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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

ASSOCIATION OF JUSTICE COUNSEL

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Association of Justice Counsel v. Treasury Board

In the matter of a policy grievance referred to adjudication

Before: David Olsen, a panel of the Public Service Labour Relations and Employment Board

For the Bargaining Agent: Christopher Rootham, Sandra Guttman, and Alexander Dezaw, Counsel

For the Employer: Lesa Brown, Counsel, and Brian Russell, Analyst

Heard at Ottawa, Ontario,
July 3, 2015.

I. Policy grievance referred to adjudication

[1] On January 23, 2014, the Association of Justice Counsel ("the Association" or "the bargaining agent") presented a policy grievance that reads as follows:

> ***Background***
>
> *Currently, the policy grievance process provides for a decision by someone other than the person who is charged to hear the grievance presentation. TB is the only department to not have the appointed grievance level officer render a decision.*
>
> ***Alleged violation***
>
> *The AJC is of the view that by not having the person with the proper authority to render a decision at the grievance hearing, the grievance process is being undermined and sections 5 and 24 of the collective agreement are being violated.*
>
> ***Corrective action requested***
>
> *That on a go-forward basis, the person authorized to render the grievance decision be the same person to whom policy grievance presentations are made.*

[2] On June 6, 2014, the assistant deputy minister, compensation and labour relations at the Treasury Board ("the employer"), responded to the policy grievance as follows:

> . . .
>
> *In the policy grievance the AJC submits that the employer is in violation of sections 5 and 24 of the collective agreement and that the grievance process is being undermined by not having the decision maker present at the grievance consultation.*
>
> *After a careful review of the grievance and consideration given to the information presented on April 25, 2014, the Employer is of the view that there is no violation of the collective agreement since there is no requirement for the decision maker to be present at the grievance consultation. I can assure you that whether I am in attendance at the grievance consultation or not, decisions are made taking all information into account and that I will continue the practice of attending grievance consultations where my schedule permits.*

> *In light of the above, your grievance is denied and the requested corrective action will not be granted.*

[3] On June 9, 2014, the bargaining agent referred the grievance to adjudication.

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the evidence

[5] The parties to the grievance filed an agreed statement of facts with the Board that read as follows:

> *The parties to this matter agree as follows:*
>
> 1. *The Adjudicator has jurisdiction to hear this grievance.*
>
> 2. *At the Treasury Board Secretariat (TBS), the Assistant Deputy Minister of Compensation and Labour Relations (ADM CLR) or acting ADM CLR has the authority to respond to all policy grievances filed by a bargaining agent. In her capacity as the ADM CLR, she is the decision-maker on policy grievances. This has not changed since the introduction of policy grievances in 2005.*
>
> 3. *The Employer is of the view that, when the Association files a policy grievance with the Employer, there is no requirement for the decision-maker to be present at the oral grievance consultation and moreover, that there is no requirement for an oral consultation.*
>
> 4. *Until September 28, 2011 the decision-maker attended the oral grievance consultations. There were five policy grievances with oral grievance consultations during that period.*

5. *Between September 28, 2011 and January 11, 2015, when a policy grievance was filed by a bargaining agent and the bargaining agent requested an oral grievance consultation, the practice was that a TBS analyst would prepares a précis of the grievance for the person who was to attend the grievance consultation. The TBS analyst and the person who was to attend the grievance consultation met to discuss the précis before the grievance consultation with the bargaining agent representative. The person attending the grievance consultation could be:*

    a. the ADM CLR; or

    b. the Associate ADM CLR; or

    c. the Executive Director, Labour Relations; or

    d. the Senior Director, Employer Representation in Recourse;

The TB analyst and the person attending the grievance consultation then brief the ADM CLR who subsequently renders the grievance decision. There were a total of 17 policy grievances dealt with during this period. 3 policy grievances settled, and 9 were addressed without oral consultation. Of the 5 policy grievances where oral consultations were held, the decision-maker attended 1 of them (the grievance in this Adjudication file).

6. *If an oral consultation is held, the Employer's decision-maker for policy grievances attends the oral consultation of that grievance at his or her discretion.*

7. *On November 7, 2014 a new position of Associate ADM CLR was created. Since that time, if an oral consultation meeting is held, the Employer's practice is that either the ADM CLR or the Associate ADM CLR will attend the oral grievance consultation. The ADM CLR remains the decision-maker on policy grievances when the Associate ADM CLR attends. The parties have not had any oral grievance consultations since the new position was created.*

8. *While it is the employer's right to determine the number of levels in the internal grievance procedure and the identity of the representative at each level with respect to individual grievances, it is the Association's expectation that the individual attending the grievance consultation meeting on behalf of the department is the decision-maker and has the authority to decide the grievance.*

9. *With respect to the policy grievance procedure, it is the Employers right to identify its representative (decision-maker) at the one level of the process.*

10. *With respect to various departments and the final level of their internal grievance procedures for individual grievances, some departments have the person with the authority to decide grievances at the final level of the grievance procedure (the "final level decision-maker") present at the final level grievance consultation, while others do not. For example:*

    a. *at the Canada Border Services Agency (CBSA), the final level decision maker does not attend the final level grievance consultation. There are no members of the Law Practitioner Group bargaining unit at CBSA;*

    b. *at the Department of Fisheries and Oceans (DFO), the final level decision-maker does not normally attend the final level grievance consultation, however, the final level decision maker will attend the final level grievance consultation on a case by case basis. There are no members of the Law Practitioner Group bargaining unit at DFO;*

    c. *at the Department of National Defence (DND), the decision maker does not normally attend the final level grievance consultation, however, the final level decision maker will attend the final level grievance consultation on a case by case basis. There are no members of the Law Practitioner Group bargaining unit at DND;*

    d. *at Veteran's Affairs Canada, the final level decision maker attends the final level grievance consultation for grievances filed by some bargaining agents but not all. There are members of the Law Practitioner Group bargaining unit at Veteran's Affairs Canada, but there have not been any grievances heard at the final level since the Bargaining Agent was certified to represent the Law Practitioner Group;*

    e. *at Justice Canada (Justice) and the Public Prosecution Service of Canada (PPSC), the final level decision maker attends the final level grievance consultation. There are members of the Law Practitioner Group bargaining unit at both Justice and PPSC;*

    f. *at the Military Grievances External Review Committee (formerly the Canadian Forces*

> *Grievance Board), the final level decision maker attended the single grievance referred to the final level by the Association. There are members of the Law Practitioner Group bargaining unit at the Military Grievances External Review Committee.*
>
> 11. *With the exception of the four policy grievances after on or about September 28, 2011, the Association has not participated in any final-level grievance consultations on individual grievances without the decision-maker being present.*
>
> 12. *Articles 24.38 and 24.39 of the collective agreement between the parties state that the Employer and the Association may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or the bargaining unit generally. There is only one level for policy grievances.*
>
> . . .
>
> [*Sic* throughout]

III. Summary of the arguments

A. For the bargaining agent

[6] The issue in this grievance is whether the employer's decision maker for a policy grievance needs to attend the grievance meeting between the bargaining agent and the employer. The underlying issue is: Does the grievance procedure matter? Is it important, or is it a signpost on the way to adjudication?

[7] If the employer's decision maker does not need to attend the grievance hearing, then the grievance process is a signpost on the way to adjudication. If that is the case, grievances should be referred directly to adjudication.

[8] The argument consists of four parts, namely:

1. An overview and context focusing on the importance of the grievance process, the public law principle that "he who hears must decide", and the contextual provisions in the agreement between the Treasury Board and the Association of Justice Counsel for the Law Group that expired May 9, 2014 (the "collective agreement").

2. Attendance by the decision maker is required by clause 24.41 of the collective agreement.

3. In the alternative, attendance by the decision maker is in an implied term of the collective agreement.

4. In the further alternative, the failure to attend is an unreasonable exercise of management's rights.

1. Overview and context

[9] The grievance process is an important part of the labour relations scheme designed to settle differences and is used to advise the employer of a bargaining agent's dissatisfaction with its practices.

[10] The following paragraphs provide contextual background with respect to the importance of discussions between the parties in the grievance process. In *U.A.W., Local 252 v. McQuay-Norris Manufacturing Co. of Canada, Mount Dennis Plant* (1947), 1 L.A.C. 81 at para. 10 and 11, former Chief Justice Bora Laskin, sitting as a labour arbitrator, stated that the servicing of grievances under a collective agreement is part of the process of collective bargaining and is designed to be a contribution to the efficient operation of the enterprise owned and managed by the employer. Easy and ready access to the grievance process is a canon of accepted labour relations policy.

[11] In *I.A.F.F., Local 626 v. Scarborough (City)* (1972), 24 L.A.C. 78 at para. 36, Arbitrator Owen Shime stated that the grievance process is designed to encourage a dialogue between the employees and the employer in which it is expected that complaints and grievances will be thrashed out and hopefully that problems will be mutually resolved to the reasonable satisfaction of all concerned. He also stated that a grievance process may also serve a useful function by allowing the parties to ventilate by providing an outlet for festering discontent.

[12] In *Windsor (City) v. O.N.A.* (1998), 77 L.A.C. (4th) 218, Arbitrator Brunner, in the context of an arbitration to determine whether a separate association had standing at a grievance hearing, commented on Arbitrator Shime's observations in *I.A.F.F.* at paragraph 22 by adding that the grievance process is intended as an informal mechanism for the review of a grievance for the purpose of determining whether or not a satisfactory resolution of the issues is possible. He also ventured that it may also

serve as an opportunity for the disclosure of relevant documents and the exchange of views and perspectives on the grievance.

[13] In *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, a case in which the Supreme Court of Canada reviewed a case in which a panel of the Ontario Labour Relations Board consulted the full board on its draft decision, Mr. Justice Binnie, in his dissent, referred to the *audi alteram partem* principle at paragraph 66 as follows: "Nothing is more fundamental to administrative law than the principle that he who hears must decide", which was articulated in *IWA v. Consolidated Bathurst Packing Ltd.*, [1990] 1 S.C.R 282.

2. Attendance by the decision maker is required by clause 24.41 of the collective agreement

[14] The bargaining agent referred to clause 24.41 on the designation of a representative and notification and clause 24.38 on the presentation of a policy grievances.

[15] The employer has designated the assistant deputy minister of compensation and labour relations (ADM CLR). By the terms of clause 24.41, the ADM CLR is the person to whom the grievance is to be presented.

[16] Clause 24.38, dealing with the presentation of policy grievances, provides that policy grievances are to be forwarded to the representative of the employer authorized to deal with the grievance.

[17] The requirement that the named representative actually hears the grievance is consistent with Arbitrator Brunner's decision in *Windsor (City)*. In that case, the arbitrator, referring to an article in the collective agreement, stated:

. . .

> *. . . This provision makes it clear that the administrator at Step 2 is to consider the grievance in the presence of the employee and two nurse representatives. He is then called upon to deliver his decision in writing which must be communicated to the employee and the Association's secretary. If the Association wishes to appeal the decision, it may do so. This is then heard by the City Administrator who is required to deliver a decision in writing on the matter and communicate this to the Association's secretary. . . .*

. . .

[18] The collective agreement in that case provides that the administrator and the city administrator shall hear the grievances. That collective agreement names the representatives and uses the words “hear” and “presents”.

[19] In this case, the collective agreement is silent on the hearing process.

3. If the attendance by the decision maker is not express, it is an implied term of the collective agreement

[20] In *New Brunswick v. O’Leary*, [1995] 2 S.C.R. 967, the Supreme Court of Canada determined that a dispute, in that case an employer’s claim in the civil courts against an employee for the cost of repairs to the employer’s vehicle, will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially. In that case, the agreement did not expressly refer to employee negligence in the course of work; however, such negligence, the Court ruled, implicitly fell under the collective agreement, and the employer could not pursue such a claim in the courts but could pursue a grievance under the collective agreement.

[21] Ronald Snyder, in his text *Collective Agreement Arbitration in Canada*, 5th edition, (Markham, ON: LexisNexis Canada Inc., 2013), observes at paragraph 2.29 on page 33 that “[s]ince O’Leary, several awards have approached the issue of implied terms in keeping with the Supreme Court’s bolder approach.”

[22] Despite the Supreme Court of Canada’s bolder approach, adjudicator Michael Bendel adopted a more restrictive approach in the case of *Perelmuter v. Office of the Superintendent of Financial Institutions*, 2013 PSLRB 15. In that case, the grievor sought the reimbursement of tuition expenses following his layoff pursuant to a workforce adjustment policy. The employer refused to pay the expenses for the sole reason that his claim was submitted over five years after the termination of his employment. Although the policy did not stipulate any express time frame in which to make a claim, the employer argued that the policy implicitly required employees to submit claims within a reasonable period. In rejecting the employer’s argument that he should imply a term that reimbursement had to be claimed within a reasonable period, the adjudicator stated:

. . .

> *[19] My second observation pertains to the evolution of case law in the area of implied terms generally. The decision by the Supreme Court of Canada in* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967, has been widely viewed as establishing a different approach to implied terms in collective agreements; see, for example, the discussion in Palmer and Snyder,* Collective Agreement Arbitration in Canada, *4th ed. (2009), at pages 32 to 36.*
>
> *[20] Despite these observations, I have decided to use the test set out in* McKellar General Hospital, *a test that continues to be followed. As noted above, the employer urged that I apply* Union of Canadian Correctional Officers - Syndicat des agents correctionnels -CSN, *a decision issued by the* Public Service Labour Relations Board *which sets out the test in* McKellar General Hospital, *to determine whether an implied term exists for the time for claiming the reimbursement of tuition expenses under the Policy.*
>
> . . .
>
> *[25] . . . According to* McKellar General Hospital, *before an adjudicator can properly conclude that a term should be implied, it must be shown that it is ". . . necessary to imply a term to give 'business or collective agreement efficacy' to the contract, in other words, in order to make the collective agreement work…" I am satisfied that there is no such necessity in this case.*
>
> . . .

[23] Despite the argument that attendance by the decision maker is an implied term of the collective agreement, in accordance with the legal principles set out in *New Brunswick,* the test of necessity set out in *McKellar General Hospital v. Ontario Nurses' Assn.* (1986), 24 L.A.C. (3d) 97, is satisfied in this case. The element of necessity is satisfied by implying a term into the collective agreement requiring the actual decision maker to attend the grievance hearing to ensure that the grievance process meets the objectives of the grievance hearing. One cannot settle a case unless the decision maker is present. The bargaining agent cannot inform the employer about problems unless the decision maker is present. If the decision maker is not present, he or she must rely on the insight or perspective of his or her delegate.

[24] There is a perception that the Treasury Board is not interested in policy grievances and is merely going through the motions. Attendance by the decision maker is necessary to meet the objectives of the internal grievance process.

[25] In *Bell Canada and Unifor (Whyte), Re*, 2014 Carswell Nat 4378 at para. 46, Arbitrator Gee observed:

> *46. The jurisprudence recognizes that, subject to the specific language of the collective agreement under consideration, there are collective agreement terms that exist by way of implication. Where the terms of a collective agreement expressly bestow a discretion on one of the parties, it is implied that such discretion will not be exercised in a manner that is arbitrary, discriminatory or in bad faith. . . Similarly, a term is implied into every collective agreement that neither party will act in a manner that would negate of [sic] undermine the terms of the agreement. Again, this implied term is the product of an inference that, during the course of bargaining, had the parties turned their minds to the question, they would have readily agreed to the implied term.*

[26] Failing to send the decision maker to a grievance hearing undermines the grievance process.

4. In the further alternative, the failure to send the decision maker to the grievance hearing is an unreasonable exercise of management's rights

[27] Clause 5.02 of the collective agreement provides that the employer will act reasonably, fairly, and in good faith in administering this agreement.

[28] It is a rule of procedural fairness that "he who hears must decide". The word "fairly" requires an element of procedural fairness.

[29] There is an obligation to "reasonably" administer the agreement. The employer's action in not sending the actual decision maker to the grievance hearing was unreasonable and contrary to the purpose of the grievance process. The Treasury Board never provided any explanation for the failure of the decision maker to attend the grievance hearing, other than scheduling. Administrative burdens that require someone else to hear grievances do not justify this practice.

[30] In *Dunaenko v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-523, Chief Adjudicator E.B. Jolliffe stated at page 43:

> *One of the administrative burdens imposed on supervisors by Act of Parliament is to process grievances and to do so fairly and expeditiously, however embarrassing they may be. That is part of their work. It is time this was more clearly*

> *understood by all persons required (to quote the Act) "to deal formally on behalf of the employer with a grievance presented in accordance with the grievance process provided for by this Act."*

B. For the employer

[31] The employer contends that the issue is whether there has been a contravention of articles 5 and 24 of the collective agreement in the context of a policy grievance process under which the bargaining agent claims to have a right to meet directly with the person who decides the grievances.

[32] The argument will review the *PSLRA* and the *Regulations* to determine what is required of the employer in processing a policy grievance. The argument will then turn to the collective agreement and finally to a review of the existing state of the law with respect to the issue of procedural fairness.

1. *PSLRA* and the *Regulations*

[33] There is no provision in the *PSLRA*, the *Public Service Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"), or the collective agreement that entitles the bargaining agent to meet directly with the decision maker during the grievance consultation. For that matter, there is no provision that requires that an oral grievance consultation take place.

[34] Subsection 220(1) of the *PSLRA* establishes the right of the employer and the bargaining agent to present policy grievances to each other in respect of the interpretation or application of a collective agreement or arbitral award. Subsections 2 through 5 set out limitations on the right to present policy grievances. Section 221 provides that a party that presents a policy grievance may present it to adjudication.

[35] Section 225 requires that the grievance process be complied with before referring a policy grievance to adjudication.

[36] These sections provide both the employer and the bargaining agent with the right to present policy grievances to each other, set out limitations on the subject matter of policy grievances, and establish the right to refer policy grievances to adjudication in accordance with the grievance process.

[37] Sections 83 to 88 of the *Regulations* set out the provisions with respect to processing policy grievances. These provisions support the interpretation that the word “presented” means “submitted”.

[38] Section 86 provides that on receipt of a policy grievance, the person to whom it is presented must provide a receipt indicating the date on which the policy grievance was received to the other party and forward the grievance to the person whose decision constitutes the level of the policy grievance process. In other words, under this section, the person to whom the grievance is presented, after acknowledging receipt, must forward that grievance to the person authorized to reply to the grievance. This section contemplates that the person to whom the grievance is presented is distinct from the grievance decision maker.

[39] Section 87 sets out a deadline of 20 days for the person whose decision constitutes the level of the policy grievance process to provide a decision to the other party after the day on which the policy grievance was received by the person to whom it was submitted. Within that deadline, the decision maker must make a decision.

[40] The bargaining agent is suggesting that there is a middle step between the forwarding of the policy grievance to the decision maker and the issuance of a decision. This step is found nowhere in the *PSLRA* or the *Regulations*. There is no provision for the hearing of the grievance.

[41] If Parliament had intended that an oral hearing was required and that the decision maker was required to attend that hearing, specific language would have been required. For example, subsection 228(1) of the *PSLRA* provides that if a grievance is referred to adjudication, the adjudicator must give both parties to the grievance an opportunity to be heard. There is an express provision contemplating that there be a hearing whereas there is no such provision for a hearing in the grievance process.

[42] Section 88 deals with the withdrawal of policy grievances before the decision is made by the person whose decision constitutes the level of the policy grievance process and highlights the distinction between the presentation of the grievance and the rendering of a decision by the decision maker at the final level of the grievance process.

2. The collective agreement

[43] The provisions in a collective agreement cannot expand upon or conflict with the *PSLRA* or the *Regulations*.

[44] Article 24 of the collective agreement deals with the grievance process generally.

[45] Clause 24.38, under the title "Policy Grievances", provides that either party may present a grievance at the prescribed level in the grievance process and forward the grievance to the representative of the party authorized to deal with the grievance. The party who receives the grievance must provide a receipt stating the date on which the grievance was received.

[46] Clause 24.39 provides that either party may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of the parties or to the bargaining unit generally. The balance of the clause sets out restrictions on matters that may not be the subject of policy grievances.

[47] Clause 24.40 establishes that there is only one level in the grievance process.

[48] Clause 24.41 requires the parties to each designate a representative to whom a grievance is to be presented.

[49] Clause 24.42 establishes a time limit for each party to present a grievance to the designated person to whom a grievance is to be presented.

[50] Clause 24.43 provides that each party shall reply to the grievance within 15 days after the grievance is presented.

[51] Clause 24.46 provides that a party that presents a policy grievance may, within 30 days, refer it to adjudication.

[52] The bargaining agent argues that the word "present" means to "hear". This proposition is not supported by the language in the collective agreement. Further, clause 24.05, which deals with situations in which it is necessary to present a grievance by mail, the grievance is deemed to have been presented on the day on which it is postmarked and shall be deemed to have been received by the employer on the day it is delivered to the appropriate office of the department or agency concerned. The

bargaining agent's argument that "present" means "hear" in this context is an absurdity.

[53] In reviewing the provisions of the collective agreement, in article 24, the "right to present" is the right to file or submit a written grievance form. The policy grievance form is one of the attachments to the policy grievance.

[54] In *Hickling v. Canadian Food Inspection Agency*, 2007 PSLRB 90, Vice-Chairperson Mackenzie made a distinction between presenting a grievance and consulting at a level in the grievance process. The collective agreement in question provides for a three-step grievance process and provides that the employer shall normally reply to a grievance within 20 days after it is presented. The grievance was transmitted to each of the three levels of the grievance process. Hearings took place at the first and second levels; however, the grievance was referred to adjudication without a grievance hearing taking place at the third level. The employer raised a preliminary objection to the referral to adjudication on the basis that the grievor did not comply with the grievance process as the employer was not given any opportunity to respond at the final level.

[55] The adjudicator, in rejecting the preliminary objection to jurisdiction, stated, at paragraph 10:

> *[10] Presenting a grievance in this context means that the grievance is transmitted and then received at the next level of the grievance process. This clause does not require that the PIPSC consult at each step of the grievance process. There is no obligation to make representations at each level. In fact, the second level response shows that the bargaining agent did not make any representations at that level. While grievance hearings at each level should certainly be encouraged, and it is a good practice for bargaining agent representatives to advise the employer if it is their intention not to make representations at any level of the grievance process, it is not my role to enforce good labour relations practices.*

[56] Clause 24.11, in the provisions dealing with individual grievances under the collective agreement, provides that "a lawyer may be assisted and/or represented by the Association when presenting a grievance at any level." It also provides that "the Association shall have the right to consult with the Employer with respect to a grievance at each or any level of the grievance procedure."

[57] There is no similar provision to clause 24.11 in the provisions dealing with policy grievances commencing in clause 24.38.

[58] Similarly, clause 24.28 in the provisions dealing with group grievances provides that the bargaining agent shall have the right to consult with the employer with respect to a grievance at each or any level of the grievance process.

[59] Had the bargaining agent wanted the right to consult on policy grievances and in particular with the decision maker, the proper forum to address this issue was in the collective bargaining process.

2. Procedural Fairness

[60] With respect to the argument that an obligation for an oral hearing should be read into or implied in the collective agreement in accordance with the test outlined at paragraph 15 of *Perelmuter*, as it is necessary in order to "make the collective agreement work", there is no evidence to indicate that the collective agreement is not working. The agreed statement of facts reflects the practice of how the Treasury Board analyst briefs the person who attends a grievance consultation in the event the decision maker is not available and how the analyst and the person attending the consultation in turn brief the decision maker.

[61] The second prong of the test outlined in *Perelmuter* requires that both parties, having been made aware of the omission of the term, would have agreed without hesitation to its insertion. There is no evidence that the employer would have agreed to the implied term. From the employer's perspective, the existing practice is in keeping with the legislation, the collective agreement, and the common law.

[62] Section 229 of the *PSLRA* provides that an adjudicator's decision may not have the effect of amending a collective agreement or an arbitral award. In *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88, Adjudicator Katkin determined that he was prohibited from modifying the collective agreement in question by section 229 of the *PSLRA* in a case in which there was no express clause in the collective agreement.

[63] In some instances, the bargaining agent has opted not to have a grievance consultation; however, the grievances are still considered to have been presented and referred to adjudication. At paragraph 5 of the agreed statement of facts, the parties

acknowledge that three policy grievances were settled and that nine were addressed without oral consultations.

[64] If the employer were to take the bargaining agent's proposition that he who hears must decide, apply it to the grievance process at large, (or for example at a line department such as the CBSA which receives thousands of grievances a year), it would ignore the practical reality of the workplace in that it could not have been the intention of the legislator to provide that the decision maker hears the grievances.

[65] The bargaining agent is suggesting that the level of procedural fairness required in the policy grievance process is akin to that of a tribunal hearing at which the parties are afforded a full oral hearing before the decision maker. This position is inconsistent with the legislation and caselaw.

[66] Section 221 of the *PSLRA* confers a right to refer a policy grievance to adjudication. At the adjudication stage, a right to a full hearing before the decision maker is provided.

[67] In Donald J. M. Brown and John M. Evans' *Judicial Review of Administrative Action in Canada*, (Toronto: Thomson Reuters Canada Limited, 2013) at para. 10:1100 at 10-4, the authors state:

> *… Accordingly, the right to participate does not invariably confer the right to attend personally at an oral hearing before a decision-maker [sic]. As the Supreme Court of Canada has said: "[T]he* audi alteram partem *rule does not require that there must always be a hearing. What is required is that the parties be given the opportunity to put forward their arguments."*
>
> *Thus, except where it is otherwise required either by statute or by the principles of fundamental justice, the duty of fairness does not confer an unqualified* right *to an oral hearing. . . .*

[68] In *Hagel v. Canada (Attorney General)*, 2009 FC 329, in a case in which the applicants argued that they were denied procedural fairness as the decision maker did not appear personally at the grievance hearing, Justice Zinn determined that the applicants were entitled to some degree of procedural fairness in the grievance process and that this entitlement arose out of the public law; however, the intensity level of the obligation was at the low end of the spectrum. He further determined that a duty to

conduct an in-person hearing did not arise out of any of the provisions in the *PSLRA* and that the applicants did not point the Court to any other policy documents that so provided. He rejected the applicants' contention that the decision maker was under an obligation to attend in person at the grievors' presentation. The Federal Court of Appeal upheld the decision in *Hagel v. Canada (Attorney General)*, 2009 FCA 364.

[69] That decision involves grievances that were not referable to adjudication under the *PSLRA*. The Court determined that the level of procedural fairness in the grievance process is low even in the absence of a right to adjudication. In this case, policy grievances are referable to adjudication, and the bargaining agent is entitled to an oral hearing.

[70] In *Public Service Alliance of Canada v. Canada (Attorney General)*, 2013 FC 918, the Federal Court, set aside the direction of the minister designated under the *PSLRA* to the chairperson of the former Board to conduct a vote among the members of the border services officers bargaining unit on the employer's (the CBSA in that case) last offer on the grounds *inter alia* that the bargaining agent's procedural fairness rights were violated. The bargaining agent had alleged that its rights were violated because it had received no notice of the employer's request that the minister exercise his authority to direct a vote and had not been afforded an opportunity to make submissions in respect of the request.

[71] The Court referred to the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, which established that:

. . .

> *. . . the content of the duty of procedural fairness depends on the context, which requires consideration of factors such as:*
>
> - *the nature of the decision in question and the process followed in making it, and, in particular, the degree to which the decision-making process resembles that followed by a court (in which event greater procedural guarantees ought to be afforded to a party);*
> - *the statutory scheme applicable to the tribunal;*
> - *the importance of the decision to the affected parties;*
> - *the legitimate expectations of the parties; and*

> - *the procedural choices made by the tribunal, especially where the choice of procedure is left to the tribunal by statute.*
>
> . . .

[72] The Court also referred to the Supreme Court of Canada decision in *Canada (Attorney General) v. Mavi*, 2011 SCC 30, in which the Court noted that even when only minimal procedural fairness rights are owed, those rights still require both notice and an opportunity to make submissions in writing. Neither the decisions in *Hagel* nor in *Public Service Alliance of Canada* require as a matter of procedural fairness that an oral hearing take place in the presence of the decision maker. In the policy grievance process, the bargaining agent can make arguments in writing.

[73] Even assuming there were procedural defects in the grievance process, a defect is cured by a hearing *de novo* before an adjudicator; see *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (F.C.A.) (QL).

[74] In *Phillips v. Deputy Head (Canada Border Services Agency),* 2013 PSLRB 67, in a case concerning a grievance contesting a termination of employment, the adjudicator dealt with an argument that the termination was void, *inter alia*, on the basis that the grievor was not advised of his right to have a representative with him at the meeting at which he was advised of his termination and that the final-level grievance hearing was not conducted by the individual who was charged with rendering the decision at that level. The adjudicator stated at paragraph 71 as follows: ". . . I agree with the employer that there was no obligation for the person who made the decision at the final level of the grievance procedure to attend the grievance hearing. In fact, there are no obligations to hold an oral grievance hearing." It then cited *Hagel.*

[75] Even in the context of a termination of employment, there is a requirement only for a low level of procedural fairness that does not entitle the grievor to meet with the decision maker in the grievance process.

[76] In *Kennedy v. Buffie (Employment and Immigration Canada)*, [1988] C.P.S.S.R.B. No. 171 (QL) , the Public Service Staff Relations Board, in the context of an unfair labour practice complaint alleging that a denial of authorization to call witnesses at departmental grievance hearings was a denial of natural justice, concluded as follows:

> . . .

> *The sum and substance of the above noted conclusions is that meetings between the parties during the grievance process are administrative, not judicial. From [sic] which it follows that neither party is obliged to conduct itself in accordance with the rules of judicial procedure and natural justice.*
>
> *. . . The right to present grievances, as set out in Section 90 of the PSSRA, does not provide that there must be meetings at the various levels of the grievance procedure. Still less does it provide that such meetings, if they take place, must be conducted in accordance with the rules of natural justice.*
>
> . . .

[77] In *Re: Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at para. 37, the Federal Court of Appeal stated:

> *[37] In the absence of statutory provisions to the contrary, administrative decision-makers enjoy considerable discretion in determining their own procedure, including aspects that fall within the scope of procedural fairness:* Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568-569 (*Prassad*). These procedural aspects include: whether the "hearing" will be oral or in writing, a request for an adjournment is granted, or representation by a lawyer is permitted; and the extent to which cross-examination will be allowed or information in the possession of the decision-maker must be disclosed. Context and circumstances will dictate the breadth of the decision-maker's discretion on any of these procedural issues, and whether a breach of the duty of fairness occurred.*

[78] In the decision of the Federal Court, in *Boshra v. Canada (Attorney General)*, 2012 FC 681, the Court determined that a decision of the Public Service Staffing Tribunal dismissing a complaint did not amount to a failure to exercise jurisdiction, breach of natural justice or procedural fairness by not providing an oral hearing.

[79] If an obligation were to be imposed requiring the decision maker to attend the grievance hearing, the practical result may be that the authority to make a decision in a policy grievance would be delegated to a lower level. That would not be in the interests of either party or effective labour relations.

[80] The suggestion that the employer uses the grievance process as a signpost on the way to adjudication is not reflected in the agreed statement of facts, in which the process for the analysis of policy grievances is set out, as well as in the parties'

experience in the grievance process, in which the ADM CLR was not present and in which 17 policy grievances were dealt from which three were settled and nine addressed without oral consultations.

[81] The issue is not about whether there is a right to an oral grievance hearing but is about who attends. The employer agreed there is value in having the decision maker present, but there is no such requirement.

C. <u>The bargaining agent's rebuttal</u>

[82] The interpretation of the collective agreement involves a dispute over the definition of the term "present", which the bargaining agent contends means "to actually present the case", while the employer argues that "present" means "to file". Depending on where the term is used in the collective agreement, it could have both meanings.

[83] Clause 24.43 of the collective agreement provides that the employer and the bargaining agent shall reply to a grievance within 15 days of when the grievance is presented. If the employer is correct, then the word "present" means "filed". In this context, the word "present" must mean something other than "filed".

[84] In response to the argument that if the bargaining agent wanted the decision maker to be present at the grievance hearing it should have bargained for it, the bargaining agent did bargain for it and is now seeking confirmation through the interpretation of the collective agreement.

[85] While section 229 of the *PSLRA* prohibits an adjudicator's decision from amending a collective agreement, the bargaining agent is not asking that the collective agreement be amended but that its express and implied terms be interpreted.

[86] The issue is not whether there is a requirement to have an oral hearing but whether when there is an oral hearing, the decision maker has to attend. Most of the cases referred to by the employer deal with the issue of whether, as a matter of procedural fairness, an oral hearing is necessary. The decisions do not discuss what happens when there is an oral hearing.

[87] In both *Hagel* and *Phillips*, there is an important distinguishing factor; namely, both involved non-unionized employees with no collective agreement. Those cases

involved the interpretation of procedural rules set out in regulations. While the *Regulations* and the collective agreement are similar, they have to be interpreted differently. The procedural rules set out in the *Regulations* are interpreted according to the rules of statutory interpretation, while the principles of interpreting a collective agreement are different.

[88] While non-unionized employees may not have a right to have the decision maker attend grievance hearings, that rule does not decide this case because there is an express or implied term in the collective agreement requiring the decision maker's presence.

[89] With respect to the principle of procedural fairness requiring the presence of the decision maker at the grievance hearing, the bargaining agent is not basing its claim on the common law but rather under clause 5.02 of the collective agreement. The parties contracted for fairness in the administration of the collective agreement.

[90] With respect to the spectre of an unmanageable quantity of grievances tying up the decision maker given the referrals of thousands of grievances at the CBSA, there is nothing in the agreed statement of facts concerning this issue. There is evidence in the agreed statement of facts setting out the number of policy grievances between the parties between September 28, 2011, and January 11, 2015, which amounted to some 17 policy grievances, of which three settled, nine were dealt with without oral consultations, and five required oral consultations over a period of 3½ years, hardly evidence of a flood at an unmanageable level.

[91] With respect to the argument that if the bargaining agent's grievance is successful, the employer may have to delegate decision making to a lower level, the bargaining agent would be quite content to live with that consequence.

IV. Reasons

[92] The issue in this grievance is whether the collective agreement requires the employer's decision maker to attend a grievance consultation with respect to a policy grievance.

[93] The bargaining agent relies upon the importance of the grievance process and the public law principle that he who hears must decide for context and argues that clause 24.41 of the collective agreement provides that the decision maker must attend

the grievance consultation hearing, alternatively that the decision maker's attendance is an implied term of the collective agreement, and in the further alternative that the decision maker's failure to attend a grievance consultation is an unreasonable exercise of management's rights.

[94] The bargaining agent asserts that the decision maker is required to attend a grievance consultation by the language in clause 24.41 of the collective agreement, which requires the parties to the agreement to designate a representative to whom a grievance is to be presented. The word "presented" in this context contemplates that the parties present their cases to the respective decision makers, in conformity with the purposes of the grievance process and the public law principle that he who hears must decide and is consistent with Arbitrator Brunner's decision in *Windsor (City)*.

[95] The employer responds that there is no provision in the *PSLRA*, the *Regulations*, or the collective agreement requiring the decision maker to consult with the bargaining agent in the grievance process. Furthermore, there is no provision requiring that an oral grievance consultation occur in the case of policy grievances. The provisions in the *PSLRA*, the *Regulations*, and the collective agreement all support the interpretation that the word "presented" means "submitted" or "filed" and not "present a case."

1. Whether attendance by the decision maker is required by the collective agreement

[96] Is the attendance by the decision maker required by clause 24.41 of the collective agreement?

[97] Article 24 contains provisions dealing with the grievance process. The procedure provides for the presentation of individual grievances and their referrals to adjudication by lawyers in clauses 24.07 to 24.23, group grievances in clauses 24.24 to 24.37, and policy grievances in clauses 24.38 to 24.46.

[98] Clause 24.38, entitled "Policy Grievances", provides as follows:

> *The Employer and the Association may present a grievance at the prescribed level in the grievance procedure, and forward the grievance to the representative of the Association or the Employer, as the case may be, authorized to deal with the grievance. The party who receives the*

> *grievance shall provide the other party with a receipt stating the date on which the grievance was received by him.*

[99] Clause 24.39, entitled "Presentation of Policy Grievance", provides in part as follows:

> *(a) The Employer and the Association may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.*
>
> . . .

[100] Clause 24.40 provides that "[t]here shall be no more than one (1) level in the grievance procedure."

[101] Clauses 24.41 and 24.42 provide as follows:

> *The Employer and the Association shall designate a representative and shall notify each other of the title of the person so designated together with the title and address of the officer-in charge [sic] to whom a grievance is to be presented.*
>
> *The Employer and the Association may present a grievance in the manner prescribed in clause 24.38, no later than the twenty-fifth (25th) day after the earlier of the day on which it received notification and the day on which it had knowledge of any act, omission or other matter giving rise to the policy grievance.*

[102] Clause 24.43 states "[t]he Employer and the Association shall reply to the grievance within fifteen (15) days when the grievance is presented."

[103] Clause 24.46 entitled "Reference to Adjudication" provides in part as follows: "(a) A party that presents a policy grievance may within thirty (30) days refer it to adjudication."

[104] Other clauses in the grievance process in the collective agreement were referred to by the parties in argument.

[105] Clause 24.11, dealing with individual grievances by lawyers, provides as follows:

> *A lawyer may be assisted and/or represented by the Association when presenting a grievance at any level. The*

> *Association shall have the right to consult with the Employer with respect to a grievance at each or any level of the grievance procedure.*

[106] Clause 24.28, dealing with group grievances by lawyers, provides as follows: "The Association shall have the right to consult with the Employer with respect to a grievance at each or any level of the grievance procedure."

[107] Clause 24.05 deals, *inter alia*, with the presentation of grievances by mail where the provisions of clause 24.38 dealing with the presentation of policy grievances in the grievance process cannot be complied with. It provides that

> *. . . the grievance shall be deemed to have been presented on the day on which it is postmarked and it shall be deemed to have been received by the Employer on the day it is delivered to the appropriate office of the department or agency concerned. . . .*

[108] General principles of interpretation of collective agreement provisions are reflected in the rules of construction that have been adopted by arbitrators and adjudicators as aids to determine the intention of the parties.

[109] A number of the rules of construction in my view are of assistance in determining the parties' intentions in interpreting the language used in this collective agreement. Firstly, words of collective agreement are to be given their ordinary and plain meaning. Secondly, a collective agreement is to be construed as a whole, and identical or similar terms used in different parts of the collective agreement should be given the same or similar meanings. Thirdly, the *expressio unius alterius* rule provides that the express mention of one thing implies the exclusion of another; see *Collective Agreement Arbitration in Canada*, at 27-32.

[110] A plain and ordinary interpretation of the words in the collective agreement language leads me to the conclusion that the parties to the agreement have not provided, in the case of policy grievances, for a right to consult each other at the final level of the grievance process. The parties have expressly provided for a right of consultation at all the levels in the grievance process in the case of individual grievances of lawyers at clause 24.11 and in the case of group grievances at clause 24. 28. The express mention of these rights and the absence of a right of consultation in the case of policy grievances imply that the parties did not intend to confer a mutual right of consultation in the case of policy grievances.

[111] Further, the use of the word "present" in the collective agreement as a whole, and in the context of all the clauses dealing with policy grievances, including clause 24.05 dealing with the presentation of policy grievances by mail, is consistent with the interpretation that the word "present" means "file" or "submit" and is inconsistent with the interpretation that it means "present" in the sense of "presenting a case to a decision maker."

[112] This interpretation is consistent with that in *Hickling*, in which the adjudicator concluded in that case that presenting a grievance meant that the grievance was transmitted and then received at the next level of the grievance process, that the clause in question did not require a consultation at each step of the grievance process, and that there was no obligation to make representations at each level.

[113] If there is no express right to mutual consultation by the parties in the case of policy grievances, and the word "present" as used by the parties in the collective agreement as a whole means to file or submit and not "present" as in presenting a case, it follows in my view that there is no express provision in the collective agreement that obligates the decision maker to attend a voluntary grievance consultation.

[114] An example of an express provision in a collective agreement requiring the decision maker to attend a grievance hearing is set out in *Windsor (City)*. In paragraph 11 of that case, step two in the grievance process provided:

. . .

> *If the complaint of the employee is not satisfied* [at step one], *she shall deliver her grievance in writing to the Administrator of the Home within ten (10) days after the occurrence giving rise to the grievance. Such grievance shall be submitted in quadruplicate upon the form provided by the Corporation and as approved by the Association and shall be signed by the employee.*
>
> *The Administrator shall hear the grievance within three (3) days after receipt thereof and the Association shall be entitled to have the grievor and two (2) Nurses' Representatives, one of whom may be a Representative of the Ontario Nurses' Association present at the hearing. The Administrator shall deliver his decision in writing to the grievor and the Association secretary within five (5) days after the hearing.*

[115] . . .Step three in the grievance process provided:

. . .

> *If the Association wishes to appeal to the City Administrator from the decision of the Administrator, it shall deliver written notice to the City Administrator within five (5) days after receipt of the said decision. The City Administrator shall hear such grievance within seven (7) days after receipt of the said notice and shall deliver his decision in writing to the Association Secretary within seven (7) days after such hearing. A representative of the Ontario Nurses' Association may attend this hearing.*

. . .

[116] I conclude for the foregoing reasons that attendance by the decision maker at the grievance consultation is not expressly required by clause 24.41 of the collective agreement.

2. Whether attendance by the decision maker is an implied term of the collective agreement

[117] Is the attendance by the decision maker an implied term of the collective agreement?

[118] The bargaining agent argues that the test of necessity set out in *McKellar General Hospital*, recited by Adjudicator Bendel in *Perelmuter*, is satisfied in this case.

[119] At paragraph 15, Adjudicator Bendel set out the test in *McKellar General Hospital*. According to the latter award, the power to declare the existence of an implied term could be exercised only in a case in which both of the following conditions were met:

. . .

> *(1) if it is necessary to imply a term in order to give "business or collective agreement efficacy" to the contract, in other words, in order to make the collective agreement work; and*
>
> *(2) if, having been made aware of the omission of the term, both parties to the agreement would have agreed without hesitation to its insertion.*

[120] The bargaining agent argues that the element of necessity is satisfied by implying a term into the collective agreement requiring the actual decision maker to attend the grievance hearing to ensure that its objectives are met, as one cannot settle a case unless the decision maker is present; nor can the bargaining agent inform the employer about problems unless the decision maker is present. The decision maker must rely on the insight or perspective of the delegate.

[121] The employer responds that there is no evidence to indicate that the collective agreement is not working. The employer refers to the agreed statement of facts that reflects how the employer balances addressing policy grievances by senior officials by the preparation of précis and subsequent briefings to the decision maker in the event that the decision maker is unable to attend a grievance consultation. It states that in some instances, the bargaining agent has opted not to have a grievance consultation; however, the grievances are still considered to have been presented and referred to adjudication. The parties acknowledge that three policy grievances were settled and nine were addressed without oral consultations. In two of the five policy grievances in which oral consultations were held, the decision maker attended.

[122] The employer argues that there is no evidence that it would have agreed to the implied term, as per the second condition in the *McKellar General Hospital* test.

[123] I have decided to apply the test set out in *McKellar General Hospital* for the same reasons as Adjudicator Bendel, as it is a test that arbitrators and adjudicators continue to follow.

[124] I am not persuaded that requiring the decision maker to attend a policy grievance hearing is necessary in order to make the collective agreement work. The practice reflected among the different departments recited in the agreed statement of facts does not show any consistent pattern reflecting the need for attendance of decision makers at the final level of the grievance process. Further, I am not persuaded that the practice between these parties and their history of resolving policy grievances without the decision maker being present at consultations demonstrates that the collective agreement is not working, or that it is not efficient. Nor is there any evidence that the employer would have agreed to the implied term without hesitation if it had been made aware of the omission.

[125] I conclude that requiring the decision maker to attend a grievance consultation on a policy grievance is not an implied term of the collective agreement.

A. <u>The statutory and regulatory regimes</u>

[126] Subsection 220(1) of the *PSLRA* establishes the right of the employer and the bargaining agent to present a policy grievance and reads as follows:

> ***220 (1)*** *If the employer and a bargaining agent are bound by an arbitral award or have entered into a collective agreement, either of them may present a policy grievance to the other in respect of the interpretation or application of the collective agreement or arbitral award as it relates to either of them or to the bargaining unit generally.*

[127] Subsections 220(2) through (5) limit the matters that may be presented by way of a policy grievance.

[128] Section 221 provides that "[a] party that presents a policy grievance may refer it to adjudication."

[129] Subsection 228(1) provides that "[i]f a grievance is referred to adjudication, the adjudicator or the Board, as the case may be, must give both parties to the grievance and opportunity to be heard."

[130] Section 229 provides that "[a]n adjudicator's or the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award."

[131] Paragraph 237(2) of the PSLRA states the following:

> "Regulations made under subsection (1) respecting individual, group or policy grievances do not apply in respect of employees included in a bargaining unit for which a bargaining agent has been certified by the Board to the extent that the regulations are inconsistent with any provisions contained in a collective agreement entered into by the bargaining agent and the employer applicable to those employees."

[132] Sections 83 to 88 of the *Regulations* set out the provisions dealing with policy grievances.

[133] Section 83 provides for one level in the grievance process.

[134] Subsection 84(1) provides that "[a]n employer shall notify the bargaining agent of the name or title, as well as the address, of any person to whom a policy grievance may be presented."

[135] Subsection 84(2) provides that "[a] bargaining agent shall notify the employer of the name or title, as well as the address, of any person to whom a policy grievance may be presented."

[136] Subsection 85(1) establishes a deadline for the presentation of a policy grievance.

[137] Subsection 85(2) deems a grievance to have been presented within the deadline if it is delivered or sent by courier to any person to whom a policy grievance may be presented under subsections 84(1) or (2).

[138] Sections 86, 87 and 88 provide as follows:

> ***86*** *On receipt of a policy grievance, the person identified under subsection 84(1) or (2), shall*
>
> > ***(a)*** *deliver to the bargaining agent or the employer, as the case may be, a receipt stating the date on which the policy grievance was received by the person; and*
> >
> > ***(b)*** *forward the policy grievance to the person whose decision constitutes the level of the policy grievance process.*
>
> ***87*** *The person whose decision constitutes the level of the policy grievance process shall provide a decision to the bargaining agent or the employer, as the case may be, no later than 20 days after the day on which the policy grievance was received by any person identified under subsection 84(1) or (2), as the case may be.*
>
> ***88 (1)*** *A bargaining agent or an employer may, by written notice to any person identified under subsection 84(1) or (2), as the case may be, withdraw a policy grievance before the decision is made by the person whose decision constitutes the level of the policy grievance process.*

[139] When reading the words of the *PSLRA* and the *Regulations* in their context in their grammatical and ordinary sense according to the rules of statutory

interpretation, a fair reading of these provisions supports the interpretation that the word "present" in this context means "submit" or "file" and not "present" in the sense of presenting a case to a decision maker. Section 86 of the *Regulations* makes a clear distinction between the person to whom a policy grievance is presented and the person who makes the decision. Sections 87 and 88 reinforce this distinction.

[140] The *PSLRA* and the *Regulations* do not provide for an oral consultation at the final level of the grievance process in the case of a policy grievance; nor do they impose an obligation on a decision maker to attend such a consultation. I do not find any inconsistencies between the regulations and the provisions of the collective agreement. However, it is significant that section 228 of the *PSLRA* requires an adjudicator to give both parties to the grievance an opportunity to be heard. There is clearly no such obligation in the *PSLRA* for a decision maker at the final level of the grievance process for policy grievances to give the other party an opportunity to be heard.

B. The public law

[141] The bargaining agent argues in the further alternative that the failure of the decision maker to attend a grievance consultation is an unreasonable exercise of management's rights as clause 5.02 of the collective agreement commits the employer to act reasonably, fairly, and in good faith in administering the agreement. It contends that the rule of procedural fairness, which is that "he who hears must decide", is imposed on the employer in the way it exercises its management rights and in particular the way it responds to policy grievances in the grievance process.

[142] The employer responds that the bargaining agent is suggesting that the level of procedural fairness required in the policy grievance process is akin to that of a tribunal hearing, at which the parties are afforded a full hearing before the decision maker as contemplated by section 221 of the *PSLRA*, and is inconsistent with the common law.

[143] It submits that the right to participate before a decision maker does not invariably confer a right to attend personally at an oral hearing and that the *audi alteram partem* rule does not always require a hearing. It requires only that the parties be given the opportunity to put forward their arguments. It relies on the Federal Court decision in *Hagel* confirmed by the Federal Court of Appeal, a decision maker is not

under an obligation to attend in person at a grievance hearing as a matter of procedural fairness arising out of the *Act* or the public law.

[144] In the alternative, assuming there were procedural defects in the grievance process, the employer argues they are cured by a hearing *de novo* before an adjudicator (*Tipple*).

[145] In *Komo Construction Inc. et al. c. Commission des Relations de Travail du Québec et al.*, [1968] R.C.S. 172, Justice Pigeon stated, with respect to the application of the *audi alteram partem* rule, at page 4 as follows:

> [Translation]
>
> *As for the* audi alteram partem *rule, it is important to note that it does not mean that a hearing must always be granted. The obligation is to provide the party with an opportunity to present its case. . . .*

[146] In *Baker*, Mme. Justice L'Heureux-Dubé outlined the factors affecting the content of the duty of fairness. She stated at paragraphs 23 to 27 of the decision in part as follows:

> *23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In* Knight, supra, *at page 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. . . .*
>
> *24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates":* Old St. Boniface, supra, *at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the*

> *decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans,* Judicial Review of Administrative Action in Canada *(loose-leaf), at pp. 7-66 to 7-67.*
>
> *25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. . . .*
>
> *26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. . . As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. . . Nevertheless, the doctrine . . . as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.*
>
> *27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances . . . .*

[147] In *Doyle v. Canada (Restrictive Trade Practices Commission)*, [1985] 1 F.C. 362 (F.C.A.), at 368-369, Justice Pratte described the maxim "he who decides must hear" and its relationship to the *audi alteram partem* rule. This description was adopted by Justice Gonthier, at paragraph 76, in the majority judgment of the Supreme Court of Canada in *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, as follows:

> *This maxim expresses a well- known rule according to which, where a tribunal is responsible for hearing and deciding a case, only those members of the tribunal who heard the case may take part in the decision. It has sometimes been said that this rule is a corollary of the* audi alter*am partem rule. This is true to the extent a litigant is not truly "heard" unless he is heard by the person who will be deciding his case . . . .*

> *This having been said, it must be realized that the rule "he who decides must hear", important though it may be, is based on the legislator's supposed intentions. It therefore does not apply where this is expressly stated to be the case; nor does it apply where a review of all the provisions governing the activities of a tribunal leads to the conclusion that the legislator could not have intended them to apply. Where the rule does apply to a tribunal, finally, it requires that all members of the tribunal who take part in a decision must have heard the evidence and the representation of the parties in the manner in which the law requires that they be heard.*

[148] In *Hagel*, Justice Zinn dealt with an application for judicial review by public service employees of the decision dismissing their grievance respecting their transfer from the Canada Customs and Revenue Agency (CCRA), a separate employer, to the CBSA, in which the Treasury Board was the employer. The affected employees, while employed by the CCRA, occupied managerial or confidential positions and were not unionized. That occupational group did not exist when they were transferred to the Treasury Board, and their positions were reclassified to a group that did not provide for a salary increase in 2004 and in which their salaries were lower.

[149] The grievances, by agreement, went directly to the final level of the grievance process and were dismissed on the basis that Treasury Board treated the applicants equitably and consistently in integrating the employees into the public service in accordance with the employer's practices.

[150] The applicants argued on judicial review *inter alia* that they were denied procedural fairness as the decision maker did not personally appear at the grievance hearing.

[151] Justice Zinn ultimately dismissed the application for judicial review and in particular rejected the applicants' contention that the decision maker was under an obligation to attend in person at the grievors' presentation. Nevertheless, in his reasoning, he concluded that the public law duty of fairness applied to the grievance process under the *PSLRA*, stating as follows:

. . .

> *In my view, there are indeed good reasons to consider that a public law duty of fairness attaches to the PSLRA grievance process. Firstly, there is established jurisprudence. In* Chong

> v. Canada (Treasury Board), *(1999), 170 D.L.R. (4th) 641, a classification grievance case arising under the PSSRA, the Federal Court of Appeal wrote at para. 12, that "[t]here is clearly a dispute between parties which the grievance process seeks to resolve and the duty of fairness clearly applies to that process" (emphasis added). Secondly, the PSLRA's procedural provisions governing non-adjudicable grievances are so skeletal that they cannot be viewed as providing statutory procedural protections of any substance, whereas employment contracts and private law are both sources of procedural protections relating to dismissal. Thirdly, where employees have no access to third-party adjudication, it is particularly significant that "questions of procedural fairness can be addressed as of right on judicial review of the decision-maker's decision," as Justice Sexton observed in* Vaughn v. Canada *in 2003 FCA 76. . . .*
>
> . . .

[152] Justice Zinn, having determined that the grievors on the facts of that case were entitled to some degree of procedural fairness arising from the public law, went on to discuss the level of that obligation at paragraph 35:

> *[35] . . . I am also of the view that the intensity of the obligation was at the low end of the spectrum, as has been established in the classification grievance cases. In this case, the grievances were apparently dealt with on a somewhat* ad hoc *basis, in that they went directly to the final level, by agreement. In his affidavit filed in this proceeding, the decision-maker [sic], Paul Burkholder, attests "that the established grievance consultation/hearing process was followed." The process followed provided the grievors with a full opportunity to make their case and indeed, on the record before the Court, their presentation to the labour relations advisors was accurately summarized in the* Final Level Grievance Précis. *Further, a duty to conduct an in-person hearing does not arise out of any provisions in the PSLRA and the applicants did not point the Court to any other policy documents that so provide. In these circumstances, I reject the applicant's contention that the decision-maker [sic] was under an obligation to attend in person at the grievors' presentation.*

[153] In order to determine the extent to which the duty of procedural fairness is imported into administrative decision making in the grievance process dealing with policy grievances under the legislation and this collective agreement, a number of factors need to be examined.

[154] Based on *Hagel*, I agree that the public law duty of procedural fairness attaches to the *PSLRA* grievance process. That duty requires that the bargaining agent or the employer, as the case may be, can make submissions in writing at the final level of the policy grievance process.

[155] Does that duty extend to require the decision maker to attend a grievance consultation at the final level of the grievance process? The closeness of the administrative process to the judicial process as well as the nature of the *PSLRA* statutory scheme are relevant in determining the extent to which further principles should be imported into the grievance process. Also relevant are the importance of the decision to the bargaining agent, and whether there has been a contravention of any representation to the bargaining agent as to the process to be followed.

[156] I have concluded that the express provisions of the collective agreement, the PSLRA, the *Regulations* and the public law duty of procedural fairness do not impose a duty of fairness on the other party to compel a decision maker to attend in person a policy grievance consultation. Of significance is the fact that the grievance may be referred to adjudication, at which there will be a full opportunity for both sides to be heard by the decision maker appointed by the Board. A review of these provisions leads me to the conclusion that the maxim, whether articulated as "he who hears must decide" or as "he who decides must hear", does not apply to compel a decision maker to attend a policy grievance consultation.

[157] The bargaining agent contends that it is not basing its claim on the common law that the principle of procedural fairness requires the presence of the decision maker at the grievance hearing but rather on clause 5.02 of the collective agreement.

[158] Clause 5.02 of the collective agreement provides that the employer will act reasonably and fairly and in good faith in administering the agreement. As stated, the collective agreement must be read as a whole. There are express provisions dealing with the presentation of grievances, and in the case of individual grievances and group grievances, the parties have provided for a right to consult, but not in the case of policy grievances.

[159] The parties have explicitly addressed aspects of procedural fairness in the grievance process but have not provided for the attendance of respective decision makers at an oral grievance consultation. In the absence of compelling authority, I am

not persuaded that the language used in article 5, which is that the employer will act fairly when administering the agreement, incorporates a greater duty of procedural fairness than that found in the public law. See the discussion in *Collective Agreement Arbitration in Canada* at pages 915-18.

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

(The Order appears on the next page)

V. Order

[161] The grievance is dismissed.

June 3, 2016.

David Olsen,
a panel of the Public Service Labour Relations and Employment Board