Date: 20110809

File: 593-02-03

Citation: 2011 PSLRB 102

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,
July 15, 2011.

I. Application before the Board

[1] The subject of this decision is a request from the Public Service Alliance of Canada ("the applicant") that the Public Service Labour Relations Board ("the Board") order the Treasury Board ("the respondent") to disclose information about its determination concerning the level at which the essential services delivered by PM-01 Citizen Service Officers (CSOs) at Service Canada Centres (SCCs) will be provided to the public in the event of a lawful strike.

II. Background

[2] In September 2007, the applicant filed four separate applications under subsection 123(1) of the *Public Service Labour Relations Act* ("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. On December 5, 2007, the Chairperson of 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).

[3] The Board has issued three decisions to date in this matter.

[4] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 55, issued on April 28, 2009, the Board defined the essential services delivered by PM-01-classified CSOs at the SCCs. The Board's order 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 that may be included in the ESA and that are not resolved by the parties.*

. . .

[5] In its second decision, *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2009 PSLRB 56, dated April 29, 2009, 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.

[6] On June 22, 2009, the respondent replied to the Board's order at paragraph 111 of 2009 PSLRB 55, the first decision, by stating the following about the level of service to be performed by the CSOs at the SCCs:

. . .

> *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 Centres (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 with 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* [*sic*] *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. . . .*
>
> *. . .*

[7] On the request from the applicant in September 2009, the Board agreed to schedule a case management conference to address issues purportedly arising from the respondent's letter of June 22, 2009. During the discussions that followed, the applicant requested disclosure by the respondent of ". . . all documentation including reports and analyses respecting [its] 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." In its reply, the respondent took the position that it was ". . . under no obligation to provide . . . information regarding the establishment of the level of service." It became apparent to the Board that the respondent also maintained that the Board had no jurisdiction to rule on a request for disclosure of information about a level-of-service decision made by an employer under section 120 of the *Act*.

[8] To resolve the dispute between the parties, the Board scheduled a hearing to consider submissions from the parties on the two 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?*

[9] In *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2010 PSLRB 88, the third decision in the PA Group ESA case, the Board made the following ruling:

> . . .
>
> *[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.*
>
> . . .

The Board did not proceed to decide the applicant's disclosure request. Instead, it issued an order that read, in part, as follows:

> . . .
>
> *[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.*
>
> . . .

[10] The respondent has applied to the Federal Court of Appeal for judicial review of the Board's decision. That application remains outstanding.

[11] As ordered, the parties attempted to resolve the applicant's disclosure request, eventually meeting with the Board in another case management hearing. Their efforts were unsuccessful. On February 8, 2011, the applicant renewed its application to the Board to order the respondent to comply with its disclosure request, amended to read as follows:

> *. . . produce all arguably relevant documentation relating to the Respondent's decision to set the level of service in this case at 100% including email communications,*

> *correspondence, reports, analyses, memoranda, notes and minutes of meetings.*

[12] On February 18, 2011, the respondent replied, stating, in part, as follows:

> . . .
>
> *The Employer believes that it has met its legislative obligations under the* PSLRA. *Furthermore and without prejudice to the Employer's position regarding the Board's jurisdiction regarding section 120 of the* PSLRA, *the Employer submits that the Bargaining Agent's continued request for disclosure is overbroad and is in effect tantamount to a fishing expedition.*
>
> *In keeping with the analytical path set forth by the Board in the Parks Canada decision, Service Canada representatives are ready to proceed to the third and final step of the process, which is to identify the types of positions, number of positions and specific positions.*
>
> . . .

[13] After considering the respondent's reply and the applicant's subsequent rebuttal that the respondent's continuing disagreement with the Board's ruling in 2010 PSLRB 88 was the reason for its refusal to produce the requested documents, the Board directed its Registry to inform the parties as follows:

> . . .
>
> *Before issuing a formal decision on the bargaining agent's request for the production of documents, the Board will convene an oral hearing to entertain final submissions, if any, on the arguable relevance of the documents that are sought or on any other matter related to the request that a party believes must be considered by the Board. Should either party wish to adduce evidence at the hearing in support of its submissions, they shall notify the Board accordingly.*
>
> *The Board also directs the bargaining agent . . . to provide further specifics regarding the documents that it seeks if, and to the extent, that it is able to do so.*
>
> . . .

[14] On March 25, 2011, the applicant further amended its disclosure request as follows:

> . . .

- *Any documents relating to the meetings that took place between Ms. Colterman and Mr. Boulianne;*
- *Any documents reviewed by Ms. Colterman or Mr. Boulianne during this process;*
- *Any documents related to the briefings of Mr. Nixon or provided to him for his review during this process;*
- *Any documents relating to the recommendation by Ms. Colterman and Mr. Boulianne to set the level of service at 100%;*
- *Any documents relating to Mr. Nixon's decision to approve the recommendation to set the level of service at 100%;*
- *Any other documents that may be relevant to this complaint that are in the employer's possession.*

[15] On April 14, 2011, the respondent wrote to the Board in reply to the applicant's letter. Noting that ". . . it is now evident that both parties disagree on the definition of level of service," the respondent stated its belief that the parties ". . . would benefit from a clear and precise understanding as to the meaning of the "level of service" under the *Public Service Labour Relations Act*."

[16] The applicant replied that any dispute between the parties about the definition of level of service was irrelevant to the issue before the Board, namely, the respondent's refusal to produce all arguably relevant documentation relating to its June 22, 2009 decision setting the level of service.

[17] The Board informed the parties that the scheduled hearing would proceed and would address the issue of disclosure.

III. Summary of the evidence

[18] Sixteen exhibits were admitted on consent (Exhibits A-1 to A-9 and R-1 to R-7), largely composed of the record of correspondence between June 22, 2009 and May 10, 2011 between the parties and with the Board about the respondent's determination of the level of service and about the resulting disclosure request by the applicant.

[19] One witness testified on behalf of the respondent. In his capacity as manager of services in the Quebec Region, Denis Boulianne participated on the departmental team

established by the respondent to negotiate an ESA with the applicant, beginning in 2007. Negotiations resulted in an agreement with local representatives of the applicant in May 2008 on the number of CSO positions at the SCCs required to maintain essential services associated with the Employment Insurance and Old Age Security programs. Mr. Boulianne and his colleagues met with Helen Berry, a national representative of the respondent, in fall 2008, to explain the details of what had been discussed locally. Mr. Boulianne stated that Ms. Berry expressed concerns. The matter was not resolved, and the parties proceeded to a Board hearing into the essential services performed by the employees in question.

[20] After the Board's decision in April 2009 (2009 PSLRB 55), a group led by Catherine Colterman, reporting to Charles Nixon, Assistant Deputy Minister for the Citizen Service Branch, worked in response to the Board's order that the respondent define the level of service for the essential services established in its decision. The result of the group's work was a level-of-service definition communicated in a letter to the applicant on June 22, 2009 (Exhibit R-2). Mr. Boulianne, who was involved as an advisor, noted that the letter reported three components to the level-of-service determination, as follows: (1) that the SCCs would remain open for their regular hours; (2) that services would be provided bilingually in those SCCs designated as bilingual; and (3) that small SCCs would be staffed with a minimum of three individuals. Mr. Boulianne testified that those parameters were already established by the respondent when he became involved in 2007 and that they were confirmed after the Board's decision.

[21] According to Mr. Boulianne, the June 22, 2009 letter also provided to the applicant information about the number of positions required to perform the essential services, to assist subsequent ESA negotiations. He identified the letter's reference to ". . . 100% of the 77% spent on the delivery of essential services" as that information. On September 18, 2009, the respondent followed up by sending to the applicant a detailed list of the positions performing the essential services identified by the Board (Exhibit R-5). According to Mr. Boulianne, it provided further information to the applicant at a subsequent meeting in January 2010 to show how it derived the numbers previously disclosed (Exhibits R-3 and R-4). In the second document, the respondent restated the three level-of-service parameters initially communicated on June 22, 2009. It did not refer again to ". . . 100% of the 77% spent on the delivery of essential services" because the applicant had only asked the

respondent to confirm the level of service. According to Mr. Boulianne, the "100%" reference pertained instead to the outstanding matter of determining the number of positions.

[22] In cross-examination, Mr. Boulianne confirmed that the respondent had identified the level of service before the Board's April 2009 decision. The three parameters already established helped the respondent to set the number of positions required to perform the essential services. He indicated that the respondent's representatives felt that the Board's decision changed nothing that the respondent had previously determined.

[23] Mr. Boulianne indicated that he met or talked by telephone with Ms. Colterman several times after April 28, 2009 about the issue of the level of service. He also had had discussions with Mr. Nixon since the start of the process. Nonetheless, he stated that Ms. Colterman finalized the work submitted to Mr. Nixon for approval. Mr. Boulianne testified that the level-of-service determination approved by Mr. Nixon was communicated to the Treasury Board Secretariat on June 6, 2009, before the respondent sent it to the applicant at the end of that month.

[24] Mr. Boulianne answered further questions about documents and reports used by the respondent, particularly during the period between the Board's April 2009 decision and the June 22, 2009 letter to the applicant. He indicated that he did not know how Ms. Colterman communicated the results of the work on the level of service to Mr. Nixon, that he did not keep a record of all the information exchanges and documents used during the process, and that he did not participate in the communications with the Treasury Board Secretariat.

[25] Mr. Boulianne reiterated that the reference to "100%" in the June 22, 2009 letter pertained to the number of positions required to perform the essential services established by the Board and that it was not part of the determination about the level of service.

IV. Summary of the arguments

A. For the applicant

[26] Two issues arise in addressing the disclosure request, as follows: (1) Does the Board have the authority to order the production of all documents arguably

relevant to the respondent's decision to establish the level of service? (2) Are the documents of which disclosure is sought by the applicant arguably relevant? The Board already answered the first question in the affirmative in 2010 PSLRB 88. It did not answer the second question.

[27] In 2009 PSLRB 55, the Board ordered the applicant to determine the level at which the essential services defined in its decision were to be provided to the public. The respondent's letter of June 22, 2009 was the result (Exhibit R-2). In refusing, for the most part, to provide information subsequently requested by the applicant to allow it to understand how the respondent defined the level of service, the respondent has not stated that there are no remaining documents that could be disclosed. It also has not suggested that it could be prejudiced by the production of such documents.

[28] The evidence indicates that meetings were held after April 28, 2009 involving Ms. Colterman, Mr. Boulianne and Mr. Nixon about the level of service, and that documents were exchanged and reviewed. The evidence also confirms that the respondent communicated with the Treasury Board Secretariat on June 6, 2009 about the level of service and that there was approval for the letter sent to the applicant on June 22, 2009. It is clear that information exists about the level-of-service determination, little of which has been received by the applicant.

[29] The applicant originally requested the disclosure of ". . . all documentation including reports and analyses respecting [its] 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." In light of the respondent's letter of January 28, 2011 (Exhibit R-4), the applicant was able to sharpen its request as outlined in its letter of March 25, 2011 (Exhibit A-6) (see paragraph 14 of this decision). Nevertheless, it maintained its position that the Board should order a more general production of all documents relevant to the respondent's level-of-service determination as communicated on June 22, 2009.

[30] The applicant maintained that all the documents that it seeks are arguably relevant as proven by the record and by the evidence at this hearing. The applicant has made out all the needed elements to support a production order by the Board.

[31] The applicant also noted that the Board has recently issued a production order in a letter to the parties in proceedings involving the Border Services (FB) group, which reads in part as follows:

> . . .
>
> *. . . the Respondent is hereby ordered to produce to the Applicant . . . the following documentation:*
>
> > *1. All documentation detailing the manner and process by which the employer established the level at which the specified essential services are to be provided to the public, including the extent and frequency of such services.*
>
> . . .

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

[32] The respondent made its submissions without prejudice to its judicial review application, in which it argues that the Board's decision in 2010 PSLRB 88 should be set aside.

[33] On the basis of the Board's ruling at paragraph 168 of 2010 PSLRB 88 that it has the power to consider an allegation that the respondent has violated a principle of administrative law or due process in exercising its exclusive authority under section 120 of the *Act* to set the level of service, the underlying issue at this hearing had to be the arguable relevance of the disclosure request to an allegation that the respondent has abused its discretion or otherwise failed to comply with the *Act*.

[34] The items specified by the applicant in its March 25, 2011 letter (Exhibit A-6) are not arguably relevant to such an allegation. The applicant has never indicated what the respondent allegedly failed to do. It had the onus to satisfy the Board that there is some basis for an allegation that the respondent acted in bad faith, acted contrary to section 120 of the *Act*, or otherwise failed to observe, for example, the factors discussed by D. Jones and A. de Villars in *Principles of Administrative Law,* 5th ed., concerning the exercise of discretionary authority. It had to meet that onus as a condition to the Board considering any request for a disclosure of information. It did not.

[35] The information and documentation provided by the respondent to the applicant since June 2009 prove that the respondent properly exercised its authority when it established the level of service as follows: (1) that the SCCs would be open for their regular hours of work; (2) that services in both official languages would continue in those SCCs designated as bilingual; and (3) that small SCCs would be staffed with a minimum of three individuals during a strike.

[36] The applicant has incorrectly and persistently expressed the respondent's determination of the level of service in terms of a percentage, "100%". It framed its disclosure request on the basis of the respondent having set the level of service at 100%. It is not clear to the respondent what the 100% refers to. No provision in the *Act* requires expressing the level of service in terms of percentages.

[37] Assuming that there is an allegation that the respondent abused its authority underlying the applicant's disclosure request, the fourfold test set out in *West Park Hospital v. Ontario Nurses' Association* (1993), 37 L.A.C. (4th) 160, applies to assess the arguable relevance of the information sought by the applicant. The four factors are as follows: (1) the information requested must be arguably relevant to the issue(s) in the proceeding (see also *Ontario Public Service Employees Union v. Ministry of Correctional Services*, [2003] OLRB Rep. March/April 242, and *Association of Management, Administrative and Professional Crown Employees of Ontario v. Ontario (Ministry of Government Services)*, 2011 CanLII 7243 (ON LRB), (2) the information must be particularized so that there is no dispute over what is requested, (3) the decision maker must be satisfied that the request is not a "fishing expedition", and (4) there must be a clear nexus between the information requested and the issue in dispute.

[38] The applicant's request fails on all *West Park Hospital* factors. The applicant has not established the logical or rational relationship between the documents that it seeks and the issue assumed to be in dispute, that is, an allegation that the respondent has acted in bad faith or improperly exercised its discretion under section 120 of the *Act*. The applicant's outline of the information sought from the respondent in its letter of March 25, 2011 (Exhibit A-6) is not sufficiently particularized. Moreover, it is clear that anything in that outline relating to the substantive level-of-service determination by the respondent cannot be arguably relevant. In effect, the applicant's request seeks to find out whether anything is out there that might reveal a problem. It is a fishing expedition, within the meaning of the *West Park Hospital* test.

[39] In sum, the applicant has failed to articulate any alleged violation by the respondent of the administrative law factors that affect the exercise of statutory discretion and has failed to establish any clear nexus between the information that it seeks and an issue in dispute. In that light, the Board must dismiss the request for the production of documents.

[40] With respect to the applicant's statement that the respondent has not suggested that it could be prejudiced by the production of the requested documents, the respondent has not raised that issue to date because the Board has not yet ordered the production of documents. The respondent also has not sought a stay order from the Federal Court of Appeal to date in the absence of a disclosure order from the Board.

[41] There is no evidence before the Board as to whether the disclosure issues now before it were discussed in the case of the FB Group, when the Board decided to issue the production order cited by the applicant.

[42] In response to a question from the Board, the respondent reiterated that the only level-of-service determination that it has made is composed of the three bulleted parameters outlined in the June 22, 2009 letter (Exhibit R-2). The reference to "100%" is irrelevant to that determination. The respondent urged me to understand that distinction in the context of its efforts to respond fully to the Board's order in 2010 PSLRB 88.

C. Applicant's rebuttal

[43] Before the parties can move forward to address the third-order issues in the analytical path described by the Board in *Public Service Alliance of Canada v. Parks Canada Agency*, 2008 PSLRB 97 — namely, the types of positions, numbers of positions and the specific positions required to perform the essential services determined by the Board — it is essential that the basis for the second-order determination by the respondent of the level of service is known. The third step cannot occur unless the respondent has exercised its discretion lawfully at the second step as contemplated by the *Act*.

[44] By distancing itself from the reference in its June 22, 2009 statement to ". . . 100% of the 77% spent on the delivery of essential services," the respondent has made

it clear that it does not know what it is doing when it sets the level of service. It states that the "100%" figure is irrelevant to the level of service, but the June 22, 2009 letter citing that figure as the level of service is exactly why the applicant made the disclosure request that led to this hearing. The applicant needs to know how the respondent came to that figure or, without that figure, how it determined the level of service to have any confidence that it exercised its discretion properly.

[45] Viewed within the context of ESA proceedings under the *Act*, the applicant has satisfied the test for arguable relevance set out in *West Park Hospital*. Its request is clearly connected to the respondent's determination of the level of service and follows directly from the Board's decision in 2010 PSLRB 88. It is sufficiently particularized, as supported by the record and the evidence. It is not a fishing expedition.

V. Reasons

[46] In 2010 PSLRB 88, the Board ruled as follows:

. . .

> *[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.*

. . .

[47] The respondent has suggested that the applicant bears an onus to establish the basis for an allegation that the respondent improperly exercised its discretion under section 120 of the *Act* if the Board is to consider a request for the production of documents. Because the applicant has not specifically done so, the respondent has assumed for the purpose of arguing the merits of the applicant's request that there is an underlying allegation of abuse of discretion before the Board. On that basis, the respondent argued that the applicant failed to establish a clear nexus between the information that it seeks and that issue.

[48] I respectfully disagree with the respondent's submission. First, I do not believe that the Board's ruling in 2010 PSLRB 88 requires that the applicant meet a burden to substantiate a formal allegation of abuse by the respondent of its discretionary authority under section 120 of the *Act* as a condition to the Board addressing a disclosure issue or that such a requirement is consistent with the logic of the analysis that led the Board to its ruling. The Board stated that it may consider a request ". . . for the disclosure of documents that are arguably relevant to an employer's determination of the level of service." The statement imposed no other condition. The Board observed that that authority follows from ". . . 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 . . . ." The Board's analysis thus found it logical that it has the power to address a disclosure request in the context of a section 120 level-of-service determination because the Board has jurisdiction to decide an allegation of abuse of the discretionary authority found in section 120. However, it is not necessary to that logical connection that one element precede the other — that there must be an allegation of abuse before the power to order the production of documents is triggered.

[49] Section 36 of the *Act* 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.*

[50] Consistent with section 36 of the *Act*, and to give concrete force to its administrative role, paragraph 40(1)(*h*) empowers the Board to ". . . compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant . . . ."

[51] By deriving its power to consider a disclosure request from its administrative authority under section 36 of the *Act*, the Board took a broad and purposive view of its role within the statutory regime for essential services. I do not believe that it is consistent with that view to find that the Board's ability to consider a disclosure issue operates only in the circumstance of an allegation of abuse of section 120 by a litigating party. It can also operate when a party wishes to satisfy itself that there has

been no such abuse and the Board judges that that disclosure of arguably relevant documents serves the positive labour relations purpose of reducing the possibility of further litigation on that issue. The Board clearly recognized that possibility in 2010 PSLRB 88 when it stated the context for its analysis of its jurisdiction as follows:

. . .

> *[106] The initiating issue in this matter is the applicant's request for a disclosure of information. . . 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.

. . .

[52] In my view, there may also be circumstances under which the Board may deal with a disclosure request concerning section 120 of the *Act* in contemplation of other elements in an ESA. In this case, the Board is addressing a specific dispute over a disclosure of documents, but it is doing so as part of its continuing involvement with the component of the PA Group ESA application that deals with outstanding issues at Service Canada. To date, the parties have asked the Board to decide several different issues with respect to Service Canada under the umbrella of that application. There is some substantial possibility that there will be more. The Board's approach has been to understand each specific decision that it has been asked to make about the CSOs at the SCCs as part of the broader process for resolving all disputed elements of the PA Group ESA for Service Canada. The analytical path outlined by the Board in its *Parks Canada Agency* decision recognized that an employer's decision about level of service builds upon the prior definition of essential services, negotiated by the parties or determined by the Board. In turn, third-order decisions about the types of positions, the number of positions and the specific positions required to perform essential services build on both the definition of essential services and the establishment of the level of service by the employer under section 120. In the end, the different parts must come together as a coherent whole.

[53] In that sense, the nature of the continuing application before the Board is very different from the discrete matter at issue in *West Park Hospital*. The decision maker in *West Park Hospital* determined the relative merits of the positions taken by the parties in a case about a termination for incompetence. In these proceedings, the Board is exercising a continuing supervisory role over the collective bargaining process. While

the proceedings are similarly adversarial, the Board's public interest perspective in this case is different than in an adjudication of an individual employee's rights. In my view, that significant difference in context largely blunts the respondent's argument, based on the test in *West Park Hospital*, which is that the applicant is improperly using its disclosure request to find out whether there is anything out there that might reveal a problem.

[54] I endorse the view expressed by the applicant that the resolution of the third-order ESA issues for the SCC CSOs depends on there being a level of confidence that the respondent has lawfully determined the level of service — the second-order issue. To exercise the power granted to it under paragraph 40(1)(*h*) of the *Act* in the circumstances of this case, the Board need only be satisfied that the information sought by the applicant is arguably relevant to the respondent's determination of the level of service — the precise wording of its ruling in 2010 PSLRB 88. If that condition is met, I take the view that issuing a disclosure order would be consistent with the Board's administrative authority under section 36 and consistent with the purposes of the *Act* as enunciated in its preamble, particularly that the Board's actions support the ". . . fair, credible and effective resolution of matters . . . ." A disclosure order could serve the positive labour relations purpose of convincing the applicant that the respondent has complied with section 120, permitting the parties to move on to further elements of the ESA. It could also, in the process, reveal further information that may facilitate discussions about those further elements.

[55] I note in passing that the Board has already issued a production order about a level-of-service determination made under section 120 of the *Act* in separate proceedings for another group involving the same applicant and respondent. The relevant section of the Board's order of June 14, 2011 reads as follows:

> . . .
>
> *. . . the Respondent is hereby ordered to produce to the Applicant . . . the following documentation:*
>
> > *1. All documentation detailing the manner and process by which the employer established the level at which the specified essential services are to be provided to the public, including the extent and frequency of such services.*
>
> . . .

[56] I have found no indication on the public record that the respondent has challenged the Board's authority to issue that disclosure order or that the order was the result of a proceeding into an allegation that the respondent abused its discretionary authority under section 120 of the *Act*. The respondent may be accurate in stating that there is no evidence that its submissions in this case were before the Board in the FB case, but that does not change the fact that an unchallenged precedent now exists for the Board exercising its authority in the exact way that the respondent contends it should not or cannot.

[57] As stated, the test in this case is the arguable relevance of the information sought by the applicant to the respondent's determination of the level of service. What is the level of service determined by the respondent?

[58] In its letter of June 22, 2009 (Exhibit R-2), the respondent informed the applicant as follows:

. . .

> *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 Centres (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 with 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* [*sic*] *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. . . .*

. . .

[59] It is evident that the applicant has consistently understood that the level-of-service determination communicated in the letter of June 22, 2009 included

the reference to the respondent ". . . establishing the level of service at 100% of the 77% spent on the delivery of essential services." Throughout its correspondence to the respondent and to the Board, the applicant has focused on the ". . . decision of the employer to establish the level of service in this case at 100%" (Exhibit A-2; see also Exhibits A-4 to A-6). However, Mr. Boulianne testified that the reference to "100%" in the June 22, 2009 letter pertained to the number of positions required to perform the essential services established by the Board and that it was not part of the determination about the level of service. Answering a question that I posed at the hearing, counsel for the respondent also insisted that the reference to "100%" is irrelevant to that determination. She maintained that the only elements that comprise the respondent's level-of-service determination are stated in the three bulleted parameters in the letter. In the written summary of her arguments given to the Board, counsel writes further that ". . . [i]t is not clear to the Employer what the 100% refers to . . . ."

[60] Section 120 of the *Act* provides some brief indication of the nature of a level-of-service determination, 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. . . .*

[61] In my view, a reasonable person can easily read the reference to ". . . establishing the level of service at 100% of the 77% spent on the delivery of essential services" as a determination of at least the extent to which the essential services performed by the CSOs at the SCCs are to be performed, if not also the frequency with which those services are to be provided. The reference can reasonably be construed to indicate the respondent's intention that the essential services performed by the CSOs at the SCCs will continue on a "business as usual" basis. If the CSOs on average spend 77% of their work time performing the essential services defined by the Board, then a level of service of 100% of that 77% would seem to require the CSOs to continue to provide the essential services during a strike to their normal extent and at their normal frequency — that is, business as usual.

[62] In the end, I do not believe that I need to rule formally in this proceeding whether the "100%" figure forms part of the respondent's determination of the level of

service. However, I feel compelled to observe that I find it very difficult to understand the basis of the respondent's claim that the reference to "100%" is irrelevant to that determination, considering all the documents now on record. When the respondent states further that ". . . [i]t is not clear to the Employer what the 100% refers to . . . ," I think that it is understandable that the applicant should want to know more about what the respondent's letter of June 22, 2009 actually meant. In light of the evidence given by Mr. Boulianne and the respondent's submissions at this hearing, there are now legitimate questions about what exactly comprises the respondent's level-of-service determination and the real meaning of its reference to "100%", in addition to the issue of how the respondent reached its decision.

[63] I am satisfied that the evidence before me is sufficient to allow me to find that substantial parts of the information sought by the applicant are arguably relevant to the respondent's determination of the level of service, whatever that might include. It is clear from Mr. Boulianne's testimony that there probably are arguably relevant documents that have not yet been provided to the applicant pertaining to the work of the group led by Ms. Colterman, particularly during the period following the Board's decision in 2009 PSLRB 55 through to June 22, 2009, when the respondent communicated its determination to the applicant. Mr. Boulianne's testimony leaves open the possibility, if not the probability, that documents were produced or used as Ms. Colterman's team worked to finalize a recommendation, that Ms. Colterman may have used documents in taking that recommendation to Mr. Nixon, that Mr. Nixon's approval of the recommendation may have taken written form and that subsequent communications with the Treasury Board Secretariat on or about June 6, 2009 may also have involved documents. To be sure, the applicant's effort to sharpen its disclosure request on March 25, 2011 (Exhibit A-6) generally reflects the process and chronology explained at the hearing by Mr. Boulianne. In that sense, I cannot agree that it comprises a fishing expedition. As to whether the applicant's request is sufficiently particularized in view of the record and the evidence, I am satisfied that it contains the level of precision that was, and is, possible in the circumstances.

[64] For all of the above reasons, the Board agrees to fashion an order for the production of documents relevant to the respondent's determination under section 120 of the *Act* of the level of service at which the CSOs at the SCCs are to provide the essential services defined in 2009 PSLRB 55. The following order follows the precedent

established by the Board in the FB case, expanded and modified to provide further specificity in light of the record and evidence in this application:

(The Order appears on the next page)

VI. Order

[65] The respondent is hereby ordered to produce to the applicant, by no later than sixty (60) days after the date of this decision, all documents as described as follows that have not previously been disclosed to the applicant:

(a) all documents detailing the manner and process by which the respondent established the level of service communicated in its letter to the applicant of June 22, 2009; and

(b) all documents detailing the meaning of the reference to ". . . establishing the level of service at 100% of the 77% spent on the delivery of essential services" in the letter of June 22, 2009, and how those figures were derived.

[66] Without restricting the generality of the foregoing, the order includes the following:

(i) all documents about the level of service exchanged or used in connection with the meetings that took place between Ms. Colterman and Mr. Boulianne;

(ii) all documents about the level of service provided to Mr. Nixon or that resulted from the decision made by Mr. Nixon; and

(iii) all documents about the level of service exchanged or used in communicating Mr. Nixon's decision to the Treasury Board Secretariat on or about June 6, 2009, including any written response issued by the Treasury Board Secretariat.

[67] 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.

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

August 9, 2011.

Dan Butler,
Board Member