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Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

TREASURY BOARD

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

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

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

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Applicant: Sean F. Kelly, counsel

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

Heard at Ottawa, Ontario,
March 30, 2010.

I. Application before the Board

[1] This is the fourth decision issued by the Public Service Labour Relations Board ("the Board") under subsection 123(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("the *Act*"), on matters that may be included in an essential services agreement (ESA) covering positions in the Computer Systems (CS) Group. It arose originally from an application by the Treasury Board ("the applicant") filed on August 12, 2008. The respondent is the Professional Institute of the Public Service of Canada, the certified bargaining agent for the CS Group.

[2] In its third decision, *Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 15 ("the *Public Safety* decision"), the Board examined what essential services, if any, CS Group positions perform at Public Safety Canada. The Board ordered in part as follows:

> ***101*** *For Public Safety Canada, the essential services performed by members of the Computer Systems Group are as follows:*
>
> *For the Government Operations Centre, including the Canadian Cyber Incident Response Centre, the following services are essential:*
>
> *(a) installing, testing, maintaining and repairing,*
>
> *(b) identifying, investigating and resolving compatibility issues and malfunctions for, and*
>
> *(c) providing direct technical assistance for*
>
> *the software, systems, applications and devices used directly to identify and analyze risks or threats that may require a response coordinated by the GOC, to communicate information to partners about those risks and threats, and to take actions and provide for the immediate expenditure of emergency funds to prevent, mitigate, prepare for, respond to and recover from those risks and threats.*
>
> *For the Canadian Cyber Incident Response Centre, the following services are essential: analyzing and assessing cyber risks and threats, planning responses for and responding to cyber risks and threats, including developing and processing reports related to cyber emergencies, reviewing and developing incident and technical reports, and delivering security programs for cyber threats.*
>
> [Emphasis in the original]

[3] During the hearing that resulted in the *Public Safety* decision, the Board learned in passing that the parties disagreed whether the Board may order the inclusion of a definition of essential services in an ESA. As it did not receive formal submissions on that issue, the Board did not rule on the matter in the *Public Safety* decision and fashioned its order defining essential services at Public Safety Canada leaving the issue open.

[4] Following the publication of the *Public Safety* decision, the parties jointly requested that the Board convene a hearing to consider the issue. The respondent formulated the question as follows: ". . . whether, where a bargaining agent so requests, an essential service agreement must contain a statement of the essential services to be performed during a strike." The respondent answered that question in the affirmative and contended that the Board has already determined that it has the authority to deem a definition of essential services part an ESA.

[5] The applicant submitted the following question as the issue to be determined: "Is a description of each and every essential service performed by certain Computer Systems Group positions required in the essential services agreement covering the Computer Systems Group?" The applicant disputed the authority of the Board to require the inclusion of a description of essential services in an ESA. It maintained that the Board would exceed its jurisdiction if it made such an order.

[6] The Board agreed to hear and determine the matter on the understanding that it would rule with specific reference to the status of the definition of essential services in the *Public Safety* decision. I have defined the question for this decision as follows: Does the Board have the authority to order that a definition of essential services — specifically, the definition of essential services found in the Board's order in the *Public Safety* decision — be included in the ESA for the Computer Systems Group?

[7] My formulation of the question differs slightly from how each party has framed it. The real issue to be resolved, in my view, is the nature and extent of the Board's jurisdiction under subsection 123(3) of the *Act*, which reads in part as follows:

> ***123.*** *(3) . . . the Board may determine any matter that the employer and the bargaining agent have not agreed on that may be included in an essential services agreement and make an order*

> *(*a*) deeming the matter determined by it to be part of an essential services agreement between the employer and the bargaining agent; and*
>
> *(*b*) deeming that the employer and the bargaining agent have entered into an essential services agreement.*

Whether an ESA must contain, on the request of a bargaining agent, a statement of the essential services to be performed presupposes that the Board has the authority to make an order having that effect. As the applicant's position directly challenges the Board's authority in that regard, I believe that determining the underlying jurisdictional issue is fundamental to resolving the existing dispute. My formulation of the question reflects that judgment.

[8] The parties agreed that there was no requirement to adduce evidence.

[9] As the party seeking a positive order, the respondent was directed by the Board to argue the case first.

II. Summary of the arguments

[10] Both parties delivered their oral arguments based on written submissions, copies of which were provided to the Board. The following summary of the arguments condenses the written submissions and, as appropriate, includes supplementary comments offered by the parties during the hearing.

A. For the respondent

[11] The respondent maintained that the Board has already decided the issue of whether, under the *Act*, an ESA must contain a statement of the essential services to be performed during a strike, if the bargaining agent so requests. The Board has carefully analyzed the purpose and context of the *Act* and the difference between it and its predecessor and has concluded that essential services form the cornerstone of ESAs.

[12] Where the Board has determined that specific essential services must be performed in the event of a strike, it has deemed the defined essential services part of the ESA between the parties. Its approach has been consistent with well-accepted principles of statutory interpretation.

[13] Had the applicant disagreed with the Board's orders, it would have been required to judicially review them. Principles of estoppel, collateral attack and abuse of process prevent the applicant from disputing previous Board decisions on the subject.

[14] The *Act* is very different from the designation model under the previous legislation. The Board's decisions under the *Act* have stated that the first step in the analytical process is to identify the essential services or activities, if any, which are performed by employees in the bargaining unit. Each Board decision that has defined essential services has concluded with an order deeming the statement of defined essential services part of the ESA between the parties.

[15] The seminal Board decision on essential services is *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97 ("the *Parks* decision"). Among the findings in the *Parks* decision are the following:

1) Rather than amending the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (*PSSRA*), the legislature has written an entirely new statute with many new provisions in the area of essential services. The Board presumed that those changes were purposeful (paragraph 134).

2) Under the *Act*, the concept of "designated position" in the *PSSRA* has been replaced with the concept of "essential service" as determined in the context of an essential services agreement (paragraph 143).

3) The Board has jurisdiction under subsection 123(3) to determine ". . . any matter that the employer and bargaining agent have not agreed on that may be included in an essential services agreement . . ." (paragraphs 144 and 183).

4) In paragraphs 151 and 152, the Board stated as follows:

> *The essential service features of the new* Act *balance the right of employees to strike and the right of the public to receive necessary safety and security services . . . protecting the right to strike is necessary to give effect to the regime of collective bargaining embodied under the new* Act *. . . It is thus part of the Board's responsibility to give real meaning to that right. . . .*

5) The central issue is, "What are the essential services in the event of a strike" (paragraphs 155 and 174)?

6) The Board observed as follows at paragraph 158:

> *. . . it may be necessary or appropriate to adjust the assignment of duties such that fewer employees are performing essential duties but are performing more of those duties than would "normally" be the case.*

7) The Board specifically held at paragraph 186 as follows:

> *To decide the "type of positions," the "number of those positions" and the "specific positions" that are necessary to provide essential services, there must be a prior determination made of what comprises the essential services performed by employees in a bargaining unit.*

In other words, it would be impossible to craft an ESA without first knowing the essential services to be performed. It is the first-order decision (paragraphs 183 through 191).

8) The Board determined the essential services to be performed during a strike and "deemed" them part of the ESA. Following the employer's determination of the level of service, the parties were directed to resume negotiations for the "remaining" content of the ESA (paragraph 218).

[16] There was no judicial review of the *Parks* decision.

[17] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55 ("the *Service Canada* decision"), the Board followed the methodology set out in the *Parks* decision. The Board ordered that the ESA for the group at issue contain the specific statement of essential services (paragraph 110). There was no judicial review of the decision.

[18] The Board followed the analytical path outlined in the *Parks* decision in *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 56. It was not judicially reviewed.

[19] In *Treasury Board v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 128, the Board ordered that the ESA for the CS Group at the Canada

Border Services Agency (CBSA) include the specifically determined essential services at the CBSA (paragraph 170). The decision is under judicial review, but that review does not contest the determination that the description of essential services form part of the ESA.

[20] *Public Service Alliance of Canada v. Treasury Board*, 2009 PSLRB 155, also followed the *Parks* decision's analytical path. The Board ordered that the ESA include a specific statement of essential services and services deemed not essential (paragraph 51). The decision has not been judicially reviewed.

[21] Finally, the Board once again followed the *Parks* decision's analytical path in the *Public Safety* decision. The Board described the essential services to be performed and ordered the parties to make every reasonable effort to negotiate the remaining content of the ESA (paragraphs 101 and 103).

[22] Taken together, the Board's case law has determined the following:

1) The Board's mandate to determine the content of an ESA includes the first-order determination of essential services.

2) The focus is on essential services and not on positions. That focus would be overly particular if it were not necessary or intended to be relied upon in the future. The essential services must continue to be performed in the event of a strike.

3) The Board will not declare an entire position essential absent clear proof that all its activities and services are essential.

4) Bundling essential services within a position is appropriate. The only duties to be performed are the essential services.

5) Definitions of essential services must endure. The parties must be able to rely upon those definitions for more than just the determination of positions. The parties must be able to identify them years after the original negotiations have been completed.

6) The Board has consistently deemed that findings of essential services form part of ESAs. If that approach were not appropriate, as the applicant

suggests, there ought to have been judicial reviews of the Board's decisions. Key guiding cases have been decided and must now be respected unless new evidence emerges.

[23] The Board's approach is consistent with section 12 of the *Interpretation Act*, R.S. 1985, c. I-21, which provides that interpretations ensure the attainment of the legislative objectives, as follows:

> ***12.*** *Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.*

[24] The Board's approach also conforms to well-accepted principles of statutory interpretation. The respondent referred me to R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (2008), LexisNexis Canada, at pages 169 to 172, 223 to 225, 299 to 322 and 359 to 367. The cited pages draw particular attention to the following decisions: *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13; *R. v. L.T.H.*, 2008 SCC 49; and *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20.

[25] It is implicit in the definition of an "essential services agreement" in subsection 4(1) of the *Act*, which reads as follows, that essential services be identified:

> *"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies*
>
> > *(*a*) the types of positions in the bargaining unit that are necessary for the employer* ***to provide essential services;***
> >
> > *(*b*) the number of those positions that are* ***necessary for that purpose;*** *and*
> >
> > *(*c*) the specific positions that are* ***necessary for that purpose.***
>
> [Emphasis added]

The term "essential services" has a purpose and role in the definition.

[26] The applicant's approach would mean that the central building block in the definition of an ESA (that is, essential services) would not be identified or known. That

outcome is not permitted; see *Sullivan*, at 169. The applicant's approach would also render nonsensical subsections 121(1) and 123(5) of the *Act* that make possible bundling and the specific determination of the number of employees based on bundling. Those determinations can happen only if the essential duties of employees are known. Consequently, when reading the legislation as a whole, an ESA must, where otherwise not apparent to the parties, identify the essential services at issue.

[27] The applicant's approach would force bargaining agents to turn to the Board for each and every definition of essential services, contrary to the legislative requirement that parties negotiate essential service matters (section 122 of the *Act*), and would be a waste of adjudicative resources. Furthermore, permitting disproportionate treatment for employees who have sought the Board's assistance in defining essential services versus those employees who have negotiated them separately would be absurd. In the event of a strike, some employees would only perform essential services as accepted by both parties. Other employees would perform the work of an entire position or be expected to rely upon the "good faith" articulation by the employer of the essential services to be performed.

[28] The respondent returned to the subjects of issue estoppel, collateral attack and abuse of process that it raised at the beginning of its submissions. The preconditions for the operation of issue estoppel are as follows: (1) that the same question has been decided; (2) that the judicial decision that was said to create the estoppel was final; and (3) that the parties to the judicial decision were the same as the parties to the proceedings in which the estoppel is raised: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para 21. Issue estoppel applies equally in administrative Board processes as in the judicial process; see *Danyluk*, at para 25.

[29] With respect to the first precondition for an issue estoppel, it is sufficient that there be some question vital to the outcome of both cases, which is the same in all material respects; see *Estenson v. Canada (Attorney General),* 2007 FC 538, at para 21. The Board may consider whether there are special circumstances which would override estoppel. The burden of establishing special circumstances is upon the party who seeks to rely upon them; see *Jaballah*, 2010 FC 80, at para 26.

[30] The respondent argued that all three conditions for estoppel have been met in this case. The applicant has proved no special circumstances that dictate against the application of estoppel.

[31] Similarly, the applicant's argument about the content of ESAs cannot succeed based on the prohibition against collateral attack; see *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, at para 33.

[32] To prevent an abuse of process, the applicant's argument must fail. Adjudicators have an inherent and residual discretion to prevent abuse of the Board's resources; see *Toronto (City)*, at para 35, 37, and 51. Litigation must have an end, and the principle of finality is crucial to the proper administration of justice. Litigation resources must be preserved to uphold the integrity of the system. Inconsistent results must be avoided. The parties must be able to rely upon the Board's decisions as a go-forward basis for negotiation; see *Toronto (City)*, at para 38.

[33] The Board's findings in the *Parks* decision and all subsequent ESA decisions must not be impeached by using an impermissible route or by relitigating the matter in a different forum. Relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. In this case, there are no reasons that justify relitigation.

[34] The respondent concluded by reiterating that the Board has already determined the issue in this hearing, that is, whether the definition of an essential service is a proper component of an ESA. The Board has conducted a substantive statutory analysis and has issued a number of decisions where precisely defined essential services have been deemed part of the parties' ESAs. The parties must be able to rely upon the finality of those decisions and complete their negotiations without having to turn to the Board each time. Bargaining agents must know what their members are required to do in the event of a strike, even if the strike occurs years after the ESA is negotiated.

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

[35] The applicant submitted that the content of an ESA is limited to the elements listed in the exhaustive definition of "essential services agreement" in subsection 4(1) of the *Act*. A description of the essential services is not an element listed in that definition. Accordingly, the Board cannot require any description of the essential services in an ESA.

[36] The modern principle of statutory interpretation is that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the statute and with the intention of Parliament; see *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para 10.

[37] When the words of a provision are precise and unequivocal, the ordinary meanings of the words play a dominant role in the interpretive process; see *Canada Trustco Mortgage Co.*, at para 10. Moreover, where a statute provides exhaustive definitions of words, there can be no departure from the meaning established by the legislature. Exhaustive definitions completely displace whatever meanings the defined term might otherwise bear; see *Mattabi Mines Ltd. v. Ontario (Minister of Revenue)*, [1988] 2 S.C.R. 175, at para 23; and *M. & M. Engineering Ltd. v. International Brotherhood of Electrical Workers, Local 2330*, 2004 NLCA 31, at para 28. An exhaustive definition is normally introduced by the verb "means"; see *Yellow Cab Ltd. v. Board of Industrial Relations et al.*, [1980] 2 S.C.R. 761, at page 7; and *M. & M. Engineering Ltd.*

[38] The definition of "essential services agreement" in subsection 4(1) of the *Act* is exhaustive, given the use of the verb "means" in that definition. The exhaustive nature of that definition is also supported by the phrase "that identifies," coupled with the use of an express enumeration, "(*a*), (*b*), and (*c*)," which follows in the definition. The content of an ESA must be limited to the following exhaustive list of required elements: (*a*) "types of positions," (*b*) "number of those positions" and (*c*) "specific positions." That interpretation should be applied throughout the *Act*.

[39] It is presumed that the legislature avoids superfluous or meaningless words and that it does not pointlessly repeat itself or speak in vain. Thus, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose; see *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, at para 36. Therefore, it is submitted that the purpose of the definition of "essential services agreement" is to provide an exhaustive list of the contents of an ESA. Otherwise, the definition becomes meaningless.

[40] An express statutory mention of one item is presumptively exhaustive and implicitly excludes other similar items; see *Institute of Chartered Accountants of British Columbia v. Stone,* 2009 BCSC 611, at para 27. If Parliament had wanted an ESA to include a description of the essential services, it would have defined "essential services agreement" in the *Act* to specifically reference it.

[41] It is a basic principle of statutory interpretation that a court should not accept an interpretation that requires the insertion of extra wording where there is another acceptable interpretation that does not require any additional wording; see *Markevich v. Canada*, 2003 SCC 9, at para 15. Requiring a description of the essential service in an ESA necessitates the insertion of extra wording in the definition of "essential services agreement." Such an interpretation should not be accepted given that the applicant's interpretation is acceptable, does not require any additional wording and is supported by the modern principle of statutory interpretation.

[42] The legislature is presumed to be competent and to have knowledge of all the legislation in existence when a statute is enacted; see *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para 237. Other labour relations statutes in force when the *Act* was passed specifically require a description of the essential service in the ESA. For example, subsection 43.1(3) of the New Brunswick *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25, (*NBPSLRA*) indicates as follows that ". . . [t]he employer and the bargaining agent shall endeavour to reach agreement identifying (a) the services provided by the bargaining unit that at any particular time are or will be necessary in the interest of the health, safety or security of the public . . . ." Accordingly, it is submitted that had Parliament wanted ESAs to include a description of the essential service, the definition of "essential services agreement" in the *Act* would include language that is analogous to subsection 43.1(3) of the *NBPSLRA*.

[43] Both the scheme and object of the *Act* confirm that a description of an essential service is not required in an essential services agreement.

[44] The *Act* contemplates a number of interrelated stages in establishing an ESA, which are focused on identifying actual positions. First, an employer must provide the bargaining agent with a notice advising that it considers that certain employees occupy positions that are necessary for it to provide essential services ("essential positions") pursuant to section 122 of the *Act*. Unlike section 87.4 of the *Canada Labour Code* ("the *Code*"), R.S.C. 1985, c. L-2, the *Act* does not require the employer to describe the essential service in the notice. Once that notice has been provided, the parties must make every reasonable effort to enter into an ESA pursuant to section 122 of the *Act*. In negotiating an ESA, the parties are required to observe the following statutory restrictions about positions: (1) the content of an ESA must be limited to "types of

positions," "number of those positions" and "specific positions" pursuant to subsection 4(1); (2) for the purpose of identifying the "number of those positions," the parties can agree that essential services can be carried out in greater proportion pursuant to subsection 121(1); and (3) for the purpose of identifying the "number of those positions," the parties cannot consider the availability of other persons to provide the essential service nor can they consider alternate means of operation pursuant to subsection 121(2).

[45] Once an ESA is concluded, subsection 130(1) of the *Act* requires that the employer provide every employee who occupies an essential position with a notice informing him or her of that fact. The employer is not required to provide a description of the essential service to those employees.

[46] The ESA continues in force until the parties jointly determine that there are no employees in the bargaining unit occupying essential positions, pursuant to section 125 of the *Act*. The trigger is not whether the essential service still exists but rather whether an employee still occupies an essential position. If an essential position becomes vacant, the employer may replace it with the same "type" of position, pursuant to section 129.

[47] Once the relevant ESA is in force, employees not occupying essential positions are permitted to strike provided they meet the other criteria prescribed in the *Act*. Employees occupying essential positions cannot strike. Subsection 194(1) prohibits a strike if the relevant ESA is not in force. Moreover, the *Act* not only prohibits a bargaining agent from organizing a strike of employees occupying essential positions pursuant to subsection 194(2), it also prohibits those employees from participating in a strike pursuant to paragraph 196(*j*). Accordingly, the *Act* does not require a description of the essential service in an ESA for the purposes of a strike.

[48] The parties may file an application with the Board to determine any unresolved matter that may be included in an initial ESA pursuant to subsection 123(1) of the *Act*. In considering such an application, the Board must take into account the following similar restrictions about positions: (1) the content of an ESA must be limited to "types of positions," "number of those positions" and "specific positions" pursuant to subsection 4(1); (2) for the purpose of identifying the "number of those positions," the Board may require that employees providing essential services be asked to carry out those services in a greater proportion pursuant to subsection 123(5); (3) for the

purpose of identifying the "number of those positions," the Board cannot consider the availability of other persons to provide the essential service during a strike nor can it consider alternate means of operation pursuant to subsection 123(6); and (4) if the application relates to a "specific position," subsection 123(7) indicates that the employer's proposal is deemed to prevail unless the Board determines the position not of the "type" necessary for the employer to provide essential services.

[49] In light of the above, the *Act* is clearly a position-based scheme as opposed to a service-based scheme. The *Act* does not require a description of the essential service for any purpose related to essential services. The ultimate purpose of this scheme is to identify actual essential positions. Although essential services are discussed during negotiations, there is no need to describe them in the ESA.

[50] The powers of the Board in subsection 123(3) of the *Act* must be read in the context of the definition of "essential services agreement" in subsection 4(1). In particular, the Board's authority under paragraph 123(3)(*a*) to deem "any matter" part of an ESA is still restricted by the definition of "essential services agreement" in subsection 4(1), which exhaustively defines what may be "included" or "part" of an ESA. Only matters that are required under the definition of "essential services agreement" can be deemed part of an ESA. As such, the Board's authority is limited to deeming "types of positions," "number of those positions" and "specific positions" part of an ESA, that is, creating a legal fiction under which those specific elements become part of an ESA between the parties. The Board cannot deem any other matter part of an ESA, including but not limited to any description of an essential service. In sum, the Board does not have the jurisdiction to require more than the *Act* requires.

[51] The Board is not precluded from making a finding as to whether a particular service is necessary for the safety or the security of the Canadian public. The Board has already proposed the following three-pronged analytical path for applications under section 123 of the *Act*: (1) identifying which services are essential for the safety or the security of the public; (2) determining the level of service, a matter that rests exclusively with the employer; and (3) determining "types of positions," "number of those positions" and "specific positions;" see the *Parks* decision, at paragraphs 186, 189 and 191.

[52] Although that analytical path may be appropriate in the context of the Board's consideration of an application under section 123 of the *Act*, each step of that

determination need not be included by the parties as the content of an ESA. Only the third and final stage, "types of positions," "number of those positions" and "specific positions," constitutes the required content.

[53] The applicant acknowledged that the Board has already deemed an essential service description part of an ESA in previous decisions. However, the Board's orders were made in the absence of any representation by the parties on the issue.

[54] Requiring a description of essential services in an ESA with a sufficient degree of precision for each essential position is onerous and will unduly increase the length of negotiations and delay the conclusion of an ESA. Negotiations should be focused on identifying actual positions rather than scrutinizing how an essential service is described for each essential position.

[55] Furthermore, requiring a description of essential services in an ESA will undoubtedly lead to avoidable litigation on how an essential service should be described, as opposed to whether a service is actually essential. For example, in the two most recent CS Group essential services cases, the applicant and the respondent had already agreed that the vast majority, if not all, of the services in question were necessary for the safety or the security of Canadian public. The debate was simply over how the essential service should be described: *Treasury Board v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 128, at para 152 (application for judicial review pending) and the *Public Safety* decision, at para 74 and 75.

[56] A description of essential services in an ESA is irrelevant for the purposes of a strike. As mentioned above, once the relevant ESA is in effect, the *Act* categorically prohibits employees occupying essential positions from striking. Specifically, the *Act* not only prohibits a bargaining agent from organizing a strike of employees occupying essential positions pursuant to subsection 194(2), it also prohibits those employees from participating in a strike pursuant to paragraph 196(*j*). The Supreme Court of Canada reached a similar conclusion in *Canadian Air Traffic Control Assn. v. The Queen*, [1982] 1 S.C.R. 696, at page 699, relying on paragraph 101(1)(*c*) of the *PSSRA* (which is analogous to paragraph 196(*j*) of the *Act*), to confirm that a designated employee cannot strike.

[57] The applicant has the exclusive right to assign duties to its employees. Section 7 of the *Act* clearly indicates that ". . . nothing in this *Act* . . ." can affect or

limit such rights and authorities. Moreover, section 132 of the *Act* specifies that a bargaining agent and an employee occupying an essential position have a duty to observe every term and condition of employment for that employee until a collective agreement is entered into. Listing each and every essential service in an ESA is irrelevant in the context of a strike given that an employee occupying an essential position cannot strike and must observe every term and condition of his or her employment, including hours of work and the performance of the full scope of his or her services. Accordingly, there is no need to provide a description of each and every essential service in an ESA for any purpose, let alone for the purposes of a strike.

[58] Asked whether the requirement that the occupant of an "essential position" perform the full scope of his or her "services" during a strike meant all the duties of the position, not just the services deemed essential, the applicant answered in the affirmative.

[59] In response to the respondent's argument that the applicant should have sought judicial review of the Board's previous decisions, the applicant maintained that the Board has an obligation to consider the matter now before it regardless of what has happened in the past; see *Byers Transport Ltd. v. Kosanovich*, [1995] 3 F.C. 354 (C.A.), at para 13.

[60] With respect to the issue estoppel, the applicant argued that a decision made by the Board outside its jurisdiction cannot form the basis for an estoppel; see *Danyluk*, at para 51. The applicant also pointed out that a number of the Board's decisions cited by the respondent as the basis for the alleged estoppel involved different parties, different departments, different facts and different situations, precluding the operation of an issue estoppel. It noted as well that the *Public Safety* decision did not deem the definition of essential services part of the ESA between the parties.

[61] The prohibitions against collateral attacks and abuse of process do not apply when the parties have jointly applied to the Board to make a determination.

C. <u>Respondent's rebuttal</u>

[62] The *Act* does not use the term "essential position." The respondent re-emphasized that the references in the *Act* to "positions" are intelligible only to the extent that positions perform essential services.

[63] The statement of the Board's jurisdiction in subsection 123(1) of the *Act* is not exhaustive. The Board, without objection from either party, has already ruled under the authority of that provision on the definition of essential services even though, following the applicant's interpretation of the language of the *Act*, subsection 123(1) limits the Board's authority to deciding only those unresolved matters ". . . that may be included in an essential services agreement."

III. Reasons

[64] The arguments of the parties touch upon many provisions of the *Act*. Because issues of statutory interpretation play so large a role in this decision, I have reproduced the essential services provisions of the *Act* in their entirety in Annex A for ease of reference. I have also reproduced as Annex B certain provisions from the *PSSRA* that serve as a point of comparison for understanding the scheme and objects of the *Act*.

A. Issue estoppel, collateral attack and abuse of process

[65] The record is clear that the Board has ordered, in previous decisions, the inclusion of essential services definitions in ESAs. It has used different words in its orders but to a common effect. The formulation found as follows in the *Service Canada* decision was an early example:

. . .

> ***110.*** *The Essential Services Agreement (ESA) for the Program and Administration Group will include the following provision:*
>
> *The following services delivered by, or activities performed by, PM-01 Citizen Services Officer positions at Service Canada Service Centres, are necessary for the safety or security of the public:*
>
> > *1. Providing at normal service delivery locations such assistance to members of the public who seek to obtain a benefit under the EI, CPP or OAS/GIS programs as is reasonably required to enable them to submit completed applications for processing, with required documentation, and provided that the service is a service normally performed by the incumbent of a Citizen Service Officer (PM-01) position within the confines of the official job description for that position.*

> *2. Providing at normal service delivery locations such assistance to members of the public who are in receipt of a benefit under the EI, CPP or OAS/GIS programs as is reasonably required to enable them to continue to receive a benefit to the extent of their eligibility, provided that the service is a service normally performed by the incumbent of a Citizen Service Officer (PM-01) position within the confines of the official job description for that position.*
>
> . . .

[66] On the basis of the Board's past orders, the respondent maintained that the applicant is estopped from arguing in this case that the Board lacks the jurisdiction to order the inclusion of an essential services definition in an ESA. In the respondent's submission, the Board has already decided the issue.

[67] Were I to accept that an issue estoppel operates in the circumstances of this case, the logical consequence would be that I would decline to consider further the issue of the Board's jurisdiction. While it strikes me as somewhat incongruous that the respondent should argue a position with that possible result after having joined in the first place with the applicant to ask the Board to determine what is essentially a jurisdictional matter, the respondent indicated at the hearing that it believed that the applicant's position left it with no choice but to bring the matter to the Board while still believing that the Board has already determined it. I agree to consider the question of issue estoppel on that basis.

[68] That said, the respondent's issue estoppel argument must fail. The first condition for the operation of an issue estoppel, as outlined in *Danyluk* and elsewhere, is that ". . . the same question has been decided." While the Board has ordered the inclusion of essential services definitions in past decisions, there is no evidence in any of those decisions that the Board has considered specific submissions from the parties on its jurisdiction to do so, that it turned its mind actively to deciding that question and that it ruled definitively on the matter. To be sure, I am confident that the Board was unaware that an issue existed until its recent hearing in this file.

[69] I also reject the respondent's argument that the applicant's position should be rejected based on the prohibition against collateral attack. It is possible that the applicant could have chosen to litigate the jurisdictional issue that is the subject of this hearing by applying for judicial review of one or more of the Board's previous

orders that incorporated a definition of essential services into an ESA. However, as none of those decisions specifically tested the jurisdictional issue, it is quite reasonable to contend that they would have served as poor candidates for a judicial review of the question. To be sure, it is debatable whether the Federal Court of Appeal would have agreed to rule on the specific question of jurisdiction in the absence of a record showing that the parties directly debated it and the Board considered and determined it. From that perspective, this proceeding can hardly be viewed as a collateral attack. Moreover, while the applicant seeks a result that might cast in doubt the Board's previous orders, these proceedings cannot result in the formal reversal or nullification of any of those orders.

[70] The respondent's third argument suggests that the applicant's position entails an abuse of process. In my view, that suggestion is without merit. Even were I to accept that these proceedings comprise a relitigation of the specific jurisdictional question in dispute — which I do not — there is no compelling reason to believe that these proceedings could undermine the credibility or effectiveness of the Board's adjudicative procedures, undercut the principle of finality in decision making, waste resources or otherwise yield detrimental effects to processes under the *Act*. As stated in *Toronto (City)*, the doctrine of abuse of process can be used where the requirements of issue estoppel have not been met but where a decision maker concludes that allowing litigation to proceed ". . . would nonetheless violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice." The threshold for invoking the doctrine is appropriately set quite high. The fundamental goal, to quote *Toronto (City)* once more, is to prevent a party from ". . . attempt[ing] to impeach a judicial finding by the impermissible route of relitigation in a different forum." I am far from convinced that these proceedings approach the required threshold, let alone surpass it. While the result of a finding in favour of the applicant's position could significantly change the Board's approach to elements of Division 8 of the *Act*, proceeding to entertain the jurisdictional issue raised by the applicant does not itself do harm to the adjudicative process. In short, the respondent has not established, on a balance of probabilities, a case for abuse of process.

[71] For those reasons, I believe that the Board can and should proceed to determine the jurisdictional issue.

B. The Board's jurisdiction

[72] Both parties advanced well-known authorities and leading case law on the construction of statutes to support their respective positions on the issue of the Board's jurisdiction to deem a definition of essential services included in an ESA. The material offered by the parties is both extensive and diverse. To some degree, reviewing that material leaves the reader with the sense that the application of the rules can and sometimes does vary with the nature and context of the interpretation problem at hand. Certainly, there can be legitimate differences over the application of commonly held principles of statutory interpretation to a given situation. In this case, for example, both parties broadly endorse the same "modern rules of statutory interpretation" but reach opposite conclusions on how to interpret harmoniously relevant provisions of the *Act* read together.

[73] In my view, I should take the same approach to statutory interpretation in this decision that the Board followed in the *Parks* decision and that it has normally adopted elsewhere. That approach recognizes the Board's obligation under section 12 of the *Interpretation Act* to give the provisions of the *Act* ". . . such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." It also adheres to the guidance of the Supreme Court, summarized as follows at paragraph 149 of the *Parks* decision:

> ***149*** *The employer cites the* Interpretation Act *and decisions of the Supreme Court of Canada — for example,* Bell ExpressVu Limited Partnership v. Rex *— to the effect that the Board must give the provisions of the new* Act *their ordinary meaning and read those provisions harmoniously with the overall legislative scheme and with the intent of the legislator. The Board concurs. The principal rule for statutory interpretation applies, as quoted in* Rizzo & Rizzo Shoes Ltd.*, at para 21 (quoting E. A. Driedger,* Construction of Statutes*, 2nd ed., 1983, at 87):*
>
> > 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.
>
> . . .

[74] In my view, I must also be guided in this decision by the Board's rulings to date about the meaning and intent of the essential services features of Division 8 of the *Act.*

The *Parks* decision led the way. Since the Board issued that decision in November 2008, successive Board rulings have embraced the same analytical path and, I believe, have expressed a common view of what the *Act* seeks to achieve. While a number of specific provisions of the *Act* obviously remain to be explored in greater depth, the Board's view of its basic architecture is by now relatively well known.

[75] The case advanced by the applicant points to a different interpretation of the *Act* than the Board has embraced. The core of the applicant's argument is a challenge to the Board's authority on a very specific point, that is, the Board's jurisdiction to deem a definition of essential services included in an ESA. However, the applicant has positioned its challenge to that authority as part of a wider theory of what the legislator intended by Division 8 of the *Act* as a whole. I believe that it is incumbent on the Board not only to determine the specific jurisdictional issue that animates this case but also to address, as required, the applicant's wider theory.

[76] On both levels, I disagree with the applicant for the reasons that follow.

[77] At the heart of the applicant's position that the Board lacks the jurisdiction to order the inclusion of a definition of essential services in an ESA is its argument that the rules of statutory interpretation, correctly applied, require the Board to accept that subsection 4(1) of the *Act* exhaustively defines the content of an ESA as follows:

> *"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies*
>
> > *(a) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;*
> >
> > *(b) the number of those positions that are necessary for that purpose; and*
> >
> > *(c) the specific positions that are necessary for that purpose.*

[78] Let me assume for a moment that the applicant's argument is correct and that the legislator intended through the definition of an "essential services agreement" in subsection 4(1) of the *Act* to exclude from the content of an ESA any element not identified in paragraphs (*a*), (*b*) or (*c*). Does it follow that the wording of those

paragraphs must be viewed as excluding, in any way, a definition of essential services from the content of an ESA?

[79] I think not. The construction of paragraph (*a*) of the definition of "essential services agreement" in subsection 4(1) of the *Act* explicitly qualifies what "types of positions" should be identified in an ESA. It requires that the "types of positions" that are properly identified in an ESA are those ". . . that are necessary for the employer to provide essential services." "Types of positions" is not a commonly understood term. It has no intrinsic meaning. It is not defined elsewhere in the *Act*. It can be interpreted only because the legislator included in that paragraph the descriptor ". . . that are necessary for the employer to provide essential services." Clearly, the reference to "essential services" is not superfluous to the meaning of paragraph (*a*); it is necessary. The paragraph must be given meaning as a whole with all its words contributing to that meaning.

[80] The same observation applies to paragraphs (*b*) and (*c*) in the definition of "essential services agreement" in subsection 4(1) of the *Act*. Both paragraphs include the phrase ". . . that are necessary for that purpose." The words "that purpose" import into paragraphs (*b*) and (*c*) the phrase "to provide essential services" from paragraph (*a*). Like paragraph (*a*), paragraphs (*b*) and (*c*) have no comprehensible meaning without the modifying reference to "essential services."

[81] Notably, the definition of the term "essential services agreement" does not stand alone in subsection 4(1) of the *Act*. The subsection also contains the definition of "essential service" as follows:

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

The presence of both definitions together in subsection 4(1) offers a strong indication that the legislator intended that the definition of "essential services agreement" must be read together with the definition of "essential services." It seems to me that the direct pairing of the two definitions in subsection 4(1) substantially undercuts the applicant's argument. In my opinion, two definitions standing together in the subsection makes it very likely that the legislator intended that the definition of "essential services agreement" must be interpreted harmoniously with the paired

definition of "essential services." To be sure, I believe that the legislator intended that we read into paragraphs (*a*), (*b*) and (*c*) the very element that gives those paragraphs concrete meaning — the definition of essential services agreed upon by the parties or ordered by the Board. When certain "types of positions" are listed in an ESA, for example, the obvious and immediate question is, "Why those types of positions?" The necessary answer — the answer required to give meaning to the list of "types of positions"— is that those types of positions are necessary to provide a defined list of essential services.

[82] In effect, the applicant argued that the legislator would have added a paragraph (*d*), identifying "the definition of the essential services" — or that it would have modified the definition in some other way to achieve the same effect — had it intended to include that element within an exhaustive listing of the content of an ESA in subsection 4(1) of the *Act*. There is no question that doing so would have removed any doubt about the matter. However, I do not believe that the absence of such additional words determines the issue. I am far more persuaded that the legislator formulated the two relevant definitions in subsection 4(1) as a coherent and integrated whole. To insist that paragraphs (*a*), (*b*) and (*c*) belie an intent to exclude a definition of essential services from an ESA is to unlink what Parliament put together, with no immediately apparent reason why one should.

[83] The applicant referred to the *NBPSLRA* as an example of a statute that specifically lists the definition of essential services as a component of an essential services agreement. The applicant argued that we must presume that Parliament knew about the *NBPSLRA* when it drafted the *Act* and that it purposely chose not to follow suit, thus indicating its intention to exclude a definition of essential services from the content of an ESA.

[84] It is true that paragraph 43.1(3)(*a*) of the version of the *NBPSLRA* in force when the *Act* was passed and proclaimed used the following words: ". . . the employer and the bargaining agent shall endeavour to reach agreement identifying (a) the services provided by the bargaining unit that at any particular time are or will be necessary in the interest of the health, safety or security of the public . . . ." However, it is important to recognize that the *NBPSLRA* is not a closely comparable scheme when it comes to essential services. It does not contemplate the negotiation of an "essential services agreement" as such and does not use or define that term; nor does it directly define

the term "essential service." Moreover, it continues to be based on the concept of a "designated position" that, as discussed below, has disappeared from the *Act*. I am unconvinced that the New Brunswick model assists me at all in this decision.

[85] If the applicant largely ignores the twinned presence of the definition of "essential service" in subsection 4(1) of the *Act*, it also fails to consider something that I believe even more basic. Does it make any sense that the legislator would use the term "essential services agreement" without intending that the "agreement" that it contemplates be about "essential services?" The words "essential services" directly modify "agreement." It cannot be an accident that the legislator chose to put those words together to form a defined concept in subsection 4(1) rather than, for example, using a term such as "essential positions agreement." The presence of the term "essential services agreement" is purposive and fundamental. I find it impossible to interpret it other than as a clear reference by the legislator that the agreement that anchors the entire approach in Division 8 is an agreement about essential services. To that critical extent, I believe that the legislator could not have consciously excluded a definition of essential services from an ESA. To the contrary, it explicitly made essential services the defining cornerstone for the establishment of an ESA. Without an agreed or deemed definition of essential services, an ESA would be empty of its defining context.

[86] Looking beyond subsection 4(1) of the *Act*, there is, in my view, ample additional reason to reject the applicant's limited construction of the proper content of an ESA. The Board's primary authority in Division 8 is expressed in subsection 123(3) as follows:

> ***123.*** *(3) . . . the Board may determine any matter that the employer and the bargaining agent have not agreed on that may be included in an essential services agreement and make an order*
>
> > *(*a*) deeming the matter determined by it to be part of an essential services agreement between the employer and the bargaining agent . . .*
>
> . . .

The plain words of subsection 123(3) place two parameters on the scope of what the Board may determine. First, it must be a matter ". . . that the employer and the bargaining agent have not agreed on . . ." Second, the matter over which there is

disagreement must be one ". . . that may be included in an essential services agreement . . . ."

[87] Both parties accept that the Board may determine the definition of essential services when the parties disagree. That authority has never been disputed, beginning with the *Parks* decision. However, according to the applicant's interpretation of subsection 4(1), a definition of essential services is not a matter ". . . that may be included in an essential services agreement . . . ." Were that an accurate reading of the legislator's intent, then it would follow that the Board could not exercise the authority to define essential services in the first place — because the plain wording of section 123(3) restricts the Board's authority to matters ". . . that may be included in an essential services agreement . . . ."

[88] Obviously, that interpretation is untenable. It must be that Parliament intended paragraphs (*a*), (*b*) and (*c*) of the definition of "essential services agreement" in subsection 4(1) of the *Act* to identify the primary content of an ESA without precluding the possibility that there may be other content. Parliament, after all, did not enact that an essential services agreement "only identifies" [emphasis added] the content described in paragraphs (*a*), (*b*) and (*c*). Given that the Board exercises its authority under subsection 123(3) only for matters ". . . that may be included in an essential services agreement . . ." and given that it is undisputed that the legislator intended that the Board resolve a disagreement over the definition of essential services, then it must be that the legislator also intended that the Board can make an order ". . . (*a*) deeming [the definition of essential services] to be part of an essential services agreement between the employer and the bargaining agent . . ." — because Parliament implicitly recognized that the definition of essential services was a matter ". . . that may be included in an essential services agreement."

[89] The provisions of Division 8 of the *Act* for the amendment of an existing ESA provide further support for that view. When a requirement to amend arises, and the parties are unable to agree on how to revise their ESA, subsection 127(3) gives the Board the authority to order its amendment as follows:

> ***127.*** *(3) The Board may, by order, amend the essential services agreement if it considers that the amendment is necessary for the employer to provide essential services.*

Had Parliament intended that an ESA can never include a definition of essential services, the plain wording of subsection 127(3) would operate to preclude the Board from amending an existing essential services definition under that authority — because the definition could never be included in the ESA in the first place. How, then, would a future dispute over amendments to the definition of essential services be resolved? If not under subsection 127(3), what would be the source of the Board's authority, if any, to address the dispute? No other provision in Division 8 establishes that authority. I certainly do not believe that Parliament would have drafted Division 8 of the *Act* as a comprehensive system for establishing and then amending essential services agreements but that it would have consciously decided at the same time that amending a definition of essential services should be accomplished under some other process or authority outside Division 8 (for example, by invoking the Board's general authority to review its orders under subsection 43(1)) or that it cannot be accomplished at all. Instead, it must be that the legislator intended that subsection 127(3) also serve as the authority for amending an essential services definition — once again, because such a definition properly forms part of the content of an ESA.

[90] I also note that section 127 of the *Act* does not contain any additional language comparable to paragraph 123(*a*) by which the Board can deem ". . . the matter determined by it to be part of an essential services agreement . . . ." The absence of such a provision in section 127 suggests to me that the legislator assumed that the definition of essential services would already form part of the ESA and that the Board could order its amendment under section 127 in the same fashion that it could order changes to any other ESA content — no deeming necessary.

[91] Closely associated with the respondent's argument that subsection 4(1) of the *Act* exhaustively lists the content of an ESA are several interrelated propositions about the *Act*'s approach to essential services advanced in its written submissions, of which the following are prime examples: (1) ". . . the *PSLRA* is clearly a position-based scheme (as opposed to a service-based scheme);" (2) "[t]he ultimate purpose of this scheme is to identify actual Essential Positions;" (3) ". . . a description of the essential service in an essential services agreement is irrelevant for the purposes of a strike;" and (4) ". . . an employee, who occupies an Essential Position, cannot strike and must observe every terms [*sic*] and condition of his/her employment (including hours of work and the performance he [*sic*] full scope of his/her services." Those propositions

are important elements of the applicant's theory of the scheme and object of the *Act*. In its view, the scheme and object of the *Act* confirm that there is no need to include a definition of essential services in an ESA.

[92] Were the Board to adopt the applicant's approach, the only required content for an ESA at the end of the day would be the list of specific positions that the parties have agreed, or that the Board has ordered, involve the performance of an essential service or services. Once a position has been listed in an ESA, the applicant takes the position that its incumbent must perform the full scope of his or her "services." At the hearing, I explicitly asked the applicant whether, by referring to "services," it meant that an employee must perform the full scope of essential services in the event of a strike or that the employee must perform all the duties of his or her position, whether or not determined to be essential. The applicant made it clear that it meant the latter.

[93] The applicant's clarification, coupled with its use of the term "essential position" — a term that appears nowhere in the *Act* — reveals its belief that Division 8 of the *Act* is not substantially different from the previous legislation in a very key respect. Whether the term used is "designated position," as under the *PSSRA*, or "essential position," as the applicant now seeks to import into the *Act*, the effect is the same, taking the applicant's argument to its logical conclusion. During a strike, employees who perform essential services must perform all the duties of their positions as normally required by the employer. Fundamentally, it is their positions that are essential rather than the services that have led to the identification of those positions.

[94] With respect, the applicant's theory mistakenly discounts the extent to which the legislative regime governing essential services has changed under the *Act*. Key provisions of the predecessor *PSSRA* are reproduced in Annex B to this decision. "Designated position" was the central defining concept of that statutory scheme. Subsection 78(1) of the *PSSRA* required that each position in the bargaining unit be designated ". . . as having duties consisting in whole or in part of duties the performance of which at any particular time or after any specified period is or will be necessary in the interest of the safety or security of the public . . ." or not. An employee who occupied a designated position could not participate in lawful strike activity. Everything in the scheme centred on the list of designated positions agreed

upon by the parties or, if not agreed upon, determined after a two-stage dispute resolution procedure culminating in a decision by the Board.

[95] No substantive statutory language from the *PSSRA* other than the concept of the ". . . safety or security of the public . . ." carried over into the new *Act*. In the *Parks* decision, at paragraph 134, the Board wrote as follows:

> ***134*** *. . . The changes are substantive and not merely a change in form. Rather than amending the previous statute, the legislator has written an entirely new law with many new provisions in the area of essential services. Given the nature and extent of the changes, the Board must presume that those changes are purposeful; that is, that the legislator intended that there be a substantively different approach under the new* Act *compared to the scheme under the former Act; see* Sullivan and Driedger on the Construction of Statutes*, at 472.*

The Board discussed at length the nature of the changes that made the *Act* fundamentally different from its predecessor, including the following:

. . .

> ***143*** *Under the new* Act*, the concept of a "designated employee" or "designated position" has disappeared. It has been replaced by the concept of an "essential service" determined in the context of an "essential service agreement" negotiated by the parties. . . .*
>
> ***144*** *The Board's role has also been redefined under the new* Act*. Subsection 123(3) now mandates the Board to determine "any matter" regarding the content of an ESA that has not been agreed to by the parties. Subsection 123(3) further authorizes the Board to deem both that any ruling that it makes forms part of an ESA and that the parties have entered into such an agreement. . . .*

. . .

[96] In the *Parks* decision, the Board explicitly considered and rejected the employer's argument on a critical question of statutory interpretation that ". . . the approach under the new *Act* is substantially the same as under the former *Act* as interpreted by the *CATCA* decision." After analyzing the new provisions in the *Act*, the Board concluded that the key issue that the legislator sought to address through the new law was the identification of essential services. The Board wrote as follows at paragraph 174:

> ***174*** *The Board concludes that, in light of the substantive changes in the new* Act *taken as a whole and what those changes reveal of the legislator's intent, the principal question that must be posed in addressing an application under subsection 123(1) is, "What services are necessary for public safety or security in the event of a strike?"*

[97] The Board then turned in the *Parks* decision to detail at length the "analytical path" consisting of three stages that it considered appropriate in light of the new legislative scheme. Defining the essential services is the first and primordial stage. Everything else flows from that definition. Establishing the level at which essential services are to be delivered to the public is the second stage. Once both the first and second elements necessary for an ESA are determined, the Board stated the following about the remaining content of an ESA at paragraph 191:

> ***191*** *The framework of the new Act suggests a logical order for determining the remaining elements of content for an ESA. With the "essential services" and "level of services" decided, the analysis turns in order to the "type of positions," the "number of those positions" and the "specific positions" that are necessary to provide essential services at the determined level of service. It may be that an ESA will not, and need not, explicitly deal with all three elements. At minimum, the "specific positions" that are necessary to provide essential services must be identified to give effect to the ESA. Depending on the case, the parties or the Board may be able to turn directly to that element without explicitly making prior decisions about the type and number of required essential service positions. More likely, where the dispute on the surface appears to focus only on determining "specific positions," the positions taken by the parties on that matter will reveal implicit assumptions or tacit agreements about the "type of positions" and the "number of those positions." Should the matter of "specific positions" be before the Board, the Board may need to "unpack" those assumptions and tacit agreements and, as necessary, issue orders based on its own determinations.*

[98] The Board's general theory of the *Act* in the *Parks* decision was not challenged. No judicial review application was made.

[99] Now, the applicant advances an alternate theory of the *Act* that identifies "essential positions" as its central operative element. It contends that ". . . the *PSLRA* is clearly a position-based scheme . . ." and that ". . . [t]he ultimate purpose of this scheme is to identify actual Essential Positions."

[100] In my view, those propositions are plainly wrong. In essence, the applicant is giving a new name — "essential position" — to the old concept of a "designated position" and arguing that, at the end of the day, nothing really matters other than arriving at the list of "essential positions." Why would the legislator have gone to the length of enacting a completely different regime governing essential services if, as the applicant appears to maintain, the real purpose and objective remain the same? Why would the legislator have created the concept of an "essential services agreement" and fashioned a process where the definition of "essential services" is the first and primordial requirement if ". . . the *PSLRA* is clearly a position-based scheme . . . ?"

[101] The answer is clearly that that was not the legislator's intent. Identifying "type of positions," the "number of those positions" or the "specific positions" are elements required to achieve the objects of the *Act* but only in the sense that essential services must necessarily be delivered by the incumbents of positions. Positions, as such, are not essential. Incumbents of positions deliver a range of services defined as their assigned duties by the employer. Some subset of those duties — or, perhaps, all of those duties in some exceptional circumstances — will be determined by the parties or by the Board to be essential to safeguarding the safety or security of the public. The "balance" that the *Act* seeks to achieve is between ensuring that those defined essential services are maintained in the event of the strike while at the same time giving real meaning to the right to strike enshrined by the *Act*. The crucible is the definition of "essential services."

[102] Surely, then, it is impossible to argue credibly that ". . . a description of the essential service in an essential services agreement is irrelevant for the purposes of a strike." To the contrary, the *Act* is all about ensuring that services essential to public safety or security continue to be delivered to the public during a strike. Division 8 of the *Act* is forthrightly a service-based scheme.

[103] The applicant referred me to sections 7 and 132 of the *Act*, which read as follows:

> ***7.*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.*

. . .

> ***132.*** *Unless the parties otherwise agree, every term and condition of employment applicable to employees in a bargaining unit in respect of which a notice to bargain collectively is given that may be included in a collective agreement and that is in force on the day the notice is given remains in force in respect of any employee who occupies a position that is identified in an essential services agreement and must be observed by the employer, the bargaining agent for the bargaining unit and the employee until a collective agreement is entered into.*

[104] If I correctly understand the applicant's reference to those sections, they are cited to reinforce its contention that

> *. . . an employee, who occupies an Essential Position, cannot strike and must observe every terms [sic] and condition of his/her employment (including hours of work and the performance he [sic] full scope of his/her services.*

I have already stated my understanding, based on the Board's previous rulings beginning with the *Parks* decision, that the primary purpose of the essential services features of the *Act* is to ensure that defined essential services are maintained in the event of the strike. I do not think that there is room in the Board's approach to accommodate the proposition that the employer's prerogatives permit it to require the performance of non-essential duties as a "condition of employment."

[105] In the *Parks* decision, the employer urged the Board to consider the views expressed by Michel LeFrançois, General Counsel, Human Resources Modernization Task Force, the body that developed Bill C-25 (which became the *Act*), as an indication of the government's intent in introducing the essential services feature of the *Act*; see paragraph 76. The Board found it unnecessary to do so; see paragraph 162. While I do not suggest that there is any greater need in this case to refer to parliamentary debates or committee proceedings for guidance about the intent of the *Act*, I have found an excerpt from Mr. LeFrançois' testimony before the Standing Committee on Government Operations and Estimates on May 7, 2003 quite interesting and a possible counterpoint to the theory advanced by the applicant in this case. Mr. LeFrançois stated as follows in response to a question from the Chair (after 16:15):

. . .

> ***The Chair:*** *. . . It is my understanding of your earlier explanation . . . that there is a new regime for identifying essential service positions, but it is your analysis that this will result in a smaller number of positions being so designated. Is that a fair representation?*
>
> ***Mr. Michel LeFrançois:*** *. . . To illustrate that, sir, I'd propose the following example, as I indicated earlier. If presently 100 people are involved in some capacity in cutting cheques for pensioners, but in reality they do so for about 50% of the time, in today's regime, those 100 employees would be designated and could not strike. In the regime under this bill, the employer could agree with the bargaining agent at the negotiating table and in the absence of such an agreement the Public Service Labour Relations Board could order that those functions related to the cutting of those cheques performed by those 100 people should be consolidated in the functions of 50 of those 100. So there would be 50 employees on the picket line under this regime, whereas in the present regime there'd be 50 fewer.*
>
> . . .

If Mr. Lefrançois' explanation accurately reflects the intent underlying the *Act*, it cannot be that the 100 persons found to be involved in performing the essential service — cutting the cheques for pensioners — would also perform duties of their positions that were not found to have been essential. If that were the case, no consolidation of the essential service in 50 positions would be possible, and all 100 employees would be required to remain on the job as under the designated positions regime of the *PSSRA*. That apparently was not Mr. Lefrançois' view.

[106] I suspect that the general grant of management rights in section 7 or 132 of the *Act* cannot be used to achieve the end of requiring the performance of non-essential duties in the event of a strike. For section 132, in particular, I expect that there is an argument to be made that it operates for a quite different purpose — to address the status of pay and other non-salary benefits for employees who cannot participate in a strike when one actually occurs.

[107] That said, I do not need to rule conclusively on any issue concerning the assignment of duties or the observance of terms and conditions of employment during a strike for the purposes of this decision. Those issues are best left to another day when, and if, there is a concrete dispute over the application of sections 7 and 132 of the *Act* during a strike or over the "bundling" provision in subsection 123(5).

[108] The applicant also referred me to subsection 194(2) and paragraph 196(*j*) of the *Act*, which read as follows:

> ***194.*** *(2) No employee organization shall declare or authorize a strike the effect of which is or would be to involve the participation of any employee who occupies a position that is necessary under an essential services agreement for the employer to provide essential services, and no officer or representative of an employee organization shall counsel or procure the participation of such employees in a strike.*
>
> . . .
>
> ***196****. No employee shall participate in a strike if the employee*
>
> . . .
>
> *(*j*) occupies a position that is necessary under an essential services agreement for the employer to provide essential services;*
>
> . . .

I do not believe that those provisions assist the applicant's argument. To the contrary, both provisions state prohibitions that are fully consistent with the Board's approach to interpreting the essential services features of the *Act*. By their plain wordings, the legislator included those prohibitions in the *Act* to protect the employer's ability ". . . to provide essential services." The word "position" obviously and not surprisingly appears in both sections (but not the term "essential positions"). The positions are necessary ". . . for the employer to provide essential services . . . ." Once more, the key is maintaining the essential services, not somehow maintaining an "essential position."

[109] I wish to address two other points advanced by the applicant. First, the applicant suggested that it was significant that section 122 of the *Act*, unlike section 87.4 of the *Code*, does not require the employer to describe the essential services in the notice that launches the process of negotiating an ESA. Section 122 of the *Act* reads as follows:

> ***122.*** *(1) If the employer has given to the bargaining agent a notice in writing that the employer considers that employees in the bargaining unit occupy positions that are necessary for the employer to provide essential services, the employer and the bargaining agent must make every*

> *reasonable effort to enter into an essential services agreement as soon as possible.*
>
> *(2) The notice may be given at any time but not later than 20 days after the day a notice to bargain collectively is given.*

Section 87.4 of the *Code* reads in part as follows:

> ***87.4** (1) During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.*
>
> *Notice*
>
> *(2) An employer or a trade union may, no later than fifteen days after notice to bargain collectively has been given, give notice to the other party specifying the supply of services, operation of facilities or production of goods that, in its opinion, must be continued in the event of a strike or a lockout in order to comply with subsection (1) and the approximate number of employees in the bargaining unit that, in its opinion, would be required for that purpose.*
>
> . . .

[110] Comparisons to the *Code* require some caution. The concept in the *Code* of ". . . the supply of services, operation of facilities or production of goods that . . . must be continued in the event of a strike or a lockout . . ." differs somewhat from the concept of "essential services" under the *Act*. The *Code*'s "maintenance of services" provisions are also not the same as the provisions governing essential services in Division 8 of the *Act*. Nonetheless, the underlying objectives are broadly similar.

[111] Were it the case that sections 122 of the *Act* and 87.4 of the *Code* stated different requirements, it strikes me that that difference would have to be viewed as relatively minor. To be sure, I am not convinced that there is any real difference. Under section 122 of the *Act*, the purpose of the required notice is to alert the bargaining agent to the fact that the employer ". . . considers that employees in the bargaining unit occupy positions that are necessary for the employer to provide essential services . . . ." Whether the employer identifies the essential services when it provides the notice, or later, the definition of those services still inescapably comprises core subject matter for the negotiations that must occur. If voluntary negotiation by the

parties to an ESA is to succeed — the end that the *Act* encourages — it is hard to imagine that the parties would not discuss how to define essential services. Even if they did not, or failed to agree when they did try to define essential services, it does not follow that the information exchange process that occurs before a dispute reaches the Board under section 123 alters the nature of the Board's authority under that section.

[112] The applicant's second point was that requiring a description of essential services in an ESA is onerous, that it will unduly increase the length of negotiations, that it will delay the conclusion of an ESA or that it will lead to avoidable litigation. With respect, that point is irrelevant to determining the jurisdictional issue in this case. The nature of the Board's authority is not a matter that depends on whether something is hard or easy, capable of rapid resolution or prone to be contentious. The legislator has established a detailed regime for maintaining essential services during a lawful strike. To the extent that the operation of that regime vitally turns on the definition of those essential services that protect the safety and security of the public, it must be assumed that Parliament intended that the parties and the Board address that matter with discipline and care and with whatever resources that prove necessary to ensure compliance with the *Act*. In any event, I believe that it can equally be argued that getting the essential services definition right in the first instance makes the other determinations that follow easier, not more difficult. Moreover, the overarching practical requirement is that employees must know with precision what services they are required to perform in the event of a strike. They should not be expected to intuit those services from a list of positions in an ESA. The essential services should be explicitly stated. Nor should it be left to management to instruct employees through other means as to what is essential. The possibility for misunderstanding and conflict in that scenario is obvious. Parliament intended the ESA to be the central controlling authority during a strike. Beyond any legal debate, as a practical matter that is where the definition of essential services belongs.

[113] Giving the provisions of the *Act* ". . . such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" as specified in section 12 of the *Interpretation Act* and following the guidance of the Supreme Court on the "modern approach" approach to statutory interpretation, I rule that the language of the *Act* does not exclude a definition of essential services from the content of an ESA. I

rule further that the Board has the authority under subsection 123(3) of the *Act* to deem that a definition of essential services forms part of an ESA.

[114] Nothing in the submissions of the parties suggests to me that I should not exercise that authority in this case to order that the definition of essential services at paragraph 101 of the *Public Safety* decision be deemed part of the essential services agreement for the Computer Systems (CS) Group.

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

(The Order appears on the next page)

IV. Order

[116] I declare that the Board has the authority under subsection 123(3) of the *Public Service Labour Relations Act* to deem a definition of essential services part of an essential services agreement.

[117] The definition of essential services at paragraph 101 of the Board's decision in *Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 15, is deemed part of the essential services agreement for the Computer Systems (CS) Group.

[118] The Board remains seized of all other matters not agreed to by the parties that may be included in the essential services agreement.

May 7, 2010.

Dan Butler,
Board Member

ANNEX A

[119] Subsection 4(1), the foundation for the *Act*'s approach to essential services, reads in part as follows:

> *"essential service" means a service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public.*
>
> *"essential services agreement" means an agreement between the employer and the bargaining agent for a bargaining unit that identifies*
>
> > *(*a*) the types of positions in the bargaining unit that are necessary for the employer to provide essential services;*
> >
> > *(*b*) the number of those positions that are necessary for that purpose; and*
> >
> > *(*c*) the specific positions that are necessary for that purpose.*
>
> . . .

[120] The procedures governing the determination of essential services and the establishment of ESAs, including the Board's roles and authorities, are outlined in Division 8 of the *Act* as follows:

> ***119.*** *This Division applies to the employer and the bargaining agent for a bargaining unit when the process for the resolution of a dispute applicable to the bargaining unit is conciliation.*
>
> ***120.*** *The employer has the exclusive right to determine the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided. Nothing in this Division is to be construed as limiting that right.*
>
> ***121.*** *(1) For the purpose of identifying the number of positions that are necessary for the employer to provide an essential service, the employer and the bargaining agent may agree that some employees in the bargaining unit will be required by the employer to perform their duties that relate to the provision of the essential service in a greater proportion during a strike than they do normally.*

(2) For the purposes of subsection (1), the number of employees in the bargaining unit that are necessary to provide the essential service is to be determined

(a) without regard to the availability of other persons to provide the essential service during a strike; and

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

122. *(1) If the employer has given to the bargaining agent a notice in writing that the employer considers that employees in the bargaining unit occupy positions that are necessary for the employer to provide essential services, the employer and the bargaining agent must make every reasonable effort to enter into an essential services agreement as soon as possible.*

(2) The notice may be given at any time but not later than 20 days after the day a notice to bargain collectively is given.

123. *(1) If the employer and the bargaining agent are unable to enter into an essential services agreement, either of them may apply to the Board to determine any unresolved matter that may be included in an essential services agreement. The application may be made at any time but not later than*

(a) 15 days after the day a request for conciliation is made by either party; or

(b) 15 days after the day the parties are notified by the Chairperson under subsection 163(2) of his or her intention to recommend the establishment of a public interest commission.

(2) The Board may delay dealing with the application until it is satisfied that the employer and the bargaining agent have made every reasonable effort to enter into an essential services agreement.

(3) After considering the application, the Board may determine any matter that the employer and the bargaining agent have not agreed on that may be included in an essential services agreement and make an order

(a) deeming the matter determined by it to be part of an essential services agreement between the employer and the bargaining agent; and

(b) deeming that the employer and the bargaining agent have entered into an essential services agreement.

(4) The order may not require the employer to change the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided.

(5) The Board may, for the purpose of identifying the number of positions that are necessary for the employer to provide an essential service, take into account that some employees in the bargaining unit may be required by the employer to perform those of their duties that relate to the provision of the essential service in a greater proportion during a strike than they do normally.

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

(a) without regard to the availability of other persons to provide the essential service during a strike; and

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

(7) If the application relates to a specific position to be identified in the essential services agreement, the employer's proposal in respect of the position is to prevail, unless the position is determined by the Board not to be of the type necessary for the employer to provide essential services.

124. *The essential services agreement comes into force on the day it is signed by the parties or, in the case of an essential services agreement that the employer and the bargaining agent are deemed to have entered into by an order made under paragraph 123(3)(b), the day the order was made.*

125. *An essential services agreement continues in force until the parties jointly determine that there are no employees in the bargaining unit who occupy positions that are necessary for the employer to provide essential services.*

126. *(1) If a party to an essential services agreement gives a notice in writing to the other party that the party giving the notice seeks to amend the essential services agreement, the parties must make every reasonable effort to amend it as soon as possible.*

(2) If a collective agreement or arbitral award is in force, the notice may be given at any time except that, if a notice to bargain collectively has been given with a view to renewing or revising the collective agreement, the notice may only be given during the 60 days following the day the notice to bargain collectively was given.

127. *(1) If the employer and the bargaining agent are unable to amend the essential services agreement, either of them may apply to the Board to amend the essential services agreement. The application may be made at any time but not later than*

(a) 15 days after the day a request for conciliation is made by either party; or

(b) 15 days after the day the parties are notified by the Chairperson under subsection 163(2) of his or her intention to recommend the establishment of a public interest commission.

(2) The Board may delay dealing with the application until it is satisfied that the employer and the bargaining agent have made every reasonable effort to amend the essential services agreement.

(3) The Board may, by order, amend the essential services agreement if it considers that the amendment is necessary for the employer to provide essential services.

(4) The order may not require the employer to change the level at which an essential service is to be provided to the public, or a segment of the public, at any time, including the extent to which and the frequency with which the service is to be provided.

(5) The Board may, for the purpose of identifying the number of positions that are necessary for the employer to provide an essential service, take into account that some employees in the bargaining unit may be required by the employer to perform their duties that relate to the provision of the essential service in a greater proportion during a strike than they do normally.

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

(a) *without regard to the availability of other persons to provide the essential service during a strike; and*

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

(7) If the application relates to a specific position to be identified in the essential services agreement, the employer's proposal in respect of the position is to prevail, unless the position is determined by the Board not to be of the type necessary for the employer to provide essential services.

128. *An amendment to an essential services agreement comes into force on the day the agreement containing the amendment is signed by the parties or, in the case of an amendment made by order of the Board under subsection 127(3), the day the order was made.*

129. *(1) If, at any time while an essential services agreement is in force, a position identified in it becomes vacant, the employer may identify a position of the same type as a replacement position. If the employer does so, the employer must file a notice of replacement with the Board and provide a copy to the bargaining agent.*

(2) On the filing of the notice, the replacement position is deemed to be a position identified in the essential services agreement and the position it replaced is deemed to be no longer identified.

130. *(1) The employer must provide every employee who occupies a position that has been identified in an essential services agreement as being a position that is necessary for the employer to provide essential services with a notice informing the employee that the employee occupies such a position.*

(2) A notice given under this section remains valid so long as the employee continues to occupy the position unless the employer notifies the employee that the position occupied by the employee is no longer necessary for the employer to provide essential services.

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

any time, apply to the Board for an order temporarily amending, or suspending, the agreement.

132. *Unless the parties otherwise agree, every term and condition of employment applicable to employees in a bargaining unit in respect of which a notice to bargain collectively is given that may be included in a collective agreement and that is in force on the day the notice is given remains in force in respect of any employee who occupies a position that is identified in an essential services agreement and must be observed by the employer, the bargaining agent for the bargaining unit and the employee until a collective agreement is entered into.*

133. *The Board may, on the application of either party, extend any period referred to in this Division.*

134. *Either party to an essential services agreement may file a copy of it with the Board. When filed, it has the same effect as an order of the Board.*

ANNEX B

[121] The following are provisions from the *PSSRA*, the legislation in place before April 1, 2005:

. . .

2. *(1) In this Act,*

. . .

"designated position" means a position that is designated pursuant to section 78.1, 78.2 or 78.4 and the designation of which has not been changed pursuant to section 78.4;

. . .

78. *(1) The Chairperson shall not, pursuant to a request under section 76 in respect of a bargaining unit, act under subsection 77(1) or (2) until the position of each employee in that bargaining unit, in accordance with section 78.1 or 78.2,*

*(*a*) has been designated as having duties consisting in whole or in part of duties the performance of which at any particular time or after any specified period is or will be necessary in the interest of the safety or security of the public; or*

*(*b*) has been determined as not having the duties described in paragraph (a).*

. . .

78.1 *(1) In this section and sections 78.2 to 78.4, "safety or security duties" means the duties described in paragraph 78(1)(*a*).*

. . .

(4) The parties shall, not later than three months before notice day, meet and review the position of each employee in the bargaining unit to determine if the position has safety or security duties.

(5) Where the parties determine that none of the positions have safety or security duties or that some do not, the employer shall, not later than two months before notice day, file a statement of the determination with the Board.

(6) Where the parties determine that some or all of the positions have safety or security duties, the employer shall, not later than two months before notice day, notify the Board of those positions and the Board shall designate those positions as having those duties.

(7) Where the parties disagree on whether any positions have safety or security duties, the employer shall, not later than two months before notice day, refer the positions in dispute to a designation review panel.

. . .

78.2 *(1) Where, after considering the recommendations of a designation review panel, the parties continue to disagree on whether any positions have safety or security duties, the employer shall, not later than notice day, refer the positions in dispute to the Board.*

(2) The Board shall review the positions in dispute and, after giving each party an opportunity to make representations, determine if the positions have safety or security duties.

(3) Where the Board determines that none of the positions in dispute have safety or security duties or that some do not, the Chairperson shall send a statement of the determination to the parties.

(4) Where the Board determines that some or all of the positions in dispute have safety or security duties, the Board shall designate those positions as having those duties and the Chairperson shall send a notice of the designation to the parties.

(5) Subject to section 78.4, a determination of the Board under subsection (3) or (4) is final and conclusive for all purposes of this Act.

. . .