Date: 20140530

File: 585-09-58

Citation: **2014 PSLRB 57**

Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

IN THE MATTER OF
THE *PUBLIC SERVICE LABOUR RELATIONS ACT*
and a dispute affecting
the Professional Institute of the Public Service of Canada, as bargaining agent,
and the National Research Council of Canada, as employer,
in respect of the bargaining unit comprised of all of the employees of the employer in the Scientific and Professional category classified as Research Officers and Research Council Officers (“RO/RCO bargaining unit”)

Indexed as
Professional Institute of the Public Service of Canada v. National Research Council of Canada

Application under section 36 of the *Public Service Labour Relations Act*.

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

For the Bargaining Agent: Michael Urminsky, Professional Institute of the Public Service of Canada

For the Employer: Caroline Richard, counsel

Heard at Ottawa, Ontario,
March 5, 2014.

[1] In decision 2013 PSLRB 147, on November 20, 2013, the Chairperson of the Public Service Labour Relations Board ("the PSLRB") issued Terms of Reference in PSLRB File No. 585-09-58 ("the Terms of Reference") further to a request for arbitration made by the Professional Institute of the Public Service of Canada ("the bargaining agent"). The request was made in respect of a bargaining unit at the National Research Council of Canada ("the employer") comprised of all of the employees of the employer in the Scientific and Professional category classified as Research Officers and Research Council Officers ("RO/RCO bargaining unit").

[2] The decision explained that the bargaining agent had initially objected to the employer's proposal with respect to article 2: Staffing of Vacancies ("article 2") of the collective agreement. However, after an exchange of various correspondence, by email of November 5, 2013, the bargaining agent withdrew its objection to the employer proposal with respect to article 2 of the collective agreement.

[3] Since there was no objection to the employer proposal with respect to article 2 of the collective agreement, the proposal was included in the Terms of Reference as part of the matters in dispute on which the arbitration board was to make an arbitral award.

[4] The parties were advised in the decision that, 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 was to be submitted without delay to the Chairperson of the PSLRB, who is, according to subsection 144(1) of the *Public Service Labour Relations Act* ("the *Act*"), the only person authorized to make such a determination.

[5] By letter dated December 9, 2013, the employer raised a jurisdictional question regarding its proposal with respect to article 2 of the collective agreement. The employer advised that, after the bargaining agent withdrew its objection to the proposal and after the Terms of Reference were issued, the parties continued collective bargaining. Collective bargaining did not result in a tentative agreement. However, the employer further advised that, as part of these negotiations, it became apparent that the same jurisdictional question regarding article 2 , as were initially raised prior to the issuance of the Terms of Reference, would arise in the course of the hearing before the arbitration board.

[6] Therefore, specifically, and amongst other questions, the employer raised the jurisdictional question as to whether section 150 of the *Act* precludes the arbitration board from rendering an arbitral award which could rescind the existing article 2.

[7] A hearing was held before the Chairperson of the PSLRB on March 5, 2014, to determine, *inter alia*, this jurisdictional question. The hearing was held to deal with the present file but also to deal with the same issues raised in files 585-09-52 and 585-09-57 concerning the same parties but different bargaining units.

[8] During the hearing, both parties acknowledged that the employer's proposal with respect to article 2 of the collective agreement was in contravention of section 150 of the *Act* and, as such, could not be included in the matters in dispute on which the arbitration board was to make an arbitral award. Therefore, the parties requested on consent that the Terms of Reference be amended to remove the reference of the employer's proposal to rescind the existing article 2 of the collective agreement.

[9] On March 19, 2014, pursuant to section 144 of the *Act*, the Terms of Reference issued on November 20, 2013 in decision 2013 PSLRB 147, were amended accordingly in decision 2014 PSLRB 35.

[10] At the March 5, 2014 hearing, the employer then applied to the PSLRB for an order under section 36 of the *Act* to rescind article 2 from the collective agreement. The present decision deals with this section 36 application before a panel of the PSLRB.

Facts

[11] For reasons currently unknown, the National Research Council as the employer, in a previous round of bargaining, negotiated with the bargaining agent and agreed to include article 2 in the collective agreement.

[12] The employer is now seeking to have these clauses rescinded. The bargaining agent will not agree to the rescission of the clauses.

[13] The employer has been unsuccessful in collective bargaining in past rounds of bargaining in reaching an agreement with the bargaining agent to have these clauses rescinded.

[14] The parties agree that on account of the application of section 150 of the *Act*, a dispute between the parties with respect to the rescission of these articles may not be referred to an arbitration board for resolution.

Submissions of the employer on the application

[15] The employer argues that the subject matter of these articles falls within the rights and authorities that are preserved for the Treasury Board or a separate agency under section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act*. Section 7 of the *Act* provides that:

> *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.*

Paragraph 5(1)(g) of the *National Research Council Act* states:

> ***5.** (1) Without limiting the general powers conferred on or vested in the Council by this Act, the Council may*
>
> . . .
>
> (g) *appoint such scientific, technical and other officers as are nominated by the President, fix the tenure of their appointments, prescribe their several duties and, subject to the approval of the Governor in Council, fix their remuneration . . . .*

[16] The article 2 of the collective agreement commit the employer to advertise internally vacant positions which it intends to staff among employees within the bargaining unit; to make appointments to the staff from among well-qualified employees in the bargaining unit whenever it is reasonable to do so; and to appoint employees who have been given notice of layoff or employees who are on leave of absence without pay whose positions have been abolished without competition to any vacancy for which the employee is qualified at a level not higher than the classification level in which the employee was formerly classified.

[17] These provisions restrict the employer's authority to appoint persons to and staff positions.

[18] In *Professional Institute of the Public Service of Canada and the National Research Council*, PSSRB File No. 169-9-509 (19911112), a decision with respect to a policy grievance concerning a provision in the collective agreement entitled "Staffing of Vacancies," the Public Service Staff Relations Board ("the PSSRB"), the predecessor to the PSLRB, concluded that article 2.02 of that staffing provision committed the employer to give first consideration to its employees when filling vacancies. The bargaining agent had argued there was an onus on the employer to advertise or to post notices of vacancies. The PSSRB, ruled that clause 2.02 does no more than require the employer to give first consideration ". . . to Council employees when filling staff vacancies."

[19] This decision determines that a provision of this nature affects the staffing authority of the agency. Section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act* preserve the right of separate agencies to determine the organization of their workplaces, including the right to staff positions and make appointments.

[20] In *Public Service Alliance of Canada and Communications Security Establishment, Department of National Defence*, [1988] C.P.S.S.R.B. No. 208 (QL), a decision of the PSLRB concerning its jurisdiction to render an arbitral award in relation to certain of the proposals of the bargaining agent, the PSSRB considered whether a provision dealing with sabbatical leave whereby employees on completion of the leave or training must be returned to their former position or to a position in keeping with their qualifications at an equivalent classification and salary level was within its jurisdiction. The PSSRB, at page 11 of the decision, concluded that it had no jurisdiction to arbitrate the proposed provision as it was directly in conflict with section 7 of the *Act*. The provision at issue in that case is similar to article 2.

[21] In *Public Service Alliance of Canada and Treasury Board*, [1986] C.P.S.S.R.B. No. 74, at p. 5, a board of arbitration determined that a provision that would limit the assignment of overtime work to employees who normally performed the duties would require the employer to refrain from assigning certain tasks to employees who did not normally perform the duties and concluded that this proposal would encroach on the employer's authority to assign duties to positions, an authority reserved to the employer by section 7 of the *Act*. The board of arbitration concluded that it did not have jurisdiction to consider this proposal.

[22] The employer submits that the article in question fall squarely within the protections provided in section 7 of the Act. They also fall within the authority of the National Research Council, set out in paragraph 5(1)(g) of the *National Research Council Act*.

[23] The article in question, *prima facie,* encroaches on the employer's exclusive ability to appoint employees. The provisions either dictate how the employer must select candidates from a limited pool or dictate how the employer must appoint employees to positions out of a limited pool and accordingly deal with the matters set out in section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act*.

[24] What is the impact of the article falling within the matters set out in section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act*?

[25] It is a well-established principle of statutory interpretation that section 7 must be interpreted in the context of the *Act* as a whole. One of the main purposes of the *Act* is to create a collective-bargaining regime supported by a dispute resolution mechanism available to the parties if they are unable to reach agreement at the bargaining table. The *Act* contains two such mechanisms, namely conciliation/strike and arbitration before a board of arbitration, commonly known as interest arbitration. The *Act*, through the mechanism of interest arbitration, assists the parties in creating a collective agreement that will govern their relationship.

[26] One must take a purposive approach to statutory interpretation. See Sullivan, *Statutory Interpretation*, 2nd edition, 2007, Irwin Law Inc., at p. 201. Using this approach, the purpose of section 7 of the *Act* is to ensure that an interest arbitration board does not render a decision that will fetter the ability of the employer to organize the workplace. Section 150 of the *Act* confirms this purpose by excluding staffing actions from the Terms of Reference from an interest arbitration board. Both parties agree that the article 2 of the collective agreement must be excluded from the Terms of Reference under section 150 of the *Act*. This encroachment on section 7 of the *Act* cannot be remedied through an arbitration board.

[27] The power to remedy the encroachment on section 7 of the *Act* is held by the PSLRB.

[28] Section 7 of the *Act* must be interpreted in the context of the other sections of the *Act*. Section 113 of the *Act* prevents a collective agreement from containing provisions constraining the employer's rights with respect to staffing. Section 144 of the *Act*, read in conjunction with section 150, prevents the PSLRB from referring to an arbitration board matters within the exclusive right of the employer dealing with staffing.

[29] Based on this context, the protection of the employer's rights is an important objective of the *Act*. Section 7 and paragraph 5(1)(*g*) provide the employer with inalienable rights to maintain authority over staffing. For reasons currently unknown, the employer negotiated these provisions with the bargaining agent and agreed to include them in the collective agreement. The employer is now seeking to have those provisions removed. Those article are in direct contravention of section 7 of the *Act* and paragraph 5(1)(g) of the *National Research Council Act*.

[30] In *Public Service Alliance of Canada and Treasury Board (Education Group)*, PSSRB File No. 148-02-124 (19860910), a case similar to the present fact situation, the PSSRB had to consider the effect of section 7 of the *Act*. At the time notice to bargain was given, the collective agreement contained a provision that restricted the maximum number of teaching hours per day and per week for teachers in the education group bargaining unit. This provision or a similar provision had been agreed to in the party's first round of collective bargaining and had been incorporated into all of the parties' subsequent collective agreements. The process for dispute resolution was arbitration. The parties were unsuccessful in their attempt to negotiate a new collective agreement.

[31] The bargaining agent sought to amend the provision dealing with teaching hours at arbitration. The employer proposed that the provision be deleted from the collective agreement. The arbitration board concluded that it did not have jurisdiction to deal with the proposals. The board determined that under the *Act*, as it then read, it could deal with proposals related solely to hours of work, but it could not deal with proposals dealing with the distribution of the mix of duties that may be assigned to employees.

[32] The employer advised the bargaining agent that it was no longer bound to observe this term or condition of employment during the bargaining freeze imposed by then section 51 of the *Act* and that it intended to assign classroom teaching responsibilities as it saw fit.

[33] The bargaining agent applied to the PSSRB for a declaration that the employer was in violation of section 51, arguing that the arbitration board in finding it had no jurisdiction to make an award respecting teaching hours had not rendered an arbitral award within the meaning of the section of the *Act*.

[34] The PSSRB concluded that the arbitration board in declining jurisdiction had dealt with the issue and in so doing had rendered an arbitral award on that proposal within the meaning of section 51 of the *Act*. In the board's view, the bargaining freeze in section 51 ceased to apply to this term or condition of employment when the arbitral award in respect of this provision was rendered.

[35] Similarly, since it is a given that the arbitration board does not have jurisdiction to deal with the rescission of these article, the employer wishes to self-remedy and does not wish to be limited by the provisions in article 30 of the collective agreement.

[36] In the Terms of Reference of the Conciliation Board decision with respect to a dispute affecting the Council of Postal Unions and the Treasury Board in respect of employees in the Postal Operations Group, PSSRB File No. 190-02-7 (19680104), the then chairperson of the PSSRB, Jacob Finkelman, commented on section 7 of the *Act*, at page 16:

. . .

> *Section 7 of the Public Service Staff Relations Act is what might be termed a "management rights clause", some aspects of which are also dealt with in section 56(2) and section 86(2) of the Act. To the extent to which a matter that falls within section 7 is identical with a matter to which either of the two subsections just referred to apply, that matter cannot be included in the terms of reference. In so far as any other matter that falls within section 7 is concerned, there is no express prohibition against its inclusion in the terms of reference. The section declares in unequivocal terms that nothing in the Act is to be construed to affect the right or authority of the Employer to do certain things. In other words, even if the Employer were to enter into some stipulation with regard to these matters, it would be free in law to repudiate the stipulation the very next day. If the Employer were to agree to include in a collective agreement a provision that limited its right or authority say to classify positions in the Public Service, it would not be bound by that provision. . . .*

. . .

[37] Although the employer could take the position that it is free in law to repudiate such a provision that is contrary to section 7 of the *Act*, it is seeking a more definitive remedy.

[38] The PSLRB has broad authority to grant the requested remedy, pursuant to section 36 of the *Act*, by virtue of the doctrine of necessary implication.

[39] In *Quadrini v. Canada Revenue Agency and Hillier*, 2009 PSLRB 104, in the context of a case where the PSLRB determined that it had authority to determine the validity of a claim for solicitor-client privilege, it relied on the doctrine of necessary implication. The employer had argued that the PSLRB had no power either to order the production of documents subject to solicitor-client privilege or to determine the validity of a claim for privilege.

[40] The PSLRB referred to the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574, in which the Court determined that the privacy commissioner's general powers to compel the production of documents and to accept any evidence in the course of investigating an alleged breach of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, did not impliedly authorize the commissioner to determine claims for legal privilege over the documents sought.

[41] The PSLRB, in referring to the Supreme Court of Canada's analysis, stated at paragraph 84:

> *The very fact that the Supreme Court asks whether the PIPEDA* _implicitly_ *grants the power to determine claims of solicitor-client privilege indicates that the absence of an* _explicit_ *granting provision is not sufficient reason to rule that that power does not exist. . . .*

[42] The Supreme Court states that there was always a need to view provisions in their different statutory contexts. The board concluded at paragraph 87:

> *In contrast to the Privacy Commissioner, the Board is a quasi-judicial tribunal. It is mandated by Parliament under the* Act *to perform a broad adjudicative responsibilities. It acts independently and impartially. At no time does the Board become adverse in interest to the parties that come before it. Those attributes place in an entirely different perspective the absence from the* Act *of specific language about solicitor-client privilege . . . .*

[43] The PSLRB concluded it had the authority to satisfy itself that the document is subject to a solicitor-client privilege and that the absence of an explicit provision in the *Act* granting that authority did not have the same significance that it had for the privacy commissioner.

[44] The PSLRB is a quasi-judicial tribunal mandated by Parliament to administer labour relations in the public service and under section 36 of the *Act*, which establishes the general powers and functions of the Board, it has the implicit power to rescind a provision of a collective agreement that contravenes section 7 of the *Act*.

[45] In their text, *Collective Bargaining in the Public Service: The Federal Experience in Canada*, Institute for Research on Public Policy, 1983, Jacob Finkelman and Shirley B. Goldenberg comment on the exercise of the incidental powers of the PSSRB under section 18 of the then *Public Service Staff Relations Act* at pages 672 and 673. This section is largely continued in section 36 of the current *Act*:

> *As we have seen, the PSSRB has relied on this section in giving it authority to deal with a number of situations for which no remedy was expressly provided under the PSSRA: for example, allegations of failure to bargain in good faith or to make every reasonable effort to achieve a collective agreement or to give effect to the provisions of the collective agreement.*

[46] In *Canada (Attorney General) v. Public Service Alliance of Canada*, [2011] F.C.J. No. 1325 (QL), the Federal Court of Appeal determined that the Board's determination that it had the statutory authority under section 36 to review the employer's decision setting the level of the essential services to be provided during a strike for abuse of discretion was not unreasonable.

[47] Pursuant to section 36 of the *Act*, the PSLRB has jurisdiction to remove the article 2 of the collective agreement.

Submissions of the bargaining agent

[48] The bargaining agent submits that the staffing provisions are not covered by section 7 of the *Act*. Section 7 refers to the organization of the public service, the assigning of duties and the classification of positions. Staffing is not included in section 7.

[49] The organization of the public administration refers to the groups established by the Treasury Board. The public service is structured on occupational group lines. The term "organization" in section 7 refers to the occupational groups.

[50] The employer argues that section 7 includes the notion of staffing. The cases submitted were wrongly decided. If the organization of the public administration was to include staffing and those cases are correct, the section would preclude almost any provision from being included in a collective agreement. One of the cases dealt with overtime. Overtime provisions are included in a wide range of collective agreements. Section 7 must be construed more narrowly and should be interpreted as referring to the occupational groups in the public service.

[51] The bargaining agent acknowledges that paragraph 5(1)(*g*) of the *National Research Council Act* could be interpreted as referring to staffing as it refers to the Naional Research Council appointing officers, fixing the tenure of appointments and prescribing duties. The section also allows the employer to fix the remuneration of employees, which is through the collective bargaining process.

[52] To construe paragraph 5(1)(*g*) in such a way as to be a bar to the negotiation of staffing provisions is inconsistent with the manner in which this section has been applied up until this time.

[53] The employer chose to negotiate these provisions at one point in time. Changes to these provisions must be done through the collective bargaining process. If the parties cannot agree, there is no dispute resolution mechanism available.

[54] Under the *Act*, as amended by Bill C-4, there may be a process available in the next round of bargaining to address the issue if the dispute resolution mechanism is through the conciliation/strike route.

[55] Assuming section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act* include provisions dealing with staffing, the *Act* contemplates that staffing provisions may be included in a collective agreement. Paragraph 150(1)(*c*) of the *Act* precludes an arbitration board from altering or eliminating existing terms or conditions of employment or establishing new terms or conditions of employment if the terms or conditions relate to standards procedures or processes governing appointments. If sections 7 or 113 of the *Act* are to be interpreted as precluding

negotiations on appointments, then paragraph 150(1)(*c*) would not be necessary and would be redundant. The drafters of the legislation foresaw situations where staffing provisions would be negotiated into a collective agreement. Section 150 protects those provisions from an arbitration board's jurisdiction.

[56] The bargaining agent acknowledges that if the employer is correct that the *Act* precludes including staffing provisions in a collective agreement, the PSLRB has the power to rescind those provisions.

[57] From a policy perspective, the negotiation of a collective agreement involves give and take. This would have been true at the time the staffing provision was included in the collective agreement. This makes the removal of the provision by the PSLRB problematic. The *quid pro quo* the union made becomes null and void should the PSLRB remove this clause.

[58] The employer properly laid out the doctrine of necessary implication. However, the examples do not deal with the removal of provisions of the collective agreement. Section 36 of the *Act* requires that in order for the power to be exercised through the doctrine of necessary implication, there should be a specific statutory object or objective.

[59] At the conclusion of the argument-in-chief, the PSLRB brought to the attention of the parties that the Federal Court of Appeal, on an application for judicial review, had set aside the decision of the PSLRB in *Public Service Alliance of Canada v. Treasury Board (education group)*, *supra*, referred to in the argument of the employer. See *P.S.A.C. v. Canada (Treasury Board)*, (F.C.A.) [1987] F.C.J. No. 240 (QL).

[60] The Court concluded that it was not possible to sustain the board's reasoning that the arbitration board had dealt with the term or condition of employment concerning the limitation of the number of daily teaching hours, matters covered by section 7of the *PSSRA,* by declining jurisdiction over the matter. As a consequence, the provision was caught by the bargaining freeze imposed by then section 51 of the *PSSRA* that continued the terms and conditions of employment in force on the day notice to bargain was given until such time as a collective agreement has been entered into or an arbitral award had been rendered or until the requirements of section 51had been met.

[61] After affording the parties an opportunity to review the decision, the PSLRB requested that they make submissions in reply on the impact of the decision on their arguments.

Reply submissions of the employer

[62] Section 7 of the *Act,* has changed and is different from the wording of section 7 contained in the *Public Service Staff Relations Act* considered by the Federal Court of Appeal. Section 7 of the *Public Service Staff Relations Act* reads as follows: "Nothing in this act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein."

[63] Section 7 of the *Public Service Labour Relations Act* reads as follows:

> *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 and to classify positions and persons employed in those portions of the federal public administration.*

[64] Section 7 has been amended to apply specifically to separate agencies.

[65] Similarly, the provisions that put special limits on the powers of arbitration tribunals in the *Act*, as described in the decision of the Federal Court of Appeal, have changed.

[66] Nevertheless, the Court confirmed at page 5 of the decision that all aspects of hours of work dealt with in the education group case was a matter of management rights under section 7 of the *Act* and were not arbitrable.

[67] In the decision, Mr. Justice MacGuigan stated that if the government had considered the inconveniences of collective bargaining harmful to the public interest, it had, unlike other employers, a remedy at hand through Parliament.

[68] Counsel submits this is not still good law. Section 113 of the *Act* restricts the contents of collective agreements from requiring the enactment or amendment of any legislation by Parliament.

[69] Article 2 of the collective agreement unduly encroaches on the agency's authority under section 7 of the *Act* and section 5 of the *National Research Council Act*. The employer needs to address these issues in this round of bargaining even though the provisions are not arbitrable. The employer requests the PSLRB to exercise its powers under section 36 of the *Act* and rescind the article from the collective agreement.

Reply submissions of the bargaining agent

[70] The bargaining agent agrees with the reasoning of Mr. Justice MacGuigan at p. 7 of the Federal Court of Appeal decision that the employer cannot get free of a provision it has voluntarily agreed to by running out the collective agreement. In this case, the employer is going one step further in trying to get the article declared illegal.

[71] The employer argues that section 113 restricts the contents of collective agreements requiring the enactment or amendment of legislation. There is nothing in section 113 that suggests the parties cannot alter, through the collective bargaining process, existing terms and conditions of employment. It was meant to ensure the sovereignty of Parliament to ensure that new terms and conditions of employment reached through the collective bargaining process would not affect existing legislation.

Reasons for decision

[72] The employer agreed in previous rounds of bargaining to include article 2 in the collective agreement with the bargaining agent. This article commits the employer to advertise vacant positions internally among employees in the bargaining unit and to make appointments from its staff whenever it is reasonable to do so and to appoint employees on layoff status or who are on leave of absence or whose positions have been abolished, without competition, to vacancies.

[73] The employer, in this round of bargaining, sought to rescind this article, and when it could not get agreement with the bargaining agent, sought to refer this article to a board of arbitration for resolution.

[74] Both parties now agree that a board of arbitration does not have jurisdiction to include these proposals in an arbitral award and I concur.

[75] The employer seeks an order under section 36 of the *Act* to rescind the article from the collective agreements, arguing that the subject matter of this article falls within the rights and authorities that are preserved for the Treasury Board or a separate agency under section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act*.

[76] The first issue that must be addressed is whether article 2 of the collective agreement fall within the scope of section 7 of the *Act* or paragraph 5(1)(*g*) of the *National Research Council Act*.

[77] As explained above, section 7 of the *Act*, preserves the rights of the Treasury Board or a separate agency to determine the organization of the federal public administration as employer and to assign duties to and to classify positions and persons so employed.

[78] In *P.S.A.C. v. Canada (Treasury Board) (F.C.A.)*, *supra*, Mr. Justice MacGuigan quoted from Mr. Justice Marceau's reasons in *PSAC v. Canada (Treasury Board)*, [1987] 2 F.C. 471, *supra*, in the context of an earlier section 28 application to the Federal Court of Appeal relating to another proposal for inclusion in the collective agreement. In his reasons for judgment, Mr. Justice Marceau dealt with the scope of section 7, concluding that a proposal that would have limited the number of hours a language teacher could be required to teach in the classroom every day would contravene section 7:

> *. . . 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 of positions. . . .*

[79] The Federal Court of Appeal also overturned the board's decision that the union's proposal that sought to oblige the employer to offer any overtime work to financial administrators who normally perform the duties contravened section 7 of the *Act*. The Court set aside the board's decision on the basis that section 7 speaks of the organization of the public service and specifically of the assigning of duties to positions within the public service but did not speak of the assigning of duties to persons.

[80] It is to be observed that section 7 of the *Act* now preserves the rights of the employer, including a separate agency, to determine the organization of the public administration as employer and to assign duties to and to classify positions and persons so employed (emphasis added).

[81] Paragraph 5(1)(*g*) of the *National Research Council Act* empowers the employer to appoint officers, fix their tenure, prescribe their duties and, subject to the approval of the Governor in Council, fix their remuneration.

[82] Reading section 7 of the *Act* together with paragraph 5(1)(*g*) of the *National Research Council Act* together with the jurisprudence recited by the employer, I conclude that article 2 constrain the ability of the employer to staff positions and fall within the meaning of section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act*. I do not read section 7 so narrowly as to conclude that the expression ". . . the organization of those portions of the federal public administration . . ." is limited to the occupational groups established by the employer, as contended by counsel for the bargaining agent

[83] What then is the impact of article 2 falling within the matters recited in section 7 of the *Act* and paragraph 5(1)(g) of the *National Research Council Act*?

[84] When the *Public Service Staff Relations Act* was first enacted, the prevailing view with respect to the interpretation and impact of section 7 was evidenced by then Chairman Finkelman's statements in the 1968 Council of Postal Unions case recited *supra* at paragraph 36 to the effect that if the employer were to enter into some stipulation with respect to the rights or authorities governed by section 7, it would be free in law to repudiate the stipulation the very next day, and if it did voluntarily agree to include such a provision in a collective agreement, it would not be bound by the provision.

[85] However, Deputy Chairman Nesbitt, in the 1986 education group, *supra*, decision, stated in obiter at page 11 of the decision as follows:

> *In my opinion, assuming the assignment of tasks to employees in a bargaining unit falls within section 7 of the Act, the respondent may nonetheless voluntarily enter into a collective agreement containing such a provision. Having done so, the respondent cannot then avoid the obligation which it has freely undertaken by relying on section 7 of the*

> *Act. . .. During the period from 1969 to 1984 the respondent entered into eight collective agreements that included a limitation on daily teaching hours for language teachers included in the education group bargaining unit. It abided by that provision until 1986 when, for the first time, it refused to include the limitation in a new collective agreement. A limitation on daily teaching hours may not be included in an arbitral award rendered pursuant to the Act, but the respondent is not precluded by section 7 thereof from agreeing to the inclusion of such a provision in a collective agreement as it has done on eight previous occasions. However, if the respondent chooses not to do so, no dispute settlement method is available to the parties the operation of which would have the effect of imposing such a limitation. That is the effect of section 7 of the Act.*

[86] Clearly, the prevailing view in 1968 that the employer could agree in collective bargaining to a provision that fell within section 7 but could resile from it or consider it unenforceable had changed by 1986.

[87] Conversely, no statutory dispute settlement method is available to the parties the operation of which would have the effect of rescinding such a limitation. I speculate that given the prevailing view in 1968 that the employer could resile from such a commitment or treat it as unenforceable, consideration was not given at the time for providing a dispute resolution mechanism for the rescission of such a clause where the parties could not reach an agreement in collective bargaining.

[88] Therefore, does the PSLRB have authority under section 36 of the *Act* to rescind article 2 from the collective agreement, given its contravention of section 7 of the *Act* and paragraph 5(1)(*g*) of the *National Research Council Act*?

[89] Section 36 provides as follows:

> *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.*

[90] The PSLRB or its predecessor the PSSRB has relied on this section to give it authority to deal with a number of situations for which no remedy was expressly provided in the *Act*. That broad authority is supported by the doctrine of necessary implication.

[91] However, I am not persuaded that the PSLRB can exercise this authority in the circumstances where the article in question are continued in force by the operation of an express statutory provision, the bargaining freeze provision set out in section 107 of the *Act*.

[92] Section 107 of the *Act* provides as follows:

> *Unless the parties otherwise agree, and subject to section 125(1), after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day on which the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> *(*a*) if the process for the resolution of the dispute is arbitration, an arbitral award is rendered; or*
>
> *(*b*) if the process for the resolution of the dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

[93] In *P.S.A.C. v. Canada (Treasury Board)* (education group), *supra*, the Federal Court of Appeal decided in a similar fact situation that a provision that admittedly fell within section 7 of the *PSSRA* that had been voluntarily entered into by the employer was continued in force during the freeze period, in accordance with section 51 of the *Public Service Staff Relations Act*, and the employer was precluded from disregarding the provision when assigning classroom responsibilities.

[94] Mr. Justice MacGuigan stated as follows page 7:

> *. . . The simple issue is whether, having since the inception of collective bargaining in the Public Service voluntarily agreed to a cap clause, presumably as part of the overall bargain, the government can get free of the clause merely by the running out of the collective agreement when all clauses of that agreement "that may be bargained for" are statutorily stated to be continued until the new collective bargain is struck. I can find no justification in either statute or policy to permit the employer so easily to escape its voluntarily assumed obligation. The government, like the union must take the inconveniences of collective bargaining along with its advantages. If it considers the inconveniences harmful to*

> *the public interest, it has, unlike other employers, a remedy at hand through Parliament.*

[95] I am not persuaded that section 113 of the *Act*, which provides that 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 if doing so would require the enactment or amendment of any legislation by Parliament, is of assistance to the employer in its argument that the decision of the Federal Court of Appeal is wrong in law in light of this provision. I agree with the bargaining agent that the purpose of section 113 of the *Act* is to ensure the sovereignty of Parliament and ensure the terms and conditions of employment reached in the collective bargaining process do not affect existing legislation. In addition, subsection 51(2), of the *Public Service Staff Relations Act* in force at the time of the Federal Court of Appeal decision in 1986 was virtually identical to section 113 of *Act*.

[96] I conclude therefore that article 2 of the collective agreement is continued in force by operation of section 107 of the *Act* until the requirement of the section have been met. The express provisions of the statute preclude the PSLRB from exercising its incidental powers under section 36 of the *Act*.

May 30, 2014.

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