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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

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Public Service Alliance of Canada v. Treasury Board

In the matter of a policy grievance referred to adjudication

Before: Michael F. McNamara, a panel of the Public Service Labour Relations and Employment Board

For the Bargaining Agent: David Yazbeck and Morgan Rowe, counsel

For the Employer: Martin Desmeules, Treasury Board

Heard at Ottawa, Ontario,
December 10, 2014.

I. Policy grievance referred to adjudication

[1] This policy grievance concerns the proper interpretation and application of salary protection provisions in three separate collective agreements that the Public Service Alliance of Canada ("the PSAC") and the Treasury Board ("the employer") signed with respect to employees who were transferred from separate agencies to the core public administration (CPA).

[2] On December 12, 2013, Robyn Benson, the PSAC's president, signed a policy grievance contesting the employer's refusal to apply the salary protection provisions of the Program and Administrative Services (PA), Operational Services (SV), and Technical Services (TC) Group collective agreements to employees who had been transferred from their former positions in separate agencies (the Canada Revenue Agency (CRA) and the National Capital Commission (NCC)) to positions in federal government departments that are part of the CPA (Shared Services Canada (SSC) and the Department of Canadian Heritage ("Canadian Heritage")).

[3] 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 *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] The parties agreed to proceed on the basis of a seven-page agreed statement of facts to which a large number of documents were appended. They also provided me with written submissions after making their oral arguments at the hearing. Rather than repeating the agreed statement of facts and the parties' written arguments, I have instead summarized the pertinent facts and arguments.

II. Summary of the evidence

A. The CRA to SSC

[5] In August 2011, the federal government established a new department, SSC, to be listed under Schedule IV of the *Financial Administration Act* (R.S.C. 1985, c. F-11; *FAA*) and to report to the Minister of Public Works. It was formed to consolidate managing the federal government's information technology (IT) infrastructure. The federal government's announcement stated that employees from 43 departments and agencies who provided certain email, data centre, and network services would be transferred to the new department.

[6] CRA employees were advised of this process in an email sent August 4, 2011, which stated that they were part of Phase II of the project, which was to take place approximately two months from then.

[7] On August 19, 2011, the CRA sent another email to all its employees, updating its earlier email. It advised them that it was in discussions with SSC on how best to implement the federal government's decision and that the details of the change had not yet been determined. A further update was promised for the following month, and on September 29, 2011, the CRA again emailed the employees, advising them that a number of them would be required to transfer to SSC and that the process of identifying the areas and individuals involved was just beginning. The email also indicates that the employer pledged to keep employees and bargaining agents informed as events unfolded. However, according to paragraph 6 of the agreed statement of facts, the "CRA declined to negotiate the terms and conditions of the transfer with PSAC".

[8] In October 2011, the CRA published a frequently asked questions (FAQ) document, which provided details of the transfer for affected employees. In answer to "How will the decision be made to transfer positions and incumbents to the new organization?", the document stated the following: "The positions of employees directly performing functions that support the delivery of these services as well as a representative share of employees from the corporate support branches are also being transferred to the new organization."

[9] On page 2, for the question: "Will this affect my terms and conditions of employment and salary?", the following answer was provided:

> *Provisions will be made to ensure that Agency employees retain their terms and conditions of employment and salary in effect immediately prior to their possible transfer including their accrued benefit entitlements (i.e., leave credits, recognition of continuous service and employment) until a new collective agreement is signed. Excluded and unrepresented employees will continue to be subject to their current terms and conditions of employment until such time as it is determined that new terms and conditions apply.*

[10] The following question indicates that the issue at the heart of this policy grievance was already contemplated before the transfer as it asks the following: "As an employee of the Agency who is being transferred to Shared Services Canada, what happens if my rate of pay is above the maximum rate for the group and level I am integrated into?" The answer reads as follows:

> *Employees whose current rate of pay immediately prior to the transfer exceeds the maximum of the Treasury Board pay structure for the corresponding level will have their current salary frozen at their current rate level until a new collective agreement is signed.*

[11] On November 14, 2011, the day before the transfer, the PSAC filed a policy grievance that alleged that the proposed transfer was contrary to the workforce adjustment appendix in the between the Canada Revenue Agency and the Public Service Alliance of Canada (PSAC) for the Program Delivery and Administrative Services group, expiry date, October 31, 2010 ("the CRA Collective Agreement"). On March 14, 2013, an adjudicator of the former Board rendered a decision denying the grievance (see *Public Service Alliance of Canada v. Canada Revenue Agency*, 2013 PSLRB 23("*PSAC-1*")).

[12] On November 15, 2011, about 80 CRA employees who were also PSAC members were transferred to SSC pursuant to an Order in Council (PC-2011-1297) and the *Public Service Rearrangement and Transfer of Duties Act*, (R.S.C. 1985, c. P-34; *PSRTDA*). The parties attached to the agreed statement of facts a copy of the order as well as a copy of the *Regulations* related to the transfer (*Transfer of Portions of the Canada Revenue Agency Regulations*, at Tab F SOR 2011-246), which indicate under the title "Block Transfer" that s. 132 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) applies to the CRA employees. This provision essentially states that the transfer of employees shall not be construed as affecting their prior "status".

[13] The CRA has its own classification standard, referred to as the "SP" standard, which has 10 different levels (SP-1 to SP-10). When they were transferred, the former CRA employees retained their SP classifications and were paid in accordance with the provisions of the SP collective agreement, and they were subject to its terms and conditions temporarily.

[14] Between the transfer in November 2011 and the summer of 2013, SSC reviewed the work descriptions of the employees who had been transferred from separate agencies, to identify the appropriate CPA occupational groups and levels into which they should be placed.

[15] In the summer of 2013, SSC held information sessions for all employees who had transferred there from separate agencies, including former CRA employees. They were advised that their salaries would be integrated into the salary scales for the CPA for their respective occupational groups and levels.

[16] A copy of the PowerPoint presentation from those sessions was attached as an exhibit to the agreed statement of facts. The fourth slide indicates that "[a]ll work must be valued within the CPA context" and recognizes that while separate agencies might have different classification standards and compensation plans from those in the CPA, all separate agency positions are "… evaluated for CPA occupational group and level" and that "[e]mployees then become subject to the respective terms and conditions attached to the occupational group and applicable collective agreement". At the bottom of the same page is found the following statement: "This action is considered a **transfer** of position and not a conversion exercise nor a reclassification [Emphasis in the original]."

[17] After the information sessions, the employees received letters advising them that their positions had been "transferred to Shared Services Canada", that as part of the transition process, their positions had undergone a "… classification review against the CPA's classification evaluation plan", and that their occupational groups and levels within the CPA had been confirmed. The letters outlined each employee's new occupational group and level as well as the pay rate applicable to that particular group and level, indicating that the CPA salary would be effective November 15, 2013.

[18] Of the approximately 80 employees who were transferred from the CRA, most had had rates of pay at the CRA higher than the new CPA classifications did that

applied to their positions.

B. The NCC to Canadian Heritage

[19] In March 2013, the federal government announced its intention, as part of the federal budget, to transfer certain functions from the NCC, a separate agency like the CRA, to Canadian Heritage, which took effect on September 30, 2013. As with the CRA employees' situation, the transfer took place as a result of an Order in Council pursuant to the *PSRTDA*, and the affected employees became part of Canadian Heritage and, as such, employees of the CPA. NCC employees were advised of the announced transfer by email, which the NCC's CEO sent on March 21, 2013.

[20] As with the CRA, the NCC has its own classification standard, referred to as the "RE" standard, which has seven different levels. Work descriptions for employees who were to be transferred were rewritten in preparation for the transfer.

[21] On May 1, 2013, Manon Rochon, the NCC's vice-president of human resources, emailed all NCC directors, outlining the necessary steps to complete the "transfer of personnel". She stated that first, Canadian Heritage had to create the positions that the NCC employees would be transferred to and that to help, the NCC would share its job summaries with Canadian Heritage. The affected employees' job descriptions were then rewritten in preparation for the transfer.

[22] Throughout that period, the PSAC sought to consult with both the NCC and Canadian Heritage about the transfer. On June 14, 2013, it filed a policy grievance with the NCC about it, in which it alleged that the NCC had violated an August 17, 2012, letter of interest that addressed the issue of "Employee Transition Policy" and that was deemed part of the collective agreement.

[23] The NCC's response, dated July 31, 2013, stated that the transition policy in no way applied to the circumstances, which resulted from a legislative initiative with clear provisions. The response ended by stating that the NCC was committed to open communication with the PSAC.

[24] Also during that period, the NCC posted on its intranet multiple updates about the transfer's impact. Attached to the agreed statement of facts were updates dated April 11, 18, and 25; May 9; June 13 and 20; July 25; and September 5, 2013. The one from April 18 stated that human resources representatives from both the NCC and

Canadian Heritage would "… proceed in determining the approach to be taken to review the classification of all positions that are being transferred." The June 20 update advised employees that discussions were underway "… to obtain information on the necessary process for the confirmation of the conditions of employment of the employees being transferred."

[25] In early July 2013, the bargaining unit members advised the PSAC that they were being called to meetings with their supervisors and were being provided with a document with information about the transfer. The document advised the employees that one or more positions like theirs would be transferred to SSC, that the employer wished to proceed on a voluntary basis, and that it was looking for volunteers. The document then advised that "[i]nformation concerning your salary and conditions of employment should be the subject of a submission to the Treasury Board", but no indication was provided as to the submission's contents.

[26] On September 17, 2013, Ms. Benson sent a letter addressed to the then Assistant Deputy Minister for Compensation and Labour Relations, Treasury Board, Marc-Arthur Hyppolite, inviting him to discuss the upcoming transfer and the application of salary protection to transferred employees.

[27] In her letter, she began by stating that it had come to the PSAC's attention that the Treasury Board had made an initial determination with respect to job descriptions and to classifying employees to be transferred and that according to the PSAC's information, "TB is not providing salary protection to these employees". The PSAC then stated that while it had no specific numbers as to those affected, it understood that the majority of the transferred employees would be negatively affected. The PSAC reminded the employer that it had been proactive on this issue from the beginning but that the employer had chosen to proceed unilaterally, and adding that "… it is outrageous that hard-working employees are asked to take salary reduction as a result of government action and due to no fault of their own." The letter ended with the PSAC requesting that a meeting be set up to discuss the salary protection issue.

[28] On September 26, 2013, all affected employees were advised that they would have brief meetings on September 27, 2013, to discuss their salaries and conditions of employment at Canadian Heritage. The following day, and before the meetings, the affected employees were assembled and were informed that their salaries were being

protected.

[29] During the individual meetings, the employees were informed that their salaries would be frozen for four years, with a cap of $12 000 per fiscal year, meaning that a maximum of only $12 000 of salary difference would be protected, and that if the difference in salary were any greater, then that portion would not be protected. They were also advised as to what their new classification groups and levels would be after the transfer. The affected employees were provided with letters detailing the classifications of their positions and the salary impact; a sample was annexed to the agreed statement of facts.

[30] On September 30, 2013, employees were transferred from the NCC to Canadian Heritage. Of the approximately 72 PSAC members transferred, 44 had higher salaries at the NCC as of the transfer date than indicated by their new CPA classifications and levels. Of the remaining employees, some were rated in levels that had higher maximum rates of pay at the NCC.

[31] Appendix R to the agreed statement of facts is an employer document entitled "Information on the classification of your position and on your salary", which was provided to affected employees. It noted that their NCC work descriptions had been reviewed and that their new occupational groups had been determined, and it then set out the transitional or temporary measures to "phase-in" the salary reduction that resulted from the employer's review. For each employee, the document indicated that his or her new position had been classified at the PM-06 group and level, with a salary of $101 892. Their former NCC positions had a salary of $116 697, which was a difference of $14 805.

III. The parties' discussions between September 2013 and May 12, 2014

[32] On September 25, 2013, the PSAC raised concerns about the transfers at a National Workforce Management Consultation Committee meeting. The meeting minutes indicate that in response, Mr. Hyppolite advised that the issue "… is more of a collective bargaining issue".

[33] On October 18, 2013, Mr. Hyppolite responded to the PSAC's September 17, 2013, letter by inviting it to work with the employer to implement the Treasury Board's decision about the salary protection issue for employees transferring from the NCC to

Canadian Heritage.

[34] In late October, the PSAC and the Treasury Board met to discuss the salary protection issue, and the discussion continued until the PSAC filed its policy grievance.

[35] On November 20, 2013, SSC sent the bargaining agents a communication stating that its discussions with the Treasury Board had resulted in a "change in direction" and that employees transferring to SSC from separate agencies would retain their former terms and conditions of employment, including salaries, until a new collective agreement was signed for their new CPA occupational groups.

[36] On November 28, 2013, the employer sent a message to employees advising them of the "change in direction" and assuring them that "until further notice", they would "… retain the terms and conditions of employment" of their positions upon their transfer to SSC, including their salaries. The message concluded by advising them that the decisions made with respect to their CPA classification groups and levels would remain valid.

[37] The PSAC filed this policy grievance on December 12, 2013. It was heard at the final level of the grievance process on February 20, 2014, and a decision rejecting it was rendered on April 14, 2014. It was referred to adjudication on May 12, 2014.

[38] In early 2014, the Treasury Board served notice to bargain for the relevant collective agreements, which resulted in a statutory freeze of the terms and conditions of employment of the affected employees transferred from the CRA and the NCC, including of their rates of pay.

[39] On February 13, 2014, Manon Brassard, the assistant deputy minister of compensation and labour relations at the Treasury Board, wrote to the PSAC about the NCC employees' salary protection issue.

[40] She stated that in October 2013, Treasury Board officials met with PSAC representatives to discuss an approach to salary protection and that on November 8, 2013, the Treasury Board presented an offer to the PSAC. The employer proposed that (1), until March 31, 2014, the employees would maintain their NCC rates of pay, and that (2), for the period from April 1, 2014 to March 31, 2018, their former substantive rates of pay would be maintained "… to a maximum of $12,000 of the core public administration rate of pay", and finally that (3), as of April 1, 2018, the rates of

pay would be "… fully integrated into the relevant collective agreement."

[41] The letter then indicated that an agreement had not been reached with the PSAC since its representatives were of the view that the transferred employees were entitled to the salary protection provisions contained in the collective agreement. The employer's view was that the positions in question were new. The letter ended by stating that in the absence of an agreement, the employer had no authority to pay the employees above the rates of pay of their new groups and levels and that it would therefore have to recover four months of overpayments as their appointment dates had been September 30, 2013.

[42] Ms. Benson responded by a letter on February 19, 2014, in which she objected to the fact that Ms. Brassard's letter threatened salary clawbacks as a result of the PSAC's failure to agree to its plan to phase in the new pay rates. She advised Ms. Brassard that the employer did have the PSAC's agreement to pay employees above the rates of pay of their new levels and that in dispute was whether full salary protection applied. From the PSAC's perspective, the terms of the employer's proposal "… were never the subject of true consultation or negotiation" but had been developed by the employer and "… announced to affected employees before there had been any discussion or negotiation with the PSAC". The letter characterized the employer's actions as a "blatant form of intimidation" and "bargaining in bad faith". The letter ended with the PSAC advising the employer that it saw no basis for the employer to implement the clawback and that it would contest any such action.

[43] On May 7, 2014, Ms. Brassard wrote a letter to Ms. Benson in which she provided the PSAC with an additional update on the salary protection issue linked to the transfers. The letter stated that since no agreement had been reached, no salary adjustments would be implemented as the freeze provisions in the legislation were in effect given that the notice to bargain that had been served for the PA, SV, and TC groups.

[44] PSAC members transferring to SSC from the CRA and the NCC were informed that they would be subject to the CPA classifications in the PA, SV, or TC occupational groups.

[45] The PA, SV, and TC collective agreements all contain a memorandum of understanding dated February 9, 1982, and entitled "Memorandum of Understanding

Between the Treasury Board of Canada and the Public Service Alliance of Canada with Respect to Occupational Group Structure Review and Classification Reform" ("the 1982 Memorandum"), which the agreed statement of facts states addresses the salary protection issue. Under the section entitled "General", the second paragraph states that the 1982 Memorandum "… supersedes the *Regulations respecting Pay on Reclassification or Conversion* where the Regulations are inconsistent with the Memorandum of Understanding." Part I states that it applies to "… incumbents of positions which will be reclassified to a group and/or level having a lower attainable maximum rate of pay …" and provides that individuals who are transferred into such positions will benefit from salary protection status.

[46] In addition, clause 64.05 of CRA collective agreement addresses the issue of salary protection by incorporating the 1982 Memorandum into the collective agreement. Similarly, clause 44.07 of the Collective Agreement between the National Capital Commission and the Public Service Alliance of Canada, expiry date December 31, 2014 ("NCC collective agreement") addresses the issue of salary protection status on downward reclassification through the inclusion of a memorandum of understanding entitled "Conversion to New Levels or to New Classification Plans and/or Pay Structures".

[47] Salary protection is also addressed in a Treasury Board document entitled "Directive on Terms and Conditions of Employment" ("the Directive") with an effective date of April 1, 2009. The Treasury Board has also issued classification policies and guidelines, which the parties adduced in evidence as attachments to the agreed statement of facts.

[48] As corrective action, the PSAC sought a declaration that the employer breached the salary protection provisions of the PA, SV, and TC collective agreements and a "… declaration that the employer will fully abide by the salary protection language …" in those three collective agreements with respect to the affected employees.

IV. Summary of the arguments

A. For the PSAC

[49] As stated in the policy grievance, the PSAC's position is that the employer reclassified the transferred employees and that the salary protection provisions contained in the 1982 Memorandum, which was incorporated into each collective

agreement at issue, should have been applied to each of them.

[50] The PSAC did not contest the employer's authority to do what it did. Indeed, it began its submissions by referring to s. 2(a) of the *PSRTDA*, which provides that the Governor in Council may "… transfer any powers, duties or functions … from one minister to another, or from one department in, or portion of, the federal public administration to another …".

[51] However, the PSAC also pointed out that s. 132 of the *PSEA* confirms that an employee's employment status is unaffected by a transfer pursuant to the *PSRTDA* provided that employee occupied a position in the CPA before the transfer, as follows:

> *Block Transfers*
>
> *Transfer of employees*
>
> ***132 (1)*** *Nothing in an order made under the* Public Service Rearrangement and Transfer of Duties Act *shall be construed as affecting the status of an employee who, immediately before the coming into force of the order, occupied a position in a portion of the core public administration the control or supervision of which has been transferred from one department or other portion of the core public administration to another, or in a department that has been amalgamated and combined, except that the employee shall, on the coming into force of the order, occupy that position in the department or other portion of the core public administration to which the control or supervision has been transferred or in the department as amalgamated and combined.*
>
> [Emphasis in the original]

[52] The PSAC acknowledged that that section applies only to positions in the CPA, but it turned to the Board's jurisprudence to argue that in *Public Service Alliance of Canada v. Canadian Food Inspection Agency*, 2004 PSSRB 155 at paras. 14 and 15, a predecessor Board concluded that the Governor in Council has the power under the *PSEA* to pass regulations applying s. 132 to other portions of the public service, including separate agencies. The Federal Court of Appeal upheld that decision in *Public Service Alliance of Canada v. Canada (Food Inspection Agency)*, 2005 FCA 366 ("*PSAC 2*"). The parties included as Appendix F to the agreed statement of facts a copy of the regulations that apply to the transfer, which state that s. 132(1) of the *PSEA* applies to the CRA employees.

[53] The PSAC pointed to paragraph 27 of the Federal Court of Appeal's decision and argued that when s. 132 of the *PSEA* applies to a *PSRTDA* transfer, it is well-established that the employment status of the affected employees does not change as a result of the transfer. They are simply deemed to occupy the same positions within a different department as of the effective date of the transfer.

[54] The PSAC then turned to the former Board's decision in *PSAC 1* referred to earlier in this decision, in which an adjudicator of the former Board denied the PSAC's policy grievance alleging that transferring employees from the CRA to SSC breached the workforce adjustment provisions of the collective agreement. It argued that by denying the grievance, the adjudicator accepted the CRA's position outlined at paragraph 6 of the decision that the transfer did not constitute a workforce adjustment as the employment status of the affected employees had not changed. The PSAC also pointed to paragraphs 6, 12, 18, and 19 of the same decision to support its position that the adjudicator concluded that the employees' employment status had remained constant throughout the transfer, without any breaks, and that their original positions had simply moved from the CRA to SSC without any change to position, duties, or status.

[55] The PSAC then turned its attention to the collective agreements at issue, stating that each provides for salary protection for employees subject to a downward reclassification to an occupational group and level with a lower attainable maximum rate of pay.

[56] As outlined by the parties in their agreed statement of facts, the PA, SV, and TC collective agreements all incorporate the 1982 Memorandum. It provides the following with respect to downward reclassifications:

…

> *(1) Prior to a position being reclassified to a group and/or level having a lower attainable maximum rate of pay, the incumbent shall be notified in writing.*
>
> *(2) Downward reclassification notwithstanding, an encumbered position shall be deemed to have retained for all purposes the former group and level. In respect to the pay of the incumbent, this may be cited as Salary Protection Status and subject to Section 3(b) below shall apply until the position is vacated or the attainable maximum of the*

> *reclassified level, as revised from time to time, becomes greater than that applicable, as revised from time to time, to the former classification level. Determination of the attainable maxima rates of pay shall be in accordance with the Retroactive Remuneration Regulations.*
>
> …

[57] The PSAC pointed out that the NCC collective agreement also provides for salary protection, at clause 44.07(b), as follows:

> *44.07 (b) Where an employee's duties and responsibilities are reclassified to a level with a lower maximum rate of pay than the level at which he or she is being paid, the following shall apply:*
>
> *i. Downward reclassification notwithstanding, an encumbered position shall be deemed to have retained for all purposes the former level. This may be cited as salary protection status and, subject to section (ii)(B) of this guideline and for a one year period following notification shall apply until the position is vacated or the maximum of the reclassified level, as revised from time to time, becomes greater than that applicable, as revised from time to time, to the former classification level. Following the one year period after notification, the incumbent's salary will be subject to a holding rate as described in section (iv) of this guideline.*
>
> …
>
> *(iv) An employee whose position was downgraded and after the one year period of salary protection, he or she will be paid a holding rate of pay for the reclassified position that is nearest to but not less than the employee's current rate of pay or, if no such rate exists, the employee's current rate of pay as a holding rate until such time as the maximum rate of pay for the reclassified position is equal to or greater than the holding rate at which time the employee's rate of pay shall become a rate of pay in the salary range for the reclassified position and be subject to the new scale of rates plan.*

[58] The PSAC then turned its attention to a memorandum of understanding appended to the NCC collective agreement entitled "Conversion to New Levels or to New Classification Plans and/or Pay Structures", referred to earlier in this decision. It argued that under it, an employee is also entitled to salary protection when he or she is subject to a conversion to a new level, new classification plan, or pay structure.

[59] Finally, the PSAC argued that in situations in which no collective agreement provision applies, the Directive also provides for salary protection on the following basis:

…

> *4.1 Persons appointed to the core public administration whose positions are*
>
> *a. reclassified to a level having a lower attainable maximum rate of pay;*
>
> *b. reclassified to a level having a higher maximum rate of pay; or*
>
> *c. converted to a new occupational group, level or both or to new classification plans, pay structures or both*
>
> *are subject to the applicable memorandum of understanding or, if there are no such memoranda, to the provisions set out in this Appendix.*
>
> *4.2 Reclassification to a level having a lower attainable maximum rate of pay*
>
> *4.2.1 Before a position is reclassified to a level having a lower attainable maximum rate of pay, the incumbent is to be so notified in writing by the person with the delegated authority and advised therein of the effective date of this change.*
>
> *4.2.2 Downward reclassification notwithstanding, an encumbered position is deemed to have retained for all purposes the former classification level. With respect to the rate of pay of the incumbent, this may be cited as salary protection status and, subject to Subsection 4.2.4 below, is to apply until the position is vacated or until the attainable maximum of the reclassified level, as revised periodically, becomes greater than that applicable, as revised periodically, to the former classification level.*

…

[60] The PSAC argued that in all instances, those provisions require advance written notice of a downward reclassification, which is consistent with the position established in the jurisprudence to the effect that a downward reclassification may not be implemented retroactively: see *Gallop v. Treasury Board (Fisheries and Oceans)*, PSSRB File Nos. 166-02-21420 to 21422 (19911030), [1991] C.P.S.S.R.B. No. 266 (QL). In that decision, the Public Service Staff Relations Board's vice-chair noted in his reasons that

"The employer has also conceded that a downward reclassification could not be retroactive."

[61] Next, the PSAC turned its attention to the Directive and to the following definitions in it:

…

> ***Classification Conversion*** *…*
>
> *Is a change made in the method of establishing the relative value of work for an occupational group with a resultant new pay structure.*
>
> …
>
> ***Reclassification*** *…*
>
> *Is the change in the occupational group, level or both of a position resulting from a review or audit of the work performed in that position.*
>
> …
>
> ***Salary Protection*** *…*
>
> *Is the rate of pay applicable to the former classification prescribed by the person's substantive level before reclassification or classification conversion or as a result of workforce adjustment.*
>
> …

[62] The PSAC argued that that definition of "reclassification" is consistent with the definition given to the word "reclassified" previously found in the *Public Service Employment Regulations* (SOR/2005-334; "the *Regulations*") and the applicable case law. In support of its contention, it cited the Federal Court's decision in *Johnson v. Canada (Customs and Revenue Agency)*, 2004 FC 646 at para. 16, in which the Court stated as follows when it referred to the definition of "reclassified" in the *Regulations*:

> *… As is obvious from this definition, only a reclassification that involves an entire occupational group and no change in duties could it [sic] be considered a conversion. Although CCRA employees no longer fall under the jurisdiction of the PSEA, there is no reason why this definition is not generally applicable to all reclassifications within the public service, including those undertaken by the CCRA.*

[63] Next, the PSAC turned its attention to the decisions of the Supreme Court of Canada, arguing that that Court has repeatedly explained that the employer's intention or the label it gives to an action is not determinative of the true nature of that action. An inquiry must go beyond the stated intention to look at what, in fact, occurred. The PSAC argued that the Court makes that very clear in its decision in *Doré v. Canada*, [1987] 2 S.C.R. 503. In that case, the question before the Court was whether a new position had been created, such that the merit principle applied to any subsequent appointment, despite the employer's position that what had occurred was an assignment and not an appointment. At paragraph 7 of its decision, the Court stated the following:

> *… the application of the merit principle and the right of appeal under s. 21 of the* Public Service Employment Act *cannot depend on whether the Department chooses to regard what is done as the creation of a position and an appointment to it within the meaning of the Act. It is what the Department has objectively done as a matter of fact and not what it may have intended or understood it was doing as a matter of law that must determine the application of the merit principle and the right of appeal.*

[64] The PSAC argued that the Federal Court has also applied a *Doré* approach to look behind the apparent creation of a new position in *Chander v. Canada*, [1983] F.C.J. No. 319 (T.D.)(QL), to determine whether the employer's actions were, in fact, more accurately characterized as a reclassification, thus activating salary protection. In reaching the conclusion that a new position had objectively been created, the Federal Court relied as follows on the Treasury Board's expert evidence about the definition of "reclassification":

…

> *… the expert witness submitted that there were three possible options which could be considered under classification practice: conversion, classification and reclassification. He defined the three terms as follows:*
>
> *i. Conversion - A term applied to the evaluation of a body of positions which follows the introduction of a new or significantly revised classification standard.*
>
> *ii. Classification - A term which covers the evaluation of a new or significantly revised position. Such actions normally follow the introduction of a new*

> *organization, position(s), or the introduction of duties requiring significantly different abilities and training as compared to those in an existing organization. By definition, a new position is created when the duties of an existing position changes [sic] to the extent that the group allocation i.e. RES to VS, changes or the position increases in level. This definition is subject to the conditions covered under Reclassification.*
>
> *iii. Reclassification - In respect to encumbered positions, this term applies to situations where a position is found to increase or decrease in level and/or change group as a result of a classification grievance lodged by an incumbent or a departmental review or audit of the encumbered position. In such cases the incumbent is performing duties assigned to the position and sanctioned by management. They do not include duties of other positions which may be performed by an individual on an acting or interim basis.*
>
> …

[65] The Federal Court also relied on the same expert's testimony with respect to the hallmarks that distinguish creating a new position from a reclassification. The expert identified the following factors, which the PSAC argued indicated the creation of a new position: 1. New duties are created. 2. Both the new and old positions could exist at the same time without overlap in function or responsibility. 3. Training is required to assume the new position. 4. There is no evolution from the old position to the new position. 5. The new position is subject to a probationary period.

[66] The PSAC then turned to Federal Court's decision in *Johnson*, stating that that Court had applied an approach similar to what the Supreme Court applied in *Doré* to an alleged conversion of certain managerial positions within the former Canada Customs and Revenue Agency. In that instance, the employer had created a new occupational classification for managerial employees, the MG group, and had transferred some positions from the AU group to it. The Federal Court, at paragraphs 14 to 18, looked behind the alleged conversion and determined that the classification change was in fact a reclassification, not a conversion, noting particularly that duties did not change and that the change did not affect the entire occupational group.

[67] The PSAC stated that the purpose of salary protection, or "red-circling", has been clearly defined several times. Such provisions are intended to protect the pay of employees who may be adversely affected by being reappointed to positions that have

been reduced in status by a reclassification process. Put another way, these provisions "… provide a measure of protection to the employee who has been 'displaced' by the action of the Employer …"; see *Overlander Extended Care Hospital v. British Columbia Nurses' Union* (2002), 105 L.A.C. (4th) 310 at para. 61, and *Canada (Attorney General) v. Jones*, [1978] 2 F.C. 39 (C.A.) at para. 44.

[68] Citing other jurisprudence, the PSAC argued that the new Board, and its predecessors and the Federal Court have consistently found that the criteria that trigger salary protection must be given a similar broad and purposive interpretation. As noted earlier in this decision, decision makers have routinely inquired into the true nature of an employer's action and have rejected the position that they should simply accept the name that the employer has attached to an action when decided whether salary protection applies. In particular, the PSAC cited the following: *Jones*, at paras. 44 and 49; *Fok v. Treasury Board (Fisheries and Oceans)*, PSSRB File Nos. 166-02-25912 and 25913 (19950830), [1995] C.P.S.S.R.B. No. 84 (QL); and *Poole v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-19019 (19900109), [1990] C.P.S.S.R.B. No. 2 (QL).

[69] The PSAC then turned its attention to the decision in *Fok* and argued that in that case, the adjudicator applied a purposive approach to interpreting both "position" and "vacated" within the salary protection memorandum of understanding. In that case, the grievor's position had been reclassified downward at the end of one of her term contracts. The employer argued that she was not the position's incumbent for salary protection purposes as her contract had ended before the reclassification and she had then been freshly appointed to the newly classified position. The adjudicator rejected the employer's argument and held that the grievor was the incumbent in her position and, accordingly, was entitled to salary protection, as follows:

…

> *Dion, in his Dictionnaire canadien des relations de travail, second edition, Les presses de l'Université Laval, 1986, defines position as:*
>
> > … the duties, obligations and responsibilities, as a whole, usually assigned to one person and carried out by that person in the execution of a work within the organization. A position exists even when it is not filled. It is then called a

vacant position.

(Translation)

> *I therefore conclude that the word "position" in Exhibit G-5 refers to the duties performed by an employee rather than a number or title. Secondly, the word "vacated" in the Memorandum of Understanding obviously refers to a situation where an employee ceases to perform the duties which constitute the position. The fact that Ms. Stromotich worked in the fish inspector position as a result of a series of "term" appointments does not negate the fact that she has been continuously employed in the position since 1989. In other words, when an employee works in a position on a term basis, the position is not vacated at the end of one term when the next term follows on its heels without interruption.*
>
> …
>
> [Emphasis in the original]

[70] Finally, the PSAC turned to *Poole* and pointed out that in that case, as in *Fok,* the adjudicator applied a purposive approach when determining that employees holding acting assignments constitute the incumbents in acting positions, for salary protection purposes.

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

[71] The employer took the position that transferring employees from separate agencies did not constitute and did not lead to a reclassification of their former positions, and therefore, salary protection provisions in the context of reclassifications do not apply. It argued that while the parties must or can negotiate salary protection and/or "salary holding" clauses specific to transfers, absent such negotiated clauses, no salary protection exists in the context of a transfer.

[72] SSC's creation impacted 44 organizations, including separate employers. The Treasury Board made a decision, in good faith, to temporarily retain the terms and conditions that the employees had had with their separate employers. Its intention was to maintain those terms and conditions in the interim until new collective agreements were in place for the transferred employees, to ensure that they were not adversely affected and to allow a smoother transition. However, the employer argued, it was not an acknowledgement or acquiescence on its part that the employees transferred into the CPA would retain their former terms and conditions of employment; their new

positions were yet to be created and classified. Particularly, the employer argued, it was not an "… acknowledgement, acquiescence, acceptance or recognition, explicit or implicit, of the classification of the positions formerly held by employees with the separate employers."

[73] The CRA, the NCC, and the Treasury Board all have different and separate statutory authority to classify positions. The employer referred to s. 51 of the *Canada Revenue Agency Act* (S.C. 1999, c. 17), s. 8(3) of the *National Capital Act* (R.S.C. 1985, c. N-4), and s. 11.1 of the *FAA* as the sources of that authority for the three employers. For the employer, therefore, how one separate employer exercises its authority is not binding on other employers.

[74] The employer rejected the notion that it had accepted the classifications and terms and conditions of employment given to the positions by other employers only to later reclassify the positions. Instead, the Treasury Board required some time to create the positions within the CPA and showed good faith by ensuring a smooth transition pending the negotiations.

[75] The employer maintained that it has always been and is still willing to negotiate "salary protection" for the employees transferred from separate employers. It simply stated that what happened was not a reclassification of positions that would trigger the salary protection provisions that the PSAC relied on. In other words, the employer submitted that it did not reclassify, replace, or otherwise alter the positions — the positions did not exist in the CPA and were newly created and classified. The exercise that was conducted was to classify positions that were new to the CPA. The employer submitted that in the circumstances, positions were eliminated at the CRA (and other separate employers), and positions were created at the CPA. There was no reclassification.

[76] The employer submitted that a reclassification occurs when a given employer reclassifies positions within its classification system and not when positions are moved from one employer to another.

[77] The employer then turned its attention to the jurisprudence and stated that whether a position is new or reclassified has been the subject of many decisions. The most recent was the Supreme Court of Canada's decision in *Canada (Attorney General) v. Kane*, 2012 SCC 64. While that Court did not provide a definition of

"reclassification", it ruled as follows: "At the very least, any reasonable reading of the record shows that whether this position was new or reclassified could be the subject of reasonable disagreement by reasonable people." Therefore, the employer submitted that whether a position is "new" or "reclassified" is a determination of fact that must be consistent with the existing rules, policies, directives, and precedents. It submitted that in this case, a reclassification did not occur.

[78] The employer then turned its attention to the following definition of "reclassification" in the Directive: **"Reclassification** … Is the change in the occupational group, level or both of a position resulting from a review or audit of the work performed in that position [emphasis in the original]."

[79] It submitted that carrying out a classification exercise after a transfer from separate employers did not fit that definition. In a case such as this, the arrival of the transferred employees and the creation of their positions triggered the classification exercise. The employer argued that what occurred was not the result of a review or audit of the work performed in positions that did not exist within the CPA before.

[80] When employees join the CPA via a transfer, they do not join with their classifications and then get reclassified. They are transferred. The process is not a reclassification; it is a transfer.

[81] The employer then turned its attention to the Federal Court's decision in *Hagel v. Attorney General of Canada*, 2009 FC 329 (upheld in 2009 FCA 364). It reads as follows at paragraphs 42 and 43:

> *[42] Moreover, I am of the view that the conclusion is defensible in terms of the facts and the law. As the parties observed, Treasury Board's* Terms and Conditions of Employment Policy *contains a provision providing that "… an employee is entitled to be paid, for services rendered, the appropriate rate of pay in the relevant collective agreement." The policy further defines 'relevant collective agreement' as the collective agreement for the bargaining unit to which the employee is assigned or would be assigned were the employee not excluded. The respondent submits that where the bargaining unit to which the grievors would have been assigned (the MG Group) has never bargained with or contracted with the employer (the Treasury Board), there was no 'relevant collective agreement'. <u>According to the respondent, "[i]t could not have been the intent of this policy that terms and conditions set in the collective agreement of a</u>

> *separate employer (with a different classification scheme and different rates of pay) would determine the rates of pay of Treasury Board employees." This reading of the policy is certainly reasonable and, in my view, correct.*
>
> *[43] Similarly, the respondent submits that Treasury Board's* Regulations respecting pay on reclassification or conversion *must be read in light of the definitions of 'reclassification' and 'conversion' in Treasury Board's* Glossary of Terms and Definitions*. In the glossary, 'conversion' refers to the introduction, for an established group, of a new group and/or level or a new classification plan and/or structure. 'Reclassification' means the change in group and/or level of a position or positions resulting from a review or audit. The respondent submits, and I agree, that these definitions do not embrace the grievors' situation. Again, this is a reasonable interpretation of the policy.*
>
> [Emphasis added]

[82] The employer submitted that in this case, the transfer from separate employers simply did not fit the definition of "reclassification".

[83] The employer also claimed that in cases in which a party claims a monetary benefit, the collective agreement language must be clear and unambiguous when conferring that benefit. A clear expression of intention is required; see Brown and Beatty, *Canadian Labour Arbitration*, at para. 4:2120; *Wire Rope Industries Ltd. v. United Steelworkers, Local 3910*, [1982] B.C.C.A.A.A. No. 317 (QL); *Golden Giant Mine v. United Steelworkers of America, Local 9364*, [2004] O.L.A.A. No. 600 (QL) at para. 19; and *Nigel Services for Adults with Disabilities Society v. Construction and Specialized Workers' Union, Local 1611* (2013), 230 L.A.C. (4th) 400. The employer submitted that the collective agreement language in this case does not support the PSAC's contention as no clear language covers transfers.

[84] According to the employer, when individuals employed by a separate agency or by another organization that is not part of the CPA are hired by a department for which the Treasury Board is the employer, their employment is normally terminated with the separate agency or other organization, and they are appointed to the new employer. As such, they become subject to the new employer's rates of pay, classification standards, and terms and conditions of employment as provided for in the relevant collective agreements.

[85] The employer argued that employees are integrated into the relevant CPA occupational groups on their transfer from separate agencies and that their positions are classified in accordance with the relevant classification standard applicable at that time. The employer maintained that in this case, no classification happened until it was determined under the Treasury Board's CPA rules. No classification and subsequent reclassification occurred. Instead, it was a transition period that was to the benefit of the former employees of the separate employers. That period was to end when new collective agreements were signed with their respective CPA bargaining units.

V. Reasons

[86] The case before me stems from the employer's decision to regroup, within SSC and Canadian Heritage, employees from separate agencies. When it transferred the employees, the employer had to deal with the fact that they were governed by a classification plan that was different from the one that applied to CPA employees. The employer sought to integrate these employees into SSC and Canadian Heritage by placing them within the classification plan that applies to CPA employees. Thus, the transferred employees became subject to the CPA's plan and were placed in the PA, SV, or TC occupational group.

[87] As a result of the employer's actions, many employees saw their salaries lowered as they found themselves classified at a group and level that provided them with a salary inferior to what they were entitled to under their former classification plans with the CRA or the NCC. Furthermore, the employer refused to apply the salary protection provisions contained in either their former collective agreements with their separate agencies or the collective agreements applicable to CPA employees in the PA, SV, or TC occupational groups. As the employer stated in its submissions, it took the position that "… the manner in which a separate employer exercises its authority is not binding on the other employers."

[88] My role is to decide whether those salary protection provisions should have applied to the CRA and NCC employees who were ordered to be transferred to SSC and Canadian Heritage. The PSAC argued that a transfer occurred that resulted in a reclassification; therefore, salary protection should have applied. The employer maintained that no reclassification occurred and therefore that salary protection

should not have applied. I have decided that the employees were entitled to salary protection for the reasons outlined later in this decision.

[89] As a panel of the new Board, I draw my jurisdiction from, among other authorities, the *PSLRA*. Although the parties did not argue it, I am nonetheless bound to observe the provisions of that statute, including the preamble, which promotes collaborative efforts, communication, and sustained dialogue as well as the fair, credible, and efficient resolution of matters that arise with respect to the terms and conditions of employment. In addition, it recognizes that the bargaining agents "represent the interests of employees". I have kept those overarching concepts in mind during my consideration of this policy grievance.

[90] The PSAC argued that s. 132 of the *PSEA* is the primary statutory provision that I must consider in this case. I accept its argument with respect to the former CRA employees, which was that the transfer's regulatory framework was such that they were transferred with no change to employment status. As outlined in the agreed statement of facts and in *PSAC-1*, approximately 80 PSAC members were transferred to SSC pursuant to an Order in Council and to regulations made under the *PSEA*, both of which were placed in evidence before me. The text of the *Transfer of Portions of the Canada Revenue Agency Regulations* clearly states that s. 132(1) of the *PSEA* "applies to all persons employed" in the CRA functions that were transferred to SSC.

[91] As the PSAC pointed out, the Federal Court of Appeal's decision in *PSAC 2*, established that employees' employment statuses do not change as a result of a transfer. I note that the employer provided me with no argument to counter the union's assertion on that point.

[92] My decision on that issue is supported by the former Board's decision in *PSAC 1*. That case arose out of precisely the factual circumstances at issue in this case: creating the SCC and transferring CRA employees to it.

[93] After the announcement was made that CRA employees would transfer to SSC, the PSAC filed a policy grievance alleging that the CRA had breached the collective agreement's workforce adjustment appendix by, among other things, refusing to declare that a workforce adjustment situation existed. The CRA argued that s. 132 of the *PSEA* applied as the Governor in Council had exercised its authority under s. 123(1) to make regulations authorizing applying s. 132 to the CRA.

[94] The PSAC argued that s. 132 "… is explicit in stating that an Order made under the *PSRTDA* shall not be construed as affecting the status of an employee". It went on to find that the impacted employees "… continued to occupy the same positions on November 15, 2011 that they had occupied on November 14, 2011, but in another organization."

[95] I will turn now to the 1982 Memorandum and its interpretation. The PSAC and the Treasury Board negotiated it, and it is included in the PA, SV, and TC collective agreements that apply to this grievance. The PSAC argued that that memo ought to have been applied to the employees who are the subject of this policy grievance.

[96] In addition to the 1982 Memorandum, the evidence revealed that both the CRA and the NCC addressed salary protection in their collective agreements with the PSAC in a similar or identical manner. For the CRA, clause 64.05 of the CRA collective agreement incorporates the memo. For the NCC, clause 44.07 of the NCC collective agreement also includes a memorandum of understanding, this one entitled "Conversion to New Levels or to New Classification Plans and/or Pay Structures".

[97] As the former CRA and NCC employees were transferred into the CPA and were employees of either SSC or Canadian Heritage when this grievance was filed, I find that I must consider the terms of the 1982 Memorandum instead of the salary protection articles in the NCC and CRA collective agreements.

[98] While the CRA and NCC salary protection provisions provide employees of those separate employers with salary protection in the event of a reclassification or conversion exercise, I find that the 1982 Memorandum is relevant to this grievance.

[99] The employees in question were transferred from the NCC and the CRA to the CPA and became subject to the PA, SV, and TC collective agreements. The Treasury Board, not the NCC or the CRA, refused to apply the salary protection provisions to the employees in question. Nevertheless, while the NCC and CRA salary protection provisions may not apply to the employees in this case, they indicate a willingness throughout the apparatus of government, whether in the CPA or with separate employers, to protect the salaries of employees who are, through no fault of their own, reclassified or subject to a conversion exercise.

[100] It appears that that approach has long been adopted in the federal sphere as the

Hagel decision, submitted by the employer, refers to the "Conversion and Post-Conversion Pay Regulations", promulgated in 1967, which provided salary protection for incumbents whose positions were classified downward.

[101] Turning to the 1982 Memorandum and the heading "Part I", it indicates that the memo applies "… to the incumbents of positions which will be reclassified to a group and/or level having a lower attainable maximum rate of pay [emphasis added] …". Section 2 of Part I indicates as follows: "Downward reclassification notwithstanding, an encumbered position shall be deemed to have retained for all purposes the former group and level [emphasis added]", and that with respect to the pay of the incumbent, "… this may be cited as Salary Protection Status …". Section 2 then states that that status "… shall apply until the position is vacated or the attainable maximum of the reclassified level, as revised from time to time, becomes greater than that applicable, as revised from time to time, to the former classification level." [Emphasis added]

[102] The intent of the 1982 Memorandum is clear: employees of the CPA should be protected in the event that through no fault of their own, their positions are reclassified to a group and level having a lower maximum rate of pay, which the parties did not dispute. I agree with the PSAC's position that the Federal Court (Appeal Division) confirmed that principle at paragraph 44 of *Jones.* The parties disagree as to whether the 1982 Memorandum's terms apply to this case. The employer argued that its terms do not apply as no reclassification occurred. It argued that a transfer occurred and that in transfers, salary protection or salary holding clauses specific to such cases must be negotiated.

[103] While it is true that the 1982 Memorandum does not directly refer to employees of separate employers being rolled into or transferred into the CPA, I note that it also does not indicate that its terms cannot be applied to such cases. The 1982 Memorandum does not indicate that its terms apply only to incumbents of positions that are and have always been within the CPA.

[104] Further, I find nothing to suggest that reclassifications and transfers are mutually exclusive such that a reclassification within the terms of the 1982 Memorandum cannot arise out of a transfer from a separate agency. The 1982 Memorandum simply states that Part I (being the part of the document that this case is concerned with) "… shall apply to the incumbents of positions which will be

reclassified to a group and/or level having a lower attainable maximum rate of pay …". While the *PSLRA* prohibits me from amending the terms of the collective agreement, my role as a panel of the Board requires me to interpret this memorandum, and I find that its wording is ambiguous and unclear.

[105] The parties also included as an appendix to the agreed statement of facts under the heading "Relevant Collective Agreement and Policy Provisions" a copy of the Directive, which at section 4 provides for salary protection for CPA employees whose positions are either reclassified or converted to a position having a lower attainable maximum rate of pay.

[106] On reading the 1982 Memorandum and the Directive, the intent to protect employees from the effects of having their salaries lowered through the employer's actions becomes clear. Unfortunately, and as stated earlier, employees of separate employers who are then involuntarily rolled into the CPA are not directly addressed in either document. But, as I held, neither are they expressly excluded from the ambit of the 1982 Memorandum.

[107] The employer argued that while employees of either the CPA or separate employers are subject to salary protection should they be reclassified downward or be subjected to a classification conversion exercise within the CPA or within their separate agency, no such protection applies to them in the event that the employer orders the transfer of employees of separate agencies to the CPA. At paragraph 16 of its written submissions, the employer wrote the following: "The employer submits that a 'reclassification' occurs when a given employer 'reclassifies' positions, within its own classification system, and not when positions are moved from one employer to another".

[108] For the employer, the language used in the salary protection provisions of the 1982 Memorandum and the Directive does not fit the present circumstances as no reclassification has taken place, only a transfer followed by an initial classification exercise to place the transferred employees within the appropriate CPA occupational groups and to identify their levels.

[109] I note that the employer's argument above, which describes the exercise as a transfer of employees, appears to contradict its argument at paragraph 26 of its written submissions, in which it indicates that the employees who are the subject of

this grievance were in fact terminated by their separate agencies and rehired by the CPA:

> *When individuals employed by a separate agency or other non CPA organization are hired by a department for which TB is the employer, their employment is normally terminated with the separate agency or non CPA organization and they are appointed to the new employer. As such, they become subject to the new employer's rates of pay, classification standards, terms and conditions of employment as provided for in relevant collective agreements.*

[110] I see an inconsistency in arguing that the employees in question were transferred on the one hand and terminated and rehired on the other. If that is what the employer contends, with respect, I reject the argument that the former CRA and NCC employees were terminated by their separate agencies and reappointed by the CPA. I have been provided with absolutely no documentary evidence to support an allegation that terminations took place, and indeed, all the evidentiary material placed before me refers to transfers.

[111] With respect to the CRA employees, the documentary evidence is overwhelming that leads to my conclusion that a transfer and not a termination occurred. Appendix C to the agreed statement of facts is an email from the CRA's commissioner to employees that indicates that "… a number of CRA employees in IT an corporate functions … will be transferring to SSC". Appendix D, the Q&A document prepared for CRA employees, lists the second question as follows: "How will the decision be made to transfer positions and incumbents to the new organization?" The document uses the word "transfer" many times but never once refers to employees being terminated. The SSC's Q&A document (Appendix H to the agreed statement of facts) does the same. Appendix E, the Order in Council used to transfer employees from the CRA to SSC, and Appendix F, the regulation applying to the events at issue, both refer to transferring functions and employees. Appendix I is a copy of a SSC PowerPoint presentation entitled "Employees Transferred to SSC from Separate Agencies". At Appendix J is a form letter addressed to an unidentified employee, which the agreed statement of facts indicates was sent to the affected CRA employees. It begins as follows: "In the context of the Order in Council of November 15, 2011, your position formerly located in CRA was transferred to Shared Services Canada …".

[112] The evidence with respect to former NCC employees is no less obvious. At

Appendix L, the parties included an email from the NCC's CEO to all employees advising them that "[a]ll activities, programs, services and staff of the Capital Experience Branch … will be transferred". At Appendix O, the parties included several employer-generated updates on the impact of the 2013 budget; the first six contain a topic entitled "The NCC Following the Transfer". And the updates refer to the upcoming "transfer" of employees, and the word "termination" or equivalent is not found. Appendix P is a document the NCC gave to its employees at meetings, and its first line states as follows: "One or more positions like yours will be transferred".

[113] The employer acknowledged that a transfer took place in this case but denied that a reclassification also occurred. While the 1982 Memorandum provides for salary protection in the event of a reclassification, it does not contain a definition of that term. However, the parties provided me with a copy of the Directive, which in its definition section includes definitions for the terms "Salary protection", "Classification conversion", and "Reclassification". According to the "Salary protection" definition, it is given to employees whose positions have been either reclassified or converted. The definition of "Classification conversion" states as follows: "[It] [i]s a change made in the method of establishing the relative value of work for an occupational group with a resultant new pay structure." The "Reclassification" definition states that such an event is "… the change in the occupational group, level or both of a position resulting from a review or audit of the work performed in that position."

[114] When the former NCC and CRA employees became part of SSC and Canadian Heritage, SSC was required to change the method by which the value of their work would be recognized and compensated. While the goal of the Directive might have been to provide guidelines for departments within the CPA in the event of reclassifications or conversion exercises performed within those departments, nothing in the Directive indicates that it is inapplicable to the cases of employees who are transferred to the CPA. I find that the definition of the term "Classification conversion" can reasonably be said to apply to the employees in question as nothing in the definition leads me to conclude that the present circumstances can be excluded from its ambit. From the perspective of the employees concerned with this grievance, they were transferred to the CPA, and the method by which their work would be evaluated was then changed, meeting the definition the employer set in its Directive. While this is a significant point, the PSAC did not argue and instead focused its arguments on the reclassification issue.

[115] As for the term "Reclassification" as defined in the Directive, I find that it could reasonably be said to apply to the employees covered by this policy grievance since they were forced to change occupational groups when, to use the language of the Directive, the employer reviewed the situation it was faced with due to its decision to create SSC. The Directive has no definition for what constitutes a review, and I find that it is a general term, not a term of art, and that it means to study, examine, consider, or look at again. In that sense, the employer was forced to review the employees' occupational group assignment and did so, it admitted, by reviewing the work descriptions the separate agencies provided against the classification plan applicable to CPA employees and by slotting the transferred employees into the CPA plan.

[116] The employer's documentation confirms that conclusion and describes what took place by using the words "review" and "classification review". Attached to the agreed statement of facts, at Appendix J, is a sample letter SSC sent to former CRA employees in July 2013, indicating the following:

> *In the context of the Order in Council of November 15, 2011, your position formerly located in CRA was transferred to Shared Services Canada (SSC) effective on that date. As an essential step in completing the transition process from your previous employer to SSC, your position underwent a classification review against the Core Public Administration's (CPA) classification evaluation plan. As a result of this review….*
>
> [Emphasis in the original]

[117] The letters sent to former CRA employees confirm that in the employer's own eyes at the time, a classification review had in fact taken place following the transfer of employees to SSC.

[118] The documentation provided to NCC managers echoes that. In an email to NCC directors dated May 1, 2013, the NCC's vice-president of human resources laid out the process to review affected job summaries for the transfer of its event and activity mandate to Canadian Heritage. In the email, she indicates that for the new positions to be created, employee job summaries must be "reviewed" and rewritten in anticipation of the transfer.

[119] I will pause to note that with respect to interpreting collective agreements, it is

trite law to say that my task is to discover the parties' intention. To give effect to that goal, arbitrators have endorsed certain principles or rules of construction. The first rule I note requires that words be given their ordinary meaning, subject to certain qualifications, the first being that if the ordinary meaning leads to an absurd result, arbitrators will modify that literal meaning to avoid an absurdity, although not to avoid hardship or an ill-considered result. Second, according to Palmer & Snyder, *Collective Agreement Arbitration in Canada,* 5th edition, at para 2.15, as follows:

> *… hardship is not a reason to alter a clear meaning, it is a reason to choose one of two equally plausible meanings … As such, where two interpretations of a provision are possible, the one that best harmonizes the document as a whole should be chosen. That is, the construction that produces a fair result should be taken as the interpretation that would promote the interpretation of the parties.*

[120] Accordingly, I find that the employer reviewed the classifications of the former CRA and NCC employees within the meaning of the Directive. While the employees in question are covered by the 1982 Memorandum rather than the Directive, the Directive's definitions are, while not binding, nonetheless instructive as they reveal the employer's definition of the terms at issue in this case. As the employer addressed the issue of what constitutes a reclassification in its Directive, I find on a balance of probabilities that the employees in question have been reclassified within the intent of the 1982 Memorandum and are therefore protected by its salary protection provisions.

[121] By arguing that neither a reclassification nor a conversion had occurred, the employer argued that it had created new positions in the CPA and that it had transferred the former CRA and NCC employees into them. It argued that in this case, CRA and NCC positions were simply eliminated, and new positions within the CPA were created. The employer argued that whether a position is new or "reclassified" is a determination of fact and that the facts in this case indicate that what happened was simply not a reclassification. On that point, it submitted that in *Kane*, the Supreme Court stated that whether the position under consideration was new or reclassified "… could be the subject of reasonable disagreement by reasonable people".

[122] While the evidence and context in *Kane* supported such a conclusion, I find that the evidentiary context of this case leads to the conclusion that the positions that are the subject of this grievance are not new. After reviewing the documents submitted by the parties, I am unable to accept the employer's characterization of what occurred as

the elimination of positions within the NCC and CRA and the creation of entirely new positions within SSC. Instead, the evidence reveals that the work formerly performed within the separate agencies was transferred, along with the incumbents of those positions, to the new CPA employers.

[123] While the employer is correct that the way separate employers exercise their authority is not binding on it, neither can it entirely ignore the fact that the employees in question were already employed by the Crown when they were ordered transferred from a separate agency to the CPA. In any event, as will be discussed later in this decision, the documentary evidence placed before me leads me to conclude that the positions in question were transferred to the CPA and were not in fact new positions.

[124] Attached as Appendix D to the agreed statement of facts is a CRA-generated document that provides answers to employees with respect to their most commonly asked questions. The following excerpt is relevant:

...

> ***Q. How will the decision be made to transfer positions and incumbents to the new organization?***
>
> *A. The decision will be made based on functions. The new organization is focused on the delivery of IT infrastructure shared services… The positions of employees directly performing functions that support delivery of these services … are … being transferred to the new organization.*
>
> ***Q. How will I know if I am supposed to transfer to this new organization?***
>
> *A. Your immediate manager or supervisor will notify you if your position is being transferred to the new organization.*
>
> ***Q. Will I be given an option to be an employee of Shared Services Canada?***
>
> ***A.** No. If your position falls under the scope of the services named in the Order-in-Council, it will be transferred to Shared Services Canada and you will transfer with it.*
>
> ***Q. Will any jobs be eliminated? If so, how will this be handled?***
>
> ***A.** Only a change in reporting relationship is being envisaged for employees moving to Shared Services Canada….*

…

[Emphasis added]

[125] At the end of the document is a section entitled "Key Messages, Transfer of Employees to Shared Services Canada", and under the heading "General Key Messages", the first one indicates that SSC is "… being established to consolidate and streamline the delivery …" of many IT resources across the Government of Canada. It also adds that most "… federal departments and agencies will no longer provide these services internally. Instead, we will receive them from the new organization." Under the second general key message, the following statement is found: "The employees providing these services for us today will be providing them tomorrow, under the leadership of Shared Services Canada". Finally, under the section entitled "CRA Key Messages" is the following line: "This is not a job reduction. This is a job transfer."

[126] From that I can conclude only that what occurred was a transfer of positions and their incumbents. The document clearly indicates that specific IT services would be centralized within a new CPA department and that the CRA employees would perform their same duties within SSC. However, I recognize that the CRA sent that document, not the employer, which however did issue its own document on the matter that agrees with the one the CRA issued.

[127] SSC also created its own quite similar frequently asked questions (FAQ) document, which the parties attached to the agreed statement of facts as Appendix H. The following extracts are of interest:

> ***Q5. How is Shared Services Canada being set up?***
>
> ***A5.*** *…The second phase involves the transfer of positions of employees who provide IT infrastructure services in the areas of email, data centers [sic] or network services….*
>
> …
>
> ***Q8. How was the decision made to transfer positions and incumbents to the new department?***
>
> ***A8.*** *The decision was made based on functions. The new department is focused on the delivery of IT infrastructure services within the operational domains of email, data centers [sic] and networks. The positions of employees performing functions that support the delivery of these services are being transferred to the new department.*

> ***Q9. Will any jobs be eliminated? If so, how will this be handled?***
>
> ***A9.*** *At this time, only a change in reporting relationship is being envisaged for employees moving to Shared Services Canada.*
>
> ….
>
> ***Q11. I am transferring from a separate agency to Shared Services Canada, which is a department in the core public administration. What does this mean for me?***
>
> ***A11****. Like all individuals whose positions are being transferred, your work description has not changed.*
>
> [Emphasis added]

[128] As with the CRA's document, this document also indicates that the functions being transferred to SSC were those formerly being performed by the employees in question in their former separate agency. The employer's factual account, as related in the FAQ, agrees with the PSAC's allegations that what occurred was a transfer of duties and positions as well as a reclassification of those positions, in accordance with the employer's CPA classification plan.

[129] In addition, the agreed statement of facts indicates that SSC held information sessions for all separate agency employees in summer 2013. Attached to the agreed statement of facts is a copy of the PowerPoint presentation given at those sessions. At page 4, it indicates that "[a]ll work must be valued within the CPA context" and that all separate agency positions "… are evaluated for CPA occupational group and level". At page 5, the presentation indicates that to integrate separate agency positions to the CPA, "[w]ork descriptions from separate agencies" will be "… used to identify appropriate occupational groups and levels".

[130] Although the employer argued that new positions were created within the CPA, the evidence with respect to the CRA employees reveals that what occurred was simply a transfer of functions from a separate employer to a new department in the CPA. No new positions were created, at least not in the sense argued by the employer or understood by any reasonable individual; the duties that formerly existed within separate employers were simply transferred to CPA employers along with the incumbents of those positions.

[131] I also find that the same situation existed with respect to the transfer of NCC employees to Canadian Heritage. Appendix L to the agreed statement of facts is a message from the NCC's chief executive officer to employees announcing the federal government's intention to "… transfer the mandate to promote the National Capital Region" from the NCC to Canadian Heritage. Appendix M, a memo from the NCC's Human Resources section to the NCC's managers, states that as the "transfer of personnel" begins, the NCC would update and share the "job summaries" with the CPA department as this new department would "… create the positions that would be transferred". If the positions being created within the department were in fact truly new, I fail to see the need to provide the department with the employees' job summaries rather than simply their résumés. At Appendix R of the agreed statement of facts, the parties included a document that was annexed to letters sent to affected NCC employees. It states in the third paragraph that Canadian Heritage officials "… reviewed the work descriptions of your substantive NCC positions and determined the occupational group and level of the position you will occupy at [Canadian Heritage]".

[132] That confirms my conclusion that the employees' work was simply transposed to a new employer. As occurred with the CRA employees, it is clear that what occurred was the wholesale transfer of employees and their positions to a different employer. The NCC did not discontinue entire business lines and convince another federal government entity to take pity on employees that it would otherwise have made surplus. The evidence clearly demonstrates that the federal government simply decided to transfer work that the NCC had performed to Canadian Heritage, and the employees who performed that work were transferred along with their positions.

[133] Therefore, I reject the employer's position that no reclassification took place as it created new positions within SSC and Canadian Heritage. I find that the facts indicate clearly that existing positions within both the CRA and the NCC were simply transferred to the CPA. The employer's allegation that it had eliminated positions at the CRA and the NCC and that it had created new positions within the CPA into which the employees were transferred simply does not concord with the facts and the employer's documentation.

[134] In support of its argument that the transfer from the separate employers did not fit the definition of "reclassification", the employer referred to the Federal Court's

decision in *Hagel.* That case arose out of the employer's decision, in 2003, to consolidate its customs operations under a new agency within the CPA and to transfer employees from a separate agency into the CPA by block transfer. As in this case, the employees were advised that all existing terms and conditions of employment and current rates of pay and job classification levels would "… be accepted and continued in the new organization until such time as the appropriate processes are in place to establish the ongoing terms and conditions of employment". When a new collective agreement was signed for the occupational group into which they were placed, the employees found that their salaries had been lowered and that they were no longer entitled to performance pay under the CPA collective agreement. They grieved the decision not to protect the terms and conditions of their employment.

[135] The issues in *Hagel* before the Federal Court were three-fold, and two had to do with the issue of procedural fairness and whether a decision maker is required to attend a final-level grievance hearing. Those are of no consequence to the grievance before me. However, the third issue is of interest and was set out as follows: Did the decision maker fail to consider and apply the Treasury Board's *Terms and Conditions of Employment Policy*, the *Regulations Respecting Pay on Reclassification or Conversion*, and s. 37.3 of the *PSEA?*

[136] The Court reviewed the final-level decision, which had concluded that that policy and those regulations did not apply. The Court found that the decision maker had considered them and that his conclusion that they did not contemplate the situation before him fell squarely within his expertise and was reasonable. The employer pointed in particular to the Court's words at paragraph 42, as follows, to its finding that this statement was not only reasonable but also correct:

> *… [i]t could not have been the intent of this policy that the terms and conditions set in the collective agreement of a separate employer (with a different classification scheme and different rates of pay) would determine the rates of pay of Treasury Board employees.*

[137] I would first like to note that at paragraph 41, the Court states that in the case before it, the decision maker proceeded on the basis that how the Canada Border Services Agency was created "… represented a unique situation <u>that was not contemplated in existing human resources policy</u> [emphasis in the original]" and that none of the Treasury Board's existing policies, cited by the applicants, applied. The

situation in this case arose nearly a decade after that in *Hagel*, and the employer has not claimed that this situation is in any way unique.

[138] Unfortunately, the arguments before the Court are not set out at any length, and it is impossible to determine whether the issues were as completely canvassed as they were before me. Indeed, I note that at paragraph 44 of *Hagel*, the Court states that it would make no finding on the issue of an alleged violation of the block transfer provisions in the *PSEA* since there was no evidence that the grievors had raised an argument grounded on the provision during the grievance process.

[139] In this case, the block transfer provision and the status of employees subject to such transfers were argued and form part of my reasoning. And the interpretation of the 1982 Memorandum that forms the basis of the argument before me is not referred to at all in *Hagel.* Therefore, I find that while at first blush the decision in *Hagel* is attractive, the issues it decided are different in substance from those in this case.

[140] The employer devoted a substantial portion of its written submissions to arguing that its decision to allow for the interim maintenance of terms and conditions of employment for the affected employees was not to be taken as its acquiescence of the classification of the positions the employees formerly held with the separate employers. In the same vein, it also argued that the three entities (the CRA, the NCC, and the Treasury Board) all have separate statutory authority to classify positions and that how a separate employer exercises its authority is not binding on other employers. To support its argument, it cited *Hagel.*

[141] I agree with the employer that the status of the employees with their former employers is not determinative of their status within the CPA. However, the employer, by transferring the employees from separate agencies to the CPA, was required to determine their new status by referring to the collective agreements, statutes, policies, directives, and precedents; that issue is at the heart of this grievance, and I have determined it. While I have been able to reach my conclusion without finding that the employees' former statuses were binding on the employer, I do have concerns with the employer's claim that it could completely disregard those statuses under the circumstances.

[142] I find that as in *Chander,* this case involves three possible options: conversion, classification, and reclassification. I have already commented on the conversion issue,

but as the PSAC did not advance it, I have not based my decision on it, concentrating instead on the distinction between classification and reclassification. On reviewing the facts of the case before me, I find that the factors the Federal Court identified in *Chander* support my conclusion that the positions at issue were not in fact new. The documentation that the parties entered into evidence did not indicate that new duties were involved and indeed indicated the opposite. All the documentation pointed to the affected employees continuing their former roles within a new organization. Their places within the new organization were determined by reference to their former duties. No discussion occurred with respect to training being necessary once the transferred employees took up their duties with SSC.

[143] The employer also argued that in cases in which a party claims a monetary benefit, the collective agreement language must be clear and unambiguous in conferring that benefit. In support of its argument, the employer cited a number of decisions, the first of which was *Wire Rope Industries Ltd.* At paragraph 20, the arbitrator stated that the panel was of the view that arbitrators ought not to impose a monetary obligation on an employer "… that [it] clearly did not bargain to pay." While I agree with that principle, it is not so that the 1982 Memorandum clearly does not apply to this situation.

[144] The employer pointed to paragraph 19 of *Golden Giant Mine*, in which the arbitrator's statement in *Wire Rope Industries Ltd.* is cited. However, I also note that that paragraph quotes that "… an Employer is only required to pay what is provided for in the Collective Agreement". What the employer and the PSAC provided for in the collective agreement is the issue before me and is the one I determined on the basis of the evidence.

[145] Finally, the employer cited the decision in *Nigel Services for Adults with Disabilities Society*, which contested the employer's failure to pay a severance allowance to employees who were transferred to a different employer. The employer pointed to no paragraph or portion in particular, and I note that at paragraph 21, the arbitrator set out that "… the core issue to be determined is what is the meaning to be given to the phrase in Article 43.01(a)(3) 'is terminated because the employee's services are no longer required due to the closure of the health care facility, job redundancy, etc…'". That issue is very different from the one before me, and I find that that decision does not apply to this case. Interestingly, the employer in that decision argued

that no termination had occurred in substance and that what had occurred could be characterized as termination only in the most technical of senses, which is contrary to what the employer argued before me.

[146] Finally, I come to the employer's claim in its written submissions that it has always been prepared to negotiate the issue in this case. While laudable and in keeping with the preamble to the *PSLRA,* either party's willingness to negotiate this dispute has no impact upon the substance of the grievance, or at least, none has been pointed out to me. Had the employer's stated willingness to negotiate had an impact on my decision, I would have had concerns about the good faith of this claim.

[147] It must be remembered that the employer made one offer to the PSAC, which was to phase out salary protection over the course of a few short years. Once the PSAC, predictably, refused that offer, given its salary protection stance, the employer imposed its own interpretation of the 1982 Memorandum on the employees and imposed terms and conditions of employment on them as it saw fit.

[148] It is difficult to reconcile such actions with the intent of the *PSLRA*'s preamble, in particular with its recognition of bargaining agents as employees' representatives with respect to establishing terms and conditions of employment. The parties have long negotiated salary protection, and it is of fundamental importance to bargaining unit members.

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

(The Order appears on the next page)

VI. Order

[150] I allow the grievance and declare that the employer violated the salary protection provisions in the PA, SV, and TC collective agreements by refusing to apply salary protection to the employees who were transferred from the CRA and the NCC to SSC and Canadian Heritage respectively.

July 4, 2016.

Michael F. McNamara,
a panel of the Public Service Labour Relations and Employment Board