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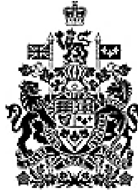
Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*



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

BETWEEN

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228

Complainant

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)

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

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

For the Complainant: James Shields, counsel

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Halifax, Nova Scotia,
June 28 to 30, 2016.

I. Complaints before the Board

[1] On August 27, 2014, the bargaining agent, the International Brotherhood of Electrical Workers, Local 2228 ("the complainant" or IBEW), filed a complaint (bearing file number 561-02-711) with the former Public Service Labour Relations Board (PSLRB) under s. 190 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") alleging that charges for parking to be implemented by the respondent, the Department of National Defence, at HMC Dockyard and Stadacona in Halifax, Nova Scotia, effective September 1, 2014, were a breach of s. 107, which specifies the requirement to maintain terms and conditions of employment during a freeze period. The bargaining agent also alleged that the respondent breached s. 185 in that it had dealt directly with members of the bargaining agent.

[2] On October 14, 2015, the complainant filed a subsequent complaint (bearing file number 561-02-769), this time with the Public Service Labour Relations and Employment Board ("the Board"), alleging that despite the first complaint, the respondent continued to make changes to terms and conditions of employment after notice to bargain had been given.

[3] In addition, the IBEW alleged that it had received complaints from its members that they were not receiving proper representation because it was allowing the respondent to flagrantly abuse the Treasury Board's parking policy and to contravene the consultation provisions of the collective agreement between the Treasury Board and the IBEW, which expired on August 31, 2014 ("the collective agreement").

[4] The bargaining agent referred to that Treasury Board policy, which contains a commitment to consult with the IBEW in the event of any changes to employee parking fees, and to article 40 of the collective agreement, which requires the IBEW and the respondent to consult on a number of matters, including such parking charges. The bargaining agent alleged that at no time did the respondent consult with it on its decision to implement parking charges.

[5] On March 15, 2016, the bargaining agent amended its second complaint. It alleged that the respondent took further action in January and February 2016 and that the parties had agreed that rather than the bargaining agent filing another complaint, it would amend its second complaint to include that action.

[6] With the consent of the parties, the Board scheduled the two complaints to be heard together.

[7] At the commencement of the hearing in Halifax on June 28, 2016, counsel for the bargaining agent advised the Board that the IBEW would not proceed with the first complaint. The bargaining agent took that position following the release of the Board's decision in *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26.

[8] In that decision, the Board concluded that the Federal Government Dockyard Chargehands Association (FGDCA) did not establish that the respondent violated the statutory freeze on terms and conditions of employment when it implemented a new monthly parking fee effective September 1, 2014, at HMC Dockyard and Stadacona.

[9] While counsel for the bargaining agent acknowledged that the IBEW did not necessarily agree with the panel of the Board's conclusion in that case, the bargaining agent did not intend to contest that decision.

[10] Counsel for the bargaining agent stated that the evidence would relate solely to the issues of consultation and direct dealing with employees under s. 186(1)(a) of the *Act*.

[11] The bargaining agent's position was that if the grievance procedure becomes ineffective, a bargaining agent is entitled to relief under s. 190(1) of the *Act*.

[12] The respondent took the position that in essence, the remaining complaint relates to an alleged failure to consult under article 40 of the collective agreement and that adjudication is the proper forum to resolve a collective agreement dispute. The respondent referred the Board to s. 191(2) of the *Act*, which gives the Board the power to refuse to determine a complaint made under s. 190(1) in respect of a matter that in the Board's opinion, the complainant could refer to adjudication under Part 2 of the *Act*.

[13] The witnesses for both the bargaining agent and the respondent referred to minutes of meetings held between the employer and representatives of bargaining agents, including the IBEW, at HMC Dockyard and Stadacona. There were two forums, the MARLANT Labour-Management Relations Committee (MARLANT LMRC) and the Base Parking Committee. The first forum was established under the leadership of the

admiral on the east coast to deal with labour relations issues. The second forum was to deal with parking issues at the base level.

[14] The following is a parking project timeline prepared by the respondent, outlining in chronological order the dates of the meetings of both forums from February 2013 until October 7, 2014. I include this summary to provide a better understanding of the evidence of the witnesses.

CFB HALIFAX PARKING PROJECT TIMELINE

19 February 2013	*MARLANT LMRC meeting held. Captain Topshee gave an overview of parking at CFB Halifax and mentioned that there are a few major projects in the works which will impact parking.*
September 2013	*Base Operations Office LCdr Dufour and Lt(N) Liddell started engaging in the initial planning process.*
10 October 2013	*MARLANT LMRC meeting held. Captain Topshee provided a parking update and elaborated on the costs related to parking at CFB Halifax. Captain Topshee also noted that a pay for parking system will be explored.*
4 November 2013	*DAOD 1004-0 – Parking and DAOD 1004-1 – Parking Administration are issued by the Vice Chief of Defence Staff.*
2 December 2013	*Parking Committee Meeting held. Announcement made that the Base will be going to scramble parking as of 21 December 2013.*
19 December 2013	*HALGEN 042/13 issued. Announced that the Base will not go to full scramble parking and a revised general parking will be implemented. Years of service requirement decreased from 12 years to 8 years.*
9 January 2014	*Base LMRC meeting held. Parking was addressed during the roundtable discussion. The change in years of service was noted, as well as the two possible base parking options and the value proposition for paid parking.*

5 February 2014	*MARLANT LMRC meeting held. Captain Topshee provided an update on parking and noted that plans for parking are contingent on the release of the fair market value study. Labour representatives voiced desire to be included in parking consultations.*
6 March 2014	*Base LMRC meeting held. A number of points regarding parking were raised: years of service to be lowered to five, fair market value study rates, how parking will be managed, and the benefits to paid parking.*
7 March 2014	*Parking Committee Meeting held. Discussion on the fair-market value study and two options for parking in the Dockyard and Stadacona presented (full scramble and pay parking).*
28 March 2014	*HALGEN 006/14 issued. Fair market value rated noted and announcement made that the years of service requirement for Stadacona and Dockyard will be reduced from 8 to 5 commencing 1 May 2014.*
9 June 2014	*HALGEN 016/14 issued. Noted that monthly parking fees will start 1 September 2014. Listed some of the essentially changes to be included in the CFB Halifax Parking Policy.*
10 June 2014	*Parking Committee Meeting held. Review of the essential changes to the CFB Halifax Parking Policy. Discussion on: new parking applications, parking inventory review and revenue allocation.*
11 June 2014	*New parking MARLANTORD 1865-0 released; replaces MARLANTORD 29-9.*
23 June 2014	*Base LMRC meeting held. Parking was discussed and labour relation representatives stated that they think the parking policy is being poorly rolled out. Captain Topshee spoke to the policies that led to the base adopting a paid parking system.*
9 July 2014	*Parking Town Hall held. Overview of upcoming changes to parking and*

	opportunity to ask questions on new parking policy.
11 July 2014	*New CFB Halifax Parking Policy posted to the MARLANT Parking Authority webpage.*
31 July 2014	*HALGEN 018/14 issued. Sale of parking passes to begin 1 August 2014. Charges for parking will not commence until 1 October, but new passes are required by 1 September 2014. Pay and display machines to be installed later in the fall.*
26 August 2014	*Only vehicles with new parking passes permitted to enter and park in the Dockyard Operations Zone.*
28 August 2014	*Revision 1 of the CFB Halifax Parking Policy posted to the MARLANT Parking Authority webpage.*
28 August 2014	*Formation Council meeting held. Captain Topshee spoke to the new parking regulations for the Dockyard Operations Zone as well as the number of passes available and plan for ships deployed. Captain Topshee also addressed the increased number of grievances.*
1 September 2014	*Pay for parking system at CFB Halifax fully implemented.*
8 September 2014	*Pay & Display machine contract out to tender.*
1 October 2014	*Parking Committee Meeting held. Review of parking pass statistics and gave update on the status of visitor parking. As well, discussed hospital parking, inventory control and signage. Minutes not yet available.*
7 October 2014	*Pay and Display machine contract awarded.*

[*Sic* throughout]

II. Summary of the evidence

[15] Captain (N) Angus Topshee, who at the material time was the base commander

for HMC Dockyard and Stadacona; Lieutenant Steve Liddell, who at the material time was the security officer for HMC Dockyard and Stadacona; and Captain Chris Sutherland, who assumed the responsibility of base commander in 2015, testified for the respondent.

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

[16] Daniel Boulet, business manager and financial secretary, and chief negotiator and labour relations officer, testified for the bargaining agent. In his position, he appoints shop stewards and representatives for the bargaining agent. Shop stewards are responsible for enforcing the provisions of the collective agreement in the workplace.

[17] Mr. Boulet testified that he first learned of the respondent's decision to start charging for parking as of September 2014 at HMC Dockyard and Stadacona when Mack Bourque, a bargaining unit member, forwarded him an email dated August 1, 2014, which had attached information from Captain (N) Topshee. Mr. Boulet stated that neither before nor since that date has he received any information from the respondent on this topic.

[18] He stated that the email included an application for a Canadian Forces Base (CFB) Halifax vehicle parking pass for civilian employees. The application set out different rates for parking passes at different facilities for general and reserve parking.

[19] The application required that each employee list his or her years of service and that he or she sign it as acknowledging that he or she had read and understood the parking terms at CFB Halifax. Attached to the application was a list of terms and conditions for using the parking pass. Mr. Boulet assumed that all his members had received this package of documents.

[20] Mr. Boulet contacted George Turner, the local shop steward, and asked him to investigate the parking situation.

[21] Mr. Boulet referred to the consultation provisions in the collective agreement. Article 40 is entitled, "Joint Consultation". Its relevant provisions read as follows:

> ***40.01*** *The Employer and the Union recognize that consultation and communication on matters of mutual interest outside the terms of the collective agreement should*

> *promote constructive and harmonious Employer-Union relations.*
>
> ***40.02*** *The Employer will recognize committees of the Union for the purpose of consultation with management with a view to resolving problems which arise within the ambit of the joint consultation process, as follows:*
>
> *(a) a National Committee of the Union consisting of not more than five (5) employee representatives of the Union;*
>
> *(b) Regional Committees of the Union consisting of not more than three (3) employee representatives;*
>
> *(c) by agreement of the parties, and where circumstances warrant, local Unit Committees of the Union, consisting of not more than three (3) employee representatives, may be established for the purpose of consultation with local management.*
>
> ***40.03*** *It is agreed that a subject suggested for discussion may not be within the authority or jurisdiction of either the management or union representatives. In these circumstances, consultation may take place for the purpose of providing information, discussing the application of policy or airing problems to promote understanding, but it is expressly understood that no commitment may be made by either party on a subject that is not within their authority or jurisdiction, nor shall any commitment made be construed as to alter, amend, add to, or modify the terms of this Agreement.*
>
> ***40.04*** *Meetings with Regional Committees and the National Committee shall take place at least every six (6) calendar months. By agreement of the parties the frequency of meetings may be increased. The frequency of meetings with local committees shall be determined by mutual agreement.*
>
> …
>
> ***40.08*** *It is agreed that the following matters will be subjects for joint consultation under clause 40.01:*
>
> …
>
> *(b) parking (current arrangements, including prices charged) …*
>
> …

[22] Mr. Boulet stated that article 40 describes the framework for consultation between the bargaining agent and the respondent and that it lists the subjects

appropriate for consultation. However, the bargaining agent and the respondent do not have committees as described in the article.

[23] The IBEW participates in a few multilateral committees at the national level twice a year with a number of other unions. There may be local committees as described in article 40; however, they are less formal.

[24] From the bargaining agent's point of view, the purpose of consultation is to provide an opportunity for the respondent to seek its advice with respect to the workforce and the respondent's operational practices. It is an opportunity for the bargaining agent to provide advice and to be consulted. The respondent does not have to follow that advice.

[25] Mr. Boulet reviewed the minutes of a number of labour-management committee meetings that preceded Capt. (N) Topshee's August 1, 2014, email.

[26] Mr. Boulet was shown minutes of a base LMRC meeting dated January 9, 2014. He noted that Mr. Turner had been present for the IBEW. Also present were the Acting Base Commander, other representatives of management, and representatives of other bargaining agents. Mr. Boulet referred to paragraphs 23 to 26 of the minutes, under the title "Roundtable", which read as follows:

> ***23.*** *It is agreed that parking will be added to Outstanding Business for the next meeting. The most recent changes saw eligibility for parking reduced from 12 years of service to 8 years of service. The Base COS office is conducting a thorough analysis of the parking and options. It is anticipated that the number of reserve spots will decrease.*
>
> ***24.*** *The Base COS only anticipates two options moving forward: 1) Freeforall scramble parking with no restrictions; or 2) Pay parking at a fair market value rate.*
>
> ***25.*** *There is the option of charging for parking spaces or providing a taxable benefit through income tax. The Base is not likely to go the route of taxable benefit because it would eliminate any revenues from parking. Currently the base receives approximately $150K/year in parking revenue which is reinvested. We would lose this ability if we go to taxable benefit.*
>
> ***26.*** *The Base is currently redoing the Fair Market Value survey. Cdr Patchell expects that it will be roughly the same as the current rate.*

[Sic throughout]

[27] Mr. Boulet stated that in the way he read the minutes, the decision had already been made to reduce eligibility or to move to charging for parking. He never received a fair market value survey.

[28] Mr. Boulet then referred to a record of discussion of the 67th Maritime Forces Atlantic (MARLANT) LMRC meeting held on February 5, 2014, which was co-chaired by Rear Admiral Newton and Mr. E. Scott, Atlantic Region consultation representative for the Professional Institute of the Public Service of Canada (PIPSC). Also in attendance were other representatives of management as well as representatives of bargaining agents, including Mr. Turner for the IBEW. Mr. Boulet referred to paragraph 15 of the record of discussion under the title, "workplace issues", which reads as follows:

> ***15.*** *Capt(N) Topshee provided an update on parking. He explained that currently we are not compliant with departmental policy on parking and we have to make a change to become compliant by 1 September 2014. The two options are to either have a pay parking system or have a full scramble parking system. The way ahead is still being determined with consideration given to the results of a parking survey that will assist to determine market value. He indicated that the survey is being done by a third party contractor and that once the final report is complete it will be made available. Capt(N) Topshee further indicated that the approximate value associated with DND locations will likely be as follows: $100/month for RA Park, $75 for Stadacona and the Dockyard, and $35 to $40 for Windsor Park and Willow Park. Mr. Brown indicated that Irving has free parking and RAdm Newton responded by stating that meetings with Irving will be held to discuss and understand their parking arrangements. In response to Mr. Turner's question regarding parking as a taxable benefit for all employees, RAdm Newton explained that some areas have zero market value and therefore there would be no taxable benefit for these areas. Mr. Brown expressed concern that while the plan for parking is being established the parking committee should have civilian labour participation to allow for consultation. RAdm Newton indicated that a committee could be formed with labour leaders involved.*
>
> *RAdm Newton determined that moving forward regular communications regarding parking will be distributed on official letterhead from the appropriate authority and that we will be aware that individuals in positions of authority do not take advantage of the system (i.e. capitalizing on privileged advance notice of changes). The issue of ensuring*

> *that spaces for PWD are cleared as soon as possible was acknowledged by the BComd.*

[29] Mr. Boulet was of the opinion that this exchange did not constitute consultation within the meaning of article 40 of the collective agreement. He characterized the exchange as a delivery of information with respect to a decision that had already been made.

[30] Mr. Boulet then referred to the minutes of the base LMRC meeting, held March 6, 2014, and chaired by Kevin Marchand, the president of the Union of National Defence Employees. In attendance were Capt. (N) Topshee, the base commander, and other representatives of management, together with representatives of several bargaining agents. Mr. Turner, of the IBEW, although invited to the meeting, had sent his regrets and did not attend. Mr. Boulet referred to the minutes of the meeting, item 2, entitled “parking”, under the heading “outstanding business”, which read as follows:

> *The base is continuing to work on the development of new parking policies. An interim measure will be to lower the eligibility for parking to those with five or more years of service. This will happen in the coming weeks.*
>
> *A Fair Market Value (FMV) Survey was completed by an independent contractor (arranged through Public Works and Government Services Canada). When a parking area has a FMV, there are three options:*
>
> *1) charge the FMV for parking;*
>
> *2) include the fair market value as a taxable benefit on the T4 statement or*
>
> *3) have wide open scramble parking.*
>
> *The Base Commander does not consider option 2 as a viable option as it significantly increases his costs to administer parking and provides no revenue to manage the parking lots and their associated costs.*
>
> *Option 3 can only be applied where there are more people looking for parking than there is parking available and there is a reasonable expectation that not everyone will find a parking space.*
>
> *Windsor and Willow Park are not eligible for scramble parking as there is more parking available than people looking for parking. Consequently, effective September 1st, all employees in Windsor and Willow Park will have to pay*

> *$40/month for a parking pass.*
>
> *NAD is also not eligible for scramble parking and effective September 1st, all employees at NAD will have to pay $25/month for a parking pass. Similarly, RA Park is not eligible for scramble parking and the price there will rise to $110/month for a parking pass.*
>
> *Based on the FMV survey, for those in Stadacona and the Dockyard that have a reserved assigned parking space, the cost will increase to $75/month effective September 1st.*
>
> *It has not yet been determined how the base will manage unassigned parking at Stadacona and Dockyard. There are two options still being considered:*
>
> *1) wide open scramble parking for all employees; and*
>
> *2) unassigned paid parking at a rate of $45/month. The chosen option will be implemented for September 1st.*
>
> …
>
> *Any money generated from parking will go back into the general revenues for the base to use against parking and other costs. Paid parking will result in a better management of the parking lots and improvement to the quality of service (e.g. snow removal, fixing potholes).*
>
> …
>
> *It was noted that a parking committee meeting is scheduled for Friday, March 7th. It was requested that these meetings be held on a regular schedule or that more advance notice be provided prior to the next meeting to ensure availability.*
>
> *It was requested that the parking committee meeting minutes be distributed to the BLMRC members. It was agreed that the minutes will be shared along with the FMV survey.*
>
> …
>
> *Mr. Marchant stated that Local 80409 is not in favour of paid parking.*

[31] After reviewing the meeting minutes, Mr. Boulet stated that he did not see any feedback from the bargaining agents. He stated that the IBEW did not have any role in developing the policy. At the time of the hearing, Mr. Boulet still had not received the fair market value survey.

[32] Next, Mr. Boulet referred to minutes of the Parking Committee meeting, held the next day, March 7, 2014, and chaired by Lieutenant-Commander K. Dufour, the base operations officer, and Lt. S. Liddell, the base security officer. Also in attendance were members of management and representatives of several bargaining agents. No one was listed as attending on behalf of the IBEW.

[33] Capt. (N) Topshee provided an update on parking, largely repeating what was stated the day before to the base LMRC, following which there was a discussion.

[34] Mr. Boulet stated that his review of the meeting minutes showed that there was no consultation between the respondent and the bargaining agent. In particular, he referred to several statements in the minutes. Under the title "fair market value study", the minutes read in part as follows:

> *The FMV study results were surprising and the Parking team is now working with new parameters that have not been considered.*
>
> *Decisions are in the works to determine the focus parking will take. Once leadership input determines the focus of the future, detailed planning can be done to implement the changes.*

[35] Mr. Boulet referred to items under a number of bullets under the title "final discussion/feedback", as follows.

…

> ***Bullet 4***
>
> *A HALGEN (a broadcast to all employees at the Halifax base) has been written and will be released on approval by higher command. The date of release is not known. The planned, un-approved, HALGEN discusses lowering the years of eligibility to 5 years. There is currently a 75-90% occupancy rate for the parking lots. This lower eligibility may fill the lots more and bring the occupancy closer to 100%. Many of the empty spaces remain in the Dockyard non-industrial areas, lots A-J, and specifically in the more inconvenient areas.*
>
> ***Bullet 5***
>
> *Ultimately, the decision to go with the pay parking system, or not, rests with the Admiral.*

…

> ***Bullet 7***
>
> *Once the choice is made for the parking option in Dockyard and* Stadacona, *a viable plan will be discussed. Many decisions will have to be made. There is a long list of questions that must be discussed and answered. Future FMV studies could change the program yet again. Studies must be done every two years and will not be done more frequently.*
>
> …
>
> ***Bullet 12***
>
> *As with other parking changes as a result of the FMV study, the increase for reserved paid parking from $65 to $75 will happen 1 September 2014. Unfortunately this change cannot be implemented with the flip of a switch. It is understood that money that is collected from paid parking is returned to the Base. If everyone has to pay, the amount collected annually can be quite significant. It is thought that if pay parking is chosen as the system for the future, then this money would be used for management of the system, snow clearing, line painting, road repair etc. Money that is not used will flow back to the Receiver General.*
>
> …

[36] Mr. Boulet referred to a "HALGEN" that was issued to all employees, including members of the bargaining agent, on March 28, 2014. He stated that it was not sent to the IBEW's business office. It was about the CFB Halifax parking fee and policy changes, and the relevant provisions read as follows:

> *1. CFB Halifax continues to make progress on updating our parking policy in order to bring it into line with the DND policy…*
>
> *2. … The years of service requirement to park in general parking at HMC dockyard and Stadacona was reduced to eight years from twelve. Effective 1 May 14 the years of service requirement for these two sites is further reduced to five.*
>
> *3. … Bases are required to update their fair market value (FMV) assessment every two years and provide notice to employees of any changes in rates charged for parking with at least 30 days notice. A new FMV assessment has recently been completed resulting in the following new monthly rates for CFB Halifax sites.*
>
> *HMC Dockyard (Reserved Parking): $75*

Stadacona (reserved parking): $75

Halifax Armoury (reserved parking): $75

R A Park (all pass holders): $110

NAD (all pass holders): $25

Willow Park (all pass holders): $40

Windsor Park (all pass holders): $40

[37] Mr. Boulet referred to the minutes of a base LMRC meeting held on May 1, 2014, under the chair of Commander Patchell, the acting base manager. Present were other representatives of management, together with representatives of the affected bargaining agents, including Mr. Turner, who was representing the IBEW.

[38] Commander Patchell advised those in attendance that the parking rules had changed as of that date to provide access to any employees or military members with five years of service or more and that September 1, 2014, would be the start date of the changes to parking rates, which were to be based on fair market value. He advised those present of the rate increases at each facility.

[39] Mr. Boulet stated that he had not been consulted; nor had he been given advance notice of the parking policy changes or of the rate increases for parking passes.

[40] On June 14, 2014, a HALGEN was issued to CFB Halifax concerning parking policy changes and setting out new monthly fees effective September 1, 2014. It also advised that a new CFB Halifax parking policy would be issued in the coming weeks.

[41] In or about June 2014, Mr. Boulet started to receive emails from his members in the Dockyard about the new rates and the new parking policy. He was not able to provide any information to them.

[42] On June 9, 2014, a MARLANT LMRC meeting was held. It was co-chaired by Rear Admiral J. Newton and Mr. Turner, representing the IBEW. Present were other representatives of management and representatives of several bargaining agents. Capt. (N) Topshee provided an update on parking, which was recorded in the minutes as follows:

As a follow up to the information provided at the February MLMRC, he confirmed that it was decided to expand paid parking to all areas with a fair market value (FMV). The scramble system is not compliant with CRA requirements therefore we have an obligation to change to an equitable system, which in this case is paid parking. The paid parking system will be implemented by September 2014. The requirement for 5 years of service for eligibility for a parking pass will remain. Capt (N) Topshee further indicated that this has been a steady evolution since 2004, with paid parking introduced within MARLANT in 2010. Maintenance services will be performed by contractors, with funds supplied from parking fees. The goal is to increase service and look at potential efficiencies such as having turnstiles. A hang tag system will replace the parking stickers and will allow up to 4 licence plates to be assigned to a hang tag.

Mr. Kiley (Union of National Defence Employees (UNDE)) enquired as to the review of other base parking systems. Capt (N) Topshee indicated that a review of other locations' parking systems was conducted. There was no FMV in Esquimalt currently but it is anticipated that it eventually will come into effect. The Canadian Forces College in Toronto is introducing a full scramble parking system. HMCS York in Toronto has paid parking at the rate of $400/Month. Although NDHQ is technically not a base, they are eliminating custodial parking. CFB Halifax is the only large base with custodial parking for which FMV exists.

Action: *Capt (N) Topshee to assess the feasibility of an early introduction of a turnstile.*

Mr. Turner requested that Capt (N) Topshee elaborate on the potential use of turnstiles. Capt (N) Topshee stated that this would mean having swipe passes that would allow access the base without requirement for commissionaires. Each turnstile costs approximately $35,000, which could be funded from parking revenues. Intention is to gradually introduce improvements, such as turnstiles and snow/ice removal as money is generated.

Mr. Ryan (FGDT&LC(E)) raised concerns regarding regular communications on parking as changes are made. Mr. Kiley raised concern that communications on parking are coming from various sources and preference would be to have Capt (N) Topshee be the single point of communication as the authority on this matter. Capt (N) Topshee responded to Mr. Ryan's concern by indicating that a draft MARTLAND HALGEN, Trident Article and Parking Policy are being reviewed and will be distributed to communicate changes. RAdm Newton responded to Mr. Kiley's concern by concurring that moving forward regular communications

> *regarding parking will be distributed from the appropriate authority.*
>
> *Mr. Turner expressed concern regarding the potential for overselling of spots to raise revenue. RAdm Newton responded that the fundamental intent is not to create a "cash cow" and that FMV will be the price for parking. Capt (N) Topshee acknowledged the concern about access to parking and that the intent is not to greatly oversell to raise revenue and so parking should be available but indicated that there is no guarantee of a parking spot.*

[43] After reviewing the minutes, Mr. Boulet stated that in his view, it was clear that the decision had been made to expand paid parking and that it was to be implemented in September 2014. He had not been made aware of the items discussed in the minutes. He was not asked for any input; nor did Mr. Turner ask him what position to put forward. He was also unaware of what Mr. Turner was doing.

[44] On June 10, 2014, a meeting of the parking committee took place, chaired by LCdr. Dufour and Lt. Liddell. Members in attendance included representatives of management and the bargaining agents, including Mr. Turner, who was representing the IBEW.

[45] Relevant extracts from the minutes of the meeting are as follows:

> *The aim of the meeting was to inform and educate parking coordinators of upcoming and effective changes to parking at CFB Halifax. Policies were discussed.*
>
> *After months of discussion, it has been decided that a number of properties at CFB Halifax will be moving to a paid parking system.*
>
> *A new MARLANTORD … has been signed and is ready for release… The new document is two pages and discusses the MARLANT Commander's intent for parking and provides the Base Commander with authority to execute parking related changes.*
>
> *There is a new Parking Policy that is written and controlled by Base Operations on behalf of the Base Commander. The new policy replaces the binders of emails, policy changes, etc. which contained much conflicting detail, making the whole program basically unmanageable. In addition, the emails provided direction for change where process was not valid or followed… The new parking policy can be updated by the Base Operations as required and immediately published on the website.*

> *The new Parking Policy is written in first draft and has been sent to select stakeholders for their review and input prior to official release. Some of the changes include the transfer of responsibility back to Unit Command for Reserved parking control. Feedback will be discussed, amendments made where necessary and it is hoped that the final document will be published by the end of June.*
>
> *Discussion will include the transition to the new pass system; there will be additional burdens on the system to make these changes….*

[46] Personnel in attendance were provided with the opportunity to voice concerns to upcoming changes. The concerns expressed were set out in the minutes, which conclude as follows:

> *Feedback is the key to ongoing success through the changes. Policies will be finalized and new passes will be issued through the summer. Once the new program is implemented, results will be reviewed and adjustments will be made as things get figured out. Public Affairs is engaged to ensure communications are done in a clear manner.*
>
> *The biggest change will be the pattern of behaviour as employees adjust to the new program.*
>
> *Parking committee meetings will continue as they provide a great forum to bring up things that are being noticed….*

[47] That afternoon, the Planning Assistant at CFB Halifax emailed Mr. Turner of the IBEW; Mr. Kiley, vice-president of UNDE in Nova Scotia; Mr. Cashin, president of the FGDCA; and Mr. Brown, president of the FGTDT& LC(E) on the subject of parking policy. The email reads in part as follows:

…

> *Base Operations is sending you a* draft *copy of the new CFB Halifax Parking Policy due to your position and experience, requesting your feedback. Please note that this* draft *has not been reviewed or officially approved by the Base Commander.*
>
> *As we value your input, we encourage you to send feedback regarding any potential problems in the process, any groups we may have missed and situations we may have overlooked directly to* [the planning assistant]. *If you have any concerns as to why we are choosing to implement this parking policy please contact LCdr Dufour. While we appreciate any feedback, there is no guarantee that it will be included in*

> *future revisions as it may not be in line with the objective or scope of the policy.*
>
> *Please send all feedback by* **Friday, June 13th at noon**. *If we do not hear back from you, we will accept that as your full support to the policy.*
>
> …
>
> [Emphasis in the original]

[48] Mr. Boulet commented that Mr. Turner would have received a copy of the email that had been sent to select stakeholders for review at 1:24 p.m. on June 10. Mr. Boulet did not receive a copy but was provided with one later on.

[49] Mr. Boulet referred to a document entitled "MARLANTORD 1865-0 Parking Policy date of issue June 11, 2014" ("MARLANTORD" means "Maritime Forces Atlantic Order"). It purports to set out a policy statement with respect to parking as well as the principles that were to be incorporated into the parking policy under the authority of the CFB Halifax base commander. Mr. Boulet stated that this is the parking policy, and it is dated two days before the time scheduled for feedback from stakeholders.

[50] On June 16, 2014, Capt. (N) Topshee issued a HALGEN to all Mr. Boulet's members working in the Dockyard, advising them as follows:

> *… there has been considerable discussion related to parking within MARLANT property. We find ourselves in a unique situation at CFB Halifax as a large base in the centre of a thriving city. As a result, a fair market value is deemed to exist at most CFB Halifax locations and, after lengthy review, it has been determined that the fairest and most equitable way of addressing the situation is to expand our current pay parking system to cover all personnel (including contractors, shift workers and visitors) who choose to drive to work and therefore need to park a vehicle.*

[51] Capt. (N) Topshee advised that HALGEN 006/14 provided additional details of the changes that were coming. Employees were advised to monitor the parking tab within the MARLANT splash page on the respondent's website to read important details. Capt. (N) Topshee concluded his communication by stating that he was open to addressing employee concerns and that he remained committed to being open and transparent as the respondent transitioned into the implementation of the policy.

[52] Mr. Boulet stated that he was not consulted on any of the items raised in the

communication and that Capt. (N) Topshee never contacted him.

[53] On June 23, 2014, a base LMRC meeting took place. Management and bargaining agent representatives attended, but Mr. Turner did not.

[54] Under the agenda topic of outstanding business, a discussion on parking took place. Mr. C. Smith, the UNDE's president of Local 80406, expressed his disappointment in the way the parking policy was being rolled out and stated that it was being done poorly. His members were echoing those concerns. He also stated that he did not want to allow his members to pay for parking without a guarantee of a spot.

[55] Mr. Marchand, the UNDE president, asked questions about how the parking issue had been raised. The Base Commander explained the background.

[56] Mr. Boulet was of the opinion that the discussion of parking at that meeting did not constitute consultation.

[57] On September 4, 2014, a base LMRC meeting was held and was chaired by Capt. (N) Topshee. Representatives of management and the bargaining agents attended, including Mr. Turner, representing the IBEW. Under the item of new business, the minutes reflect that a discussion occurred about parking for galley shift-workers and for persons with disabilities.

[58] Mr. Smith requested shift-worker parking at a discounted rate since a transit pass was not an option for people who started work at 5:30 a.m. The Base Commander stated that they would have to figure out peak periods for shift workers. There was also a discussion about a large parking lot eventually being available within the Dockyard for shift workers to use and one about reserved parking for employees with disabilities. It was argued that those employees should not be charged more for a parking spot than a person without a disability.

[59] Mr. Smith stated that he had not seen any movement on anything that had been brought up at that meeting or any other meeting. The Base Commander disagreed, stating that he had made an exception to keep the regular parking price low, explaining that the fight was not with him but with the Defence Administrative Orders and Directives (DAOD).

[60] Mr. Turner asked about people working at the Dockyard going on sea trials for three days. He stated that employees were not allowed to park for 24 hours straight. Lt. Lindell stated that some exceptions could be made, and the Base Commander stated that the intent was to allow parking for 48 hours.

[61] After reviewing the meeting minutes, Mr. Boulet stated that although questions were asked and some answers were given, in his opinion, it did not constitute consultation.

[62] On October 1, 2014, the parking committee held a meeting chaired by LCdr. Dufour and Lt. Liddell. Representatives of management and concerned bargaining agents attended. The IBEW was not listed as having a member representative in attendance.

[63] The minutes reflect that this was the first parking committee meeting since the new base parking policy had been implemented. LCdr. Dufour advised the committee that changes would continue to be evolutionary and that it was recognized that there were areas to improve. He advised that significant formal and informal feedback had been received, which was continually welcomed. He stated that solutions were not always possible for every suggestion or concern but that all would be considered. He provided an update on the current parking situation.

[64] A roundtable discussion ensued of concerns dealing with such items as shuttle service, day passes for employees who forget their passes, access to the operation zones after hours, expanding accessible parking rates for employees identified for return-to-work programs, student parking, creating a parking representative distribution list, base movement for work-related purposes, and a potential fee increase, among other things.

[65] Mr. Boulet testified that in his view, no consultation took place during this meeting. There was much discussion about mechanics but no consultation.

[66] He stated that as 2015 approached, the respondent had not contacted or consulted the IBEW about parking since the discussions held in October 2014.

[67] He stated that throughout the fall and winter of 2015 and the spring of 2016, he received complaints from employees who were not able to find parking spaces. He launched a survey and ascertained that the problem was more acute when ships were

in port.

[68] He was not involved in any discussions with the respondent. He stated that he did not know what it was doing on the base and speculated that if it was dealing with parking complaints, it was dealing with employees directly.

[69] He was referred to the amended complaint and in particular to paragraphs 17, 18, and 19. He was made aware of these complaints directly by the employees. He was asked if he had worked with the respondent to resolve them. He stated that he was never contacted.

[70] In cross-examination, Mr. Boulet acknowledged that he represented the IBEW at a national level and that Mr. Turner was the local representative. He also confirmed that he appointed the stewards.

[71] He stated that once a steward is appointed, he expects that person to report important information to him. Parking is an important issue to the IBEW. It is a national topic, and he expected Mr. Turner to report any related issues to him. Parking at CFB Halifax had been a sensitive matter for a number of years. But until June 2014, he had not heard anything about that parking issue in Halifax.

[72] He stated that parking was discussed once at the national level in meeting with the respondent's deputy minister, which was some four or five years before this hearing. Mr. Boulet stated that he did not believe that he attended that meeting, although he reviewed the minutes.

[73] He stated that Mr. Turner reported to him on the parking issue in June 2014 after the decision to charge for parking had already been made.

[74] The respondent's position was that the IBEW had participated in meetings with respect to parking before and after June 2014. Mr. Boulet responded that the respondent never notified him of meetings with respect to parking.

[75] He stated that he did not receive complaints directly from members but usually through stewards.

[76] He acknowledged that he had never sat on any of the committees that produced the meeting minutes he had referred to in his evidence. His conclusion that there had

been no consultation was based on his interpretation of the minutes. He acknowledged that as he was not present at the meetings, he could not state that the attendees were not asked for their opinions.

[77] He was shown an email dated November 27, 2013, from Capt. (N) Topshee to a number of recipients, which included bargaining agent representatives, including Mr. Turner. The subject was the parking committee meeting to be held on December 2, 2013. It reads in part as follows:

…

> *As you are aware, we have had many ongoing challenges with our current parking system and the status quo is not a sustainable option as we must now comply with two new DAODs that have been recently signed. I have attached the links to the DAODs below so that you can familiarize yourself with them.*
>
> *To address these challenges, there will be a Parking Committee meeting held on Monday, 2 December, at 0900 to discuss necessary immediate interim changes to parking as well as consider some long term options to resolve the parking situation and ensure compliance with the regulations.*
>
> *I encourage you to attend or have a representative attend the parking meeting to ensure that you are aware of the changes, and have the opportunity to voice the concerns of your members…*

[78] Mr. Boulet acknowledged that Mr. Turner was an addressee and that the document was an attempt to provide information. He did not acknowledge that it was a consultative approach but instead stated that it was an attempt to disseminate information. He was referred to the third paragraph, which refers to an opportunity to voice members' concerns. Mr. Boulet's interpretation was that the decision had already been made.

[79] It was suggested to Mr. Boulet that this reflected an intent to discuss the issue at the local level. He replied that this was not consultation and that he was not sure what role Mr. Turner was playing on the parking committee.

[80] Mr. Boulet was referred to the minutes of the base LMRC meeting held on May 1, 2014, which he had referred to in his examination-in-chief. He acknowledged that Mr.

Turner represented the IBEW on the base LMRC as well as at the local level at the MARLANT LMRC.

[81] Mr. Boulet was asked whether Mr. Turner represented the IBEW on the parking committee. He stated that it depended on the committee's terms of reference. He did not know what the respondent thought about the scope of Mr. Turner's representational role. In his view, the role might have been broader when he represented an individual IBEW member.

[82] He was referred to the parking policy MARLANTORD, dated June 11, 2014. Mr. Boulet stated that he was not happy at having only three days to respond to the policy. He acknowledged that he had seen it after he received notice of it in August. At this time, he started researching the policy change.

[83] It was suggested to Mr. Boulet that many conversations with Mr. Turner and the respondent had occurred since July 2015 concerning changes to the parking policy. Mr. Boulet replied that the IBEW at the national level had not been consulted and that even after August 2014, information had not been transmitted to him about those changes.

[84] He was asked whether after August 2014, he received information from Mr. Turner concerning the change to the parking policy. Mr. Boulet replied that his conversations with Mr. Turner were about preparing the complaint.

[85] Mr. Boulet reaffirmed that before June 2014, he had not been told anything about parking at CFB Halifax. He did not recall Mr. Turner raising with him any parking questions.

[86] Mr. Boulet was asked whether he felt that at the national level, the bargaining agent had a proactive role to play and whether he had ever tried to discuss the issue at that level. He replied that the respondent had already made its decision at the local level. As notice to bargain had already been given, his action was to file a complaint.

[87] Most of the problems that were occurring in January and February 2016 were on account of ships being in port.

[88] He was asked whether the repairs to the McKay Bridge, linking Dartmouth and Halifax, had an impact on limiting parking. He stated that he did not live in the area and that no impact of that nature had been reported to him.

[89] He was asked as to what facts supported the bargaining agent's claim that the respondent had dealt directly with employees with respect to parking. He answered that disciplinary action could be taken if employees violated the parking policy. The appendix to the policy did not reference that possibility.

[90] He was referred to the June 1, 2009, Union Management Consultation Committee (UMCC) meeting minutes. He acknowledged that he was a member of that committee but stated that he was not present at that particular meeting. He acknowledged that the minutes had been sent to him.

[91] Mr. Boulet stated that it was not his role to seek consultation with the respondent. Bargaining agents rely on the respondent to come to them with full disclosure. It is not a mutual obligation. It is not the bargaining agent's role to manage the workplace. If a policy deals with terms and conditions of employment, it is not a matter for local consultation. If there is a national policy, it should be dealt with at the national level.

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

1. <u>Captain (N) Topshee</u>

[92] From August 2012 to July 2015, Capt. (N) Topshee was the base commander at CFB Halifax. Part of his responsibility included real property and parking.

[93] When he became base commander in 2012, parking had been a long-standing issue, as insufficient spaces were available to meet the employees' parking demands.

[94] In 2004, the Canada Revenue Agency (CRA) wrote to the base commander at that time, inquiring whether the base was in compliance with tax policy. This initiated a long dialogue between CFB Halifax and the respondent's national headquarters, which resulted in a series of interim measures being taken by base commanders to reconcile the local practice with tax policy.

[95] Capt. (N) Topshee's predecessor had implemented a system under which employees paid to reserve parking. However, challenges arose with its implementation.

[96] Capt. (N) Topshee also lowered the years of service to 12 for employees to be eligible for parking. The challenge remained for employees with less than 12 years of

service who wished to park at the base.

[97] A system had emerged in which an employee with a sticker for a parking place was allowed to take up to four stickers, which led to abuse. It was concluded that the system was broken.

[98] It was also brought to the Captain's attention that there was a recurring problem of falsified parking passes and that there were problems with visitor parking. Management was looking for feedback and input. The feedback it received was that employees were not interested in paying for parking.

[99] There were broader challenges. With a quota system, there was a risk of fraud in administering parking. Alternatively, a pricing mechanism for parking was a non-starter with most of the bargaining agents.

[100] The base was constrained by the fact that the respondent had no official parking policy. The DAODs available were only in draft form and had no effect, which led to the parking issues being raised in a number of forums in 2013.

[101] The MARLANT LMRC was a forum established under the leadership of the admiral on the east coast to deal with labour relations issues. In addition, a labour relations forum was in place at the base level at CFB Halifax. The MARLANT LMRC met quarterly, while the base level met monthly.

[102] Management brought the unions together for the purpose of discussions, to hear their concerns, and to solicit their feedback.

[103] Capt. (N) Topshee briefed representatives of the bargaining agents, including Mr. Turner, at the MARLANT LMRC meeting held on February 19, 2013. The meeting touched on the parking challenges the base faced. He stated that a robust discussion took place.

[104] Under the heading "parking", the minutes of that meeting reflect the following:

> *Capt (N) Topshee opened the discussion stating that in 2010 the move had been made to scramble parking and that parking has been a long standing issue. The Capt (N) said that the current system is not working, as it is not fair and equitable. A full review is going to take place, however that does not mean changes to the current system. The Base*

> *Operations team is working on proposals and welcomes innovative ideas to solve the problem. It was also noted that it was felt that the one parking pass for all sites was not *good for* security.*

[105] Under the heading "round table", the minutes state as follows:

> …
>
> *Mr. Turner was pleased that it was a lively discussion today and that he felt it was necessary. Mr. Turner stated that he was nervous regarding the restructuring, contracting out of work and pay parking. Mr. Turner expressed that he does not feel employees should have to pay for parking as it has been 'fought' for previously.*

[106] Capt. (N) Topshee stated that the biggest change came in November 2013, when the Vice Chief of Defence Staff issued the DAODs on parking without notice.

[107] The base was informed that the DAODs were effective immediately and that there would be no transition period. The interim solution included paid reserved parking places. Under the new policy, open-scramble parking was not permitted. Years of service as a criterion for allocating parking permits was also not permitted.

[108] That left three options. First, if a fair market value existed for a parking space, employees would be charged that fair market value. Second, if the base did not charge for parking, the employees' T4 slips would show a taxable benefit for parking. Third, only if it could be demonstrated that the demand for parking far exceeded parking space availability could a scramble parking regime be used.

[109] A large number of employees wanted to park at the base.

[110] Management, having consulted with the bargaining agents and having ascertained that no one was interested in paid parking, and given that a predecessor Base Commander had ruled out showing a taxable benefit on employees' T4 slips, chose the third option, unrestricted scramble parking, which became effective after the 2014 New Year's Day holiday.

[111] Very quickly, demand outstripped the supply of parking spaces. Some employees were convinced that they had to show up for work at 5 a.m. to obtain a parking space. That is when employees began to express a preference for paid parking.

[112] Capt. (N) Topshee discussed the situation with the Rear Admiral, and it was decided that they would leave the old practice in place while the base worked on modifying its parking policy, which was to be implemented in September 2014.

[113] The base developed a new parking policy that was compliant with the DAODs, and it promulgated the policy in July 2014.

[114] A major effort was undertaken to communicate the new policy to bargaining agents and employees. Emails were sent to everyone who worked for the respondent in the Halifax region. HALGENs were sent to all commands. Articles were placed in all base newspapers. There was local media coverage. Capt. (N) Topshee ran a town hall meeting to solicit feedback from employees. Signs were also used.

[115] Capt. (N) Topshee stated that every forum available to him at the base level was briefed on the issues, to solicit feedback.

[116] He did not attend the Base Parking Committee meeting as he thought that he might impair the discussion. He left that responsibility to the base security officer and Lt. Liddell.

[117] Minutes of the MARLANT LMRC meetings were made accessible on the Internet through an internal webpage to keep employees up to date with respect to parking.

[118] Opportunities were provided for feedback. The base parking policy was adopted and implemented after September 2014. It provided for paid parking at fair market value prices at the Dockyard and Stadacona as well as for visitors. There were challenges in the implementation, and parking payments were delayed until October 1, 2014.

[119] The MARLANT LMRC and the Base Parking Committee continued to discuss the parking issue as the parking policy adopted in September 2014 was never intended to be final. It had been revised three times by the time Capt. (N) Topshee left his base commander position in July 2015.

[120] Capt. (N) Topshee stated that the approach to consultation with the bargaining agent was to ensure that the MARLANT LMRC had a chance to comment on the policy. He sent the draft policy to all bargaining agent leaders and other stakeholders to ensure that they knew the underpinnings of the need for paid parking.

[121] He knew that the paid parking proposal was not popular, but it was the only viable option within the requirements of the DAODs. He tried to be as flexible as reasonably possible.

[122] The parking issue was complicated since parts of CFB Halifax, including Willow Park and Windsor Park, had more parking spots available. It was difficult to have scramble parking at Stadacona and the Dockyard and yet charge fair market value at other locations, so it was decided to have one common parking system across the base.

[123] He stated that he tried to ensure that the bargaining agents' position was heard. When the base proposed adopting scramble parking in November 2013, management received feedback from the bargaining agents that that option would not work, so the base delayed implementing it.

[124] He ensured that the bargaining agents had strong representation on the Base Parking Committee. He committed to formal meetings with bargaining agent representatives every two months and to informal monthly meetings in his office. No minutes were taken of the informal meetings.

[125] He recalled one meeting early in 2014 in his office with bargaining agent representatives at which he shared his understanding of the problem and the available options. In his view, he did everything he could to build a policy that was compliant with the DAODs. He fully understood that the bargaining agent representatives were not going to solve his problems for him.

[126] Capt. (N) Topshee organized a base operations team to work on parking proposals. It was composed of Lt. Liddell, LCdr. Dufour, and a civilian employee.

[127] The Base Parking Committee had been long-standing; however, for some periods, it did not meet. It did meet on December 2, 2013. Capt. (N) Topshee acknowledged that its direction was limited to recommending criteria for allocating parking equitably and for managing waiting lists. As of December 2, 2013, the base was to implement the scramble parking policy.

[128] Capt. (N) Topshee sent an email with respect to the new DAODs and scheduled a parking committee meeting to discuss them. Lt. Liddell was to be the contact.

[129] Capt. (N) Topshee stated that he was not aware of any consultations the Vice Chief of the Defence Staff had held before the DAODs were issued.

[130] He was not certain whether he advised Lt. Liddell that a consultative process was required.

[131] He had no recollection of having seen a document entitled "Consultation Framework", which applied between the respondent and UNDE. It was dated May 27, 1998, and had been revised on November 30, 2009 ("the consultation framework").

2. <u>Lieutenant Liddell</u>

[132] Between May 2013 and May 2015, Lt. Liddell was the base security officer at CFB Halifax, which was a part of base operations that reported to LCdr. Dufour and Capt. (N) Topshee.

[133] Capt. (N) Topshee assigned the responsibility for managing the existing parking policy to Lt. Liddell, including creating a new base parking policy.

[134] As of May 2013, parking at the base was governed by a MARLANTORD. That order from the commander of the MARLANT directed that the Halifax base commander enforce the parking policy.

[135] The policy had not been reviewed in some time. Lt. Liddell's responsibility was to determine the parking policies that were in place and the issues that existed with respect to parking at the base, to make recommendations for a new parking policy. To do that, he worked with local staff and other respondent officials responsible for parking.

[136] No formal parking policy was in place that the base could refer to. Two MARLANTORDs had been issued on parking in or about 2011; however, they were rescinded in the spring of 2013. Attempts were being made to reissue them to bring them in line with other Government of Canada operations.

[137] Lt. Liddell spent a number of months consulting with officials in Ottawa, Ontario, including the office of the respondent's Vice Chief of the Defence Staff. He learned that the respondent had developed a new national parking policy.

[138] "DAOD 1004-0" ("the policy"), entitled "Parking", was first issued on March 17, 2009, and was modified on November 4, 2013. Lt. Liddell stated that it provides high-level policy direction. The policy statement reads as follows:

> *The DND and CF are committed to:*
>
> *1. acquiring and administering parking in accordance with the principles of responsible financial management of programmes and the sound stewardship of real property and immovables; and*
>
> *2. Ensuring parking-related benefits are administered in accordance with applicable income tax law.*

[139] The policy sets out the authorities that are accountable and responsible for local parking. In particular, base commanders are local parking authorities, and they control parking at the defence establishments for which they have management authority. They are mandated with establishing procedures for parking administration, in accordance with the policy.

[140] The policy sets out a number of operating principles, namely, the local authority must ensure that the operating principles are applied in an equitable and coherent manner. Under the heading "Personal Responsibility", the policy states as follows:

> *Under the* Income Tax Act *the cost associated with the daily commute to work is a personal responsibility and considered a personal expense. Except for a few specific provisions under the* Income Tax Act, *parking provided by an employer is considered a taxable employment benefit.*

[141] Under the title "Employer Responsibility", the policy states as follows:

> *Worker parking is generally not a DSP requirement. Charges for worker parking provided by the DND and the CF must be set at the fair market value… Should there be a taxable benefit, the DND and the CF must ensure the benefit is reported in accordance with federal and provincial income tax legislation. Worker parking may only be provided if it is consistent with the principles of the responsible financial management and the sound stewardship of real property and immovables.*

[142] As a result of discussions with officials in Ottawa, Lt. Liddell concluded that CFB Halifax was not managing parking in compliance with the policy.

[143] The Base Commander scheduled a Base Parking Committee meeting for December 2, 2013. The Committee included representatives of management and several bargaining agents, including Mr. Turner of the IBEW. The purpose of the meeting was to advise the Committee of what Lt. Liddell had learned and of the options being considered.

[144] As reflected in the email dated November 27, 2013, inviting addressees to the meeting, links to the two new DAODs were attached.

[145] Lt. Liddell stated that that meeting was his first opportunity to sit down with the stakeholders to discuss the changes taking place at the national level as reflected in the updated policies in the DAODs.

[146] The discussion focused on how those policies affected those on the base, the available options, and the changes potentially coming in the following year. The meeting minutes set out the following review of the options:

> *1) Full scramble parking with some reserved space*
>
> *2) Scramble parking would still require some sort of pass system, perhaps issued at in-routine*
>
> *3) Fully paid parking system where costs come from FMV studies and spaces guaranteed, but not in a specific spot (Dalhousie University sells 10x as many passes as space, this will not be an option on the Base and is not permitted in policy)*
>
> *4) PSP - the Base Commander has asked PSP to look into at the options of PSP taking on parking as a PSP program for the Base; PSP is part of the CF community and this would allow some leveraging versus a third party company who would provide the lowest level of service for the highest charge (PSP requires CDS approval to take on such a role, CFB Halifax is the first to approach PSP for this type of responsibility)*
>
> *5) Minimal Operational Requirement- Core provisions still have to be provided for crown vehicles, shift workers, Persons with Disabilities(PWD), etc.** this does not have to be provided for free*

[147] The minutes reflect the following from the roundtable discussion: "Decisions on paid parking have not been made and will be part of the longer term decisions in phase two. All decisions in phase two will be made with input from parking

coordinators. Risk will be identified and assessed."

[148] The committee was advised that MARLANTORD 29-9 should be rewritten by the summer of 2014.

[149] The Base Commander concluded the meeting as follows:

> *Parking representatives are asked to provide information to Base Operations regarding their requirements for reserved space by 24 January 2014. Information should include unit requirement for reserved parking and what can currently be provided.*
>
> *The next Parking Committee meeting will be held around the end of February/early March 2014 and will be held in advance of any final policy being released.*
>
> *Interim policy implementation will be the focus of the next 2 weeks. Base Operations will then engage units and start to discuss feedback and unit issues. Parking representatives are reminded to field all questions coming from their units and compile the notes to submit to Base Operations instead of individuals contacting the Base directly.*

[150] Following the meeting, some incremental changes were made. Initial steps were taken to bring the base into compliance with the policy. The years of service for obtaining a parking pass were reduced from 12 to 1.

[151] One of the things that the new policy required was to have a fair market value analysis done of the area available for parking. Lt. Liddell stated that there were two possible courses of action. One was to have scramble parking. There was no limit to the use of that option; however, the demand for parking had to exceed the supply available. Because a fair market value was attached to the parking area, the base could not guarantee that an employee would find parking. However, if the supply was greater than the demand, there was a limitation in that employees would have to be charged for parking.

[152] In the past, parking availability had been limited by a years-of-service criterion. Although there was a reasonable chance of finding parking, there was no reference to the fair market value criterion. The Base Commander lowered the years-of-service criterion on an interim basis to bring the local policy into compliance.

[153] Lt. Liddell received feedback from employees at the base by email. A significant concern was raised about opening parking to everyone. The Base Commander, in conjunction with the Head of the MARLANT, decided to make parking available to employees with eight years or more of service as opposed to one year of service.

[154] Lt. Liddell continued to work on crafting a local parking policy. He received a fair market value analysis during the winter of 2014. Any area that had a fair market value assigned to it would require payment for parking

[155] He held subsequent parking committee meetings. He received direction from the Base Commander and the Head of the MARLANT.

[156] He held a parking committee meeting on March 7, 2014, referred to earlier in this decision. A discussion took place of the fair market value study. A review of the DAODs took place, and the Base Commander indicated that the respondent was likely moving towards a paid parking system.

[157] The attendees at the meeting were advised that decisions were in the works to determine the focus parking would take in the future. Once leadership input determined the focus of the future, detailed planning could be done to implement changes.

[158] The parking committee had existed for a number of years. It was a forum for the stakeholders on the base to be informed about parking issues and for conveying intent and direction.

[159] As of March 7, 2014, progress had been made in drafting a new policy. The MARLANT directed the base to introduce pay parking and to produce a parking policy.

[160] Lt. Liddell referred to the CFB Halifax parking policy dated July 11, 2014, and noted as “Revision 0”. It provides that commencing September 1, 2014, all employees working at a location governed by CFB Halifax with an assessed fair market value would be required to pay for either reserved or general parking. As a general rule, employees at HMC Dockyard and Stadacona with five years of service or more would be permitted to purchase passes. Employees at other locations with fair market value assessments would have no years-of-service requirement. Visitors would be required to pay for parking. The policy allowed for a reasonable overselling of parking passes.

[161] On June 10, 2014, the parking committee held a meeting that was chaired by LCdr. Dufour and Lt. Liddell. Management and bargaining agent representatives attended, including Mr. Turner for the IBEW.

[162] The meeting was held to communicate pending changes to the policy to the committee and to provide information to all stakeholders. The attendees were advised that after months of discussion, a number of the properties of CFB Halifax would be moving to a paid parking system and that a first draft of the new parking policy had been written and had been sent to select stakeholders for their review and input before its official release.

[163] Copies of the draft policy were sent that day to a number of stakeholders, including, Mr. Turner. The email reads in part as follows:

…

> *Base Operations is sending you a* draft *copy of the new CFB Halifax Parking Policy due to your position and experience, requesting your feedback. Please note that this* draft *has not been reviewed or officially approved by the Base Commander.*
>
> *As we value your input, we encourage you to send feedback regarding any potential problems in the process, any groups we may have missed and situations we may have overlooked directly to* [the planning assistant]. *If you have any concerns as to why we are choosing to implement this parking policy please contact LCdr Dufour. While we appreciate any feedback, there is no guarantee that it will be included in future revisions as it may not be in line with the objective or scope of the policy.*
>
> *Please send all feedback by* **Friday, June 13th at noon**. *If we do not hear back from you, we will accept that as your full support to the policy.*

…

[Emphasis in the original]

[164] On June 16, 2014, the Base Commander emailed all employees on the subject of pending changes to parking at CFB Halifax. The email stated that considerable discussion had occurred on parking and that CFB Halifax was a large base in the centre of a thriving city. As a result, a fair market value was deemed to exist at most CFB Halifax locations. After a lengthy review, it was determined that the fairest and most

equitable way of addressing the situation was to expand the current pay parking system to cover all personnel, including contractors, shift workers, and visitors. The email concluded that the Base Commander was open to addressing concerns and remained committed to being open and transparent as the respondent transitioned to the implementation of the policy.

[165] The base created an internal website to keep employees up to date with respect to parking. On the homepage, the Base Commander included a video about the changes to the MARLANT parking policy.

[166] The Base Commander held a town hall meeting at which anyone who wished to attend could provide feedback and ask questions about the new parking policy before it came into effect.

[167] On July 31, 2014, Lt. Liddell sent a base-wide email advising of the policy change and the particulars of the new parking pass system. A HALGEN with the same information was issued on that date.

[168] During August 2014, a revision to the July 14, 2014, parking policy was made. The revision included a number of minor changes as to how the policy would be rolled out. The new policy was to take effect on August 28, 2014. New parking passes were to be issued as of September 1, with payments commencing on October 1, 2014.

[169] During the winter months of 2014 and 2015, it was necessary to deal with snow and ice control. The winter was particularly harsh, and a significant number of parking spaces became unavailable due to the weather.

[170] During cross-examination, Lt. Liddell confirmed that the only parking policy in force in 2013 was “MARLANTORD-2019”, which was approved at that time by the Maritime Force Commander.

[171] At the first Base Parking Committee meeting in December 2013, a discussion arose about incremental change. Such changes were arrived at between May 2013 and the date of the meeting. The Chief of the Defence Staff provided the direction in November 2013, encompassed in DAOD 1004-0, on parking, and in DAOD 1004-1, on parking administration. The base had seen a draft copy of the directions before they were issued.

[172] The DAODs were issued in November 2013 and reflected a policy change. The base would start making incremental changes on December 21, 2013.

[173] Lt. Liddell acknowledged that the changes had been contemplated before the committee meeting on December 2, 2013, that policies at the departmental level had been issued, and that at the time of the meeting, the base knew its options.

[174] He stated that DAOD 1004-0 reflected the government's core values of accountability and equity and responsible financial management. DAOD 1004-1 dealt specifically with parking administration. Lt. Liddell acknowledged that he had not drafted those documents and that they had been given to the base. He acknowledged that DAOD 1004-1 was very specific and that the base had to follow it.

[175] He was referred to section 7 of the policy dealing with parking allocation, specifically to section 7.6, which reads as follows:

> *If the demand is greater than the amount of worker parking available and scramble parking is not implemented, parking controls are required and the local parking authority must establish a parking committee to ensure a fair system of allocation. The local parking committee is chaired by the local parking authority, or an appropriate delegate, and its role is limited to recommending criteria for an equitable allocation of worker parking and the management of waiting-lists.*

[176] He acknowledged that the local parking committee's role was limited to the equitable allocation of employee parking.

[177] During the balance of Lt. Liddell's assignment to CFB Halifax, DAOD 1004-1 was not amended.

[178] Lt. Liddell acknowledged that while DAOD 1004-1 set out some options, the base could not change it; nor could it add options. It set out some constraints, and the base had to develop options that were compliant with the higher policy. The parking committee stayed within the jurisdiction of its mandate.

[179] He also acknowledged that the December 19, 2013, HALGEN signalled that the base was doing away with the years-of-service requirements, to line up with the principles of DAOD 1004-1. Although the base did not fully comply with those policies, steps were taken to incrementally bring it into compliance.

[180] Lt. Liddell was shown the consultation framework. He acknowledged that he had not seen it before.

[181] He was asked whether he had ever been given any instructions on what was required for consulting with the bargaining agents on parking. He answered, "No."

[182] Lt. Liddell acknowledged that the local parking committee could not change the direction in the policies but that it had the authority to influence how the policies were implemented.

3. <u>Captain Sutherland</u>

[183] At the time of the hearing, Capt. Sutherland was the base commander at CFB Halifax, a position that he had held since July 10, 2015. His predecessor was Capt. (N) Topshee.

[184] He was asked to discuss the parking issues at the base since July 2015. He stated that the feedback he had received was that many people were not happy with having to pay for parking.

[185] One of the biggest challenges was that the respondent's pay system was to be centralized and moved to Miramichi, New Brunswick, under the new Phoenix pay system. Consequentially, CFB Halifax no longer had personnel who could handle deductions from paycheques for parking. After consulting with the respondent and representatives of the bargaining agents, the base decided that employees would pay directly for parking via credit card, debit card, or personal cheque.

[186] The employees were not happy. They raised privacy concerns. The base decided to take a phased approach under which it provided free parking for the month of December 2015 to avoid employees being charged for parking twice, once under the respondent's system and again under Phoenix. Direct payment for parking was implemented in January 2016.

[187] The issue was discussed at the MARLANT LMRC meeting held on October 20, 2015. Mr. Turner was present. Capt. Sutherland communicated that there would be a new mechanism for paying for parking that would soon be launched. Mr. Scott, the PIPSC's Atlantic Region consultation representative, indicated that some employees did not like the new payment method.

[188] On November 24, 2015, Capt. Sutherland wrote to the LMRC leadership and advised them that he had met with some employees and with bargaining agent leadership to discuss the parking payment options for the CFB Halifax parking lots. He stated in part as follows:

> […] *Some members of the DND team had requested to continue to pay for parking by allotment through the Phoenix system, which, as of 2016 will be centrally managed at Miramichi, NB. I explained that this was not possible, as there was no way for the Base parking staff to confirm that DND members' parking payments had been made through Miramichi, as we (CFB Halifax parking staff) are not allowed to access a DND members' pay once the pay migration to Miramichi has occurred. At that meeting I committed to better explain the status of DND parking payments as of 30 November 2015. The update is as follows:*
>
> *I've confirmed with parking payment staff, that as of 30 November 2015, no* ***(I repeat no)*** *DND employee in Halifax will be paying for parking at CFB Halifax parking lots … through the current DND pay allotment system. This is because the Base will no longer be charging them the parking fee through this system. Basically, the Base will execute a* ***mass stoppage*** *of charging parking fees through DND allotment as of 30 November 2015 (next Wednesday).*
>
> *In accordance with Base LMRC recommendations and advice, the Base Parking Payment staff will use the month of December 2015 to verify that DND personnel are no longer being charged for parking through DND pay allotment. This is to ensure that CFB Halifax is not double-charging people when we begin charging for parking again in January 2016. This means that no DND member will be charged for parking for the month of December 2015.*
>
> …
>
> *Based on representations made at Base and Formation LMRCs, I have tasked the parking staff to investigate if there is a way to manage payments in the future through either Miramichi* (Phoenix system) *or PWGSC….*
>
> *Thanks for your continued input and advice as to how we can improve the application of this parking policy. I know that it is very challenging for all of you to have to go before your membership and explain yet another change to the way I manage parking at CFB Halifax. Since my appointment to the position of Base Commander, I have been very impressed with the professional, passionate, and empathetic way in which you all represent your respective memberships. Your*

> *input at LMRCs in which I have been present, has not been to identify a problem, but also to make a recommendation as to how we may solve the problem. This effort is most appreciated.*
>
> …
>
> [Emphasis in the original]

[189] Subsequent to this issue being addressed, Capt. Sutherland signed terms of reference for an ongoing parking policy review to ensure that the policy was as effective as possible within the framework of Treasury Board guidelines. After three months, a small team reported to him with a number of recommendations that he in turn took back to the MARLANT and to base labour relations forums.

[190] On February 23, 2016, Capt. Sutherland wrote to the stakeholders, inviting bargaining agent leadership to send representatives to a meeting on February 29 at which the purpose and intent of the program review was to be explained. The letter states in part that the respondent would hear any comments, concerns, and suggestions of the individuals on the ground executing the policy. In addition to that, bargaining agent leadership was invited to send modification proposals in writing so that they could be considered and integrated into the parking program as appropriate.

[191] Mr. Turner was not included in the invitation and wrote to Capt. Sutherland, asking to be included. Capt. Sutherland wrote back, apologizing and inviting him to the meeting.

[192] After the meeting, Capt. Sutherland committed to use the funds from parking to clear snow and ice from the parking areas. He stated that he had done his best to consult with bargaining agent representatives during his tenure.

[193] He acknowledged that he had suggested moving away from the paid parking regime since bargaining agent leadership was advocating for a free parking system. He acknowledged that he had never seen the consultation framework.

III. Summary of the arguments

A. For the bargaining agent

[194] The first complaint was filed in August 2014. The parking issues at CFB Halifax occurred between 2013 and 2016, and the complaint related to actions taken by

management in 2014 and expanded throughout 2015 and 2016. Mr. Boulet's evidence related to the facts that occurred during 2013 and 2014, the germane time frame in this case.

[195] Given the Board's decision in *Federal Government Dockyard Chargehands Association* dealing with the contravention of the freeze period, the issues to be dealt with in this case relate to direct dealing with employees and to consultation.

1. Consultation

[196] The minutes of the December 2, 2013, meeting should be analyzed in terms of Lt. Liddell's evidence. He was quite clear that as the security officer in charge of parking, he was tasked in mid-2013 with gathering all parking documents from the respondent, including from its headquarters, and formulating a parking policy, in an internal process. It is clear that no consultation with anyone from the bargaining agent occurred from mid-2013 until December 2013.

[197] Lt. Liddell confirmed that he was not given any instructions with respect to consultation; nor was he aware of the consultation framework.

[198] The minutes reveal that the meetings were all information sessions. The only dialogue that occurred took place to impart information to the participants.

[199] The minutes of the parking committee meeting of December 2, 2013, as well as the cross-examination of Lt. Lindell, reflect that he was governed by the DAODs published on November 4, 2013. A careful reading of those minutes together with DAOD 1004-1 indicates that the bargaining agents were not consulted. It was clearly an information session as to how the respondent would comply with the DAODs.

[200] Mr. Boulet reviewed the MARLANT LMRC and the base LMRC meeting minutes. He explained that in his reading, at those meetings, the participants were merely receiving information.

[201] Capt. (N) Topshee's timeline, generalizations, and comments as compared to Lt. Liddell's testimony about the parking committee's actions and its jurisdiction show that Capt. (N) Topshee agreed that that committee had limited jurisdiction.

[202] It is important to examine Capt. (N) Topshee's three options and to compare

them to those set out in DAOD 1004-1 about what could be done.

[203] There is no question that communication occurred, and there is no question that information sessions were held. However, the bargaining agent was not consulted.

[204] In terms of management dealing directly with employees, Mr. Boulet's evidence, together with the application for a CFB Halifax parking pass sent to all employees and the terms and conditions for using that pass, indicate that the respondent went directly to employees and that it did not consult the bargaining agent.

[205] Although Capts. (N) Topshee and Sutherland may have had the best of intentions, neither was aware of the agreement on the consultation framework and the obligations that it imposed.

[206] Article 40 of the collective agreement deals with joint consultation. Clause 40.01 states that the respondent and the bargaining agent recognize that consultation and communication on matters of mutual interest outside the terms of the collective agreement should promote constructive and harmonious "Employer-Union" relations. Clause 40.08 states that it is agreed that some matters will be subjects for joint consultation under clause 40.01, including parking (current arrangements, including the prices being charged) (40.08(b)).

[207] In *Reid v. Treasury Board (Department of Industry)*, 2012 PSLRB 123, the PSLRB had to deal with the issue of whether the respondent had complied with an article in the collective agreement requiring consultation before scheduling shifts that deviated from the normal starting and finishing times for operating employees. At paragraph 39, the adjudicator concluded as follows:

> *[39] In my view, the intent and purpose of clause 28.03(c) of the collective agreement is to ensure that the bargaining agent or the affected local and its members are made aware of any proposed changes to the shifts of its members and that it has the opportunity to take part in a dialogue with the employer and to raise any related concerns….*

[208] In the circumstances of that case, the adjudicator concluded that the bargaining agent had not met its onus.

[209] The bargaining agent had to be given an opportunity to dialogue with the respondent over the proposed parking changes.

[210] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 169-02-409 and 412 (19850613), [1985] C.P.S.S.R.B. No. 158 (QL), the former Public Service Staff Relations Board (PSSRB) dealt with policy grievances alleging that the respondent changed shifts without prior consultation. In defining the verb "to consult" and the noun "consultation", the PSSRB referred to the decision of Chief Adjudicator E.B. Jolliffe, QC, in *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 169-02-49 (19741123) at 28, in which he stated as follows:

> *The crux of the matter is that the bargaining agent contends "consultation" involves consulting until such time as the parties agree, while the employer insists its obligation is discharged by meeting with the representatives of the union concerned and disclosing reasons for the change it proposes to make.*

[211] The PSSRB, commenting on Mr. Jolliffe's decision, stated as follows at paragraph 27:

> *27 Mr. Jolliffe held with regard to a provision very similar to article 24.09 in the above case that the parties intended consultation to mean that, in advance of the shift change, there is responsibility on the employer to explain fully and attempt to justify the reasons for the proposed changes. In other words, the employer would be in violation of the article if it took such a decision without considering the views of the Alliance. It does not follow, however, that the employer's failure to convince union representatives of the need for the shift change constitutes a violation of the article. Indeed consultation need not result in agreement between the parties….*

[212] In *Ottawa (City) v. Civic Institute of Professional Personnel of Ottawa-Carleton*, [2000] O.L.A.A. No. 300 (QL), an arbitration board had to determine whether the respondent in that case contravened its obligation to consult the union under the relevant collective agreement, which provided that consultation with the union had to take place when the respondent intended to alter or revoke a right, benefit, or privilege enjoyed or possessed by any union employee. The arbitration board stated the following at paragraph 70:

> ***70** … It is trite to remind that the first rule of construction and interpretation is to consider the word in issue in its literal sense. To this effect, a plain reading of the word "consultation" leads us to the conclusion that it is an exchange of information and opinions between the parties.*

> *Consultation must be distinguished from an information session where there is no dialogue except to impart information. In an information situation, the purpose of such a session is to give out information. There is no requirement to afford the exchange of views or to try to convince the other party to adopt one's opinions and actions. Whereas, in the case of a consultation, both parties have an active role to discuss, express opinions and make their views known to each other. Consultation is an opportunity to have a say and an expectation of a response. Parties must confer or take regard and consider each other's views. The purpose of the consultation is to allow the Union, such as in this case, to study, consider an intended change, reply and be afforded an opportunity to present counterproposals or alternatives concerning the proposed alterations or revocations. In the Canadian Broadcasting Corporation and Communications, Energy and Paperworkers Union of Canada (supra), Arbitrator Knopf* [decision dated October 6, 1997] *had to deal with a similar language. She interpreted the obligation to consult in the following terms:*
>
>> *The concept of notice and consultation should be taken seriously. They are recognized as substantive rights. Unless substance is given to the requirement to consult, employers could act with impunity by either ignoring the requirement or engaging in the mere pretense (sic) or façade of consultation. Therefore, consultations are often considered as a precondition of the employer being able to proceed, even if the employer has the unilateral right to make the final decision. Further, consultation implies but goes far beyond the mere giving of information. It also implies the willingness to receive counsel and advice in return. It demands that the party with the obligation to consult remain open to suggestions and input before the final decision is made. But it does leave the right to make the final decision with the employer. The right to consult is not the right of veto power. The right to consult does not take away management's right to make a decision. (page 31)*

[213] The parties in this case defined the word "consultation" in the consultation framework. The parties to that framework state the following at page 3:

> *Consultation is a process of seeking and providing information and advice, exchanging views, and discussing problems in an atmosphere of mutual respect and trust. To be effective, the process must be motivated by a commitment of both sides to sharing information, to listening to the opinions and observations of the other, and to working together to solve problems and resolve differences. Consultation in a labour relations context can be defined as:*

> *full disclosure, to the maximum extent possible, of contemplated actions to the representatives of the other party, prior to decisions being taken, with a view to ascertaining the full implications of those actions on the legitimate interests of the other party and resolving any problems which are identified.*

[214] Based on the evidence, the consultation required by that framework did not occur in this case. Full disclosure did not occur before decisions were made or attempts were made to resolve problems.

2. <u>Direct dealing with employees</u>

[215] In *Federal Government Dockyard Trades and Labour Council (East) v. Treasury Board (Department of National Defence - includes DRDC)*, 2015 PSLREB 25, the Board dealt with a policy grievance alleging that the respondent in that case had failed to pay premium pay to the grievors in accordance with the relevant collective agreement by changing their shifts for time they spent at the Fleet Maintenance Facility in Cape Breton, Nova Scotia. The respondent argued that the grievors had consented to an amendment to their shift schedule so as to bar any claim for premium pay.

[216] The article of the collective agreement in question specified that amendments to the shift schedule required the parties' mutual consent. The Board was not persuaded that the word "parties" in the article meant the respondent and the individual employees whose shift schedules were being amended. The Board stated as follows at paragraphs 86 and 87:

> ***86*** *… as a general rule, the employer is not entitled to negotiate changes to the collective agreement with individual employees. To permit such negotiation would undermine the role of the bargaining agent. It would also lead to confusion in the workplace, with some employees negotiating rights or obligations different from their co-workers and different from those spelled out in the collective agreement. The general rule would have particular application when, as in this case, the employer is seeking to amend an expressly mandated shift schedule, the hours of which are clearly and specifically spelled out in clause 15.02. This conclusion is particularly true when in normal course under the collective agreement, an employee who works anything other than his or her regular working hours is entitled to other benefits under other clauses.*

> ***87*** *Taking all of this together, I am satisfied that the mutual consent that is required in clause 15.06(c) of the collective agreement is that of the employer (or its authorized delegate) and the Council (or its authorized delegate)…*

[217] In *The Professional Institute of the Public Service of Canada v. Treasury Board*, 2000 PSSRB 5, the PSSRB dealt with a policy grievance alleging that the respondent in that case had contravened the consultation provisions of the relevant collective agreement by not allowing the bargaining agent in that case to attend focus group meetings at the London Tax Services Office (LTSO) that were held with management and employees in the bargaining unit.

[218] In addition, it was alleged that the respondent had committed an unfair labour practice by interfering with the representation of employees by the bargaining agent by engaging in direct consultation with the employees on bargaining agent issues without its presence.

[219] The PSSRB upheld the unfair labour practice complaint and stated as follows at paragraphs 43 and 44:

> *[43] … Nevertheless, I conclude that the respondents' deliberate exclusion of PIPSC representatives from the LTSO focus groups, where bargaining issues were at times discussed, interfered with the bargaining agent's ability to represent its members.*
>
> *[44] The focus groups were set up to discuss directly with employees and without union participation issues of common interest. Employees participating in these meetings were encouraged to continue discussions on these issues with team leaders and other employees during working hours. Such a practice can only make it more difficult for the union to represent its members and constitutes interference in the representation by PIPSC of these employees contrary to subsection 8.(1) of the* PSSRA*.*

[220] In the case before me, the bargaining agent had no knowledge that the respondent was dealing directly with employees until a bargaining unit member emailed to Mr. Boulet the application for a paid vehicle pass for CFB Halifax on August 1, 2014.

[221] In *Commercial Bakeries Corp. v. CAW-Canada, Local 462*, [2003] O.L.A.A. No. 728 (QL), the arbitration board considered a policy grievance claiming a violation of the

relevant collective agreement with respect to unilateral return-to-work procedures for employees receiving Workplace Safety and Insurance Board benefits. The union alleged that the procedures undermined its ability to represent its members and requested that all return-to-work procedures be mutually agreed to by the union and the respondent.

[222] The arbitration board concluded that the union had the right to represent members in their dealings with the respondent in cases in which an employee was injured or disabled, attempts were made to accommodate the employee with modified work, and some kind of adjustment was being made with respect to the employee's hours of work and working conditions, including remuneration. The arbitration board also concluded that the union was entitled to represent an employee when an issue arose concerning the employee's return to work.

[223] The arbitration board's decision was derived from both the union's exclusive right to represent employees as well as its duty under human rights legislation. Dealing with the union's exclusive right to represent employees, the arbitration board stated in part as follows at paragraph 8:

> *[8] … The nature of the relationship between the employer, the Union and the employees has been defined by the Supreme Court of Canada in Syndicat catholique des employees de magasins de Quebec Inc. v. Cie Paquet Ltee (1959), 18 D.L.R. (2d) 346 (S.C.C.) at p.353-354 and McGavin Toastmaster Ltd. v. Ainscough (1975), [1976] 1 S.C.R. 718, 54 D.L.R. (3d) 1 (S.C.C.). The relevant impact of those decisions on this case is that Union recognition stands "at the forefront of the substantive terms of the Collective Agreement" and the Collective Agreement tells the Employer on what terms it must conduct its relations with its employees. Also, the Employer is bound to regulate its relationship with its employees according to the agreed terms of the Collective Agreement and "there is no room left for private negotiations between employer and employee". The arbitration decisions also confirm that the employer has no right to bypass the Union in dealing with individual employees. See e.g. Atomic Energy of Canada Ltd. and Society of Professional Engineers and Associates (2000) 90 L.A.C. (4th) 129 at p. 142 (O.B. Shime, Q.C.). For the Employer to claim that it has the right to deal with an individual employee without the presence of the Union is tantamount to individual bargaining with the bargaining unit member and denies the employee the substantive right of representation in matters which are of significant*

consequences to that employee.

[224] The repeated disregard for the terms of the collective agreement as well as the fact that the respondent continued to disregard them after the complaint was filed over the failure to consult, which it did not even file a reply to, constituted an unfair labour practice.

[225] This issue has not been the subject of a decision by the PSLREB, but the Canada Industrial Relations Board (CIRB) has rendered a decision with that subject.

[226] In *United Transportation Union v. Canadian National Railway Company*, 2005 CIRB 315, the union alleged that the respondent in that case had engaged in unfair labour practices, contrary to the provisions of the *Canada Labour Code* (R.S.C. 1985, c. L-2; *CLC*), which had rendered the arbitration process ineffective.

[227] The respondent raised a preliminary objection, arguing that the CIRB should exercise its discretion to defer the union's complaints to grievance arbitration, as they involved the interpretation and application of the collective agreement.

[228] The *CLC* provides that the CIRB may refuse to determine an unfair labour practice complaint in respect of a matter that, in its opinion, the complainant could refer to an arbitrator or arbitration board under a collective agreement.

[229] The union claimed that the breaches of the collective agreement also constituted violations of the *CLC* and that the arbitration process could not effectively deal with its complaints.

[230] The CIRB refused to defer two grounds of the unfair labour practice complaint to arbitration on the basis that the respondent had repeatedly violated the same provisions of the collective agreement even after several arbitral awards and cease-and-desist orders were made.

[231] In this case, the parties agreed to the interpretation to be given to the word "consultation". The grievance procedure has become ineffective. The bargaining agent is entitled to relief.

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

1. How does the essential character of this dispute constitute an unfair labour practice?

[232] The matter before the Board is an unfair labour practice complaint made under s. 190(1)(g) of the *Act* in which it was alleged that the respondent committed an unfair labour practice within the meaning of s. 185, which defines "unfair labour practice" as anything prohibited by ss. 186(1) or (2), 187, 188, or 189(1).

[233] Subsection 186(1) provides that neither the respondent nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the respondent, shall do the following: "… participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization …".

[234] Most of the evidence was on consultation. The bargaining agent wanted to be consulted before any parking changes were made at CFB Halifax.

[235] Allegations were made that the respondent did not respect article 40 of the collective agreement, which deals with joint consultation between the IBEW and the respondent.

[236] The usual route for determining issues of a breach of the collective agreement is filing a grievance under Part 2 of the *Act* under s. 209(1)(a) or a policy grievance under s. 220. However, this is not the route that the bargaining agent chose. It chose to argue an unfair labour practice complaint. The procedure for making such a complaint should not be distorted and transformed into a procedure for filing one alleging a breach of a collective agreement.

[237] Section 191(2) of the *Act* provides that the Board may refuse to determine a complaint made under s. 190(1) in respect of a matter that, in its opinion, the complainant could refer to adjudication under Part 2.

[238] The legislator foresaw circumstances such as those presented in this case.

[239] To justify that the Board should determine this complaint, the bargaining agent referred to the CIRB's decision in *Canadian National Railway Company*. Even if some

paragraphs of the decision are read in isolation, care must be afforded to the details. In that case, there is evidence that the union was successful at arbitration on a number of occasions and that arbitrators granted cease-and-desist orders against the respondent in that case, and yet the respondent continued to breach the relevant collective agreement. Under those circumstances, the CIRB found that the union could bring an unfair labour practice complaint.

[240] Those are not the facts in this case. In that case, the conclusion was made that the grievance procedure had become ineffective. In the case before me, no group or policy grievance was referred to the Board. There is no evidence that the grievance procedure is ineffective.

[241] In *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2006 PSLRB 29, the PSLRB considered a complaint alleging that the respondent in that case had violated relevant statutory freeze provisions by cancelling telework arrangements for employees after notice to bargain had been given. It was also alleged that the joint consultation provision of the relevant collective agreement had not been adhered to as the bargaining agent in that case first found out about the telework cancellation from the affected employees.

[242] The PSLRB concluded at paragraph 84 that no contravention of the bargaining freeze provision had occurred as the right to cancel telework was available to either party before notice to bargain was served.

[243] The PSLRB also concluded that there was no reason to address the issue of consultation. It stated at paragraph 85 as follows:

> *[85] I would note that the appropriate forum for the alleged misapplication of the Telework Policy to individual employees by virtue of the employer's failure to consult is the grievance procedure and some of the affected employees availed themselves of that process. Mr. Quebec's reply at the second level of the grievance procedure seemed to satisfy the grievors, as they did not pursue their grievances any further. Certainly, as with any claim for damages, the grievors had the burden of proving, on a balance of probabilities, that the CRA was at fault and acted negligently or in bad faith…*

[244] Article 40 of the collective agreement deals with joint consultation. The parties agreed that parking would be a subject for joint consultation under clause 40.01.

[245] Not embedded in the collective agreement is any limitation to the respondent's ability to manage its operations. It has the authority to manage its parking lots under ss. 7 and 11 of the *Financial Administration Act* (R.S.C., 1985, c. F-11).

[246] What could be confusing is that free parking at CFB Halifax could be considered a privilege falling under the *Act*'s statutory freeze provision.

[247] Nothing in the Board's decision in *Federal Government Dockyard Chargehands Association* stated that the respondent could not charge for parking or that it had to negotiate such a provision at the bargaining table. The Board stated as follows at paragraph 55:

> *[55] … The issue before me is not whether the employer's decision to alter its parking policy and to charge a monthly parking fee was well motivated, legitimate, or sound. Nothing in the collective agreement prevented the employer from charging a parking fee on government-owned properties before or after the freeze.*

[248] Clause 40.01 of the collective agreement provides that the parties recognize that consultation and communication on matters of mutual interest outside the terms of the collective agreement should promote constructive and harmonious "Employer-Union" relations.

[249] Clause 40.08 provides that parking is a matter for joint consultation under clause 40.01. Nothing in clause 40.01 states that the respondent shall consult with bargaining agents on parking. The bargaining agents were consulted and were kept in the loop.

[250] Clause 40.02 of the collective agreement lists a number of potential committees for the purpose of consultation. At this hearing, Mr. Boulet testified that those committees do not exist. He denied that the bargaining agent had any responsibility for establishing consultation committees, yet it does not want to recognize the committees that the respondent established. The respondent sought to consult with the bargaining agent via several committees.

[251] Nothing in clause 40.02 of the collective agreement gives the bargaining agent the right to negotiate and obtain an agreement with the respondent.

[252] Clause 40.03 recognizes that a subject suggested for discussion may not be within the authority or jurisdiction of either management or bargaining agent representatives. It also recognizes that consultation may take place solely for the purpose of providing information, including discussing policy application or airing problems to promote understanding, and that no commitment may be made by either party on a subject not within its authority or jurisdiction.

[253] The consultation framework contemplates a number of different levels of consultation, including a national union-management consultation committee to deal with department-wide policies, programs, and strategic issues. Intermediate-level and local committees were to address operational and tactical issues, respectively.

[254] The minutes of the Union Management Consultation Committee (UMCC) meeting dated June 1, 2009, reflect that DAODs on the parking issue had been published and distributed electronically to bargaining agent representatives on the committee on April 28, 2009. Mr. Brown indicated that before the final drafts were to be published, it was his understanding that they were to be provided to the bargaining agents, which had requested to be members of the parking committee. The Rear Admiral in charge at that time indicated that he was aware of that request and that he would review it. Mr. Boulet was a member of the committee at that time but did not attend the meeting.

[255] The minutes of the same committee's meeting dated November 30, 2009, reflect that the Treasury Board was to issue new parking directions before the end of that year that might have required changes to the then-current DAOD. The minutes note that the bargaining agents would be advised and consulted. And a secretarial note states that the response to the bargaining agents' parking questions was sent to them on November 30, 2009. Mr. Boulet is noted as attending this meeting.

[256] The Board heard the respondent's evidence. Lt. Liddell would not have changed anything. The Base Parking Committee members had input into the options. He stated that he wanted to have the pulse of the people. Management met the requirements of clause 40.01 of the collective agreement.

[257] The consultation framework came from the UMCC and involved members of the Defence Management Committee and all bargaining agents representing the respondent's employees. This document has nothing to do with article 40 of the collective agreement.

[258] The complaint relates to a lack of consultation concerning what happened in June 2014 when the bargaining agent learned that the respondent had sent several email notices to employees announcing that it would begin charging for parking effective September 1, 2014. It was alleged that no notice was sent to the bargaining agent and that it was not otherwise consulted.

[259] The bargaining agent did not raise lack of consultation with respect to the issuance of the DAODs, which took place in November 2013. The original complaint was filed on August 27, 2014. Had it alleged such a lack of consultation, it would have been done well after the 90-day time limit for making a complaint under s. 190 of the *Act*.

[260] The bargaining agent argued that Mr. Turner was acting on his own without telling the bargaining agent's national office what he was doing. Mr. Boulet appointed the stewards, including Mr. Turner, who acted at all times with the CFB commander as if he was the IBEW's representative. The respondent wanted to consult. It does not have the responsibility of telling the bargaining agent how to conduct its business.

[261] Mr. Turner received the DAODs and all the documentation. If there were problems with the DAODs in November 2013, the bargaining agent was aware of them.

[262] The bargaining agent referred to the PSLRB's decision in *Reid*, and to the extract from the reasons at paragraph 39 in which the PSLRB stated that the intent and purpose of the collective agreement's consultation clause was to ensure that the bargaining agent or the affected local and its members would be made aware of any proposed changes to its members' shifts and that it would have the opportunity to dialogue with the respondent and raise any related concerns.

[263] The bargaining agent in this case was made aware of the proposals and was given an opportunity to dialogue and to raise any concerns. The goal of consultation was achieved.

[264] In *Canadian Association of Professional Employees v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 100, the bargaining agent in that case filed a policy grievance in which it alleged that the respondent had violated the workforce adjustment directive in part by failing to comply with the section in it that required it to advise and consult with the bargaining

agent. The PSLRB stated as follows at paragraphs 30 and 31:

> ***30*** *In* Canadian Broadcasting Corp. v. Communications, Energy and Paperworkers Union of Canada*, [1997] C.L.A.D. No. 554, the arbitrator explained what was meant by a contractual duty to consult. This is what the arbitrator stated at paragraph 113:*
>
>> … Further, consultation implies, but goes far beyond the mere giving of information. It also implies the willingness to receive counsel and advice in return. It demands that the party with the obligation to consult remain open to suggestions and input before the final decision is made. But it does leave the right to make the final decision with the employer. The right to consult is not the right of veto power. The right to consult does not take away management's right to make a decision.
>
> ***31*** *As is implicit in the passage just quoted, when an employer has a contractual duty to consult, the onus is on the union to raise issues and move the consultation process forward. An employer's compliance with a provision such as section 1.1.12 of the* WFAD *is judged by its response to the bargaining agent's request to meet and discuss the issues under consideration.*

[265] The respondent submitted that in this case, the bargaining agent did not have veto power and that the respondent had the right to manage parking. The goal of consultation was met.

[266] The bargaining agent operated in the consultation process through its local representative. If that was not the case, it should have advised the respondent. Even after the complaint was filed, Mr. Turner continued to sit in on the Base Parking Committee meetings. When he was not available, someone replaced him. The bargaining agent's local representatives held themselves up as having the authority to speak on behalf of the bargaining agent.

[267] An unfair labour practice complaint is not the forum in which to address the alleged failure to consult. This matter should have been dealt with through the grievance procedure.

[268] With respect to the secondary allegation that the respondent negotiated directly with its employees over parking fees, the respondent is entitled to communicate with its employees and to keep them advised of developments in the workplace. It fulfilled its obligation to consult with the bargaining agent.

C. <u>Bargaining agent's reply</u>

[269] In reviewing s. 191 of the *Act*, which gives the Board discretion to refuse to determine an unfair labour practice complaint if it is a matter that could be referred to adjudication, note the CIRB's decision in *Canadian National Railway Company*. The provisions in both the *CLC* and the *Act* are comparable. The Board should interpret both Acts consistently.

[270] It is not the bargaining agent's position that it had veto power. There is no evidence of that. Article 40 of the collective agreement deals with consultation. The nature of the consultation is reflected in the consultation framework.

[271] Mr. Boulet did not testify that consultation could take place only at the national level. At the local level, only information sessions, not consultation, took place.

IV. <u>Issues to be determined</u>

[272] The matter before the Board is a complaint under s. 190(1) of the *Act* alleging that the respondent engaged in an unfair labour practice by its failure to consult with the bargaining agent when it implemented new monthly parking rates effective September 1, 2014, at HMC Dockyard and Stadacona. The bargaining agent claimed that when the grievance procedure becomes ineffective, it is entitled to relief under s. 190(1) of the *Act*.

[273] The respondent stated that in essence, the complaint relates to an alleged failure to consult under article 40 of the collective agreement and that the proper forum for resolving a collective agreement dispute is adjudication. The Board should refuse to determine the complaint as it could have been referred to adjudication under Part 2 of the *Act*.

[274] The bargaining agent also alleged that the respondent dealt directly with employees and that it negotiated parking fees with them. Thus, it committed an unfair labour practice contrary to the provisions of s. 186(1)(a) of the *Act*.

[275] The respondent denied that it negotiated parking fees directly with employees. Instead, it merely communicated information to them and in any event met its obligation to consult with the bargaining agent under the collective agreement.

[276] Given the above, I need to address the two matters raised in the complaint, namely: consultation, and direct dealing with employees.

V. Reasons

A. Consultation

[277] Should the Board exercise its discretion under s. 191(2) of the *Act* and refuse to determine this aspect of the complaint relating to a failure to consult on the grounds that the matter could have been referred to adjudication under Part 2 of the *Act*?

[278] The bargaining agent contended that the parties already agreed to the interpretation to be given to the word "consultation" in article 40 of the collective agreement in the consultation framework.

[279] The IBEW submitted that based on the evidence, a failure to consult occurred within the meaning of the consultation framework and that in several meetings with bargaining agent representatives, including of the IBEW, the participants merely received information.

[280] Relying upon the CIRB's decision in *Canadian National Railway Company*, the bargaining agent argued that the grievance procedure has become ineffective and that the Board should hear the complaint filed under s. 190(1) of the *Act*.

[281] The respondent argued that the preponderance of the evidence heard in the case relates to consultation. The bargaining agent's position is that the respondent did not respect article 40 of the collective agreement.

[282] The usual forum for addressing issues of a breach of a collective agreement is filing a grievance under Part 2 of the *Act* pursuant to s. 215(1) in the case of a group grievance or a policy grievance under s. 220.

[283] The respondent stated that pursuant to its authority under s. 191(2) the Board should refuse to determine the complaint made under s. 190(1) of the *Act* as it is a matter that could have been referred to adjudication under Part 2 by the IBEW.

[284] Section 191(2) of the *Act* provides that the Board may refuse to determine a complaint under s. 190(1) in respect of a matter that in its opinion the complainant could refer to adjudication under Part 2 of the *Act*.

[285] In *Canada Revenue Agency*, the PSLRB concluded that the appropriate forum for an employer's failure to consult is the grievance procedure. That case involved an alleged misapplication of a telework policy to individual grievors.

[286] In the comparable provisions in the *CLC* that authorize the CIRB to refuse to determine an unfair labour practice complaint in respect of a matter that in the CIRB's opinion the complainant could refer to an arbitrator or arbitration board under a collective agreement, the CIRB and its predecessor, the Canada Labour Relations Board (CLRB), developed criteria to govern the exercise of its discretion.

[287] In *Canadian Union of Postal Workers v. Canada Post Corporation* (1989), 76 di 212, the CLRB set out the criteria to govern exercising its discretion under the *CLC*.

[288] The case involved an unfair labour practice complaint in which the Canadian Union of Postal Workers complained that the Canada Post Corporation was not permitting union members to hold a meeting in its cafeteria for union business after working hours. The CLRB concluded that it was an appropriate case to defer to arbitration as the relevant collective agreement contained provisions dealing with the matter in dispute and a rights arbitrator had the authority to remedy the dispute.

[289] The CLRB discussed its past practice with respect to the criteria used to exercise its discretion, which it articulated as follows:

…

> *The Board set out how it would approach section 98(3) in* ***Air Canada*** *(1975), 11 di 5; [1975] 2 Can LRBR 193; and 75 CLLC 16,164 (CLRB no. 45); and* ***Bell Canada*** *(1977), 20 di 356; [1978] 1 Can LRBR 1; and 78 CLLC 16,126 (CLRB no. 97). In the* ***Air Canada*** *decision, wherein the Board dismissed the complaint as being untimely, the Board had the following to say about its powers under section 98(3), (then 188(2)):*
>
> > *"The very wording of Section 188(2) of the Canada Labour Code (Part V) makes it clear that the sole fact that a matter may be referred to arbitration under a collective agreement does not automatically deprive the Board of its jurisdiction to hear and determine an unfair labour practice complaint involving the same issue. However, the Board is permitted to refuse to exercise its jurisdiction. Nevertheless, it seems clear that the Board should be careful not to interfere with the grievance arbitration procedure established under a collective*

> *agreement, in accordance with the requirements of the Canada Labour Code (Part V).”*
>
> *(pages 13; 195; and 1220)*

*In **Bell Canada, supra,** the Board took a very different tack:*

> *“The Board has full and complete jurisdiction to decide matters relating to complaints of unfair practices and does not intend to decline such jurisdiction except for very serious reasons and only after a close study of each case submitted to it.*
>
> *In certain cases, even if an arbitration procedure is provided for in a collective agreement, the Board will hear and determine a complaint of unfair practice.”*
>
> *(pages 360; 4; and 372)*

The Board then went on to set out guidelines that included five criteria which the Board would look for before deciding if it should defer to arbitration:

> *“… The first factor is naturally the existence of a collective agreement. The second factor is the presence or absence in the collective agreement of concrete provisions concerning anti-union discrimination which may allow recourse to the grievance procedure and ultimately, to arbitration. A third factor is the actual text outlining the grievance procedure, the universality of its application to employees and the possibility of filing a grievance in the event of an alleged violation of an anti-discrimination clause of this nature. A fourth factor is the connection which exists between the grievance procedure and the arbitration procedure itself, that is, the possibility of a given grievance being referred to arbitration. Some collective agreements limit the number and type of disputes that may be referred from the grievance procedure to arbitration. Lastly, the jurisdiction of the arbitrator and the arbitration tribunal must be examined. Some collective agreements limit this jurisdiction or the powers of the arbitrator or the arbitration tribunal in granting remedies or redress.*
>
> *If the indications concerning each and every one of the above factors are positive, then it is more likely that the Board will exercise its discretion pursuant to section 188(2) of the Code.”*
>
> *(pages 365; 8; and 375)*

*The approach expressed in **Bell Canada, supra,** has been followed by the Board to this day, with the result being that*

the Board rarely defers to arbitration pursuant to section 98(3). In fact, it has become fashionable for trade unions bringing complaints to the Board under section 97 to allege anti-union animus and then to point out that their collective agreement contains no anti-union animus provisions or remedies, to convince the Board that it should not defer to arbitration. Applying the five-step criterion from ***Bell Canada****, the Board is almost obligated to hear all such complaints. In the respectful opinion of this panel of the Board, this should not be so. We think perhaps the time has come for the Board to take another look at its practice vis-à-vis section 98(3) and lean towards giving more priority to the private dispute resolution mechanisms that are mandatory in each collective agreement under the Code. Particularly where there has been a long-standing relationship between the parties, where the dispute arises from their day-to-day operations and where there are no important matters of public policy under the Code at stake.*

Under Part I of the Code, specifically section 57, parties to collective agreements are ***required*** *to provide a means to resolve* ***all*** *differences arising from their collective agreement without work stoppage. This places an onus on the parties to use their dispute resolving mechanisms responsibly, using give and take to settle issues during the various steps in the grievance procedure, leaving only the unresolvable matters for arbitration. It is our view that this Board ought not to interfere with this phase of the free collective bargaining process by making itself available as an alternate forum thereby allowing the parties to abrogate their responsibilities. Where there is a collective bargaining regime in place, it seems to us that the Board should deal only with complaints from the parties where there are circumstances going beyond the scope of the collective agreement which would warrant the Board's intervention. This is certainly the approach being taken by the courts who have been showing more and more deference to the arbitration process over the past decade - see* ***St. Anne Nackawic Pulp and Paper Co. Ltd., v. Canadian Paper Workers Union, Local 219****, [1986] 1 S.C.R. 704.*

Further, there have been some significant developments in the field of labour relations since 1977 when the ***Bell Canada*** *decision came down. One such development was the introduction of the duty of fair representation into the Code in 1978. Both the* ***Air Canada*** *and* ***Bell Canada*** *cases involved complaints by individuals who were included in bargaining units and who elected to come to the Board. In both cases, the Board was obviously grappling with the problem of the capability of the individuals to have their complaints fully resolved. Hence the criteria flowing from the* ***Bell Canada*** *decision to ensure that the relevant collective*

> *agreement contains provisions and remedies to suit the particular circumstances. In the **Bell Canada** case, the Board specifically voiced its concern that the incumbent Association, which held the bargaining rights for Mr. Simpson's bargaining unit, would not vigorously pursue his grievance through to arbitration. Today, this would not be a concern for the Board when assessing the situation under section 98(3) because of the duty of fair representation provisions in the Code. If a bargaining agent refuses to process a grievance to arbitration on discriminatory grounds, there is redress to the Board through section 37 (previously section 136.1). It seems incongruous, considering the plethora of decisions of the Board in the realm of the duty of fair representation which acknowledge the need for a wide latitude for bargaining agents when deciding whether to pursue a grievance, that the Board would retain a criterion for the purposes of section 98(3) concerning the possibility or the likelihood that a bargaining agent would take a grievance all the way to arbitration. In a free collective bargaining system this is surely a decision for a bargaining agent to make without the pressure of a threat of alternative proceedings before the Board at the instigation of the grievor.*
>
> *When dealing with complaints by individuals who are included in bargaining units represented by trade unions, the Board should be extremely cautious not to interfere with the union's exclusive right to represent the bargaining unit collectively.*
>
> *Let us be very clear, we are not suggesting for one moment that individuals or trade unions acting on their behalf should not be heard by the Board in circumstances where their rights under the Code have been interfered with. What we are suggesting is simply that the Board be more flexible than it has been in the past when deciding whether to defer to the grievance-arbitration process.*
>
> …
>
> [Emphasis in original]

[290] The CIRB, in *Canadian National Railway Company*, summarized as follows the further evolution of its policy and the criteria it would use when determining whether to defer a matter to arbitration:

…

> *[59] In* Canadian Museum of Civilization Corporation *(1996), 102 di 130; 32 CLRBR (2d) 146; and 96 CLLC 220-067 (CLRB no. 1181), the CLRB revisited the criteria set out in* Bell

> Canada, supra, *and* Canada Post Corporation, supra*. The Board first reviewed the rationale behind section 98(3) of the* Code *by analyzing the previous case law just described and then, against this background, reviewed the effect of the then recent decisions in* Weber v. Ontario Hydro, *[1995] 2 S.C.R. 929; and* New Brunswick v. O'Leary, *[1995] 2 S.C.R. 967.*
>
> …
>
> *[65] The Board found that the cumulative effect of these decisions gives arbitrators exclusive jurisdiction over all disputes where the essential character of the dispute arises under the collective agreement, regardless of how the issue may be framed.*
>
> …
>
> *[67] In determining the "essential character" of a dispute, the Board said it would be guided by the identity of the parties, the place of conduct, the time of the claim and whether the remedies sought could be granted by the arbitrator. It also stated that it would likely find that a dispute arose under the collective agreement if it concerned its application, interpretation, administration or alleged violation (see* Canadian Museum of Civilization Corporation, supra, *page 136).*
>
> …

[291] The CIRB then summarized its position as follows:

> …
>
> *[68] … The merits of a complaint are not the focus of the Board's analysis when it is asked to determine whether a matter is properly before it. In* Bell Canada, supra*, five criteria were developed to govern the exercise of the Board's discretion under section 98(3) of the* Code*. In* Canada Post Corporation, supra, *these criteria were found to be so broad as to be ineffective, since few complaints were ever referred to arbitration. The criteria were reassessed to include only complaints going beyond the scope of the collective agreement or dealing with matters of public policy, based on the test of whether there was a genuine statutory right to be defined or reasserted. Following directions of the Supreme Court in* Weber *and* O'Leary, *the Board further narrowed its focus to the examination of the facts giving rise to the dispute to establish its essential character, rather than its legal characterization by the parties. Accordingly, where a dispute can be referred to arbitration, the Board will refuse to hear the complaint.*

…

[292] In applying its criteria to the facts of the case before it, the CIRB stated as follows:

…

> *[73] The union's position is that while issues have indeed been the subject of arbitral awards, these awards have been ineffective in resolving disputes concerning the application of the collective agreement. The employer continues to violate a number of provisions of the collective agreement, such as the rest provisions and bargaining unit work; payment of time claims remains unresolved since the employer has instituted a claw-back process; payments to employees following successful arbitrations are unduly delayed; in some instances, the employer has adopted creative ways of interpreting the collective agreement. While individual grievances have been dealt with by the arbitrator, apparently the process has been ineffective in preventing a recurrence of the complaints.*
>
> *[74] The union's arguments are countered by the employer's position that grievances are being referred to arbitration, that it has settled many matters and that since this complaint was filed it has taken the means to address the union's concerns about enforcing the collective agreement and responding to grievances, and that, after all, the incidents are isolated events.*

…

[293] It concluded as follows:

…

> *[75] In the circumstances of this case, the Board finds that there is no win-all, lose-all answer. In fact, the issues can be divided into two groups. Within the first group are the issues that have been referred to arbitration, where the union has been successful but that apparently remain the subject of continued violations by the employer, namely the switching of cars by road crews within terminal limits (article 41) and the rest provisions (article 51).*
>
> *[76] As to the second group of issues, such as the employer's failure to respond to grievances, replies to grievances that are unresponsive or inadequate, joint statements of issue that are not provided, the Board finds that such issues are within the scope of the provisions of the collective agreement and must be dealt with on a case-by-case basis by the CROA*

arbitrator….

…

[294] In the result, the CIRB decided to hear the first group of issues and deferred the second group to arbitration.

[295] In *Canadian Union of Postal Workers v. Canada Post Corporation*, 2012 CIRB 627, the CIRB refused to determine a freeze complaint as well as other unfair labour practice complaints when the essence of the dispute arose from the interpretation of the bridging clause that the parties had negotiated into the collective agreement. The union argued that the grievance arbitration process would take too long to resolve the issue. The CIRB determined that an arbitrator had jurisdiction over the issue.

[296] In the case before me, there is a long-standing relationship between the parties. It appears that the dispute arose from day-to-day operations, and the pay-for-parking issue has been between the parties for a considerable period.

[297] The dispute concerns the interpretation of the consultation provisions in article 40 of the collective agreement. The bargaining agent could have filed either a group or a policy grievance and could have referred it to adjudication under Part 2 of the *Act*. In fact, the proper recourse for the dispute, as it pertains to consultation, was for the IBEW to bring a policy grievance on the matter, not an unfair labour practice complaint.

[298] The bargaining agent argued that the Board should hear this case as the essential nature of the dispute goes beyond interpreting the collective agreement, which the parties already agreed to in the consultation framework, on the basis that the grievance procedure would be ineffective at resolving this dispute. Yet, there is no specific evidence before me from the complainant upon which I can conclude that the grievance procedure would have been ineffective to address this matter. There is certainly no evidence, of the nature of what was before the CIRB in *Canadian National Railway Company*, of an employer that repeatedly violates the same provisions of a collective agreement even after several arbitral awards and cease-and-desist orders have been made.

[299] I have gone to some lengths to recite the evidence of the witnesses. Without deciding the matter, it is apparent to me that, based on a fair reading of all the evidence, there are cogent competing arguments as to whether the consultation

provisions in article 40 have been complied with. However, in my opinion, the complainant should have initiated a policy grievance, which could then have been referred to adjudication under Part 2 of the *Act*.

[300] It does not appear to me that important matters of public policy arise from this dispute that go beyond the scope of the collective agreement and that would warrant the Board hearing this complaint under Part 1 of the *Act*.

[301] In conclusion, I refuse to determine the matter of consultation raised in the complaint since, in my opinion, it could have been referred to adjudication under Part 2 of the *Act*.

B. Direct dealing with employees

[302] Did the respondent bypass the bargaining agent and deal with individual employees with respect to parking at CFB Halifax?

[303] The law is clear that where a collective agreement applies there is no room for private negotiations between an employer and an employee and that an employer has no right to bypass a bargaining agent to deal with individual employees.

[304] However, that does not mean that the respondent cannot communicate with its employees. Subsection 186(5) of the *Act* provides as follows:

> ***186 (5)*** *The employer or a person does not commit an unfair labour practice under paragraph (1)(a) or (b) by reason only that the employer or person expresses their point of view, so long as they do not use coercion, intimidation, threats, promises or undue influence.*

[305] With respect to the scope of the comparable provision, s. 94(2)(c) of the *CLC*, see *Canada Council of Teamsters v. FedEx Ground Package System, Ltd*, 2011 CIRB 614.

[306] The bargaining agent argued that Mr. Boulet's evidence, that an application for a parking permit at CFB Halifax was sent to all employees, together with the terms and conditions for using it, indicates that the respondent went directly to employees and did not consult the bargaining agent.

[307] Mr. Turner, the IBEW's local steward, was a member of both the MARLANT LMRC and the base LMRC.

[308] The minutes of the many meetings held by the MARLANT LMRC and the base LMRC indicate that Mr. Turner was present at the following meetings, at which the parking issue was discussed with the bargaining agents. For other meetings of both committees, Mr. Turner sent his regrets and did not attend.

- MARLANT LMRC meeting on February 19, 2013;
- base LMRC meeting on December 2, 2013;
- base LMRC meeting on January 9, 2014;
- MARLANT LMRC meeting on February 5, 2014;
- base LMRC meeting on May 1, 2014;
- MARLANT LMRC meeting on June 9, 2014, which he co-chaired; and
- Base Parking Committee meeting on June 10, 2014.

[309] On June 10, 2014, Mr. Turner was sent a draft copy of the new parking policy and was requested to provide feedback before the policy was issued (see the minutes of the September 4, 2014, base LMRC meeting, etc.).

[310] The complainant did not call Mr. Turner to testify as to the discussions that took place during those meetings. The evidence of the minutes from those meetings reflects the nature of the discussion with representatives of the IBEW and other bargaining agents. After regularly engaging representatives of the bargaining agents, including the IBEW, over a period of approximately a year-and-a-half on two committees, the respondent advised the employees of its new parking policy and invited applications for parking permits.

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

(The Order appears on the next page)

VI. Order

[312] The Board refuses to hear the unfair labour practice complaint relating to a contravention of the consultation provisions of the collective agreement pursuant to s. 191(2) of the *Act*.

[313] The Board dismisses the unfair labour practice complaint alleging that the respondent interfered with the bargaining agent's representation of employees by negotiating directly with employees in the bargaining unit.

April 19, 2017.

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