Date: 20091006

File: 569-13-17

Citation: **2009 PSLRB 121**

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

COMMUNICATIONS SECURITY ESTABLISHMENT

Employer

Indexed as
Public Service Alliance of Canada v. Communications Security Establishment

In the matter of a policy grievance referred to adjudication

REASONS FOR DECISION

Before: Georges Nadeau, adjudicator

For the Bargaining Agent: Chantal Homier-Nehme, counsel

For the Employer: Stephen Bird, counsel

Heard at Ottawa, Ontario,
February 12 to 14 and 16, July 9 to 12, July 23 to 26, October 2 to 4, and November 13 and 14, 2007, and January 15 to 17, February 6 to 8, March 11 and 12, April 2 and 3, June 18, 25 and 27, and August 6 and 7, 2008.

I. Policy grievance referred to adjudication

[1] This decision concerns a policy grievance referred to adjudication on January 19, 2006, by the Public Service Alliance of Canada ("the PSAC") under section 220 of the *Public Service Labour Relations Act*, S.C. 2003, c.22, s.2, ("the *PSLRA*"), regarding Appendix B – Memorandum of Understanding in Respect of Market Allowances of the collective agreement between the PSAC and the Communications Security Establishment, expiry date February 9, 2006.

[2] The relevant provisions of Appendix B are as follows:

> *Preamble*
>
> *The Employer agrees to provide an allowance to incumbents of positions classified at the UNI-4 to UNI-11 levels performing Computer Science Administration and/or Engineering functions in the performance of duties.*
>
> *Eligible positions*
>
> 1. *Positions classified on the day before the issuance of the arbitral award as a "CS-1" to "CS-5" or an "EN-3" to "EN-6".*
>
> 2. *Positions where the primary duties require the performance of Computer Science Administration and/or Engineering functions.*

II. Summary of the evidence

[3] The PSAC is the bargaining agent certified by the Board to represent the employees of the Communications Security Establishment ("the CSE" or "the employer") in the bargaining unit.

[4] The details of the reference to adjudication and the corrective action requested are as follows:

> *On January 19th, 2006 the Public Service Alliance of Canada (PSAC) referred to adjudication a policy grievance signed by Nycole Turmel on September 30th, 2005. The grievance reads as follows:*
>
> *Policy Grievance*
>
> *This is a policy grievance hereby filed by the Public Service Alliance of Canada pursuant to section 220 of the Public Service Labour Relations Act.*

> *Details of grievance:*
>
> *The grievance relates to the interpretation and application of Appendix "B" – Market Allowance – of the collective agreement between the Communications Security Establishment (CSE) and the Public Service Alliance of Canada (PSAC).*
>
> *The Bargaining agent and the Employer have been unable to resolve the question of which positions are eligible to receive the market allowance. The Bargaining agents maintains that there are positions which are not receiving the Market Allowance notwithstanding their eligibility under the criteria listed in either paragraph 1 or 2 of Appendix B.*
>
> *In light of this impasse, the parties both agree that the issue of the interpretation of eligibility for the market allowance set out in appendix "B" of the collective agreement must be resolved through the grievance-adjudication process outlined in the PSLRA.*
>
> *Corrective Action:*
>
> *The PSAC asks for a declaration that the CSE is required to pay a market allowance to those positions referred to in both paragraph 1 and 2 of Appendix "B" – Market Allowance – of the collective agreement.*

[5] Agreeing that the grievance relates to the interpretation and application of Appendix B – Market Allowance, the employer responded to the grievance as follows:

> *CSE provides supplementary salary allowances (referred to as market allowance) to employees who occupy certain positions in order to be competitive with the market place for skills which were in short supply, and to attract and retain individuals with these key skills. As both the amount and duration of this allowance are driven by market forces, this allowance has historically been paid as a separate wage item, and has been limited to specific categories of CSE employees. Prior to the last collective agreement, market allowances were only paid to employees who were classified as EN of CS.*
>
> *The conversion to the UNISON classification system had an impact on the description of who would be eligible to receive market allowances, as CSE moved away from the Treasury Board Secretariat classification system. The negotiation of the current collective agreement focused on finding ways to describe those previous employees who were in receipt of the market allowance, and those new employees who would have*

> *been eligible for the allowance had CSE maintained the old classification system.*
>
> *The current language of Appendix "B" reflects the intent of the parties at negotiations – that these employees who previously received the allowance would continue to do so, and new employees who would have qualified under the old regime would also be eligible. At no time was it contemplated that the scope of the eligibility be increased or that the market allowance would be extended to new classes of employees.*
>
> *The present language of Appendix "B" reflects this reality. CSE is paying market allowance to those employees who are eligible for it under its terms and the intent of the parties.*
>
> *Accordingly, the grievance is denied.*

[6] In the course of the grievance procedure, the employer provided the bargaining agent with a document (Exhibit G-115) indicating how it was applying the market allowance provisions contained in Appendix B. This document reads as follows:

> *Determination of Market Allowance Eligibility*
>
> *Prior to conversion to UNISON, if the positions were classified CS or ENG with no change to duties and responsibilities, they were automatically given the Market Allowance.*
>
> *When new Work Descriptions (PIQs) were submitted for evaluation, classification personnel determined through analysis of the work whether or not the predominant duties and responsibilities would meet the inclusions of the Category and group of the former CS and ENG Classification Standards. If all conditions were met, the Classification Officer indicated on the Classification Action Decision (CAD) that the positions are eligible for the Market Allowance.*

[7] The PSAC agreed that it had the onus of establishing the basis for its policy grievance. For national security considerations, my account of the testimony of each of the witnesses has been set out in Appendix 1, which forms an integral part of this decision.

[8] To summarize, the evidence presented by the bargaining agent described in significant detail the work activities performed by the employees who are ultimately affected by the policy grievance.

[9] In general, the employer did not dispute the accuracy of the evidence presented by the employees as to the nature of their work, but focused its evidence on the collective bargaining history that eventually resulted in the inclusion of Appendix B in the collective agreement and on the context within which that bargaining took place.

[10] Fundamentally, the parties disagree on the meaning and scope of the phrase "Computer Science Administration and/or Engineering functions," the employer arguing that these words should be given a very specific meaning and read in relation to formerly applicable Treasury Board classification standards for the Computer Systems Administration (CS) and Engineering and Land Survey (EN) occupational groups.

[11] The parties' complete submissions follows.

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

[12] Counsel for the PSAC indicated that the main thrust of this policy grievance is that there were a number of positions that were not receiving the market allowance, despite their eligibility under the criteria listed in either paragraph 1 or paragraph 2 of Appendix B to the collective agreement.

[13] Reviewing the second criterion, found in paragraph 2, counsel for the PSAC noted that this entitlement could not be treated as a classification matter. She indicated that the undisputed evidence was that the primary duties of the positions held by the mathematicians and the engineering technologists required the performance of computer science administration and/or engineering functions. This evidence was corroborated by the position descriptions (PIQs) and by the competency profiles established by the CSE and by the testimony of the CSE's directors and managers.

[14] Counsel for the PSAC argued that the CSE's objection to the introduction of evidence subsequent to the expiry date of the collective agreement (February 2006) should be dismissed since the present policy grievance is a continuing grievance and most of the CSE's evidence came from directors and managers who occupied their positions only after February 2006.

[15] Counsel for the PSAC stated that the CSE's application of the second criterion for eligibility for the market allowance was not only contrary to the wording of Appendix B but also contrary to the extrinsic evidence put forward by the CSE.

[16] Counsel for the PSAC noted that the CSE had been inconsistent in the application of the second criterion, in effect, having gone from refusing to apply the clause to applying it only to new positions whose primary duties relate to computer science administration or engineering. This inconsistency was also evident in the CSE's response to the individual grievances filed on this issue, in which the CSE indicates its belief that the problem with the second criterion is that there were no definitions of computer science administration or engineering functions. Counsel for the PSAC noted that the Hadad report, prepared at the CSE's request, supported the view that the mathematicians met the second criterion.

[17] Counsel for the PSAC noted that the purpose of the CSE's final application of the second criterion, which had been developed by its classification section, was in effect to determine whether the primary duties and responsibilities of the positions would meet criteria for the inclusion in the CS or EN groups as defined in the Treasury Board classification standards. This application is in contradiction to the CSE's own wording of the second criterion, which was accepted by the parties, and is contrary to the CSE's stated intent of not using the Treasury Board standards after the implementation of UNISON, the new classification system. Ms. Dufour's evidence was that the CSE wanted to avoid references to the "old" Treasury Board classification standards and that, with the introduction of UNISON, a competency-based classification system, entitlement to the market allowance should be based on competencies.

[18] Counsel for the PSAC argued that the wording of the second criterion excluded the use of the Treasury Board standards, which define groups as exclusive of one another, while the second criterion refers to positions whose primary duties require the performance of either or both computer science administration and engineering functions. Under the Treasury Board standards, a position cannot be both a CS and an EN, while the criterion clearly contemplated positions that require both computer science administration and engineering functions.

[19] With respect to the extrinsic evidence put forward by the CSE, counsel for the PSAC noted that, according to Ms. Dufour, the challenge was to find the positions that were performing computer science and engineering functions within the new universal classification system, UNISON. It was precisely because of the introduction of UNISON that a grandfathering provision, the first criterion, was put in place to ensure that no one receiving the allowance at the time would lose that benefit as the new classification

system may result in the identification of different eligible positions. It was also clear from Ms. Dufour's testimony that entitlement would be based on competencies and not on the use of the old Treasury Board classification standards other than with respect to the first criterion.

[20] Counsel for the PSAC added that, if the parties had intended that the second criterion apply only to new positions, they would have said so. If the CSE, as the drafter of the language, had the intent of providing the market allowance only to positions whose primary duties would be in computer science administration and engineering functions and met the inclusions within the Treasury Board standards for the CS and EN groups, it would have drafted the language differently.

[21] Counsel for the PSAC noted that the bargaining agent had never agreed to the employer unilaterally determining eligibility and had wanted to be involved. She also noted that the letter of intent proposed during the negotiations clearly confirmed the CSE's intent to use the competency framework as the basis for the determination of eligibility. She added that the PSAC had consistently advised the CSE of the need for clarity and definitions of the words.

[22] Counsel for the PSAC indicated that the words "as determined by the Employer" and "subsequent to this date" had been removed from the proposed language by the time a tentative agreement on this criterion was reached by the parties.

[23] Counsel for the PSAC argued that the CSE's mandate and the Price Waterhouse study on compensation had not been shared with the PSAC and were therefore not relevant to determining the present case.

[24] Counsel for the PSAC asserted that the following three questions were to be addressed in arriving at a decision in the present case:

> *What do the words Computer Science Administration and/or Engineering functions mean?*
>
> *What is the correct interpretation and application of the phrase "positions whose primary duties require the performance of Computer Science Administration and/or Engineering functions"?*
>
> *Do the positions, as presented in evidence, meet the criteria?*

[25] Counsel for the PSAC objected to the use of extrinsic evidence about the history of the negotiations. The PSAC submitted that Appendix B to the collective agreement is clear and that the employer has not established that there was a patent or latent ambiguity to be resolved. The employer own witness, Mr. Leblanc, in an email, indicates that the appendix is clear (Exhibit G-6).

[26] In the alternative that I do find that there is an ambiguity, counsel for the PSAC argued that the language prepared by the CSE's negotiating team should be construed in accordance with the *contra proferentem* rule. Relying on *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, counsel for the PSAC argued that the CSE, in drafting the language, should have spelled out what was necessary to protect its own interest.

[27] Additionally, counsel for the PSAC argued that there was no clear, cogent and unequivocal evidence as to what the parties' intentions were at the time of the tentative agreement or the arbitral award. Ms. Dufour testified that the CSE was not going to use or refer to the "old" Treasury Board classification standards, and yet those were the criteria that the CSE ultimately adopted. She relied on *Hiram Walker & Sons Ltd v. Distillery Workers, Local 61*, [1973] 3 L.A.C. (2d) 203, and on *Re Strait Crossing Joint Venture v. International Bargaining agent of Operating Engineers/Iron Workers*, [1997] 64 L.A.C. (4th) 229.

[28] Counsel for the PSAC argued that it was widely accepted in labour law that the fundamental purpose in construing the terms of a collective agreement is to discover the intent of the parties on the basis of what is written. The intent must be gathered from the written instruments. The adjudicator's function is to ascertain what the parties meant by the words they used, on the basis of what is written in the instrument, not what was intended to have been written. She relied on *Consolidated Bathurst Export Ltd.* and *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415.

[29] Counsel for the PSAC argued that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. It cannot be relied on to discover the intention of the parties. It may be relied on only to ascertain the meaning of the words written in the agreement and only if it is clear, cogent and unequivocal. On the basis of the evidence heard, this is not the case. She relied on the Supreme Court of Canada decision in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316.

[30] Counsel for the PSAC argued that the only exception to this rule is when there is an ambiguity in the written contract itself and that in the present case the employer has not shown that such an ambiguity, patent or latent, exists.

[31] Counsel for the PSAC indicated that, while in support of its position that there is an ambiguity the CSE argued that the words "computer science administration functions" and "engineering functions" are undefined, Ms. Dufour in her testimony constantly referred to computer science work and that the CSE had really meant computer systems administration functions. Ms. Dufour also referred to engineering functions and indicated that these functions refer to the Engineering classification standard. There is no evidence that this point was explained to the bargaining agent. The evidence was that the CSE constantly changed its position throughout the negotiations up to the tentative agreement and did not really know how it was going to determine entitlement to the market allowance.

[32] Counsel for the PSAC indicated that the CSE argued that the second criterion was meant to apply to new positions. Nowhere in Appendix B does the word "new" appear, and extrinsic evidence cannot be used to add or vary the agreement reached in writing by the parties.

[33] Relying on *DHL Express (Canada) Ltd. v. C.A.W.-Canada, Locs. 4215, 144 & 4278 (Re)*, [2004] C.L.A.D. No. 613, counsel for the PSAC argued that extrinsic evidence may be used only when there is a patent or latent ambiguity and must be used as an aid to interpreting the language. Counsel for the PSAC also indicated that, for negotiation history to be an aid interpreting the language, the evidence adduced must disclose either a shared intention or a consensus between the parties about the meaning urged by one party. The fact that there may be a doubtful meaning in the very general sense of a provision of a collective agreement does not necessarily mean admissibility of the evidence.

[34] Counsel for the PSAC argued that extrinsic evidence should not be used in the present case to amend the collective agreement in such a way that the second criterion would apply only to new positions and would exclude the incumbents of mathematician and engineering technologist positions from eligibility for the benefit. Furthermore, the provisions of the *PSLRA* do not allow an adjudicator to change, modify or alter a term of the collective agreement.

[35] Relying on *Ontario Jockey Club v. S.E.I.U., Loc. 528 (McNeil) (Re)*, [2001] 87 L.A.C. (4th) 283, counsel for the PSAC argued that the evidence failed to show that the parties were of a single mind as to the meaning of the clause and that there has always been considerable onus on the party seeking to justify the use of extrinsic evidence for the purpose of giving to the words of the collective agreement a meaning that the words themselves, taken at face value, do not support.

[36] Counsel for the PSAC argued that the terms used in Appendix B should be given their natural and ordinary meaning. The words "The Employer agrees to provide an Allowance to incumbents of positions classified at the UNI-4 to UNI-11 levels performing Computer Science Administration and/or Engineering functions in the performance of duties" are clear. To find otherwise would be patently unreasonable. Relying on *Construction and General Workers' Local 1111 v. PCL Construction Ltd.*, [1982] A.G.A.A. No. 1, counsel for the PSAC argued that all contracts are to be interpreted according to the primary meaning of the language used. If the plain meaning is unambiguous, is not excluded by the context and is sensible with reference to the extrinsic evidence, then such a meaning should be taken exclusively as being the intent of the parties.

[37] Relying on *Consolidated Bathurst Export Ltd.* and *Medis Health and Pharmaceutical Services Ltd. v. Teamsters, Chemical and Allied Workers, Local 424 (Overtime Grievances),* [2000] O.L.A.A. No. 753, counsel for the PSAC argued that if there was an ambiguity, it would have to be resolved against the CSE since the CSE drafted the language.

[38] Counsel for the PSAC argued that all the mathematicians and engineering technologists who testified had demonstrated, through extensive examples of projects and the very nature of their deliverables, that the primary duties of the positions they occupy require the performance of computer science administration and/or engineering functions. Counsel for the PSAC went on to describe in some detail the evidence provided by each of the bargaining agent's witnesses as it pertained to the work of the mathematicians and engineering technologists. Since these arguments contain details of actual projects which ought not to be disclosed for national security reasons, I have reproduced them in Appendix 2 of this decision.

[39] Counsel for the PSAC concluded her arguments by indicating that the evidence clearly established that the primary duties of the incumbents of the mathematician and

engineering technologist positions require that they perform computer science administration and/or engineering functions. She asked for a declaration that the CSE is required to pay the market allowance to persons occupying those positions retroactively to the date of the collective agreement, a declaration that the CSE had contravened the collective agreement by not paying the market allowance, and a declaration that the PSAC's interpretation was correct. She also asked that I remain seized to deal with any matters resulting from the application of the order.

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

[40] Counsel for the CSE, commenting on the PSAC's arguments, indicated that the present case is a policy grievance and that the bulk of the testimony was not relevant.

[41] Counsel for the CSE indicated that he agreed with the way counsel for the PSAC framed the issue as: "What is the correct interpretation, application and administration of Appendix B of the June 16, 2004 arbitral award?" He noted that, to make that determination, two of the three questions raised by counsel for the PSAC needed to be answered: "What do the words 'Computer Science Administration and/or Engineering functions' mean?", and "What is the correct interpretation and application of the phrase 'positions whose primary duties require the performance of Computer Science Administration and/or Engineering functions'?" The third question, "Do the positions as presented in evidence meet the criteria?", was not part of the policy grievance.

[42] Counsel for the CSE also noted that each side used the classification evidence to its own end. He added that the present case is not a classification grievance and that the issue is not whether the positions should be included in the CS or EN groups.

[43] Counsel for the CSE argued that, at the bargaining table, the PSAC had received a clear indication of what was meant by the words used in the appendix and an indication that the employer would be seeking further changes in subsequent rounds. An agreement had been reached between the parties; otherwise, since the PSAC needed certainty, it would not have submitted the agreement to its membership.

[44] Counsel for the CSE argued that Ms. Dufour clearly stated in her testimony that there was an agreement as to what the parties meant by the words used in the Appendix: it was to the effect that the market allowance would continue to be provided to positions comparable to those in the CS and EN groups. Mr Sullivan's testimony that the employer told him that he". . . won't lose sleep over it. . ." should be excluded since

Ms. Dufour was not given an opportunity to refute Mr Sullivan's recollection. The rule in *Browne and Dunn* should be applied. Counsel for the CSE relied on Brown and Beatty, *Canadian Labour Arbitration, 2008 (4th edition),* at volume 3-56, Sopinka, *The Law of Evidence in Canada, 1999 (2nd edition),* at pages 954 to 957, *Browne v. Dunn,* (1893) 6 R. 67, H.L., *Avey v. Canada (Canadian Forces, Staff of the Non-Public Funds),* [1998] P.S.S.R.B. No. 10, *McElrea v. Treasury Board (Industry Canada),* [1998] P.S.S.R.B. No.98, and *Séguin v. House of Commons*, 2000 PSSRB 78. He added that, in any event, it was so vague and imprecise that the evidence from Ms. Dufour should be preferred.

[45] Counsel for the CSE argued that the PSAC did not have a clear vision of what definition it wanted. The witnesses each put forward a definition that captured their own work; however, those definitions were inconsistent. In many cases, accepting a definition from one witness would exclude another witness from eligibility to the market allowance and might in fact eliminate from eligibility many employees who currently enjoy the market allowance. He argued that any definition that includes the development of algorithms might in fact exclude employees working on networks or the help desk. The self-interest of the witnesses was evident.

[46] With respect to the time frame of the evidence provided counsel for the CSE argued that the relevant period of time is from July 2004 to February 2006. He added, however, that the Director's evidence was still admissible and relevant because without exception all the PSAC's witnesses stated that they were doing more of the work in question today than they had done during the relevant period. No negative inference should be drawn from the fact that none of the employer's witnesses in director positions occupied those positions during the relevant period.

[47] Noting that the PSAC alleged that the policy grievance is a continuing grievance, counsel for the CSE noted that the PSAC was correct in so far as the CSE's interpretation had not changed. However, he maintained that the evidence from the PSAC's witnesses for the period from February 2006 to February 2008 should be excluded since it is not relevant to a policy grievance submitted on June 16, 2004.

[48] Counsel for the CSE noted that the CSE's position was expressed in the response to the grievance (Exhibit E-1) and in an email from Mr. Leblanc (Exhibit G-6).

[49] Counsel for the CSE argued that while the CSE's initial position was a desire to avoid using the Treasury Board classification standards, in the end the agreement

reached was that positions comparable to those in the CS and EN groups were eligible but the parties would not refer to the classification standards.

[50] Counsel for the CSE noted that there were different accounts of what took place at the ratification meeting as to whether there was a change for the eligibility to the market allowance. Had there been the change alleged by the PSAC, it would have been a significant change.

[51] Responding to the argument by the PSAC that, if the intent of the CSE was to determine entitlement on the basis of the document entitled "Determination of Market Allowance Eligibility" (Exhibit G-115), that criterion would have been included in the language of Appendix B, counsel for the CSE argued that this document was prepared by the CSE at the request of the PSAC for the purpose of these proceedings. It did not exist at the relevant time. It was evident from the testimony of Ms. Dufour that the CSE did not want to refer to the CS and EN classification standards but wanted to ensure that the positions that were eligible were comparable to those in the CS and EN groups.

[52] Responding to the argument by the PSAC that the *contra proferentem* rule should apply, counsel for the CSE argued that Appendix B was not a contract clause inserted by one party, namely, the CSE, since it was a negotiated document, and that the *contra proferentem* rule may be applied only when the clause being construed creates an exception, such as exclusion of limitation of liability as in *Medis Health and Pharmaceutical Services Ltd.* In the present case, the clause being interpreted creates a right, not an exclusion. The present case is not a situation where a clause put forward by party was not freely negotiated.

[53] Referring to comments by one of the bargaining agent's witnesses on the advanced computer science requirement of positions held by mathematicians, counsel for the CSE noted that Appendix B did not set out that requirement. Similarly, the fact that an incumbent has specific skills does not establish that the position held by the incumbent requires those skills.

[54] Counsel for the CSE noted that, since the Director of Research and Development had not testified, the comments that the CSE management acknowledged that engineering technologist positions in the T3D group performed functions was only hearsay evidence.

[55] Counsel for the CSE noted that the comments by counsel for the PSAC that one Paul Brown had made extensive contributions were not to be relied on since Mr. Brown did not testify and it was not known what he did.

[56] Counsel for the CSE disputed as not being accurate the allegations that the positions appearing in the list of mathematicians and technologists (Exhibits E-15, E-16 and E-17) are positions that would have been classified as positions in CS or EN groups. He also disputed the allegation by the PSAC that part of the primary duties of all the mathematician and engineering technologist positions is a requirement to perform duties comparable to those of positions currently in receipt of the market allowance. That allegation was not heard in evidence.

[57] Counsel for the CSE objected to my remaining seized with any matter resulting from the application of the present decision. Counsel for the CSE noted that an arbitrator dealing with a policy grievance on the interpretation of a 2004 arbitral award does not have jurisdiction in individual cases.

[58] Counsel for the CSE argued that, when the parties agreed to the language in Appendix B at the time of the tentative agreement, they accepted the common understanding that had been reached.

[59] Counsel for the CSE submitted that the evidence about duties and classification received from the employees and the CSE should lead to the following observations. Classification requires a broad overview, a search for purpose and outcomes. The fact that one may find certain tasks within a classification standard does not mean that a position fits the standard or that a particular duty that is performed routinely is a primary duty. Counsel for the CSE noted that Exhibits E-18 and E-19 demonstrate that mathematicians fit clearly within the Cryptographic Professional (CP) standard and that technologists fit within the CP and/or Cryptographic Technologist (CTO) standards. He added that the Hadad report (Exhibit G-14) clearly indicated that mathematicians would not fit within the CS standard.

[60] Counsel for the CSE submitted that the present policy grievance is not a classification grievance (i.e., should one or more mathematicians be classified in the CS group), even if an individual employee has “primary duties related to computer science administration or engineering functions” — whatever that term means in the context of the collective agreement. In fact, much of the evidence heard, including that received

from the CSE management witnesses, will be irrelevant to the analysis. That said, some of the evidence will be of great assistance in the task at hand.

[61] Counsel for the CSE submitted that the first issue to be addressed is whether the phrase "positions where the primary duties require the performance of Computer Science Administration and/or Engineering functions" is clear or ambiguous. He noted that in accordance with the *Parol* evidence rule, extrinsic evidence may be admitted in evidence only to interpret the language if the terminology contains an ambiguity or to disclose the ambiguity. It sometimes happens that a common word or phrase has a special meaning, attributed to it by the parties, which might or not normally be associated with it in a common dictionary definition.

[62] Counsel for the CSE submitted that the evidence is of assistance in determining whether the phrase in question is ambiguous. He noted that the evidence showed that, for the CSE, the phrase meant the CS and EN Treasury Board classification standards while, for the PSAC, no consistent interpretation was put forward. He indicated that the 27 witnesses who testified had provided 12 definitions of computer science administration (Exhibits G-5, G-17 and G-25). Those definitions were not consistent, had significant variations, and were contradictory, and the use of some of the definitions would result in the exclusion of some employees who are currently in receipt of the market allowance. Some of the PSAC witnesses acknowledged that the Treasury Board CS standard was the best definition of computer science administration. He noted that all the witnesses had different interpretations of the term and its application to the specific functions described. Similarly, engineering functions were not precisely defined; there were numerous definitions or guidelines of what an engineering function was (Exhibits G-53 and G-57).

[63] Counsel for the CSE submitted that the evidence heard from the PSAC witnesses alone indicated that the language was capable of numerous meanings and in itself was patently ambiguous. He added that the extrinsic evidence showed that the parties used the phrase in question as a "term of art" to accomplish a specific negotiating goal for both sides. This was precisely an "ambiguity of reference" is referred to in the case law.

[64] Counsel for the CSE submitted that the position of the CSE was that the terms "computer science administration" and "engineering functions" were used as terms of art and created an "ambiguity of reference." He added that extrinsic evidence was admissible if the written agreement was ambiguous as an aid to interpreting the

agreement or to explain the ambiguity but not to vary the terms of the agreement. The extrinsic evidence relied on by the CSE was the history of the negociations and the tentative agreement reached by the parties.

[65] Counsel for the CSE submitted that, in *Noranda Metal Industries Ltd. v. I.B.E.W., Loc. 2345*, (1983) 44 O.R. (2d) 529 (C.A.), the Ontario Court of Appeal concluded that the extrinsic evidence was admissible in the case of a patent ambiguity and also in the case of a latent ambiguity. He also indicated that, in *International Nickel Co. of Canada Ltd* v. *United Steelworkers* (1974), 5 L.A.C. (2d) 331, the arbitrator found that a latent ambiguity may also be present where a word may have a special meaning.

[66] Counsel for the CSE submitted that there was a latent ambiguity since the two expressions "computer science administration" and "engineering functions" could have many different meanings. There was also an ambiguity in the term "administration" alone. He added that the external definitions presented by the PSAC witnesses and the descriptions of the duties and how those duties corresponded to the definition of the phrase was extrinsic evidence that was admitted into evidence.

[67] In the alternative, counsel for the CSE submitted that, where there was a patent or latent ambiguity, evidence of the intent of the parties is relevant and essential to resolving the ambiguity. The language in the present case was awarded by the Board of Arbitration on the basis of what was presented as a tentative agreement. This tentative agreement reveals the intention of the parties and what was truly agreed to in what Ms. Dufour described as a last-minute deal reached to address the immediate needs of the parties.

[68] Relying on the *Consolidated Bathurst* decision, counsel for the CSE noted that it was important to determine what the parties were trying to achieve. He submitted that, according to the evidence of Ms. Dufour about the negotiations, the following three important elements led to collective bargaining: the mandate process (Exhibit E-13), the Price Waterhouse study (Exhibit E-14) and the UNISON. Counsel for the CSE noted that the CSE was required to obtain approval from the Treasury Board Secretariat for anything they wanted to negotiate, that at no time did the CSE contemplate an extension of the market allowance, that the Price Waterhouse study provided support for the fact that no extension of the allowance was required, and that, as a result of the UNISON Conversion, the CSE needed a mechanism to describe who would get the allowances once UNISON was implemented.

[69] Counsel for the CSE submitted that the PSAC, on the other hand, had no proposal and was not seeking an extension of the market allowance. According to the evidence provided by Ms. Dufour, there was common ground that no one was to lose through the implementation of UNISON and that employees receiving the allowance the day before the implementation would continue to receive the allowance the day after. He added that the evidence provided by Mr. Sullivan on this common ground was imprecise but that it did not contradict the evidence provided by Ms. Dufour.

[70] Counsel for the CSE indicated that the CSE's original position was that, an employee already in receipt of the market allowance would continue to receive it. For the future, the CSE wanted to tailor the allowance to positions that it believed called for an attraction and retention allowance. If a new CS position was created, persons occupying that position might not receive the allowance even though a person occupying an identical existing position would received it. The issue became how to describe both existing and future positions that would receive the allowance since the CSE did not want to rely on the Treasury Board standards, which were no longer in use.

[71] Counsel for the CSE submitted that the issue came into focus at that point. The CSE did not know how to describe the eligibility after the implementation of UNISON and could not provide the PSAC with a clear definition. The PSAC was very concerned about the wording "as determined by the Employer" because of the potential for abuse and concern about the possible contraction of the eligibility. The PSAC was seeking certainty as to who would receive the allowance.

[72] Counsel for the CSE noted that, according to the evidence provided by Ms. Dufour, the parties agreed to the status quo. An employee entitled to the market allowance before implementation of UNISON would continue to receive it afterward. New positions that would have been CS or EN positions would be eligible for the market allowance. Counsel for the CSE noted that the PSAC rejected a number of proposed wordings because it wanted certainty about who would be eligible. The tentative agreement was a compromise that provided for the status quo in the interim.

[73] Counsel for the CSE added that the market allowance was the last item on the table. He noted that, in its submissions, the PSAC acknowledged that Ms. Dufour had indicated that only positions requiring work comparable to that of CS and EN positions would be entitled to the market allowance and that the CSE did not know how it would determine what positions would receive the market allowance in future since the criteria

had not been finalized. He noted that, as of October 9, 2002, the PSAC was still uncomfortable with such a broad definition and that it continued to seek clarification. He also noted that the proposed letter of intent had been withdrawn by the employer.

[74] Counsel for the CSE noted Ms. Dufour's testimony that during collective bargaining the CSE had advised the PSAC of the meaning of the allowance language and that, during cross-examination, counsel for the PSAC had failed to present to the witness the contradictory evidence that was eventually submitted by Mr Sullivan. Relying on the *Browne v. Dunn* rule as described and applied in Brown and Beatty and in Sopinka and applied by the Public Service Staff Relations Board in *Avey*, *McElrea* and *Séguin*, counsel for the CSE argued that the evidence provided by Mr. Sullivan was inadmissible. Counsel for the CSE added that, in any event, Mr. Sullivan's evidence was so vague and imprecise that it could simply be rejected and that Ms. Dufour's evidence should be preferred.

[75] Counsel for the CSE argued that the CSE's position during arbitration was instructive and that it pointed to the difference in language between the proposed eligibility wording and the note appearing under that proposal (Exhibit E-13, tab 11). He noted that the PSAC's position during arbitration did not indicate that it had acquired, with the tentative agreement, a substantial improvement to the market allowance. The PSAC ratification document (Exhibit E-7) did not report that a substantial improvement had been achieved, nor did the examples within the document suggest such an improvement; one witness who was present at the ratification meeting indicated that they were not advised of such an improvement. During these events, the mathematicians were meeting with the CSE's Chief about what they perceived to be inequities. The PSAC did not advise the mathematicians that they had negotiated the improved benefit; in fact, there was no mention of the mathematicians or the technologists during negotiations. Counsel for the CSE argued that what went to ratification was critical because that was what the Board of Arbitration awarded (Exhibit E-2).

[76] Counsel for the CSE noted that in its Arbitration Brief (Exhibit E-13, tab 10) the PSAC was looking for a market allowance comparable to those in the federal public service, while the CSE had rolled back its proposal (Exhibit E-13, tab 11). He did not state that there was evidence to support an allegation that the mathematicians or the technologists in the public service receive a market allowance. In fact, the PSAC was looking to roll the market allowance into the UNISON wage rate for all employees (Exhibit E-13, tab 12).

[77] Counsel for the CSE argued that other points should also be considered in the analysis of the situation. He argued that the CSE received a pay envelope from the Treasury Board Secretariat and that there was no costing for an expanded market allowance eligibility. The costing as outlined in Exhibits E-15, E-16, E-20 and E-21 is significant and, in fact, may be even higher.

[78] Counsel for the CSE argued that the collective agreement should be considered as a whole. The evidence is that the purpose of the market allowance is to attract and retain employees. The PSAC's position voids the appendix of any meaning as an attraction and retention mechanism. Relying on *DHL Express*, counsel for the CSE stated that the interpretation should match the stated purpose of the appendix and the negotiation of the clause. Such allowances are typically employer-driven mechanisms, and there is no evidence that the CSE was seeking to expand the application of the market allowance.

[79] Counsel for the CSE indicated that there was no evidence of any attraction or retention issues with the technologists, since employees accepted positions at the CSE with the full knowledge that they would not receive the market allowance and with no promise that they would receive it in the future.

[80] Counsel for the CSE noted that there was nothing in the submission to arbitration or in the award itself that appeared to contemplate an expansion of the scope of the market allowance and argued that sound labour relations and principles of interpretation require ensuring the certainty of a provision, which could only accomplished by accepting the CSE's position.

[81] Counsel for the CSE asked what to make of the inclusion of the term "administration" and recalled the testimony of Ms. Dufour that the CSE equated computer science administration with computer systems administration on the basis of the Treasury Board classification standards. There was no evidence from Mr. Sullivan that any other representations were made or even discussed. This was an indication of commonality of understanding.

[82] Counsel for the CSE asked that the employment relationship be considered as a whole. He indicated that the CSE was aware of the mathematicians' concerns. It knew the nature and purpose of the work mathematicians do set out in the position descriptions (Exhibit G-34) and had been aware of the competency profiles for the mathematician

positions since August 2000 (Exhibits G-8 and 22) and of the fact the work involves various levels of computer science. Counsel mathematicians noted that the CSE was also aware of the position descriptions of the technologists and of the competency profiles for the technologist positions.

[83] Counsel for the CSE noted how the CP and CTO classification standards (Exhibits E-18 and E-19) described the duties and the market skills in demand according to the Price Waterhouse study (Exhibit E-14). He also noted that some mathematicians had acknowledged that their work is captured by proposal #3 (Exhibit E-3) which is, according to counsel, taken from the mathematician classification standard (Exhibit G-18). Counsel for the CSE recalled that the main hiring indicator for mathematicians for one of the managers was the Putman Scor*e*, a pure and applied mathematics test (Exhibit G-28B).

[84] Counsel for the CSE asked what evidence there was of any intent to extend the allowance to the technologists and mathematicians. He noted that the non-receipt of the market allowance is an issue for the mathematicians since they perceived it as a matter of equity and raised the issue with senior management. According to, the documentation entitled "Lack of Equity for CSE Mathematicians," as confirmed by the testimony of the signatories, the CSE was not about to extend the market allowance eligibility. Although senior management was sympathetic, it never indicated that it was moving in that direction. Counsel for the CSE noted that the dates of a memorandum (Exhibit E-3) and an email (Exhibit E-4) expressing the concerns of the mathematicians coincided with the expiry of the collective agreement. Surely the bargaining agent would have presented a proposal on this issue. Ms. Dufour and Mr. Sullivan testified that this issue was not discussed at the bargaining table.

[85] If the CSE's interpretation were not accepted, counsel for the CSE asked which interpretation could be used. He noted that the witnesses had each proposed a version that included their position but that it was clear that the adoption of one interpretation would exclude coverage of some of the other witnesses. Counsel for the CSE argued that any interpretation dealing with algorithms would exclude positions at the help desk and many computer scientists working on networks. It would likely also exclude the bulk of the technicians and technologists.

[86] Counsel for the CSE argued that one of the biggest problems in the present case was that, while all the witnesses stated categorically that they are performing computer

science administration functions, they did not apply any consistent definition, consequently, their testimony has limited value.

[87] Counsel for the CSE argued that the evidence put forward by the PSAC was of limited value. He noted that much of the evidence was provided by a number of individuals who were not in the bargaining unit at the time of the grievance.

[88] Counsel for the CSE reviewed the various witnesses' comments about the range of proposed definitions of computer science, found in Exhibit G-5. For national security considerations, I will refer to these witnesses by their initials only.

[89] Counsel for the CSE indicated that one witness (JP) agreed that none of those definitions were as descriptive as would be needed at the CSE. He argued the same witness's comment that computer science and computing science were synonymous was problematic at the CSE because of the diversity of the job duties.

[90] Counsel for the CSE noted that one witness (SD) acknowledged that importing the universities' definitions of computer science was problematic since the universities are focused on the development of knowledge while the CSE is focused on the application of knowledge.

[91] Counsel for the CSE noted that another witness (DV) indicated that there were quite a few acceptable definitions and that the various universities' definitions contained various descriptions most of which lead to a reasonable definition of computer science. One other witness (MR) indicated that he did not see a single unacceptable definition but added that none are perfect.

[92] Counsel for the CSE noted that one witness (LC) indicated that the universities' definitions were good definitions of the functions of computer science but less so of the functions of computer systems.

[93] Counsel for the CSE noted that one witness (FT) indicated that computer science meant the algorithmic processes that describe and transfer information. Counsel for the CSE argued that such a definition would exclude many CS positions whose incumbents currently receive the market allowance.

[94] Counsel for the CSE noted that one witness (BM) defined computer science administration as "to perform an act or a process to control the use, execution or

conduct of an analysis design, development, implementation, testing, application and maintenance of a computer algorithm." Counsel for the CSE asked how many employees would continue to qualify for the market allowance under that definition.

[95] Counsel for the CSE noted that one witness (JW) indicated that computer science meant the practice and application of computer science and its discipline including software development, optimization, algorithm design, and software testing and maintenance. Counsel for the CSE argued that that witness was tailoring the definition to his position.

[96] Counsel for the CSE noted that another witness (CMc) indicated that computer science administration meant algorithmic processes to describe and transform data, write software, design databases, and optimize software and data.

[97] Counsel for the CSE noted that two of the technologist (TB and WR) prefer the CS standard as a definition of computer science administration.

[98] Counsel for the CSE noted that one witness (GP) preferred the universities' definitions and that his position might not correspond to a definition that was based on algorithms.

[99] Counsel for the CSE noted that one witness (RT) agreed that his position would meet the exclusions under the CS classification standards.

[100] With respect to the Treasury Board CS classification standard, counsel for the CSE noted that one witness (JP) indicated that it encompassed more of the systems and was the only standard for scoring program developers. Counsel for the CSE noted that another witness (BW) indicated that the standard encompassed part of computer science but that some parts of the standard, perhaps including IT support and software installation were not part of computer science. This witness indicated that IT support and installing software may not be.

[101] Counsel for the CSE argued that one witness (RG) best captured the problems in accepting the PSAC's case. According to counsel for the CSE, this witness stated duties performed in the T3D unit were missing from the definition found in the CS classification standard and that many definitions were applicable since computer science administration was a vast field. Counsel for the CSE argued that a proper definition cannot be tailored to different circumstances. Counsel for the CSE noted that

this witness struggled, under cross-examination, to show how he would qualify under the algorithm criteria, and that the witness agreed that the help desk employees who currently receive the market allowance would not properly qualify under the algorithm definition. According to counsel for the CSE, the witness indicated that, in stating that he was doing computer science administration, he had a definition (Exhibit G-17) in mind that was not in use at the CSE and agreed that the only definition used at the CSE was the CS definition contained in the standard.

[102] Counsel for the CSE indicated that one witness (MW), a technologist preferred the definitions from the *Encyclopaedia Britannica*, the Canada Revenue Agency (Exhibit G-7) and the CS standard (Exhibit G-20) to the universities' definitions, which had more of an academic focus. According to counsel for the CSE, the witness indicated that he used the three definitions plus his "collective lifetime experience" when answering the question "did he perform computer science administration?" He also noted that the witness indicated that computer science administration "runs the whole gamut from high level architecture to changing hard drives on a PC or installing Windows."

[103] Counsel for the CSE noted that one witness (DF) indicated that the use of computer-assisted drawing to manipulate a circuit board is a computer science administration function, as is monitoring the heat and reflow and how to react to processes performed by computer.

[104] Counsel for the CSE commented on the use of the term "administration," noting that some witnesses (JP, PM, BW, FB and JW) attributed various meanings to the word: it does not mean much, it adds slightly, it means applying computer science to resolving problems, it means information processing using computers, which enables the development of solutions and programs, it means administration functions, it means the practice and application of software development, optimization, algorithm design, and software testing and maintenance. Many of these meanings involved tailoring the definition to the duties that individual witnesses perform.

[105] Counsel for the CSE noted that some technologists had a different focus. He noted that one witness (PT) stated that everything related to network administration was computer science administration; another (CStJ) stated that the use of computers as a tool to manipulate data and control signals, to integrate hardware and software components for a specific application, to modify hardware and configure software and to write code was computer science administration. Counsel for the CSE asked how

many current recipients of the market allowance would qualify under this last definition. Counsel for the CSE noted that one other witness (GP) stated that computer science administration was a vague term.

[106] With respect to the engineering functions as described by the technologists, counsel for the CSE noted that, according to the examples provided by one witness (PT), while these functions involved identifying problems, the technologist did not solve the problem, which was then referred to the engineers of the equipment provider to resolve. Counsel for the CSE questioned whether setting up a test bed was an engineering function and whether the reverse engineering examples provided would qualify for the market allowance.

[107] Counsel for the CSE noted that one witness (CStJ) indicated that the engineering functions he conducted were design work based on user requirements, analysis, testing and reporting, on the basis of meeting with engineering staff to come up with a solution acceptable from a security perspective. These functions included researching components and coming up with network architecture and test plans. Counsel for the CSE noted that this witness testified that any test procedure is an engineering function and that his representing the CSE in a group as a lead specialist on the basis of his experience was an engineering function.

[108] Counsel for the CSE indicated that another witness (TB) testified that any design and building of a process or integration and any evaluation of a system was an engineering function, that the completion of a technical task implementing a technical decision made by a person who is a design or process authority was an engineering function, that the installation of a piece of equipment on a line was an engineering function, that the complete process was an engineering function, that choosing the correct solder was an engineering function, and that entering a set of parameters into a test device was an engineering function.

[109] Counsel for the CSE noted that another witness (DF) testified that an engineering function involves the application of mathematics, physics and mechanical principles to solving procedural problems, that the identification of which test to run and how to implement it was an engineering function, that the installation of all telecommunications equipment and ensuring functionality when installed was an engineering function, that doing cost and analysis and documenting was an engineering function, that life-cycle management and was an engineering function, that providing

advice to clients implied a leadership role was an engineering function, and that knowing which material to use was an engineering function.

[110] Counsel for the CSE indicated that one witness (WR) indicated that analyzing a problem and coming up with a test environment to measure the degree of risk was an engineering function. Counsel for the CSE argued that, according to that definition, an auto mechanic performs engineering functions.

[111] Counsel for the CSE indicated that one witness (RG) indicated the engineering functions here involved in making any decision in relation to a process, in making a responsible decision for a proper business case, in conducting a risk analysis, and in presenting a solution in line with a group's business process. Counsel for the CSE noted that the witness agreed that the electromechanical skills of the technologist in the T3D unit were certainly unique, and that their hardware design abilities certainly exceeded the expectations for CTO positions. Counsel for the CSE noted that this witness (RG) agreed with the concept of applied knowledge found in the technologist' position description in use in the T3D unit that use the term "electronics engineering technology."

[112] Counsel for the CSE indicated that one witness (MW) indicated that presenting technical information to a technical audience was an engineering function.

[113] Counsel for the CSE indicated that one witness (RT), indicated that finding solutions to problems, making prototypes, being able to provide explanations, to end user; drafting documents, performing installations, adapting to differences between suppliers, and cabling involved engineering functions.

[114] Counsel for the CSE indicated that one witness (GP) indicated that providing reports to T Group, attending meetings where strategies are planned, using tools required to access data, understanding how to probe parts on a circuit board, setting up a test bed, interacting with clients to understand setup and properly document and report, understanding how "ISDN" works, responding to students' technical questions, and participating in technical exchange meetings were engineering functions.

[115] On the question of whether technologists performed computer science administration function, counsel for the CSE indicated that one witness (CStJ) indicated that because he had to define monitor boards and conduct manipulations in the lab he

was performing computer science administration functions. Counsel for the CSE added that the witness also indicated that the use of computer-based systems to come up with proofs of concepts qualified as computer science administration functions and that knowing how an operating system behaves and how to configure a personal computer and an operating system qualified as computer science administration.

[116] Counsel for the CSE noted that one witness (TB) testified that X-raying was a computer science administration function for the purpose of the market allowance.

[117] Counsel for the CSE noted that another witness (DF) indicated that the installation, maintenance, configuration or support of a computer or network was a computer science administration function, as were, design, computation, architecture, programming, and the preparation of instructional manuals. He noted that this witness preferred the CS standard definition but added that the use of a computer-assisted drawing system that manipulates computer boards was a computer science administration function. Counsel for the CSE also noted that according to this witness all aspects of life-cycle management were a computer science administration function. He also noted that this witness acknowledged that his position would be excluded from the CS group on the basis of the exclusions found in the group definition.

[118] Counsel for the CSE indicated that one witness (WR) testified that examination of how secure and non-secure systems interrelate and interconnect, coding, setting parameters in a computer test equipment, and life-cycle management were computer science administration functions.

[119] Counsel for the CSE noted that according to one witness (GP) specifying motherboards and chipsets and testing hardware were computer science administration functions. This witness also acknowledged that his position would be excluded from the CS group since it fell under one of the exclusions listed in the group definition.

[120] Counsel for the CSE indicated that according to one witness (RG) anyone who developed specialized software performed computer science administration functions.

[121] Counsel for the CSE noted that one witness (CT) testified that using a computer with an operating system to adapt it to the network was a computer science administration function.

[122] Counsel for the CSE indicated that one witness (WR) testified that determining where technology is heading was a computer science administration function and that ensuring that the CSE labs met future requirements as well as purchasing equipment and conceptualizing tests were also computer science administration functions.

[123] Counsel for the CSE wondered whether any of the above statements by the witnesses were consistent with the provision of a market allowance.

[124] Relying on the testimony provided by the classification officer (RL), counsel argued that to determine primary duties one must take a holistic view from the top down and look at the outputs expected of the group and how they affect the organization as a whole. He added that one must also identify the responsibilities to the various levels of higher management and the skills sought in staffing the positions. Finally, one must benchmark the positions.

[125] Counsel for the CSE noted that, if this were done, then none of the mathematicians or CTOs would have computer science administration or engineering functions as a primary duty. He acknowledged that there was no denying that some aspects of computer usage and engineering principles are associated with the performance of these persons' work. He added, however, that resolving the issue is not as simple as saying that if a person can pinpoint anything that looks like computer science or engineering in a particular position description then it is the primary duty of the position, particularly since the present grievance is all about market allowance eligibility.

[126] Counsel for the CSE argued that the testimony of one witness (RG) indicated that the positions in the T3B unit who receive the market allowance and the positions in the T3D unit who do not receive the allowance were quite different. These positions have distinct position descriptions and competency profiles; the T3B group is mainly concerned with computer administration.

[127] Counsel for the CSE noted that the CSE uses National Occupation Classification (NOC) codes to distinguish among positions in job families (Exhibits G-10 and E-13). These codes distinguish among different groups and specifically do not group mathematicians with computer science employees or the technologists with either computer science employees or engineers. The evidence shows that the CSE uses these job families and distinguishes among technologists, engineers and computer science

employees. Counsel for the CSE argued that primary duties should be determined through classification as described by witness RL and that the evidence provided by the CSE's witnesses indicated the primary duties of the positions concerned and the skills by manager in hiring.

[128] Counsel for the CSE asked whether there is a distinction between "engineering" and "electronic engineering." He indicated that witness DF stated that where engineering starts and stops is blurry and that there was a huge overlap between engineering functions and engineering technologist functions.

[129] Counsel for the CSE asked which technologists should receive the market allowance. He noted that a large number of technologists in the Z group (CIO-I) listed in Exhibit E-15 did not testify and that as a result little is known of their work. Counsel for the CSE noted that the PSAC did not specifically indicate that these employees would not be eligible for the market allowance as, under their proposal, everyone else may qualify.

[130] Counsel for the CSE argued that the economic consequences of this clause were enormous since there are 85 technicians and technologists, representing a significant portion of payroll**.** Counsel for the CSE added that the comment attributed to the CSE's negotiator that he ". . . won't lose sleep over it . . ." was unbelievable since the clause, if interpreted as the PSAC would prefer, provides an expensive benefit to a group of employees that was undefined and potentially open. There was all the more reason to apply the rule in *Browne and Dunn* since this question was not put to the CSE's witness, Ms. Dufour.

[131] Counsel for the CSE argued that the same problem existed for the mathematicians and that, if the PSAC's interpretation were accepted, the qualifications of the individual would govern receipt of the allowance, not the primary duties of the position.

[132] Counsel for the CSE argued that the end result was that the PSAC's interpretation was unacceptable, if for no other reason than it, proposes no clear definition. What is proposed will lead to uncertainty and labour relations chaos.

[133] Counsel for the CSE noted that the adjudicator does not have jurisdiction to order the parties to agree on what the language means. The adjudicator can explain the words and must provide a clear definition of the words that the parties negotiated. He

noted that the PSAC did not propose a single clear definition. Counsel for the CSE added that because the present case is a policy grievance, I could not indicate who might qualify and could not award retroactivity.

[134] Counsel for the CSE asked that I find that, while the parties did their common intent very clearly, the common intent was to preserve the status quo and that only the CS or EN positions that would qualify under those standards should receive the market allowance.

[135] Counsel for the CSE noted that there were reasons the parties did what they did and that I should leave this for the parties to negotiate for the future (which is exactly what Ms. Dufour testified was the agreement at the negotiating table leading to the tentative agreement that the Board of Arbitration imposed as the text of Appendix B). The parties negotiated a stop-gap measure; the problem should be solved at the bargaining table.

[136] Counsel for the CSE asked that I dismiss the grievance.

C. <u>Reply for the bargaining agent</u>

[137] Counsel for the bargaining agent cautioned that much of the evidence was misstated or taken out of context by counsel for the CSE. She urged the adjudicator to review the notes since many of his statements were inaccurate.

[138] Counsel for the bargaining agent noted that counsel for the CSE often described bargaining agent's position regarding to the application or interpretation of Appendix B as being absurd and not logical. Counsel for the bargaining agent argued that the bargaining agent maintains that, with the implementation of UNISON, a competency-based classification system, entitlement to the market allowance should be based on the position description and the competency profile. This is not an absurd interpretation.

[139] With respect to the eligibility of positions for the market allowance, counsel for the bargaining agent requested a remedy that is entirely within the adjudicator's jurisdiction: a declaration that Appendix B applies to all bargaining unit positions. Counsel indicated that the bargaining agent provided examples of positions that should be entitled to the market allowance.

[140] Counsel for the bargaining agent noted that, while counsel for the CSE indicated that the present case is not a classification matter, the document establishing the CSE's application of Appendix B (Exhibit G-115) clearly shows that the CSE is treating it as a classification matter. Counsel for the bargaining agent submitted that the CSE's application was completely inconsistent with the extrinsic evidence it submitted and with the terms of the appendix, which were in fact drafted by the CSE's negotiating team, led by counsel for the CSE. In fact, the CSE would like to see the Treasury Board CS and EN standards used after the implementation of UNISON, contrary to what was stated during the negotiations. Counsel for the bargaining agent argued that such an approach would render the use of "and/or" in the second criterion meaningless.

[141] Counsel for the bargaining agent submitted that, even if it was agreed that the Treasury Board CS and EN standards should be use, the evidence showed that the employees who testified performed the functions described in these definitions, even though they may not be classified as CS or EN.

[142] Counsel for the bargaining agent submitted that the work performed by the employees was relevant. The work required of the employees who testified as described in their work descriptions and competency profiles should be considered in defining computer science administration functions and engineering functions. Counsel for the bargaining agent argued that the primary duties are the deliverables and key activities described in the work descriptions. Computer science administration functions and engineering functions need to be defined within the context of the work done at the CSE.

[143] Contrary that what was affirmed by counsel for the CSE, counsel for the bargaining agent submitted that every employee who testified provided extensive examples of deliverables and key activities that require the performance of computer science administration functions or engineering functions.

[144] Counsel for the bargaining agent argued that, when asked for their definitions of computer science administration functions or engineering functions, the witnesses always answered in the context of the work they performed. They stated why their primary duties required the performance of computer science administration and/or engineering functions. Counsel for the bargaining agent indicated that what was important was that every single employee who testified, although they may have preferred one definition over another, agreed that the proposed definitions were acceptable. Contrary to what was affirmed by counsel for the CSE, the proposed

definitions are not mutually exclusive. While some definitions may emphasise different aspects of computer science administration or engineering functions, it is clear that they are describing the same thing.

[145] Counsel for the bargaining agent disputed the allegation by counsel for the CSE that the use of any one definition would result in the exclusion from eligibility of positions currently in receipt of the market allowance. She noted that this allegation was not substantiated by any evidence.

[146] Counsel for the bargaining agent noted that the CSE was asking that the CS and EN standards be used to determine eligibility for the market allowance, while arguing that the present case is not a classification matter. Counsel for the bargaining agent indicated that if, as argued by the CSE, the activities described in the CS and EN classification standards are computer science administration and engineering functions and if the issue is not a classification matter, there is no reason to render positions ineligible because they are covered under the exclusions listed in the classification standards, since the exclusions found in the CS and EN classification standards do not preclude a person in any position from performing these functions. The exclusions listen in the classification standards are classification devices designed to ensure that any one position is classified under only one standard.

[147] Counsel for the bargaining agent argued that, according to the evidence provided by Ms. Dufour, the CSE position as set out in the "Determination of Eligibility to the Market Allowance" (Exhibit G-115) was not only incorrect, but also was never presented to the bargaining agent during the negotiations. In effect, the CSE is asking the adjudicator to alter the terms of the collective agreement.

[148] Counsel for the bargaining agent disputed the CSE's allegation that the Putman scores were the determining factor in the hiring of mathematicians and indicated that computer science, according to the confidential document on hiring (Exhibit G-28), was more significant since more points were awarded to this factor.

[149] Referring to the argument by counsel for the CSE that some mathematicians had acknowledged that their work is captured by proposal #3 (Exhibit E-3), which according to counsel for the CSE is taken from the mathematician classification standard (Exhibit G-18), counsel for the bargaining agent noted that, contrary to the argument by counsel

for the CSE, the source of that statement was not the Treasury Board mathematics classification standard but the computer systems group definition.

[150] Counsel for the bargaining agent maintained that one witness (JP) testified that various definitions of computer science were applicable at the CSE. She indicated that the proposed definition of computer science administration (Exhibit G-17) was in fact included in the grievance presentation (Exhibit G-16). JP's testimony was that this definition could be applied to the CSE and had been prepared in line with the comment by Dr. Coulter that both parties should work together toward a joint definition and list of activities.

[151] While agreeing that the bargaining agent did not make any proposals to extend the market allowance, counsel for the bargaining agent noted that the bargaining agent never agreed that the market allowance should exclude certain positions. The bargaining agent was seeking a clear definition of the terms used and in fact wanted to know who would be eligible for the market allowance. There is no evidence that the bargaining agent agreed to have Appendix B apply only to certain positions or categories of positions. Counsel for the bargaining agent added that the fact that the bargaining agent in its arbitral brief wanted to roll the market allowance into salary was another clear indication that the bargaining agent believed that the market allowance should apply to all positions.

[152] Counsel for the bargaining agent submitted that, contrary to what was affirmed by counsel for the CSE, the bargaining agent and the CSE never agreed on a definition of the words contained in the collective agreement. She recalled that Ms. Dufour never provided a definition of computer science administration or engineering functions and that, in fact, she testified that the bargaining agent was seeking a definition that was never obtained.

[153] Counsel for the bargaining agent noted that the Price Waterhouse study was never shared with the bargaining agent and that, in fact, no evidence was presented in support of the allegation that the market allowance was all about retention issues. Ms. Dufour did say that the CSE wanted to extend the market allowance to positions of which the incumbents performed work comparable to that described in the CS and EN standards on the basis of the competency profiles. However, the evidence also revealed that Ms. Dufour was not part of the team developing the competency profiles, which at the time had not been completed. If any uncertainty existed, it had more to do with the

application of the agreement then being negotiated than with eligibility for the market allowance in future collective agreements.

[154] Counsel for the bargaining agent noted that counsel for the CSE had relied on the Haddad report (Exhibit G-14), which concluded that the mathematicians would not be included in the CS group, but had disregarded the conclusion of the expert who prepared the report that the mathematicians did meet the second criterion of Appendix B.

[155] Counsel for the bargaining agent argued that there was clear evidence in the CSE's submissions to the Arbitration Board (Exhibit E-13, tab 11) that the CSE did not have a fixed criterion for the market allowance eligibility, as was illustrated by the note appearing in the proposal on the market allowance. Clearly the employer's intent as stated to the bargaining agent was to use the new competency profiles to determine eligibility for the market allowance.

[156] Counsel for the bargaining agent noted that the rule in *Browne and Dunn* is a discretionary rule that has not been applied consistently in labour arbitration. An adjudicator has broad discretion to accept or reject evidence. Counsel noted that there were exceptions to the application of the rule and referred to *Grand River Hospital Corp. v. C.A.W.-Canada, Loc 302 (Re)*, [2002] O.L.A.A. No. 1039. Since Ms. Dufour was extensively cross-examined and was not a party to the proceedings, it would not be a breach of procedural fairness to allow the evidence provided by Mr. Sullivan.

[157] In response to the arguments by the CSE that the *contra proferentem* rule did not apply, counsel for the bargaining agent agreed that the appendix was a right-creating clause but that, none the less, the rule applied because the appendix contained employer-proposed language drafted by the CSE's negotiating team. It was not a fully negotiated clause since the employer did not clarify its meaning. Relying on *Medis Health and Pharmaceutical Ltd* counsel for the bargaining agent indicated that the rule applied because the CSE was attempting to limit and exclude certain positions from the application of Appendix B. The rule supports the argument that if the CSE wanted to limit the application of the appendix it should clearly stated in the appendix.

[158] Referring to *Strait Crossing Joint Venture*, counsel for the bargaining agent indicated that for extrinsic evidence to be used it must be clear and cogent and must be

relied on only if unequivocal. The negotiating history in the present case did not meet that test.

III. Reasons

[159] In support of the position put forward by the bargaining agent at the bargaining table, Appendix B of the collective agreement, entitled "Memorandum of Understanding in Respect of Market Allowance," states that the employer has agreed to "provide a market allowance to incumbents of positions classified at the UNI-4 to UNI-11 levels performing Computer Science Administration and/or Engineering functions in the performance of duties." More specifically, the eligible positions are identified under two separate eligibility conditions. The first establishes that the positions classified as CS-01 to CS-05 and the positions classified as EN-03 to EN-06 on the day before the issuance of the arbitral award are eligible for the market allowance. The second condition states that positions of which the primary duties require the performance of "Computer Science Administration and/or Engineering functions," are also eligible for the allowance.

[160] There is no evidence that leads me to conclude that there is any problem with the application of the first condition. Incumbents of positions in receipt of the market allowance before the introduction of the new UNISON classification plan continue to receive the market allowance.

[161] The problem centers on the application of the second condition. The evidence has shown that, after wavering on how to apply it or even whether to apply it at all, the employer finally adopted the approach that is reflected in the document entitled "Determination of Market Allowance Eligibility" (Exhibit G-115). In essence, the employer is limiting eligibility for the market allowance to new positions that qualify for inclusion in the former CS and EN groups as defined in the Treasury Board classification standards. In other words, as a condition of eligibility, the CSE essentially conducts a group allocation exercise on new positions under the formerly applicable Treasury Board classification standards.

[162] My task as an adjudicator is to determine the correct application of Appendix B and more specifically its second eligibility condition. It is trite to state that in doing so I must apply the words chosen by the parties to the agreement or, as in the present case, included as a result of an arbitral award. In applying the arbitral award, I must give the words their ordinary meaning and must avoid looking beyond the words to search for

the parties' intent. Simply put, the parties' rights or obligations flow from the text of the agreement, unless its ordinary meaning leads to an incongruity or a truly absurd result.

[163] The PSAC has argued that Appendix B is clear, positions classified between the UNI-4 and UNI-11 level of which the primary duties require the performance of computer science administration and/or engineering functions are eligible for the market allowance. I agree. Although witnesses involved in operational roles from both the employer and the bargaining agent have expressed a number of variations on what is meant by computer science administration functions and engineering functions, these variations are not significant and, contrary to the assertions of counsel for the CSE, do not give rise to any interpretation problems. For nearly all persons employed in operations positions at the CSE, computer science administration and engineering functions are, at minimum, the functions that are performed out when an employee engages in one or more of the activities described in the list of activities set out in the Computer Systems and Engineering Group definitions. The problem lies, not in the fact that the positions require the performance of those activities but in the fact that, under the Treasury Board classification standards, all of the incumbents of the positions would be excluded from the CS and EN groups because, in accordance with the list of exclusions set out in those group definitions, the positions belong to other groups. The CSE relies on these exclusions to declare the positions not eligible for the market allowance.

[164] For instance, a mathematician, whose position was classified as a Cryptographic Professional (CP) under the former classification system in force at the CSE, performs functions characteristic of computer science administration such as the analysis, design and programming activities for the development, implementation and maintenance of administrative, scientific and technological information processing systems. His position could not be included in the CS Group because the primary duty of his position was cryptography and because that position was part of the Cryptographic Professionals Group. This exclusion became inoperative when the employer, the CSE, abandoned the Treasury Board classification standards and the CP group in favour of the new UNISON classification system. Since the second criterion for eligibility for the market allowance does not require that positions be classified as CS or EN, but that the primary duties of positions require the performance of computer science administration functions, a mathematician who is involved in the analysis, design and programming activities for the development, implementation and maintenance of administrative,

scientific and technological information processing systems occupies a position of which the primary duties (related to cryptography) require the performance of computer science administration functions.

[165] The evidence provided by the mathematicians and the engineering technologists established that their primary duties, whether as mathematicians, research mathematicians, crypto mathematicians, mathematician specialists, senior cryptanalysts, metadata analysts and mathematicians, COMSEC technologists, Fielded System Unit Head, Head of Covert Technologies and Deployment, Engineering Technologist of Covert Technology and Deployment, senior EMSEC technologist, Head of Key Management Hardware Services, or Key Management Hardware Services technologists, require the performance of computer science administration and/or engineering functions. These witnesses provided abundant and detailed evidence of that requirement. Their testimonies were confirmed by essentially all the managers called by the employer who acknowledged that, although the incumbents of those positions where neither CSs nor ENs, the primary duties of their positions required the performance of computer science administration and/or engineering functions.

[166] This finding is further supported by the Hadad report, which concluded that mathematicians and persons occupying similar positions were performing computer science administration functions. It is also supported by the competency profile for each of those positions, which clearly supports the employees' claim that they are required to possess competencies in computer science and networking systems, and by their respective position descriptions (PIQs).

[167] Similarly, engineering technologist and similar positions are positions of which the primary duties require the performance of engineering and/or computer science administration functions. As is the case with the mathematicians, the technologists who testified before me all provided specific examples establishing that their primary duties required the performance of engineering and/or computer science administration functions. This finding was, in essence, corroborated by the managers who testified before me. It is also supported by the competency profiles submitted in evidence for these positions and by the position descriptions (PIQs).

[168] It is true that, according to the CSE's evidence, none of these positions would qualify to be included in the CS or the EN group under the Treasury Board classification standards; however, that is not the requirement under the second condition. To make it

such would have called for substantially different wording. Had the parties agreed to use inclusion in the CS or the EN group as defined in the Treasury Board classification standard as the determinant condition for eligibility, they would have said so and in language similar to the first condition. Furthermore, the use of "and/or" within the second condition is incompatible with the use of the Treasury Board classification standards because, within that system, a position cannot belong to two groups.

[169] The juxtaposition of the two criteria for eligibility under the "Eligible Positions" heading of Appendix B makes it quite clear that the second condition must apply independently of the former CS and EN classification standards.

[170] The employer argued further that the second criterion should be applied only to new positions classified after the coming into effect of the collective agreement. There is no reference to new positions in the second eligibility condition of Appendix B. Consequently, eligibility cannot be limited only to situations where new or amended position descriptions are subject to a classification exercise. Such a limitation would require a different wording of the second criterion. Written as they are, the eligibility criteria apply, in my view, to all existing positions in the bargaining unit classified at the UNI-4 to UNI-11 levels on the operative date of Appendix B.

[171] Within the context of the CSE, Appendix B is not ambiguous. Computer science administration and engineering functions are well-understood terms and should be given their plain and ordinary meanings. Furthermore, there is no doubt that the activities described in items 1 to 11 under the heading "Inclusions" found in the CS Group Definition (Exhibit G-20) are typical of computer science administration functions. Similarly, there is no doubt that the activities described in items 1 to 6 of the EN Group Definition (Exhibit G-57) are typical engineering functions. Although the use of the words "computer science administration" rather than "computer system administration" may have been the result of an error by the employer's negotiating team, the use of "computer science administration" enlarges the scope of activities and in any event, this term encompasses the activities listed in the Treasury Board CS standard.

[172] The evidence is conclusive that the mathematicians and the engineering technologists who testified before me are required by virtue of the primary duties of their respective positions to perform one or more of the activities described in one or both of the group definitions. Consequently, they are performing activities which are typical of positions performing those functions. The fact that their positions may be

excluded from being classified in the CS or the EN group by virtue of the operation of the exclusions found in the same definitions does not change the fact that they are performing those functions. Furthermore, the CSE chose, with the introduction of UNISON, to do away with the Treasury Board group definitions in favour of a universal classification system.

[173] I would also add that, even if I had found a latent ambiguity in the language used by the parties, I am of the view that the evidence provided by Ms. Dufour, who sat at the bargaining table on behalf of the employer, is that the use of the Treasury Board classification standards was to cease with the implementation of UNISON. In essence, eligibility for the market allowance was to be determined by the actual requirements of the primary duties, not in the use of Treasury Board classification standards.

[174] The finding is also evident in the changes to the CSE's proposal on the market allowance. The CSE's point form proposal put forward on September 18, 2002 clearly specified as follows, that:

> *All CS and EN employees as of date of signing continue to receive:*
>
> *All new positions or transfers will receive based on competencies required in position.*

[175] The first proposed wording of the second criterion, submitted on October 9, 2002, provided that the employer would determine who would be eligible as follows, on:

> *. . . the basis of the performance of duties in the Computer Science Administration and/or Engineering functions performed . . . subsequent to the day of signature of the collective agreement.*

That wording was changed on October 15, 2002 to the following:

> . . .
>
> *Positions where the primary duties require the performance of Computer Science Administration and/or Engineering functions, as determined by the Employer.*

That wording was accompanied by a letter of intent that served to confirm as follows:

. . .

> *the Employer will finalize the development of a competency career framework based upon groupings such as job communities, jobs families and profiles to determine eligibility for this Allowance. The Employer agrees to provide the local Bargaining agent with updates on the progress of this process, and present the finalized criteria to the local Bargaining agent upon its completion . . .*

[176] Although the PSAC did not have a specific proposal, it is clear that none of those proposals were accepted by the bargaining agent. The final wording agreed to by the parties when they reached a tentative settlement on November 6, 2002, did not include either this letter of intent or the specification ". . . as determined by the Employer. . . ." It was this final wording, which was included in the arbitral award, which is the subject of the present policy grievance.

[177] While I can see that it was never the express intent of the parties to expand the eligibility for the market allowance, there was never, contrary to the assertions by counsel for the CSE, any specific agreement on the actual meaning of the clause, since Ms. Dufour testified that the PSAC was seeking a clear definition of the terms used in the various CSE proposals and that there was no agreement on their meaning.

[178] The CSE clearly expressed the view that it wanted to cease using the Treasury Board classification standards. To revert to the strict application of the Treasury Board classification standards in determining eligibility, as the CSE has done, is contrary to the wording and contrary to the stated intent that flows from the wording and that was expressed at the bargaining table.

[179] Because the CSE is a separate employer, the constraints imposed by the mandate obtained from Treasury Board are not relevant to the determination of the issue. Whether the CSE acted within or outside its mandate is a matter to be resolved between the Treasury Board and the CSE, not between the parties to the present collective agreement. As well, the costs associated with a correct application of the collective agreement are not relevant to the issue to be determined.

[180] There is also no need to rule on the admissibility of the evidence provided by the witness John Sullivan, as I have not considered or relied on this evidence in reaching my conclusion.

[181] Consequently, I am of the view that the CSE contravened the provisions of Appendix B of the collective agreement from the time of the arbitral award. The evidence has clearly established that the primary duties of the positions held by the incumbents who testified in these proceedings required the performance of computer science administration and/or engineering functions and that they were denied the market allowance, contrary to the provisions of the collective agreement.

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

(The Order appears on the next page)

IV. Order

[183] The policy grievance filed by the PSAC is allowed.

[184] I declare that the CSE incorrectly applied Appendix B of the collective agreement when it required that a position be capable of being classified in the CS or the EN occupational group, under the formerly applicable Treasury Board classification standards, as a condition for eligibility for the market allowance provided for in that Appendix.

[185] The CSE is directed to cease determining eligibility for the market allowance through analysis of the work on the basis of whether the primary duties and responsibilities would meet the requirements for inclusion in the CS or the EN group.

[186] The CSE is further directed to pay the market allowance to the incumbents of positions whose primary duties require the performance of computer science administration functions and/or engineering functions, from the date of the issuance of the arbitral award that resulted in the collective agreement. These functions include those performed when an employee engages in one or more of the activities described in the definition of the CS or the EN group.

October 6, 2009.

Georges Nadeau,
adjudicator