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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

CANADIAN ASSOCIATION OF PROFESSIONAL EMPLOYEES

Complainant

and

TREASURY BOARD
(Department of Public Works and Government Services)

Respondent

Indexed as
Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

Before: Chantal Homier-Nehmé, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Benjamin Piper, counsel

For the Respondent: Michel Girard, counsel

Heard at Ottawa, Ontario,
March 23, 2016.
(PSLREB Translation)

I. Complaint before the Board

[1] The Canadian Association of Professional Employees ("CAPE" or "the complainant") is the certified bargaining agent, in accordance with the *Public Service Labour Relations Act* ("the *Act*"), for all employees in the TR group, namely, translators, interpreters, and terminologists of the Translation Bureau, which is a department under Public Services and Procurement Canada. The applicable collective agreement is between the Treasury Board and the CAPE for the Translation Group, and it expired on April 18, 2014 ("the collective agreement"). The employer served notice to bargain on March 7, 2014, and bargaining is ongoing.

[2] On July 31, 2015, the CAPE filed a complaint with the Public Service Labour Relations and Employment Board ("the Board") under s. 190 of the *Act*. It alleged that the Treasury Board of Canada ("the respondent"), specifically the Parliamentary Translation Directorate (PTD), had contravened s. 107 of the *Act*. The complainant asserted that the respondent had contravened the terms and conditions of employment freeze by ending the long-standing practice of allowing parliamentary translators to modify their work schedules and to work days, between 08:00 and 18:00, when Parliament is not sitting ("the intersessional period"), while keeping the pay supplement.

[3] According to the respondent, the employer is authorized to change work hours under the *Financial Administration Act* and article 4 of the collective agreement. Under the business-as-before criterion, the employer's right to change work hours continues during a freeze. By ordering parliamentary translators to keep their evening and night work schedules to receive a pay supplement, the employer not only distributed human resources effectively, it also applied the collective agreement.

[4] The parties agreed to proceed by an agreed statement of facts. The facts that led to the complaint are not in question, and the respondent acknowledged that for at least 10 years, parliamentary translators could work days during intersessional periods, while keeping their pay supplement.

[5] Stéphanie Beaulieu and Marie-Josée Hamel, parliamentary translators, were called to testify for the complainant. They described the circumstances in which parliamentary translators carry out their work and how the change affected them.

[6] Simon Lamoureux, PTD director, was the only witness to appear for the respondent. He explained why management decided to change its practice in June 2015.

[7] For the following reasons, I conclude that the respondent contravened s. 107 of the *Act* when it ended the long-standing practice of allowing parliamentary translators to modify their work schedules and work days, while keeping their pay supplement, during intersessional periods. The employer decided not to consult the CAPE before instituting that change. Furthermore, I conclude that that unilateral change did not constitute a reprisal against the parliamentary translators as a result of the CAPE's request to revoke it.

II. Summary of the evidence

[8] For the sake of brevity, I have reproduced only the facts relevant to determining the complaint. This complaint involves translators who are assigned to parliamentary service and who are required to translate the records of Senate and House of Commons proceedings ("the debates"), commonly known as the Hansard.

A. Work hours

[9] Under the collective agreement, parliamentary translators are "… normally required to perform work days of varying length with irregular hours …" and do not work set hours. They are assigned to shifts that begin late in the afternoon or early in the evening, and they work until all the day's parliamentary debates have been translated.

[10] Since November 7, 2011, Ms. Beaulieu, parliamentary translator, has held a position classified at the TR-2 group and level at the PTD. She pointed out that she is currently assigned as a TR-3 to parliamentary debates. She explained that parliamentary translators work variable hours when Parliament is sitting. The TR-2s begin their shifts at 16:00 on Mondays, Tuesdays, and Thursdays; at 18:00 on Wednesdays; and at 14:00 on Fridays.

[11] Ms. Beaulieu also explained that parliamentary translators classified TR-3, who assume a revisor role, always start their shifts two hours after the TR-2s, who translate Senate and House of Commons debates. Once a translation is completed, the TR-3s

revise translations to ensure quality control, i.e., to ensure that the translated text is true to the source text and does not contain any typos.

[12] During a parliamentary session, the TR-3s finish their shifts once all debates have been translated and revised. They must work quickly and must meet the PTD's production standard.

[13] The volume and workload change from day to day and depend on the events in Parliament. During a typical day, parliamentary translators can finish work at around 03:00 or 04:00. When sessions are shortened, for example, due to an important announcement such as the national budget, they end earlier, at approximately 01:30.

[14] However, in June, the parliamentary session often stretches until midnight, and even until 02:00. In that case, the parliamentary translators' shifts sometimes begin at 14:00 and end at 03:00 or even 05:00. Consequently, the TR-3 parliamentary translators, i.e., the revisors, finish even later.

[15] During cross-examination, Ms. Beaulieu indicated that her work schedule varies significantly when Parliament is sitting. However, she mentioned that for her, starting at 16:00 and ending around 05:30 was exceptional. Because she works quickly, she finishes at around 02:00 on Mondays and Tuesdays. However, she emphasized that other translators are slower and finish later than she does.

[16] During her first intersession, from November 2011 to January 2012, she began her shift between 11:00 and 13:00, never at 09:00. She always chose to work between 10:00 and 18:00, as did the majority of parliamentary translators.

[17] The CAPE called Ms. Hamel as a witness. She is a parliamentary translator classified at the TR-2 group and level at the PTD. As a TR-2, she mainly performs the same duties during the same hours as described in the agreed statement of facts. She explained that her schedule was variable and that it depended on the length of a House or Senate session. On Mondays, Tuesdays, and Thursdays, she starts her shift at 15:00, on Wednesdays at 16:30, and on Fridays at 14:00. She never knows when she will finish. When all the work is distributed, an email is sent to the parliamentary translators, and they work until everything is translated.

[18] According to her testimony, during parliamentary sessions, she does not have a

personal life because she has no idea when she will finish her shifts. Her evenings are dedicated to work. She is unable to look after her child; for example, she cannot attend parent meetings at school or help with homework. She does not see her spouse, her child, or her friends. Her family and social lives are relegated to weekends.

[19] In cross-examination, Mr. Lamoureux acknowledged that before June 2015, the employer allowed parliamentary translators to choose their time slots during intersessional periods, while remitting them the pay supplement. He also admitted that parliamentary translators received a pay supplement even during leave. Finally, he admitted that the collective agreement does not describe the pay supplement as an evening premium and that the language refers only to irregular hours, a variable schedule, and pay supplement.

B. Compensation

[20] The fact that parliamentary translators are not paid overtime was uncontested. They receive special compensation in the form of parliamentary leave as well as a pay supplement. That compensation is remitted to translators classified TR-2 and TR-3 who provide parliamentary services. They receive it because they work evenings or nights, always in haste, and they must meet the PTD's qualitative and quantitative standards.

[21] Ms. Beaulieu testified that the TR-2s receive a seven percent supplement and that the TR-3s receive a four percent supplement. The supplement is paid when they are on annual leave or during any other paid leave, as well as during intersessional periods. The House of Commons and Senate sessions take place only during certain weeks of the year, which are specified in the parliamentary calendar. They must work during parliamentary sessions and even during intersessional periods. They can be called in at any time during the summer. In addition to the pay supplement, they have roughly 40 days of leave, which increases after 12 years of service.

[22] In cross-examination, Ms. Beaulieu underlined that she had 40 days of additional leave in addition to 3 weeks of vacation leave. Therefore, she has a total of 11 weeks' leave.

[23] Mr. Lamoureux testified that the intersessional period, coupled with the holiday

period, represents approximately a quarter of the year. For parliamentary translators, it constitutes roughly 40 days of parliamentary leave in addition to annual leave. After 11 years of service, parliamentary translators receive 50 days of parliamentary leave, in addition to annual leave.

[24] During cross-examination, he acknowledged that parliamentary translators are required to take their leave during the intersessional period and that all of them have to take the majority of their leave in the summer.

C. Customary practice

[25] The respondent recognized that for at least 10 years, parliamentary translators have had the option of working days in intersessional periods. They were able to choose the hours of their shifts, while keeping the pay supplement.

[26] Ms. Beaulieu pointed out that starting in 2012, the PTD set the time slots during which parliamentary translators could work their shifts, which were from 10:00 to 18:00, 13:00 to 21:00, or 16:00 to midnight. The purpose was to facilitate distributing work during intersessional periods. She explained that she had a set schedule, from 13:00 to 21:00, during the intersessional period. A limit was not imposed on parliamentary translators in terms of choosing time slots; in other words, there was no requirement that all time slots had to be filled.

[27] During the intersessional period, parliamentary translators are subject to the same work as other Translation Bureau employees. They are subject to the same productivity standards as other translators at the same level, which are 1600 words per day for TR-2s and 1800 words per day for TR-3s. The texts come from departments with which they have been paired or from distributors' pools.

[28] Ms. Hamel testified that her first intersessional period occurred three weeks after she began working at the PTD, in January 2011. She explained that an intersessional period occurs approximately every month, except in June. That year, an election had been triggered. As a result, there were no debates to translate for an extended period. In such cases, parliamentary translators are loaned to the Translation Bureau and are paired with departments operating in fields they know well.

[29] According to practice, parliamentary translators worked days during that

period. Ms. Hamel worked from 08:00 to 16:00 or from 08:30 to 16:30. Her colleagues had similar day schedules. The supplement continued to be paid. That practice lasted until June 2015.

[30] Before the winter 2014 intersessional period, PTD management emailed the parliamentary translators and asked them to choose the "[translation] the time slot of your choice". Three options were offered for the intersessional period. Likewise, on March 12, 2015, the PTD emailed them again, similarly asking the parliamentary translators to "[translation] confirm your choice" from the three time slots offered for the spring 2015 intersessional period, which were the following: 10:00 to 18:00, 13:00 to 21:00, and 16:00 to midnight.

[31] During intersessional periods, parliamentary translators could modify their work schedules while keeping their pay supplement under article 5 of "Pay Notes" in Appendix A of the collective agreement. It remained part of their compensation, even though they worked day shifts.

D. The change

[32] According to Ms. Beaulieu's testimony, the employer never imposed limits for time slots, aside from asking them to work days. That practice changed in June 2015.

[33] Mr. Lamoureux has been the PTD's director since May 2014. On June 5, 2015, during a Union-Management Consultation Committee meeting, he mentioned that the pay supplement remitted to parliamentary translators would no longer be granted from then on if they decided to change their evening schedules to work days during the intersessional period.

[34] In cross-examination, Mr. Lamoureux acknowledged that on June 15, 2015, the issue was not clearly established as to whether parliamentary translators who decided to work days would keep the pay supplement. He recognized that the CAPE was not consulted at the national level.

[35] He explained that he instituted the change because he was required to sign an authorization form for one of the employees who reported to him. The form dealt with a pay supplement for hours worked during the day. He then wondered why an employee who worked days should receive a pay supplement.

[36] He said that he, as well as other employees, work days and do not receive a pay supplement, so he asked why parliamentary translators doing the same benefit from what he termed an "[translation] evening premium". According to him, the pay supplement is equivalent to an evening premium. Working days and receiving a pay supplement does not make sense.

[37] He explained that he managed a $15 million budget and that he had to "[translation] brief" his employers. He underscored that the "[translation] evening premium" is named that for a reason and that he is accountable to his colleagues and employers. So, he asked the parliamentary translators who chose to work days during the intersessional period to communicate their work schedules to their managers for the period from late June to early September by 18:00 on June 19, 2015.

[38] On June 24, 2015, the CAPE expressed its position to Mr. Lamoureux through a letter from Isabelle Germain, a labour relations officer. It noted that the employer's actions represented a "… [translation] blatant violation of the statutory freeze on conditions provided for in section 107 of the PSLRA." The CAPE asked the employer to immediately revoke the amendment and to reinstate the pay supplement for parliamentary translators when they work days during an intersessional period.

[39] Mr. Lamoureux emphasized that when he gave the parliamentary translators the option of working days without receiving the supplement, they were unhappy. The ultimate goal was to remove the supplement for parliamentary translators who worked days. He indicated that he had consulted his colleagues and the Treasury Board and that they had all agreed that the supplement was granted for evening work.

[40] He explained that the purpose of his email was to give the parliamentary translators a choice. After the union refused, he reinstated the evening schedule. Then, in an email dated June 24, 2015, he told Ms. Germain that the employer would no longer allow parliamentary translators to change their evening schedules to work days during intersessional periods.

[41] Ms. Germain once again informed Mr. Lamoureux that changing the parliamentary translators' work schedule during the freeze period contravened the *Act.*

[42] During a meeting on June 24, 2015, Mr. Lamoureux advised the parliamentary

translators that they had to work evening shifts during the intersessional period to keep the supplement. Since then, the parliamentary translators have had to work evening shifts, even during intersessional periods.

[43] Management then gave the parliamentary translators the choice of starting their shifts between 14:00 and 16:00 and finishing between 22:00 and midnight. The evening shifts starting between 14:00 and 16:00 were offered to parliamentary translators as an accommodation measure. Mr. Lamoureux explained that it was a case of give and take. He was not comfortable allowing parliamentary translators to work their shifts between 12:00 and 20:00, while paying them the supplement. He tried to be flexible by agreeing to move the start time back by two hours.

[44] Mr. Lamoureux added that at the operational level, it made sense to have parliamentary translators available to provide services after normal work hours. Global Affairs Canada, the Public Health Agency of Canada, and the Royal Canadian Mounted Police make many after-hours requests. Having parliamentary translators available evenings allows for translated documents to be returned the following day.

[45] Mr. Lamoureux pointed out that the timing of the change, June 2015, was not ideal, since it was in the middle of the election period. Before then, translators in Vancouver had provided after-hours service. He conceded that as Ms. Hamel had underscored, evenings are quieter. However, according to him, the change was justified and was economical, since the PTD no longer required external service providers in the evenings.

[46] Mr. Lamoureux explained that all translation requests from clients must go through the Processing Centre, which then handles them. The process is different for parliamentary translators, who are used to handling one client at a time. He pointed out that several failures had occurred in the past. He indicated that Ms. Beaulieu's comments to the effect that quiet periods happened during the intersessional period were related to the electoral period and to setting up the Processing Centre. As he remembered, only about five people complained about the lack of work in the evenings.

[47] Ms. Beaulieu emphasized that since the change, work comes from the distributors using the new dispatching system. In general, the texts are similar to those

from the Translation Bureau, and the parliamentary translators are subject to the same production levels. The distributors have a list of translators available evenings and days, and texts are assigned based on translators' availability.

[48] In cross-examination, Mr. Lamoureux indicated that that decision was in no way a form of reprisal in response to the CAPE's initial letter. He pointed out that he had recommended that management offer the parliamentary translators the opportunity to work days without the pay supplement. He was then told it was complicated for the pay service to remove the supplement during the intersessional period and then to reinstate it when Parliament was in session. He testified that the CAPE's national office was not consulted about the letter but that the CAPE had requested that the status quo remain until a new collective agreement was signed.

[49] In cross-examination, he testified that the CAPE letter had led him to believe that he could not remove the pay supplement from parliamentary translators. However, he was allowed to change the schedule, since their normal hours were in the evening. He understood that he could not offer a day schedule without a pay supplement, so he simply instituted the evening schedule so parliamentary translators could continue receiving the supplement.

[50] According to operational needs, parliamentary translators work evenings 75% of the year. Mr. Lamoureux recognized that the collective agreement does not limit hours or state that the pay supplement may be withdrawn. Management granted the pay supplement for years during intersessional period for hours worked during the day. Mr. Lamoureux pointed out that he was not there at that time and that the supplement was paid for work performed on an irregular schedule.

[51] Still in cross-examination, Mr. Lamoureux explained that a team was in place and that a need existed for after-hours service. As manager, he has the authority to define the associated work schedule. He added that there was the same number of translators with evening emergencies.

[52] In rebuttal, Mr. Lamoureux explained that parliamentary translators work evenings or nights. They are responsible for translating debates that take place during the day; so, the work is necessarily carried out on evenings or nights. When Parliament is in recess, conditions are different.

[53] When Parliament is sitting, the TR-2s must meet a production standard of 2500 words per day, and the TR-3s, 2800 words per day; they work under pressure and always in haste. Outside a parliamentary session, the TR-2s must meet a production standard of 1600 words per day, and the TR-3s, 1800 words per day; the conditions under which they receive the pay supplement do not exist in this case, and the supplement should not be granted.

[54] Mr. Lamoureux added that translating spoken language is different from translating prepared documents. The stress and production levels are not the same during the intersessional period.

E. Impact on translators working nights

[55] Ms. Beaulieu explained that parliamentary translators always work out-of-step with others, and consequently, their personal lives are affected. She mentioned that on Sundays, she says goodbye to her partner and does not seem him again until Friday. She added that they sleep in separate rooms, which means that sometimes, her nights' sleep is not very peaceful. Finally, since she sleeps during the day, she cannot sleep deeply and gets very little rest. The intersessional period allows her to recharge her batteries and to establish order in her personal life, not only in terms of her health but also in terms of her social life.

[56] Ms. Beaulieu pointed out that the changes to her work hours negatively affected her personal life. She explained that she had no social life because she worked late. She added that she spent very little time with her spouse and that they were not even able to spend 48 hours together. When Parliament is sitting, she does not have a recovery period or normal life; she has no respite.

[57] Ms. Beaulieu mentioned that when she was hired, she was told she would have the chance to recover during the intersessional period. For her and the other parliamentary translators, this modification was an abrupt change to work conditions with the same requirements. With respect to training, all translators had to take training sessions for the new translation software, which was offered only during the day. Consequently, due to her evening work hours, she often did not receive a full night's sleep. She added that the employer said it was up to the parliamentary translators to adapt to their evening schedules.

[58] In cross-examination, she testified that her letter of offer stated that she would work variable hours based on an irregular schedule, and it was not a question of choosing to work a day shift during intersessional periods. That choice was communicated to her verbally.

[59] Ms. Hamel emphasized that the change affected her child because she could not help with homework. She had to hire a tutor. She mentioned that she had no family or social life during the week and that she found not seeing her spouse during the week extremely hard. She is also unable to visit her family in Québec because she cannot travel on Friday nights as she works until 22:00. The change also affected her sleep. Every morning, she wakes up with her child at 06:45; thus, her sleep is interrupted. The time change during the intersessional period allowed her to recover and have periods of normal life with her family and friends. In cross-examination, she affirmed that she finished work at 22:00 and that she rose at 06:45. She sleeps roughly five or six hours per night.

[60] She explained that because of the schedule changes during intersessional periods, parliamentary translators are assigned to other sections. Since they are required to work with people who work during the day, communication is difficult, since they must wait until the next day for missing information. She added that often, off-peak periods occurred with no work.

[61] The schedule changes also affected her career plans. On June 24, 2015, at the end of the meeting at which the changes were announced, Ms. Hamel told her immediate supervisor Maryse Bertrand that it was impossible for parliamentary translators with children to work evenings the entire year and that she would have to find another job.

[62] She told management that she loved her work, that the subjects were very interesting, and that she was willing to deal with variable hours when Parliament was sitting. However, because of the change, she emphasized that she lost time with her family and that it was too difficult to continue under the circumstances at that time. Unless the situation were to change, she would have to find another job.

III. Summary of the arguments

A. For the complainant

[63] The evidence and the agreed statement of facts outline all the constituents of a violation of terms and conditions of employment provided by the *Act.* The collective agreement expired on April 18, 2014, and the employer served notice to bargain on March 7, 2014. When it was served, a term or condition of employment was in force that might have been included in a collective agreement. The employer unilaterally abolished the long-standing practice of allowing parliamentary translators to choose to work days during intersessional periods while keeping their pay supplement.

[64] Under section 19 of the collective agreement, parliamentary translators are required to work irregular and demanding hours. For that reason, they have parliamentary leave and receive a pay supplement; they work in haste and under pressure. They receive the supplement regardless of the time of year, even when on leave. For Ms. Beaulieu and Ms. Hamel, the opportunity to work days is important for their mental health, for spending time with family, and for their quality of life.

[65] On June 24, 2015, the employer advised the parliamentary translators that they had to keep their evening schedules during the intersessional period, which amounted to a change to the terms and conditions of employment during the freeze period outlined in the *Act*.

[66] The change significantly impacted Ms. Beaulieu and Ms. Hamel. They love their work. However, they are subject to higher production standards than others, and their schedules as well as work requirements significantly impact their family and social lives. Ms. Hamel cannot help her child with homework; her spouse must do it. She can no longer visit her family in Québec, and she does not have time to see her friends.

[67] Ms. Hamel pointed out that it is important to have one week per month to regain a normal life. She loves her work but wonders if she can continue to regularly work an evening schedule. Even with the number of vacation days she is entitled to, on many days during intersessional periods, she does not benefit from a vacation.

[68] The pay supplement is a requirement associated with parliamentary translator positions. Under clauses 5(a)(ii) and (j) of the Pay Notes section of Appendix A of the collective agreement, a supplement is added to the compensation of parliamentary translators who must “usually” work evenings or nights, “under pressure at all times”, or also work evenings or nights. Under the collective agreement, they can be called

back at a moment's notice to provide that service.

[69] Article 19 of the collective agreement provides parliamentary leave for employees assigned to parliamentary service who are "normally [emphasis added]" required to work days of varying lengths with irregular hours. That is not conclusive language. In any case, it is not relevant in the context of a complaint filed about a violation of the terms and conditions of employment freeze.

[70] According to the employer, the collective agreement authorizes revoking the pay supplement, which arises from its management rights. However, the evidence does not support that allegation. After receiving the CAPE's letter, the employer decided not to revoke the supplement during the negotiating period.

[71] The employer recognized that it could not do that, which is why it asked parliamentary translators to work evenings. There are certain exceptions under case law, but they do not apply to the circumstances of this complaint.

[72] *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.), is the leading case on that issue. In that case, the Federal Court of Appeal determined that after consultation, a term or condition of employment can take the form of an agreement or unilateral exercise of management authority. That case also established that the statutory freeze provision under an Act applies not only to the terms and conditions of employment included expressly in a collective agreement but also to those terms and conditions that may (emphasis added) be included in the collective agreement.

[73] According to the employer, since this practice was not included in the collective agreement, it had the right to change the parliamentary translators' schedule. That is not what the *Act* and case law indicate. In *The Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 148-02-125 (19870211), the Public Service Staff Relations Board (PSSRB) ruled that the employer's parking policy, which had been outlined and instituted in a September 23, 1974, memo, which had then been amended, was a term of employment that applied to members of the bargaining units since it could have been included in a collective agreement (emphasis added).

[74] The respondent recognized and admitted that it did not have the right to revoke

the supplement during the statutory freeze period under the Act in that case. It recognized that it was a term or condition of employment. However, it did not recognize that the work schedule was also a term or condition of employment.

[75] The employer admitted that due to the election, a slow period occurred in terms of workload. It also recognized that issues arose with setting up the new distribution system. No operational need existed to work evenings. The urgency around evening translation needs was theoretical and did not represent an actual need. The respondent's position, which was that the purpose of the change was to meet an operational need, was implausible.

[76] The first time the employer instituted the change, the employees had the right to work days without the pay supplement. Only when it received Ms. Germain's letter from the CAPE did it change its initial position, which was that parliamentary translators had to work evenings to receive the supplement.

[77] According to Mr. Lamoureux, that measure did not constitute a reprisal. However, the same day he received the CAPE's letter advising him that he could not change the practice of paying the supplement, he forced the parliamentary translators to work evenings during intersessional periods. In any legal context, that constituted a clear example of a reprisal.

[78] Taken as a whole, it is difficult to accept that an operational need actually existed. The evidence showed the opposite. In any case, with respect to complaints about a statutory freeze under the *Act*, operational needs are irrelevant.

[79] That is not what occurred in the circumstances. The employer cannot draw on operational needs to justify changing a practice that it recognized for over 10 years.

[80] As corrective measures, the CAPE requested a declaration stating that the employer contravened s. 107 of the *Act*, that the initial practice be restored, and that compensation be paid in accordance with s. 192(1)(a) of the *Act*. The CAPE drew on the former Public Service Labour Relations Board's (PSLRB) ruling in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2005 PSLRB 36, in which its vice-president ordered that CS bargaining unit members be paid a terminable allowance retroactively.

[81] In *Public Service Alliance of Canada v. Treasury Board (Canadian Border Services Agency)*, 2013 PSLRB 46, a PSLRB panel ordered the respondent to pay damages to the bargaining agent equal to the amount that would otherwise have been payable to employees from August 15, 2012, to the date of the decision, had the arrangement not been terminated.

[82] In *Pacific Press Ltd. v. Vancouver, New Westminster Newspaper Guild, Local 115* (1980), 27 L.A.C. (2d) 42, the arbitrator determined that damages from working nights are irreparable because they are not an economic loss and concluded that a financial remedy was suitable for reimbursing an interrupted social life and loss of sleep. However, the arbitrator thought it a poor substitute and determined that paid leave would be the best way to reimburse the affected employees.

[83] In *Buanderie Central de Montréal Inc. v. Syndicat des Travailleurs(euses) de la Buanderie Centrale de Montréal (CSN)* (1989), 6 L.A.C. (4th) 403, the arbitrator awarded compensatory damages for the extreme inconvenience that employees were subjected to when the employer forced them to work nights. They received an allowance for working nights. The arbitrator calculated the reimbursement based on the premium provided for in the applicable collective agreement and ordered that it be paid as redress for the extreme inconvenience the employees had been subjected to.

[84] The CAPE requested compensation in the form of paid leave, without affecting the parliamentary leave to which parliamentary translators are entitled. The change dates to almost a year, and the CAPE requested a ruling on the complaint as well as relief in full.

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

[85] The respondent submitted written arguments. The complainant did not object. For the sake of brevity, I reproduced only the main arguments. According to the respondent, the issue to determine is the following: Does the employer's authority to change the schedule continue during the statutory freeze?

[86] The respondent pointed out that by virtue of the principles under the *Financial Administration Act* and under the business-as-before criterion, the employer's authority to change work hours was maintained in the freeze period.

[87] Section 107 of the *Act* states that each term or condition in force before notice to bargain is served must remain in force until a new collective agreement is entered into and freezes the rights provided in the collective agreement on the date notice to bargain is served. As the Federal Court of Appeal stated as follows in *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1983] F.C.J. No. 700 (C.A.) (QL): "[The purpose of the article] is to preserve and continue the effect of the agreement between the parties, not to qualify or restrict that effect."

[88] The employer had the right to change the work schedules before notice to bargain was served and still had that right in June 2015 when it changed the work schedules. It has the authority to unilaterally modify the terms and conditions of employment, except for specific exceptions provided for under the *Act* or the collective agreement, which arises from ss. 7(1)(e) and 11.1 of the *Financial Administration Act.*

[89] Article 12 of the collective agreement sets out the normal workday and the measures the employer must take to modify work hours for employees to whom clause 12.01 applies. However, article 12 does not apply to parliamentary translators.

…

> ***ARTICLE 12 - HOURS OF WORK***
>
> ***12.01 Normal Work Week***
>
> *a. The normal work week shall be thirty-seven decimal five (37.5) hours Monday through Friday (the normal work day being seven decimal five (7.5) hours worked between 8:00 a.m. and 6:00 p.m.) except for employees covered by Article 19, Parliamentary Leave and Interpretation Leave, or employees engaged in shift work.*

…

[90] Under article 19 of the collective agreement, parliamentary translators are "… normally required to perform work days of varying length with irregular hours …". This is the only collective agreement provision that mentions parliamentary translators' work hours. In contrast to employees subject to article 12 of the collective agreement, nothing in it restricts the employer's discretionary authority to define or modify work hours.

…

> ***19.01 Parliamentary Leave and Interpretation Leave***
>
> *a.*
>
> *i. In addition to their annual leave, employees assigned to parliamentary service and who are normally required to perform work days of varying length with irregular hours shall receive special compensation in the form of parliamentary leave prorated to the number of days worked by the employee for the Employer during the fiscal year.*
>
> …

[91] In fact, under the collective agreement, the employer retains all the functions, rights, powers, and authority that the collective agreement does not explicitly abridge, including the right to assign human resources.

> …
>
> ***Management Rights***
>
> ***4.01*** *The Employer retains all the functions, rights, powers and authority which are not explicitly abridged, delegated or modified by this Agreement, including his [sic] right to assign human resources to meet operational requirements.*
>
> …

[92] On the other hand, with respect to evening work, the collective agreement provides that parliamentary translators receive parliamentary leave and a pay supplement when they work evenings or nights, as follows:

> ***Appendix A***
>
> …
>
> *5.*
>
> *a. A supplement of seven per cent (7%) of the employee's pay shall be added to the pay of the employee classified as TR-2 who is in:*
>
> …
>
> *ii. a position of translator assigned to parliamentary services, in the evening or at night, under pressure at all times, and in accordance with production standards which are qualitatively and*

> *quantitatively reasonable as determined by the Employer.*
>
> …

[93] Thus, translators must work evenings or nights to receive the supplement.

> ***Appendix A***
>
> …
>
> *5.*
>
> *j. A supplement of four per cent (4%) of the employee's pay shall be added to the pay of the employee classified as TR-3 assigned to the parliamentary service and who usually work [sic] in the evening or at night, under pressure at all times, or who also works in the evening or at night and can be assigned to the parliamentary debates service at a moment [sic] notice.*
>
> …

[94] Although the language includes the term "usually", it also clearly states that work is completed "under pressure at all times". During the intersessional period, work is not always done under pressure, and there are fewer words to translate.

[95] Before notice to bargain was served, the employer had the authority to end the practice of allowing parliamentary translators to work days during an intersessional period. Its discretion to set work schedules was in force before notice to bargain was served. Furthermore, the collective agreement did not state that the schedule was definitive. The employer has the right to set work hours, especially to respect the collective agreement.

[96] In this case, nothing in the collective agreement abridges the employer's right to modify work hours; nor is it required to consult the union before doing so. In reality, article 4 of the collective agreement states that management has the right to set work hours.

[97] The former Boards, as well as several other administrative decision makers, have confirmed that if the employer had the right to change work schedules before notice to bargain was served, then that right still existed during the freeze period. That principle was recognized in *Canadian Union of Public Employees Local 1605 v. Mohawk*

Hospital Services Inc., [1993] OLRB Rep. September 873, *Dongara Pellet Plant LP v. United Brotherhood of Carpenters and Joiners of America (Carpenters' Union, Central Ontario Regional Council)*, [2012] O.L.A.A. No. 30 (QL), and *UCCO-SACC-CSN v. Treasury Board*, 2004 PSSRB 38.

[98] In those three decisions, the arbitrators and adjudicator concluded that because the collective agreement stated that the employer could change work hours, this right existed before the freeze period and therefore continued after notice to bargain was served.

[99] In *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1983] F.C.J. No. 700 (C.A.) (QL), the Court concluded that on reading the collective agreement, the employer had the right to unilaterally set position schedules. Before schedules were set that way, the employer was required to meet with the group of employees or their representatives to review the changes, i.e., to advise the group of the proposed changes before officially implementing them. In this case, nothing in the collective agreement prevents the employer from changing work hours. It is not required to consult the union before changing those hours. Article 4 of the collective agreement states that management has the right to establish work hours.

[100] In *Canadian Association of Professional Radio Operators v. Treasury Board (Transport Canada)*, PSSRB File No. 148-02-173 (19900508), the employer implemented a rotating schedule for instructors, to meet operational needs. From then on, the instructors worked irregular hours or were assigned alternately to one of the following shifts: 08:00 to 16:00, 12:00 to 20:00, or 16:00 to midnight. Thus, the employees lost overtime compensation. They received a premium if they worked after 16:00 because their schedule obligated them to. The PSSRB found that the relevant provisions of the collective agreement did not exclude the possibility of such a status change and that the terms and conditions of employment freeze did not change anything.

[101] In *Canadian Air Traffic Control Association v. Treasury Board (Transport Canada)*, PSSRB File No. 148-02-149 (19890119), the PSSRB ruled that the rights and privileges of the parties to a collective agreement do not lose their effect if they are not invoked. Ruling otherwise would have meant that all rights and privileges would have to be exercised, regardless of whether they were justified by the circumstances, during the collective agreement's lifetime. By virtue of its authority under article 4 of the

collective agreement, in 2011, the employer instituted three time slots before notice to bargain was served.

[102] The leading case on the business-as-before approach is *Spar Aerospace Products Ltd.*, a decision of the Ontario Labour Relations Board, in which it stated that the legislative intention of the statutory freeze was to maintain the prior employment relationship practices in their entirety.

[103] Before the freeze, it was common for parliamentary translators to keep their normal schedules during intersessional periods and to work evenings. The employer set the time slots from which the parliamentary translators could choose their shifts, which were from 10:00 to 18:00, 13:00 to 21:00, or 16:00 to midnight. Consequently, it cannot be said that the employer never changed the schedule before the freeze. For all the above reasons, the complaint should be dismissed.

[104] Should the Board rule that the complaint is substantiated, the employer argued that damages should not be awarded. Paragraph 192(1)(a) of the *Act* states the following:

> ***192 (1)*** *… the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> > ***(a)*** *if the employer has failed to comply with section 107 or subsection 125(1), an order requiring the employer to pay to any employee compensation that is not more than the amount that, in the Board's opinion, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee ….*

[105] The parliamentary translators have not suffered any loss. Their compensation did not change, and they all received the pay supplement. They have three months of leave per year. The employer should not be required to pay damages for trying to uphold the collective agreement. It did not act in bad faith by changing the TR's schedules during the intersessional period; that measure cannot be considered a reprisal.

[106] The decision to end a practice that did not respect the collective agreement did not violate s. 107 of the *Act*. The complaint should be dismissed because the employer had the right to change work schedules before notice to bargain was served, which still

existed in June 2015, when they were changed. Only two parliamentary translators testified with respect to the damages suffered. With the exception of them, no evidence supports the damages the change might have caused.

C. The complainant's reply

[107] The statutory freeze provided under the *Act* applies to management rights and benefits from the same protection provided under the *Act*. When ruling on a failure to comply with terms and conditions of employment during a freeze period, the practice must be examined. The cases in which complaints were dismissed were those in which the practice itself permitted the change or in which there was no established practice.

[108] In the circumstances of this complaint, the employer changed the schedule, which is undisputed. However, although it did so, it gave parliamentary translators the choice of working days.

[109] The issue is determining the nature of the practice.

[110] The employer alleged that the practice changed in 2011. The complainant argued that the practice was not changed but modified instead. The practice has given parliamentary translators the choice of several time slots since at least 2012. Its duration is not relevant for determining whether it was contravened. Even if it is agreed that the practice was changed in 2011 or 2012, the practice that was in place from that moment until March 2014 must be examined.

[111] With respect to corrective measures, s. 192(1)(a) states that the Board may order an employer to pay compensation. This authority is much broader. The language contains the term "including", which means that what is specified is not exhaustive. The Board has the authority to order any corrective measure appropriate in the circumstances.

[112] The employer's modifications to the schedule were a direct response to the CAPE's letter pointing out its members' rights. It is not necessary to demonstrate bad faith by the employer to determine that a reprisal occurred.

D. The issue

[113] The main issue involves determining whether the practice of giving

parliamentary translators the choice of working days during the intersessional period while receiving the pay supplement, and under the business-as-before approach between the employer and the CAPE, existed before the freeze.

[114] The second issue is determining whether the change the employer made unilaterally constituted a reprisal against the parliamentary translators due to the CAPE's letter dated June 24, 2015.

[115] If the Board decides that the complaint is well founded, what corrective measures could it order, besides compensatory pay?

IV. Reasons

A. Purpose of section 107

[116] Section 107 of the Act states the following:

> ***107*** *Unless the parties otherwise agree, and subject to subsection 125(1), after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day on which the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> > ***(a)*** *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
> >
> > ***(b)*** *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*
>
> [Emphasis added]

[117] In *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46, and in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19, panels of the PSLRB and the new Board, respectively, upheld the Federal Court of Appeal's principles set out in *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.), when determining the scope of protection provided under s. 107 of the *Act*.

[118] In that decision, the Federal Court of Appeal referred to section 51 of the *Public Service Staff Relations Act* (R.S.C. 1970, c. P-35). The provision in that legislation essentially constituted the same freeze provision as s. 107 of the *Act* and stated the following:

…

> ***51.*** *Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent ….*
>
> [Emphasis added]

[119] In that case, it was necessary to determine whether before the statutory freeze set out in that Act and under the business-as-before approach between the employer and the union there was a practice of allowing employees to refuse to work overtime. Although the collective agreement provided for the opposite, the Court ruled that that practice existed and that it might have been the subject of a clause in the collective agreement. The Court defined the scope of that protection as follows:

…

> … *The purpose of section 51 of the Public Service Staff Relations Act is to maintain the status quo in respect of terms and conditions of employment while the parties are attempting to negotiate an agreement. It is a particular version of a provision generally found in labour relations legislation and is designed to promote orderly and fair collective bargaining. There must be some firm and stable frame of reference from which bargaining can proceed. The provision should not be given a narrowly technical construction that would defeat its purpose.*
>
> *Section 51 is directed to "any term or condition of employment applicable to the employees in the bargaining unit" at a given point of time. The term or condition must be one that may be embodied in a collective agreement, not necessarily one that is embodied in a collective agreement. And it must be "in force" at the time notice to bargain*

> *collectively was given*….
>
> …
>
> [Emphasis added]

[120] The right of employees to refuse to work overtime was in force when the freeze provided for under section 51 was triggered, and it might have been included in the collective agreement. The Court ruled: "One of the incidents in the employer-employee relationship existing immediately prior to the notice, though not embodied in the collective agreement, was the mutual understanding that the right of the employer to require overtime work within the limits specified in the collective agreement, had been modified to permit the employees to refuse to do so."

[121] In *Air Canada* (1977), 24 di 203, the Canadian Air Line Pilots Association complained that Air Canada, the employer, had unilaterally modified the terms and conditions of employment when it terminated the pilots' privilege to travel in first class when deadheading or returning home after a flight. Section 148(b) of the *Canada Labour Code* at the time read as follows:

> ***148.*** *Where notice to bargain collectively has been given under this Part,*
>
> …
>
> *(*b*) the employer shall not alter the rates of pay, any term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 180(1)(a) to 180(1)(d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.*
>
> [Emphasis added]

[122] The Canada Labour Relations Board agreed that the statutory freeze provision, s. 148(b) at that time, had been violated, and it stated the purpose of the provision as follows, on page 213:

> … *The prohibition is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union*….

[Emphasis added]

[123] In that case, the Canada Labour Relations Board ruled that the purpose of s. 148(b) was "… protecting the exclusive authority of the bargaining agent from being undermined by unilateral employer action, encouraging cooperative collective bargaining practices and the constructive settlements of disputes …", which corresponds to the requirement in s. 148(b) suggesting that the employer can make modifications only with the "consent of the bargaining agent".

[124] It ruled: "By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst avoidable legal or illegal industrial conflict. Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the *Canada Labour Code*, Part V."

[125] The Canada Labour Relations Board stated as follows:

> *… that consent requires the employer to recognize the authority and role of the bargaining agent and necessitates communication between the employer and bargaining agent, thereby fostering joint resolution of interests of either party.*

[126] According to the *Act* and case law, the purpose of a statutory freeze is to ensure that the parties are on an equal footing throughout the negotiations by preventing the employer's position from being unilaterally imposed on the conditions to negotiate, which would undermine the bargaining agent's exclusive representation rights. The goal is to promote labour peace. The relationship between the employees and the employer, as it existed at the time of bargaining, is protected in its entirety. That protection lasts until the collective agreement containing the condition is concluded, an adjudicator's decision is rendered, or a legal strike can be declared or authorized.

B. Practice

[127] In *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46, the PSLRB panel adopted the business-as-before approach when determining a violation of s. 107 of the *Act*. The leading case for that approach is *Spar Aerospace Products Ltd.*, [1979] 1 Can. LRBR 61, a ruling by the Ontario Labour

Relations Board, in which it stated that the purpose of the statutory freeze was to maintain the prior employment relationship practices in their entirety. That Board stated the following:

…

> *The "business-as-before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union.*
>
> …
>
> [Emphasis added]

[128] In that case, the PSLRB adopted a broad approach and decided that the entire relationship between the bargaining agent and the employer was protected by s. 107 of the *Act*. The practice must be assessed based on the employer's operational policy under "[translation] business-as-usual", meaning all prior practices within the employment relationship between the employer and the bargaining agent must be maintained.

[129] In *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19, the new Board ruled that the criteria would not be contradicted by the "[translation] reasonable expectations" test described in the case law, according to which employees would expect the employer to maintain normal practices during a statutory freeze. The business-as-before approach is not exclusive to the reasonable expectations approach. The employer's business as usual when determining work hours includes the parliamentary translators' expectations.

[130] Once a party serves notice to bargain, the freeze imposed by s. 107 of the *Act* requires that the parties respect each term and condition of employment that applies to the employees from the bargaining unit subject to the notice and that was still in force when notice to bargain was served. That term or condition must be one that could be included in a collective agreement and not one that is necessarily already

included in one.

[131] In the circumstances of this complaint, the employer served notice to bargain on March 7, 2014, and negotiations have been ongoing ever since. Thus, the threshold tests for s. 107 of the *Act* were satisfied. Now the employer's practice must be determined along with the parliamentary translators' expectations when determining shifts during intersessional periods at the moment notice to bargain was served.

[132] The evidence is clear and uncontested. Mr. Lamoureux affirmed that when notice to bargain was served, the PTD gave parliamentary translators the choice of working days during intersessional periods while receiving the pay supplement. Since 2011, the evidence showed that parliamentary translators have had the choice of three time slots during intersessional periods, namely, 10:00 to 18:00, 13:00 to 21:00, and 16:00 to midnight. Although the PTD established those time slots, the parliamentary translators could choose from them. Thus, they had a fixed schedule set by the employer, based on their choice, day or evening, while maintaining the pay supplement. They received the supplement even when they were on leave.

[133] That practice was in place when notice to bargain was served. It was protected by the *Act* because it might have been subject to a clause of the collective agreement. No statutory provisions in either the *Act* or the *Financial Administration Act* provide for excluding that type of collective agreement clause.

[134] The *Act* and case law are unequivocal. The fact that the practice is not included in a clause set out in the collective agreement is irrelevant. When notice to bargain was served on March 7, 2014, a term or condition of employment was in force that might have been included in a collective agreement.

[135] In effect, such an argument completely contradicts the *Act* and case law, which provide for preserving the employer-employee relationship for reasons of business as usual, even if it contradicts the collective agreement. Several court decisions, including *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, have recognized that principle.

[136] The employer's argument that it had the right to modify work hours under the principles outlined in the *Financial Administration Act* and that that authority

continued into the freeze period cannot be accepted to justify its decision to force parliamentary translators to work evenings to receive their pay supplement.

[137] Accepting that argument would render the protection conferred under s. 107 of the *Act* meaningless and could lead to an absurd interpretation of the *Act*. Therefore, it would mean that there could never be a violation of the freeze provided for under the *Act* by virtue of the very existence of the employer's residual powers. As established by case law, that was not Parliament's intent. The purpose of the protection is to ensure orderly and equal bargaining between the parties and peaceful labour relations during the statutory freeze. Such an interpretation would allow the employer to take action that could destabilize this relationship and, consequently, violate what s. 107 seeks to protect.

[138] The employer relied on the principles the Federal Court of Appeal set out in *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1983] F.C.J. No. 700 (C.A.) (QL). In that case, the Court determined that the purpose of section 51 of the *Public Service Staff Relations Act* (R.S.C., 1970, c. P-35) was to maintain in force the collective agreement that existed between the parties.

[139] In that decision, the Federal Court of Appeal, without justifying its conclusion, determined that the continuance of the collective agreement was protected by the statutory freeze. The Court disregarded its conclusion in *Canada (Treasury Board) v. Canadian Air Traffic Control Association* to the effect that the obvious purpose of s. 51 was to maintain the employer-employee relationship with respect to the terms and conditions of employment.

[140] Furthermore, I conclude that the facts of that decision differ considerably from the circumstances of this complaint. In *Public Service Alliance of Canada*, the issue was the schedules of firefighter positions at the Thunder Bay airport. On November 3, 1981, the Alliance served notice to bargain. At that time, the firefighters worked 16-hour schedules. However, on October 29, 1981, the employer had served them notice that that schedule would be replaced by one of nine hours as of November 10, 1981.

[141] Under clause 22.05 of the collective agreement, the employer was required to consult the Alliance and to justify the change that had been made under the circumstances. The Court ruled that nothing in s. 51 of that *Act* had the effect of

invalidating an express agreement reached between the parties to make such an amendment. As a result, it dismissed the Alliance's argument that the Board's interpretation and application of clause 22.05 were contrary to the spirit of s. 51 because it allowed changes to a term or condition of employment after notice to bargain had been served.

[142] The Federal Court of Appeal's decision in *Canada (Treasury Board) v. Canadian Air Traffic Control Association* is better reasoned, reflects the purpose of the provision, and is more consistent with the express language of s. 107 of the *Act* that refers to "… each term and condition … that may be included in a collective agreement, and that is in force on the day on which the notice is given …" and not the "collective agreement". Furthermore, this Board and its predecessors have adopted that decision as it is closer to the principles in *Spar Aerospace Ltd.* and the business-as-before approach.

[143] The employer's argument also fails that a decision to end a practice that does not respect the collective agreement does not violate s. 107 of the *Act* because it not only fulfilled its duty to allocate human resources effectively but also correctly applied the relevant collective agreement.

[144] The Court also ruled that there was no doubt that a policy or practice, as long as it continued, constituted or became a term or condition of employment. When notice to bargain was served on March 7, 2014, no revocation occurred, and the practice of giving parliamentary translators the choice of time slots was in force at the time.

[145] In *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, the Federal Court of Appeal ruled that after consultation, a term or condition of employment could take the form of an agreement or the unilateral exercise of management authority. Although the collective agreement stated otherwise, the parties in that decision adopted guidelines under which overtime was voluntary for air traffic controllers at the Montreal Control Centre. Those guidelines were in place when notice to bargain was served and could have been embodied in the collective agreement. As a result, the Court decided that they were a term or condition of employment protected by the statutory freeze.

C. Violation of the statutory freeze

[146] The evidence showed that the employer unilaterally changed the practice of giving parliamentary translators the option of working days or nights while maintaining the pay supplement. On June 5, 2015, at a Union-Management Consultation Committee meeting, Mr. Lamoureux announced that the parliamentary translators' supplement would no longer be paid if they decided to change their evening schedules to work days during intersessional periods.

[147] Mr. Lamoureux instituted the change because he thought it was unfair that parliamentary translators received a supplement when they worked days. He and other translators work days and do not receive a supplement. Mr. Lamoureux's testimony reveals that he confused the pay supplement and the evening premium. There is no mention of an evening premium in the collective agreement. I conclude that the pay supplement differs from an evening premium. If the parties to the collective agreement intended to characterize the pay supplement as an evening premium, they would have included that language in the collective agreement.

D. Reprisal

[148] On June 17, 2015, Mr. Lamoureux officially announced that the supplement would no longer be paid to parliamentary translators who opted to work days. The CAPE contacted PTD management when it found out about the change. It informed the employer that its unilateral action violated the freeze provided for in the *Act* and asked the employer to withdraw the amendment and to re-establish the practice of paying the supplement for shifts worked during the day.

[149] In response to that letter, Mr. Lamoureux pointed out that the purpose of the change was to give parliamentary translators a choice of either working days and not receiving the supplement or working evenings and receiving it. He emphasized that the union refused; consequently, he re-established the evening schedule. Thus, on June 24, 2015, it was decided that from then on, parliamentary translators would no longer be able to change their evening schedules to work days during intersessional periods.

[150] I considered the employer's argument that it did not act in bad faith by changing the TRs' schedules during the intersessional period. I find that that action cannot be deemed a reprisal. However, I find that it was stubbornness on the employer's part. Such a "[translation] tit-for-tat" practice has no place in labour

relations, especially during a statutory freeze. Such conduct by the employer during collective bargaining is not conducive to good labour relations and could seriously interfere with negotiations that have been long ongoing.

[151] The employer argued that the change instituted on June 24, 2015, to address operational needs is irrelevant when assessing a violation of the statutory freeze. The *Act* provides for a duty to consult. The evidence also does not support that claim in any way. Ms. Hamel, Ms. Beaulieu, and Mr. Lamoureux all emphasized that when the change was implemented, slow periods occurred due to the election. Therefore, given the lack of evidence to the contrary, I am not convinced that operational needs actually existed.

E. Impact on parliamentary translators

[152] Ms. Hamel and Ms. Beaulieu emphasized that the change significantly impacted their respective personal lives and that it surprised them. They both mentioned that they liked their jobs. However, the impact of the change on their personal lives caused them to reconsider working for the PTD under such conditions. For over a year, they have not seen their friends or family and have suffered from lack of sleep. The impact is significant.

F. Corrective measures

[153] According to the CAPE, the Board has broad discretion under s. 192(1)(a) of the *Act* to order an employer to pay compensation for a loss. The language contains the term "including", which means that what is set out is not exhaustive. The parliamentary translators lost the enjoyment of their family and social lives as well as sleep. The loss is not economic. The Board has the power to order any corrective measures appropriate under the circumstances, including leave and parliamentary leave provided for in the collective agreement.

[154] The employer submitted that the corrective measures provided for under s. 192(1)(a) of the *Act* should be interpreted restrictively. The *Act* provides for "… compensation that is not more than the amount that, in the Board's opinion, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee … [emphasis added]". Despite the schedule change, the

parliamentary translators did not suffer any loss. According to the employer, damages should not be awarded because all parliamentary translators were compensated; they received the supplement as well as parliamentary leave, in accordance with the collective agreement.

[155] Paragraph 192(1)(a) of the *Act* states the following:

> ***Orders***
>
> ***192 (1)*** *If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> > ***(a)*** *if the employer has failed to comply with section 107 or subsection 125(1), an order requiring the employer to pay to any employee compensation that is not more than the amount that, in the Board's opinion, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee ….*
>
> [Emphasis added]

[156] The wording of the *Act* is clear. The Board has the authority to order any corrective measure it deems appropriate under the circumstances, including ordering the payment of compensation equivalent to the remuneration that, but for that failure, the employer would have paid to the employee. That power is broad and is not restricted to paying compensation for a pecuniary loss.

G. Loss

[157] The evidence showed that parliamentary translators suffered damages that significantly impacted their private lives. No direct evidence of monetary loss was adduced. The loss is intangible and not economic. They suffered from a loss of enjoyment of their family and social lives. The evidence showed that the impact was significant. The loss arose from them losing the opportunity to work their shifts during the day during the intersessional period.

[158] The damages associated with the evening shift are irreparable because the losses are not economic. Financial compensation may help remedy the losses, e.g.,

disrupted life, loss of social and family life, and loss of sleep, but is a poor substitute. I award the CAPE's request to provide additional leave with pay to parliamentary translators who usually work their shifts during the day in intersessional periods while receiving the pay supplement.

[159] The employer submitted no arguments in response to the CAPE's to grant additional leave with pay. It simply pointed out that the Board does not have the authority to award that corrective measure under s. 192(1) of the *Act* and that the parliamentary translators did not suffer any loss.

[160] Leave with pay is the most appropriate corrective measure in the circumstances. A statement to the effect that the unilateral change the employer imposed is declared null and void does not constitute an adequate corrective measure to compensate the loss suffered by the parliamentary translators. Had a violation not occurred, they would have had a choice of three time slots, including one during the day, from 10:00 to 18:00, and one in the afternoon, from 13:00 to 21:00. They would have had an opportunity to rest and to enjoy their family and social lives during intersessional periods, while receiving a pay supplement.

[161] The CAPE did not submit any evidence with respect to the number of parliamentary translators who would have chosen the day schedule. The appropriate method to use to make this determination is to review the number of parliamentary translators who were working day schedules when notice to bargain was served, on March 7, 2014, and the date on which the employer imposed the change, June 24, 2015.

[162] The appropriate formula for determining the amount of leave with pay shall be as follows. For parliamentary translators who worked the 10:00 to 18:00 schedule, one hour of paid leave for each work hour performed after 18:00; and for those who worked the 13:00 to 21:00 schedule, one hour of paid leave for each hour worked after 21:00 The leave shall be granted from the date on which the employer instituted the change, June 24, 2015, until the date of this decision. The leave is in addition to the parliamentary leave provided for in the collective agreement and shall be used in accordance with that agreement in a manner that does not disrupt the employer's operations.

V. Conclusion

[163] For all the above reasons, I conclude that ss. 190 and 107 of the *Act* were violated. The evidence is unequivocal. The employer unilaterally changed the parliamentary translators' employment terms after notice to bargain was served when it implemented the compulsory evening schedule during the intersessional period. For several years, the PTD had given parliamentary translators the choice of working days during intersessional periods while keeping the pay supplement. That practice might have been subject to a clause in a collective agreement. The *Act* provides for the employer's obligation to consult the bargaining agent for any changes during negotiations. However, it chose not to. In the absence of evidence of bad faith, I conclude that that unilateral change did not constitute a direct reprisal in response to the CAPE's letter requesting the change be revoked.

[164] For all of these reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[165] The complaint is allowed.

[166] The Board declares that the employer contravened ss. 107 and 190 of the *Act.*

[167] The Board orders the revocation of the employer's decision to no longer allow parliamentary translators to work their shifts during the day during intersessional periods while receiving the pay supplement.

[168] The change imposed on June 24, 2015, is declared null and void until negotiations are completed. For greater clarity, the negotiations are finished once a new collective agreement is reached between the parties, when an arbitral decision is rendered, or when a strike can be declared or authorized without violating s. 194(1) of the *Act.*

[169] The Board orders the employer to award one hour of paid leave for each hour worked after 18:00 during the intersessional period for translators working the 10:00 to 18:00 schedule.

[170] The Board orders the employer to award one hour of paid leave for each hour worked after 21:00 during the intersessional period for translators working the 13:00 to 21:00 schedule.

[171] The parliamentary translators covered are those who worked the 10:00 to 18:00 or 13:00 to 21:00 schedules between the date on which notice to bargain was served, March 7, 2014, and the date of the change, June 24, 2015. This leave is in addition to the parliamentary leave provided for under the collective agreement and must be used in accordance with the relevant provisions in such a way as to not disrupt the employer's operations.

[172] The Board orders the employer to post this decision in a clearly visible location in all the workplaces of the bargaining unit's employees.

[173] The Board orders the employer to send an electronic copy of the decision to all bargaining unit members no later than four weeks after the date of this decision.

[174] The panel of the Board will remain seized of this decision for 90 days in the

event of any difficulties in its enforcement.

July 26, 2016.

PSLREB Translation

Chantal Homier-Nehmé,
a panel of the Public Service Labour Relations and Employment Board