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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

CANADIAN FOOD INSPECTION AGENCY

Employer

RE: Reference under Section 99 of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Bargaining Agent: Jacquie De Aguayo

For the Employer: Neil McGraw

Heard at Ottawa, Ontario, July 22, 2004; written submissions presented on August 13, September 3 and 10, 2004.

[1] The Public Service Alliance of Canada (PSAC) filed a reference under section 99 of the *Public Service Staff Relations Act* (*PSSRA*) on December 23, 2003.

[2] In its reference, the PSAC alleges that the Canadian Food Inspection Agency (CFIA or employer) has failed to observe or carry out certain obligations contained in the Employment Transition Policy, which is found at Appendix B of the collective agreement entered into between the parties on July 6, 2001.

[3] At the hearing held on July 22, 2004, the parties filed an agreed statement of facts, as well as several exhibits referred to in the agreed statement of facts which reads as follows:

> *1. The parties are bound by the terms and conditions of a collective agreement – a copy of which is included herein as Exhibit "A". This collective agreement includes an Employment Transition Policy ("the ETP") at Appendix B of that agreement.*
>
> *2. The Employer, Canadian Food Inspection Agency ("the CFIA"), is a separate employer listed in schedule I, Part II of the Public Service Staff Relations Act. A copy of the Canadian Food Inspection Agency Act is included herein as Exhibit "B".*
>
> *3. The Union, Public Service Alliance of Canada ("the PSAC"), is an employee organization certified by the Public Service Staff Relations Board to represent specified employees of the CFIA. Included herein as Exhibit "C" is a copy of the Board's Certificate, dated October 27, 1997, and amended April 20, 1999, and December 22, 1999.*
>
> *4. Effective December 12, 2003, by Order-in-Council 2003-2065, SI/2003-217 and pursuant to the Public Service Rearrangement and Transfer of Duties Act, certain portions of the Operations Branch of the Canadian Food Inspection Agency were transferred to the Canada Border Services Agency ("the CBSA"). The CBSA is a portion of the Public Service for which Treasury Board is the Employer. Included as Exhibit "D" is a copy of Order-in-Council and included as Exhibit "E" is a copy of the Public Service Rearrangement and Transfer of Duties Act ("the PSRTDA").*
>
> *5. Also effective December 12, 2003, Regulations were issued under the authority of paragraph 36(1)(b) of the Public Service Employment Act deeming that the transfer of employees of the CFIA, in those portions of the Operations Branch that provide passenger and initial import inspection services performed at airports and other Canadian border*

points other than import service centers, to the CBSA was subject to the Block Transfer provisions set out in subsections 37.3(1) and (2) of the PSEA. Included as Exhibit "F" is a copy of the Public Service Employment Act and included as Exhibit "G" is a copy of the Transfer of Portions of the Canadian Food Inspection Agency Regulations, SOR/2003-430.

6. On December 12, 2003, approximately 90 indeterminate and term employees of the CFIA employed as Inspectors in the PM and EG occupational groups ceased to be employees of the CFIA and became employees of the Treasury Board.

7. Persons employed by the Treasury Board in the PM and EG occupational groups are governed by different terms and conditions of employment, including rates of pay, established under two different collective agreements between the Treasury Board and the Public Service Alliance of Canada. Specifically, employees classified in the PM occupational group are governed by the Programme administrative Services collective agreement, and those employees classified in the EG occupational group are governed by the Technical Services collective agreement.

8. On December 12, 2003, the President of the CFIA wrote directly to those employees immediately impacted by the transfer. Included herein as Exhibit "H" is a representative copy of the letter from Richard B. Fadden, President, CFIA to Lisa Mah, Inspector, Vancouver International Airport.

9. As is set out in Mr. Fadden's letter, for a transition period the CFIA would continue to provide services such as finance, human resources, and general administration to the impacted employees.

10. On the same date, an e-mail was sent to Inspectors subject to the transfer explaining the creation of the CBSA. It advised that those activities related directly to the discharge of passenger and initial import inspection services for animals, plants and food (not including the work of the import service centers) would be moved to CBSA. The majority of these resources operate at border crossings, airports and seaports. Another e-mail forwarded the same date advised all employees of the CFIA of the transfer. The e-mail also attached a Questions and Answers document. Included herein as Exhibit "I" is a representative copy of the e-mails from Richard B. Fadden to employees, together with a copy of the Q&A attachment to that e-mail.

11. The creation of the CBSA and the decision to transfer certain duties and functions formerly performed by the CFIA through its employees to the new CBSA was made by the Governor-in-Council, on recommendation by the Prime

> *Minister. The President of the CFIA or his delegates are responsible for identifying the positions and individuals affected by the Order-in-Council in order to determine which employees were, and ceased to be on December 12, 2003, employed by the CFIA and become employed with the CBSA.*
>
> *12. Prior to December 12, 2003, the President or his delegates identified which positions would be transferred to the CBSA. These employees were then informed by e-mail and by letter, on December 12, 2003, that their position would be transferred form the CFIA to the CBSA.*
>
> *13. Before December 12, 2003, or thereafter, the CFIA has not engaged in consultation with the PSAC as contemplated in Part I, articles 1.13, 1.1.10, or Part II, 2.1 of the Employment Transition Policy. The reason that such consultation has not occurred was communicated to the President of the Agriculture Union ("the AU"), Yves Ducharme, as well as to other AU representatives such as Bob Kingston 1st National Executive Vice-President of the AU. The reason given was that the ETP was not triggered by the transfer.*
>
> *14. A copy of the e-mail from Richar Fadden, dated December 12, 2003, and advising individual employees of the transfer, was copied to AU President Yves Ducharme. In addition, Fiona Spencer, CFIA, telephoned Mr. Ducharme that same date to advise him that the transfer was happening.*
>
> *15. Some individual employees of CFIA who were transferred to the CBSA have filed individual grievances under the ETP.*

[4] In its application, the PSAC, by way of redress, requests that the Public Service Staff Relations Board:

> *a. Declare that the CFIA has breached the ETP as alleged;*
>
> *b. Order the CFIA to cease and desist from its ongoing violations of the collective agreement and ETP;*
>
> *c. Order that a copy of the Board's award herein be provided to all of its employees affected by the ETP and government restructuring and that the Board's award be posted in visible places in CFIA workplaces as well as the CFIA's opening page of its intranet website;*
>
> *d. Order the CFIA to meet with PSAC representatives forthwith;*

> *e. Order the CFIA to provide to the PSAC forthwith any and all information relating to the ETP and the government restructuring's impact on employees of the CFIA, including but not limited to:*
>
> *i. The names of all employees affected, their work site and their classification group and level;*
>
> *ii. The work areas affected; and*
>
> *iii. Any terms of hire agreed to by Treasury Board, including, but not limited to, a statement of the rates of pay, benefits, accumulated sick leave and vacation credits and any changes thereto;*
>
> *f. Order the CFIA to meet with PSAC representatives on an ongoing basis with respect to the anticipated transfer of additional functions to the CBSA or elsewhere; and*
>
> *g. Such other relief as the PSAC may request and the Board may grant.*

[5] Only one witness was heard. Bob Kingston is the first National Executive Vice-President of the Agriculture Union, a component of the PSAC. He testified on behalf of the PSAC.

[6] Mr. Kingston stated that not all of the inspectors performing the inspection functions referred to in Order-in-Council 2003-2065 (OIC) (Annex D to the agreed statement of facts) were in fact transferred to the Canada Border Services Agency (CBSA). By way of example, Mr. Kingston indicated that only 13 of the 40 inspectors at the Vancouver Airport were transferred to the CBSA pursuant to the OIC. The selection for transfer was made by senior management without consultation or advance notice. Rumours exist that other inspectors will be transferred to the CBSA in the fall of 2004.

[7] Because of the lack of consultation between the employer and the PSAC, union officials have been unable to answer most questions raised by the members.

[8] Mr. Kingston also indicated that he has not been advised whether any of the corporate support positions referred to in Annex I of the agreed statement of facts will in fact be transferred.

[9] The parties were asked to submit written representations. What follows are the complete texts of those submissions.

Bargaining Agent's Submission

Summary

The PSAC submits that the discontinuance of border inspection functions within the CFIA constitutes an employment transition situation as defined in the Employment Transition Policy. Having met the requirement of the Policy in fact, the PSAC maintains that there is nothing in the legislative instruments engaged to effect the transfer of those functions to the CBSA, whether the Public Service Rearrangement and Transfer of Duties Act or a Regulation issued under the Public Service Employment Act, that expressly or impliedly conflicts with or overrides the ETP so as to render its terms of no force or effect. Accordingly, the PSAC respectfully submits that there is no basis in law or in fact to conclude – as the CFIA suggests - that the Union's right to be consulted as set out in the Employment Transition Policy was never engaged.

Accordingly, and for the reasons that follow, the PSAC respectfully requests that the Board allow the PSAC's Reference under section 99 of the Public Service Staff Relations Act and grant the relief requested therein.

Facts

The parties proceeded before the Board on July 22, 2004, on the basis of an agreed statement of facts. For ease of reference, these facts are reproduced here:

1. The parties are bound by the terms and conditions of a collective agreement – a copy of which is included herein as Exhibit "A". This collective agreement includes an Employment Transition Policy ("the ETP") at Appendix B of that agreement.

2. The Employer, Canadian Food Inspection Agency ("the CFIA"), is a separate employer listed in Schedule I, Part II of the Public Service Staff Relations Act. A copy of the Canadian Food Inspection Agency Act is included herein as Exhibit "B".

3. The Union, Public Service Alliance of Canada ("the PSAC"), is an employee organization certified by the Public Service Staff Relations Board to represent specified employees of the CFIA. Included herein as Exhibit "C" is a copy of the Board's Certificate, dated October 27, 1997, and amended April 20, 1999, and December 22, 1999.

4. Effective December 12, 2003, by Order-in-Council 2003-2065, SI/2003-217 and pursuant to the Public Service Rearrangement and Transfer of Duties Act,

certain portions of the Operations Branch of the Canadian Food Inspection Agency were transferred to the Canada Border Services Agency ("the CBSA"). The CBSA is a portion of the Public Service for which Treasury Board is the Employer. Included as Exhibit "D" is a copy of Order-in-Council and included as Exhibit "E" is a copy of the Public Service Rearrangement and Transfer of Duties Act ("the PSRTDA").

5. Also effective December 12, 2003, Regulations were issued under the authority of paragraph 36(1)(b) of the Public Service Employment Act deeming that the transfer of employees of the CFIA, in those portions of the Operations Branch that provide passenger and initial import inspection services performed at airports and other Canadian border points other than import service centres, to the CBSA was subject to the Block Transfer provisions set out in subsections 37.3(1) and (2) of the PSEA. Included as Exhibit "F" is a copy of the Public Service Employment Act and included as Exhibit "G" is a copy of the Transfer of Portions of the Canadian Food Inspection Agency Regulations, SOR/2003-430.

6. On December 12, 2003, approximately 90 indeterminate and term employees of the CFIA employed as Inspectors in the PM and EG occupational groups ceased to be employees of the CFIA and became employees of the Treasury Board.

7. Persons employed by Treasury Board in the PM and EG occupational groups are governed by different terms and conditions of employment, including rates of pay, established under two different collective agreements between the Treasury Board and the Public Service Alliance of Canada. Specifically, employees classified in the PM occupational group are governed by the Programme Administrative Services collective agreement, and those employees classified in the EG occupational group are governed by the Technical Services collective agreement.

8. On December 12, 2003, the President of the CFIA wrote directly to those employees immediately impacted by the transfer. Included herein as Exhibit "H" is a representative copy of the letter from Richard B. Fadden, President, CFIA to Lisa Mah, Inspector, Vancouver International Airport.

9. As is set out in Mr. Fadden's letter, for a transition period the CFIA would continue to provide services such as finance, human resources, and general administration to the impacted employees.

10. On the same date, an e-mail was sent to Inspectors subject to the transfer explaining the creation of the CBSA. It advised that those activities related directly to the discharge of passenger and initial import inspection services for animals, plants and food (not including the work of the import service centres) would be moved to CBSA. The majority of these resources operate at border crossings, airports and seaports. Another e-mail forwarded the same date advised all employees of the CFIA of the transfer. The e-mail also attached a Questions and Answers document. Included herein as Exhibit "I" is a representative copy of the e-mails from Richard B. Fadden to employees, together with a copy of the Q&A attachment to that e-mail.

11. The creation of the CBSA and the decision to transfer certain duties and functions formerly performed by the CFIA through its employees to the new CBSA was made by the Governor-in-Council, on recommendation by the Prime Minister. The President of the CFIA or his delegates are responsible for identifying the positions and individuals affected by the Order-in-Council in order to determine which employees were, and ceased to be on December 12, 2003, employed by the CFIA and became employed with the CBSA.

12. Prior to December 12, 2003, the President or his delegates identified which positions would be transferred to the CBSA. These employees were then informed by e-mail and by letter, on December 12, 2003, that their position would be transferred from the CFIA to the CBSA.

13. Before December 12, 2003, or thereafter, the CFIA has not engaged in consultation with the PSAC as contemplated in Part I, articles 1.1.3, 1.1.10, or Part II, 2.1 of the Employment Transition Policy. The reason that such consultation has not occurred was communicated to the President of the Agriculture Union ("the AU"), Yves Ducharme, as well as to other AU representatives such as Bob Kingston, 1st National Executive Vice-President of the AU. The reason given was that the ETP was not triggered by the transfer.

14. A copy of the e-mail from Richard Fadden, dated December 12, 2003, and advising individual employees of the transfer, was copied to AU President Yves Ducharme. In addition, Fiona Spencer, CFIA, telephoned Mr. Ducharme that same date to advise him that the transfer was happening.

15. Some individual employees of CFIA who were transferred to the CBSA have filed individual grievances under the ETP.

The PSAC called one witness, Bob Kingston, 1st National Executive Vice-President of the AU. By his evidence, Mr. Kingston confirmed that not all individuals performing the inspection services described in the Order-in-Council were transferred to the CBSA. Citing the Vancouver Airport operations as an example, Mr. Kingston indicated that out of approximately 30 or 40 Inspector positions, 13 were selected by the CFIA for transfer to the CBSA. Mr. Kingston stated in cross-examination that no further transfers have been officially confirmed. However, he indicated that employees were told that a future transfer was being postponed until the Fall. Mr. Kingston indicated that the Union's information is not from the Employer but through employees and the rumour mill.

Mr. Kingston also testified that the Union has received ongoing inquiries from employees as to their rights are under the Transition Policy, whether they have any options, and what other transfers may happen in the future. The Union has not been able to give them any additional information.

The PSAC also wishes to draw the attention of the Board to some additional facts arising from the documents annexed to the Agreed Statement of Facts. However, specific portions of the ETP, as well as the legislative instruments referred to in the Agreed Statement of Facts, are fully set out in the argument portion of this submission.

Staff were first advised at 2:26 p.m. on December 12, 2003, that, effective immediately, passenger and initial import inspection services at airports and Canadian border points (other than import inspection services) (hereinafter referred to as "border inspection services") within the CFIA were being taken over by the CBSA. (See Exhibit "I"). This e-mail communiqué was not forwarded to the Union until a half hour after it had been communicated directly to employees (e-mail from Ms Derickx of 3:06 p.m.). No communications were, or have been made, directly to the National President of the PSAC.

> *Note: Exhibit "I" contains a series of related e-mails from December 12, 2003: an e-mail from Richard Fadden at 2:26 p.m.; an e-mail from Richard Fadden at 3:53 p.m. representing a joint communiqué from the CFIA and CBSA; an e-mail from Josee Derickx to AU President Yves Ducharme at 3:06 p.m. forwarding the 2:26 p.m. e-mail from Richard Fadden to employees; and a copy of a Q&A attachment prepared by the Employer for employees and attached to the 2:26 e-mail from Richard Fadden. They are referred to herein by the name of the sender and the time.*

By letter also dated and received December 12, 2003, employees whose positions were being transferred to the CBSA were also advised of the transfer by CFIA President Richard B. Fadden. (See Exhibit "H").

In these two written communications, CFIA confirms that additional corporate support transfers would be addressed at a later time. Accordingly, affected employees were told they were now employed by the CBSA but, in the interim, would remain within the same CFIA reporting and corporate support structure. Indeed, CFIA expressly states that "it will take some time before every aspect of the full transfer is complete" (See Ex. "I", paras. 3 & 5).

Analogous information was provided to employees in Mr. Fadden's e-mail representing a joint CFIA, CCRA, CIC and CBSA communiqué of 3:53 p.m. In that e-mail, the Employer(s) stated that during the "period of reorganization" they "will be consulting employees, their representatives and stakeholders to ensure an orderly and transparent process" (See Ex. "I", paras. 3, 4, 5, 10, & 12). However, it is clear that, with respect to CFIA, consultation did not occur. What the Union has received is the same general information as has been communicated directly to employees, whether at the same time or, indeed, subsequently (See general e-mail of 2:26 p.m. and the J. Derickx e-mail to Y. Ducharme at 3:06 p.m. & Agreed Statement of Facts, paras. 13 & 14).

Moreover, paragraph 7 of the 3:53 p.m. e-mail confirms that an agreement was made between the CFIA, CCRA and the CBSA (Treasury Board) relating to interim terms and conditions of employment and the recognition of transfer rights for certain benefits for employees. The CFIA, CCRA and CBSA expressly recognize that this situation is different than for those affected employees from Citizenship and Immigration Canada (CIC) where, as it was a transfer of functions within Treasury Board, such protections would be automatic.

Paragraph 9 of that same e-mail also provides that "the transfer of functions and employees to the new agency is essentially seamless and has been planned and structured*…" (Emphasis added).*

Argument

(1) The Employment Transition Policy is Engaged

The PSAC submits that the Employment Transition Policy ("the ETP") unequivocally contemplates that the events of December 12, 2003, prima facie constitute an "employment transition situation".

(a) The Parties Have Defined Employment Transitions Broadly

An employment transition situation is broadly described in the ETP Policy statement:

> *Reasons for the occurrence of employment transition situations include, but are not limited to, expenditure constraints, new legislation, program changes, reorganization, technological change, productivity improvement, elimination or reduction of programs or operations in one or more locations, relocation, and, decentralization. These situations may result in a lack of work or discontinuance of a function. (Ex. "A", p. B-1)*

An employment transition is further defined as:

> *Employment transition is a situation that occurs when the President decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work or the discontinuance of a function within the Agency. Such situations may arise for reasons including but not limited to those identified in the Policy section above. (Ex. "A", p. B-2)*

Accordingly, the PSAC submits that the parties' contemplated that a broad range of events will trigger the ETP where the effect is the discontinuance of a function within the Agency. The most cogent evidence of that intention is the use of the words "including but not limited to" and "such situations may arise".

(b) The Transfer of December 12, 2003, Meets the Definition of Employment Transition Situation

There is no dispute that there was a discontinuance of border inspection services within the Agency. Effective December 12, 2003, therefore, there was an elimination (or discontinuance) of this function within the Agency immediately affecting approximately 90 employees.

Moreover, the reason for the occurrence of the employment transition situation arose out of a reorganization within the broader Public Service. As is set out, above, the parties have expressly indicated that new legislation, program changes, reorganization, and the elimination of programs or operations in one or more locations are triggers for the ETP.

The President, or his delegates, in carrying out the Agency's newly-modified mandate, decided which positions would no longer be required as at December 12, 2003. This process of deliberation within the Agency occurred before the

December 12, 2003, date. Indeed, the joint e-mail communication of December 12, 2003, (Ex. "I") expressly refers to the fact that the reorganization was "planned to minimize disruption" and that an agreement was forged in advance to deal with terms and conditions of employment for affected employees. It is also the case that the President chose from a range of inspector positions, 13 out of 40 in the Vancouver Airport location as an example, that would be transferred.

The PSAC submits that the impact of the reorganization of the Public Service upon the CFIA constitutes an employment transition situation as defined in the ETP. In the result, there can be no doubt that the obligation to consult with the Union as set out in the ETP was triggered (See Ex. "A", Part I, articles 1.1.3, 1.1.10 and Part II, article 2.1).

(c) The ETP Contemplates Employment Subsequently Obtained Within the Broader Public Service

The ETP states that its focus is to allow, where possible, individual employees to continue their employment within the Agency where there is an "employment transition situation". There is no guarantee of continued employment. However, the ETP is clear that employees are to be given a reasonable opportunity to exercise the right to "continue their careers as Agency employees" in accordance with the terms of the ETP and in the face of a lack of work or the discontinuance of a function. (Ex. "A", p. B-1 & B-2, article 1.1.1).

The ETP also provides affected employees with a range of options where there is no alternative work, including a payment based on years of service (a transitional support measure), maintaining a twelve-month priority appointment right for a position within the CFIA, or an education allowance (Ex. "A", p. B-2, 3, & article 6.3.1. at p. B-12).

The ETP provides that employees' individual rights and opportunities may vary depending on the availability of other positions within the Agency and the nature and timing of employment obtained outside the Agency.

For example, as part of the Agency's general obligations under the ETP, articles 1.1.4 and 1.1.39 provide for the situation where an Agency employee obtains indeterminate employment with a new, "cooperating" employer. In these circumstances, the ETP states that the Agency shall enter into an Agreement with the new employer dealing with, among other things, salary protection, costs of termination and other matters. Indeed, the joint e-mail communication of 3:53 p.m. confirms that an agreement was in fact entered into in respect of the individual employees transferred

(Exhibit "I", para. 7). Moreover, it is hard to imagine a guarantee of "salary protection upon lower level appointment" applying anywhere but to a transfer within the broader Public Service (see 1.1.39(a)).

The ETP also addresses the consequences of subsequent employment within the Public Service – whether with Treasury Board or another separate employer. For example, where there is a break in service, article 6.3.7 expressly provides that an employee, who has received either pay in lieu of surplus period, transitional support measures or an education allowance and becomes employed by either Treasury Board or another separate employer, must reimburse the Receiver General for Canada in the manner specified in the article.

There is a similar article (6.4.3) that deals with the repayment of retention pay where an individual is employed by Her Majesty in Right of Canada anytime within six months of leaving the Agency.

It would be incongruous indeed to suggest that employment by Treasury Board, whether immediate or not, serves to render the ETP inapplicable from the outset and in its entirety. Article 1.1.39 is cogent evidence of the incompatibility of such a proposition with the range of circumstances contemplated in the ETP and set out here. An employee's ultimate employment with Treasury Board may impact on the scope of his or her rights in the event that no alternate position is available within the CFIA. Clearly, these questions remain to be decided in the context of the adjudication of individual grievances filed by employees under the ETP. At the end of the day, however, it cannot be suggested, having regard to the language and terms of the ETP, that the right to an answer to these questions never arose because of a unilaterally, and it is submitted unreasonably, held view by only one party to that agreement that it does not apply.

Accordingly, the PSAC states that there is nothing about employment with Treasury Board that nullifies the applicability of the ETP with respect to individual employees. This, in turn, further supports the conclusion that the failure to consult with the Union as contemplated by the ETP is also in contrary to its terms.

(d) The Employment Transition Policy Contains Significant Union Consultation Obligations

The ETP places significant emphasis on the role of the Union in employment transition situations. Accordingly, the Union has specific rights to information, notice and consultation, as

well as the duty advise and act on behalf of employees, in the context of employment transition situations.

It is the respect for, and recognition of, these rights and obligations that is the core issue raised by the within Reference. The principle at stake being the reinforcement of the legitimacy of the Union's role in the workplace – a role which is sanctioned under the PSSRA, and is reinforced in the collective agreement and the ETP.

For example, underlying the ETP is the notion that employees who have questions or concerns about the interpretation or application of the ETP ought to be able to get information from the Union as well as from the Employer. (See page B-3 "Enquiries"). Article 1.2.1 further confirms that employees have the right to be represented by their bargaining agent in the application of the ETP and are entitled to a copy of the ETP whenever they are faced with an employment transition situation (article 1.1.13).

In addition, article 1.1.3 requires that the Employer establish, where appropriate, joint Union/Management employment transition committees to consult on employment transitions within the Agency. Article 1.1.10 states that the Agency "shall advise and consult with the bargaining agent representatives as completely as possible regarding any employment transition situation as soon as possible after the decision has been made and throughout the process. The Agency will make available the to the bargaining agent the name and work location of affected employees."

Where there is an employment transition situation that is likely to involve ten or more indeterminate employees, the President of the CFIA is required to inform, in writing and in confidence, the President of the PSAC not less than 48 hours before any employment transition situation is announced. (See Part II, article 2.1).

(e) The Union Consultation Obligations Were Violated

The PSAC submits that the CFIA failure to consult was a breach of the ETP in fact and in spirit.

There is no doubt that none of the consultation envisioned by the ETP was made in this case. When asked why the CFIA was not consulting, the consistent response from the CFIA was that the ETP was not triggered (Agreed Statement of Facts, para. 13). Moreover, direct employee communications were copied to the Union after the fact. (See Ex. "I", e-mail from J. Derickx). The facts also make a mockery of the direct communication to employees that the Employer will be "working with union representatives" (Ex. "I", joint e-mail, para. 3). There is also the Q&A sent by the CFIA as part of its

communication to employees at 2:26 on December 12, 2003 (Ex. "I", Q&A, Q3). It revealingly states, in response to question Q3: "have the unions been consulted on these changes?" A3: "Union officials are being briefed".

The evidence also shows that the reorganization and the identification of affected positions was not, and could not have been, a spontaneous act that occurred without the input of the President or his delegates. On the contrary, there was information available to the President prior to December 12, 2003, that could, and should, have been communicated to the National President of the PSAC in accordance with Part II of the ETP.

Moreover, employees were advised that certain benefits were preserved on transfer and that, in the interim, their terms and conditions of employment remained the same. As contemplated by the ETP, an agreement was entered into with the CBSA (Treasury Board) relating to terms and conditions of employment. The Union was not part of any agreement in this regard yet employees, through the ETP, have a legitimate right and expectation that their Union will be in a position to advise them of what, in its view, employees' short term and long term rights are, as well as the employer's obligations (See Ex. "I" & "H").

The current restructuring within the Public Service also confirms the ongoing prejudice of the Employer's refusal to recognize the applicability of the ETP. Prospectively, there remains the possibility of the discontinuance of support services to inspectors currently performed by Agency employees. Indeed, the reference to subsection 37.3(2) of the PSEA in the Regulation issued by Order in Council (Ex. G) is strong evidence of that intention. Moreover, there is no doubt that, in the communications made to employees, additional change was presented as inevitable (however ill-defined in its scope or timing). As Bob Kingston indicated, there is an active rumour mill that the PSAC is ill-equipped to address given that it's information comes through that same rumour mill or is provided at the same time as, or after, direct communications to employees by the Employer.

The impact of a breach of these types of provisions on a Union is obvious. It denies the Union the opportunity to assess the situation in advance and to develop a response and advice for the inevitable inquiries from its members. Without the fulfillment of this right, the Union is placed on its heels by reacting to information as it comes out. It is clearly the intention of the ETP that such a situation is to be avoided. Indeed, the degree to which Union consultation plays such a prominent part in the ETP is strong evidence of the Union's objectives in negotiating the ETP and the Employer's recognition of the legitimacy of those objectives. Circularly,

the communication did not occur on the basis of the Employer's view that the ETP did not apply. As is stated elsewhere in these submissions, that view was clearly unreasonable given the broad language and objectives of the ETP. In light of all the foregoing, the PSAC submits that the ETP was intended to be read broadly and flexibility in light of a wide range of circumstances affecting the work of the Agency. Prima facie, therefore, the preponderance of the evidence supports the conclusion that the ETP was engaged.

(2) The Relevance of the PSRTD Act and the PSEA

In response to the within Reference, the CFIA asks the Board to conclude that, notwithstanding its terms, the ETP was never triggered because the mechanism to effect the reorganization was "according to law". The PSAC submits that the CFIA position is an untenable one in law and in fact and ought to be rejected by the Board for the reasons that follow.

(a) The Transfer of Statutory Powers and Ministerial Functions from one Portion of the Public Service to Another Requires Legal Authorization

The mandate of the CFIA and the power of the President of the CFIA over human resources are statutory in nature and arise by virtue of the Canadian Food Inspection Agency Act, S.C. 1999, c.6 ("the CFIA Act") (Ex. "B"). The Minister responsible for the CFIA and its functions is, according to section 2 of the CFIA Act, the Minister of Agriculture and Agri-Food.

The Agency administers and enforces a wide range of legislation listed in section 11 of the CFIA Act. In accordance with subsection 13(3) of the CFIA Act, it is the President of the Agency who designates those inspectors charged with the enforcement or administration of the legislation within the mandate of the Agency. Accordingly, inspectors performing border inspection services at airports, sea ports and other ports of entry are performing a statutory function under the direction of the President of the CFIA.

As a result of an Order-in-Council, dated December 12, 2003, certain inspection functions were transferred from the Agency to the CBSA. The Public Service Rearrangement and Transfer of Duties Act ("the PSRTD Act") consists of only four operative sections which are reproduced below in full:

> *1. This Act may be cited as the Public Service Rearrangement and Transfer of Duties Act.*

> *2. The Governor in Council may*
>
> > *(a) transfer any powers, duties or functions or the control or supervision of any portion of the public service from one minister to another, or from one department or portion of the public service to another; or*
> >
> > *(b) amalgamate and combine any two or more departments under one minister and under one deputy minister.*
>
> *3. Where under this Act, or under any other lawful authority, any power, duty or function, or the control or supervision of any portion of the public service, is transferred from one minister to another, or from one department or portion of the public service to another, the minister, department or portion of the public service to whom or which the power, duty, function, control or supervision is transferred, and the appropriate officers of that department or portion of the public service, shall, in relation thereto, be substituted for and have and carry out the respective powers and duties that formerly belonged to or were to be carried out by the minister, department or portion of the public service and the respective officers of the department or portion of the public service from whom or which the power, duty, function, control or supervision is so transferred.*
>
> *4. Where a minister to whom any powers, duties or functions have been transferred by name pursuant to this Act dies or otherwise ceases to be a minister, those powers, duties or functions may be transferred to another minister.*

The PSAC states that this is not complex legislation with a broad public policy purpose, nor does it purport to regulate all matters arising out of transfers within the Public Service. On the contrary, its objective is, while necessary, a more functional one. Section 2 vests in the Governor in Council the power to transfer duties, functions, or the control or supervision of portions of the public service between ministers, departments or other portions of the public service. Section 3 confirms that, in so doing, the Minister or officers exercising an authority under the direction or control of a former Minister, department or portion of the public service, are lawfully exercised by the new Minister, department or portion of the public service where the Governor in Council so directs.

The necessity of ensuring that statutory powers of decision, and in the present case enforcement, are provided for by legislative instrument is underscored by a number of Federal

Court of Canada cases dealing with the PSRTD Act. In short, the cases emphasize the importance of ensuring that rearrangements within the Public Service maintain a "lawful" chain of statutory authority in the administration, delivery and enforcement activities of Government. The consequences of a failure in this regard will impact upon the legality of the exercise of any authority occurring after a transfer.

For example, in Branigan v. Canada (Minister of Citizenship and Immigration), [2004] FCJ No. 282 (TD), the Applicant challenged the lawfulness of a deportation order in light of the transfer of Ministerial authority from the Department of Citizenship and Immigration Canada to the CBSA. On December 11, 2003, a Report was issued maintaining that the Applicant was inadmissible to Canada under the Immigration and Refugee Protection Act. On the basis of the Report, the matter was referred to the Immigration Division for an admissibility hearing. That referral was made on December 12, 2003.

The Court concluded that the December 12, 2003, reorganization would have had no impact on the Report issued on December 11, 2003. With respect to the referral of December 12, 2003, the Court considered Orders-in-Council issued under the PSRTD Act in concluding that these legislative instruments ensure that there is "no gap in the chain of authority from the appropriate Minister to her delegate in respect of the referral…" (at pp. 4-5, paras. 10-15).

Similarly, in Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans), [1998] F.C.J. No. 976 (TD), an environmental assessment report concluded that the proposed construction of two bridges would not likely cause significant adverse environmental effects. In reliance on the report, the Canadian Coast Guard issued the approvals on behalf of the Minister of Fisheries and Oceans under the authority of the Navigable Waters Protection Act. The Minister of Fisheries and Oceans had assumed responsibility for the Coast Guard as a result of a reorganization made under the PSRTD Act. However, the Navigable Waters Protection Act, under which the approvals were made, designated the Minister as the Minister of Transport.

The Court recognized that the PSRTD Act Order in Council improperly failed to transfer powers from the Minister of Transport to the Minister of Fisheries and Oceans. It only purported to transfer the control and operation of the Canadian Coast Guard. As such, the issuance of the approvals on behalf of the Minister of Fisheries and Oceans was found to be irregular. At the end of the day, however,

the Court declined to render the approvals null and void as being in the interests of justice.

It is submitted that the reorganization of December 12, 2003, required an Order in Council issued under the PSRTD Act. However, the necessity for that Order was to ensure the lawfulness of the subsequent exercise of any powers, duties and functions by any inspectors, the new Minister responsible for the CBSA, or any of the officers such as the President of the CBSA.

(b) The PSRTD Act speaks only to duties, powers, functions and control and supervision over parts of the Public Service – not Employees

The PSAC submits that there is nothing in the PSRTD Act that expressly or impliedly supports the proposition that the attainment of its objectives override the terms of a collective agreement applicable to individual employees, the Union and the Employer. Indeed, nowhere does the PSRTD Act use, or propose to cover off, labour relations matters or terms and conditions of employment. On the contrary, the PSRTD Act speaks only to the exercise of powers, duties or functions and the control of portions of the public service – whether vested in a minister, department or other portion of the public service. It does not speak of "employees".

(c) There is no Conflict Between Achieving the Objects of the PSRTD Act and Recognizing the Rights and Obligations under the ETP

Recognizing that there exists an employment transition situation does not impact the "chain of authority" concerns to which the PSRTD Act addresses itself. Stated another way, compliance with the Union consultation obligations in the ETP in no way impacts on the transfer of authorities from the CFIA to the CBSA.

Indeed, the ETP was negotiated by parties well-versed in the mechanics of the Public Service. The ETP deals directly with the movement of employees from one part of the Public Service to another as part of an employment transition situation. (See references in the ETP discussed earlier, and the agreement with a cooperating employer contemplated there; as well as the actual agreement entered into by the CFIA and referenced in the joint e-mail communiqué of December 12, 2003).

Accordingly, there is no conflict in fact or law between the fulfillment of the objectives of the PSRTD Act and a finding that the transfer fell within the meaning of the ETP. The imposition of a different type of obligation, where the collective agreement and legislative instruments operate in

overlap, is not a conflict. (See Brown & Beatty, Labour Arbitration in Canada, para. 2:2140) At the end of the day, the terms of a collective agreement must prevail where they are not in conflict with legislative instruments.

Indeed, the view expressed by arbitrators is consistent with the general presumption in statutory interpretation that legislative instruments should be read in a manner that avoids conflict. The authority to reorganize the Public Service as articulated in the PSRTD Act must be construed in a manner consistent with the rights of employees and employee organizations under the PSSRA and a collective agreement deemed binding under that statute. Parliament is deemed to legislate in light of existing rights and obligations and an intention to override those rights must be set out with "irresistible clearness". No such clarity of intention exists here. (See Driedger on the Construction of Statutes, pp. 185-186 & p. 288 & 368-370)

As Driedger states at p. 288, "[O]ther things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred". Accordingly, it is respectfully submitted that the Board ought to favour an interpretation that allows for the attainment of both the objectives of the PSRTD Act and those of the PSSRA and binding collective agreements as prescribed by that Act.

(d) Regulations Issued Under the Public Service Employment Act Are Interpretive - Not Prescriptive

By Regulation issued under paragraph 36(1)(b) of the Public Service Employment Act, ("the PSEA"), subsections 37.3(1) and (2) of that Act are deemed to apply to the transfer of border inspection services to the CBSA (Ex. "G"). Again, the CFIA relies upon this Regulation to assert that the ETP was never engaged because the transfer was effected "according to law". The PSAC submits that the language of the Regulation does not assist the Employer in its view.

At the outset, it bears noting that section 37.3 of the PSEA is not prescriptive. It is, in essence, an interpretive provision that requires that the fact of an Order under the PSRTD Act not be "construed as affecting the status of an employee" who was transferred (subsection 37.3(1)). The PSAC submits that it is this subsection that applies directly to inspectors transferred on December 12, 2003, as that transfer was limited to those positions performing the inspection functions expressly identified in the PSRTD Act Order-in-Council. (See Ex. "D").

In contrast, subsection 37.3(2) provides that individuals performing duties in or in part in support of the positions transferred under a PSRTD Act Order, occupy their positions

in the same department as the persons transferred under subsection 37.3(1). The PSAC notes that the reference to the applicability of this subsection in the Transfer of Portions of the Canadian Food Inspection Agency Regulations ("the Regulation") lends further support to the proposition that additional transfers may occur in the future for support staff.

It goes without saying that statutes must be read as whole. The PSAC states that section 37.3 of the PSEA must be read in context.

In determining the objectives of section 37.3, one must have regard to subsection 37.3(3). It specifically limits the definition of Public Service to transfers within Treasury Board. It is significant that elsewhere in the PSEA, the definition of Public Service is the same as that in the PSSRA.

The PSAC submits that this limitation makes sense because, with respect to Treasury Board (and unlike separate employers such as the CFIA), the staffing and incumbency in positions in Departments and other portions of the public service for which Treasury Board is the Employer requires strict adherence to the PSEA and its Regulations, the merit principle, and rights of appeal under section 21 of the PSEA. Moreover, the classification of positions and the rates of pay applicable to those classifications are consistent as between departments and agencies for which Treasury Board is the employer. The same is not the case for separate employers.

The PSAC submits that the reference to the effect of a transfer on the "status" of an employee must be understood in its PSEA-context. In short, a transfer does not represent a new appointment to a position that would trigger the other provisions of the PSEA and/or the application of the principle of selection according to merit, nor does it disrupt the organization and classification of positions that is consistent within Treasury Board itself.

> *Attorney General of Canada v. Greaves, [1982] 1 F.C. 806 (C.A.) per Pratte J.A. at 810 (citing Nanda v. Appeal Board established by the Public Service Commission, [1972] F.C. 277 (C.A.) per Jackett, C.J.)*
>
> *Charest v. Attorney General of Canada, [1973] F.C. 1217 (C.A.) at 1221*
>
> *Bambrough v. Public Service Commission, [1976] 2 F.C. 109 (C.A.) at 115*

However, the CFIA asks the Board to read into the Regulation an intention to render both individual and Union collective agreement rights that would otherwise be triggered by the

transfer as null and void. The CFIA asks the Board to read into these instruments an intention that the ETP not apply. It is significant that the CFIA is not asking the Board to take these legislative instruments into context in determining the scope of rights under the ETP but, rather, it asks the Board to read these rights completely out of the collective agreement in the circumstances of this case.

Its position cannot be sustained. In reliance on the authorities listed above, the Regulation is issued under the PSEA and, accordingly, ought not to be read in such a way as to override matters governed under the PSSRA unless there is a clear conflict or an express intention to do so. There is no reference to the PSSRA or to collective agreements in the PSRTD Act or section 37.3 of the PSEA. Accordingly, the PSAC submits that Parliament must be presumed to have intended that the rights, duties and obligations contained in these separate pieces of legislation were meant to operate concurrently.

Moreover, there is no conflict between the terms of the ETP and the transfer. The CFIA did in fact enter into an agreement analogous to that contemplated in article 1.1.39 of the ETP and, in the joint communiqué, recognized that this was necessary for separate employers. Moreover, there are provisions in the ETP that address circumstances where an employee becomes employed by Treasury Board. The PSAC submits that the language of the ETP itself speaks volumes on the degree to which it can, and does, apply concurrently and in harmony with the transfer. Accordingly, in the absence or conflict or an express intention in the legislative instrument itself, the PSAC submits that the Board must read these various provisions in a manner that allows them to work together.

Indeed, the PSAC submits that it is significant that the CFIA position bears no reference or acknowledgement of the unforgiving language of the ETP in the context of the present case. The only trigger in the ETP is the decision that the services of an employee are no longer required by the Agency because of a discontinuance of a function within the Agency. Once this criteria is met, the CFIA has a duty to consult the Union that is not subject to what the Employer's own views may be on the rights it, or employees, may have under the ETP. While the legislative instruments relied upon by the Employer here may be relevant to the interpretation of the ETP, they do not preclude resort to it.

(e) Alternative Submission

In the event that the Board is inclined to accept the CFIA's argument that the applicability of subsections 37.3(1) and (2) of the PSEA nullify the duties and obligations under the ETP,

the PSAC submits that these subsections do not and cannot apply to transfers of employees from a separate employer to the Treasury Board and, as such, are not transfers made "according to law" as asserted by the Employer.

The Regulation purports to apply the block transfer provisions of the PSEA to the movement of employees from Part II to Part I of Schedule I of the PSSRA. The Regulation is issued under paragraph 36(1)(b) of the PSEA which gives the Governor in Council the power to "notwithstanding any other Act, applying all or any of the provisions of this Act that do not otherwise apply, including the provisions relating to appointments, to any portion or part of any portion of the Public Service". There is no doubt that this is a general provision relating to the Governor-in-Council's overall regulation-making authority.

In this case, the Governor in Council issued a regulation under 36(1)(b), the Transfer of Portions of the CFIA Regulations, which states that only subsections 37.3 (1) and (2) of the PSEA apply to the transfer of employees from CFIA to the CBSA. However, subsection 37.3(3) specifically defines "public service" for the purposes of the interpretation of subsections 37.3(1) and (2) as being limited to Treasury Board. Subsection 37.3(4) also provides that the section (as a whole) applies to transfers under the PSRTDA.

The PSAC submits, therefore, that there is an express requirement that while the block transfers apply to PSRTDA transfers, they do so only where the transfers occur within the Public Service as specifically defined in that section.

The principles of statutory interpretation are clear: the statute will always prevail over a regulation. On its face, the Regulation issued in the present case does not "apply" the act but, effectively, amends it by carving subsection 37.3(3) out.

The Regulation-making authority under section 36(1), however, gives the Governor-in-Council the broad authority to issue Regulations applying certain provisions of the PSEA notwithstanding any other Act. It is submitted that the "other" Act in the present case would be the Canadian Food Inspection Agency Act which provides that the President of the CFIA has control and supervision over Agency employees including the power to appoint. (See Ex. "B", ss. 12-13). Subsection 36(1)(b) does not say notwithstanding the provisions of this Act.

Moreover, where a statute has a general provisions (the power to regulate in this case) and a specific provision (a definition of "public service" directed exclusively to section 37.3), it is well accepted that the specific must prevail over the general. Accordingly, the PSAC submits that the

Governor-in-Council cannot, through her general power to issue a regulation applying the PSEA notwithstanding another Act, effectively amend the Act and ignore a specific provision relating to the applicability of block transfers. (See Drieger, pp. p. 185-186, 188).

For example, in Public Service Alliance of Canada v. Canada (Public Service Commission), the Federal Court held that an Order issued by the Governor-in-Council could not stand on the basis that it derogated from the principle of selection according to merit in the Act. As such, a regulation-making power cannot be used to undermine the clear purpose and words of the Act.

> *Public Service Alliance of Canada v. Canada (Public Service Commission), [1992] 2 FC 181 (QL) at paras. 11-26*

Indeed, in that case Rouleau J. quotes from Le Dain J.A. in a decision entitled Greaves stating:

> *I am mindful that the conclusion reached in this case may severely limit the flexibility provided by the power of transfer in the Public Service, to the extent that a particular transfer constitutes an appointment within the meaning of the Act, but if more is required in this regard it should be clearly provided by the legislation.*

In light of all the foregoing, the PSAC submits that it is not possible to "apply" subsections 37.3(1) and (2) to a transfer under the PSRTD Act without regard to subsection 37.3(3). The CFIA asks this Board to conclude that the ETP was not triggered because the transfer was "according to law". The PSAC submits in the alternative, therefore, that the legality of the Regulation is in doubt and, accordingly, ought not to be relied upon by the Board in the disposition of this complaint.

Conclusion

The PSAC submits that the discontinuance of border inspection functions within the CFIA constitutes an employment transition situation as defined in the Employment Transition Policy. Moreover, there is nothing in either the PSRTD Act or the Regulation that expressly or impliedly conflicts with or overrides the ETP so as to render its terms of no force or effect.

Accordingly, the PSAC respectfully submits that there is no basis in law or in fact to conclude that the Union's right to be consulted as set out in the Employment Transition Policy was never engaged.

Accordingly, the PSAC respectfully requests that the Board allow the PSAC's Reference under section 99 of the Public Service Staff Relations Act and grant the relief requested therein.

Employer's response

The Employer maintains that the provisions of the collective agreement in issue are not engaged in this matter, and therefore, cannot be said to have been contravened. It is also the employer's position that the Regulation is issue made under the Public Service Employment Act ("PSEA") is intra vires

Context

On December 12, 2003, Prime Minister Paul Martin announced the creation of the Canada Border Services Agency (CBSA) in order to build on the Smart Border Initiative, a partnership between Canada and the United States to expedite trade and travel while enhancing security and working with stakeholders in the business, labour and immigration sectors. The CBSA was created by Order-in-Council on that day, pursuant to s.3(1)(a) of the Financial Administration Act (FAA).

Also on December 12, 2003, pursuant to the Public Service Rearrangement and Transfer of Duties Act (PSRTDA), the Governor-in-Council transferred certain functions that were under the responsibility of the CFIA to the CBSA, by issuing the Order-in-Council reproduced as Exhibit "D" of the Agreed Statement of Facts. The Order-in-Council specified that "the control and supervision of the portions of the public service within the Operations Branch of the Canadian Food Inspection Agency that provide passenger and initial import inspection services performed at airports and other Canadian border points other than import service centres" were thereby transferred to the CBSA.

The employer agrees with the PSAC that the PSRTDA and the above-cited Order-in-Council are the lawful authorities for the transfer of the powers, duties and functions to a minister or department. While the provisions of the PSTDRA do not address the status of employees, they engage the provisions of the Public Service Employment Act (PSEA)[1] that specifically address employee status:

[1] *We will deal with the Bargaining agent's alternate assertion that the regulation made under the PSEA is ultra vires below. However, for the purpose of our arguments on the merits of the case, we will proceed on the assumption that all legislation, regulations and Orders-in-Council are vires.*

Block Transfers

Deemed transfer of employees
37.3 (1) Nothing in an order made under the Public Service Rearrangement and Transfer of Duties Act shall be construed as affecting the status of an employee who, immediately before the coming into force of the order, occupied a position in a portion of the Public Service the control or supervision of which has been transferred from one department or portion of the Public Service to another, or in a department that has been amalgamated and combined, ***except that the employee shall, on the coming into force of the order, occupy that position in the department or portion of the Public Service to which the control or supervision has been transferred or in the department as amalgamated and combined.***

Transfer of other staff
(2) Where an order is made under the Public Service Rearrangement and Transfer of Duties Act, the Governor in Council may, by order made on the recommendation of the Treasury Board and where the Governor in Council is of the opinion that an employee or class of employees is carrying out powers, duties or functions that are in whole or in part in support of or related to the powers, duties and functions of employees referred to in subsection (1) and that it is in the best interests of the Public Service to do so, declare that the employee or class of employees shall, on the coming into force of the order, occupy their positions in the department or portion of the Public Service where the employees referred to in subsection (1) are currently occupying their positions.

Definition of "Public Service"
(3) In this section, "Public Service" means the departments and other portions of the public service of Canada specified in Part I of Schedule I to the Public Service Staff Relations Act.

Retroactive application
(4) This section applies to any order made under the Public Service Rearrangement and Transfer of Duties Act on or after March 20, 1995 and before or after the coming into force of this section.1995, c. 17, s. 10.
(Emphasis added)

The block transfer provisions are explicit in stating that while an Order made under the PSRTDA shall not be construed as affecting the status of an employee, it clearly adds: ***"except that the employee shall, on the coming into force of the order, occupy that position in the department or portion of the Public Service to which the control or supervision has been transferred or in the department as***

amalgamated and combined." *Therefore, the Bargaining agent's claim at page 15 of their written representations that section 37.3 of the PSEA is interpretive and not prescriptive is incorrect.*

The block transfer provisions of the PSEA do not automatically apply to the CFIA. They can only apply if the limitation contained in s. 37.3(3) is addressed. The Regulation made under s. 36(1)(b) reproduced at Exhibit "G" of the Agreed Statement of Facts had indeed addressed the matter and has suspended the operation of s. 37.3(3). . From the moment the Order-in-Council under the PSRTDA comes into force, these employees occupy the positions in the CBSA. In short, the transfer of employees to the CBSA was made "by operation of law".

The Employment Transition Policy

The Bargaining agent's complaint must be determined on the issue of whether or not the ETP applied in the case of the above-described transfer of employees to the CBSA. The Bargaining agent's argument, however, dwells on the policy objectives and the obligations found in the ETP. The Bargaining Agent avoids the threshold issue to be determined by the Board, whether the transfer on December 12th constituted an "employment transition" defined in the ETP as follows:

Employment transition *– is a situation that occurs when the President decides that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work or the discontinuance of a function within the Agency. Such situations may arise for reasons including but not limited to those identified in the Policy section above.*

The definition of an employment transition is clear. It provides for one primary condition precedent before the ETP can be triggered: the President of the CFIA must decide that the services of one or more employees are no longer required.

In this case, the transfer was not a decision of the President of the CFIA. The decision was made by the Governor-in-Council under the PSTDRA, and by operation of the PSEA, the employees' positions were in law transferred. This transfer should not be confused with the ongoing exercise of interpreting and applying the Order-in-Council to the organization by identifying the individuals and positions transferred. The President of the CFIA's role as a deputy head is to implement the Order-in-Council. The President of the CFIA shares this role with the President of the CBSA. In so doing, neither of these deputy heads is making a

"decision" under the ETP provisions of a collective agreement.

The Bargaining agent's position leads to the inescapable conclusion that the President of the CFIA has the power to decide which positions have been transferred to the CBSA while the deputy head of the CBSA would have no power over the employees who have been transferred to his or her organization by the Governor-in-Council. Applying the Order-in-Council and identifying employees to be transferred as a result of it is not a "decision" by the President that services are no longer required. The example of employees located at the Vancouver Airport is thus not relevant to the debate..

The Bargaining agent points to policy considerations to buttress its position that the transfer to the CBSA is a "reorganization". This is the basic fallacy of the Bargaining agent's argument – the President of the CFIA made no "decision" under the ETP. Should the President of the CFIA decide to reorganise the CFIA, due to budgetary constraints, technological advances or a host of other reasons, and in doing so, decide that the services of certain employees were no longer required, there would be an employment transition as defined in the ETP. But this is not a reorganization within the CFIA, but rather a government-wide reorganization by the Governor-in-Council pursuant to the PSTDRA.

In any event, the Bargaining agent's examination of policy considerations ignores the primary reason for the ETP: to maximise employment opportunities for indeterminate employees facing employment transition situations. To paraphrase, the purpose of the ETP is to protect the employment of individuals who lose their jobs. However, as described above, and as uncontradicted by the facts, not a single employee lost his or her job. In fact, there is no evidence that any of the employees transferred lost pay.
The Bargaining agent also points to the union consultation obligations under the ETP and the fact that the Employer did not follow these obligations to show that the ETP was engaged. What the Employer should have done if the ETP was engaged and what the Employer did do are irrelevant to the threshold question in issue in this complaint.

The Bargaining agent states that the Employer was aware of the transfer prior to December 12th and planned the reorganization to minimize disruption. Whether or not this is so is irrelevant. Knowledge of the intentions of the Governor in Council cannot be equated to making a "decision" under the ETP provisions of the collective agreement.

To take the Bargaining agent's argument to its logical conclusion, if the transfer of employees to the CBSA were a

"decision of the President" that services were no longer required, the President would have also had the authority to decide otherwise. The President could have decided that the transfer would only occur on December 15th, or not at all. Since this is clearly not the case, as the President had no power or authority to make this kind of decision, the Bargaining agent's argument must fail.

Finally, the Bargaining agent's position that the transfer cannot "override" the collective agreement or "nullify" the applicability of the ETP misses the mark. The Employer does not contend that the ETP is superseded or nullified by legislative or regulatory action. Quite simply, the ETP has not been triggered

Validity of the PSEA Regulation

The Bargaining agent contends that, if the Employer's case rests on the applicability of the PSEA, the Regulation applying the block transfer provisions of the PSEA is ultra vires since it contradicts the explicit language at paragraph 37.3(3) that the section only applies to departments and other portions of the Public Service for which the Treasury Board is the employer.

The Employer wishes to underline the rule of legislative interpretation that argues in favour of a presumption of validity of an enactment. The rule of effectivity favours the interpretation that best promotes the validity of the enactment. Further, this presumption applies to the validity of regulations in the face of their enabling statutes. Regulations are not only deemed to remain intra vires, but also to be formally coherent with the enabling statute[2].

Also, the Employer wishes to underline that this is not a situation, as suggested by the Bargaining agent, where the specific clause in a statute (37.3(3)) must prevail over a general regulation granting power. Paragraph 36(1)(b) of the PSEA, reproduced below, is not a "general power to issue a regulation". It is a specific power afforded to the Governor-in-Council which clearly envisions the precise situation at issue here. The provisions read as follows:

> *36. (1) The Governor in Council may make regulations*
> *(a) applying all or any of the provisions of this Act to all or any of the positions of persons mentioned in subsection 39(1);*

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[2] *Côté, Pierre-André, The Interpretation of Legislation in Canada, 2nd ed., Cowansville, Qc: Les Éditions Yvon Blais Inc., 1992, p. 309-310.*

> *(b) notwithstanding any other Act, applying all or any of the provisions of this Act that do not otherwise apply, including the provisions relating to appointments, to any portion or part of any portion of the Public Service; and*
>
> *(c) prescribing the manner in which inquiries shall be instituted and conducted for the purposes of section 34.*
>
> *(2) Where a regulation made pursuant to paragraph (1)(b) provides for a matter for which provision is made in or under any other Act, the other Act, during the time that the regulation is in force, is deemed to make no provision for that matter either therein or thereunder. R.S., c. P-32, s. 34.*

One must consider the entire PSEA, including its history and construction, to understand the purpose of 36(1)(b). The PSEA is designed to regulate employment within the "Public Service". The "Public Service" is composed entities for which the Treasury Board is the employer as well as "separate employers". A number of separate employers are excluded from all or most of the provisions of the PSEA, commonly by way of their constituent statutes (for example, the CFIA Act).

By virtue of the powers at 36(1)(b), Parliament approved the granting of a specific power to the Governor-in-Council: the power to apply any or all of the provisions of the PSEA to a portion of the Public Service to which they would not otherwise apply. In so doing, Parliament has specifically conferred upon the Governor in Council the power to make regulations that apply parts of the PSEA or the whole of the PSEA to separate employers.

The Bargaining agent points to the introductory words "notwithstanding any other Act" to say that the Regulation cannot be passed notwithstanding the provisions of this Act. This is a fallacious argument since the regulation-making power at 36(1)(b) forms part of the PSEA. As stated above, parts of the PSEA may be excluded from applying to parts of the Public Service by virtue of the PSEA or other Acts. The words "notwithstanding any other Act" are simply a legislative method to ensure that a Regulation passed under 36(1)(b) cannot be challenged as being ultra vires another Act. For example, if a provision of an Act of Parliament could be interpreted as meaning that the PSEA does not apply to the CFIA, a regulation passed in accordance with paragraph 36(1)(b) of the PSEA would be paramount (except to the extent that the provision of the Act of Parliament specifically nullifies the effect of s. 36(1)(b).

However, the operative part of the paragraph is found after the first comma "applying all or any of the provisions of this Act that do not otherwise apply". The absence of a

statement "notwithstanding this Act" is simply that the purpose of the paragraph itself is to apply all or any of the PSEA provisions that do not otherwise apply, to a portion of the Public Service. In other words, if the PSEA or any of its provisions do not otherwise apply, there is no need to include a clause stating that the power is notwithstanding the PSEA: it forms part of the PSEA.

Further, in its clearest reading, 36(1)(b) allows the Governor-in-Council to apply the entire PSEA to a part of the Public Service to which it does not otherwise apply. If the Bargaining agent's argument is correct, then such a regulation would apply the entire PSEA except for s. 37.3. This interpretation runs contrary to the rule of effectivity and is clearly contrary to the will of Parliament outlined at paragraph 36(1)(b). The regulation-making power allows for the application of "any or all" of the PSEA and clearly, a regulation which does exactly that cannot be said to be ultra vires.

Also, the Employer would underline that the caselaw submitted by the Bargaining agent on this point predates the block transfer provisions of s.37.3. The comments of Justice Rouleau are clearly not applicable in the situation at hand since we are dealing with a section of the PSEA that deems that employees are occupying the positions in the new organization.

In short, the Employer asks the Board to reject the alternate submission of the PSAC since the Regulation in question is clearly made in accordance with the power conferred by Parliament to apply part of the PSEA to a part of the Public Service to which it does not otherwise apply.

Conclusion

The Employer respectfully asks this Board to reject the complaint made by the PSAC since the ETP was not triggered by the transfer of employees and positions to the new CBSA. Moreover, the regulation adopted under s. 36(1)(b) of the PSEA is intra vires.

Bargaining Agent's reply

When Does the President "Decide"?

The Respondent states, at page 3 of its response, that the PSAC "avoids the threshold issue to be determined by the Board" – that of being cognizant of the definition of "employment transition" in the ETP. As the PSAC directly addresses that question starting at page 6 of its submission, we wholly reject the Respondent's suggestion that the PSAC has avoided a core issue in this Reference.

What the PSAC did not anticipate in its submission is the alarming position advanced by the CFIA on the interpretation of the phrase "when the President decides" within the definition. The Respondent states that since the decision to reorganize the Public Service on December 12th was that of the Governor-in-Council, acting on the recommendation of the Prime Minister, it was not a "decision" of the President within the meaning of the ETP.

It necessarily follows, continues the Respondent, that the definition of employment transition is only triggered by any reorganizations that arise solely out of "budgetary constraints, technological advances or a host of other reasons". We are left to speculate what the "host" of other reasons might be but, asserts the Respondent, they cannot include the circumstances at issue in the present case. As such, the Respondent asks the Board to, effectively, read into that definition a proviso that the ETP is only triggered as a result of job losses resulting from the decisions rendered on those matters that are within the unilateral and exclusive control of the President.

It is submitted that this position ought to be summarily rejected by the Board for the following reasons.

First, the application before the Board relates to the interpretation and application of a binding collective agreement. As such, the objectives of the ETP, and an understanding of the scope of employment transition situations, are to be determined from the definitions as well as a reading of the ETP as a whole. It is telling that the Respondent's argument rests almost exclusively on four words - "when the President decides" – conveniently ignoring the balance of the definition, the ETP as a whole, and the role of the CFIA within the broader Public Service.

The ETP uses broad and inclusive language. The ETP also addresses a range of consequences arising from employment elsewhere within the Public Service on employees' rights under the Policy. These points are already set out in detail in

the PSAC's August 13th submission. A few of them, however, bear emphasis.

The definition of employment transition incorporates within it the Policy statement of the ETP. Both provisions use the phrase "including but not limited to" and contemplate reorganizations, new legislation and program changes, among other things. At the end of the day, the trigger for the ETP is "a lack of work or the discontinuance of a function".

Contrary to the Respondent's submissions, the PSAC's position herein does not rely upon any one portion of the definition of employment transition – such as the word "reorganization". While it is our view that such a position could be successfully advanced, there are a number of areas expressly contemplated by the definition – even without drawing on the words "including but not limited to" – that could apply here. For example, while the President does not have the power to issue new legislation, the ETP is clear that the impacts of new legislation within the Agency will trigger the ETP. These all offer support for the view that the parties intended that the triggers for the ETP be broad and inclusive.

Moreover, the legal mechanisms of the transfer may impact on the scope of rights available to individual employees under the ETP. However, these mechanisms do not serve to render the ETP irrelevant in those or the circumstances at issue here – the position apparently advocated by the Respondent. The PSAC has entitlements under the Policy and they are central to the Union's ability to represent, advise and provide information to employees in the bargaining unit in the circumstances of a large range of organizational changes contemplated by the ETP. The importance of the right to consultation in the circumstances of an employment transition is nowhere more evident than in the language of the ETP. This, in turn, underscores its centrality to any analysis of the issues raised here.

Second, the CFIA is not a private corporation in respect of which the President has unbridled and exclusive decision-making authority. On the contrary, the CFIA itself is a body corporate whose powers are exercised as an agent of Her Majesty in right of Canada (CFIA Act, s.3). With respect to the Public Service, the CFIA is the employer as a representative of Her Majesty in right of Canada (PSSRA, Schedule I, Part II & definition of employer in ss. 2(1)). It is the CFIA Act, as enacted by the Crown, that sets out the parameters of the CFIA's mandate and, through its Preamble, sets out the Government's policy objectives in creating the CFIA. The CFIA Act also assigns a range of authorities including those conferred on the President, the Minister, the Governor in Council and the CFIA Advisory Board in order to carry out that Government policy. It is the

Governor-in-Council who appoints the President of the CFIA at pleasure. Notwithstanding the President's functions, it is the Minister that has overall direction and responsibility for the CFIA (s.4). In short, the CFIA is an integral part of the Public Service and its mandate and its work can, and does, shift depending on a range of decisions that are made by and for Government.

The President is the operational head for the CFIA as expressed in ss. 6(1) of the Act. Part of the President's mandate is to implement, coordinate and make day to day decisions relating to the work of the CFIA, including in the face of changes in Government policy as articulated by Cabinet, the Minister, and through Orders-in-Council. Indeed, the President did just that when he decided in advance of December 12th which Inspector positions would be transferred, as well as when he wrote on behalf of the CFIA directly to the individual employees affected telling them that, as of December 12, 2003, the work they used to perform was no longer the work of the CFIA.

Respectfully, there can and should be no doubt in the mind of the President that the ETP is not limited to job loss impacts that arise only as a result of decisions that he can render exclusively and unilaterally. On the contrary, the role of the President, with all due respect, is to implement Government policy and to manage agency staff (s. 13 & s. 6). While this is no small task, the President's exercise of these functions relate to the work of the Agency. The work of the Agency, in turn, functions as part of Government, through the Minister, as well as part of the overall Public Service. If the Agency's power to enforce and administer provisions of the Food and Drugs Act was removed, thereby resulting in a loss of jobs within the Agency, the position of the Respondent in this case is that since it was not the President that made the decision precipitating the job losses, the ETP would not be triggered.

If this were the case, why would the definition of employment transition refer to "new legislation" and "reorganization". Surely the Respondent cannot take the position that because the President does not set the "in force date" of new legislation, or is unable to enact that legislation or dictate its terms, that the ETP cannot be engaged. Yet it asks this Board to accept that result in reliance on the four words "when the President decides".

To ignore the terms of the ETP and the actions of the President in carrying out his mandate to implement the policies of Government are necessary elements to accepting the position of the Respondent. By corollary, to read the language of the ETP in accordance with its terms, consistent with the divisions of authority within the CFIA Act, and recognizing the unique workings of Government, leads to an

interpretation of the phrase "employment transition" wholly opposite to the one advanced by the Respondent in this case.

For all the foregoing reasons, the PSAC respectfully requests that the Board reject the Respondent's position that the ETP was not triggered because the President was not the one who decided to reorganize Border Services. At the end of the day, the language and scope of the ETP, the actions of the President preceding and on December 12th, and the role of the CFIA within Government, act as an unforgiving foil to the Respondent's position.

Section 37.3 of the PSEA

The PSAC repeats and relies upon its submissions of August 13th on the issue of the wording of section 37.3 of the PSEA. Section 37.3 simply confirms that an employee lawfully occupies a position in the new Department. This avoids the possibility that each position transferred will require a new, formal appointment, triggering appeal rights and the application of the merit principle. Otherwise, the PSRTDA transfer expressly does not affect the "status" of that employee. Accordingly, the PSAC submits, the employee otherwise retains status to, in this case, assert possible rights under the ETP, or to maintain their indeterminate status, or whatever the case may be.

The PSAC submits that the Respondent's silence on the principles relating to the avoidance of conflict between the terms of collective agreements and legislative instruments is telling. Indeed, the "irresistible clearness" that the Respondent requires in order to be successful in its position that the ETP cannot be triggered because the transfer was made under the PSRTDA and PSEA is lacking. Therefore, its arguments in this regard must fail.

Validity of the PSEA Regulation

The PSAC submits that the Respondent has either misunderstood or mischaracterized the PSAC's position on paragraph 34(1)(b) of the PSEA. Accordingly, we offer the following summary to make the PSAC position clear.

The PSAC maintains that the statement that the Governor-in-Council can make regulations "notwithstanding any other Act" must be read together with the phrase "applying all or any of the provisions of this Act that do not otherwise apply". In short, the PSEA can be applied to a separate employer notwithstanding the fact that the "other Act" – the CFIA Act - confers upon the President the power to appoint employees to the CFIA. This is all paragraph 34(1)(b) of the PSEA allows the Governor-in-Council to do. This, as the Respondent suggests, ensures that where the power of the Governor-in-

> *Council is exercised in accordance with section 34, it cannot be challenged in reliance on the CFIA Act to suggest that the President retained the authority to appoint.*
>
> *By way of another example, if the Governor-in-Council applied the entire PSEA to the CFIA, it could do so notwithstanding that the CFIA Act excludes its application. However, the PSEA would apply in accordance with its terms. This means that where "public service" is defined to include separate employers, as it does in the majority of the Act, its provisions will be operative; and where it is defined to exclude them, they will not. It is difficult to see this result as being contrary to the "will of Parliament" – as suggested by the Respondent – when it was Parliament that clearly provided that limitation in the first place.*
>
> *The same result must hold true where the Governor-in-Council applies a part of the PSEA. Regulations cannot purport to apply the Act in such a way as to, effectively, ignore or re-write its express provisions – the very dicta of the Federal Court in the PSAC v. Canada case. Notwithstanding that the decision predates section 37.3 of the PSEA, the reasoning of Rouleau J. on the requirement for consistency between regulations and the express requirements of the Act are directly on point. It is the PSAC's position that the Regulation in issue here does not apply at part of the PSEA, it amends and applies a part of the PSEA. This, as Rouleau J. found in the PSAC case, is unlawful.*
>
> ***Conclusion***
>
> *For all the reasons submitted, the PSAC respectfully requests that the Board allow this Reference on the terms requested.*

Reasons for Decision

[10] As a starting point in deciding this reference, I must determine whether the provisions of the ETP were triggered by the decision of the Governor in Council on December 12, 2003, to transfer certain positions from the CFIA to the newly created CBSA. I agree with the employer that this constitutes a threshold issue which must be determined by the Board.

[11] The provisions of the ETP are clear and unambiguous. An employment transition situation occurs "when the President decided that the services of one or more indeterminate employees will no longer be required beyond a specified date because of a lack of work or the discontinuance of a function within the Agency".

[12] The decision to transfer positions from the CFIA to the CBSA was made by the Governor in Council on the recommendation of the Prime Minister of Canada (tab D, agreed statement of facts).

[13] The fact that the President of the CFIA may have been involved in discussions surrounding the implementation of the Order-in-Council does not negate the fact that the decision to transfer was not his in the first place. I agree with the employer when it states that: "Applying the Order-in-Council and identifying employees to be transferred as a result of it is not a "decision" by the President that services are no longer required".

[14] With respect to the *vires* of the regulation purporting to make applicable the "block transfer" provisions of the *Public Service Employment Act* to the facts of this case (tab G, agreed statement of facts), I find nothing in the documentation provided that would allow me to come to the conclusion that the regulation is *ultra vires*.

[15] Paragraph 36(1)(b) of the *PSEA* clearly authorizes the Governor in Council to make regulations "applying all or any of the provisions of the *PSEA* that do not otherwise apply (…) to any portion or part of any portion of the Public Service", which by definition includes all Departments and portions of the public service of Canada specified in Parts I and II of Schedule I to the *PSSRA*. I agree with the employer that the words "notwithstanding any other Act" in paragraph 36(1)(b) of the *PSEA* "are simply a legislative method to ensure that a regulation passed under 36(1)(b) cannot be challenged as being *ultra vires* another Act".

[16] For these reasons, this reference is denied. Having so concluded, I must, however, state that union involvement in the discussions leading up to the transfer of duties from the CFIA to the CBSA would have been appropriate and useful. In November 2003, Parliament passed the *Public Service Modernization Act*, S.C. 2003, c. 22. Although the legislation is not yet fully implemented, its hallmark is the improvement of labour management cooperation. Consultation and co-development on matters that affect employees and the workplace are recognized as being essential for the well-being of our public service. One can hardly imagine situations having more impact on the workplace than the substantial structural changes to the Public Service that occurred on December 12, 2003. We must all, in difficult times, do more than pay lip service to these very important and basic principles of labour relations.

[17] Although not legally required, consultation concerning the transfer of duties from the CFIA to the CBSA could have and, more importantly, should have taken place. Such openness would have demonstrated that the government was serious about improving the labour relations climate in the federal public sector. Failure to do so is a recipe for disappointment, frustration and resentment. Good labour relations do not just happen overnight, they require by all concerned constant effort and dedication.

Yvon Tarte,
Chairperson

OTTAWA, October 29, 2004.