Date: 20100819

File: 593-02-03

Citation: 2010 PSLRB 88

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

TREASURY BOARD

Respondent

With respect to the Program and Administrative Services Group

Indexed as
Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)

In the matter of an application for a determination on matters 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: Andrew Raven, counsel

For the Respondent: Caroline Engmann, counsel

Heard at Ottawa, Ontario, April 7 and 8, 2010, and based on supplementary written submissions dated May 31 and June 22 and 23, 2010.

I. Application before the Board

[1] In September 2007, the Public Service Alliance of Canada ("the applicant") filed four separate applications under subsection 123(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 ("the *Act*"), relating to matters that may be included in an essential services agreement (ESA) covering positions in the Program and Administrative Services (PA) Group for which the Treasury Board is the employer (hereafter "the respondent"). On December 5, 2007, the Chairperson of the Public Service Labour Relations Board ("the Board") consolidated all matters related to the ESA for the Program and Administrative Services Group under one file (PSLRB File No. 593-02-03).

[2] The Board has issued two decisions to date in this matter. In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55 ("the *Service Canada* decision"), the Board considered the services delivered by PM-01 Citizen Service Officers (CSOs) at Service Canada Centres. The Board issued an order, which reads in part as follows:

. . .

> ***V. Order***
>
> *[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.*
>
> *[111] The Board directs the respondent to determine the level at which the foregoing essential services will be delivered to the public in the event of a strike in accordance with section 120 of the* Act *and to so inform the applicant and the Board within 30 days of the date on which this decision is issued.*
>
> *[112] The Board further directs the parties to resume negotiations and to make every reasonable effort to negotiate the remaining content of the ESA regarding PM-01 Citizen Services Officer positions.*
>
> *[113] The Board remains seized of all other matters relating to PM-01 Citizen Services Officer positions at Service Canada Service Centres that may be included in the ESA and that are not resolved by the parties.*
>
> . . .

[3] In its second decision, *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 56, the Board declined to identify as essential any services performed by assistant bankruptcy analysts at the Office of the Superintendent of Bankruptcy Canada at Industry Canada.

[4] With respect to the Board's order at paragraph 111 of the *Service Canada* decision, the Board received a copy of a letter sent by the respondent to the applicant on June 22, 2009 (Exhibit R-1). The letter reads in part as follows:

> . . .
>
> *This refers to the* [Service Canada] *decision . . . in which the Board directs the Employer to establish the level at which the essential services listed in the decision will be delivered in the event of a strike.*
>
> *Essential services related to the payment or continuation of a payment under EI, OAS and CPP will be provided at the normal service delivery locations as follows:*
>
> - *Service Canada Centers* [*sic*] *(SCC's) will be opened for their regular hours of work;*
> - *Services in both official languages will continue in those SCC's designated as bilingual;*

> - *Small SCC's will be staffed at a minimum of three individuals during a strike.*
>
> *Based on national statistics, it has been determined that approximately 77% of CSOs' time is required to enable citizens to submit completed applications and documentation required to apply or continue EI, OAS and CPP benefits. The Employer is establishing the level of service at 100% of the 77% spent on the delivery of essential services. Despite the level of service established nationally, there will be opportunities to reduce the number of employees required during a strike when looking at individual service centres. . . .*
>
> . . .

[5] The applicant later wrote to the Board, requesting that it convene a case management conference to address a number of issues in dispute between the parties that had arisen in discussions held after the respondent determined the level of service at Service Canada Centres (Exhibit A-1).

[6] Due to scheduling conflicts, the Board was unable to convene a case management conference until February 24, 2010. In the interim, the Board scheduled a new hearing for April 7 to 9, 2010. The anticipated purpose of the hearing was to identify the types of PM-01 Citizen Services Officer positions at Service Canada Service Centres that are necessary for the respondent to provide the essential services identified in the *Service Canada* decision, the number of those positions that are necessary for that purpose and the specific positions that are necessary for that purpose.

[7] At the case management conference, the applicant provided the Board with a copy of a disclosure request, dated February 16, 2010, sent to the respondent (Exhibit A-2). The request read in part as follows:

> . . .
>
> 1. *It is our understanding that following the Board's decision of April 28, 2009 . . . the employer established a level of service at 100% of the 77% spent on the delivery of the identified essential services. We would appreciate receipt of all documentation including reports and analyses respecting the employer's decision to set the level of service at 100% for delivery of these services. We would also appreciate particulars of the process adopted by the employer to reach this decision, including the date that that decision was made.*

> 2. *In our letter to you of January 19, 2010, we requested a copy of the "time and motion study" undertaken by the employer, including all supporting documentation which was used in conjunction with the study. The two page attachment to your letter of February 5, 2010 dealing with the time and motion study appears to be a summary document prepared in response to our January 19, 2010 request. However, while we appreciate receipt of this summary document, we have not been provided with the actual time and motion study itself including the supporting documentation which was used in conjunction with it. Accordingly, we repeat our request for all of the material associated with the time and motion study including the actual study itself.*
>
> . . .

[8] The respondent replied as follows on February 22, 2010 (Exhibit R-2):

> . . .
>
> *As you are well aware, section 120 of the* Public Service Labour Relations Act *gives the Employer the exclusive right to determine the level of service. It is our position that we are under no obligation to provide you with information regarding the establishment of the level of service.*
>
> *Once you provide the Employer with the specific areas of dispute as requested in our previous correspondence, it will then be in a better position to assess what further information we can provide, if any.*
>
> . . .

[9] After confirming the nature of the dispute between the parties at the case management conference, the Board provided directions to the parties for the hearing scheduled for April 7 to 9, 2010, as follows:

> . . .
>
> *. . . As a result of the pre-hearing conference, the Board has identified preliminary matters that it must determine.*
>
> *The bargaining agent has requested disclosure by the employer as follows:*
>
> *". . . all documentation including reports and analyses respecting the employer's decision to set the level of service at 100% for delivery of these services. . . . [and] particulars of the process adopted by the employer to reach this decision, including the date that that decision was made."*

> *The employer has taken the position that it is ". . . under no obligation to provide . . . information regarding the establishment of the level of service."*
>
> *The Board has decided to use the scheduled hearing to consider submissions from the parties on the following questions:*
>
> *1. Is the bargaining agent requesting information that is arguably relevant to a determination that the Board has the jurisdiction to make under the* Public Service Labour Relations Act*?*
>
> *2. For greater certainty, does the Board have the jurisdiction to consider whether the employer complied with the* Act *in determining the level at which the essential services identified in* Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55, are to be provided to the public?*
>
> . . .

[10] The Board also indicated to the parties that it would ". . . entertain at the hearing any other outstanding disclosure request."

[11] The hearing was held on April 7 and 8, 2010, and the parties made submissions on the two questions identified in paragraph 9 of this decision, as directed. Subsequent to the hearing, the Board sought further written submissions from the parties. On my direction, the Registry of the Board wrote to the parties on April 16, 2010 as follows:

> . . .
>
> *The Board has determined that further submissions from the parties may assist it in determining its jurisdiction.*
>
> *The applicant has relied, in part, on section 36 of the* Public Service Labour Relations Act *("the* Act*") to support its contention that the Board has the authority ". . . to ensure that the employer has properly exercised its discretion . . . " under section 120 of the* Act*.*
>
> *Section 36 provides that the Board ". . . may exercise the powers and perform the functions . . . as are incidental to the attainment of the objects of this* Act *. . ."*
>
> *The Board seeks further written submissions from the parties on the following question:*

> ***In light of the objects of the*** **Act*****, are the Board's powers under section 36 sufficiently broad to give it the jurisdiction to inquire into the way in which the respondent has exercised its "exclusive right" to determine the level of service under section 120?***
>
> *The Board's request should not be taken in any way to indicate that it has decided that the respondent's determination of the level of service under section 120 of the* Act *is subject to any form of review. The Board is continuing to consider that issue on the basis of the submissions already made by the parties. The purpose of this request is specifically focused on the extent and nature of the Board's authority under section 36 of the* Act*. The Board believes that it may benefit from the more detailed submissions of the parties on that subject.*
>
> . . .
>
> [Emphasis in the original]

[12] This decision is confined to the preliminary matters identified earlier in the preceding paragraphs.

II. Summary of the arguments

[13] I admitted four exhibits on consent. The parties concurred that there was no need to adduce oral evidence. The hearing proceeded directly to their arguments on the preliminary matters.

[14] Both parties presented written submissions at the hearing and supplemented those submissions with further oral arguments. For each party in turn, the following summary condenses the written submissions and then reports the additional oral submissions that I have found most relevant. I also summarize separately the parties' written submissions on the question concerning section 36 of the *Act* posed by the Board after the hearing.

A. For the applicant

1. Written arguments

[15] The applicant maintains that the information the disclosure of which it seeks is arguably relevant to a matter within the Board's jurisdiction. As part of its jurisdiction to administer the *Act* and, in particular, under sections 36 and 123, the Board maintains the authority to ensure that the parties satisfy their obligations under the

legislation. With respect to section 120, the Board cannot dictate to the respondent the outcome of the exercise of its discretion with respect to the level of service at which essential services will be provided. However, the Board must ensure that the respondent exercises its discretion on the particular facts before it, and that it does not otherwise abuse its discretion by entertaining irrelevant considerations or by failing to take into account relevant considerations. The information requested by the applicant is directly related to those questions and, as such, must be disclosed.

[16] As identified by the Board, the test for disclosure is arguable relevance. Paragraph 40(1)(*h*) of the *Act* stipulates that the Board may ". . . compel at any stage of a proceeding . . ." the production of any document that "may be relevant" to the proceedings before it.

[17] The Board has applied the arguable relevance test in a number of recent decisions, noting that the threshold for the disclosure of documents is lower than that for the admissibility of evidence. Disclosure is an issue to be decided before arguments are made about the relevance of documents and the weight to be given to them; see, for instance, *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 103, at para 45, and *Bratrud v. Office of the Superintendent of Financial Institutions Canada*, 2004 PSSRB 10, at para 103. The "arguable relevance" threshold has also been applied by other labour relations boards, for example, by the Canada Industrial Relations Board in *Air Canada (Re)*, [1999] CIRB No. 3, at para 28, and by the Ontario Labour Relations Board in *Mancinelli*, [2010] O.L.R.D. No. 590 (QL).

[18] The applicant acknowledges that section 120 of the *Act* gives the respondent the discretion to determine the level at which an essential service is provided to the public. However, it is well established that unlimited discretion cannot exist. Even the broadest statutory grant of discretion is subject to certain limitations. In the present context, the applicant maintains that the respondent, as a delegate of statutory authority, was required to exercise its discretion to set the level of service after considering the particular circumstances of the case, taking into account the purpose of the essential services provisions of the *Act*. A failure to do so would vitiate the respondent's purported exercise of discretion and would require that the Board ensure that the respondent complies with its obligations: D. Jones and A. de Villars, *Principles of Administrative Law,* 5th ed., Carswell (hereafter "*Jones and de Villars*"), at page 174.

[19] Canadian law has established that even seemingly unlimited grants of discretion are constrained by administrative law principles designed to avoid abuses of that discretion. *Jones and de Villars* groups the limits on discretionary authority into the following five general categories: (1) improper intention in exercising a discretionary power for an unauthorized or ulterior purpose, in bad faith, or for irrelevant considerations; (2) acting on inadequate material where there is no evidence or by ignoring relevant considerations; (3) exercising discretionary power so as to obtain an improper result, which may be unreasonable, discriminatory, retroactive or uncertain in operation; (4) exercising discretionary power under a misapprehension of the law; and (5) fettering the exercise of discretion by adopting a policy or entering into a contract.

[20] Each of the foregoing categories represents a set of principles that, if violated, vitiates the delegated decision maker's exercise of discretion. For instance, Canadian courts have long held that an individual exercising a statutory grant of discretion cannot do so for an unauthorized purpose, in bad faith or based on irrelevant considerations. In its landmark ruling in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, the Supreme Court of Canada explained the limited nature of discretion as follows:

. . .

> *In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. . . .*

. . .

[21] The categories of abuses of discretion outlined earlier are relevant to this case. For instance, acting on inadequate material, or failing to entertain relevant considerations, will violate the grant of statutory discretion. To that end, *Jones and de Villars* explains at page 189 that relevant considerations may include factors that

are not explicitly set out in the legislation. Furthermore, it is well established that a delegated decision maker cannot fetter its discretion; it must exercise it. *Jones and de Villars* explains as follows at page 198:

. . .

> *The existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in each case. Each case must be looked at individually, on its own merits.*

. . .

W. Wade and C. Forsyth, *Administrative Law*, 8th ed. ("*Wade and Forsyth*"), at page 328, confirms the same principle as follows:

. . .

> *It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.*

See also *Lloyd v. British Columbia (Superintendent of Motor Vehicles)*, [1971] B.C.J. No. 675 (QL).

[22] To illustrate the application of the principle, the applicant cited the limits that were placed on the exercise of discretion under the former *Public Service Employment Act*, ("the former *PSEA*") R.S.C., 1985, c. P-33. Prior to amendments made in 1993, the former *PSEA* granted the Public Service Commission (PSC) broad discretion to determine whether an individual could appeal an appointment stemming from a closed competition. In particular, paragraph 21(*b*) restricted the right to file a complaint to persons ". . . whose opportunity for advancement, in the opinion of the Commission, [had] been prejudicially affected." Despite the broad statutory discretion given to the PSC, the Federal Court repeatedly held that the PSC could not fetter its discretion or base its opinion on irrelevant considerations; see *Canada (Attorney General) v. Canada (Public Service Commission, Appeals and Investigations Branch, Chairman),* [1984] F.C.J. No. 1014 (C.A.)(QL), and *Yergeau v. Public Service Commission Appeal Board*, [1978] 2 F.C. 129 (C.A.).

[23] Furthermore, the Supreme Court has consistently held that a delegate may not exercise its statutory authority in an arbitrary manner. In *Dunsmuir v. New Brunswick,*

2008 SCC 9, at para 104, the Supreme Court confirmed that ". . . public law is rightly concerned with preventing the arbitrary exercise of delegated powers . . ." The Supreme Court affirmed the principle that public bodies with powers derived from statute must exercise those powers according to the rules of administrative law as set out in its earlier decision, *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

[24] The exercise of discretionary power can also give rise to procedural fairness issues. In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Supreme Court dealt with a case in which the head of a penitentiary had the discretion to disassociate inmates if the head was "satisfied" that it was necessary for the maintenance of good order in the institution or it was in the best interests of the inmate. The Supreme Court held at paragraph 21 that, due to the serious effect the decision would have, procedural fairness required that the head of the penitentiary inform the inmates of the reasons for his or her decision and that he or she give them an opportunity to make representations.

[25] Similarly, it is well established that the discretionary decisions of the Canadian Human Rights Commission as to whether to extend the time for a complainant to file a human rights complaint are subject to the principles of administrative law. For instance, that Commission must consider each request on its own merits and must take into account all relevant considerations put before it: *Richard v. Canada (Treasury Board)*, 2008 FC 789, at para 9, 16 and 17.

[26] The administrative law principles just surveyed apply to Parliament's decision to delegate discretion to the respondent under the *Act*. By stating in section 120 that the respondent has the right to determine ". . . the level at which an essential service is to be provided . . ." [emphasis added], the legislator made clear its intent that the respondent must exercise its discretion with respect to the facts of each case. Section 120 must also be read in light of the broader legislative regime that seeks to protect a meaningful right to strike for employees limited only to the extent necessary to maintain the safety and security of the public.

[27] In administering the *Act*, the Board has the responsibility to ensure that the respondent satisfies its obligation to determine the level of service under section 120. Where the respondent commits an abuse of authority in that determination, such as failing to exercise its discretion with respect to the particular circumstances before it,

its decision is vitiated, and it must properly determine the level at which the essential service will be provided.

[28] The Board's authority to determine issues related to the provision of essential services is derived from section 123 of the *Act*. Subsection 123(3) provides the Board with the authority to determine any matter on which the parties have not agreed that can be included in an ESA. Subsection 123(4) restricts this authority such that the Board's 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."

[29] The express restriction outlined in subsection 123(4) of the *Act* highlights the breadth of the authority otherwise granted to the Board by subsection 123(3). As with its authority to otherwise administer the essential services provisions of the *Act*, including its authority to order the respondent to determine level of service by a particular date and its authority to define the essential service in question, the Board maintains the jurisdiction to ensure that the respondent's exercise of its discretion is lawful and not an abuse of its authority.

[30] A failure by the respondent to exercise its discretion with respect to the particular facts before it is equivalent to it refusing to exercise that discretion. In either case, the Board maintains the authority to ensure that the respondent meets its obligations as set out in the essential services provisions of the *Act*. The Board's authority to make such orders as are incidental to the attainment of the objects of the *Act* is confirmed by section 36, which reads as follows:

> ***36.*** *The Board administers this* Act *and it may exercise the powers and perform the functions that are conferred or imposed on it by this* Act*, or as are incidental to the attainment of the objects of this* Act*, including the making of orders requiring compliance with this* Act*, regulations made under it or decisions made in respect of a matter coming before the Board.*

[31] The Board has recently confirmed that its authority under sections 36 and 40 of the *Act* must be interpreted in a manner that is consistent with the legislative scheme as a whole, including implicit grants of authority that are necessary for the realization of the statute's purposes; *Quadrini v. Canada Revenue Agency and Hillier*,

2009 PSLRB 104, at para 84 and 90. In this case, the Board's authority necessarily includes ensuring that the respondent has properly exercised its discretion under section 120 of the *Act.*

[32] In summary, the *Act* provides the Board with discretion to administer the *Act* and to make such rulings as are incidental to its purposes. While the Board cannot dictate the precise outcome of the respondent's decision about the level at which an essential service is to be provided, it is authorized to ensure that the respondent has turned its mind to the issues in the particular case before it and that it has taken into account the necessary considerations. In this case, documents and other evidence about the particulars of the respondent's decision to set the level of service at 100% are arguably relevant to whether it has appropriately exercised its discretion on the facts before it. As such, those documents must be disclosed.

2. Further oral submissions

[33] According to the applicant, the Board has made the point that its identification of essential services is a relevant consideration that the respondent must take into account when it sets the level of service: *Service Canada* decision, at para 76. That point opens the question of whether the respondent has exercised its prerogative under section 120 of the *Act* taking into consideration how the Board defined essential services at paragraph 110 of the *Service Canada* decision.

[34] When it exercises its authority under section 120 of the *Act*, it is also important that the respondent appreciate the balance that the Board has emphasized between safeguarding the public interest and protecting the right to strike, beginning with its decision in *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97 ("the *Parks* decision"), at para 151. That balance cannot be thwarted by the respondent determining the level of service in bad faith, based on irrelevant considerations or by not exercising its discretion. For example, applying a fixed rule when setting the level of service would have the effect of fettering the respondent's discretion. If the respondent's determination that essential services will be maintained at a 100% level is the product of a policy or an iron-clad rule that does not account for the specific facts of the case, then that determination is a sham.

[35] Parliament has made clear in section 36 of the *Act* that the Board administers the *Act*, not the courts. The Board's exercise of its authority under section 123 to make

decisions about the content of an ESA must be read broadly, in light of section 36. The applicant contends that subsection 123(2), which reads as follows, places both parties under an obligation to act in good faith:

> ***123.*** *(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.*

While the Board is enjoined from requiring "*. . .* the employer to change the level at which an essential service is to be provided to the public . . ." by subsection 123(4), its obligation to ensure the good-faith administration of the essential services features of the *Act* remains, and it may make orders requiring compliance with those aspects of the *Act* as necessary.

[36] Were the Board to find circumstances of the nature described in *Jones and de Villars* that call into question the respondent's exercise of its discretion under section 120 of the *Act*, the Board could not change the level of service determined by the respondent — it clearly may not dictate the results. Instead, it could issue a finding that the respondent's exercise of discretion under section 120 was tainted (for example, by bad faith, or fettered by the application of a policy), declare that the respondent's determination is a nullity and require it to determine the level of service again. The Board's role is to supervise the process by which the respondent uses its discretion and to ensure that that discretion is exercised in light of the objects of the *Act*.

[37] To be clear, section 120 of the *Act* says nothing to the effect that the respondent can exercise its authority contrary to law. It does not allow the respondent to use its discretion in any manner. The rule of law requires that any statutory authority must be exercised in good faith and in a fashion that comports with the objects of the legislation.

[38] In summary, the applicant submitted that anything integral to completing the ESA process is properly before the Board under section 123 of the *Act* and is subject to the residual authority of the Board under section 36. How the respondent exercised its discretion under section 120 is ". . . incidental to the attainment of the objects of [the] Act . . ." within the meaning of section 36. The applicant has the right to be satisfied that the respondent exercised its discretion in good faith and for a proper purpose. It

asked how it could be inconsistent with the underlying objectives of the *Act* for the applicant to be denied access to information about that exercise of discretion?

[39] In response to a question from the Board about the meaning and importance of the words "exclusive right" in section 120 of the *Act*, the applicant returned to the example of the PSC's discretionary authority under the former *PSEA*. It pointed out that section 8 of the former *PSEA* gave the PSC ". . . the exclusive right and authority to make appointments to or from within the Public Service . . . ." In *Ethier v. Canada (Royal Canadian Mounted Police (RCMP) Commissioner)*, [1992] 1 F.C. 109 (T.D.), the Federal Court stated the following at pages 11 and 13:

. . .

> *Despite the fact that the statute appears to grant the Commission the discretion to make decisions as to whether to recruit from without or within, it is clear that in decisions such as these that may be considered administrative in nature, the decision-maker owes a duty of procedural fairness in certain situations:* Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, *[1979] 1 S.C.R. 311. This duty is derived from the fact that the decision-makers are public bodies which derive their power from statute, and which power, therefore, must be exercised in accordance with the precepts of administrative law.*
>
> . . .
>
> *It is clear law that the discretion vested in the Public Service Commission by section 8 and 11 of the Act is not absolute, and must be exercised reasonably and in good faith, taking into account relevant considerations: see* Slaight Communications Inc. v. Davidson, *[1989] 1 S.C.R. 1038 at 1076;* Padfield v. Minister of Agriculture, Fisheries and Food, *[1968] A.C. 997 (H.L.).*
>
> . . .

(The applicant also provided the Federal Court of Appeal's decision in *Ethier v. Canada (Royal Canadian Mounted Police (RCMP) Commissioner)*, [1993] 2 F.C. 659 (C.A.).

3. Section 36 of the *Act*

[40] The applicant maintains that section 36 of the *Act* provides the Board with sufficient powers to inquire into how the respondent exercised its authority to determine the level of service. Section 36 has been interpreted in a broad manner to

ensure that the administration of the federal public service labour relations regime is consistent with Parliament's intent and with the objects of the *Act*. In the context of this case, the objects of the *Act* require the protection of a meaningful right to strike and the promotion of an effective collective bargaining process. Those objects confirm the importance of the Board's role in ensuring that the essential services provisions of the *Act* are properly administered, including that the respondent's exercise of its discretion under section 120 conforms to the obligations placed on all delegates of statutory authority.

[41] In addition to the broad array of powers granted to the Board elsewhere under the *Act*, section 36 provides it with significant residual authority to exercise any powers, or perform any functions, which are incidental to the objects of the *Act*. That residual authority is consistent with the Supreme Court's recognition in *Vaughan v. Canada*, 2005 SCC 11, at para 13, 16 and 17, that the *Public Service Staff Relations Act* ("the former *Act*") established a comprehensive regime to address labour relations disputes in the federal public service. Although *Vaughan* was rendered in the context of a grievance adjudication under the former *Act*, its conclusion applies equally to all aspects of the current legislation, including essential services. As such, section 36 must be interpreted in light of Parliament's intent that all aspects of the essential services framework of the *Act* be dealt with by the Board.

[42] The Board and the federal courts have repeatedly affirmed the Board's residual authority to take such action as is necessary to ensure that the *Act* is administered in conformance with its objects and with its broader scheme.

[43] In *Canada v. PIPSC*, [1980] 2 F.C. 295 (C.A.), the Federal Court of Appeal upheld the Board's authority to determine whether particular individuals were properly designated as being employed in a managerial or confidential capacity despite the employer's argument that those individuals were automatically designated under paragraphs (a) and (b) of the definition of "person employed in a managerial or confidential capacity" in the former *Act.* The Federal Court of Appeal relied on the Board's authority to exercise such powers as were incidental to the attainment of the objects of the former *Act* to rule that the Board's exercise of the disputed authority was reasonably necessary to the proper administration of the former *Act*.

[44] In *Canadian Air Traffic Control Association v. The Queen in right of Canada as represented by the Treasury Board*, [1985] 2 F.C. 84 (C.A.) at 5, the Federal Court of

Appeal concluded that the absence of an express provision in the former *Act* imposing a duty of fair representation on bargaining agents did not prevent the Board from supervising a bargaining agent's conduct in that respect. The Board had held that the existence of a duty of fair representation was consistent with the scheme of the former *Act.*

[45] In *Canada (Attorney General) v. O'Leary*, 2008 FC 212, at para 8-11, 13, 14 and 17, the Federal Court upheld a decision of an adjudicator under the former *Act* to order the reinstatement of a grievor to his former position and to order compensation for all lost earnings and benefits. The Attorney General had argued that the adjudicator's decision effectively amounted to an order of appointment, which was an exclusive authority given to the PSC under the former *PSEA*. In dismissing the application for judicial review, the Court relied on the Board's authority to make such orders as are incidental to the attainment of the objects of the legislation, ruling that this ". . . generous grant of remedial authority . . ." reflected Parliament's intent to construct effective and case-specific remedies.

[46] In *Quadrini*, at para 84 and 90, the respondent challenged the Board's authority to satisfy itself that a document was subject to solicitor-client privilege. The Board found that its authority under sections 36 and 40 of the *Act* must be interpreted in a manner that is consistent with the legislative scheme as a whole, including implicit grants of authority that are necessary for the realization of the statute's purpose. Accordingly, the Board held that the absence of a provision explicitly granting it the authority to satisfy itself that a document was subject to solicitor-client privilege did not prevent it from reviewing the documents in question for that purpose. (*Quadrini* is currently under judicial review.)

[47] In *Rostrust Investments Inc. v. Canadian Union of Public Employees, Local 4266-05, et al.*, 2005 PSSRB 1, at para 16, the Board noted that a general powers provision cannot be relied on to grant it a power that is already addressed by a specific provision in the legislation. In that case, a former employer sought to import a novel definition of employer into the former *Act,* despite the fact that it already contained a clear definition of that term. In this case, nothing in the *Act* expressly addresses the obligations imposed on delegates of statutory authority under Division 8 or any other part of the *Act.*

[48] The applicant also referred me to two decisions under the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.)(*PESRA*), involving the Board's exercise of its residual authority: *Beaulne v. Public Service Alliance of Canada*, 2009 PSLRB 10, at para 277 and *House of Commons Security Services Employees Assn. v. House of Commons of Canada*, PSSRB File Nos. 447-HC-3 and 469-HC-9 (19960708).

[49] According to the applicant, the decisions that it cited demonstrate that section 36 of the *Act*, like comparable provisions in the former *Act* and in the *PESRA*, has been liberally interpreted to provide the Board with the broad authority to administer the *Act* in a manner that promotes the object and purpose of the legislation. That authority allows the Board to inquire into matters otherwise dealt with by the statute or reserved for the employer's determination, provided the Board does not usurp a statutory grant of authority. In the *Canadian Air Traffic Control Assn. v. Canada (Treasury Board)*, [1982] 1 S.C.R. 696 ("the *CATCA* decision), and *Beaulne*, the Board went so far as to use its residual powers to establish a substantive right, the duty of fair representation. In this case, the substantive rights claimed by the applicant, which involve restrictions on how all delegates of statutory authority exercise their discretion, exist by virtue of common law. As such, the applicant relies on section 36 only to implement the respondent's already existing obligations.

[50] The objects of the *Act* include the establishment of an effective collective bargaining regime that maintains the mutual confidence and respect of the parties. The preamble to the *Act* recognizes the importance of collective bargaining as a vehicle to ensure ". . . the expression of diverse views for the purpose of establishing terms and conditions of employment . . . ." Those legislative objectives go hand in hand with ensuring that the parties are able to meaningfully employ the mechanisms provided in the *Act*, such as the right to strike.

[51] If the Board fails to ensure that the respondent does not abuse its authority in setting the level of service, it would call into question the integrity of the essential services regime and, by extension, the collective bargaining system established under the *Act*. The importance of maintaining an effective right to strike requires that the Board ensure that the respondent set the level of service in good faith, exercising its discretion only after having turned its mind to the particular circumstances of the situation.

[52] Moreover, allowing the respondent to behave in an arbitrary manner by limiting the right to strike would undermine the balancing act intended to be maintained between the right of employees to strike and the need to maintain services necessary for the safety and security of the public; see the *Parks* decision, at paragraphs 150-153. In particular, a decision by the respondent to arbitrarily set the level of service at 100%, without considering the specific circumstances before it, could significantly curtail the effectiveness of the employees' strike rights. As for the objects of the *Act,* section 36 provides the Board with the jurisdiction to inquire into how the respondent exercises its discretion under section 120, ensuring that any concerns about the exercise of that discretion are dealt with in an efficient and expeditious manner.

[53] That Parliament granted an "exclusive right" to the employer to make the determination under section 120 of the *Act* does not alter the analysis. In *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529 , at para 37-38, the Federal Court held that the Board had the jurisdiction to look behind a claim by the employer that a termination during the probationary period was employment related. Subsection 92(3) of the former *Act* prohibited ". . . the referral to adjudication of a grievance with respect to a termination of employment under the *Public Service Employment Act*." Despite the protection accorded the employer's exclusive authority to terminate employment during a probationary period, the employer was required to lead evidence to demonstrate that it had an "employment-related" reason for its decision so as to bring the termination within the scope of the former *PSEA*. The burden would then have shifted to the grievor to show bad faith, a "sham" or a "camouflage"; see *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72, at para 105-108 (upheld in 2007 FC 389 and 2008 FCA 61).

[54] In this case, the applicant does not call for a review of the merits of the respondent's decision on the appropriate level of service. It merely seeks to require that the respondent demonstrate that it exercised its authority under section 120 of the *Act* in a manner that satisfies the common law obligations imposed on all delegates of statutory authority; that is, in a good faith manner with attention to the broader objects of the statutory scheme and with respect to the particular facts before it. As in *Leonarduzzi*, evidence satisfying those basic requirements is required to bring the respondent's decision within the scope of the exclusive right granted by section 120.

[55] In summary, ensuring that the respondent's exercise of its discretion does not violate its common law obligations is clearly in line with the objects of the *Act*, given the central role that the determination of the level of service plays in the analytical path set out by the Board in the *Parks Canada* decision. That authority allows the Board to ensure that the essential services features of the *Act* are properly administered and implemented, much as the jurisprudence presented by the applicant demonstrates that the Board may exercise the same authority for other provisions in the *Act*. Indeed, the Board's authority to inquire into the respondent's exercise of its authority under section 120 is analogous to its authority to compel the respondent to exercise its discretion and identify the level of service at which the essential service will be performed, if it refuses to.

B. For the respondent

1. Written submissions

[56] On September 29, 2009, the applicant informed the respondent that the latter party, in the applicant's view, had failed to satisfactorily explain its proposals identifying the CSOs required to provide essential services (Exhibit A-1). The applicant requested that the Board intervene, but it failed to specify its concerns. At a meeting on January 7, 2010, the respondent provided further explanation and documentation to the applicant about the respondent's methodology for determining the number of proposed CSO positions. Again, the applicant did not specify the respondent's proposals that it disputed. To date, the applicant has not provided that information. Instead, it has sought an order of disclosure from the Board with respect to the respondent's determination of the level of service under section 120 of the *Act* (Exhibit A-2).

[57] The respondent respectfully submits that the Board must determine the following issues: (1) Does the Board have jurisdiction in the context of an application made under section 123 of the *Act* to inquire into the exercise by the respondent of its statutory grant of authority under section 120? (2) Is the information requested by the applicant arguably relevant to ". . . any unresolved matter that may be included in an essential services agreement"? and (3) Does the Board have the jurisdiction to consider whether the respondent complied with the *Act* in determining the level at which the essential services identified in the *Service Canada* decision are to be provided to the public?

[58] The statutory scheme in Division 8 of the *Act* confers on the respondent the ". . . exclusive right to determine the level at which an essential service is to be provided . . ." and ". . . [n]othing in [the statutory regime] is to be construed as limiting that right." Based on pure administrative law and statutory interpretation principles, the Board has no supervisory jurisdiction over the respondent in the exercise of that statutory grant of authority.

[59] The Board's substantive grant of authority, derived from section 123 of the *Act*, is to ". . . determine any unresolved matter that may be included in an essential services agreement." That grant of jurisdiction is not open ended. The Board must only decide "matters" that may be included in an ESA. An ESA is a statutorily mandated agreement that must be concluded by the respondent and the applicant. It identifies the types of positions in the bargaining unit that are necessary for the respondent to provide essential services, the number of those positions that are necessary for that purpose and the specific positions that are necessary for that purpose. The respondent's determination pursuant to section 120 to continue to provide certain essential services to the public at a certain level is not a matter that forms part of an ESA. Therefore, it does not fall within the jurisdiction of the Board. As an administrative tribunal, the Board is a statutory creation that cannot exceed the powers granted by its constituent statute.

[60] As the Board may not consider whether the respondent complied with the *Act* when it determined the level at which the essential services performed by incumbents of the PM-01 Citizen Service Officer positions at Service Canada are to be provided to the public in the event of a strike, the Board has no jurisdiction to require the respondent to provide information to the applicant relating to that determination. The information for which the applicant seeks disclosure is not relevant to a matter over which the Board has jurisdiction. Therefore, the respondent requests that the Board dismiss the applicant's request for disclosure.

[61] The respondent submits that the relevant statutory regime for the Board to interpret includes the following provisions of the *Financial Administration Act* (*FAA*), R.S.C. 1985, c. F-11:

> ***7.*** *(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to*
>
> . . .

> (b) *the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein;*
>
> . . .
>
> (e) *human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it;*
>
> . . .
>
> ***11.1*** *(1) In the exercise of its human resources management responsibilities under paragraph 7(1)*(e)*, the Treasury Board may*
>
> (a) *determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;*

In addition to subsection 4(1) and section 120, subsections 123(1) to (4) and 127(4) of the *Act*, the respondent referred me to sections 6 and 7, which read as follows:

> ***6.*** *Nothing in this* Act *is to be construed as affecting the right or authority of the Treasury Board under paragraph 7(1)(b) of the* Financial Administration Act.
>
> ***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.*

[62] The modern principle of statutory interpretation requires that the words of the provisions in question must ". . . 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"; *Sullivan on the Construction of Statutes*, 5th ed., LexisNexis Canada Inc., chapter 1 ("*Sullivan*") and *Bell Express-Vu Limited Partnership v. Rex,* 2002 SCC 42, at para 26. See also *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4 ("*ATCO*"), at para 37 and 48. The Supreme Court has instructed that a textual and purposive analysis may also be of

assistance in applying the modern principle of statutory interpretation: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at para 10.

[63] The root of the statutory grant of authority in section 120 of the *Act* traces first to sections 7 and 11.1 of the *FAA* and then to sections 6 and 7 of the *Act*. Read purposively and contextually, those provisions dictate that the respondent's authority to determine the level at which essential services will be delivered to the public is exclusive and is not subject to negotiation between the parties or to a review by the Board. Under the *FAA*, the Treasury Board as the employer is given the authority to act for the Queen's Privy Council on all matters relating to the organization of the federal public administration and the determination and control of establishments therein as well as human resources management, including the effective allocation and utilization of those resources. The statutory scheme under the *Act* similarly reserves such authority to the employer in sections 6 and 7. Those management rights provisions have been described as the "exclusive" and "untouchable prerogatives" of the employer; see *Chong v. Canada (Treasury Board)*, [1997] F.C.J. No. 832 (T.D.)(QL) (for "exclusive") and *P.S.A.C. v. Canada (Treasury Board)*, [1987] F.C.J. No. 240 (C.A.)(QL) (for "untouchable prerogative").

[64] Establishing the level of service for the provision of essential services is an intrinsic aspect of management rights reserved to the respondent, as confirmed by the Supreme Court in the *CATCA* decision. Through the *Act*, Parliament codified the rationale for the *CATCA* decision.

[65] The grammatical and ordinary sense of the words "exclusive right" used by Parliament in section 120 of the *Act* clearly dictate that the authority to determine the level of service was meant to be reserved only to the respondent. The "right" granted is exclusive to the respondent, to be exercised by it alone to the exclusion of all others. Parliament indicated only that the respondent's determination includes ". . . the extent to which and the frequency with which the service is to be provided." Parliament further stressed the exclusive nature of the respondent's power by stipulating that "[n]othing in this Division is to be construed as limiting that right."

[66] For further emphasis and clarity, Parliament stipulated in subsection 123(4) of the *Act* that the Board may not order the employer to change the level of service. The level of service is not an authorized area of inquiry for the Board.

[67] Subsection 123(3) of the *Act* gives the Board the authority to determine "any matter" that the parties have not agreed on and that may be included in an ESA. The words "any matter" pertain only to those matters that may be included in an ESA under subsection 4(1) which provides an exhaustive list of its contents. "Level of service" is not one of the items listed.

[68] When read together in their ordinary and grammatical sense, the provisions of the *Act* lead inexorably to the conclusion that the level of service is not one of the matters that the Board may determine under section 123(3). That interpretation conforms with a purposive and harmonious reading of the *Act*. Any other interpretation would defeat or undermine its purpose. S*ullivan* notes the following at page 255:

. . .

> *. . . the purposive analysis considers, in so far as the language of the text permits, that interpretations that are consistent with or promote legislative purpose should be adopted; interpretations that defeat or undermine legislative purpose should be avoided.*

. . .

[69] The purpose of the *Act* as a whole and Division 8 in particular are best fostered by an interpretation that preserves the respondent's exclusive prerogative under section 120. The *Act*, and, in particular, Division 8, is clearly public-policy legislation that establishes a carefully balanced and calibrated scheme to promote the legitimate exercise of collective bargaining rights by public servants while at the same time protecting the broader public interest in the provision of essential services. This is reflected in the preamble, which reads in part as follows:

. . .

> *Recognizing that the public service labour-management regime must operate in a context where protection of the public interest is paramount . . . .*
>
> . . .
>
> [Emphasis added]

In this instance, the interest that is engaged is the public interest in ensuring that essential services are maintained during a strike — an integral part of the respondent's prerogative.

[70] In the *Parks* decision, the Board agreed that the public interest is paramount. It recognized that section 120 of the *Act* assigns to the respondent the public-interest decision of setting the level of service. The Board cautioned that the respondent's determination of the level of service ought not serve as a surrogate for the Board's first-order determination defining essential services; see paragraph 190. That risk does not arise in this case. The Board has already made the first-order determination.

[71] Parliament did not intend that the level of service be a matter to be resolved between the parties. Parliament specifically anticipated that the parties would instead resolve the positions necessary for the provision of essential services and the number of those positions, as indicated in section 122 of the *Act*. Even for those matters, Parliament saw fit to protect the respondent's exclusive prerogative by providing that the respondent is not required to change the manner in which it normally operates, including the hours of work and the equipment used in its operations; see section 121.

[72] The information requested by the applicant is not relevant to a question to be decided by the Board because, *inter alia*, the *Act* stipulates that the Board may not require the respondent to change the level of service. If the Board were to order the provision of documents relating to the determination of the level of service, it would be acting beyond the jurisdiction conferred upon it by Parliament.

[73] The respondent summarized its position as follows:

. . .

- *Section 120 gives the employer the exclusive right to determine the level at which an essential service is to be provided, including the extent to which and frequency with which the service is to be provided.*

- *Within the context of and for purposes of the* [Act]*, not only is it an employer right, Parliament has stipulated that this right is exclusive to the employer.*

- *Nothing in Division 8 is to be construed as limiting that right. This direction applies whether in relation to the obligation of the parties to reach an ESA or in relation to the Board's jurisdiction regarding an ESA.*

- *Under subsection 123(4), Parliament has expressly prohibited the Board from being able to require the employer to change the level of service.*

- *The employer's determination of the level of service in the exercise of its "exclusive right" under section 120 of the* [Act] *is not a matter within the jurisdiction of the Board.*

- *As the Board has no jurisdiction, there is no basis to consider the Bargaining Agent's request for information regarding the level of service. It is simply irrelevant to the subject matter before the Board. The Bargaining Agent's request is for something which on the face of the* [Act] *the Board does not have the power to review.*

- *The Board's broader jurisdiction under clause 40(1)(*h*) is not engaged in this instance. The jurisdiction under this clause is to compel the production of documents in relation to any matter before it and at any stage of a proceeding. It stands to reason that the Board can only compel production of documents in respect of a matter that is properly within the Board's jurisdiction. The Employer's determination of the level of service is not such a matter.*

2. <u>Further oral submissions</u>

[74] Nothing in section 120 of the *Act* establishes a process that the respondent must follow in determining the level of service. Section 120 states only that the respondent will determine the extent to which and the frequency with which essential services are to be provided. Through its letter of June 22, 2009 (Exhibit R-1), the respondent met that requirement. The respondent takes the position that the letter provided sufficient information. The respondent was not required to explain further, but it did provide further information to the applicant.

[75] The Board's authority under section 36 of the *Act* must be read in the context of the entire legislative scheme. Section 36 does not derogate from the exclusive grant of authority to the respondent under section 120. If the Board were to claim the authority under section 36 to intervene in the process of determining the level of service, it would render subsection 123(4) meaningless or redundant.

[76] The process issues canvassed by *Jones and de Villars* are all irrelevant to the decision that the Board must make in this case. In assessing the case law argued by the applicant, the Board must take care to study the specific nature of the statutory grants of discretionary authority that those cases examine. The presence of the words

"exclusive right" distinguishes section 120 of the *Act*, and those words must be given their clear meanings. Other statutes may not use similar words in granting discretionary powers.

[77] If the Board accepts that it has the authority to consider how the respondent exercised its discretion under section 120 of the *Act*, it should interpret that discretion as being in the nature of a high-level policy decision that does not attract considerations of natural justice or procedural fairness.

[78] The respondent disputed the aptness of the applicant's analogy to the former *PSEA*. It stated that, unlike the *Act*, the former *PSEA* made available to the parties a recourse process for reviewing the exercise of discretionary authority.

[79] The respondent did not dispute that the test of arguable relevance is appropriate in weighing a disclosure request. However, it maintained that the disclosure request must be linked to a matter over which the Board has substantive jurisdiction, which is not the case in this matter.

3. Section 36 of the *Act*

[80] Section 36 of the *Act*, which is simply a codification of the common law doctrine of "jurisdiction by necessary implication," cannot be used to subvert the clear intention of Parliament to assign duties, responsibilities and authorities. While the Board is given overall authority to determine ". . . any unresolved matters that may be included . . ." in an ESA, the employer, on the other hand, is given the "exclusive right" to determine the level at which an essential service will be provided to the public in order to maintain and protect the public interest. Parliament went further to state categorically in section 120 that "[n]othing" under the ESA regime ". . . is to be construed as limiting [the exclusive] right" of the employer to establish the level of service.

[81] The Supreme Court considered the doctrine of jurisdiction by necessary implication in *ATCO*, examining whether the general supervisory jurisdiction of the Alberta Energy & Utilities Board (AEUB) over gas utilities and their owners provided it the authority to approve a proposed disposition of the proceeds from the sale of a utility. The Supreme Court stated that, in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: (1) express grants of

authority (explicit powers) and (2) the common law by the application of the doctrine of jurisdiction by necessary implication (implicit powers). The Supreme Court found that the power to ". . . allocate the proceeds of the sale . . ." was absent from the explicit language of the legislation governing the AEUB. To determine whether there was an implicit power to undertake such an allocation, the Supreme Court examined the main function of the AEUB and then explored the incidental powers that could be derived from that context. It concluded that the power to allocate the proceeds of the sale could not be implied from the legislative regime as being necessarily incidental to the explicit powers.

[82] In *ATCO*, the Supreme Court explained that the doctrine of jurisdiction by necessary implication is less helpful where powers are broadly as opposed to narrowly drawn. Broadly drawn powers are necessarily limited to those that are "rationally related" to the purpose of the regulatory framework. The Supreme Court adopted the following enumeration of situations in which the doctrine of jurisdiction by necessary implication is of assistance: (1) when the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the tribunal or board fulfilling its mandate; (2) when the enabling statute fails to explicitly grant the power to accomplish the legislative objective; (3) when the mandate of the tribunal or board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction; (4) when the jurisdiction sought is not one that the tribunal or board has dealt with through the use of expressly granted powers, thus showing an absence of necessity; and (5) when the legislature did not address its mind to the issue and decide against conferring the power on the tribunal or board.

[83] By its very language, section 36 of the *Act* is a broadly drawn provision. Therefore, it must be narrowly construed, since Parliament has specifically limited the Board's jurisdiction, both substantive and remedial, with respect to the level at which an essential service will be provided to the public. There is no need to apply the doctrine of jurisdiction by necessary implication in this case because Parliament has chosen to expressly grant powers. Its clear intent was to leave the determination of the level of service, a matter that is essentially a policy decision, exclusively to the employer. The general and broadly drawn language in section 36 must not derogate from the specific language in section 120 and subsections 123(4) and 127(4) (*generalia specialibus non derogant* — the universal does not detract from the specific).

[84] The Board cannot rule on the level at which the essential services will be provided; nor can it grant any relief in that respect. As a consequence, the supervisory jurisdiction that the applicant advocates for the Board cannot be deemed necessary or reasonably incidental to any authority that the Board has with respect to the level of service. As the Federal Court of Appeal quoted in *Canada v. PIPSC*, ". . . [a]n authority to make a purely declaratory decision is not . . . to be implied from a . . . provision requiring it to exercise such powers as may be incidental to the attainment of its objects . . . ."

[85] The mischief argued by the applicant to justify an implied supervisory jurisdiction for the Board is fictional. An employer's determination of the level of service, in and of itself, is meaningless until actual positions have been proposed. When actual positions are proposed, the Board has the explicit jurisdiction to deal with the numbers of positions proposed by the employer under section 121 and subsection 123(5) of the *Act*, allowing the Board to strike a balance between the employees' right to strike and the public interest in the maintenance of essential services. If an employer abused its authority in determining the level of service, it would certainly be reflected in the number of positions proposed for inclusion in the ESA — a matter that the Board can determine. There is nothing in the legislative scheme to suggest that the level at which essential services are provided must be reduced. Instead, it provides that the number of bargaining unit employees providing essential services can be reduced.

[86] The *CATCA* decision, *Beaulne* and *O'Leary*, as argued by the applicant, must be distinguished. For the issues decided in those cases, the legislation was silent about the Board's authority, whether substantive or remedial. In this case, there is no silence. Parliament has specifically limited the Board's jurisdiction.

[87] In *Leonarduzzi*, the Federal Court recognized that what constitutes disciplinary action was a "core" concern within the "recognized expertise and experience" of adjudicators. By contrast, determination of the level at which essential services, once determined, ought to be provided, is a matter over which the Board has no recognized experience or expertise. The employer alone has the experience and expertise to make such a determination based on its own operations, experience and expertise.

[88] The applicant quotes the preamble of the *Act* in support of its position. Interestingly, it fails to state what is obvious from the preamble, that is, that the ". . . public service labour-management regime must operate in a context where the

protection of the public interest is paramount . . .” and that “. . . effective labour-management relations . . . improve the ability of the public service to serve and protect the public interest . . . .” Clearly, the preamble establishes a competing interest or value to employees’ right to strike.

[89] In conclusion, accepting that the Board has supervisory jurisdiction over the exercise of the employer’s exclusive right under section 120 of the *Act* by virtue of the general, broad provision in section 36 would render the clear language of Parliament in section 120 and subsections 123(4) and 127(4) redundant and meaningless, contrary to the basic principles of statutory interpretation: see *Sullivan* as well as the instructions from the Supreme Court in countless cases on statutory interpretation.

C. Applicant’s rebuttal

1. To main written and oral submissions

[90] All three steps in the analytical path identified by the Board in the *Parks* decision are important and integral to the process of establishing an ESA. If there is a problem at any stage, the Board — and only the Board — has the supervisory authority over the parties given the operation of sections 36 and 123 of the *Act*. In the case of the second step of the analytical path about the level of service, the Board must be able to direct the respondent to exercise its discretion lawfully if the Board concludes that there is a need to intervene to correct the process used by the respondent. If, for example, an employer refused to exercise its discretion under section 120, surely the Board would be empowered to order it to do so to ensure that the process of establishing the ESA complies with the *Act*.

[91] The applicant stated that it did not hear the respondent dispute that Parliament intended that the exercise of discretion under section 120 of the *Act* be used for a proper purpose. The respondent also did not dispute the proposition that a discretion exercised in bad faith is a nullity. While the respondent argued that there are no standards built into the *Act* governing the respondent’s exercise of its discretion, it does not mean that the respondent’s discretion is free from the limits identified in the case law. The respondent may use its discretion to identify any level of service that it deems appropriate provided, for example, that there is no bad faith, that it considers the specific circumstances of the case before making its decision and that it does not

act with an improper motive. If it turns out that the respondent invariably identifies the level of service at 100% in every case, a red flag must be raised.

[92] With respect to the *FAA*, the applicant maintained that the right of employees to participate in a lawful strike does not infringe any management rights protected by statute. The respondent's authority to assign duties under the *FAA* does not override the specific provisions of the *Act*. Indeed, there is nothing in the *FAA* that assists an understanding of section 120 of the *Act*.

[93] The applicant also argued that the *CATCA* decision is unhelpful. The Board recognized in the *Parks* decision, beginning at paragraph 134, that it's a whole new ball game. The *CATCA* decision has nothing to do with an ESA, which is the centrepiece of the new regime under the *Act*. The *CATCA* decision certainly did not stand for the proposition that the respondent's discretion is unlimited or that the Board has no authority to intervene. The law articulated by *Jones and de Villars* and by the Supreme Court in *Roncarelli* has been in place throughout, was applied then and continues to apply today.

[94] The applicant noted that the respondent was wrong about the existence of a recourse process under the former *PSEA*. Under that legislation, there was no right of appeal to a decision made by the PSC to hold a closed competition.

2. Section 36 of the *Act*

[95] The respondent repeatedly mischaracterizes the applicant's argument by claiming that the applicant seeks to have the Board usurp an employer's authority to determine the level of service, rendering redundant the clear language in section 120, and subsections 123(4) and 127(4) of the *Act*. As the applicant's previous submissions make clear, it maintains only that the Board possesses the residual authority to ensure that, in setting the level of service, an employer does not abuse the authority delegated to it by Parliament. That authority is readily distinguished from encroaching on an employer's right to determine the level of service. The Board will not determine the level of service but will only require the employer to make its determination in a manner that does not constitute an abuse of authority.

[96] The respondent again fails to address the question of what recourse the Board would have in a situation in which an employer simply refuses to exercise its authority

to determine the level of service or unduly delays doing so, effectively grinding the process of reaching an ESA to a halt. The respondent implies that the Board would remain powerless to address the situation.

[97] *ATCO* can be readily distinguished. Given that the sale of the utility's private property at issue in that decision had nothing to do with the AEUB's principal function of setting rates, the Supreme Court held that it would be ". . . absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes." To that end, the *dicta* (passing statements not necessary to the reasons for the decision) in *ATCO* simply established that a tribunal's incidental powers are not unlimited and that they must be ascertained by reference to its main function. In this case, the Board's main function with respect to Division 8 of the *Act* is to administer or supervise the process put in place by Parliament for reaching ESAs. Ensuring that the respondent does not abuse the authority delegated to it by Parliament for ESAs is directly related to that function, given the principles identified in the preamble to the *Act* and the common law principle that no statutory grant of authority authorizes such abuse by a delegate. While the Supreme Court in *ATCO* was concerned with the arbitrary conduct of the AEUB, in this case the respondent seeks to reserve for itself an unfettered discretion to act without consideration for the particular facts before it or for the purpose of the statutory regime that grants its authority.

[98] The five factors enumerated by the Supreme Court in *ATCO* also support the applicant's interpretation of section 36 of the *Act*:

> (1) the authority to administer the process of determining the level of service is necessary to maintain the principles set out in the preamble to the *Act* and to advance the process of reaching ESAs;
>
> (2) the *Act* does not explicitly grant the power to prevent abuses of authority by the employer, given the common law assumption that such conduct is always beyond the scope of a delegate's authority;
>
> (3) the mandate of the Board in this case is sufficiently broad to suggest a legislative intent to implicitly confer jurisdiction;
>
> (4) the jurisdiction in this case is not one that the Board has dealt with through the use of expressly granted powers; and

(5) there is no indication that the legislator turned its mind to the issue and decided against conferring on the Board the authority to prevent abuses of authority by the employer.

[99] In advancing its position on section 36 of the *Act*, the respondent fails to cite even one authority from the public service labour relations regime in support of its interpretation.

[100] The respondent incorrectly claims that, in the cases relied on by the applicant, Parliament was silent on the Board's authority while it has spoken clearly in this case. That distinction is groundless. The respondent fails to distinguish between two separate issues: the statutory authority granted by section 120 of the *Act* to the employer to determine the level of service and the statutory silence with respect to the Board's authority in administering the *Act* to ensure that an employer does not abuse its authority when it exercises its section 120 powers. The applicant does not dispute Parliament's intent on the first issue but that has no bearing on the separate issue of the Board's authority to rely on section 36 to prevent abuses of authority.

[101] At best, the respondent can attempt to argue that the provisions of the *Act* on which it relies demonstrate Parliament's express intent to allow the respondent to abuse its authority, unlike all other delegated decision makers. However, based on the authorities cited in the applicant's initial written submissions, much clearer statutory language would be required to justify such a significant departure from common law principles.

[102] Contrary to the respondent's argument, the determination that the Board may make concerning section 120 of the *Act* is not purely declaratory. Important issues about the standards applied to all statutory decision-makers are at stake. The Board could require an employer to redetermine the level of service while taking into account the particular facts before it and other necessary considerations. In any event, it is not open to the respondent to claim that the Board's decision would be "purely declaratory," while simultaneously arguing that the Board's supervision would usurp the employer's exclusive right to determine the level of service.

[103] In *Leonarduzzi*, the Federal Court held that, despite the express limit on an adjudicator's authority to inquire into a termination under the former *PSEA*, adjudicators maintained a supervisory function to address arbitrary or otherwise

illegitimate decisions. According to the Court, the alternative would ". . . open the door to decisions which may be entirely arbitrary, based on irrelevant considerations, and possibly without a scintilla of legitimacy." Importantly, the respondent does not dispute that conclusion. Rather, it attempts to distinguish this case, claiming that the issue in *Leonarduzzi* fits within the recognized expertise of adjudicators, while the present issue is beyond the Board's expertise. Even if that were true, recognized expertise would not be sufficient to bestow jurisdiction if the clear wording of the statute denied it.

[104] The possible "mischief" identified by the applicant is hardly a "fictional" matter. The respondent claims that an arbitrary decision to set the level of service at 100% could be addressed by the Board when it determines the number of positions necessary to provide the essential service. However, determining the number of positions is based, at least in part, on the level of service decided by an employer. The respondent cannot seriously suggest that it is of no consequence to the Board's decision on the required number of positions whether an employer decides to maintain the level of service at 10% or 100%.

[105] The authority to control the number of positions necessary to provide an essential service is insufficient to address an arbitrary decision to maintain an essential service at 100%. Simply put, allowing the level of service to be arbitrarily determined, with no regard for the particular facts of the situation, would result in an arbitrary restriction of the rights of employees to strike. Such a restriction would defeat the principles set out in the preamble of the *Act* and the overall balance sought by its essential services provisions.

III. Reasons

[106] The initiating issue in this matter is the applicant's request for a disclosure of information. Through its request, the applicant apparently seeks to understand how and when the respondent determined the level at which the essential services defined by the Board in the *Service Canada* decision are to be delivered to the public in the event of a strike, as outlined by the respondent in Exhibit R-1. The reason for seeking disclosure, according to the applicant, is so that it can be satisfied that the respondent properly exercised its discretion under section 120 of the *Act*.

[107] The Board's authority to order the disclosure of information is founded in paragraph 40(1)(*h*) of the *Act*, which reads as follows:

> ***40.*** *(1) The Board has, in relation to any matter before it, the power to*
>
> . . .
>
> *(*h*) compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant;*

[108] The disclosure request has opened a more fundamental issue about the Board's authority. Does the request pertain to a determination that the Board has the jurisdiction to make under the *Act*? Specifically, does the Board have the authority to inquire into how the respondent exercised its discretion under section 120 to determine the level of service in the circumstances of this case or in any circumstances?

[109] I must note that I take the view that the Board's power under paragraph 40(1)(*h*) of the *Act* is sufficiently expansive to allow it to consider a disclosure request without necessarily ruling first on a jurisdictional issue to which that request in some way relates. In this case, the disclosure request has arisen in the context of an application before the Board under section 123. In a broad sense, it could be argued that the disclosure request thus relates to a matter already "before the Board" within the meaning of subsection 40(1) and that it could be determined on that basis applying the test of arguable relevance. Alternatively, the Board could rule on the disclosure request directly as a prior issue on the basis that it concerns information that is arguably relevant to determining the Board's jurisdiction with respect to section 120. Just as an adjudicator under Part 2 of the *Act* could consider ordering the disclosure of a document using his or her power under paragraph 226(1)(*e*) before ruling on his or her jurisdiction to entertain a particular grievance under section 209 — or, indeed, to assist him or her in making that ruling — so too may the Board consider disclosure in a case under Part 1 before ruling on its specific jurisdiction, if that course seems appropriate to the Board.

[110] I did not choose to take that route in this case. The issue of jurisdiction raised in conjunction with the disclosure request has serious implications. I believe that it would not serve the best interests of the parties or the object of the *Act* to resolve

disputes efficiently were the Board simply to consider disclosure as a prior issue and to put off the matter of its jurisdiction under section 120 to another day. For that reason, I have opted to examine the Board's jurisdiction as the principal matter to be determined. Should I find that the Board does not have the jurisdiction to inquire into how the respondent exercised its discretion under section 120, then there may be no basis to consider the disclosure application.

A. <u>The grant of discretion to the respondent under section 120 of the *Act*</u>

[111] The wording of section 120 of the *Act* is the foundation for this analysis. Section 120 reads as follows:

> ***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.*

[112] The Board has confirmed its adherence to the standard approach to statutory interpretation in previous cases, including cases that involved the essential services provisions of the *Act*. Most recently, in *Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 60, I reconfirmed my understanding of that approach as follows:

> *73. . . . 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 of Canada, 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.*
>
> . . .

[113] Giving the words of section 120 of the *Act* their plain and ordinary meaning, the "right" granted to the respondent to determine the level of service appears to be unequivocal. That right is "exclusive." Nothing elsewhere in Division 8 — the portion of the *Act* that outlines the processes for establishing and amending an ESA — limits that "exclusive" right. As conceded by the applicant, neither it, as the bargaining agent, nor the Board may in any way dictate to the respondent the substantive outcome of the exercise of its discretion with respect to the level at which essential services will be provided.

[114] The *Act* recognizes employer rights in a number of its provisions. Notably, section 120 is the only provision that specifically qualifies an employer right as "exclusive." The presence of that word must be considered purposive. The legislator must have intended to place special emphasis on protecting the discretionary right that section 120 identifies. Not to leave any doubt, the legislator added a second sentence in section 120 to make clear that no other provision in Division 8 limits the exercise of that discretion.

[115] The respondent's argument rests in the first instance on a reading of the words used in section 120 of the *Act* in their grammatical and ordinary sense. For the respondent, those words admit only one possible interpretation. Nevertheless, the respondent argued further that its interpretation of section 120 accords harmoniously with other specific provisions of the *Act*, both in Division 8 and elsewhere, and with the overall scheme and objects of the legislation.

[116] The respondent's submissions about the concordance of section 120 with other specific provisions of the *Act* and with the scheme and objects of the *Act* are persuasive on the essential starting point — that the legislator intended that the respondent, and only the respondent, define the level of service. To be sure, the applicant does not dispute that point. The applicant never takes the position that it

has a role to play in substantively deciding the level of service or that the Board may intervene to order a different level of service than the respondent has determined.

[117] Because there is no dispute over the respondent's sole authority to determine the level of service, I do not need to comment on a number of the other propositions advanced by the respondent in support of that conclusion, with which I may disagree or have some concerns. Those elements include the respondent's interpretation of the significance of subsection 7(1) and paragraph 11.1(1)(*a*) of the *FAA* and of sections 6 and 7 of the *Act*, its depiction of subsection 4.1 as an exhaustive list of the permissible content of an ESA, and some aspects of its argument about the interplay of subsections 4(1) and 123(3) of the *Act*. I have addressed some of those propositions in *Treasury Board v. Professional Institute of the Public Service of Canada*, now under judicial review.

B. Is the grant of discretion subject to review?

[118] The disputed issue is whether the respondent's exercise of its discretionary authority under section 120 of the *Act* is constrained by the type of administrative law principles identified in *Jones and de Villars* or otherwise subject to review for compliance with certain standards such as the courts have applied in *Roncarelli*, *Dunsmuir* or *Cardinal*, among others.

[119] In essence, the applicant's argument is that all grants of discretionary authority, however worded in a statute, are limited and must adhere to basic principles of administrative law or to basic requirements of procedural fairness. No discretion may be exercised abusively or contrary to law.

[120] On the plain meaning of the words used by the legislator, section 120, in the context of the *Act*, is an exceptionally strongly stated grant of exclusive authority. However, according to *Jones and de Villars*, the strength of the words conveying the grant of discretion does not conclusively determine the issue. In the following passage, at pages 175 and 176, *Jones and de Villars* states that it takes more than strong words to immunize from scrutiny the exercise of discretion under a statutory grant of delegated authority. Instead, the law must contain explicit words that oust the application of standards such as the duty of fairness:

. . .

> *The underlying theme connecting* [all the errors in the exercise of discretion] *is that they make the delegate's action so outrageous, unreasonable or unacceptable that the courts decide that the legislative branch could never have intended to grant the statutory delegate the power to act in such a manner. But this implied statement of legislative intent must necessarily yield whenever the legislative branch has used sufficiently specific words to indicate that the statutory delegate does in fact have the power to proceed in the manner complained of, for example, by specifically ousting the applicability of the procedural requirements of the duty to be fair, or permitting a delegate to exercise its discretion in a discriminatory or retroactive manner. . . .*
>
> . . .

[121] Section 120 of the *Act* does not contain specific ousting words of the type contemplated above. The stipulation that ". . . [n]othing in this Division is to be construed as limiting that right" is an unmistakable indication that Parliament intended that other sections of Division 8 not be used to limit the respondent's discretion under section 120, but it probably cannot be interpreted as having a greater effect than that. It does not explicitly exclude any of the administrative law considerations and standards that *Jones and de Villars* discusses. Indeed, it may be noteworthy that the stipulation in section 120 refers only to "Division 8." It does not provide, for example, that ". . . [n]othing in this Act is to be construed as limiting that right" [emphasis added].

[122] Were I to discount the *Jones and de Villars* concern that section 120 of the *Act* does not specifically exempt the exercise of the respondent's discretion from standards prohibiting the abuse of that discretion, there remains in the authorities and case law cited by the applicant considerable support for the proposition that those standards apply nonetheless.

[123] For example, in *Roncarelli*, the Supreme Court wrote as follows:

> . . .
>
> *In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute . . . "Discretion" necessarily implies*

> *good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. . . .*
>
> *. . .*

[124] Speaking about the discretionary authority of a warden (or "Director") in a federal penitentiary under section 40 of the *Penitentiary Service Regulations*, C.R.C. 1978, c. 1251, the Supreme Court observed as follows in *Cardinal* (at paragraph 14):

> *There can be no doubt . . . that the Director was under a duty of procedural fairness in exercising the authority conferred by s. 40 of the Regulations . . . This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual:* Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, *[1979] 1 S.C.R. 31;* Martineau v. Matsqui Institution Disciplinary Board (No. 2), *[1980] 1 S.C.R. 602;* Attorney General of Canada v. Inuit Tapirisat of Canada, *[1980] 2 S.C.R. 735. . . .*

[125] In *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, referenced above in *Cardinal*, the Supreme Court of Canada, among other findings, endorsed the common law principle ". . . that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."

[126] The applicant offered *Ethier* as an example of a case where the courts properly claimed the authority to review the exercise of discretionary authority even where the grant of authority is described as an "exclusive right." Section 8 of the former *PSEA* conferred on the PSC the ". . . exclusive right . . . to make appointments to or from within the Public Service . . . ." [emphasis added] The applicant quoted the Federal Court as follows at page 11 of *Ethier*:

> *. . .*
>
> *Despite the fact that the statute appears to grant the Commission the discretion to make decisions as to whether to recruit from without or within, it is clear that in decisions such as these that may be considered administrative in nature, the decision-maker owes a duty of procedural fairness in certain situations:* Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, *[1979]*

> *1 S.C.R. 311. This duty is derived from the fact that decision-makers are public bodies which derive their power from statute, and which power, therefore, must be exercised in accordance with the precepts of administrative law.*
>
> . . .

[127] The finding in *Ethier* is perhaps somewhat less helpful than the applicant claims because the exercise of discretion concretely reviewed by the Federal Court was not the PSC's "exclusive right" to make appointments as such, but rather its derived authority under section 11 of the former *PSEA* not to appoint from within the public service when, in its "opinion," the best interests of the public service favoured an external appointment process. Moreover, the Federal Court of Appeal eventually overturned *Ethier*, although not on the basis of its findings about the application of the precepts of administrative law to the exercise of discretion by the PSC; see *Ethier*, 2 F.C. 659 (C.A.).

[128] The applicant also offered *Dunsmuir*, at paragraph 104, in support of the proposition that ". . . public law is rightly concerned with preventing the arbitrary exercise of delegated powers . . . ." Although the authority of that general statement cannot be disputed, *Dunsmuir* more directly addresses how common law contractual rights are exercised than the exercise of a specific statutory discretion. The employment relationship at issue in that case was governed by private law and contract law. The Supreme Court wrote as follows at paragraph 105:

> ***105** . . . the good faith exercise of a common law . . . right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.*

[129] If some qualifications attach to applying the *Ethier* and *Dunsmuir* decisions as cited by the applicant, the analysis of the case law principles summarized in *Jones and de Villars* appears to leave little doubt about the application of administrative standards to the exercise of discretion under a statute. *Jones and de Villars* states as follows at page 174:

. . .

> *. . . unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses. It is possible to identify at least five generic types of abuses, which can be described as follows. The first category occurs when a delegate exercises its discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has been committed where there is an improper result, including unreasonable, discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises its discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise its discretion by adopting a policy which fetters its ability to consider individual cases with an open mind.*
>
> . . .

Jones and de Villars continues by maintaining that an abuse in the exercise of discretion by a delegate constitutes a jurisdictional error even if the delegate ". . . is properly constituted, has complied with all mandatory requirements, is dealing with the subject matter granted to it by the legislation, and undoubtedly has the right to exercise the discretionary power in question." Where the delegate abuses its authority or commits an error, according to *Jones and de Villars*, its action is a nullity.

[130] On the question of fettering discretion by applying an invariable policy, *Wade and Forsyth*, a United Kingdom authority, states the following at page 328:

> . . .
>
> *An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid out in advance. It is a fundamental rule for the exercise of a discretionary power, that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time. . . .*
>
> . . .

[131] I found the respondent's refutation of the administrative law principles argued by the applicant somewhat limited. Based on the clear wording of the grant of an "exclusive right" to the respondent in section 120 of the *Act*, it maintained that the

type of process issues canvassed by *Jones and de Villars* cannot apply. It argued that the case law cited by the applicant can be distinguished because the decisions examine grants of statutory authority that may be different from section 120. In the alternative, the respondent suggested that the discretion exercised by the respondent under section 120 takes more of the form of a "high-level policy decision" that does not attract considerations of natural justice or procedural fairness.

[132] As the applicant pointed out in rebuttal, the respondent did not specifically dispute that the exercise of discretion under section 120 of the *Act* must be used for a proper purpose or that a discretion exercised in bad faith is a nullity.

[133] In the end, the respondent's position rests principally upon the wording of section 120 of the *Act*. Either I accept the respondent's basic argument that the wording of section 120 is so plain and unambiguous as to admit no possibility that the respondent's exercise of discretion using its "exclusive right" may be reviewed or I find that administrative principles designed to prevent the abuse of discretion must apply, to some extent at least, regardless of the wording of section 120. If such principles apply, some authority must be able to review the respondent's decision if an issue of compliance with those principles arises.

[134] Once more, there is no doubt in my mind that the "exclusive right" granted by section 120 of the *Act* is very strongly stated and that the legislator's intent underlying those strong words must be respected. It is absolutely clear that an employer, possessing the "exclusive right" to determine level of service, is entitled to exercise discretion when it acts on that right. The result of its exercise of discretion is an authoritative determination about the required level at which essential services, agreed on by the parties or ordered by the Board, must be maintained. Parliament unambiguously intended that no one else make that determination.

[135] Does the matter end there? On balance, my review of the authorities and case law has persuaded me that I cannot foreclose the possibility that there may conceivably be circumstances under which it is appropriate to review the exercise of discretion pursuant to section 120 of the *Act*, however strong its statement of the respondent's "exclusive right." Were there compelling evidence that the respondent approached its decision about the level of service in manifest bad faith, that it failed to take into account the specific circumstances of the case in making its determination or

that it abused its discretion in some other demonstrable fashion, how can it be that Parliament intended that there can be no recourse?

[136] As the Board has emphasized since its initial *Parks* decision, the scheme of the *Act* contemplates a critical balancing of interests in the event of a lawful strike. There is a paramount need to protect the public's interest in continuing to receive those services that are genuinely essential to public safety or security. At the same time, the *Act* enshrines the right of employees to strike and carefully outlines the conditions under which employees may exercise that protected right. The essential service features of the *Act* maintain a balance intended to reconcile the tensions that can arise between public and private interests in a strike situation. To achieve and sustain that balance, it is essential that both parties to the bargaining relationship exhibit the good faith necessary to make the essential services features of the *Act* work as intended. If either party acts in a fashion that undercuts the objects of the *Act* as stated in its preamble — including in particular the ". . . commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations . . ." [emphasis added] — then there should be some mechanism to review what has occurred and to take action to ensure that the *Act* operates as contemplated by Parliament.

[137] With respect to section 120 of the *Act* specifically, I concur with the applicant's emphasis that the purpose of any review of the respondent's exercise of discretion based on its exclusive right to determine the level of service would not be to substitute another determination of the level of service by some other authority. As set out in *Jones and de Villars*, I understand that the purpose of the review would be limited to determining whether any circumstances existed that vitiated the respondent's determination of level of service as an abuse of authority. For example, I take that it is not contested by the parties that a decision shown to have been made in manifest bad faith may be declared a nullity, as *Jones and de* Villars insists. As the Supreme Court ruled in *Roncarelli*, "[d]iscretion necessarily implies good faith in discharging public duty . . . ." Proof of bad faith so undermines the exercise of discretion that there is no option but to require that a delegate make the determination again.

[138] In considering this matter, I have wondered whether the debate is largely abstract in nature. In practical terms, how likely is there to be a situation that might require intervention by a reviewing authority? What type of evidence could conceivably

prove an abuse of authority that renders null a decision about the level of service? If there are concerns about the process by which the level of service has been determined under section 120 of the *Act*, might it be the case that the Board could address any negative effects of the determination when and if called upon later to decide the "types of positions" required to deliver the essential services, the number of those positions and the specific positions?

[139] I am satisfied that I cannot answer such questions at this time. If the Board has the authority to review the respondent's actions under section 120 of the *Act* — the question to which I must now turn — it will have to consider the specific circumstances surrounding an allegation that discretion has been abused and will have to define in more concrete terms how to exercise its review authority in those circumstances. Issues such as the burden of proof and the standard of proof would be among the important matters to be decided. In my view, a review would be an unusual and exceptional occurrence. There should be no expectation that employer determinations under section 120 are to be routinely subject to scrutiny by a reviewing authority.

[140] In summary, I rule that the respondent's exercise of discretion pursuant to its exclusive right to determine the level of service under section 120 of the *Act* can be subject to review to determine whether the respondent has abused its discretion or otherwise failed to comply with the *Act*.

C. Does the Board have the authority to review the grant of discretion?

[141] Having ruled that the grant of the "exclusive right" to determine the level of service to the respondent under section 120 of the *Act* may be subject to review to determine whether there has been an abuse of discretion, does it follow that the Board possesses the authority to conduct such a review?

[142] The applicant argues that the Board does have that authority and cites subsection 123(3) and section 36 of the *Act* as the principal mandating provisions to that effect.

[143] I turn first to subsection 123(3) of the *Act*. It reads as follows:

> ***123.*** *(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.*

[144] I cannot accept that subsection 123(3) of the *Act* clothes the Board with the authority to review the respondent's exercise of discretion under section 120. 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 in disagreement must be one ". . . that may be included in an essential services agreement . . . ." I need only refer to the first of the two parameters to determine the question.

[145] In view of the undisputed, exclusive nature of the respondent's authority to determine the level of service under section 120 of the *Act*, level of service is not a matter that is subject to the bilateral negotiation process launched under section 122. As such, it cannot be a matter ". . . that the employer and the bargaining agent have not agreed on . . . ." A disagreement as to how the respondent has exercised its authority under section 120 does not qualify for the purpose of the first parameter stated in subsection 123(3) — it is not a disagreement over the substance of a subject that may be negotiated but rather a disagreement over how the respondent has exercised discretion outside of, or independent of, the bilateral negotiation process. Under subsection 123(3), the Board only makes determinations to resolve substantial disputes about certain elements of the content of an ESA that arise during negotiations. It cannot go further under that subsection, as the applicant urges, to claim jurisdiction to ensure that the respondent's exercise of its discretion is lawful and not an abuse of its authority.

[146] If subsection 123(3) of the *Act* does not give the Board the authority claimed by the applicant, does section 36 achieve that end? Section 36 reads as follows:

> ***36.*** *The Board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the*

> *making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.*

The applicant argues that the respondent's exercise of its authority under section 120 of the *Act* is a matter that is ". . . incidental to the attainment of the objects of this Act." The applicant submits that the Board, accepting its obligation under section 36 to ". . . administer[] this *Act* . . .", may review whether the respondent has exercised its discretion under section 120 properly and in a fashion consistent with ". . . the objects of this Act." The respondent disagrees and argues that nothing in section 36 overcomes the grant of exclusive authority to an employer under section 120.

[147] I must state candidly that I have found that disagreement to be among the most difficult to resolve of those that I have encountered as a member of the Board. Both parties have advanced strong and credible arguments to support opposite perspectives on section 36 of the *Act*. In my view, this is clearly not a situation where either of the positions taken by the parties inexorably succeeds.

[148] Searching for assistance, I have reviewed the decisions made by the Board since the *Act* came into force in which it was asked to exercise its authority under section 36. With one possible exception, I have found no decision where the Board used section 36 to review employer prerogatives under the *Act*. Several of the decisions involving section 36 have related to the issuance of consent orders by the Board; see, for example, *Public Service Alliance of Canada v. Treasury Board*, 2008 PSLRB 43, *Public Service Alliance of Canada v. Canada Revenue Agency,* 2008 PSLRB 44, *Public Service Alliance of Canada v. Parks Canada Agency,* 2008 PSLRB 45, *Professional Institute of the Public Service of Canada v. Treasury Board*, 2008 PSLRB 57, *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2008 PSLRB 58, and *Canadian Association of Professional Employees v. Treasury Board*, 2009 PSLRB 59. The others have related to matters such as a change to the name of a bargaining agent (*Communications, Energy and Paperworkers Union of Canada v. Treasury Board,* 2005 PSLRB 151), the Board's authority to issue interim orders for complaints under section 190 (*International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers v. Correctional Service of Canada,* 2006 PSLRB 46, and *Bremsak v. Professional Institute of the Public Service of Canada,* 2008 PSLRB 49), other procedural matters in section 190 complaints (*Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100 and *Tench v.*

Canadian Association of Professional Employees, 2009 PSLRB 119), and the implementation of a grievance settlement agreement (*Ilapogu v. Treasury Board (Correctional Service of Canada)*, (2008 PSLRB 6)).

[149] The exception cited by the applicant is the Board's decision in *Quadrini*. In that ruling, the Board canvassed section 36 as part of an analysis to determine whether the Board had the authority to satisfy itself as to the *bona fides* of a claim of solicitor-client privilege advanced by an employer as a defence against a disclosure application. The Board ruled that it had that authority, although not solely as the result of the operation of section 36. The Board wrote as follows at paragraph 90:

> *90. The Board's powers under sections 36 and 40 of the* Act, *and elsewhere, must be interpreted in a fashion that is consistent with the legislative scheme as a whole — a scheme that gives the Board the character of a quasi-judicial decision maker. In my view, it would be inconsistent with the broad and encompassing nature of the Board's adjudicative role under the* Act *to accept that, as a quasi-judicial tribunal, it can compel the attendance of witnesses at hearings, administer solemn oaths, order the disclosure of documents or things, rule on its own jurisdiction, decide diverse points of law, interpret the* Canadian Human Rights Act, *R.S.C. 1985, c. H-6, and the* Charter, *order corrective action including damages, and order measures to ensure compliance with its rulings — among other powers — but at the same time to deny that it has the authority to satisfy itself as to the validity of a claim of solicitor-client privilege concerning a document that comes before it.*
>
> [Emphasis in the original]

As previously mentioned, the Board's decision in *Quadrini* is currently the subject of a judicial review application.

[150] As the author of *Quadrini*, I must take care to avoid making any comments that might be viewed as expanding on, or further explaining, its reasons. However, I believe that it is uncontroversial to state that *Quadrini* did not concern the exercise of a delegated discretionary authority by the employer under the *Act*. Instead, the matter arose as a question of the Board's authority to make an evidentiary ruling. I determined that the Board was empowered to satisfy itself that the respondent's claim of solicitor-client privilege as a defence against the disclosure of a document was well founded. The ruling in *Quadrini* did not invoke section 36, or any other section, to permit the Board to supervise the employer's exercise of delegated discretion under

the *Act*. It claimed for the Board only the incidental power to undertake an evidentiary inquiry for a purpose — determining the admissibility of evidence in an unfair labour practice complaint hearing — that was clearly within the Board's express jurisdiction.

[151] Subsection 21(1) of the former *Act* was the predecessor provision to section 36 of the *Act* and bears a close resemblance to it. It read as follows:

> ***21.*** *(1) The Board shall administer this Act and exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the objects of, this Act including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Act, with any regulation made hereunder or with any decision made in respect of a matter coming before it.*

Because there are practical challenges to conducting an automated data base search of all decisions under the former *Act*, I cannot be confident that my survey of rulings involving subsection 21(1) was comprehensive or completely reliable. That said, I have been unable to identify a case under the former *Act* where the Public Service Staff Relations Board ("the former Board") used subsection 21(1) to review an employer's exercise of delegated authority for evidence of an abuse of discretion. (Note that the *CATCA* decision and *O'Leary*, cited by the applicant, were <u>not</u> expressly founded in section 21.) I did find one decision in which the former Board took the opportunity of an application under section 21 to expand its reviewing authority — assessing a bargaining agent's compliance with the duty of fair representation despite the absence of a specific statement of that duty under the former *Act*; see *Deschamps v. Public Service Alliance of Canada*, PSSRB File No. 148-2-205 (19930912). Nonetheless, I am left with the clear impression that the use of the Board's "incidental powers" or "residual powers" urged by the applicant in the circumstances of this case was as unprecedented under the case law of the former Board as it appears to be under the current *Act*.

[152] I note that there <u>is</u> one recent Board decision where it explicitly invoked its "residual powers" to expand its substantive jurisdiction, although not under the *Act*. In *Beaulne*, cited by the applicant, the Board Member applied a provision analogous to section 36 of the *Act* to support a finding that the duty of fair representation also exists implicitly under the *PESRA*. He wrote as follows:

. . .

> ***277*** *In my opinion . . . it follows that the duty of fair representation exists implicitly in the* PESRA*. Since the PSLRB's mandate is to administer the* PESRA*, it follows that the PSLRB has jurisdiction to hear a complaint on a breach of this duty. In fact, the* PESRA *gives the PSLRB the mandate of administering the* PESRA*:*
>
> . . .
>
> **10.** The Board shall administer this Part and shall exercise such powers and perform such duties as are conferred or imposed on it by, or as may be incidental to the attainment of the purposes of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with this Part, with any regulation made hereunder or with any decision made in respect of a matter coming before it.
>
> . . .

As an application for judicial review of *Beaulne* is pending, it remains to be seen whether the Federal Court of Appeal will support the Board's view of section 10.

[153] The absence of more explicit guidance in the case law on the scope of section 36 of the *Act* (or the scope of its predecessor provision under the former *Act*) sends me back to an analysis of the words of the statute. When section 36 assigns to the Board powers that ". . . are incidental to the attainment of the objects of this Act . . .," what does it mean and how far does that assignment extend? Specifically, do those powers include the power to supervise the respondent's "exclusive" discretionary decision making under section 120?

[154] The *New Shorter Oxford English Dictionary*, 1993, defines the word "incidental" in part as follows:

> ***incidental*** *. . . naturally attaching to . . . Occurring as something casual or of secondary importance; not directly relevant to; following (up)on as a subordinate circumstance . . .*

Black's Law Dictionary, 8th ed., offers the following definitions:

> ***incidental*** *. . . Subordinate to something of greater importance, having a minor role.*

> ***incident power*** *. . . A power that, although not expressly granted, must exist because it is necessary to the accomplishment of an express power.*

[155] The language used in section 36 of the *Act* persuades me that it cannot independently found a power. The powers to which it refers are either expressly conferred on the Board by the *Act* — not the case here — or are acquired by the Board because they are ". . . incidental to the attainment of the objects of this Act . . . ." Thus, they are subordinate or derived in the sense that they must flow from other statutory elements.

[156] In the context of this case, I believe that I may accept the applicant's position about the interplay of sections 36 and 120 only if I agree that the power to supervise the respondent's exercise of discretion under the latter provision is incidental to, or rationally linked to, the attainment of an object or objects of the *Act*. Furthermore, given the strength of the grant of delegated authority under section 120, I believe that it must be shown that it is necessary that the Board have that supervisory power to achieve the specified statutory object or objects; see the first condition enumerated in *ATCO* as summarized at paragraph 82 of this decision.

[157] What are the operative legislative objects? It is apparent, but not surprising, that the parties emphasize in their arguments different legislative objects as outlined in the preamble of the *Act*. The applicant stresses the goal of maintaining effective labour-management relations and the need to preserve the right of employees to strike as part of the "balance" that the Board has sought to preserve in interpreting the ESA provisions of the *Act* beginning with its decision in *Parks*. For its part, the respondent underscores the importance of protecting the public interest, an object described as "paramount" in the preamble of the *Act*. For the respondent, the public interest underlying Division 8 of the *Act* is the maintenance of services that are necessary for public safety or security. Through section 120, Parliament expressly reserved to the expertise of the employer the right to decide the level of service necessary to protect that public interest.

[158] In my opinion, giving the Board the power to supervise the employer's discretionary authority under section 120 of the *Act* is not necessary to, or rationally related to, the paramount legislative object of protecting the public interest, considered on its own. To be sure, leaving the employer completely unfettered to make

its determination under section 120 arguably could be the most effective approach to realizing that goal.

[159] However, protecting the public interest is not the only object of the *Act*. In my view, the applicant makes a persuasive argument that giving the Board limited supervisory power over the employer's discretionary authority under section 120 is rationally related to, and necessary to, the strongly stated object in the preamble of maintaining effective labour-management relations. As argued by the applicant, based on the Board's own prior findings, administering the ESA regime in accordance with the objects of the *Act* requires preserving the balance between the public interest of receiving essential services and the right of employees to strike. Abuse by the employer of its discretion under section 120 could compromise that balance by undercutting the integrity of a determination that is vital to the ESA negotiation process. The result could redound to the detriment of effective labour-management relations that, according to the preamble of the *Act*, ". . . improve the ability of the public service to serve and protect the public interest . . . ." Following the logic of the argument, the Board would properly exercise a power through section 36 that advances the objects of the *Act* were it to intervene in the event that there is an abuse of discretion in setting the level of service.

[160] The respondent contends that the "mischief" in the exercise of discretion under section 120 of the *Act* alleged by the applicant to justify the need for supervising an employer's level of service determination is fictional. In its submission, there can be no need for the Board to intervene in a section 120 decision even if it has that power. The respondent maintains that the Board has sufficient supervisory authority to tend to the required balance of rights and interests at the downstream stage of addressing a dispute over the number of positions proposed by an employer under section 121 and subsection 123(5) of the *Act*.

[161] From my perspective, the respondent's position on that point ultimately is not persuasive. In effect, it seems to diminish the importance of an employer's decision setting the level of service by implying that the real crux of the matter is to determine the number of positions that perform essential services and that any concern about the level of service set by an employer can be addressed by that determination. Why, then, did Parliament take such care to protect an employer's exclusive right to determine the level of service if that decision was not, in fact, the cornerstone for

protecting the public interest that establishes the boundaries around all the other elements of an ESA that are subsequently addressed? Contrary to what the respondent urges, I believe that the Board must operate on the presumption that determining the level of service is pivotal. If there is a defect in that determination, it stands to reason that the defect could negatively impact what happens after — deciding the types of positions, the numbers of those positions and the specific positions required to perform the established essential services. There is no basis without the benefit of concrete experience to expect that the Board can adequately remedy a defect in setting the level of service at the subsequent stages of the ESA analytical path.

[162] It is abundantly clear that the Board bears the duty under section 36 to administer the *Act*, including the provisions of Division 8 dealing with essential services. In one sense, at least, I believe that the Board has already used its authority to address section 120. At paragraph 111 of the *Service Canada* decision, for example, it directed the respondent to ". . . determine the level at which the . . . essential services will be delivered to the public . . . in accordance with section 120 of the *Act* and to so inform the applicant and the Board within 30 days . . . ." That order was not contested by the respondent even though its effect was to supervise the respondent's exercise of discretion under section 120. While the order did not in any way seek to intervene in the respondent's exclusive authority to determine the level of service — as it could not — it placed procedural conditions on the respondent. The Board required the respondent to make its determination "within 30 days" and to inform the applicant and the Board about its decision. Although the Board did not explicitly state its reasons for placing those conditions on the respondent, it is fair to say that the order was consistent with the goal of moving the parties forward towards completion of their ESA. That goal is apparent in the next paragraph of the order in the *Service Canada* decision, which reads as follows:

> *[112] The Board further directs the parties to resume negotiations and to make every reasonable effort to negotiate the remaining content of the ESA regarding PM-01 Citizen Services Officer positions.*

[163] What would have happened had the respondent failed to comply with the Board's order and had it refused to proceed to determine the level of service in a timely fashion? As administrator of the *Act*, would the Board have been powerless to intervene because doing so would have interfered with the respondent's exercise of its "exclusive right" under section 120?

[164] On balance, I believe that the answer to that question must be in the negative. Parliament intended that the Board take responsibility for the labour relations processes that the *Act* mandates provided that it acts in a fashion that is consistent with the objects of the *Act*. With *Vaughan* and other more recent decisions, the courts have increasingly recognized that labour statutes create exclusive regimes for the supervision of labour relations and for the resolution of labour relations disputes. Effective stewardship for those regimes requires that boards and arbitrators or adjudicators, as opposed to the courts, actively supervise the parties to the extent that their enabling statutes (or collective agreements) permit. In the case before me, I am unable to conclude that Parliament intended that the Board's supervisory responsibilities come to a shuddering stop at the door of section 120 as long as the Board does not try to do what section 120 expressly precludes — limit the right of an employer to determine the level of service. Parliament did not exempt either section 120 or, more broadly, Division 8 from the ambit of section 36. As mentioned previously, section 120 states only that "[n]othing in [Division 8] is to be construed as limiting . . . " an employer's delegated authority to determine the level of service. Had Parliament intended section 120 to operate outside the exercise of any administrative supervision by the Board whatsoever, it could have achieved that end by expressly exempting section 120 from section 36 in either or both provisions. Parliament did not.

[165] In my view, directing an employer to exercise its exclusive right under section 120 of the *Act* within certain administrative parameters (for example, within a certain time frame) does not limit or derogate from that exclusive right. By extension, requiring that an employer disclose information about how it exercised its discretion to set the level of service also does not in principle interfere with the exclusive right that section 120 protects.

[166] Do the Board's supervisory powers under section 36 of the *Act* take it the further step of intervening if, for example, the disclosure of information about the exercise by an employer of its discretion under section 120 causes an affected party to allege that the employer's decision was tainted by a violation of an important principle of administrative law? Despite the strong arguments made by the respondent to the contrary, I have come in the final analysis to agree with the applicant's position. However exceptional the circumstances may be that could justify the Board's intervention, I do not believe on balance that it is consistent with the objects of the

Act, taken together, for the Board to sit on the sidelines if a dispute about a key principle of administrative law with respect to a determination under section 120 occurs in the midst of an ESA negotiation process. The alternative course would be to leave the resolution of such a dispute to the courts, with the inevitable delays that would attend an application for judicial determination of the matter. If it were the case that the courts, rather than the Board, possessed the specialized expertise necessary to understand the dynamics of a strike situation and the extent to which a "level of service" determination interplays with the other elements of an ESA, I might take a different view. As it is, I judge that there are strong policy reasons consistent with the objects of the *Act* that it makes better sense in the first instance for the Board to consider a dispute over the exercise of discretion under section 120, subject to subsequent judicial review of its decision as necessary. Furthermore, as a question of law, I believe that the Board may use section 36 as necessary to resolve that dispute because doing so is rationally linked to, and thus incidental to, the objects of the *Act* to resolve disputes efficiently and to maintain effective labour-management relations.

[167] Issues of compliance with general principles of administrative law are hardly foreign to the Board throughout the exercise of its supervisory mandate. It frequently addresses arguments that a party has acted or exercised discretion in a manner that is arbitrary, capricious or in bad faith, or is otherwise contrary to the precepts of administrative law. There is no reason that the Board is not well positioned to do the same for section 120 and, in particular, to do so in a fashion that does not derogate from an employer's exclusive authority to determine the level of service. The Board can clearly confine its intervention to declaring a violation of an administrative law requirement and to requiring an employer to revisit its determination of the level of service to redress that violation. As stated repeatedly in these reasons, the Board would not and could not substitute its judgment about the required level of service for that of the employer.

[168] In summary, I find that the Board has the power under section 36 of the *Act* to consider an allegation that an employer has violated a principle of administrative law or due process in the exercise of its exclusive authority under section 120 to determine the level at which essential services must be delivered to the public, such power being incidental to the attainment of the objects of the *Act*. It follows that the Board may rule on a request for the disclosure of documents that are arguably relevant to an employer's determination of the level of service.

[169] In the disclosure application that initiated this decision, the applicant sought the following:

> - *. . . all documentation including reports and analyses respecting the employer's decision to set the level of service at 100% for delivery of these services*
> - *. . . particulars of the process adopted by the employer to reach this decision, including the date that that decision was made.*
> - *. . . a copy of the "time and motion study" undertaken by the employer, including all supporting documentation which was used in conjunction with the study*

[170] I am not prepared to rule on the arguable relevance of the applicant's disclosure request without affording both parties a further opportunity to address the particulars of the request. Moreover, I believe that it would be appropriate in the first instance for the parties to attempt to resolve the outstanding disclosure issues before I make a ruling. Because the parties disagreed on the underlying issue of the Board's jurisdiction to address an issue with respect to the respondent's determination under section 120 of the *Act*, I am not convinced that the parties have made reasonable efforts to settle the matter themselves. I wish to provide them that opportunity.

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

(The Order appears on the next page)

IV. Order

[172] I direct the parties to meet and attempt to resolve the outstanding disclosure issues. In the event that they are unsuccessful, the Board will convene a case management meeting to hear submissions on the applicant's disclosure request and to rule on that request.

[173] The Board remains seized of all other matters relating to PM-01 Citizen Service Officer positions at Service Canada that may be included in the ESA and that are not resolved by the parties.

[174] The Board remains seized of all matters not agreed to by the parties with respect to other positions in the PA Group.

August 19, 2010.

Dan Butler,
Board Member