Date: 20130827

File: 585-24-48

Citation: 2013 PSLRB 98

Public Service Labour Relations Act

Before the Chairperson of the Public Service Labour Relations Board

IN THE MATTER OF
THE *PUBLIC SERVICE LABOUR RELATIONS ACT*
and a dispute affecting
the Public Service Alliance of Canada, as bargaining agent,
and the Statistics Survey Operations, as employer,
in respect of the bargaining unit composed of all employees of the employer engaged in the carrying out of survey activities primarily in the Statistics Canada Regional Offices

Indexed as
Public Service Alliance of Canada v. Statistics Survey Operations

TERMS OF REFERENCE

To: Christine Schmidt, chairperson of the arbitration board;
Joe Herbert and Guy Lauzé, arbitration board members

Before: David P. Olsen, Acting Chairperson of the Public Service Labour Relations Board

For the Bargaining Agent: Chantal Homier-Nehmé and Morgan Gay, Public Service Alliance of Canada

For the Employer: Joshua Alcock, counsel, and Gloria A. Tatone Blaker, Statistics Survey Operations

Issued on the basis of written submissions
dated October 5, 16, 24 and 25 and November 8, 15 and 27, 2012,
and March 20 and 23, 2013,
and a hearing held at Ottawa, Ontario,
March 27 and 28, 2013.

I. Matter before the Chairperson of the Public Service Labour Relations Board

[1] By letter of October 5, 2012, the Public Service Alliance of Canada ("the bargaining agent") requested arbitration in respect of the bargaining unit composed of all employees of the employer engaged in the carrying out of survey activities primarily in the Statistics Canada Regional Offices ("the bargaining unit"). In its request, the bargaining agent provided a list of the terms and conditions of employment that it wished to refer to arbitration. Those terms and conditions of employment and supporting material are attached as schedule 1.

[2] By a first letter of October 16, 2012, the Statistics Survey Operations ("the employer") responded to the terms and conditions of employment that the bargaining agent wished to refer to arbitration. Several jurisdictional objections were raised by the employer. The employer also provided a list of additional terms and conditions of employment it wished to refer to arbitration. That letter and supporting material are attached as schedule 2.

[3] By a second letter of October 16, 2012, the employer more fully described its various jurisdictional objections in response to certain terms and conditions of employment that the bargaining agent wished to refer to arbitration. The employer clarified its objections as follows:

- in regards to the bargaining agent's proposal for a new Appendix XX (List of On-going Surveys), the employer objected on the basis that it violates subsection 150(2) of the *Public Service Labour Relations Act* since the term or condition of employment sought was not the subject of negotiation between the parties; the employer claimed the proposal further violates paragraphs 150(1)(*a*), (*c*) and (*e*) of the *Public Service Labour Relations Act* as well as paragraph 4(2)(*b*) and section 7 of the *Statistics Act*;

- in regards to the bargaining agent's proposal for a new definition of "Indeterminate Employee" in article 2 (Interpretation and Definitions), the employer objected specifically on the basis that it violates paragraphs 150(1)(*c*) and (*e*) of the *Public Service Labour Relations Act* and that it encroaches on paragraph 4(2)(*b*), subsection 5(1) and section 7 of the *Statistics Act*;

- in regards to the bargaining agent's several proposals for article 20 (Job Security), the employer objected on the basis that they are in violation of paragraphs 150(1)(*a*), (*c*) and (*e*) of the *Public Service Labour Relations Act* as well as interfering with paragraph 4(2)(*b*) and section 7 of the *Statistics Act*; and

- in regards to the bargaining agent's proposal for new clauses 23.16 (Work Assignment) and 23.17 (Population of Work Schedules), the employer objected on the basis that they contravene paragraphs 150(1)(*a*) and (*e*) of the *Public Service Labour Relations Act* as well as paragraph 4(2)(*b*) and section 7 of the *Statistics Act*.

That letter and supporting material are attached as schedule 3.

[4] By letter of October 24, 2012, the bargaining agent responded to the additional terms and conditions of employment that the employer wished to refer to arbitration. The bargaining agent objected to a portion of the employer's proposal for a new paragraph at article 53 (Duration) on the basis that, as per subsection 150(2) of the *Public Service Labour Relations Act*, an arbitral award ". . . may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested." That letter is attached as schedule 4.

[5] By email of October 25, 2012, the bargaining agent completed its response to the additional terms and conditions of employment that the employer wished to refer to arbitration. It informed that:

. . .

> *. . . for all matters outstanding between the parties other than those referred to by the Union in its submissions when requesting arbitration and the matter referred to in yesterday's letter, the Union's position is status quo in terms of language contained in the party's collective agreement, with the exception of the Employer's proposal concerning article 14.01, to which the Union agrees.*

. . .

That email is attached as schedule 5.

[6] By email of November 8, 2012, the bargaining agent submitted its response to the jurisdictional objections raised by the employer. It stated that it viewed its proposals with respect to Appendix XX (List of On-going Surveys), a new definition of "Indeterminate Employee" in article 2 (Interpretation and Definitions) and new clause 23.17 (Population of Work Schedules) as being consistent with the "Board's jurisdiction" and therefore maintained its position on these. The bargaining agent withdrew its specific proposals on clauses 20.05, 20.06 and 20.09 and maintained its position with respect to its remaining proposals for article 20 (Job Security). Finally, the bargaining agent provided an amended proposal for a new clause 23.16 (Scheduling of Work Hours). That email and amended proposal are attached as schedule 6.

[7] By a first email of November 15, 2012, the employer submitted its response to the jurisdictional objection raised by the bargaining agent concerning the employer's proposal for a new paragraph at article 53 (Duration), stating that it viewed its proposal as consistent with the "Board's jurisdiction" and wished to maintain its proposal. That email is attached as schedule 7.

[8] By a second email of November 15, 2012, the employer provided its comments on the bargaining agent's email of November 8, 2012. The employer maintained its jurisdictional objections to the bargaining agent's proposals for a new Appendix XX (List of On-going Surveys), a new definition of "Indeterminate Employee" in article 2 (Interpretation and Definitions), changes to article 20 (Job Security) and a new clause 23.17 (Population of Work Schedules). The employer also objected to the bargaining agent's amended proposal for a new clause 23.16 (Scheduling of Work Hours), on the basis that it violates subsection 150(2) of the *Public Service Labour Relations Act* since the term or condition of employment sought was not the subject of negotiation between the parties. That email is attached as schedule 8.

[9] Following a review of the materials submitted, the Dispute Resolution Services of the Public Service Labour Relations Board wrote to the employer on November 20, 2012, at my request, requiring the employer to provide its position with respect to a new paragraph at article 53 (Duration).

[10] By email of November 27, 2012, the employer withdrew its specific proposal on a new paragraph at article 53 (Duration). That email is attached as schedule 9.

[11] On January 10, 2013, the parties were informed that the Chairperson of the Public Service Labour Relations Board had decided to hold a hearing so that the jurisdictional objections raised by the parties could be addressed. Hearing dates were set for March 25 to 28, 2013.

[12] By email of March 20, 2013, the bargaining agent withdrew its specific proposals on clauses 20.02, 20.09, 20.10 and 20.13 for article 20 (Job Security). Also, the bargaining agent withdrew its proposal for a new Appendix XX (List of On-going Surveys). With respect to the other jurisdictional matters, the bargaining agent maintained its position. That email is attached as schedule 10.

[13] By email dated March 23, 2013, the bargaining agent withdrew its specific proposals on clauses 20.11 and 20.12 for article 20 (Job Security). This email is attached as schedule 11.

[14] Prior to the hearing, the parties had resolved all of the outstanding jurisdictional objections, save for a new definition of "Indeterminate Employee" in article 2 (Interpretation and Definitions) and new clauses 23.16 (Scheduling of Work Hours) and 23.17 (Population of Work Schedules). That hearing took place on March 27 and 28, 2013.

II. Hearing

[15] At the commencement of the hearing, both parties provided opening statements outlining their positions. At the hearing, the bargaining agent withdrew its specific proposal on a new definition of "Indeterminate Employee" in article 2 (Interpretation and Definitions).

[16] The bargaining agent proposed to refer to arbitration an amended proposal for a new clause 23.16 (Scheduling of Work Hours). The employer's position is that the amended proposal requires the employer to assign specific duties to specific categories of employees, contrary to section 150 of the *Public Service Labour Relations Act*. The amended proposal for a new clause 23.16 reads as follows:

> ***23.16 Scheduling of Work Hours***
>
> *a) Hours of work associated with on-going surveys shall first be assigned to available indeterminate employees.*

> *b) If there are insufficient indeterminate employees available to work the hours associated with an on-going survey, the hours shall then be offered to available term employees.*
>
> *c) Hours of work associated with ad hoc surveys shall first be assigned to available indeterminate employees.*
>
> *d) If there are insufficient indeterminate employees available to work the hours associated with an ad hoc survey, the hours shall then be offered to available term employees.*
>
> *e) When hours of work associated with a survey become available, they shall be assigned first to available employees who are trained to work the survey, following the preference order outlined above.*
>
> *f) In the event that there are insufficient trained employees, the Employer shall assign the hours and provide the necessary training to available indeterminate employees.*
>
> *g) If there are insufficient indeterminate employees available, the hours shall be assigned and the necessary training provided to available term employees.*
>
> *h) Employees must meet language requirements to work the hours associated with a survey.*
>
> *i) For each level of the preference order outlined in a) through h) above, where there are excessive employees available, the hours of works shall be assigned in order of seniority.*

[17] The bargaining agent also proposed to refer to arbitration new clause 23.17 (Population of Work Schedules), dealing with the scheduling of work hours such as to maximize straight-time hours by seniority. According to the employer, the amended proposal has the same problems that are inherent in the amended proposal for a new clause 23.16 (Scheduling of Work Hours). The proposed new clause 23.17 reads as follows:

> ***23.17 Population of Work Schedules***
>
> *Once the Employer has determined the collection period, targeted hours, peak calling periods and the number of employees required to work a survey, the Employer shall schedule hours following the preference order outlined in 23.16 and in such a way as to maximize straight-time hours by seniority.*

[18] The bargaining agent says that the amended proposal for a new clause 23.16 (Scheduling of Work Hours) and new clause 23.17 (Population of Work Schedules) deal with the scheduling of work hours that panels of the Public Service Labour Relations Board have recognized as appropriate for collective bargaining under the *Parliamentary Employment and Staff Relations Act*. Four different bargaining units at the House of Commons and the Senate pursued through arbitration proposals dealing with hours of work.

A. Summary of the evidence

[19] Both parties called evidence to provide context for their respective positions.

1. For the employer

[20] The employer called Guy Oddo, the director general for regional offices at Statistics Canada, as a witness. Mr. Oddo has overall responsibility for the management of field surveys and telephone surveys. That responsibility involves planning and establishing a budget for specific surveys. It also includes distributing work and managing the workforce.

[21] Mr. Oddo defined a number of terms in order to understand the context in which the proposals at issue can be evaluated.

[22] An ongoing survey is a survey that the employer estimates will continue for the foreseeable future in its planning assumptions. An example of an ongoing survey is the Labour Force Survey, which is used to measure the number of jobs created and the number of persons unemployed in the labour force on a monthly basis. There are approximately 12 ongoing surveys. Some surveys deal specifically with businesses, others with the public, an example of which is the Household Survey.

[23] An ad hoc survey is one that the employer is asked to conduct on one occasion or on an irregular basis that is not planned with much advance notice. The Survey of Financial Security, of the income and wealth of Canadians, is a survey that is done on an irregular basis.

[24] Employees in the bargaining unit interview survey respondents by telephone. As they are engaged in proportionally more householder surveys, their work is typically carried out on weekends and evenings, when survey respondents are available. A

smaller portion of the work involves business surveys, in which case the telephone interviews are done during the day during business hours, Monday to Friday.

[25] General training is given to all new hires. Employees assigned to a specific survey are given specific training for that survey. Training for an individual survey involves explaining to employees why the survey is being done, providing employees with the tools to conduct the survey and explaining to the employees the content of the survey in order to convince Canadians to complete the questionnaire. The employees are also provided with more technical training on the computer, as each survey is unique. If it is an ongoing survey, employees are given refresher training.

[26] When faced with deciding how to staff for a survey for regional offices, management must consider the workload, the duration of the interviews with survey respondents and the best time to telephone survey respondents. For households, the best times to telephone are evenings and weekends. The duration of the period during which information is to be collected may be short or long. These parameters are provided by methodologists. Interviewers only collect the information and the employer has no flexibility with respect to these parameters. In determining the appropriate staffing profile, it is necessary to consider the budget available for the specific survey, the number of interviewers required, the workload already being carried in the regional offices and the availability of interviewers for the period of the survey. If other surveys have already been assigned to employees, and if employees have already worked the maximum number of hours and a new survey comes in, there may be a need to assign work to new surveyors.

[27] Because work is scheduled seven days in advance for the next month, management does not want to produce a schedule with a lot of changes. Management asks employees on a regular basis to indicate their availability. There is an attempt made to take into account the availability of employees when work is scheduled. Management considers bringing in new hires when employees are not available to do a survey either because they are working on another survey or they are just not available. It may not be practical to pull employees off a survey that is ongoing. If the employer is not going to be able to get timely results because of the demands of the existing workload with the current capability, it will consider bringing in new hires. In addition, if the cost of travel on account of the distance to survey respondents is too expensive, the employer will hire.

[28] There are two distinct groups of employees: ongoing employees, whose term of employment has no end date; and term employees, whose term has a specific end date. All employees are hired under the authority of the *Statistics Act*. They are all part-time employees and have the same contract of employment.

[29] The workweek for employees in the bargaining unit is to a maximum of 37.5 hours, after which there is an entitlement to overtime. However, these employees do not work that many hours, as it is not efficient to schedule evening and weekend work for them.

2. <u>For the bargaining agent</u>

[30] The bargaining agent called Morgan Gay, the bargaining agent's chief negotiator, as a witness, to provide context. Mr. Gay has been employed by the bargaining agent for approximately 6.5 years and has been involved in representing the employees in the bargaining unit since February 2011. Since that time, Mr. Gay has met with a number of employees and has engaged in a prioritisation exercise. In meeting with employees in the bargaining unit, he has observed that there is considerable frustration with respect to the hours of work.

[31] Mr. Gay has participated in 11 bargaining sessions with the employer. The main topics discussed in bargaining have been hours of work, assignments and the workweek in the context of pensions. Mr. Gay referred to his opening remarks made in bargaining to the effect that there were a number of unresolved issues from the last round of bargaining. One of the issues left on the table at that time was seniority recognition for hours of work. Mr. Gay stated that circumstances had changed since the last round as there had been arbitral awards involving the House of Commons and the Senate where seniority for the purpose of scheduling had been recognized by panels of the Public Service Labour Relations Board under the *Parliamentary Employment and Staff Relations Act*. Mr. Gay stated that he was trying to drive home to the employer that the bargaining agent wanted for the employees in the bargaining unit the same seniority rights for the purpose of scheduling hours of work.

[32] Mr. Gay asked the employer representatives in bargaining to help the bargaining agent understand the factors that management took into account in scheduling work. The employer gave the bargaining agent a full presentation on the factors used in scheduling. It was apparent from the presentation that the number of hours required

are linked to a survey's sample size. The bargaining agent had tabled a proposal in February 2012 for a new clause article 23.16 (Work Assignment) that would have required the employer to schedule hours of work based on employee seniority and availability and, where possible, employees' preferred hours in the following preference order: a) indeterminate employees, and b) term employees. A proposed new clause 23.17 (Population of Work Schedules) further stated that additional straight-time hours that become available after the posting of the master schedule shall be offered first to indeterminate employees in the order of seniority. If there are no indeterminate volunteers, the additional hours shall be offered to term employees in order of seniority. In its presentation to the bargaining agent, the employer replied that when seniority is applied as a primary consideration during the scheduling process within the current work environment, cost, quality and/or response are affected.

[33] Following the employer's presentation on scheduling hours of work, the bargaining agent stated that it wanted to have a discussion with management. The bargaining agent agreed that it is management that determines when it needs people. The bargaining agent was of the view that management did not understand the proposal for a new clause 23.17, as there was a reference in the management presentation to a concern that employees would use seniority to pick the peak times. The bargaining agent was not seeking that commitment. It was up to management to determine how many people were needed, when the calls were to be made and the number of hours required. Management said that cross-training costs would be significant. The bargaining agent stated that the assignment of work was to be left to management. Mr. Gay testified that the employer representatives indicated that they had discussed the bargaining agent's comments and stated that seniority and scheduling were key. The employer representatives asked the bargaining agent to provide copies of arbitral awards where seniority had been recognized in scheduling hours of work.

[34] Mr. Gay indicated that he advised management conceptually as to how the bargaining agent's proposal would work. It was the bargaining agent's objective to maximize hours to 7.5 within the peak time frames. Once the hours were maximized, the schedule would be built. The schedule would then be populated by employees on the basis of seniority and availability. He stressed that the assignment of duties was immaterial to the bargaining agent and it was the hours that were important.

Management replied that all of the factors were important as the schedule was based on the survey, the number of hours was provided for in the budget, along with the number of interviewers needed, the collection period, the number of hours available as well as language requirements. The bargaining agent responded by agreeing that scheduling was based on the survey, the targeted hours, the collection period, bilingual needs and the number of interviewers needed. The bargaining agent indicated that this was a framework the parties could work from.

[35] Who gets assigned to a survey and the number of hours to be worked on a survey is where seniority could apply. The bargaining agent stated that it was trying to accommodate management needs and that management could take into account all the factors, including the methodology. The bargaining agent wanted to come up with something whereby management could run its business but give the employees some rights. Management indicated that it was prepared to continue the dialogue. It stated in response that the bargaining agent wants to maximize hours; however, it would be difficult to maximize hours. Management discussed the prospect of providing stability over long periods of time and the assignment of ongoing interviewers to ongoing surveys. It was pointed out that the employer did not have 37.5-hour workweeks.

[36] Ultimately, the parties reached an impasse on the proposed language for new clauses 23.16 and 23.17.

B. Summary of the arguments

1. For the employer

[37] The employer stressed that although the bargaining agent sought to provide context for the hearing, the scope of the evidence went beyond what was expected. The first principles are, of course, relevance; although the evidence was interesting, it ultimately did not provide an evidentiary basis for the determination of the issues in dispute. The bargaining agent's agenda was the use of seniority to maximize hours of work for employees in the bargaining unit, and it did so by crafting various iterations of proposals. Clearly, this is the evidence of one side of the discussions. The other side has its own interpretation of the discussions.

[38] What we have here is a question of interpretation, and it is fairly straightforward. Is there jurisdiction for an arbitration board to incorporate into a

collective agreement proposals dealing with the use of seniority to maximize hours of work? It is necessary to look at the amended proposal for a new clause 23.16 (Scheduling of Work Hours), the wording of the *Public Service Labour Relations Act* and the case law. The bargaining agent's evidence did not contribute to answering the fundamental question.

[39] Subsection 150(1) of the *Public Service Labour Relations Act* reads as follows:

> ***150.*** *(1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> *. . .*
>
> *(*c*) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*
>
> *. . .*
>
> *(*e*) doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*

The employer referred to the decision of the Chairperson of the Public Service Labour Relations Board in *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20, for the proposition that section 150 is to be interpreted broadly and that an arbitral award may not deal with a term or condition of employment even if it incidentally affects or encroaches on one of the prohibited grounds recited in the section.

[40] On November 8, 2012, the bargaining agent provided an amended proposal for a new clause 23.16 (Scheduling of Work Hours), to be included in the terms of reference for the arbitration board. The amended proposal requires the employer to assign specific duties to specific categories of employees. First, the hours for an ongoing survey are to be assigned to available indeterminate employees and then to term employees. There is a similar pattern for ad hoc surveys. The amended proposal drives hours to indeterminate employees as opposed to the other class of employees, and where there are excessive employees available, the hours are to be assigned in order of seniority. This precludes the employer assigning hours on the basis of merit or on other considerations.

[41] In essence, the amended proposal for a new clause 23.16 (Scheduling of Work Hours) prescribes that particular duties are to be assigned to a particular person, contrary to the provisions of paragraph 150(1)(*e*) of the *Public Service Labour Relations Act*. The amended proposal operates the same way with respect to training. Under the amended proposal, the employer cannot hire until it exhausts the steps outlined in the amended proposal. The language of the amended proposal mandates the manner in which the employer must assign hours. If the employer were to hire a new employee, it will only be after the employer has exhausted the steps in the amended proposal, and this precludes the employer from hiring a new employee to address a specific need. The amended proposal is a clear infringement of section 150.

[42] The bargaining agent proposes that clause 23.20 of the current collective agreement be rescinded. That clause reads as follows:

> ***23.20*** *Notwithstanding clause 23.18, where operational requirements permit, the Employer will endeavor to offer additional work available at a work site to readily available qualified employees at that worksite, irrespective of the nature of the survey, prior to hiring additional staff. This clause shall not be interpreted or applied to preclude the Employer from hiring additional staff, at any time, to meet operational requirements nor to preclude the Employer from hiring additional staff prior to providing employees with full-time hours.*

The amended proposal for a new clause 23.16 (Scheduling of Work Hours) has exactly the effect of precluding the employer from hiring additional staff in the circumstances recited in clause 23.20, contrary to paragraph 150(1)(*e*) of the *Public Service Labour Relations Act*. If one looks at the structure of the amended proposal and compares it to the clauses in the collective agreement, it is clear the amended proposal is not with respect to the hours of work but with respect to the assignment of duties.

[43] The final jurisdictional issue relates to the bargaining agent's proposed new clause 23.17 (Population of Work Schedules). The primary objection is that new clause 23.17 entrenches the amended proposal for a new clause 23.16 (Scheduling of Work Hours). If the amended proposal for a new clause 23.16 is beyond the scope of bargaining, then new clause 23.17 cannot be awarded by an arbitration board. All of the problems inherent in the amended proposal for a new clause 23.16 are incorporated into new clause 23.17. The bargaining agent may argue that this is a saving provision that recognizes the employer's ability to determine the collection, the

targeted hours, the calling periods and the number of employees required to work a survey. New clause 23.17 does not accomplish the goal because it still stipulates how the employer is to assign employees to a survey.

[44] The fundamental point made at *Association of Justice Counsel*, para 28, referring to subsection 150(1) of the *Public Service Labour Relations Act* that provides that an arbitral award cannot directly or indirectly alter, eliminate or establish a term or condition of employment under certain circumstances, is that ". . . [i]f something 'directly or indirectly . . . relates to' something, it is clear that even if it is only incidentally related to the subject matter, it is covered by the statutory provision . . .", and that " . . . the use of 'indirectly . . . affect' shows the intention of Parliament that the provision be interpreted broadly." It does not matter what the purpose of new clause 23.17 (Population of Work Schedules) may be, but if its effect is to encroach on a particular subject matter beyond the scope of bargaining, it cannot be referred to the arbitration board.

[45] *Professional Institute of the Public Service of Canada v. Canadian Nuclear Safety Commission,* 2005 PSLRB 174, demonstrates the breadth of paragraph 150(1)(*c*) of the *Public Service Labour Relations Act*. In that case, the Professional Institute of the Public Service of Canada proposed, among others, to refer to arbitration definitions for "lay-off" and "substantive position." The Chairperson of the Public Service Labour Relations Board determined at para 39 that, "[w]hile only a definition, the subject of the definition — "lay-off" — is clearly a matter which was not arbitrable . . ." and that ". . . [i]n trying to define the term, one is trying to set the 'standard' of what constitutes a lay-off, contrary to paragraph 150(1)(*e*) of the [*Public Service Labour Relations Act*]." At para 40, the Chairperson of the Public Service Labour Relations Board found that "[s]imilarly, the term 'substantive position' is integrally related to the 'standards, procedures or processes governing appointment', which is expressly prohibited by paragraph 150(1)(*c*) . . . ."

[46] In *Professional Institute of the Public Service of Canada*, the Professional Institute of the Public Service of Canada also proposed a clause be referred to arbitration dealing with leaves in excess of six months that gave the Canadian Nuclear Safety Commission the option to appoint or deploy another person on an indeterminate basis to the vacated position and upon the employee's return to use its best efforts to provide comparable employment. The Chairperson of the Public Service Labour

Relations Board ruled at para 44 that ". . . in essence, this proposal deals with staffing processes, which is prohibited by paragraph 150(1)(*c*) of the [*Public Service Labour Relations Act*]. . . ."

[47] At *Professional Institute of the Public Service of Canada*, para 45, the Chairperson of the Public Service Labour Relations Board also ruled that "[a]ny question as to who will carry out duties is an issue which is precluded from arbitration, by virtue of section 7 and paragraph 150(1)(*e*) of the [*Public Service Labour Relations Act*]. . . ."

[48] In *Federal Government Dockyard Trades and Labour Council East v. Treasury Board*, 2005 PSLRB 42, the Federal Government Dockyard Trades and Labour Council East proposed a clause be referred to arbitration that established limitations on the Treasury Board's ability to contract out work normally performed by employees. The Chairperson of the Public Service Labour Relations Board ruled at para 19-20 that the Treasury Board's right ". . . to determine the organization of the Public Service and to assign duties to positions therein is protected by legislation . . ." and that ". . . a proposal preventing contracting out '. . . clearly interferes with the employer's right to determine its organization. . . .' and could not be considered within the scope of a request for arbitration." Similarly, the Chairperson of the Public Service Labour Relations Board ruled at para 25 that a proposed obligation to hire additional employees where there is sufficient work available to create a full-time position interferes with ". . . the employer's right to determine the organization of the Public Service and to assign duties to positions therein is protected by section 7 of the [*Public Service Staff Relations Act*]. . . ."

[49] In the case of the *P.S.A.C. v. Canada (Treasury Board)*, [1987] 2 F.C. 471, the Federal Court of Appeal had to deal with a proposal which ". . . would have limited the number of hours a teacher could be required to teach in a classroom per day. . . ." The Court reasoned as follows at page 478:

> *. . . Determining the maximum number of hours per day that the employees in certain positions may be required to perform a particular duty, to me, not only impedes the freedom of the employer, but is an integral part of the assignment of duties to positions. Only the time element is involved but it is vital. It is indeed easy to realize that if a determination of that type were introduced with respect to one of the duties attached to a position, nothing would*

> *prevent it being extended to each and every duty attached to it: the Government employer would obviously be left with a seriously impaired freedom of action in the assignment of duties to that position, which is precisely what Parliament was determined to prevent.*
>
> . . .

The proposals under consideration have a similar effect.

2. <u>For the bargaining agent</u>

[50] With respect to the amended proposal for a new clause 23.16 (Scheduling of Work Hours), the employer and the bargaining agent do not agree on what is at issue. The language clearly deals with the scheduling of work hours. Panels of the Public Service Labour Relations Board have recognized this as an appropriate issue for bargaining. The parties had extensive discussions on the issue. Mr. Gay testified that he visited many workplaces, all of which had the same issues with respect to hours of work.

[51] Four different bargaining units at the House of Commons and Senate pursued through arbitration proposals dealing with hours of work for employees who did not have any guarantees on the number of hours. Workers at the House of Commons and the Senate have similar working conditions as the employees in the bargaining unit at hand; no one has guaranteed hours of work, and all are, for the most part, part-time employees.

[52] One should look at how the proposal for a new clause 23.16 evolved. After the employer explained the detailed factors involved in scheduling, the bargaining agent decided to amend its proposal in response to the employer's concerns. The amended proposal for a new clause 23.16 (Scheduling of Work Hours) takes into account management's concerns. The bargaining agent always agreed that the proposal should take into account these factors. Mr. Gay confirmed that scheduling hours of work is a management prerogative. Management determines the survey, cluster, the criteria, the particular hours for the survey and the time slices. The bargaining agent referred to Mr. Gay's testimony to the effect that the duties that are assigned to employees are immaterial to the bargaining agent; it is the hours of work that are important. Seniority and scheduling are also key for the bargaining agent. It is clear from the amended proposal for a new clause 23.16 (Scheduling of Work Hours) that the employer decides

when and where a survey is to be done. All the bargaining agent requests is that the work be assigned by seniority of the available employees. This is consistent with the factors involved in scheduling identified by management in bargaining and as well with the framework that Mr. Oddo referred to in his testimony.

[53] If the Chairperson of the Public Service Labour Relations Board finds the proposal to assign work to indeterminate employees prior to term employees as encroaching on management prerogatives then he should revert back to the bargaining agent's initial proposal for new clause 23.16 (Work Assignment). The bargaining agent's amended proposal for a new clause 23.16 (Scheduling of Work Hours) was a hybrid proposal to accommodate the employer and to show movement on the part of the bargaining agent. At the bargaining table, the employer was willing to consider assigning surveys to indeterminate employees prior to assigning surveys to term employees. The employer objected to the relevance of Mr. Gay's testimony. It is as relevant as Mr. Oddo's testimony as it provides a clear understanding of the issues at play.

[54] It is clear from reading the jurisprudence that a party who makes an objection to jurisdiction bears the burden of demonstrating that a proposal as written would require an amendment to the legislation, contrary to paragraph 150(1)(*a*) of the *Public Service Labour Relations Act*, or that the proposal would affect the organization of the public service or the assignment of duties to persons in the public service, contrary to paragraph 150(1)(*e*). The bargaining agent also referred to *Association of Justice Counsel* for the proposition that it is the employer that must demonstrate that a need would arise that would require legislation to be enacted or amended under paragraph 150(1)(*a*) of the *Public Service Labour Relations Act*. The employer has not met that burden. Much of the employer's argument is based on assumptions and presumptions. The decision of the Chairperson of the Public Service Labour Relations Board cannot be made on presumptions and assumptions but on the evidence as well as the legislation and case law.

[55] All of the amended proposal for a new clause 23.16 (Scheduling of Work Hours) does not deal with the assignment of duties. Where there are excessive employees available, the bargaining agent's proposal is that the hours of work should be assigned in order of seniority. The bargaining agent also recognizes that training is a management prerogative, as are language requirements.

[56] The bargaining agent referred to clause 23.02 of the current collective agreement that provides that nothing in the agreement shall be construed as guaranteeing minimum or maximum hours of work, and to clause 23.14 that provides that the preparation and administration of work schedules is the responsibility of the employer. The bargaining agent is not proposing that those clauses be deleted. When the amended proposal for a new clause 23.16 (Scheduling of Work Hours) is read in conjunction with clauses 23.02 and 23.14, it is clear that there will be no encroachment on management's responsibilities to assign duties and classify positions.

[57] The bargaining agent referred to the presentation made by management on scheduling surveys for the employees in the bargaining unit and the attempt of the bargaining agent to address management's concerns in its amended proposal for a new clause 23.16 (Scheduling of Work Hours). Hours of work and seniority fall within an arbitration board's jurisdiction when making an arbitral award under the *Public Service Labour Relations Act*. The employer is refusing to recognize the terms and conditions of employment that are standard in other unionized workplaces. Where all employees are part-timers, there is extremely high turnover. When employees do not have a guarantee of working hours, there needs to be some sort of a solution. The collective bargaining scheme should be utilized as a means to address these types of issues. In the bargaining agent's view, the proposals are a fair way of addressing the employer's concerns and to provide the employees with an equitable system to access hours through the use of a limited-based seniority system for shift selection that does not infringe on management rights. Seniority protection provides fairness and increased stability for employees with the strong likelihood that those employees will become more productive.

[58] The bargaining agent is merely seeking parity with other federal employees. The bargaining agent realizes that it is different legislation, but the case law developed by panels of the Public Service Labour Relations Board under the *Parliamentary Employment and Staff Relations Act* indicates that the scheduling of shift assignments on the basis of seniority can be done without infringing managerial authority. Employees who are part-time and seasonal employees at the House of Commons do not have guaranteed hours, yet they are entitled to seniority protection. The provisions of sections 5, 43 and 55 of the *Parliamentary Employment and Staff Relations Act* are almost identical in nature to the analogous provisions in the *Public Service Labour*

Relations Act. Sections 5, 43 and 55 of the *Parliamentary Employment and Staff Relations Act* read as follows:

> ***5.*** *(1) The purpose of this Part is to provide to certain persons employed in Parliamentary service collective bargaining and other rights in respect of their employment.*
>
> *(2) Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which the employee is a member.*
>
> *(3) Nothing in this Part shall be construed to affect the right or authority of an employer to determine the organization of the employer and to assign duties and classify positions of employment.*
>
> . . .
>
> ***43.*** *(1) The provisions of a collective agreement shall, subject to the appropriation by or under the authority of Parliament of any moneys that may be required, be implemented by the parties*
>
> *(a) where a period within which the collective agreement is to be implemented is specified in the collective agreement, within that period; and*
>
> *(b) where no period for implementation is specified in the collective agreement, within a period of ninety days from the date of its execution or, on application by either party to the agreement, within such longer period as may appear reasonable to the Board.*
>
> *(2) No collective agreement shall provide, directly or indirectly, for the alteration or elimination of any existing term or condition of employment or the establishment of any new term or condition of employment*
>
> *(a) the alteration or elimination of which or the establishment of which, as the case may be, would require or have the effect of requiring the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating moneys required for its implementation; or*
>
> *(b) that has been or after the coming into force of this Part is, as the case may be, established pursuant to the* Government Employees Compensation Act *or the* Public Service Superannuation Act.
>
> . . .

> ***55.*** *(1) Subsection 43(2) applies, with such modifications as the circumstances require, in relation to an arbitral award.*
>
> *(2) No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.*
>
> *(3) An arbitral award shall deal only with terms and conditions of employment of employees in the bargaining unit in respect of which the request for arbitration was made.*

For their part, the analogous provisions in the *Public Service Labour Relations Act* read as follows:

> . . .
>
> ***5.*** *Every employee is free to join the employee organization of his or her choice and to participate in its lawful activities.*
>
> . . .
>
> ***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.*
>
> . . .
>
> ***113.*** *A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if*
>
> (a) *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or*
>
> (b) *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act.

. . .

117. *Subject to the appropriation by or under the authority of Parliament of money that may be required by the employer, the parties must implement the provisions of a collective agreement*

(a) *within the period specified in the collective agreement for that purpose; or*

(b) *if no such period is specified in the collective agreement, within 90 days after the date it is signed or any longer period that the parties may agree to or that the Board, on application by either party, may set.*

. . .

150. *(1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*

(a) *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;*

(b) *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act*;*

(c) *the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*

(d) *in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or*

(e) *doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*

(2) The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.

. . .

The case law under the *Parliamentary Employment and Staff Relations Act* is perfectly acceptable to rely upon in making determinations under the *Public Service Labour*

Relations Act. The assignment of hours of work on the basis of seniority does not infringe the employer's authority.

[59] In the case of *Public Service Alliance of Canada v. House of Commons*, PSSRB File No. 485-H-10 (19900828), a panel of the Public Service Labour Relations Board, in rendering its arbitral award under the *Parliamentary Employment and Staff Relations Act*, had to consider a number of jurisdictional objections to proposals of the Public Service Alliance of Canada. The Public Service Alliance of Canada proposed, *inter alia*, a clause whereby the seniority of an employee was to be the determining factor in shift selections. The House of Commons objected to the clause on jurisdictional grounds and, in addition, on its merits. The House of Commons submitted that ". . . the proposed clause . . . is contrary to subsection 5(3) of the [*Parliamentary Employment and Staff Relations Act*] . . ." on the basis that ". . . seniority would determine the assignment of duties. . . " The Public Service Alliance of Canada argued that ". . . the proposed clause . . . speaks of the assignment of hours of work and that the selection of hours of work is based on seniority." The panel of the Public Service Labour Relations Board concluded as follows at para 26:

> *. . . the proposed clause . . . does not infringe upon the Employer's rights and authority provided in subsection 5(3) of the* [*Parliamentary Employment and Staff Relations Act*]. *Furthermore, it does not violate subsection 55(2) of the* [*Parliamentary Employment and Staff Relations Act*] *because this proposal deals with shift selection which relates to hours of work. It attempts to provide that seniority will determine the employees' hours of work. However, the decision of the Board is not to award the Alliance's proposed article 32.*

[60] In *Public Service Alliance of Canada v. House of Commons*, 2010 PSLRB 28, a panel of the Public Service Labour Relations Board considered on its merits the introduction of seniority-based shift selection into the collective agreement. The House of Commons proposed ". . . to maintain the status quo." The bargaining agent referred expressly to the comments of the panel at para 45 to 47, which read as follows:

> *[45] Seniority-based systems are common in labour agreements in the private sector and have been introduced to a number of bargaining units within the federal public administration. Although the term "seniority" has been viewed by some employers as an infringement of their authority to manage the workforce, assign duties, schedule shifts and grant promotions, that is not necessarily the case. The Board recognizes the employer's right to manage,*

> *schedule shifts and classify positions. Seniority can also be characterized as the scope of capabilities through years of experience. In other words, through his or her years of service, an employee attains a breadth of knowledge and expertise as a result of his or her tenure with the organization. Through time, an employee becomes a more valuable asset, with more capabilities, and should be treated accordingly.*
>
> *[46] The introduction of limited seniority gives a measure to an employee not in terms of compensation but in recognition of his or her value and contribution to the organization. The lack of tenure and the continuous churn of employees between departments, crown corporations and other federal public administrations has been recently acknowledged as a serious matter by senior government officials.*
>
> *[47] The use of the limited seniority-based system for hours of work and shift selection is not an infringement on management rights. The scheduling of shifts and the assignment of hours of work to employees will now be done by seniority.*
>
> [Emphasis in the original]

[61] In *Public Service Alliance of Canada v. House of Commons,* 2010 PSLRB 14, a panel of the Public Service Labour Relations Board considered a proposal by the Public Service Alliance of Canada to assign on the basis of seniority to part-time and seasonal certified indeterminate employees straight-time hours of work beyond those scheduled for full-time indeterminate employees. The panel amended the hours-of-work provision of the collective agreement ". . . to strengthen the protection offered to [seasonal certified indeterminate] employees . . .", including using seniority when assigning work. The bargaining agent asserted that the preference order awarded by the panel was similar to those at issue in its amended proposal for a new clause 23.16 (Scheduling of Work Hours).

[62] In the bargaining agent's view, the matters of hours of work, seniority and scheduling are appropriate for arbitration. The amended proposal for a new clause 23.16 (Scheduling of Work Hours) does not infringe on staffing or the assignment of duties. The prerogatives of the employer remain intact. In the alternative, in the event that some language would cause an encroachment, the clause should be amended as appropriate.

3. Employer's rebuttal

[63] There is some similarity in the language in the *Public Service Labour Relations Act* and the *Parliamentary Employment and Staff Relations Act* with respect to the scope of bargaining and what may be included in an arbitral award. In particular, subsection 5(3) of the *Parliamentary Employment and Staff Relations Act* and section 7 of the *Public Service Labour Relations Act* deal with the preservation of the rights of an employer.

[64] Subsection 55(2) of the *Parliamentary Employment and Staff Relations Act* stipulates the matters that may not be dealt with in an arbitral award. Similarly, subsection 150(1) of the *Public Service Labour Relations Act* stipulates matters that may not be dealt with in an arbitral award.

[65] There is no equivalent provision under the *Parliamentary Employment and Staff Relations Act* to the provision in paragraph 150(1)(*e*) of the *Public Service Labour Relations Act* that prohibits an arbitral award from directly or indirectly altering, eliminating or establishing conditions of employment ". . . if doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service."

[66] Subsection 55(2) of the *Parliamentary Employment and Staff Relations Act* provides that "[n]o arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested . . . ." This provision is similar to paragraph 150(1)(*c*) and subsection 150(2) of the *Public Service Labour Relations Act*. Paragraph 150(1)(*c*) provides that an ". . . arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment . . . if the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees . . . ." Subsection 150(2) provides that an ". . . arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested."

III. Reasons

[67] I agree with the analysis of the Chairperson of the Public Service Labour Relations Board *in Association of Justice Counsel*, which found that section 150 of the *Public Service Labour Relations Act* is to be interpreted broadly. An arbitration board may not deal with a term or condition of employment even if it incidentally affects or encroaches upon one of the prohibited grounds recited in section 150. I find that the bargaining agent's proposed language for new clauses 23.16 (Scheduling of Work Hours) and 23.17 (Population of Work Schedules) contravenes section 150 and, in particular, paragraphs (1)(*c*) and (*e*). These paragraphs prohibit an arbitration board from directly or indirectly altering, eliminating or establishing a term or condition of employment ". . . if the term or condition relates to . . . processes governing the appointment . . . of employees . . ." or ". . . if doing so would affect the organization of the public service or the assignment of duties to . . . persons employed in the public service."

[68] The bargaining agent's amended proposal for a new clause 23.16 (Scheduling of Work Hours) provides that hours of work relating to ongoing surveys will be assigned to available indeterminate employees first. If no sufficient indeterminate employees are available, the hours of work will be offered to available term employees. Similarly, hours of work relating to ad hoc surveys will be assigned to available indeterminate employees first. If no sufficient indeterminate employees are available, the hours of work will be offered to available term employees. When there are too many employees available in each category, the hours of work will be assigned on the basis of seniority. I find that the amended proposal interferes with the ability of the employer to assign duties to employees, contrary to paragraph 150(1)(*e*) of the *Public Service Labour Relations Act,* as it mandates the manner in which the employer must assign hours of work. Further, I find that the amended proposal restricts the employer from hiring new employees until the employer has exhausted the steps in the amended proposal, contrary to paragraph 150(1)(*c*) of the *Public Service Labour Relations Act*.

[69] The proposed new clause 23.17 (Population of Work Schedules) provides that after assigning hours of work in accordance with the preference order established in the amended proposal for a new clause 23.16 (Scheduling of Work Hours), the employer must schedule hours ". . . in such a way as to maximize straight-time hours by seniority." The proposed new clause 23.17 is predicated on the amended proposal

for a new clause 23.16 being within the jurisdiction of an arbitration board and I have already found that the amended proposal for a new clause 23.16 is beyond the jurisdiction of an arbitration board under paragraphs 150(1)(*c*) and (*e*) of the *Public Service Labour Relations Act*. Therefore, I similarly find that the proposed new clause 23.17 is also beyond the jurisdiction of an arbitration board under the *Public Service Labour Relations Act*.

[70] Although decisions of panels of the Public Service Labour Relations Board under the *Parliamentary Employment and Staff Relations Act* are of interest, the fact that there is no statutory equivalent in the *Parliamentary Employment and Staff Relations Act* to paragraph 150(1)(*e*) of the *Public Service Labour Relations Act*, which further restricts the matters that may be referred to arbitration, in my view distinguishes those cases from the situation at hand. While I understand the importance of the issue raised in the proposals to the bargaining agent and the employees in the bargaining unit as well as the rationale underlying the proposals, Parliament has expressly limited the permissible scope of matters that may be referred to an arbitration board under the *Public Service Labour Relations Act.*

[71] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[72] Pursuant to section 144 of the *Public Service Labour Relations Act*, the matters in dispute on which the arbitration board shall make an arbitral award are those set out in schedules 1 to 11 inclusive, which are attached to this decision, with the following clarifications:

- the bargaining agent's proposal for a new clause 23.16 will not be included in the Terms of Reference; and
- the bargaining agent's proposal for a new clause 23.17 (Population of Work Schedules) will not be included in the Terms of Reference.

[73] Should any jurisdictional question arise during the course of the hearing as to the inclusion of a matter in these Terms of Reference, that question must be submitted without delay to the Chairperson of the Public Service Labour Relations Board, who is, according to subsection 144(1) of the *Public Service Labour Relations Act*, the only person authorized to make such a determination.

August 27, 2013.

David P. Olsen,
Acting Chairperson of the
Public Service Labour Relations Board