Date: 20090212

File: 585-02-25

Citation: 2009 PSLRB 20

Public Service Labour Relations Act

Before the Chairperson
Public Service Labour Relations Board

IN THE MATTER OF
THE *PUBLIC SERVICE LABOUR RELATIONS ACT*
and a dispute affecting
the Association of Justice Counsel, as bargaining agent,
and the Treasury Board, as employer,
in respect of all the employees of the Employer in the Law Group
bargaining unit

Indexed as
Association of Justice Counsel v. Treasury Board

TERMS OF REFERENCE OF THE ARBITRATION BOARD

To: Michael Bendel**,** chairperson of the arbitration board;
Chris Paliare and Jean-François Munn, arbitration board members

For the Bargaining Agent: Stephen Barrett, counsel, and Caroline Baumann, co-counsel

For the Employer: Caroline Engmann, counsel, and Marc Thibodeau

Issued on the basis of written submissions
dated September 25, October 6, 15 and 27, November 21, and December 5, 2008,
and heard at Ottawa, Ontario, December 15 and 16, 2008.

Requests before the Chairperson

[1] On September 25, 2008, the Treasury Board ("the employer") requested arbitration with respect to the LA Group bargaining unit. The LA Group is composed of all employees in the LA Group as defined in Part I of the *Canada Gazette* of March 27, 1999, for which the Treasury Board is the employer and who are not excluded from collective bargaining by law or determination of the Public Service Labour Relations Board ("the Board") (*Association of Justice Counsel et al. v. Treasury Board et al*, 2006 PSLRB 45, as amended by *Treasury Board v. Association of Justice Counsel,* 2007 PSLRB 84).

[2] The employer provided a list of the terms and conditions of employment that it wished to refer to arbitration. Those terms and conditions of employment are attached as Schedule 1.

[3] On October 6, 2008, the Association of Justice Counsel (AJC or "the bargaining agent") provided a list of additional terms and conditions of employment that it wished to refer to arbitration. Those terms and conditions are attached as Schedule 2.

[4] The employer, in correspondence to the Board dated October 15, 2008, objected to a number of the terms and conditions proposed by the bargaining agent. The employer raised a number of jurisdictional objections, identified several articles that the employer now viewed as "not agreed upon" in light of the bargaining agent's proposals and identified other articles that should not be included in the terms of reference because the bargaining agent had not provided its proposals on the award to be made, contrary to subsection 48(1) of the *Public Service Labour Relations Board Regulations*. The correspondence is attached as Schedule 3.

[5] The Board asked the bargaining agent for its submissions on these objections, and the bargaining agent responded on October 27, 2008. The bargaining agent replied to the submissions of the employer and requested particulars on the objections. The bargaining agent also amended some of its proposals. The correspondence is attached as Schedule 4.

[6] The Board requested that the employer provide particulars on its jurisdictional objections. The employer replied on November 21, 2008, and that correspondence is attached as Schedule 5. The bargaining agent provided its response to the employer's

letter on December 5, 2008, and included some amended proposals. The correspondence is attached as Schedule 6.

[7] The Chairperson determined that an oral hearing would be held on the jurisdictional objections raised by the employer. Pursuant to section 45 of the *Public Service Labour Relations Act* (*PSLRA* or "the *Act*"), the Chairperson of the Board has authorized me, in my capacity as Vice-Chairperson, to issue the present terms of reference to the arbitration board.

[8] At the commencement of the hearing the employer agreed that its objections relating to the duration and the retroactivity of the arbitral award were matters within the jurisdiction of the arbitration board. Accordingly, those objections will be determined by the arbitration board.

[9] Before the hearing, there was a dispute as to whether there had been agreement on the "no discrimination" clause and on article 15.04. At the hearing, the employer conceded that these articles had been agreed to and accordingly do not form part of the terms of reference. In its correspondence dated October 27, 2008, the bargaining agent stated that it did not intend to pursue its proposal under article 16.03 (Professional Responsibilities).

[10] The employer objected to the inclusion of the word "just" in the bargaining agent's proposed article 25.01 as it would require the amendment of the *Financial Administration Act*, contrary to paragraph 150(1)(*a*) of the *PSLRA*. The bargaining agent, in its letter of October 27, 2008 (Schedule 4), agreed to modify its proposal by removing the word "just." Accordingly, as modified, the proposal forms part of the terms of reference.

[11] The employer contended that the bargaining agent included two new proposals in its correspondence to the Board of October 27, 2008 (Schedule 4). The first was an amended proposal relating to offices, and the second related to pay administration (article 22). At the hearing, the employer submitted that the proposals were not filed in the proper form by the bargaining agent and therefore could not be included in the terms of reference. The employer also submitted that these matters had not been the subject of negotiations and therefore were contrary to subsection 150(2) of the *PSLRA*. The bargaining agent submitted that the employer could not raise objections for the first time at this hearing.

[12] I have concluded that I can address the employer's objections, which are jurisdictional in nature. There can be no implied waiver of jurisdictional objections as I can only refer to arbitration those terms and conditions that meet the requirements under the *PSLRA*. The bargaining agent was not prejudiced by the raising of these objections at the hearing. If the late raising of a jurisdictional objection results in prejudice to a party, the appropriate response is to grant an adjournment. No request for an adjournment was made, and the bargaining agent was capable of responding to the objections.

[13] With respect to the employer's objection that the proposals were not in the appropriate form, I agree that providing proposals for terms of reference in the body of a letter is not standard practice and should not be encouraged. That is why I suggested at the beginning of the hearing that the bargaining agent submit a revised list of proposed articles for the terms of reference, in the prescribed forms, to assist the arbitration board, once established. However, the bargaining agent did raise the proposal in advance of the setting of the terms of reference, in accordance with the *PSLRA*. Also, section 241 of the *PSLRA* clearly states that no proceeding is invalid by reason only of a defect in form or a technical irregularity. I will address below the allegation that these two articles were not the subject of negotiations.

Jurisdictional objections

[14] The employer objected to a number of proposals on the basis that the impugned proposals were not referable to an arbitration board under section 150 of the *PSLRA*., which reads as follows:

> ***150.*** *(1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> (a) *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;*
>
> (b) *the term or condition is one that has been or may be established under the* Public Service Employment Act*, the* Public Service Superannuation Act *or the* Government Employees Compensation Act*;*

> (c) *the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*
>
> (d) *in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or*
>
> (e) *doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*
>
> *Matters not negotiated*
>
> *(2) The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.*

[15] The parties made submissions on the appropriate principles of statutory interpretation that should be considered in interpreting the provisions of the *PSLRA*.

[16] The employer stated that the jurisprudence showed that I should perform a two-stage analysis. First, I should determine whether the proposal falls within the substantive provisions of sections 113 and 150 of the *Act*. Secondly, I should determine whether or not the proposal would leave intact the other prerogatives of the employer as set out in the legislation, in particular section 7 of the *Act*.

[17] The employer submitted that the modern principle of statutory interpretation was applicable (*Sullivan and Dreidger on the Construction of Statutes,* 4th edition, at page 1):

. . .

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

. . .

[18] In its correspondence of December 5, 2008, the bargaining agent stated the following:

. . .

> *…while in this proceeding the AJC is not directly challenging the constitutional validity of the* PSLRA *restrictions on collective bargaining, it is AJC's position in these proceedings that, in accordance with well-established principles of statutory interpretation, any restrictions on the constitutionally recognized s. 2(d) [of the Canadian Charter of Rights and Freedom (the "Charter")] freedom to engage in collective bargaining over all terms and conditions of employment should be interpreted as narrowly as possible in order to be consistent with* Charter *rights and freedoms and* Charter *values. Furthermore, the fact that AJC is not directly challenging the constitutional validity of the statutory restrictions is without prejudice to the AJC's position that the restrictions are an unjustified violation of s. 2(d) of the* Charter of Rights and Freedoms.

[19] The bargaining agent expanded on its position at the hearing. It submitted that the proposals at issue should be interpreted narrowly and in a manner most consistent with Charter values. The bargaining agent also relied on the presumption in favour of compliance with constitutional norms set out in *Sullivan and Dreidger on the Construction of Statutes,* at page 367. The bargaining agent referred me to *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (also know as "B.C. Health Services"), and submitted that that decision established a *Charter* right to collective bargaining. I was also referred to *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *R. v. Sharpe*, 2001 SCC 2; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ermineskin Indian Band and Nation v. Canada*, 2006 FCA 415 (CanLII); *Province of Manitoba and Manitoba Government and General Employees' Union*, October 27, 2008; *Canada (Attorney General) v. Abrahams*, [1983] 1 S.C.R. 2; *Fraser v. Ontario (Attorney General)*, [2008] ONCA 760 (CanLII); and *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (dissent of Dickson, C.J.). In *Durham Regional Police Association v. Regional Municipality of Durham Police Services Board*, 2007 CanLII 27333, the arbitrator stated the following:

. . .

> *75. This Preliminary Award is neither the time nor the place to determine the effect of this recent Supreme Court decision with regard to collective bargaining in general. Its relevance to this case can be restricted to the interpretative guidance that it offers. Essentially the Supreme Court is saying that the constitutional protection of freedom of association encompasses limited protections over collective bargaining. Accordingly, it follows that legislation should be read and applied to give effect to that protection. Therefore, a statute should not be interpreted or applied in a way that would substantially interfere with or undercut the ability of an association or union to engage in the process of negotiating working conditions. This places an interpretive presumption upon the reading of a statute that would mean that absent clear directives to the contrary, a statute should be taken to allow for ability of employees to negotiate working or workplace conditions. The* PSA *explicitly provides for this. Very explicit language would be required to lead to the conclusion that the Regulations and or some provisions of the* PSA *take away the process of bargaining over working condition….*
>
> . . .
>
> *77. Therefore, when interpreting and applying the* PSA*, effect must be given to the Supreme Court's pronouncements regarding the protection of the* process *of collective bargaining. Absent a clear directive that staffing and deployment are outside the scope of bargaining, the* PSA *must be interpreted to continue to allow for the parties to engage in the process of negotiating such "working conditions.". . .*
>
> . . .

[20] The bargaining agent submitted that many of its proposals do not alter or eliminate a term or condition of employment but merely seek to preserve existing rights. This is especially the case when the proposal is stated to be "subject to" legislation.

[21] The bargaining agent also submitted that a purposive interpretation should be given to employment-related statutes; see *Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; at para 24. I was also referred to the preamble of the *PSLRA* to support the bargaining agent's position that the statutory restrictions on jurisdiction of an

arbitration board should be given a narrow interpretation that allows as many issues to be put before an arbitration board as possible. The bargaining agent submitted that I should be looking at the "pith and substance" of the proposals in determining whether they could be referred to arbitration.

[22] The bargaining agent submitted that paragraph 150(1)(*a*) of the *Act* (which states that an arbitral award may not include a proposal that would require the amendment of legislation) should be interpreted as requiring more than just the potential of an amendment. The bargaining agent submitted that I must be satisfied that including the proposal "would require" the amendment of legislation.

[23] The bargaining agent submitted that paragraph 150(1)(*b*) of the *Act* (which states that an arbitral award may not contain a term or condition that has been or may be established under the *Public Service Employment Act (PSEA)* or the *Public Service Superanuation Act* (*PSSA*) should be interpreted as requiring a real or fundamental inconsistency between the proposal and the statute in question for the proposal to be excluded from the terms of reference.

[24] The bargaining agent submitted that paragraph 150(1)(*c*) of the *Act* (which states that an arbitral award may not include a term or condition that "relates to" standards, procedures or processes governing a range of staffing matters) should be interpreted as "meaningfully or substantially related" to staffing matters rather than just "touching on such" matters.

[25] The bargaining agent submitted that paragraph 150(1)(*e*) of the *Act* (which precludes the inclusion of a term or condition that "affects" the organization of the public service, the assignment of duties and classification) was also ambiguous and should be interpreted narrowly.

[26] The employer submitted that the principle of interpreting statutes in accordance with *Charter* values was only applicable when the statutory provisions were ambiguous (*Bell Express Vu Limited Partnership v. Rex,* 2002 SCC 42, at para 29, and *R. v. Rodgers,* 2006 SCC 15 at para 19). In this case, the statutory provisions were not ambiguous, and I was not required to apply a *Charter* analysis. The employer also noted that the statutory language in *Durham Regional Police Association* and *Province of Manitoba* different from the language in the *PSLRA*.

[27] I agree that the *Charter* can be used as a tool for statutory interpretation. However, the Supreme Court of Canada has been clear that such a principle is not a substitute for a direct constitutional challenge (*Canada (Attorney General) v. Mossop* [1993] 1 S.C.R. 554, cited in *Sullivan and Driedger on the Construction of Statute,* at page 369):

. . .

> *Absent a Charter challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law. If there is some ambiguity as to its meaning or scope, then the courts should, using the usual rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose is available, that which is more in conformity with the Charter should prevail.*
>
> *But, I repeat, absent a Charter challenge, the Charter cannot be used as an interpretative tool to defeat the purpose of the legislation or to give the legislation an effect Parliament clearly intended it not to have.*

. . .

[28] Where parliamentary intent is clear from the language of the statute, I am not free to ignore that intent. In this case, there is no ambiguity in the statutory provisions. Subsection 150(1) of the *Act* is clear on what an arbitral award can include. First of all, an arbitral award cannot "directly or indirectly" alter, eliminate or establish a term or condition of employment under certain circumstances. This is very broad language, and if Parliament had intended the scope of exclusions to be narrow, it would not have used the term "indirectly." Paragraph 150(1)(*a*) is not ambiguous. I agree with the bargaining agent that the paragraph means that the employer must demonstrate that a need would arise that would require legislation to be enacted or amended. This is because the phrase "would require" is mandatory in nature. Paragraph 150(1)(*b*) is also not ambiguous. The arbitral award cannot directly or indirectly establish a new term or condition of employment where that term or condition is one "that has been or may be established" under the *PSEA* or the *PSSA* (the *Government Employees Compensation Act* is not relevant in this case). The bargaining agent suggested that a real or fundamental inconsistency between the term or condition and the relevant statute was required. A plain reading of the provision shows that it is enough to demonstrate that the term or condition either has been or could be established under one of the cited *Acts*. The

bargaining agent suggested that I should look at the "pith and substance" of the proposals to determine if they "primarily related" to the items listed in paragraph 150(1)(*c*). This represents a significant narrowing of the statutory provision. It states that an arbitral award may not "directly or indirectly" alter, eliminate or establish a term and condition of employment where that term or condition "relates to" standards, procedures or processes governing appointments, appraisals, promotions, deployments, etc. If something "directly or indirectly … relates to" something, it is clear that even if it is only incidentally related to the subject matter, it is covered by the statutory provision. Paragraph 150(1)(*e*) is similar: a term or condition that "directly or indirectly … would affect" the organization of the public service or the assignment of duties and the classification of positions and persons is not permitted in an arbitral award. There is no ambiguity, and the use of "indirectly … affect" shows the intention of Parliament that the provision be interpreted broadly.

[29] In the course of the hearing, the bargaining agent submitted that the jurisprudence cited by the employer, for the most part, was decided under former statutory provisions with substantially different statutory language. Accordingly, it was submitted that the jurisprudence was not applicable. The employer countered that the statutory language was not significantly different and that the jurisprudence was still relevant. While recognizing that the statutory language is different in some instances, I do not agree that the legislative framework for determining the terms of reference of an arbitration board has significantly changed under the *PSLRA*. The jurisprudence under former statutory provisions, although not binding, is relevant for my consideration of the objections of the employer.

Proposals subject to objections

[30] I have set out each proposed article (or a summary of it) that is the subject of an objection and summarized the parties' submissions and have set out my determination on each article. Unless otherwise noted, I have used the numbering of the bargaining agent's proposals.

[31] Where I have found that parts of some proposals are not within the jurisdiction of an arbitration board, I have severed those parts of the proposals where the rest of the proposal remains within the jurisdiction of the arbitration board; see *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 185-02-297 (19860204).

Article 10.17 - Full or Part-time leave for AJC President/Officers and Article 10.18 - No Prejudice to Lawyers on Article 10 Leave

[32] The proposed articles are as follows:

> *Full or Part-time leave for AJC President/Officers*
>
> *10.17 The employer will grant leave without pay to the President of the AJC, and up to two additional officers of AJC, on a full or part-time basis as determined by AJC. This leave will not constitute a break in service or in continuous employment, and shall be counted towards accumulation of service, for all purposes under this collective agreement, including:*
>
> > *(a) calculation of vacation credits,*
> > *(b) calculation of sick leave credits,*
> > *(c) calculation of entitlement to severance pay,*
> > *(d) pension benefits and entitlement, subject to any applicable legislation,*
> > *(e) entitlement to health and welfare, dental and life insurance benefits,*
>
> *Furthermore, for purposes of determining their salary upon return to work following the leave, lawyers on full or part-time leave under this provision will, in the case of LA2s and above, be deemed to have received performance pay at the "meets expectations" level, and in the case of LA1s, to have moved through the LA-1 increment steps and promotion from LA1 to LA2, during the period of the leave.*
>
> *No Prejudice to Lawyers on Article 10 Leave*
>
> *10.18 Time spent on leave under this Article will be included in calculating vacation entitlement, sick leave entitlement, will not constitute a break in service or in continuous employment, and shall be counted towards accumulation of service, for all purposes under this collective agreement, including:*
>
> > *(a) calculation of vacation credits,*
> > *(b) calculation of sick leave credits,*
> > *(c) calculation of entitlement to severance pay,*
> > *(d) pension benefits and entitlement, subject to any applicable legislation, and*
> > *(e) entitlement to health and welfare, dental and life insurance benefits.*

[33] The employer objected to those portions of the articles that referred to leave being counted for pension purposes. It argued that that portion of the proposal was contrary to paragraph 150(1)(*b*) of the *PSLRA* since the proposal related to matters

under the *PSSA*. The employer also objected to the provision that deemed that employees had received performance pay at the "meets expectations" level because it related to both performance appraisal and appointment. The employer further objected to the proposal that those at the LA-01 level be appointed to the LA-02 level, as this was contrary to paragraphs 150(1)(*b*) and (*c*) of the *PSLRA*.

[34] In its correspondence of December 5, 2008, the bargaining agent submitted that there was no conflict with the *PSSA* since the provisions are expressly stated to be subject to whatever terms are or may be established under that statute. In addition, the bargaining agent is not seeking to alter or eliminate an existing, or establish a new, term or condition of employment. It was submitted that there is nothing in the proposal that is inconsistent with the *PSSA*. Furthermore, the proposal does not alter or eliminate a term or condition of employment or establish a new term or condition. It merely maintains the status quo. In the alternative, the bargaining agent submitted that the pith and substance of the proposal concerns protecting overall compensation of those on leave, which includes an incidental effect on pensions. The bargaining agent stated that the proposal should be interpreted purposively, and in the absence of any conflict with the *PSSA*, it should be determined that it is within the jurisdiction of an arbitration board.

[35] At the hearing, the bargaining agent submitted that the deeming provision for those on leave without pay relates solely to pay and has nothing to do with the appraisal of employees. The bargaining agent submitted, in the alternative, that the proposal could be amended to provide for the deeming of additional increases once an individual had been deemed to have reached the top of the LA-01 level.

[36] I find that those portions of the proposal that relate to pensionable service or benefits cannot form part of the terms of reference. Paragraph 150(1)(*b*) of the *PSLRA* clearly states that if the term or condition is one that has been or may be established under the *PSSA*, it cannot be included in the terms of reference. Adding the phrase "subject to any applicable legislation" does not change the fact that the proposal is a term or condition that either is or might be established under the *PSSA*. The argument of the bargaining agent that it is not seeking to alter, eliminate or establish a term or condition of employment is not supportable. Obviously, the new collective agreement will establish terms and conditions of employment. Even if there are existing terms and conditions of employment for those in the LA group that the first collective

agreement incorporates, it is still the case that the new collective agreement will establish new terms and conditions of employment.

[37] The employer also objected to the provision relating to salary on return from leave contained in article 10.17. The proposed language states that those employees at the LA-02 level and above will be "deemed to have received performance pay at the 'meets expectations level.' Employees at the LA-01 level returning from leave will be deemed to have moved through the LA-1 increment steps and "promotion from LA1 to LA2" during the leave period. The basis of the employer's objection was that the proposal related to performance evaluation and appointment. The bargaining agent submitted that the proposal was pay-related only.

[38] The first part of the proposed language "deems" that employees on leave have received performance pay at the "meets expectations" level. I find that this is a pay proposal and does not relate to the evaluation or appraisal of employees. There is no suggestion that employees on leave will actually be appraised or evaluated for the period while on leave. This part of the proposal simply addresses the manner in which pay will be calculated on the return from leave. With respect to the employees at the LA-01 level, the first part of the proposed language addresses movement through the increment levels and, as such, is a pay-related proposal. The second part of the proposed language cannot be included in the terms of reference, as it requires the promotion of an employee at the LA-01 level to the LA-02 level. The amended proposal put forward by the bargaining agent would provide for the deeming of additional pay increases once an employee had reached the maximum of the LA-01 level. I find that, as amended, the proposal is a pay-related proposal and that it can be included in the terms of reference.

[39] Accordingly, paragraphs (d) in both proposed articles (10.17 and 10.18) are deleted from the proposals and the articles, as amended, are included in the terms of reference. This includes the amendment to the pay calculation for LA-01 employees on leave, as put forward by the bargaining agent. In Schedule 6, the bargaining agent proposed language for Appendix S1.2 that related to situations where an employee at the LA-01 level had reached the top of the LA-01 salary range ("for every additional 6 months that a lawyer spends at the LA1 level, the employee receive a further pro-rated pay increment"), and the proposal for articles 10.17 and 10.18 will be amended in accordance with that formula.

Article 11 - Grievance Procedure

[40] The proposed article is as follows:

> *11.03 The employer agrees that, upon request, it will produce all documentation relating to the grievance available to the person or persons making the decision being grieved.*

[41] The employer submitted that this proposal may require the amendment of the *Access to Information Act*, since the information available to the person making the decision may be barred from disclosure under the *Access to Information Act* or the *Privacy Act*. This is specifically prohibited under paragraph 150(1)(*a*) of the *PSLRA*. The employer also submitted that disclosure requirements under the *PSLRA* address the bargaining agent's concerns.

[42] The bargaining agent submitted that the employer did not demonstrate that an amendment of the *Access to Information Act* or the *Privacy Act* would be required. It was the bargaining agent's submission that providing a bargaining agent with documents relevant to enforcing the collective agreement through its grievance and arbitration procedure does not conflict with the *Act*. In its correspondence of December 5, 2008 (Schedule 6), the bargaining agent stated that it had "no difficulty with making the requirement to provide documentation subject to the overriding effect, if any, of the *Access to Information Act*." At the hearing, the bargaining agent submitted that the proposal was not intended to override the *Access to Information Act* or the *Privacy Act*. I was referred to the following number of cases to support the bargaining agent's view that the proposal was not contrary to the legislation: *Monarch Transport Inc. v. Dempsey Freight Systems Ltd.*, [2003] CIRB no. 249; *Canada Post Corp. v. Canadian Union of Postal Workers*, [1993] C.L.A.D. No. 277 (QL); and *Public Service Alliance of Canada v. Treasury Board and Public Service Commission*, PSSRB File Nos. 161-02-791 and 169-02-584 (19960426). At the hearing, the bargaining agent stated again that it was content to add to the proposal that it was subject to the *Access to Information Act* and the *Privacy Act*, in order to eliminate any debate.

[43] The case law cited by the bargaining agent involved access to employees' personal information such as addresses and phone numbers. None of the cited cases referred to access to information in the context of grievances, where there may be a great deal of personal information about third parties. In light of the bargaining agent's suggested amendment to the proposal contained in Schedule 6, and its

reiteration of the amendment at the hearing, I do not need to come to a conclusion on this matter. Accordingly, I find that the amended proposal of the bargaining agent can be included in the terms of reference as it is clear that no amendment to the *Access to Information Act* or the *Privacy Act* would be required. The proposal is accordingly amended by adding the following: "subject to the provisions of the *Access to Information Act* and the *Privacy Act*."

Article 16 - Professional Responsibilities

[44] The employer objected to the inclusion of a portion of article 16.01 because it dealt with the evaluation of employees, contrary to paragraph 150(1)(*c*) of the *PSLRA*. The article reads as follows (with the impugned part highlighted):

> *16.01 Professional obligations and standards are of equal concern to employees and their managers, who are both responsible to ensure their preservation. To that end, if, for any reason, employees have concerns about their ability to act in accordance with their professional responsibilities, they will bring these concerns to the attention of their manager, who will investigate and take any necessary remedial measures. In any event, employees will not be disciplined* ***or negatively evaluated*** *for raising concerns about professional obligations or refusing to act in a manner contrary to their professional obligations. In any event, it is agreed that no lawyer shall be expected to perform work below the standard of quality and professional competence specified by the Rules of Professional Conduct of the applicable Law Society or bar association.*
>
> *(Emphasis added]*

[45] The bargaining agent submitted in its correspondence of December 5, 2008 that the "true intent and effect, or pith and substance" of the proposal did not relate to appraisal but to the protection of the professional obligations of lawyers. At the hearing, the bargaining agent submitted that a purposive approach leads to the conclusion that the proposal is about professional obligations, not evaluation. The question to ask is whether or not the proposal "primarily or substantially relates" to appraisals. To be caught by the exclusion in paragraph 150(1)(*c*) of the *Act,* the proposal must be, in essence, substantially about appraisals. I was asked by the bargaining agent to exercise my discretion to allow the proposal to be included in the terms of reference. In the alternative, the bargaining agent submitted that the phrase "negatively evaluated" could be removed from the proposal.

[46] I find that the portion of the proposal that refers to evaluation directly relates to the appraisal of employees, and is, consequently, not to be included in the terms of reference. The remainder of the proposal can be included in the terms of reference.

Article 16.02 - Offices

[47] In its letter of October 27, 2008, the bargaining agent proposed an amendment to its proposal because of matters that came to its attention after the filing of the proposals. The amended proposal reads as follows (the amended text is bolded):

> *Each lawyer will be provided with closed door offices in order to enable them to fulfill their professional responsibilities, including the professional obligations to maintain confidentiality and to protect solicitor-client privilege.* ***For clarity, the closed door offices will be exterior window offices.***
>
> *[Emphasis added]*

[48] The employer submitted that this could not be included in the terms of reference because it was contrary to subsection 150(2) of the *PSLRA*. Counsel for the employer referred me to *Treasury Board v. Economists, Sociologists and Statisticians Association (ESSA)*, PSSRB File No. 185-02-281 (19841221), where the bargaining agent changed its proposal in mid-course. In that case, the arbitration board held that the changed proposal was not within its jurisdiction because it was not the subject of negotiations. The bargaining agent submitted that the matter of lawyers' offices was the subject of negotiations.

[49] The arbitration board in *Treasury Board v. ESSA* interpreted a provision identical to subsection 150(2) of the *PSLRA,* which requires that the term or condition of employment in question must have been the subject of negotiation, not the proposal itself. The purpose of this provision was articulated by the arbitration board as follows:

> . . .
>
> *Subsection 70(3), by preventing an award from dealing with a matter not raised in negotiations, is an integral part of the policy of the Act to the effect that the parties must bargain to an impasse before either may request arbitration … It would be undermining that policy to allow a party to request arbitration on a matter that the other had not had a reasonable opportunity to consider and respond to in the*

> *course of bargaining. It is difficult to define with certainty the point at which a modified proposal can no longer be said to relate to the same term or condition of employment as the original proposal. This will have to be a question for the Board's judgement in any particular case in light of its understanding of the negotiation and arbitration processes….*
>
> . . .

[50] In the case cited above by the employer, the arbitration board concluded that the differences between the original and amended proposals were "obvious and significant, even though they can be said to have been motivated by a similar concern". The issue of offices for lawyers was the subject of negotiations, and the amended proposal is not significantly different from the original proposal. Accordingly, the proposal can be included in the terms of reference.

Article 19.03 - Maternity Leave Without Pay (employer numbering)

[51] In Schedule 2, the bargaining agent mistakenly referred to proposed language as being the employer's language. This mistake was corrected in its letter of October 27, 2008. Accordingly, the following will form part of the terms of reference as a matter in dispute:

> *19.03 Maternity Leave without Pay*
>
> *(d) The Employer may require an employee to submit a medical certificate certifying pregnancy, at employer expense.*

Article 19 - Vacancies

[52] The proposal is as follows:

> *19.01 Each employee in the bargaining unit shall be entitled to receive reasonable notice of, and to apply to, any competition respecting a bargaining unit employee position.*
>
> *19.02 The Employer will consult with AJC over the rules governing the filling of vacancies.*

[53] The employer submitted that the proposal deals with staffing. The authority over such matters is governed under the *PSEA*. Consequently, this proposal is contrary to paragraphs 150(1)(*b*) and (*c*) of the *PSLRA*. The employer submitted that proposed article 19.01 specifically provides for an entitlement to notice of vacancies, which is already governed by the *PSEA*. The consultation proposal contained in article 19.02

also deals directly with staffing and is also barred from being included in an arbitral award. The employer referred me to *Finkelman and Goldenberg*, *Collective Bargaining in the Public Service: the Federal Experience in Canada* and *National Association of Broadcast Employees and Technicians v. House of Commons*, PSSRB File No. 485-H-1 (19880315).

[54] The bargaining agent submitted in its correspondence of December 5, 2008 that nothing in the proposed article 19.01 usurps the right of the employer to fill vacancies based on its assessment of the merit of any particular candidate under the *PSEA*. It also submitted that the proposed article 19.02 would result only in a consultation obligation and would not affect any employer rights with respect to staffing. At the hearing, the bargaining agent noted that the employer had not pointed to any provision of the *PSEA* that was in conflict with this proposal. It was the bargaining agent's position that there was nothing inconsistent between the proposal and the *PSEA*. The case cited by the employer (*Natural Association of Broadcast Employees and Technicians v. House of Commons*) did not address the language in this proposal. I was also referred to *Professional Association of Foreign Service Officers v. Treasury Board*, 2004 PSSRB 144, and to *Professional Institute of the Public Service of Canada v. Treasury Board*, 2008 PSLRB 72. In the alternative, the bargaining agent submitted that the proposal could be modified to be "subject to the provisions of the *PSEA*."

[55] Proposed article 19.01 clearly relates to matters governed by the *PSEA*. It purports to impose requirements on the employer before running a competition (reasonable notice) and to give employees a right to apply to any competition involving a bargaining unit position. These requirements clearly relate to the processes and procedures governing staffing (appointment, promotions and deployment of employees) and as such cannot be included in the terms of reference pursuant to paragraph 150(1)(*c*) of the *PSLRA*. I do not need to decide on whether that proposed article would also breach paragraph 150(1)(*b*).

[56] Proposed article 19.02 is a consultation provision. In the terms of reference for *Professional Institute of the Public Service of Canada and Treasury Board (Research Group)*, a Board Vice-Chairperson ruled on a consultation proposal that the employer alleged was contrary to paragraphs 150(1)(*b*) and (*c*) of the *PSLRA*. In that case, the proposal was for consultation on a pay plan study. The Vice-Chairperson noted that the employer did not contradict the bargaining agent's argument that the

pay plan study was an employer policy that made no reference to the provisions of the *PSEA*. With respect to paragraph 150(1)(*c*), the Vice-Chairperson concluded that the consultation proposal did not interfere with the employer's power to conduct appointment or promotion processes. In this case, the consultation proposal specifically refers to matters governed by the *PSEA*. I must then determine if the proposal is for a term or condition "that has been or may be established" under the *PSEA*. The *PSEA* contains the following provision:

> *Consultation by Commission*
>
> ***14.*** *The Commission shall, on request or if it considers consultation necessary or desirable, consult with the employer or any employee organization certified as a bargaining agent under the* Public Service Labour Relations Act *with respect to policies respecting the manner of making and revoking appointments or with respect to the principles governing lay-offs or priorities for appointment.*

[57] I find that the proposed term would establish a new term of employment that has been established under the *PSEA*. Accordingly, it cannot be referred to an arbitration board. I note that the statutory provision in the *PSEA* establishes a right to consultation on staffing at the request of the bargaining agent or the employer.

Article 22 - Pay Administration

[58] In its letter of October 27, 2008 (Schedule 4), the bargaining agent stated that it agreed with the employer's proposed language in its pay administration article (article 15), with the exception of articles 15.05 and 15.06. In addition, the bargaining agent proposed the following additional article:

> *If, during the term of this Agreement, a new classification standard for a group is established and implemented by the Employer, the Employer shall, before applying rates of pay to new levels resulting from the application of the standard, negotiate with the Alliance* [sic] *the rates of pay and the rules affecting the pay of employees on their movement to the new levels.*

[59] The employer objected to the inclusion of this proposal because it was not the subject of negotiations, contrary to subsection 150(2) of the *PSLRA,* and also because it relates to classification matters, contrary to paragraph 150(1)(*e*). The employer referred me to *Treasury Board v. ESSA*.

[60] The bargaining agent submitted that this proposal is a standard article in collective agreements and that it clearly relates to rates of pay. Negotiating rates of pay is not a classification matter.

[61] This proposal can be referred to an arbitration board. It deals with the negotiation of new pay rates and does not touch on classification. It is a standard article in many collective agreements. It is also clear that pay-related issues were the subject of negotiations. It is not necessary for each proposal to have been the subject of negotiations, as long as the term or condition was the subject of negotiations. The proposal is therefore included in the terms of reference.

Article 48 - Timekeeping

[62] The bargaining agent's proposal is as follows:

> *48. Any timekeeping will be consistently administered (including methodology and targets). Timekeeping data will not be used for the purpose of adversely evaluating an employee, nor in an arbitrary, discriminatory or bad faith manner. The employer will consult with the AJC over work and activities to be included in timekeeping and in meeting any timekeeping targets, including time spent on AJC business. Both managers and lawyers will receive training in the proper use and implementation of timekeeping.*

[63] The employer submitted that the proposal deals with appraisals and is therefore in conflict with paragraph 150(1)(*c*) of the *PSLRA*. The employer referred me to *Finkelman and Goldenberg*; *Research Council Employees' Association v. National Research Council of Canada*, PSSRB File No. 185-09-332 (19880919); and *National Association of Broadcast Employees and Technicians v. House of Commons*.

[64] The bargaining agent submitted in its correspondence of December 5, 2008 that the "true intent and effect, or pith and substance" of the proposal is to regulate the use of timekeeping data, which has nothing to do with employee appraisals. In the alternative, the bargaining agent stated that it would be prepared to substitute "disciplined" for "adversely evaluated." At the hearing, the bargaining agent noted that the cases referred to by the employer were decided under former legislation and were of no assistance.

[65] The part of the proposal that limits the use of timekeeping data for evaluation of employees is clearly related to the appraisal of an employee. Consequently, that

portion of the proposal is not included in the terms of reference. The bargaining agent's alternative wording (deleting "adversely evaluated" and substituting "disciplined") is acceptable. The proposal, as amended, is accordingly included in the terms of reference.

Article 52 - National Joint Council Agreements

[66] In Schedule 2 the bargaining agent stated that it accepted the employer's wording "except AJC considering position on workforce adjustment directive, and subject to clarification on dental, disability and life insurance, and save for reference to the uniforms directive." In its correspondence of October 27, 2008 (Schedule 4), the bargaining agent stated that it agreed to include the Workforce Adjustment Directive in the article. It also confirmed that it did not want the Uniforms Directive included. It also stated that it continued to propose the maintenance of existing dental, disability and life insurance benefits.

[67] The employer objected to the inclusion of this proposal in the terms of reference. In a letter to the National Joint Council, dated November 11, 2008 (Exhibit E-2), the bargaining agent stated that it was opting in under the National Joint Council (NJC) by-laws to all of the directives except the Uniforms Directive. For that reason, the employer submitted that the bargaining agent's proposal with respect to dental, disability and life insurance ought not to be in the terms of reference. In addition, no specific proposals were made on dental, disability and life insurance.

[68] The bargaining agent submitted that it was simply proposing to preserve any superior benefits of its members.

[69] The proposal of the bargaining agent is to maintain existing terms of dental, disability and life insurance for some of its members. I see no reason not to include this proposal in the terms of reference. It is clearly a matter in dispute. The impact, if any, of the letter to the NJC is a matter that can be addressed by the arbitration board.

Article 54 - Part-time Employees, Article 55 - Articling Students and Appendix A S4.0 - Articling Students

[70] The AJC states in Schedule 2 that "there was no discussion in bargaining on this issue, and the AJC reserves the right to modify this proposal at or prior to arbitration." The employer submitted that this proposal had not been the subject of negotiations and that it was, therefore, contrary to subsection 150(2) of the *PSLRA*. The employer

also submitted that it was not open to the bargaining agent to modify its proposal at some future date.

[71] The bargaining agent submitted that there was no real discussion of the application of the collective agreement provisions to articling students and part-time employees. However, it was recognized in discussions that the collective agreement would apply to these two groups of employees, and it remained to be discussed what provisions would apply. The bargaining agent also submitted that the note about reserving rights to modify its proposal was not part of the proposal.

[72] The employer's proposals include provisions relating to part-time employees, and from that I conclude that it was a subject matter of negotiations. Accordingly, there is no reason not to include the bargaining agent proposal in the terms of reference. The reference to "no discussion" in the Schedule is obviously a reference to no specific discussion of the proposal, which is not required under the *PSLRA*. The notation that the AJC reserves its right to modify its proposals is not included in the terms of reference. The AJC is free to make submissions on its proposals at arbitration, and the arbitration board can consider those submissions in determining its award.

[73] Similarly, there is no reason not to include the proposal relating to articling students. The collective agreement applies to all employees in the LA classification, and this group was at the very least implicitly addressed in collective bargaining.

Appendix A S1.2 - Salary and Performance Pay

[74] The proposal reads as follows:

> *S1.2 The L.A-1 category will consist of 8 equal increments (an increment every six months while employed as an LA-I), commencing with the minimum of the range ($73,683), with each increased increment payable every six months. Lawyers Effective April 1, 2006, current LA-01ss will be placed in the appropriate increment step in accordance with time elapsed since their year of call, or year of commencement with the employer as an LA-I, whichever is earlier. Those lawyers with more than 4 years will be promoted to the minimum of the new LA-2A scale. New hires with less than 4 years call will be placed on the LA-01 salary scale in the same manner.*
>
> *[Sic throughout]*

[75] The employer submitted that this proposal deals with matters related to promotions as well as with matters that are or can be established under the *PSEA* and that it is contrary to paragraphs 150(1)(*b*) and (*c*) of the *PSLRA*.

[76] The bargaining agent submitted in its correspondence of December 5, 2008 (Schedule 6) that the proposal is directed at ensuring that lawyers progress within the LA salary range and, in particular, that they advance from the entry level within a reasonable period. The proposal is about salary level and not classification. In the alternative, the bargaining agent suggested that it was prepared to seek a provision that provides that "for every additional 6 months that a lawyer spends at the LA1 level, the employee receive a further pro-rated pay increment."

[77] At the hearing, the bargaining agent submitted that this proposal relates primarily to pay, not to promotion. The LA classification levels are simply salary levels. Also, the employer did not point to any provision in the *PSEA* that was affected by the proposal.

[78] The reference in the proposal to the promotion of lawyers with more than four years of experience to the LA-02A scale clearly relates to the appointment of employees. The bargaining agent's amended proposal (which does not include promotion to the LA-02 level) does not relate to the appointment of employees, and accordingly, this amended proposal is included in the terms of reference.

Appendix A S1.6 - Salary and Performance Pay

[79] The proposal reads as follows:

> *51.6 A minimum of 30% of lawyers in the AJC bargaining unit will be classified as LA-2B or above.*

[80] The employer submitted that this proposal clearly deals with classification matters and that it conflicts with sections 6 and 7 and paragraph 150(1)(*c*) of the *PSLRA*. The proposal seeks to limit the employer's authority to assign duties and classify positions. It also relates to the appointment of employees.

[81] The bargaining agent submitted in its December 5, 2008 correspondence that the intent and effect of the proposal relates to salary and salary level and not to classification or staffing. The purpose of the proposal was to "ensure that a minimum percentage of lawyers now paid at the LA2A level advance in their salaries by being

paid at the higher LA2B level." At the hearing, the bargaining agent submitted that it was simply seeking to preserve an existing employer rule.

[82] This proposal deals with matters of classification of positions, and it relates to the appointment of employees. Accordingly, this proposal is not included in the terms of reference.

Appendix A S1.9 - PIPSC Lawyers

[83] This proposal states that the effective date for pay purposes for former PIPSC lawyers will be February 28, 2006.

[84] The employer submitted that this proposal deals with matters of classification of positions and cannot be referred to arbitration since it conflicts with sections 6 and 7 and paragraph 150(1)(*c*) of the *PSLRA*.

[85] This proposal relates to the effective date for pay purposes and simply refers to a group of employees for whom a different effective date is proposed. This does not affect their classification. Accordingly, this proposal will be included in the terms of reference.

Appendix A S3.1- PREA Performance Increases

[86] The proposal is as follows:

> *S3.1 Effective with the PREA performance increase payable April 1/06, the performance increase for LA-2s will be 5% for those who "meet expectations", and 8% for those who "exceed expectations". The "exceeds expectations" category will not be less than 20% of the complement of LA-2 lawyers in the bargaining unit (or such other groupings as are agreed between AJC and the employer), and no more than 2% of lawyers in the bargaining unit (or such other groupings as are agreed between AJC and the employer) may receive a performance increase of less than 5%. For LA-3s, the performance rating levels and applicable percentages in the existing PMP will continue in effect.*

[87] The employer submitted that this proposal deals with appraisals and is in conflict with paragraph 150(1)(*c*) of the *PSLRA*.

[88] The bargaining agent submitted in its December 5, 2008 correspondence that the proposal is directed at ensuring that certain proportions of the bargaining unit receive the proposed performance pay amounts and "at the amount of salary increase

lawyers receive on an annual basis." The bargaining agent submitted that performance pay is an "integral component" of compensation for lawyers and that the "pith and substance" of the proposal is aimed at ensuring that lawyers receive a certain amount of performance pay increases. At the hearing, the bargaining agent submitted that for the LA-03 level, the proposal was not seeking to alter or eliminate an existing term or condition of employment. For the LA-02 level, the proposal was primarily related to salary, not appraisals. The employer is free to appraise; it is only the proportions of lawyers at each performance level that are set out in the proposal. In the alternative, the bargaining agent proposed a minimum "envelope" for payment of performance pay that, it submitted, would not affect appraisals.

[89] While performance pay is certainly a pay-related matter, it also indirectly relates to the appraisal or evaluation of employees. The portion of the proposal that states the percentage of lawyers who will receive specified appraisal ratings relates to the evaluation of employees. That portion of the proposal is therefore excluded from the terms of reference. Given that performance pay is linked to the evaluation of employees, the provision that seeks to limit the percentage of employees who receive a performance increase of less than five percent is also related to the evaluation of employees. That portion of the proposal is therefore also excluded from the terms of reference. To the extent that the "existing PMP" specifies percentages of LA-03 employees who will be rated at certain levels, that portion of the proposal will also be excluded. That portion of the proposal that specifies the rate of salary increase for attaining a certain performance level is a pay-related proposal and can be included in the terms of reference. For ease of reference, the proposal that is included in the terms of reference will now read as follows:

> *S3.1 Effective with the PREA performance increase payable April 1/06, the performance increase for LA-2s will be 5% for those who "meet expectations", and 8% for those who "exceed expectations". ~~The "exceeds expectations" category will not be less than 20% of the complement of LA-2 lawyers in the bargaining unit (or such other groupings as are agreed between AJC and the employer), and no more than 2% of lawyers in the bargaining unit (or such other groupings as are agreed between AJC and the employer) may receive a performance increase of less than 5%.~~ For LA-3s, the ~~performance rating levels and~~ applicable percentages in the existing PMP will continue in effect.*

Appendix A - S3.2

[90] The employer submitted that portions of the proposal deal with pensions, contrary to paragraph 150(1)(*b*) of the *PSLRA*. The proposed article reads as follows:

> *S3.2 Performance pay received by LA2 and LA3 lawyers will become part of base salary. Lawyers whose performance increase would take them above the maximum of the salary range will receive a lump-sum payment of the excess, which payment will be pensionable.*

[91] The bargaining agent submitted in its December 5, 2008 correspondence that this proposal is "simply aimed at preserving the status quo." Nothing in the proposal seeks to alter an existing term of employment or to establish a new term. The bargaining agent referred me to Bulletin no. 523 (July 2008) and the Law Group Salary Administration Policy (both attached to its correspondence of December 5, 2008). The bargaining agent also stated that it would have no difficulty making the proposal expressly subject to any applicable pension legislation.

[92] As noted above, the new collective agreement will establish terms and conditions of employment - even if a provision of the collective agreement relates to terms and conditions of employment already in place for employees. The determination of what is pensionable service is governed by the *PSSA*. Accordingly, the part of the proposal that refers to the lump sum being pensionable is not included in the terms of reference.

Appendix A S3.4 - PREA Performance Increases

[93] The proposal is as follows:

> *S3.4 The existing "Performance Review and Employee Appraisal Policy" will apply to lawyers covered by this collective agreement, and is hereby incorporated into this collective agreement.*

[94] The employer submitted that the proposal deals with appraisals and is in conflict with paragraph 150(1)(*c*) of the *PSLRA*.

[95] The bargaining agent submitted in its December 5, 2008 correspondence that its primary concern in advancing this proposal is the entitlement to being considered for the PREA and the PMP and the corresponding performance pay in relation to employees on various forms of leave, acting appointments and alternate working

arrangements. In addition, the proposal does not seek to alter an existing term of employment or to establish a new term. The bargaining agent stated that it was simply proposing that the employer abide by its own policy (the applicable policy was included in the bargaining agent's correspondence of December 5, 2008).

[96] The employer's performance review and employee appraisal policy directly relates to the appraisal process. Consequently, it cannot be included in the collective agreement, and the proposal cannot be included in the terms of reference.

Conclusion

[97] Accordingly, pursuant to section 144 of the *Act,* the matters in dispute on which the arbitration board shall render an arbitral award in this dispute are, subject to the rulings on the jurisdictional objections herein, those set out as outstanding in Schedule 1, Schedule 2, Schedule 3, Schedule 4, Schedule 5 and Schedule 6 inclusive, attached hereto, and the amended proposals contained above.

[98] Should any additional jurisdictional question arise during the course of the hearing as to the inclusion of a matter in these terms of reference, that question must be submitted to the Chairperson of the PSLRB, because the Chairperson is, according to the provisions of subsection 144(1) of the *PSLRA*, the only person authorized to make such a determination.

February 12, 2009.

Ian R. Mackenzie,
Vice-Chairperson,
Public Service Labour Relations Board