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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and and Employment Board

BETWEEN

CANADIAN UNION OF PUBLIC EMPLOYEES

Applicant

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Respondent

and

PUBLIC SERVICE ALLIANCE OF CANADA
AND PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Intervenors

Indexed as
Canadian Union of Public Employees v.
Treasury Board (Royal Canadian Mounted Police)

In the matter of an application for certification under section 54 of the *Federal Public Sector Labour Relations Act*

Before: Margaret T. A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Christopher Rootham, counsel

For the Respondent: Sean Kelly, counsel

For the Intervenors: Andrew Raven, counsel for the Public Service Alliance of Canada, and Colleen Bauman, counsel for the Professional Institute of the Public Service of Canada

Heard at Ottawa, Ontario,
June 26 to 28, 2017.

I. Background

[1] The Royal Canadian Mounted Police (the "RCMP") is a unique institution in the public service. It is a police force for Canada. Given the nature of the duties to be performed, Parliament determined at the inception of collective bargaining in the federal public service in 1967, that members of the RCMP and certain persons employed by the RCMP were not permitted to engage in collective bargaining.

[2] This automatic exclusion was successfully challenged in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*Mounted Police Association of Ontario*"). The Supreme Court of Canada held that the exclusion of RCMP members from collective bargaining under paragraph (d) of the definition of "employee" in s. 2(1) of the *Public Service Labour Relations Act* (*PSLRA*) was an infringement of the Charter. The offending paragraph of the *PSLRA* was declared to be of no force and effect. The declaration of invalidity was suspended for a total of sixteen months, allowing for the possibility of new legislation governing collective bargaining for the RCMP. No such legislation had been tabled and proclaimed in force by May 16, 2016. Accordingly, from that point, members of the RCMP became 'employees' for the purposes of the *PSLRA* and were no longer prohibited from engaging in collective bargaining.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) (the "*Amending* Act") received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the *Public Service Labour Relations and Employment Board Act*, and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[4] The *Act* contained a new definition of 'employee'. The exclusion of members of the RCMP from collective bargaining was limited to an exclusion of officers, as defined in ss. 2(1) of the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10; "the *RCMP Act*"). By virtue of the Supreme Court's decision, from May 16, 2016 until June 19, 2017, an employee organization could file an application for any group of members of the RCMP. Where an application for certification was made prior

to June 19, 2017, the transitional provisions of the *Amending Act* circumscribe the exercise of the Board's powers to certify any employee organization where the employee organization made an application for a group that included RCMP members appointed to rank (such as officers) or reservists.

II. Applications before the Board

[5] The Canadian Union of Public Employees ("the applicant") has filed three applications pursuant to s. 54 of the *Act*, to be certified as the bargaining agent for three distinct bargaining units:

i. an application filed on December 9, 2016, for:

> *all Civilian Members of the Royal Canadian Mounted Police within the Law Enforcement Support -Telecom Operations (LES-TO) occupational sub-group* (Board File No. 542-02-0008);

ii. an application filed on January 19, 2017, for:

> *all employees of the Treasury Board of Canada within the Police Operations Support-Telecommunications Operations occupational subgroup* ("PO-TCO")" (Board File No. 542-02-0009); and

iii. an application filed on March 28, 2017 for:

a. *All Civilian Members of the Royal Canadian Mounted Police within the Law Enforcement Support – Intercept Monitors ("LES-IM") occupational subgroup; and*

b. *All employees of the Treasury Board of Canada within the Police Operations – Intercept Monitoring and Analysis ("PO-IMA") occupational subgroup."* (Board File No. 542-02-0011)

[6] The respondent, Treasury Board (the employer) has proposed one bargaining unit be certified, which would include the LES-TO, PO-TCO, LES-IM, and PO-IMA sub-groups, rather than three separate bargaining units as requested by the applicant.

[7] On the basis of the common facts and legislative framework underlying each application, and as the parties and intervenors to each application were present at the hearing, the Board has determined that it would be appropriate to consolidate these three files.

[8] On the basis of the documentation filed at the hearing and the agreement of all parties, the Board finds that the applicant is an employee organization and that the applications before me were duly authorized. The question to be decided is whether the TOs and IMs should be within the same bargaining group. In other words, whether the proposed bargaining groups are appropriate for certification under s. 57 of the *Act*.

III. History of Proceedings

[9] Pursuant to Board policy, all employee organizations which may have had an interest in the applications were notified of the applications for certification, as described above.

[10] The Public Service Alliance of Canada (the "PSAC"), the Professional Institute of the Public Service of Canada (the "PIPSC") and the Canadian Police Association each filed forms with the Board to apply for intervention in Board File No. 542-02-0008; only the PSAC requested intervenor status in the 542-2-0009 and -0011. The Board set a closing date in respect of each file.

[11] As required by the Regulations, the employer was directed in each proceeding to post in all of its workplaces a copy of the notice to employees of the application for certification.

[12] The Board granted intervenor status to the PSAC, the Canadian Police Association and the PIPSC in Board file no. 542-02-0008. Prior to this hearing, the Canadian Police Association notified the Board that it no longer had an interest in Board File No. 542-02-0008 and it withdrew its application for intervention and its previous submissions.

[13] The Board also granted intervenor status to the PSAC in Board file no. 542-02-0009. The Board did not issue a formal decision with respect to the PSAC's intervenor status in Board File 542-02-0011, however, the three files (542-02-0008, -0009 and -0011) have been consolidated and the PSAC was present at the hearing

and made submissions.

[14] The Board did not receive any statements of opposition.

IV. Summary of the evidence

[15] Members are appointed to the RCMP under the *RCMP Act*. The *RCMP Act* provides for two types of members: those that are appointed to rank, commonly known as 'regular members' and those that are appointed to level, commonly known as 'civilian members'. The category of civilian members includes LES-TOs and LES-IMs. There are also other persons employed at the RCMP who are appointed pursuant to the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*"); as detailed below, this includes PC-TCOs and PO-IMAs.

[16] In 2014, pursuant to the "Category of Employee Initiative", the RCMP decided to eliminate or limit the civilian members category. The *RCMP Act* was amended to give the Treasury Board the right to determine the category of civilian employees. In 2014, the Treasury Board created the Police Operations Support occupational group. Everyone in it was appointed under the *PSEA*. Consequently, the only difference between those classified LES-TO and those classified PO-TCO is when they were appointed. If it was before 2014, they are classified LES-TO, and if it was after 2014, they are classified PO-TCO. They do identical work; their terms and conditions of employment are found in different documents but mirror each other. Likewise, for the LES-IM and PO-IMA sub-groups, the only distinction is date of appointment.

[17] Effective April 26, 2018, the category of civilian member will be eliminated from the organizational structure of the RCMP pursuant to a notice dated February 3, 2017 (the "Treasury Board notice"), which was published in the *Canada Gazette, Part I*, on February 11, 2017. Effective April 26, 2018, all civilian members will be deemed to have been appointed under the *PSEA*. The result of this will be the elimination of the LES-TO and LES-IM sub-groups. These employees will become PO-TCO and PO-IMAs on that date.

[18] Thus, on April 26, 2018, the distinction between the LES-TO and PC-TCO, and between LES-IM and PO-IMA groups, a distinction which is based on date of appointment only, will no longer exist. However, according to the applicant,

this is the extent of the similarity between the TOs and the IMs.

[19] According to the employer's representative, the all-inclusive bargaining unit proposed by the employer is co-extensive with the current and future classification structure. All four sub-groups do similar work; they receive information, assess it, and dispatch accordingly. All members of the sub-groups testify in court about matters that arose in the course of their duties. The rates of pay for the employees in the LES sub-groups are the same as their counterparts in the POS sub-groups, as are the terms and conditions of employment. They all work shifts, are exposed to high-stress events (including violence and abusive language), and have a common skill set (strong auditory attention and the ability to multitask and to assess information received and to act quickly on it). TCOs and IMs have similar workplaces and report to uniformed RCMP members ('regular members') and up the chain of command ultimately to the RCMP's commissioner. The education required for both types of work is a high school diploma and on-the-job training.

A. Kathleen Hippern

[20] Ms. Hippern testified in support of the proposal in that the employees of the LES-TO sub-group would constitute an appropriate bargaining unit and that IMs should be in a separate bargaining unit. At the time of the application the LES-TO subgroup was comprised of 713 employees.

[21] According to her evidence, she was actively involved in the pursuit of certification. A Facebook page was created by those conducting the organizing drive. It was open only to TOs. It posed a question of whether IMs should be included in the bargaining unit. According to Ms. Hippern, the answer was that the two groups should be in separate bargaining groups because TOs are first responders who deal directly with the police and the public while IMs do not deal directly with the public. The only evidence of this Facebook survey was Ms. Hippern's oral evidence. She provided no quantifiable proof to support her statement.

[22] According to Ms. Hippern's evidence, TOs are employed in 22 operational communication centres across the country that supports federal operations, provincial policing, and municipal contract policing. LES-TOs and PO-TCOs work side-by-side, doing the same work. Both require knowledge of court proceedings and are called upon to testify in court. They are both exposed to high-stress situations, violence,

and abusive language. The must both have strong auditory concentration and wear a headset while performing their duties. The centres they work in are quite noisy.

[23] The 911 telephone service calls that come into the communication centres are eventually routed to the police authorized for the jurisdiction from which the call originated. The 911 service is not the core function of every communications centre; functions vary, depending on the centre. TOs in the communications centres who work the 911 service take calls directly from members of the public. They speak directly to the police officers when they dispatch calls to them for follow up. In so doing, the TOs prioritize how and when the information is given to the police officers initially and as a situation evolves. When required, TOs travel to other locations, such as to Canada's north, to provide relief. Another function of the TOs is monitoring consulate alarms and security alarms for people in the witness protection program. TOs go out with the tactical and emergency response teams as radio operators and scribes in mobile communications centres.

[24] In 2012, the National Telecommunications Core Course was developed, which replaced the previous on-the-job training received by TOs. A candidate requires a high school diploma and must complete seven weeks of classroom and field work, following which he or she has six months to meet the benchmarked standards established by the employer. TOs and IMs do not train together. They are not located in the same buildings or in the same towns. This information conflicted with her later evidence stating that it is not unusual for TOs and IMs to be housed in the same building.

[25] TOs work a four-day-on, four-day-off shift, while IMs work a different shift depending on the need. Overtime is regular for TOs, according to Ms. Hippern, but she was unaware if IMs work overtime. On cross-examination, she admitted that she had no idea what IMs do. She has never worked as an IM; nor has she worked with one. Her opinions of the IMs' work are based on what others have told her.

[26] There are 4 levels of TO, with levels 3 and 4 being supervisory. A TO-4 is the operations communication centre commander, although the commander may be a uniformed RCMP member at the sergeant or staff sergeant rank, in the absence of a TO-4. A TO-4 reports to the officer-in-charge, who is a uniformed member at the inspector rank who reports to a superintendent. The superintendent reports to the chief superintendent, who reports to the commanding officer of the division. Each

commanding officer reports to the RCMP commissioner.

B. Sylvie Corriveau

[27] Ms. Corriveau is responsible for the operational communications centres' policy and standards. She joined the RCMP in 1989 and has worked as an LES-TO-2 (the working-level TO) across the country, including in Nunavut and the Yukon. While in the Yukon, she also worked as an IM. In her current role, she is responsible for governance, training, and standard operating procedures for all operational communication centres across the country. She is responsible for the equipment used in the centres and for developing and introducing policies and practices and ensuring quality control.

[28] She confirmed that operational communications centres provide 911 service in 8 of the 10 provinces. The centres in London, Ontario, and Montreal, Quebec, provide only federal policing services as the provinces have their own provincial police forces. The centre in Ottawa, Ontario, supports Parliament Hill security and monitors embassies' security cameras. The centre in Montreal monitors the integrity of the border between Canada and the United States via cameras and alarms. The London centre provides support to those working in immigration, drug units, and embassies.

[29] The job descriptions submitted as Exhibit 1, tabs 4 and 13, are identical except for the identifiers on the front pages. The work described in both is identical. One job description is for the LES-TO classification, and the other is for the PO-TCO classification. The core business of a TO employed in a federal operational communications centre is supporting the enforcement of federal statutes. The stakeholders are members of the public who call in because they are in crisis or need police intervention.

[30] Approximately 100 of the 900 TOs work within the federal operational command centres either within headquarters or in stand-alone buildings. Headquarters buildings could be national or detachment headquarters. There are division headquarters in each province and territory; plus, national headquarters and "O Division" headquarters are in the National Capital Region. TOs work within the high-security zones in these buildings. IMs also work in these buildings under the same high security conditions.

[31] Ms. Corriveau described the training for TOs. A TO-1 receives seven weeks of training, which consists of four weeks as a call taker and three weeks as a call dispatcher. In addition, they receive 240 to 900 hours of coaching. TOs and IMs are trained separately.

[32] The educational requirement for a TO or an IM is a high school diploma or equivalent. TOs are required to pass a medical exam; plus, they undergo yearly hearing tests and psychological testing every other year. As part of the recruitment process, they are evaluated on their decision-making abilities, judgement, listening skills, keyboarding skills, and multitasking skills.

[33] Once a candidate successfully completes the initial screening, he or she attends a structured interview, following which, if they are successful at the interview stage, they undergo a medical and psychological evaluation. Their security clearance level depends on the nature of their positions, with "enhanced reliability status" being the most common.

[34] Listening skills and the ability to interpret what is said and how it is said is key to a TO's success. The TOs transfer such information into a computer-assisted dispatch system, which requires that they have writing skills. It is essential that the officer dispatched knows what was said and the level of urgency of the call.

[35] TOs are occasionally subpoenaed to testify in court, typically to enter audio files as exhibits. Otherwise, their work generally involves sitting and monitoring phone calls for an entire shift, other than when they are on breaks, which requires sustained auditory and visual concentration. A TO may deploy with an emergency response team, to free up a team member. His or her role is to record and transcribe the decisions of the incident commander in charge of the scene and to note the times of events.

[36] Ms. Corriveau testified that while she was a TO in the Yukon, she also worked as an IM after her TO shifts completed and on weekends. According to her evidence, TOs who become tired of the constant shiftwork may become IMs. IM work is more project-based, and when a monitoring phase is completed, an IM will transcribe the recordings, which allows for a Monday-to-Friday eight-hour shift. The skill set for an IM includes the ability to listen to calls, to determine the importance of calls, to decipher what is being said, and to multitask. The TO-to-IM transition is done easily, without further training.

C. Sergeant Pierre Gagnon

[37] Sgt. Gagnon has managed the 60 IMs in the employer's Montreal offices for the past 2.5 years. He testified that IMs conduct all electronic surveillance authorized by court orders. They listen to intercepted communications and prepare transcripts of what they overheard. They then transmit this information to investigators.

[38] According to Sgt. Gagnon, candidates are screened on their résumés. They are tested to ensure that they can type at least 40 words per minute. They must successfully complete a transcription test by transcribing a recorded conversation word for word. If the candidate successfully completes these tests, then he or she is interviewed, given a hearing test, and screened for a security clearance.

[39] Once hired, an IM is given one week of training and is then assigned a mentor, who assists in his or her development. An IM's work is done at a computer, using earphones and telephones. The work hours vary and depend on the case; they often include nights, weekends, and holidays. IMs work in a large room in which a number of workstations are located. They work in groups based upon the room to which they are assigned.

[40] Communications are intercepted and relayed to IMs in real time. They must analyze them and transmit the information to the investigators as soon as possible. IMs verbally transmit information to investigators over an internal communications network or by phone. They must notify the investigators instantly of anything they intercept that may put the officer or a member of the public in danger. IMs are required to testify in court concerning communications they intercepted.

[41] The job description (Exhibit 1, tab 15) accurately describes the effort required of IMs. During an investigation, situations may arise in which IMs are required to work outside normal hours. They are exposed to traumatic events in the course of their duties, including viewing pictures on the Internet, such as child pornography, and hearing fights and threats. IMs intercept telephone and cellphone calls and listen to ongoing events taking place in houses, monitor the Internet usage of people under surveillance, and monitor surveillance cameras. In the Sergeant's opinion, there is no difference between the LES-IM and the PO-IMA sub-groups.

[42] IMs do not interact directly with the public; they deal directly with RCMP

members. They report through a sergeant to a staff sergeant, a sector inspector, and eventually, to a superintendent, who is also responsible for TOs.

D. Dennis Duggan

[43] Mr. Duggan is a senior labour relations consultant in the Compensation and Labour Relations section of the Office of the Chief Human Resources Officer. He provides advice and guidance on compensation and labour relations policy and on legislative initiatives to the employer and was involved in the deeming exercise in which RCMP civilian employees other than TOs and IMs were matched to public service bargaining groups as part of the rationalization of the human resources function by the RCMP. He explained that on April 26, 2018, all employees in the occupational groups, including TOs and IMs, will be deemed to have been appointed under the *PSEA*.

[44] The Police Operations Support occupational group was created in 2014 by the Treasury Board. PO-TCOs and PO-IMAs are hired under the *PSEA*. Those hired before 2014 into the LES-TO and LES-IM sub-groups will, on April 26, 2018, be deemed to have been hired under the *PSEA*, at which point all rates of pay for these occupational sub-groups will be established by the Treasury Board. Currently, the LES-TO and LES-IM sub-groups are paid according to the terms and conditions of employment in the RCMP compensation manual. LES-TOs and PO-TCOs receive identical pay as do LES-IMs and PO-IMAs.

[45] According to Mr. Duggan, it is not unusual for bargaining groups in the public service to contain more than one group or sub-group. Terms and conditions specific to a group or sub-group may be negotiated during the collective bargaining process and are identified within the particular collective agreement as applying only to a certain subset of the bargaining group. The statutory freeze period imposed by the application of the *Act* would apply to the terms and conditions of the LES group as set out in the compensation manual and to those established by the Treasury Board for the POS group.

[46] Mr. Duggan agreed with the proposal put to him by the representative of the Public Service Alliance of Canada (PSAC), which was that the employer has the prerogative to establish classifications and that it determines to which group or sub-group a classification belongs. According to Mr. Duggan, the TO and

IM classification standards are unambiguous; both belong to separate sub-groups within the POS occupational group.

[47] When collective bargaining began in the public service in 1967, separate certification orders were issued for each occupational group. In the 1980s, groups bargained at common tables; master agreements and group-specific agreements were negotiated. Terms of general application were included in the master agreements, while group-specific terms of limited application were included in the group-specific agreements, which worked hand-in-hand with the master agreements.

[48] In 1999, new occupational groups were developed, but according to Mr. Duggan, no change occurred in bargaining affiliation. Unrepresented occupational groups were never forced into specific bargaining groups. There is nothing to prevent the LES-TO and the PO-TCO sub-groups from being included in the same bargaining unit or for that matter from being included in the same bargaining group as the LES-IM and PO-IMA sub-groups.

V. Summary of the arguments

A. For the applicant

[49] In these applications there are three issues are to be decided, two of which neither the respondent nor the intervenors challenged. They all accept that the applicant is an employee organization and that it is duly authorized to pursue certification of the LES-TO, the PO-TCO and PO-IMA sub-groups. What is to be decided is the definition of the appropriate group for collective bargaining.

[50] The applicant's proposed bargaining unit in each application is consistent with both the wording of the *Act* and the standard factors used to assess the appropriateness of a bargaining unit. Subsection 57(3) of the *Act* requires that the Board accept a bargaining unit that is consistent with the occupational sub-group that the employer has established. The applicant's proposed bargaining units do so, and the Board must accept each as appropriate for collective bargaining. Based on statutory interpretation principles, a bargaining unit consisting of an occupational sub-group is presumptively acceptable.

[51] The principal rule of statutory interpretation is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense,

harmoniously with the scheme of the Act and the intention of Parliament (see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; and *Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 60). On the plain reading of s. 57(3) of the *Act*, the Board must accept a proposed bargaining unit that aligns with the respondent's occupational groups or sub-groups.

[52] The choice of bargaining unit also concerns the exercise of choice by the employees affected in how to structure their bargaining relationship with their employer. Restricting that choice is justified only if doing so is necessary to permit the labour relations regime to function adequately (see *Syndicat des employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ c. Association synidcale des employés(es) de production et de services (ASEPS)*, 2017 QCCA 737). An interpretation of s. 57(3) of the *Act* that permits the members of an employee organization to choose whether to affiliate by occupational group or sub-group is more consistent with the purpose of the *Act* and the employees' constitutional right of freedom of association.

[53] The current version of s. 57 of the *Act* does not solely require a bargaining unit based on occupational groups, as it had in the past. When read in light of the history of the section, commencing with the *Public Service Staff Relations Act* (R.S.C., 1985, c P-35), when the Board was to take into account the employer's classification and pay plan (which was amended in 1992 to require that the bargaining unit be co-extensive with the classes, groups, or sub-groups established by the classification plan), it is clear that Parliament's preference was for bargaining units based on sub-groups because there was no stated preference for bargaining units based on occupational groups. Furthermore, the proposed bargaining unit is consistent with other established labour relations principles.

[54] Other factors for the Board to consider in determining the appropriateness of a bargaining unit include community of interest, the viability of the unit, the employees' wishes, industry practice, and the employer's organizational structure. The test to determine community of interest is to evaluate the nature of the work performed, the conditions of employment, and the skills of the employees, along with administration, geographic circumstances, and functional coherence and interdependence (see *Servisair Inc. v. Servisair Deicing Services Inc.*, 2013 CIRB 692; and *Federal Government Dockyard Chargehands Association v. Treasury Board*,

PSSRB File No. 146-02-278 (19880201), [1988] C.P.S.S.R.B. No. 26 (QL)).

[55] A party seeking to rebut this presumption has the onus to show that certifying a sub-group would not permit the satisfactory representation of the employees. In this case, the employer has not met this onus. There is only one way for the respondent to challenge a bargaining unit that aligns with occupational groups or sub-groups; it must show that certifying a bargaining unit of only LES-TOs will in some way inhibit their right to representation. The exception is meant only as a way to protect employees' right to representation and not as a tool for the respondent to oppose their choice of bargaining unit.

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

[56] A broad-based bargaining unit composed of all employees in the PO occupational group (PO-TCO and PO-IMA) as well those in the LES-TO and LES-IM sub-groups is consistent with the employer's classification system. It is co-extensive with the employer's occupational group and sub-groups and allows for the satisfactory representation of the employees. The Board's role is to choose the most appropriate bargaining unit rather than simply to assess the appropriateness of an applicant's proposed bargaining unit (see *Parks Canada Agency v. Professional Institute of the Public Service of Canada*, 2000 PSSRB 109).

[57] In assessing the appropriateness of each of the applicant's proposed bargaining units, the Board must comply with the *Act*'s legislative framework as set out in s. 57. The *Act* requires that the Board establish a bargaining unit that is co-extensive with the occupational groups or sub-groups established by the employer. Nonetheless, such considerations can be rebutted if the proposed bargaining unit does not permit satisfactory representation.

[58] In assessing what constitutes satisfactory representation within the meaning of s. 57(3) of the *Act*, the Board has considered its well-established practice of establishing broad-based bargaining units rather than multiplying or fragmenting bargaining units. The community of interest in the proposed group must be considered, including the nature of the work, the conditions of employment, the employees' skills, the tools used, the geographic circumstances, and the educational requirements. The specialized nature and mission of the employer's operation must be taken into account. Finally, the decision must be made in light of

the historical context, including upcoming classification decisions (see *Public Service Alliance of Canada v. National Energy Board*, PSSRB File Nos. 142-26-297 to 301 (19931108), [1993] C.P.S.S.R.B. No. 183 (QL); *Parks Canada Agency*; and *Public Service Alliance of Canada v. Staff of the Non-Public Funds, Canadian Forces*, 2012 PSLRB 116).

[59] Historically, the Board has held the view that sound labour relations require broadly based bargaining units, and therefore, it disapproves of multiplying bargaining units, particularly when the nature of the work is very similar, as it is in this case. The fewer the bargaining units, the less likely the potential for impasses in negotiations, for work disruptions, and for jurisdictional disputes. This is of particular concern in the context of public sector collective bargaining, in which the public interest and safety is at stake (see *Association of Justice Counsel v. Treasury Board*, 2006 PSLRB 45; *Parks Canada Agency*; *Canada Customs and Revenue Agency v. Association of Public Service Financial Administrators*, 2001 PSSRB 127; *Quebec Air Traffic Controllers' Union v. Treasury Board*, PSSRB File No. 143-02-164 (19780926), [1978] C.P.S.S.R.B. No. 9 (QL); *International Brotherhood of Electrical Workers, Local 228 v. Treasury Board*, 2000 PSSRB 52; and *Canadian Food Inspection Agency Financial Officer Association v. Canada Food Inspection Agency*, 2015 PSLREB 68).

[60] The Board has demonstrated a trend towards larger, more encompassing bargaining units in the federal public service (see *Public Service Alliance of Canada v. National Capital Commission*, PSSRB File Nos. 142-29-312 and 313 (19940824), [1994] C.P.S.S.R.B. No. 112 (QL); *Communications Security Establishment, Department of National Defence v. Public Service Alliance of Canada*, 2001 PSSRB 14; *Parks Canada Agency*; *Association of Justice Counsel*; *Canada Customs and Revenue Agency*; *Canadian Food Inspection Agency Financial Officer Association*; and *Public Service Alliance of Canada v. Treasury Board*, 2010 PSLRB 57).

[61] In the *Canada Customs and Revenue Agency* case, the Board reiterated its long-standing policy of promoting broadly based bargaining units because the fewer the bargaining units, the less likely the potential for an impasse in negotiations, for work disruptions, and for jurisdictional disputes, which is of particular concern when the public interest is at stake.

[62] In the *Parks Canada Agency* case, the Board chose the most appropriate bargaining unit and confirmed its policy of favouring larger bargaining units.

The Board stated that it had always believed and that it continued to believe that there should not be a fragmentation or multiplicity of bargaining units in the workplace (see Christopher Rootham, *Labour and Employment Law in the Federal Public Service*, 2007).

[63] The undisputed evidence reveals that the employer regularly negotiates collective agreements that include unique conditions of employment for specific groups of employees within a larger unit. The Board is not obliged to accept a proposed bargaining unit even if it is co-extensive with the employer's occupational groups or sub-groups if the proposed bargaining group, in the Board's opinion, does not allow the satisfactory representation of the employees. The onus is on the party proposing a bargaining unit not consistent with s. 57 of the *Act* to establish that its proposal best guarantees the representation of the employees. In situations in which both proposals are co-extensive with the employer's occupational groups, the Board decides which of the two is appropriate, considering the specialized nature of the employer.

[64] In this case, the employer's proposal of a broad-based bargaining unit is not only consistent with the employer's classification system, it is also co-extensive with the employer's PO occupational group as well as its LES-TO and LES-IM sub-groups. Moreover, the entire unit will be co-extensive with the PO occupational group effective April 26, 2018, when all LES-TOs and LES-IMs become POs. Furthermore, there is no reason to believe that the employer's broadly based bargaining unit would not permit satisfactory representation.

[65] The undisputed evidence shows that the employer's proposal would allow satisfactory representation because it is consistent with the Board's preferences and ensures the uniformity of conditions of employment for employees who share a strong community of interest, including the nature of the work performed, the conditions of employment, the skills and education required, the tools used, and the geographic circumstances. The specialized nature of the RCMP, with its specialized mission, must be considered. A broadly based unit recognizes Parliament's intention to exclude LES-TOs and LES-IMs from a single national bargaining unit of the other LES sub-groups composed of all RCMP members (regular and auxiliary) appointed to a rank.

[66] A single bargaining group, as proposed by the employer, is not only consistent with the Board's view that multiplicity should be avoided; it also ensures the uniformity of the conditions of employment for employees who share a strong community of interest. Moreover, the applicant's proposed bargaining unit, in the employer's submission, is not satisfactory for representation purposes. It creates undue multiplicity, it fails to encompass all employees who share a strong community of interest, it neglects to consider the RCMP's specialized nature and mission, it fails to take into account the effect of the Treasury Board notice that encompasses the LES-TO and LES-IM sub-groups into the PO group on April 26, 2018, and it ignores the fact that the applicant has applied to certify all these employees under three separate applications. There is no evidence that the LES-TOs' interests can be protected only if they belong to a separate and distinct bargaining unit.

C. <u>For the Public Service Alliance of Canada</u>

[67] Historically, public service bargaining units have been tied to the employer's classification structure. Under the current *Act*, the connection is made explicit through the co-extensive test found in s. 57(3). Unlike prior legislation, which simply required the Board to have regard to the employer's classification plan, s. 57(3) creates a mandatory presumption in favour of bargaining units that are co-extensive with the occupational groups or sub-groups established by the employer.

[68] The integration between bargaining units and the employer's occupational group and sub-group structure is particularly notable given the employer's exclusive control over the public service classification structure. Sections 7 and 11.1 of the *Financial Administration Act* (R.S.C. 1985, c. F-11; *FAA*) clearly state that the Treasury Board is responsible for determining the organization and classification structure of the public service, including establishing occupational groups and sub-groups. Section 7 ensures that this power remains within the employer's exclusive control.

[69] The employer has the opportunity even before an application for certification is filed to express it view on the community of interest shared by a particular set of employees in terms of their pay, responsibilities, training, experience, and skills by establishing occupational groups and sub-groups. These groupings become presumptively appropriate bargaining units unless a party opposing the co-extensive presumption can demonstrate that the existing group would not permit

the satisfactory representation of the employees (see *Professional Institute of the Public Service of Canada v. Public Service Staff Relations Board*, [1982] 1 F.C. 584).

[70] The employer's authority to divide an occupational group into sub-groups must be considered significant. Such a division reflects something more than simply a distinction in rates of pay; rather, sub-groups are intended to reflect the further division of job families along similar functions. Thus, the employer's decision to divide an occupational group into sub-groups indicates on its face a recognition that some sufficient distinction in function exists to warrant creating sub-groups (see *Professional Institute of the Public Service of Canada v. Canadian Nuclear Safety Commission*, 2004 PSSRB 19; and *Association of Justice Counsel*).

[71] It is appropriate to apply the co-extensive presumption in favour of a bargaining unit defined along sub-group lines when an employee organization seeks certification on behalf of employees in that sub-group. This gives effect to the employer's recognition of a distinction between occupational sub-groups in its classification plan as well as to Parliament's decision to explicitly refer to sub-groups in s. 57(3) of the *Act*.

[72] When an employer or other party wishes to rebut the co-extensive presumption, it bears the burden of leading evidence to establish that the sub-group bargaining unit would not permit the satisfactory representation of employees. This requires more than the existence of a party's preferred alternative bargaining unit structure (see *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 142-02-274 (19880108), [1988] C.P.S.S.R.B. No. 3 (QL) ("*Patent Examiners*"); and *Association of Marine Assessors, Inspectors and Investigators of the Public Service of Canada v. Treasury Board*, PSSRB File No. 142-02-321 (19980608), [1998] C.P.S.S.R.B. 47 (QL)).

[73] The certification of a bargaining unit along sub-group lines does not open the door to the fragmentation of existing bargaining units along sub-group lines or to labour instability in general. The test to fragment an existing bargaining unit is different from the test on initial certification as it requires the Board to engage in a redetermination of a prior order under s. 43 of the *Act*. An employee organization seeking a redetermination of a certification order under s. 43 will still bear the onus of showing that there is new and compelling evidence that the

employees cannot be properly represented, in order to succeed (see *Canadian Food Inspection Agency Financial Officer Association* and *Patent Examiners*).

[74] Interpreting s. 57(3) of the *Act* in this manner is in keeping with the premise that the right to bargain collectively is protected under s. 2(d) of the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11; "the *Charter*"). In *Mounted Police Association of Ontario*, the Supreme Court of Canada concluded that collective bargaining and employee choice in collective bargaining processes are fundamental aspects of the right to freedom of association.

[75] Legislation should be interpreted in a manner consistent with the *Charter*. In this case, this means interpreting the co-extensive test in the manner that gives greater effect to employees' ability to assemble to pursue collective bargaining and to exercise their right to choose how to pursue their collective interests. The Board should accept that the proposed unit is appropriate. It respects both the employer's classification plan and the employees' choices.

D. <u>For the Professional Institute of the Public Service of Canada</u>

[76] The question is whether civilian members of the RCMP and public servants can be in the same bargaining unit even though the Treasury Board notice deeming civilian members public servants does not come into effect until April 2018. Section 57 of the *Act* requires the Board to look beyond this type of technicality. The Board must answer the question of whether members of the LES sub-groups meet the definition of "employee" under the *Act*.

[77] From the time of the decision in *Mounted Police Association of Ontario*, it has been clear that civilian members of the RCMP have been determined to be employees under the *Act* and that the Treasury Board is the employer. The RCMP has been included in Schedule IV of the *FAA*. The Treasury Board order eliminating the distinction between civilian members and public servants clearly demonstrates that the distinction between the LES and PO occupational groups no longer exists. The Board must look to the future to ensure the success of collective bargaining in this new world.

[78] The LES-TO and PO-TCO sub-groups are similar in practice, although technically

they are different and will be until April 2018. The reality is that they function as one group, and certifying them separately would serve no practical purpose. There is no labour relations sense in doing that given the knowledge that the LES group will no longer exist in less than a year and that the Treasury Board is the employer for both the LES and PO groups. The parties have to bargain collectively for the future.

VI. Reasons

[79] The Board and its predecessors have always indicated that, and the Board continues to believe, there should not be fragmentation or a multiplicity of bargaining units in the workplace (see *Parks Canada Agency*, at para. 127). This is an even more important consideration in light of the new era upon which the RCMP and its employees are embarking, in which collective bargaining is in its infancy and the potential for labour unrest is great given the parties' inexperience with it in the national policing context. Its impact will be felt throughout the country, and any potential for a negative impact must be limited.

[80] The applications before me were filed under the *PSLRA,* which has since been renamed the *Federal Public Sector Labour Relations Act*. Section 57 remained unchanged. It states that when determining the composition of a bargaining unit, the Board must consider the employer's occupational groups or sub-groups unless doing so would not permit the satisfactory representation of the employees. It also allows the Board the discretion to establish a bargaining group with a composition that is not identical to that proposed by the applicant. Section 57 reads as follows:

> *Determination of Appropriate Bargaining Units*
>
> *Determination of unit*
>
> ***57 (1)*** *When an application for certification is made under section 54, the Board must determine the group of employees that constitutes a unit appropriate for collective bargaining.*
>
> *Consideration of employer's classification*
>
> ***(2)*** *In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board must have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.*
>
> *Unit co-extensive with occupational groups*

> ***(3)*** *The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.*
>
> *Composition of bargaining unit*
>
> ***(4)*** *For the purposes of this Part, a unit of employees may be determined by the Board to constitute a unit appropriate for collective bargaining whether or not its composition is identical with the group of employees in respect of which the application for certification was made.*
>
> [Emphasis added]

[81] The fact situation in this case is very simple. The applicant has applied for the certification of both sub-groups of the LES and the PO occupational groups; in essence, it is seeking to establish three bargaining units. It should be noted that the applications were all filed after the Supreme Court's declaration of invalidity in *Mounted Police* took effect, but before the new *Act* came into force; there can be no question that all of the proposed bargaining units are comprised of persons who are 'employees' for the purposes of collective bargaining. None of the bargaining units proposed by the applicant contain employees who have been appointed to rank or who are reservists. Accordingly, the transitional provisions of the *Amending Act* are inapplicable to this matter. Finally, as the RCMP is listed in Schedule IV to the *Financial Administration Act*, the employer for all of the employees in each of the proposed bargaining units is the Treasury Board, irrespective of whether they were appointed under the *RCMP Act* or under the *PSEA*.

[82] It submitted that each proposed bargaining unit, is consistent with both the wording of the *Act* and the standard factors used to assess the appropriateness of a bargaining unit. Therefore, the applicant submits, s. 57(3) of the *Act* requires that the Board accept a proposed bargaining unit which is consistent with the occupational sub-group that the employer has established. Each of the applicant's proposed bargaining units does this, and the Board must accept them as appropriate for collective bargaining. Based on statutory interpretation principles, a bargaining unit consisting of an occupational sub-group is presumptively acceptable.

[83] On the other hand, the employer proposed a broad all-inclusive bargaining group that would combine all LES and PO sub-groups into one bargaining unit. This, it argues, is consistent with the legislation and with the Board's preference for larger bargaining units.

[84] If I accept the applicant's argument, I would be ignoring the express provision in s. 57(4) which grants the Board the discretion to establish a bargaining unit which differs in composition from that proposed by in the application. While I agree with the applicant's statement of the law when it comes to statutory interpretation, in my opinion, it is not a full statement of the law. I cannot ignore the entirety of s. 57, including s. 57(4). Nor can I ignore the preamble of the *Act*, which reads in part as follows:

> ***Preamble***
>
> *Recognizing that*
>
> *the public service labour-management regime must operate in a context where protection of the public interest is paramount;*
>
> *effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;*
>
> *collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment;*
>
> *the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;*
>
> *the Government of Canada recognizes that public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;*

> *commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service;*
>
> …

[85] There is another issue that arises from the applicant's argument. The applicant has contended that section 57 requires the Board "to accept" the bargaining unit proposed in the application if it aligns with the respondent's occupational groups or sub-groups; in fact, the language used by Parliament is not for the Board "to accept" a proposed bargaining unit. Under section 57 the language used by Parliament is that Board "must determine" the group of employees that constitutes a unit appropriate for collective bargaining. As stated in *Parks* at paragraph 131, the Board is of the view that in considering several appropriate units, it should seek the most appropriate unit and if necessary, in the interest of all parties, it should fashion the most appropriate one.

[86] Part of acting in the best interests of the public, particularly in the specialized environment of the RCMP, is consistency and labour harmony and stability. Creating separate bargaining units for the LES-TO, PO-TCO, LES-IM, and PO-IMA sub-groups would be counterproductive and would violate the sentiments of the preamble of the *Act* by creating a situation in which the parties could be in a state of perpetual collective bargaining and in a state of a heightened potential for labour unrest, which would threaten police operations and public safety. In my opinion, it is necessary to create a single bargaining unit rather than multiple bargaining units, to ensure the protection of the public and to ensure the smooth functioning of this newly created labour relations regime (see *Syndicat des employés professionnels-les et de bureau, section locale 574 (SEPB) CTC-FTQ*).

[87] The evidence has clearly established that both TOs and IMs have more commonality of interests than differences. While it is true that they serve different stakeholders, since TOs serve the public and IMs serve internal clients, the nature of their duties is evidence of the community of interest and common goal. In these circumstances, they are working jointly to ensure that the employer's core mandate is met. The community of interest exists in the common goal. The applicant has not convinced me that TOs and IMs do not share a community of interest. There is sufficient community of interest based on each cog in the "machine"

being essential to the machine's overall viability. (See *Canadian Food Inspection Agency Financial Officer Association* at paragraph 77).

[88] The education, skills, duties in general, tools, reporting relationships, and the terms and conditions of their employment essentially mirror each other. Where they are different, the differences are minor in nature and would not preclude the parties at bargaining from addressing them. The applicant's limited evidence of a Facebook page on which LES-TOs commented on including IMs in their proposed bargaining groups does not establish sufficient proof that a bargaining group based on an occupational group, rather than sub-groups, would not allow the applicant to properly represent the employees. I would also note, as set out in *Parks Canada* at paragraph 129, "a bargaining unit that is too small in size will often have no real influence on the outcome of service wide issues and on the determination of the parameters for pay and benefits".

[89] The PSAC's representative argued that because belonging to an employee organization is a constitutional right, the Board must certify the applicant's proposed bargaining unit given that the applicant is an employee organization authorized to apply for certification. While it is true that in *Mounted Police Association of Ontario*, the Supreme Court of Canada established the right to belong to an employee organization as a constitutional right, the decision did not eliminate s. 57 of the *Act*, which clearly establishes the criteria for certification in the federal public service, and specifically grants discretion to the Board in s. 57(4). Nor did it erase the jurisprudence of this Board and its predecessors to prefer larger bargaining groups.

[90] Furthermore, since that Supreme Court of Canada decision, Parliament has turned its mind to collective bargaining within the RCMP and has amended both the *Act* and the *RCMP Act*, which clearly states Parliament's preference for a single national bargaining group for members appointed to rank and reservists. While it did make changes related to unionization within the RCMP, s. 57 remained unchanged, clearly indicating Parliament's intention that the certification of bargaining units must be considered in light of the Board's enabling legislation and past practices.

[91] The parties provided me with numerous cases to support their arguments, many of which were common to all parties involved. While I have read each one, I have referred only to those of primary significance.

[92] Creating bargaining units is not a science. I agree with the representative of the Professional Institute of the Public Service of Canada, who advocated a common-sense approach in recognition of the Treasury Board notice, which will deem all RCMP civilian members to have been hired under the *PSEA* and to be members of the POS occupational group. I will take that one step further and order that, in light of the community of interest that exists, all employees in the LES and PO occupational groups, whether TO, TCO, or IM or IMA, be included in the same bargaining unit. Following the release of this decision, the parties and intervenors will be contacted by the Board to discuss the next steps in the certification process.

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

(The Order appears on the next page)

V. Order

[94] I order that all employees in the LES-TO and LES-IM sub-groups, and in the PO occupational group be included in the same bargaining unit.

[95] I order that a bargaining unit defined as follows be created:

> *All employees in the Intercept Monitoring and Telecommunications Operations sub-groups of the Law Enforcement Support Group and in the Police Operations Support Group defined in Part I of the Canada Gazette of July 26, 2014.*

[96] I will remain seized of jurisdiction for 180 days to deal with any matters arising out of this order.

October 19, 2017.

Margaret T. A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board