

**Date:** 20110202

**File:** 575-02-14

**Citation:** 2011 PSLRB 12



*Public Service  
Labour Relations Act*

Before the Public Service  
Labour Relations Board

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BETWEEN

**PUBLIC SERVICE ALLIANCE OF CANADA**

Applicant

and

**TREASURY BOARD**

Respondent

Indexed as

*Public Service Alliance of Canada v. Treasury Board*

In the matter of an application, under subsection 77(1) of the *Public Service Labour Relations Act*, for revocation of an order that declared that a position is a managerial or confidential position

**REASONS FOR DECISION**

***Before:*** Casper M. Bloom, Q.C., Ad. E., Chairperson

***For the Applicant:*** Stephanie Copeland, Public Service Alliance of Canada

***For the Respondent:*** Lynn Grenier-Beaulne, Treasury Board Secretariat

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Decided on the basis of written submissions  
filed November 24 and 30, 2010 and January 20, 2011.

### **Application before the Board**

[1] On November 24, 2010, the Public Service Alliance of Canada (“the bargaining agent”) filed an application with the Public Service Labour Relations Board (“the new Board”) for an order revoking the managerial or confidential status of position 22764 (Manager, Community Services, Department of Indian Affairs and Northern Development, in Amherst, Nova Scotia) (“the position”) and returning the position to the following bargaining unit, for which the bargaining agent was certified as the bargaining agent (see *Public Service Alliance of Canada v. Treasury Board*, PSSRB File Nos. 144-02-19 and 36 (19680724), as modified by *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 141-02-1 (19930812), *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 142-02-337 (19990607), and *Treasury Board (Canada Border Services Agency) v. Public Service Alliance of Canada*, 2007 PSLRB 22):

*All employees of the Employer in the Program and  
Administrative Services Group as defined in Part I of the  
Canada Gazette of March 11, 2006.*

[2] On November 24, 2010, the Treasury Board (“the employer”) responded that it consented to this application.

### **Background**

[3] When the initial application for exclusion was made, the incumbent of the position was identified as a “person employed in a managerial or confidential capacity” under subparagraph (c)(iii) of that definition in section 2 of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (“the former Act”). At that time, subparagraph (c)(iii) read as follows:

*2. In this Act,*

...

*“person employed in a managerial or confidential capacity”  
means any person who*

...

*(c) is employed in the Public Service and, in connection  
with an application for certification of a bargaining  
agent for a bargaining unit, is designated by the Board,  
or, in any case where a bargaining agent for a  
bargaining unit has been certified by the Board, is  
designated in prescribed manner by the employer or by*

*the Board on objection thereto by the bargaining agent,  
to be a person*

...

*(iii) who is required by reason of the duties and responsibilities of that person to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act,*

[4] No record exists of an order made by the former Public Service Staff Relations Board (“the former Board”) that declared the incumbent of the position a “person employed in a managerial or confidential capacity.” Before June 1, 1993, a person could have been identified by the employer as a “person employed in a managerial or confidential capacity” without any determination by the former Board.

[5] On June 1, 1993, subsections 32(1) and (4) and 94(2) of the *Public Service Reform Act*, S.C. 1992, c. 54, were proclaimed in force. Subsection 32(1) repealed the definition of “person employed in a managerial or confidential capacity” in section 2 of the former *Act*, and subsection 32(4) provided for a new definition of “managerial or confidential position.” Pursuant to subsection 94(2), the incumbent of the position was then deemed employed in a “managerial or confidential position” as follows:

***94. (2) A person who, immediately before the repeal of the definition “person employed in a managerial or confidential capacity” in section 2 of the Public Service Staff Relations Act by subsection 32(1) of this Act, was a person described in paragraph (c) of that definition shall be deemed to occupy thereafter a position described in paragraph (g) of the definition “managerial or confidential position” in section 2 of that Act, as enacted by subsection 32(4) of this Act.***

[Bold in the original]

[Emphasis added]

[6] On April 1, 2005, the former *Act* was repealed, and the *Public Service Labour Relations Act* (“the new *Act*”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 50 of the *Public Service Modernization Act*, the incumbent of the position was deemed the incumbent of a “managerial or confidential position” under the new *Act* as follows:

***50. Every position that was a position referred to in any of paragraphs . . . (g) of the definition “managerial or confidential position” in subsection 2(1) of the former Act immediately before the day on which the definition “managerial or confidential position” in subsection 2(1) of the new Act comes into force is deemed, as of that day, to be a managerial or confidential position within the meaning of subsection 2(1) of the new Act.***

[Bold in the original]

[Emphasis added]

For its part, subsection 2(1) of the new Act provides as follows:

*2. (1) The following definitions apply in this Act.*

. . .

*“managerial or confidential position” means a position declared to be a managerial or confidential position by an order made by the Board. . . .*

. . .

[Emphasis added]

### **Reasons**

[7] There is no dispute between the parties that before June 1, 1993, the incumbent of the position was identified as a “person employed in a managerial or confidential capacity” under subparagraph (c)(iii) of that definition in section 2 of the former *Act*. Pursuant to subsection 94(2) of the *Public Service Reform Act* and section 50 of the *Public Service Modernization Act*, the position is deemed to have been ordered declared by the new Board as a “managerial or confidential position” within the meaning of subsection 2(1) of the new *Act*.

[8] Sections 77 and 78 of the new *Act* provide that a bargaining agent may apply to the new Board for an order revoking the order that declared a position a “managerial or confidential position,” in which case the bargaining agent bears the onus of proving that the position is no longer a “managerial or confidential position”:

*77. (1) If the bargaining agent considers that a position is no longer a managerial or confidential position, the bargaining agent may apply to the Board for an order revoking the order that declared that position to be a managerial or confidential position.*

*(2) The bargaining agent must provide the employer with a copy of the application.*

*78. (1) If an application is made under section 77, the Board must, after giving the employer and the bargaining agent an opportunity to make representations, determine whether the position is still a managerial or confidential position and, if it determines that it is not, make an order revoking the order that declared the position to be a managerial or confidential position.*

*(2) The burden of proving that a particular position is no longer a managerial or confidential position is on the bargaining agent.*

[9] Given that the employer has consented to this application, I consider that the bargaining agent has met its burden of proof.

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

*(The Order appears on the next page)*

**Order**

[11] I declare that position 22764 (Manager, Community Services, Department of Indian Affairs and Northern Development, in Amherst, Nova Scotia) is no longer a “managerial or confidential position” within the meaning of subsection 2(1) of the new Act, and I order revoked the order that declared it so.

February 2, 2011.

**Casper M. Bloom, Q.C., Ad. E.  
Chairperson**