and goods that enter the country. For example, the Enforcement Library contains information about drugs and pharmaceutical goods. It will inform border services officers whether those goods are illegal. It supports program sub-activity 6 in Exhibit E-11 by providing border services officers with useful information, such as where to search a car or plane. The Enforcement Library supports program sub-activity 7 in Exhibit E-11 by providing the CBSA with information that may be required to justify a seizure or prosecution.

[84] Mr. Bryon described the “Global Query Component” (GQC), item 8 in Exhibit E-9. The CBSA sets the level of importance of each system. For example, it identifies ACROSS as critical for its operations. The GQC supports the two program activities and the seven sub-activities listed in Exhibit E-11 for the same reasons given for items 1 and 2 in Exhibit E-9.

[85] Item 9 in Exhibit E-9, the “Integrated Customs Enforcement Systems” (ICES), is a national enforcement system for customs that manages risk and security at the border. It operates 24 hours a day, 7 days a week. It supports customs front line and intelligence resources in collecting, analyzing and disseminating information to react

to risk at the border. That application was introduced to improve the front-end delivery in the customs primary lane. Before it was introduced, border services officers had to log on to seven or eight systems when processing travelers. The ICES consolidates all the information on a person into one system. The ICES queries a series of systems for information, such as CANPASS, immigration systems or police force databases. The ICES consolidates all the gathered information and sends it to border services officers.

[86] Mr. Bryon testified that the ICES supports the two programs activities listed in Exhibit E-11 by providing border services officers with information about persons and goods entering Canada. It allows border services officers to stop the entry of persons or goods that represent a risk to the security of Canadians.

[87] The ICES supports program sub-activities 1 to 6 listed in Exhibit E-11 by flagging to border services officers persons that pose a risk to security and by indicating how they should be handled. For example, the system may flag a person because it has received an indication from the RCMP that the person poses a risk to security. The ICES supports program sub-activity 7 in Exhibit E-11 by allowing the establishment of a chain of evidence for persons that are later prosecuted.

[88] Item 10 in Exhibit E-9, the “Intelligence Management Systems” (IMS), is primarily used by enforcement and intelligence officers. It is a case management and intelligence sharing system. The IMS provides intelligence to combat high cross-border risks such as terrorism and organized crime. When an intelligence officer gathers information about persons or goods, he or she records the information in the IMS and disseminates it. For example, if the CBSA learns that the driver of a truck transporting merchandise is associated with a biker gang, the IMS sends flags to several ports, such as the border crossings where the truck is expected to enter Canada.

[89] The IMS supports the two program activities in Exhibit E-11 and program sub-activities 1 to 6 by allowing border services officers to share information and to coordinate their activities. It helps them decide whether to let a person or goods enter the country. The IMS supports program sub-activity 7 by allowing border services officers to record information in it, thus building a chain of evidence for investigating and prosecuting persons that contravene Canadian laws.

[90] In cross-examination, Mr. Bryon stated that the NEXUS application was in the original list of computer systems submitted by the applicant, but it was later removed. That application was designed to simplify border crossing for low-risk travelers to allow the CBSA to concentrate its efforts on higher-risk travelers. It is intended to reduce traffic congestions and delays at border crossings.

[91] In response to questions from the respondent's representative, Mr. Bryon stated that CS employees do more than support the applications in Exhibit E-9. They also repair the systems and develop enhancements. They perform maintenance or development on computer systems, as indicated in the description of position CSC428 in tab 4 of Exhibit B-3 which contains the applicant's ESA proposal. Maintenance is fixing a problem such as a bug in an application. It may also include applying patches to programs. For example, it is necessary to apply security patches every month from Microsoft. Maintenance also includes the CBSA developing security patches. Development is different. It involves adding new functionality to IT systems. For example, if new legislation requires that the CBSA treat information differently, the CBSA may have to modify an application to reflect the new requirement. It could mean big or small changes to applications. Usually, maintenance and development are performed by different teams.

[92] Mr. Bryon stated that the applications listed in Exhibit E-9 are not programs as such, even though one application, CANPASS, has the same name as a CBSA program. Some of the CBSA's programs are listed in Exhibit B-2. The "Postal Program," for example, is a CBSA program. That program is linked to several applications, including ACROSS and the ICES. Another of the CBSA's programs is the "Advanced Commercial Information" program described on page 3 of Exhibit B-2. That program is supported by the ACI application. In other words, the ACI application is a component of the ACI program. The programs set the rules on how information is provided, and the application is the means by which information is sent.

[93] The CBSA's programs are subject to strategic review, and consequently, the applications that support the programs are subject to review. Mr. Bryon was not aware of any plans to abolish any program.

[94] The respondent's representative asked Mr. Bryon whether the 90 items of legislation referred to on page 5 of Exhibit E-3 include aspects of acts that are not related to essential services. For example, provisions of the *Excise Act* R.S.C. 1985,

c. E-14, relates to collecting duties on imported goods. Mr. Bryon answered that such activities would not be essential under the IT umbrella of activities.

C. Testimony of Mr. Calvert

[95] Mr. Calvert testified that he has been a negotiator for the PIPSC for the last year. He started working for the PIPSC in September 2007 as an organization and mobilization officer. That last position entailed mobilizing employees in the event of a strike. It also entailed organizing new members who join the PIPSC. In his current position, he negotiates ESA agreements for the employees of the Canada Revenue Agency and the Canada Food Inspection Agency, as well as for all CS employees employed by the applicant. Before that, he held several positions with the Ontario Public Service Employees Union.

[96] Mr. Calvert stated that 28 or 29 departments under the Treasury Board employ CS employees. He explained how the respondent carries out negotiations to establish an ESA. The PIPSC usually waits for the employer to propose items to be included in an ESA. After the PIPSC receives the proposals, it reviews them to determine whether they could form the basis of an agreement. Each department has its own view of how to construct an ESA. The PIPSC tried to create a common approach by meeting with each department and explaining to them its rationale for constructing a proposal. For example, the PIPSC asked that the departments or agencies relate each essential service to their mandates and identify the computer systems that would deliver that service. Most departments had a broad approach to what makes up an essential service. The PIPSC's view was that the ESA should focus on the computer systems. CS employees do nothing other than work on computer systems. So, it is relatively easy to identify those computer systems that are essential. Once the PIPSC identified the essential computer systems, it identified the employees working on those systems.

[97] Mr. Calvert stated that the proposal that the PIPSC received from the applicant (Exhibit B-3) is structured in the way that the PIPSC proposed. The PIPSC received from the CBSA a list of systems that it believed were essential. The proposal mentions the computer applications supported by each position.

[98] Mr. Calvert stated that he found out only during the week of this hearing that the applicant was proposing to define essential services in terms of the program activities listed in Exhibit E-11.

[99] In cross-examination, Mr. Calvert stated that he has no university degree or college diploma in computer science. He has a masters degree in social work, although he taught entry-level computer skills to social workers at Algonquin College in 1986.

[100] Mr. Calvert stated that approximately 31 departments and agencies, for which the applicant is the employer, employ CS employees, as suggested by the applicant's representative.

III. Summary of the arguments

A. For the applicant

[101] The applicant contends that the only issue before me is the scope of the definition of the "essential services" provided by certain CS Group positions at the CBSA. The applicant asked that I make the following declaration:

*All services delivered by or activities performed by certain
Computer Systems Group positions at the Canada Border
Services Agency with respect to:*

- 1. securing the Canadian border, as well as*
- 2. managing the access of people and goods
(including food, plants, and animals) to and from
Canada*

are necessary for the safety or security of the public.

[102] Those activities are supported by the computer equipment listed in Exhibit E-9, which are maintained and supported by CS employees.

[103] The parties have agreed that the computer equipment listed in Exhibit E-9 are essential for the protecting the Canadian border. However, the parties disagree on the definition of "essential services." The respondent's position is that the essential services should comprise the computer equipment and systems listed in Exhibit E-9. The applicant's position is that the essential services should not comprise the computer equipment and systems, but rather the services that they support.

[104] The applicant's representative stated that, when the applicant negotiates the types of positions that provide the essential services, it will rely exclusively on the items listed in Exhibit E-9. The applicant will consider only those positions that support computer equipment and systems listed in that exhibit. The applicant asked

that, with the respondent's agreement, the Public Service Labour Relations Board ("the Board") append Exhibit E-9 to its decision.

[105] The applicant pointed out that the parties agree on a significant number of facts. The parties agree that the computer equipment and systems listed in Exhibit E-9 are necessary for the safety and security of the public and that CS employees support those systems. They also agree that those computer systems support the program activities and sub-activities listed in Exhibit E-11. They also agree on the descriptions of the computer systems found in Exhibit E-12.

[106] It is uncontested that there is a reasonable possibility that Canadians' safety and security will be at risk if the CBSA cannot perform the program activities and sub-activities listed in Exhibit E-11 and cannot rely on the equipment and systems listed in Exhibit E-9. Those risks can include delaying the entry of legitimate goods into Canada that could affect the safety and security of Canadians, such as medical supplies and military weapons which are not manufactured in Canada.

[107] Canadians would also be at risk since there is a reasonable possibility that illegal goods would enter the country and be accessible to the Canadian public. Those goods include drugs, currency, weapons, child pornography and hate propaganda. There is also a risk of the contamination of Canada's food supply and risks to the environment. The applicant's witnesses gave several examples, such as the H1N1 flu virus, the emerald ash borer bug that attacks ash trees, hoof and mouth disease and the gypsy moth. The respondent has not taken issue with those risks.

[108] Although the applicant agrees that the equipment and systems listed in Exhibit E-9 support essential services at the CBSA, it does not agree that the equipment and systems themselves comprise the essential services. The employer's position has always been that the equipment and systems should be addressed at a later stage of the ESA negotiations when the parties determine the required number of employees to provide essential services.

[109] Three reasons support the approach that the scope of the definition of essential services should be based on the actual services supported by the computer equipment and systems, as opposed to the equipment and systems themselves. The first is that the Board does not have jurisdiction to limit the employer's authority with respect to the equipment and systems used to provide essential services. The second is that the

applicant's approach is consistent with the Board's decisions about essential services. The third is that the applicant's approach is more practical than that suggested by the respondent.

[110] The applicant elaborated on those three reasons. Its view is that the Board does not have jurisdiction to define essential services in terms of equipment or systems. The Board only has the powers conferred on it by the *PSLRA*, which limits those powers in several ways. For example, section 120 of the *PSLRA* provides that the employer determines the level of an essential service. The Board has no power over that determination. Paragraph 123(6)(b) provides another example of limits that the *PSLRA* imposes on the Board. In determining the number of employees that provide an essential service, the Board cannot take into consideration the possibility of employees working overtime.

[111] Several provisions of the *PSLRA* make it clear that the Board has no jurisdiction over the equipment used to provide an essential service. Subsection 4(1) does not refer to equipment but rather to a service, activity or facility. Paragraph 123(6)(b) provides that, in determining the number of employees necessary to provide an essential service, the Board cannot take into consideration the equipment used for that purpose. The employer has the exclusive right to determine the equipment used for an essential service. It is the employer's prerogative. The respondent's position is an attempt to circumvent those provisions of the *PSLRA*.

[112] The items listed in Exhibit E-9 are equipment; they are not services, activities or facilities. The CBSA uses them to meet the objectives of its program activities and sub-activities. For example, Mr. Bryon clearly stated that the ACI, item 2 in Exhibit E-9, is messaging equipment, like a telephone. The ACI sends messages through the applicant's network. The ACI is equipment, not a service. Another example is the "Radiation Network System," item 37 of Exhibit E-9. The description of that item in Exhibit E-12 indicates that it is a physical machine that scans containers. That makes it a piece of equipment. The same is true of "General IT Network Support," item 34 in Exhibit E-9. The description of that item found in Exhibit B-5 indicates that it is a "... network backbone infrastructure" That equipment is a server; it contains cabling and machines and is not a service. The ESA must be expressed in terms of a facility, service or activity and not in terms of equipment.

[113] The second reason for taking this approach is that it is supported by the decisions of this Board. In *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97, the Board stated that the paramount object of the *PSLRA* is the protection of the public interest (at paragraph 176). The Board also stated that it should err on the side of caution in protecting the safety and security of the public (at paragraph 179). That should guide this Board in determining the scope of the essential service.

[114] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55, the Board stated that an ESA need not be cast at the same level of detail as a job description (at paragraph 106). The Board opted for a simplified statement of essential services. The Board ordered the employer to provide “. . . such assistance to members of the public who seek to obtain a benefit under the EI . . . as is reasonably required to enable them to submit completed applications . . .” (at paragraph 107). The applicant in this case has also suggested a simplified approach to designating essential services.

[115] In *Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board (Ship Repair Group - West Coast)*, PSSRB File No. 181-02-182 (19850109), the employer sought to designate as essential 852 ship repair employees who maintained the fleets of the Department of National Defence and the RCMP. The employer was seeking a very generic designation. One of the designations sought was the following:

. . .

Class of employees required to provide Ship Repair Unit (Pacific) resources for the maintenance, repair, overhaul, and refit requirements to support ships, submarines, shore facilities and auxiliary-vessels and thus enable the west coast fleet to meet their assigned operational readiness states in the defence of Canada and to meet their international commitments.

. . .

[116] That designation is much more generic than the definition that the applicant is seeking in this application. The employer in that decision did not identify the equipment used to perform those activities. The Public Service Staff Relations Board agreed to designate all 852 employees as essential. In this application, the applicant is

seeking to designate only 125 CS employees at the CBSA, 19 percent of all CS employees.

[117] The third reason the applicant has taken this approach is that it is practical. Designating equipment as essential services would be impossible to manage. Computer equipment and systems evolve over time. They are continuously updated, as Mr. Bryon explained. If the employer were to decide in the future to purchase new equipment, it would have to amend the ESA. The ESA would lose its usefulness. It is much more preferable to have a definition based on an activity or a service. If new equipment or a new system is required, it will be easy to determine whether the service it supports is essential.

B. For the respondent

[118] The respondent agrees that border security is essential and that it is essential that the border stay open. The issue in this application is the following: How should the services or activities to be included in the ESA be defined? The respondent proposes that the essential services be defined as follows: “The essential activity provided by CS employees at the CBSA is the support, in maintenance mode, of the agreed-upon computer systems, applications and programs.”

[119] The respondent’s position is that the definition proposed by the applicant is simply a restatement of the CBSA’s mandate. It is much too broad. A definition has to be sufficiently clear to allow the parties to proceed to the next steps of the ESA process, including identifying the types of positions needed to perform the essential services. The applicant’s definition is also too broad since it captures activities that are not essential to the safety and security of the public.

[120] In defining “essential services,” one should examine the *PSLRA* and its legislative history, the purpose of an ESA, the Board’s previous decisions, and the approach taken by the parties in attempting to reach an ESA.

[121] An ESA is meant to capture the legislative balance between the fundamental right to strike and the safety and security of the public. The Board stressed that point as follows in *Public Service Alliance of Canada v. Parks Canada Agency*:

. . .

179 . . . 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.

. . .

[122] The respondent is not proposing that equipment be identified as an essential service. Its view is that the essential service is the support provided by CS employees to those computer systems. Unlike other groups, it is possible with employees of the CS Group to be precise in defining their activities, services or facilities. Exhibit E-9 is not an inventory of machines or equipment; it is a list of several information technologies. CS employees support those technologies. Each and every item in Exhibit E-9 can be accurately described as a service, activity or facility.

[123] The respondent's approach does not conflict with the *PSLRA*, as the applicant argues. In *Public Service Alliance of Canada v. Treasury Board (Program And Administrative Services Group)*, the Board noted that the constraints that paragraph 123(6)(b) of the *PSLRA* imposes relate only to identifying the number of employees necessary to provide an essential service, not to identifying the essential service (at paragraph 96). If the employer truly believes that the items in Exhibit E-9 are equipment, and for that reason beyond the Board's jurisdiction, it would not have agreed to that list, which it, did nor would it have based its ESA proposals on that list.

[124] Both of the applicant's witnesses were asked to describe the activities that the CS employees perform, and their answers were that the CS' activities were to support, in maintenance mode, the computer technologies listed in Exhibit E-9. Mr. Bryon added that the development of computer systems, as opposed to their maintenance, was not essential.

[125] The applicant's approach is too broad. It does not meet the purpose of the provisions of the *PSLRA* on ESAs. Subsection 4(1) of the *PSLRA* provides that an ESA must identify the types of positions that are necessary for the employer to provide the essential services, the number of positions that are necessary for that purpose and the positions themselves. Therefore, the ESA must be sufficiently specific to allow the

parties to identify the types of positions, the number of positions and the specific positions to be included in the ESA. The applicant's approach fails to do so.

[126] The respondent contended that its interpretation was supported by the legislative history of the *PSLRA*. Michel LeFrançois, General Counsel, Human Resources Modernization Task Force (which developed Bill C-25 which became the *Public Service Modernization Act*), stated to the Standing Committee on Government Operations and Estimates, to which Bill C-25 was referred, that, under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, the determination of the number of employees needed to provide an essential service was done differently. A position was designated as essential even if the person occupying the position performed the essential service only 50 percent of the time. The result was that too many positions were designated as essential. Under the *PSLRA*, the parties can agree or the Board can order that the functions of two positions be consolidated so that it is only necessary to designate one of the positions as essential. (Testimony of Michel LeFrançois, 37th Parliament, 2nd Session, Standing Committee on Government Operations and Estimates, May 7, 2003, at page 25). That testimony shows that it is necessary to be specific in determining essential services.

[127] The applicant's proposal is too broad. It is simply a restatement of the CBSA's mandate and mission statement. Consequently, it does not permit the identification of the services or activities that are necessary for the safety and security of Canadians. In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, the Board warned the employer as follows against using descriptions that are too broad, such as programs, in defining essential services:

...

74. *The real problems lay elsewhere. If a program is to be declared essential in its entirety, then the onus of proof that falls to the employer must be to establish comprehensively that all services, activities or facilities that make up the program are necessary for public safety or security. . . .*

75. *The "unit of analysis" concern here is serious. In practical terms, a "program" may simply be too large or extensive a unit of analysis to be readily identified as an essential service within the meaning of subsection 4(1) of the Act. More seriously, declaring a program essential in its entirety may not be consistent with the "balancing act" described in Parks Canada Agency. . . .*

...

[Emphasis in the original]

[128] In this application, the broad definition proposed by the applicant is not consistent with the balancing act described in *Public Service Alliance of Canada v. Parks Canada Agency*.

[129] The negotiation history of the parties up to the hearing supports the respondent's approach on how an essential service should be defined. The cover letter of the binder that contains the applicant's proposed positions for inclusion in an ESA states the following "[p]lease find enclosed the CS essential services submission for the Canada Border Services Agency . . ." (Exhibit B-3). That letter then refers to the computer equipment used by CS employees. Therefore, the applicant's proposals were based on computer systems. The rationale for each position that the applicant proposed for inclusion in the ESA is directly linked to computer systems and applications. That is the methodology that the applicant and the respondent employed for departments and agencies that have CS employees.

[130] The respondent's representative argued that the program sub-activities listed on page 5 of Exhibit E-3 are too broad to be useful in identifying essential services. They capture non-essential activities. The applicant's representative and witnesses have conceded that several of the activities listed in the CBSA booklet (Exhibit E-3, page 5) are not essential. The seventh bullet in that exhibit, for example, states that the CBSA administers trade legislation. The eighth bullet states that the CBSA administers anti-dumping legislation. Those activities are not related to safety or security.

[131] The respondent also contended that the applicant did not clearly establish the risks involved in not performing the program activities and sub-activities listed in Exhibit E-11, as well as not having the computer systems listed in Exhibit E-9. For example, Mr. MacRae testified that the health and safety of Canadians would be at risk if legitimate goods were delayed in crossing the border, but the applicant did not tender any evidence to support that proposition.

[132] The first bullet on page 5 of Exhibit E-3 refers to administering 90 items of legislation but does not specify the legislation that the CBSA administers. The applicant did not lead evidence on the content of that legislation. Mr. MacRae

acknowledged that not all of the noted legislation deals with essential services. Some also deals with customs and excise taxes.

[133] The second bullet on page 5 of Exhibit E-3 states that the CBSA establishes how people and goods cross our borders. Mr. Bryon was very candid in stating that that bullet would include systems and activities that the parties have agreed are not essential for the safety and security of Canadians, such as NEXUS.

[134] The activities listed on page 5 of Exhibit E-3 include the development of systems, as opposed to the maintenance of systems. Mr. Bryon testified that the development of systems should not be considered essential.

[135] Why does the applicant propose such a high-level description of essential services? One reason it stated was that systems change frequently. But there is no evidence to that effect. On the contrary, Mr. Bryon stated that some systems have been in place for several years. The CBSA does enhance its systems, but it does not regularly create new systems. Even if there were a need to create a new system, sections 126 to 128 of the *PSLRA* set out a process for amending an ESA. The fact that the applicant may find it inconvenient to use those provisions to change the ESA is not a valid reason for not identifying the services or activities that CS employees provide.

[136] The high-level wording proposed by the applicant would deny more employees the right to strike than is reasonably necessary to protect the safety and security of the public in the event of a strike. The overly broad definition proposed by the applicant would allow it to have employees perform activities that are not essential during a strike. Because of its general nature, it would also engender a dispute over what services or activities are essential. Why obfuscate when clarity is possible.

[137] *Federal Government Dockyards Trades and Labour Council (Esquimalt, B.C.) v. Treasury Board (Ship Repair Group - West Coast)* is not relevant because it was decided under the *Public Service Staff Relations Act*, not the *PSLRA*. That decision can also be distinguished on the grounds that all the positions at issue involved the safety and security of Canadians, while in this application not all of the CBSA's activities involve that safety and security.

C. Applicant's reply

[138] The applicant pointed out that it has always contended that the equipment itself was not the essential service. That is clear from the cover letter of the applicant's proposal in the ESA negotiations, which states that the applicant has provided "... a description of the computer systems and applications that support the essential services provided by the department ..." (Exhibit B-3). It is also clear that the applicant always defined essential services in terms of services and activities from the content of the Position Proposal and Analysis Form contained in Exhibit B-3. That form sets out activities under the title "Summary of Essential Services" (see, for example, the rationale for position CSC 145 in Tab 9). That section does not refer to equipment. Equipment is mentioned only in the bottom part of the form, under the title "Essential Services Rationale."

[139] According to the applicant, the Board was not correct in *Public Service Alliance of Canada v. Treasury Board (Program And Administrative Services Group)* in stating that the constraints that paragraph 123(6)(b) of the *PSLRA* imposes about considering equipment in establishing an ESA relate only to identifying the number of employees necessary to provide an essential service (at paragraph 96). In the applicant's view, those constraints on equipment also apply to the determination of essential services.

[140] The applicant argued that this Board should not take into consideration the legislative history of the *PSLRA* since legislative history should come into play only when the wording of a statute is ambiguous, which is not the case with the provisions of the *PSLRA* on ESAs.

[141] The applicant did not recall Mr. Bryon referring to computer systems as being in "maintenance mode."

[142] The applicant did not concede that the remaining five items listed on page 5 of Exhibit E-3 to which the applicant did not refer were not essential for the safety and security of the public, as the respondent contends. The applicant did not comment on those remaining items because it wanted to focus on the sub-activities that are supported by the equipment and systems that the parties agreed were essential. In fact, the applicant is of the view that those other activities are also essential to the safety and security of the public.

[143] The applicant pointed out that there is evidence that it has made changes to its computer systems, contrary to what the respondent contends. Mr. Bryon testified that the equipment evolved over the last few years and that it was continuously updated.

[144] The applicant submitted that it did lead evidence on the 90 items of legislation that the CBSA administers. Both witnesses, especially Mr. MacRae, identified several acts that the CBSA administers.

[145] The applicant had initially included NEXUS in the list of computer systems agreed to by the parties. It later decided to exclude that system from the agreed-upon list. The applicant should not be prejudiced for acting in good faith to reach an agreement. To do so would compromise future negotiations.

IV. Reasons

[146] 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. . . .

[147] 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.

[148] 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 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 that are necessary to provide an essential service.

[149] At issue before me is identifying the facilities and the services provided, or the activities performed, by the CS Group at the CBSA that are necessary for the safety or security of the public.

[150] In *Public Service Alliance of Canada v. Parks Canada Agency*, the Board ruled as follows that the principal burden of proof falls to 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. . . .

...

[151] The applicant's burden is to prove that there is a reasonable and sufficient basis for finding that some or all the facilities and the services delivered, or the activities performed, by employees in the CS Group at the CBSA are essential within the meaning of subsection 4(1) of the *PSLRA*.

[152] I would like to point out at the outset that the parties agree on several matters. They agree that the computer equipment or systems listed in Exhibit E-9 are necessary for the safety and security of Canadians because they are an essential part of ensuring that persons or goods of risk do not enter or leave Canada. They also agree that CS employees at the CBSA support those systems or applications. The dispute centres on the manner of defining those essential services. The employer asks that I make the following declaration:

All services delivered by or activities performed by certain Computer Systems Group positions at the Canada Border Services Agency with respect to:

1. securing the Canadian border, as well as

2. managing the access of people and goods (including food, plants, and animals) to and from Canada

are necessary for the safety or security of the public.

[153] The respondent contends that the above declaration is too broad and that it would include services that are not necessary for the safety and security of Canadians. The respondent's view is that the essential service is the support provided to each computer equipment or system listed in Exhibit E-9. The applicant, on the other hand, contends that the items listed in Exhibit E-9 are equipment and not services, activities or facilities. For the applicant, the essential services are the activities or services that the listed equipment supports.

[154] It is not an easy task to define a "service," "activity" or "facility." Those notions can be defined very broadly or very narrowly. That task is further complicated by the fact that federal departments and agencies are not necessarily structured in terms of services, activities or facilities. Often, as in this application, they are structured in terms of mandates, strategic outcomes, program activities and program sub-activities as well as directorates.

[155] In my view, two principles must guide the manner in which a service, activity or facility is defined. The first is that it should be defined in a manner that fulfills its purpose. That purpose is to allow the employer and the bargaining agent to proceed to the other steps in establishing an ESA set out in the definition of an ESA in subsection 4(1) of the *PSLRA*, which are identifying the types of positions that are necessary providing the essential service, the level of service, the number of positions necessary for that purpose and the actual positions that provide that service.

[156] The second guiding principle is that, however broad or narrow the definition, it must only include positions that are necessary for the safety or security of Canadians.

[157] The applicant wants me to declare in part, that activities performed by CS employees at the CBSA related to managing the access of people and goods to and from Canada are necessary for the safety and security of the public. In my view, the definition proposed by the applicant is too broad since it would capture positions that are clearly not necessary for the safety and security of the public. The evidence establishes that CS employees at the CBSA do not work exclusively on safety and

security matters when managing the access of people and goods to and from Canada. The booklet about the CBSA (Exhibit E-3) specifies that it also administers trade legislation and trade agreements. Therefore, managing the access to Canada of people and goods includes managing them for purposes other than the safety and security of Canadians.

[158] Nor do I believe that the 38 items listed in Exhibit E-9 are services or activities within the meaning of subsection 4(1) of the *PSLRA*. They are computer systems or applications or equipment. ACROSS, item 1 in Exhibit E-9, for example, is a computer information system that gathers and processes information from several databases about people and goods that enter Canada. CANPASS (the system component, item 6 in Exhibit E-9) is a computer information system that uses iris-recognition biometric technology to verify the identities of people in airports. The IMS, item 10 in Exhibit E-9, is an intelligence sharing and risk management computer system that shares and analyzes data on the movement of people and goods across the border. The same is true of the “General IT Network Support,” item 34 on Exhibit E-9, which, as described in Exhibit B-5, is basically referring to a server, as contented by the applicant.

[159] I am also of the view that the items listed in Exhibit E-9 are not “facilities” as contemplated by the definition of “essential service” in subsection 4(1) of the *PSLRA*. A “facility” is more than a system or equipment. In my view, it connotes the idea of a building or an area. The *Canadian Oxford Dictionary* defines “facility” as “a building designated for a specific purpose.” In my view, an airport or a hospital is a facility, but a computer system or equipment is not.

[160] The respondent argues that the essential services are the activities performed by CS employees to support the computer systems listed in Exhibit E-9. Specifically, the provision of support to each of the 38 computer systems by CS employees is a distinct essential service or activity. In my view, that approach is not reasonable. An essential service should not be tied so narrowly to a piece of equipment or system that is only part of a vast network of computers that manage information. To do so would force the parties to amend the ESA each time they replace one of those 38 computer systems or add a new one. An ESA must be able to sustain changes in components of an information network composed of different computer systems without having the parties amend the ESA each time a new computer system is introduced.

[161] I realize that Mr. Bryon testified that there have not been many replacements of computer systems in the last years (although they are continually updated) but computer systems, by their very nature, are destined to be replaced because of the rapid evolution in information technology.

[162] I doubt that the 38 computer systems were installed at the same time, although no evidence was tendered on this matter. Had the respondent's approach been in effect during the establishment of those computer systems, the parties would have had to amend the ESA each time one of those systems was introduced, possibly 38 times.

[163] Although I believe that the definition of an essential service in this application should not be tied to equipment or systems, it is not because the *PSLRA* prevents me from doing so, as the applicant contends. Paragraph 123(6)(b) of the *PSLRA* provides that the number of employees required to provide an essential service is to be determined on the basis that the employer is not required to change its equipment. In my view, that section does not apply to this application since I am not determining the number of employees necessary to provide an essential services, I am determining the essential services. Those two determinations come at different stages in establishing an ESA.

[164] I do not believe that the program sub-activities listed in Exhibit E-11 are helpful in defining essential services. The applicant did not propose that they be used for that end, but I will address that matter since the respondent submitted arguments on that issue. In my view, the program sub-activities are over-inclusive. They capture activities that are not related to the safety and security of the public. The first program sub-activity relates to the administration of 90 items of legislation about the admissibility of people and goods into Canada. But those items, as Mr. MacRae and Mr. Bryon testified, also relate to customs and excise matters. While custom and excise matters are related to the admissibility of goods into Canada, they are not related to the safety and security of the public. The second program sub-activity is "[e]stablishing how people and goods move through the Canadian border." That program sub-activity could also include matters of customs, excise and trade agreements, none of which related to the safety and security of the public.

[165] I believe that it is possible to define the essential services in a manner that reflects the fact that both the applicant and the respondent agree that it is necessary

to protect Canadians against persons and goods that pose a risk to the safety and security of the public, that would only capture services or activities that are related to those purposes, that would not be tied narrowly to equipment, and that would enable the parties to identify the other elements of the ESA. Defining essential services in the following manner would attain those goals:

The provision of computer systems and services related to securing the border by managing the access of people and goods (including food, plants and animals) to and from Canada for the purpose of protecting the safety or security of the public.

That wording would not capture activities related to customs, excise or trade agreements since they are not related to the safety and security of the public. The above wording would also allow the applicant to change computer systems or equipment when required since the definition is not narrowly tied to equipment or systems. It will be fairly easy for the parties to identify the other components of the ESA, such as the types of positions necessary for providing those essential services, especially since the parties have already agreed on the computer systems that should be used for those purposes.

[166] The respondent argued that a definition that would be too broad would capture systems such as NEXUS, which the parties agreed to exclude from the ESA even though it is related to border crossings. Whether NEXUS, a program aimed at facilitating cross-border traffic, is captured by my definition is an academic question since the parties agreed verbally during the hearing that, when they determine the positions that are necessary to provide the essential services, they will rely exclusively on the 38 computer systems listed in Exhibit E-9. Had the parties not made such an agreement, the question would have been whether CS employees who support NEXUS are providing computer services related to managing the access of people and goods to and from Canada for the purpose of securing the Canadian border. If CS employees were providing such services, their services would satisfy that definition, and their positions would be included in the ESA; if not, their positions would not be included in the ESA. Therefore, the manner in which I defined essential services does not capture services or activities that should not be included in an ESA, which are services or activities that are not related to the safety or security of the public.

[167] I do not accept the respondent's argument that there is insufficient evidence that there is a risk to the safety and security of the public if the applicant cannot secure the border against unwanted persons or goods. The applicant's witnesses have provided ample uncontradicted testimonial evidence that there are risks to the safety and security of the public. For example, there is a risk to Canadians if criminals or contaminated food enters the country. In fact, I have difficulty reconciling that argument of the respondent with the fact that it accepts that the items listed in Exhibit E-9 are necessary for the safety and security of the public. If those computer systems are necessary to protect the safety and security of Canadians, surely the services they support are essential for that purpose.

[168] Since I have not relied on the computer systems listed in Exhibit E-9 to define the essential services that the CBSA provides, there is no useful purpose in addressing the respondent's arguments about whether those systems are essential only in "maintenance mode" as opposed to in "development mode."

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

(The Order appears on the next page)

V. Order

[170] The Essential Services Agreement for the Computer Systems Group at CBSA will include the following provision:

The provision of computer systems and services related to securing the border by managing the access of people and goods (including food, plants and animals) to and from Canada for the purpose of protecting the safety or security of the public.

October 14, 2009

**John Mooney,
Board Member**

APPENDIX**EXHIBIT E-9**

1. ACROSS
2. Advanced Commercial Information (ACI)
3. Automated Targeting Systems (ATS-I and TITAN)
4. Commercial Risk Scoring Analysis (CRSA)
5. Customized Commercial Systems (CCS)
6. CANPASS
7. Enforcement Library
8. Global Query Component (GQC)
9. Integrated Customs Enforcement Systems (ICES)
10. Intelligence Management Systems (IMS)
11. Integrated Border Query-Customs Query (IBQ/CQ)
12. Commodity Search Component (CSC)
13. Integrated Primary Inspection Lane (IPIL)
14. Passage (IPIL, CANPASS Air)
15. Passenger Information Systems (PAXIS)
16. Primary Automated Lookout Systems (PALS)
17. Risk Assessment Component (RAC)
18. Travellers Maintenance System (TMS)
19. Travellers Entry Processing System (TEPS)
20. Global Enrolment Component (GEC)
21. Electronic Document Image System on Edison (EDISON)
22. Modern War Crimes System (MWCS)
23. Support System for Intelligence (SSI)
24. Secure Tracking Systems (STS)
25. Secure Systems
26. Security Referral Request (SRR)
27. Postal Import Control Systems (PICS)
28. Telephone Reporting Centre System (TRCS)
29. SSAName 3
30. Customs Electronic Commerce Platform (CECP)
31. Advance Commercial Information Electronic Data Interchange (ACI-EDI)
32. Customs Distributed Applications
33. Electronic Commerce Platform (a.k.a UNIX)
34. General IT Network Support
35. General Security of Systems
36. Integrated Customs Systems - Infrastructure (ICS)
37. Radiation Network System (RADNET)
38. Secure Networks