File 590-02-21

IN THE MATTER OF

THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT

and a dispute affecting
the **Public Service Alliance of Canada** and
the **Treasury Board**, in respect of the employees of the employer
in the bargaining unit for the

Border Services (FB) Group

Before a Public Interest Commission composed of:

Michael Bendel, Chairperson
Joe Herbert and Jean-François Munn, members

For the bargaining agent:

Morgan Gay and David-Alexandre Leblanc

For the Employer:

Ted Leindecker

Heard at Ottawa, Ontario, on November 2, 6 & 23, 2017.

REPORT

INTRODUCTION

1. This Public Interest Commission (the "PIC" or the "Commission") was established, pursuant to section 167 of the *Federal Public Sector Labour Relations Act* ("the *Act*"), on May 18, 2017.

2. The Commission met with the parties' representatives on October 17, 2017, for the purpose of assisting the parties in negotiating a new collective agreement. Given the positions taken that date, the Commission did not believe that there was a real prospect of the parties reaching a voluntary resolution through its mediation, and it decided to hold formal public sessions to allow the parties to make presentations on their proposals for a new collective agreement. The formal public sessions were held on November 2, 6 & 23, 2017, following which the members of the Commission met to consider the Report to be presented to the Chairperson of the Federal Public Sector Labour Relations and Employment Board ("the Board") under section 176 of the *Act*.

3. In conducting its activities, the Commission has endeavoured to comply fully with the relevant provisions of the *Act*, particularly section 173 (by giving each party a full opportunity to present its evidence and make submissions), and section 175 (by taking due account of the statutory factors in making its recommendations).

4. However, we feel it is right that we draw attention to what appears to be some confusion in the *Act* about the Commission's mandate. The Commission's role is defined in several provisions of the *Act,* which are difficult to reconcile with each other. Firstly, section 172 requires the Commission to "endeavour to assist the parties to the dispute in entering into or revising a collective agreement". Secondly, subsection 175 (1) states the following:

> *In determining whether compensation levels and other terms and conditions represent a prudent use of public funds and are sufficient to allow the employer to meet its operational needs, the public interest commission is to be guided by and to give preponderance to the following factors in the conduct of its proceedings and in making a report to the Chairperson:*
>
> *(a) the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians; and*
>
> *(b) Canada's fiscal circumstances relative to its stated budgetary policies.*

Thirdly, subsection 175 (2) empowers the Commission to take account of various enumerated factors, of the kind typically relied upon by interest arbitration boards, "[i]f relevant to the making of a determination under subsection (1)". (However, nowhere in the *Act* is the Commission expressly required to determine "whether compensation levels and other terms and conditions represent a prudent use of public funds and are sufficient to allow the employer to meet its operational needs".) Fourthly, if the Commission is unsuccessful in mediating the dispute, subsection 176 (1.1) of the *Act* requires it to set out in its report the reasons for each of its recommendations.

5. So, in the light of these provisions, what is the Commission's role? Is it to assist the parties to reach a new collective agreement on terms acceptable to them? Or is it to determine whether compensation levels and other terms and conditions proposed by the parties represent a prudent use of public funds and are sufficient to allow the employer to meet its operational needs? As regards the Commission's reasons for each of its recommendations, as required by subsection 176 (1.1), would the Commission be acting improperly by taking an "accommodative" or "conciliatory" approach and stating as its reason that it believes its recommendations should be acceptable to the parties, or is it required to "adjudicate" the dispute by reference to the factors listed in subsections 175 (1) and 175 (2)?

6. While the Commission raised these issues briefly with the parties' representatives in the formal public sessions, it is not necessary for us to express a firm view on them. We are satisfied that our recommendations do not conflict with the factors identified as the "preponderant" ones

in subsection 175 (1) or with those listed in subsection 175 (2). As regards the reasons for our recommendations, we feel that a sufficient reason for each recommendation is that the recommendations as a whole constitute a package which, in our view, should be acceptable to both parties. It is unrealistic, not in keeping with the way in which collective bargaining is conducted, and not helpful to the collective bargaining process for a body such as the Commission to examine and give a reasoned ruling on each proposal independently without taking account of the total package.

COMPARATORS

7. The principal underlying issue debated by the representatives, both in the mediation phase of our proceedings and in the formal public sessions, was whether the "comparator" groups for employees in this bargaining unit were R.C.M.P. officers and Correctional Officers ("CX"), as contended by the bargaining agent, or other public servants - federal, provincial and municipal - engaged in administering and enforcing laws and regulations, in areas such as hunting and fishing or public transit, as contended by the employer. As a result of their fundamental disagreement on the identification of comparator groups, the parties were unable to move forward on numerous terms and conditions of employment that were in dispute, particularly the major cost items.

8. We should state that, after having heard their representations and examined carefully the evidence they adduced, we are unable to endorse either party's position on the proper comparator groups. Both parties made a plausible case, but neither a convincing one.

RECOMMENDATIONS: MAJOR ECONOMIC ITEMS

9. Since we have been unable to endorse either party's position on the proper comparator group, we have decided, in making our recommendation on pay increases, to be guided by the distinctive pattern of bargaining outcomes in this sector for the four-year period in question.

10. As regards rates of pay, we have therefore decided to recommend the following:

(a) effective June 21, 2014, all rates to be increased by 1.25%;
(b) effective June 21, 2015, all rates to be increased by a further 1.25%;
(c) effective June 21, 2016, all rates to be increased by a further 1.25%;
(d) effective June 21, 2016, all rates to receive a market adjustment of a further 2.3%; and
(e) effective June 21, 2017, all rates to be increased by a further 1.25%.

11. As regards the Integrated Border Services Allowance ("IBSA"), we recommend the following:

(a) effective June 21, 2016, the IBSA for non-uniformed officers should be increased to $1,750.00; and
(b) effective June 21, 2016, 100% of the IBSA should be integrated into employees' base pay before the application of the economic increase and the market adjustment.

12. On the question of the meal allowance payable to employees working overtime (**Clause 28.07** of the collective agreement), we recommend that the value of the allowance be increased from $10.00 to $12.00. We also recommend (as did a majority of the previous PIC dealing with this same bargaining unit in its Report of June 5, 2013, Board file 590-02-10) that employees who are prevented from leaving the worksite (because of the work location or other factors, but who are not required to "stay on the job") should be entitled to a reasonable meal break with pay (under paragraph 28.07 (c)) as if they had left the worksite. The dissenting view of the employer nominee is found in the Annex to this report.

RECOMMENDATIONS: OTHER ITEMS IN DISPUTE

13. We note that the parties agree on changing **Clause 10.01** of the collective agreement to read as follows:

> The Employer agrees to supply the Alliance each quarter with a list of all employees in the bargaining unit. The list shall include the name, geographic location and classification of the employee and the date of appointment for each new employee.

14. The employer has also proposed a change to **Clause 10.02**, which would allow the employer to dispense with supplying a paper copy of the collective agreement to employees, if it gave them electronic access to the agreement. The bargaining agent has opposed this change.

15. The employer has argued that its proposal on Clause 10.02 would eliminate the substantial cost of printing the booklets. The bargaining agent has replied that it sees value in each employee having a pocket-sized booklet available for immediate consultation. To this, the employer has observed that the current collective agreement would allow it to satisfy its obligations by providing each employee with a letter-size copy of the agreement at a smaller cost.

16. We have decided to recommend that the employer's proposal be incorporated in the collective agreement. The proposal reads as follows:

> 10.02 The Employer agrees to supply each employee with a copy of this Agreement. For the purpose of satisfying the Employer's obligation under this clause, employees may be given electronic access to this Agreement. Where electronic access is unavailable, the employee shall be supplied, on request, with a printed copy of this Agreement.

We see little justification in imposing on the employer the substantial cost of producing printed copies when all employees can be assumed to have access to devices that would enable them to consult the agreement electronically at no real cost to themselves. We note that the employer's proposal has recently been included in at least a dozen of its collective agreements.

17. The parties have both proposed changes to **Clause 12.03** of the collective agreement dealing with the bargaining agent's use of employer facilities. We have decided to recommend that this provision be amended in accordance with the employer's proposal to read as follows:

> A duly accredited representative of the Alliance may be permitted access to the Employer's premises, which include vessels, to assist in the resolution of a complaint or grievance and to attend Meetings called by management and/or meetings with Alliance-represented employees. Permission to enter the premises shall, in each case, be obtained from the Employer. Such permission shall not be unreasonably withheld. In the case of access to vessels, the Alliance representative upon boarding any vessel must report to the Master, state his or her business and request permission to conduct such business. It is agreed that these visits will not interfere with the sailing and normal operation of the vessels.

18. In **Article 14**, dealing with leave for Alliance Business, the bargaining agent has made several proposals for changes, the principal one of which would require the employer to grant leave with pay to employees who exercise the authority of Branch President or National CIU Representative to enable them to undertake the duties associated with their office. We have decided to make no recommendations for changes to Article 14. In particular, we note the employer's claim that this proposal would contravene section 34 of the *Financial Administration Act*, which prohibits the payment of federal funds where no work has been performed, goods supplied or services rendered. We would also question whether the bargaining agent's proposal is implicitly prohibited by paragraph 186 (3) (a) of the *Act*.

19. The union has proposed several changes to **Article 17** dealing with employee discipline. The employer has agreed to minor changes in the wording of Clauses 17.01 and 17.02. The principal remaining disagreement relates to the bargaining agent's proposal for a new provision which would ensure that employees suspended from work for non-disciplinary reasons (i.e. "investigatory" or "administrative" suspensions) continue to receive their regular pay and benefits.

20. It is true, as the employer has observed in its submissions, that the concept of the indefinite, non-disciplinary, unpaid suspension from employment is well established in the arbitral case law, most commonly where the employee has been charged with serious criminal activity not directly related to his or her employment. The bargaining agent, however, has complained, in its submissions, that the employer has resorted to indefinite "investigatory" or "administrative" suspensions without pay in an abusive fashion, although there have been relatively few instances of recourse to this practice in recent years. The bargaining agent has

referred us, as an example of an abusive administrative suspension, to a recent adjudication decision (Grant v. Deputy Head (Canada Border Services Agency) 2016 PSLREB 37).

21. We would not want to deprive the employer completely of the power to suspend an employee pending investigation, a power recognized in cases such as Re Ontario Jockey Club and S.E.I.U., Local 258 (1977), 17 L.A.C. (2d) 176 (Kennedy), where the limits to that power are also recognized. However, it appears to us that it would be desirable for the collective agreement to circumscribe the use of this power. In particular, in our view, the power should only be available to the employer where an employee has been charged with serious criminal conduct, but not yet convicted.

22. We would therefore recommend that the collective agreement include a new provision in Article 17, which would read as follows:

> 17.08 No employee shall suffer any loss in wages or benefits afforded under this Agreement while on investigatory or administrative suspension, except an employee who, having been charged with the commission of an indictable offence, has been suspended without pay by the employer pending trial.

23. Under **Article 24**, entitled Technological Change, the bargaining agent seeks several changes, including the deletion of the first sentence in Clause 24.03, in which the two parties "recognize the overall advantages of technological change and will, therefore, encourage and promote technological change in the Employer's operations". This particular proposed amendment to the agreement would not affect the employer's power to initiate technological change, but merely relieve the bargaining agent of having to reconcile its members' opposition to specific proposed technological changes with the language of the agreement. The bargaining agent, it seems to us, should be free to disavow or repudiate any philosophical commitment to technological change, and we recommend that the sentence in question not appear in the next collective agreement. In all other respects, we would confirm the current language of Article 24.

24. Both parties have made proposals for the amendment of various aspects of **Article 25** dealing with hours of work. One of the bargaining agent's proposals is for the recognition of the possibility of employees working compressed workweeks. We would endorse that proposal and

recommend that Clause 25.06 be amended by the addition of a new paragraph (c), which would read as follows:

> (c) subject to operational requirements as determined from time to time by the employer, a request by an employee for a workday between 6 a.m. and 6 p.m. shall not be unreasonably denied.

The bargaining agent also made a proposal on the subject of "alternative work arrangements". We would recommend a new provision on this subject, probably as part of Article 25, which would read as follows:

> The parties at the local level may, depending on operational requirements, agree upon and implement a policy for alternative work arrangements, including telework.

We would not endorse any of the other proposals for changes to Article 25. (However, because of the addition of paragraph 25.06 (c), it will be necessary to amend paragraph 25.12 (a) by including a reference to paragraph 25.06 (c).)

25. The bargaining agent has made several proposals for changes to **Article 30** relating to designated paid holidays. We have decided to recommend the addition of a new Clause 30.09, based on the bargaining agent's proposals, which is designed to avoid certain scheduling practices to which the bargaining agent takes exception. The clause would read as follows:

> (a) In the event that there are more employees scheduled to work a designated paid holiday than are needed, the Employer shall canvass employees scheduled to work the holiday to determine if there are volunteers who wish to take the day off. In the event that there are too many volunteers, years of service, as defined in sub-paragraph 34.03 (a) (i), will be used as the determining factor to select the employees to be granted the day off.
>
> (b) In the event there are insufficient or no volunteers after the Employer has canvassed in accordance with paragraph (a), the employees with the least years of service, as defined in sub-paragraph 34.03 (a) (i), shall be given the day off.

26. In **Article 33**, entitled "Leave General", the bargaining agent has proposed a change to paragraph 33.02 (a), whereby leave without pay for care of the family would be treated the same as leave without pay for illness as regards the calculation of continuous employment. The proposal would be consistent with the recognition of the caregiver role assumed by many employees. We have decided to recommend that the parties include the following underlined paragraph in their collective agreement:

> 33.02 Except as otherwise specified in this Agreement:
>
> …
>
> (a) where leave without pay for a period in excess of three (3) months is granted to an employee for reasons other than illness, the total period of leave granted shall be deducted from "continuous employment" for the purpose of calculating severance pay and from "service" for the purpose of calculating vacation leave;
>
> (b) notwithstanding the foregoing, an employee on leave without pay for care of the family who is absent for a period not greater than six (6) months shall not have such period deducted from "continuous employment";
>
> (c) time spent on such leave which is for a period of more than three (3) months shall not be counted for pay increment purposes.

27. The bargaining agent seeks changes to the service accrual provisions as regards vacation leave (**paragraphs 34.03 (a) and (b)**). Principally, it wants to reverse the result of a recent adjudication decision (Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency), 2017 PSLREB 20), where it was held that prior service in the Canadian Armed Forces could count, not only for the purpose of vacation leave accrual, but also for the purpose of vacation leave scheduling, when employees are competing for the right to take their vacations at times of the year with large numbers of vacation leave applications. The bargaining agent objects to military service being recognized for the purpose of vacation leave scheduling.

28. We share the bargaining agent's concern that the adjudication decision in question does not reflect the parties' intentions. We have decided to recommend that sub-paragraph 34.03 (a) (ii) be amended by the addition of the underlined words to read as follows:

> For the purposes of clause 34.03 (a) (i) only, effective on April 1, 2012, and on a go forward basis, any former service in the Canadian Forces for a continuous period of six (6) months or more, either as a member of the Regular Force or of the Reserve Force while on Class B or C service, shall also be included in the calculation of vacation leave credits, but not for the purpose of the application of sub-paragraph 34.05 (b) (iii).

Sub-paragraph 34.05 (b) (iii) should also be amended by the addition of the underlined words in the first sentence to read as follows:

> In cases where there are more vacation leave requests for a specific period than can be approved due to operational requirements, years of service, as defined in sub-paragraph 34.03 (a) (ii) of the Agreement, shall be used as the determining factor for granting such requests...

29. The bargaining agent has proposed a new provision in **Article 35**, entitled Sick Leave with Pay, on the subject of payment for medical certificates, which we recommend to the parties. It reads as follows:

> When an employee is asked by the Employer to provide a medical certificate, the employee shall be reimbursed by the Employer for the cost of the certificate.

It seems to us reasonable that this cost should be borne by the employer when it insists on being provided with the medical certificate.

30. On **Article 41**, entitled Leave without Pay for the Care of the Family, the employer has made certain proposals. We have decided to recommend that the collective agreement include the following underlined addition:

> 41.02 An employee shall be granted leave without pay for the care of family in accordance with the following conditions:
>
> …
>
> (dd) Depending on the particular circumstances of the request, the Employer may require proof of the purpose of the leave.

31. The bargaining agent has made several proposals for changes to **Article 56** dealing with employee performance review and employee files. We recommend that the provision be changed by adding the following:

> 56.03 When a report pertaining to an employee's conduct is placed on that employee's personnel file, the employee concerned shall be given:
>
> (a) A copy of the report;
>
> (b) An opportunity to sign the report to indicate that its contents have been read; and
>
> (c) The right to make written comments to be added to the report.

32. **Appendix D** of the expired collective agreement contained a Memorandum of Understanding relating to the implementation period of the collective agreement. The employer has proposed that the 150-day period in the Memorandum of Understanding be increased to 270 days, the bargaining agent that it be reduced to 95 days. The employer argued that an increase was needed to relieve the current burden on its pay system. It also observes that 150 days had been agreed to by the bargaining agent for four other bargaining units in the current round of bargaining.

33. We note that, under section 117 of the *Act*, collective agreements are to be implemented within 90 days of signature unless the parties agree on a different period or the Board sets a different period. We would also note that, under section 115, a collective agreement has effect from "the first day of the month after the month in which the agreement is signed" unless it provides otherwise.

34. We have decided to recommend that the 150-day period be included in the next collective agreement. We would caution the employer, however, that we do not regard 150 days as the new norm. If we are recommending 150 days, it is only because we are aware of the well-publicized problems with the employer's new payroll processing system. The default period of 90 days in the *Act*, in our view, has to be the target for the implementation of collective agreements.

35. **Appendices F and G**, attached to the expired collective agreement, dealt with the subject of firearm training, specifically the process for the selection of employees to undergo this training and the establishment of a consultation committee to discuss strategy for the selection of trainees. The employer has proposed that both Appendices be removed from the collective agreement since they were designed to deal only with the introduction of firearms training. Now that the training programme for existing employees is complete and this training is a precondition of employment, these Appendices no longer have a purpose. The union, on the other hand, proposes a new provision that would primarily protect employees who have to be re-certified on firearms and control defence tactics.

36. We have decided to recommend that the bargaining agent's proposal be included in a new provision in the collective agreement. We are sensitive to the bargaining agent's concern for the continued employment of employees who fail to be re-certified. It makes sense, in our view, that some rules and mechanism be established to address this issue. The bargaining agent's proposal reads as follows:

> xx.01 Employees required to undergo firearm training and/or certification, as well as Control Defence Tactics and/or certification, shall be given every reasonable opportunity to achieve certification or re-certification.
>
> xx.02 If an employee fails to meet the criteria for training, certification or recertification outlined above, the Employer shall make every reasonable effort to find the employee a placement opportunity within the Public Service. Such employees shall be salary protected consistent with Part V of Appendix C of this agreement.
>
> xx.03 The parties agree to maintain a joint consultation committee to discuss the strategy for the placement of employees who are unsuccessful on the firearm and control defence training, certification and re-certification.

CONCLUSION

37. Any proposals made to the Commission that are not specifically dealt with above should be considered to have been rejected.

38. We have attempted to understand the parties' positions and interests, and to put together recommendations which should be acceptable to both sides. We commend to the parties the recommendations in this Report.

March 12, 2018.

Original signed by
Michael Bendel
For the Public Interest Commission

Annex

Dissent of Employer Nominee

In response to the recommendation on the paid meal period where employees are prevented from leaving the work location because of geography or other factors, I strongly disagree.

This recommendation comes directly from the Mackenzie report of June 5, 2013. It did not help the negotiation process at the time and it will not now. It would most likely increase the difficulties for the parties to reach a collective agreement.

It is not based on serious evidence, it is not documented, it is not proven as a conclusive solution to a problem if there is one, nor justified and has not even been asked for.

One of the problems is that the parties do not agree on a comparator. Possible and conceivable comparators that are in situations more difficult and more problematic than border services employees do not have, nor have they asked for, this working condition and have concluded collective agreements.

From the state of evidence right now, no reasonable persons will agree on such a clause.

More, vague and broad as it is, this recommendation will only generate problems and litigations. It is unmanageable and will only worsen the relations between the parties.

This is the kind of recommendation that does not make sense in the process. It will be unacceptable for the employer as well as for the millions of taxpaying Canadians that eat their lunch every working day at their worksite during an unpaid lunch period.