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Citation: 2001 PSSRB 103

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

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

Before: Guy Giguère, Deputy Chairperson

For the Bargaining agent: Barry Done, Public Service Alliance of Canada

For the Employer: Asha Kurian, Counsel

Heard at London, Ontario,
April 26 and 27, 2001.

[1] The Public Service Alliance of Canada (the Alliance) filed these three references under section 99 of the *Public Service Staff Relations Act* (*PSSRA*). The Alliance alleged that it was denied approval to post notices on bulletin boards at the workplace of Canada Customs and Revenue Agency (CCRA), in the London office and across Canada. The Alliance also stated that the notices in question contained information for its members on the progress of negotiations, which posed no threat to the interests of the employer.

[2] The Alliance requested as redress that the Board order the employer to: comply with clause 12.01 of the collective agreement, redefine the standards used to grant or withhold approval for the posting of materials on the bulletin board, apply those standards consistently and reasonably and where approval to post materials is denied, reply in writing with the specific reason(s) for withholding approval. With respect to the reference in Board file 169-34-630 filed on July 12, 2000 and concerning the posting of notices in the London office, the Alliance requested as an additional redress that the employer issue a written apology. Clause 12.01 of the collective agreement between the Alliance and the employer reads as follows:

> ***USE OF EMPLOYER FACILITIES***
>
> *12.01 Reasonable space on bulletin boards in convenient locations will be made available to the Alliance for the posting of official Alliance notices. The Alliance shall endeavor to avoid requests for posting of notices which the Employer, acting reasonably, could consider adverse to its interests or to the interests of any of its representatives. Posting of notices or other materials shall require the prior approval of the Employer, except notices related to the business affairs of the Alliance, including the names of Alliance representatives, and social and recreational events. Such approval shall not be unreasonably withheld.*
>
> …

[3] On January 31, 2001, following the employer's request for particulars, the Alliance wrote to the Board with further information regarding its references. The Alliance indicated that the references referred to negotiations during two rounds of collective bargaining; the first commenced on January 24, 2000 and the second, on October 24, 2000. The Alliance also provided a list of the documents that were not approved for posting by the employer.

Evidence

[4] Diana Poole, a Staff Relations Consultant at CCRA, at the London office, testified that in September 1999, when local Alliance officials wanted to post a notice on the bulletin board, they would first seek approval from the employer. If the notice was approved for posting, it would be stamped approved and would then be posted. She explained that for a period ending in November 1999, the Alliance conducted a "No Agency Campaign", as it was opposed to the creation of the CCRA as a separate employer. Management of the London office sought direction from Headquarters in Ottawa for authorizing the posting of union notices during the No Agency Campaign.

[5] Dave Knowler, an employee of CCRA and the elected President of the London district branch of Customs and Excise Union Douanes Accise (CEUDA), a component of the Alliance, testified that the bulletin boards in the CCRA London office are not visible to the public. The practice of the CEUDA, when Mr. Knowler became President, in November 1999, was to post material without asking authorization from management. Thereafter management would ask the local CEUDA officials to take down the notices that they did not approve for posting.

[6] Nick Stein, the regional Vice-President of the Southwestern Ontario Region for the Union of Taxation Employees (UTE), a component of the Alliance, testified that he recommended to the local presidents that they not seek permission to post notices on bargaining as this was business affairs of the Alliance. Mr. Stein stated that nothing was more fundamental to the Alliance than bargaining. He also explained that it was the Alliance's opinion that in the past, during negotiations with Treasury Board, the Alliance had not communicated sufficiently with its membership. A different approach was taken in the negotiations with the CCRA, as regular notices were communicated to the membership and were to be posted on the bulletin boards.

[7] P. Lynn Meston, who became Vice-President in 1999 and President in 2000 of the UTE in the London office, explained that she noticed a change in management's attitude with respect to the posting of material on the bulletin boards, during the first round of negotiations. Management began notifying local union officials that some documents concerning bargaining were not authorized for posting and had to be taken down. Ms. Meston explained that she did not ask permission to post notices on the bulletin board as she felt this was the business affairs of the Alliance. However, Ms. Meston testified that she had asked the employer's permission to post

electronically and there was an understanding with the employer that, if electronic posting was authorized, posting was also approved on the bulletin boards. Ms. Meston explained that she asked permission to post electronically a News Release dated October 24, 2000 (Exhibit G-13) and a Bargaining Up-date dated October 25, 2000 (Exhibit G-14) which was granted by management at the London office but was later overruled by the employer at CCRA Headquarters.

[8] Ms. Poole testified that in February 2000 she had a meeting with Mr. Knowler. They discussed the posting of material on the bulletin boards. At this meeting, the employer recognized that it was difficult to give timely responses to requests for posting while seeking Headquarters' approval. The employer decided to do away with the approval stamp. The procedure put in place was that, if the Alliance would seek prior approval, local management was prepared to give it. The understanding was that, if Headquarters later advised that they did not approve postings, management and local union officials would do a walkabout to take down the material not approved for posting. The employer's expectation was that the Alliance would seek approval to post but both local Alliance presidents felt that notices on negotiations were notices on the business affairs of the Alliance, not requiring approval. The employer and the local Alliance presidents discussed the meaning of "business affairs" in clause 12.01 of the collective agreement. The Treasury Board Interpretation Bulletin (Exhibit E-2) on the definition of "business affairs" was specifically referred to. The employer specified that it viewed as business affairs of the Alliance: the CEUDA newsletter, minutes of local meetings, financial statements, lists of executive members, and minutes for committees that local union officials would sit on.

[9] Ms. Meston testified that during the first round of negotiations the Headquarters' decisions regarding posting were very sporadic and after the fact but, in the second round, she was informed on October 27, 2000 that Headquarters was now taking over completely authorization for the posting of notices on bulletin boards.

[10] Ms. Meston pointed out that she saw it as unfair that the employer would deny the posting of a notice such as Exhibit G-5 but would respond to it and give its position to the employees through a "pop-up electronic posting". Ms. Meston explained that as soon as an employee would log on to a computer, a message would come up, which is referred to as a "pop-up" message. The employer also had at its disposal the Intranet where in "Info Zone" it could comment on the progress of negotiations. Ms. Meston

was concerned that the employer had the means to communicate its position electronically to the employees but the Alliance had no way to do the same. She recognized that material on the progress of negotiations was available on the Alliance's web site but the employees did not have access to the Internet at their workstations.

[11] André Fillion, Director, Certification and Collective Bargaining, CCRA, testified that he reviewed on behalf of the employer, at CCRA Headquarters, notices on the progress of negotiations prepared by the Alliance for posting on bulletin boards. This responsibility was assigned to him because of the frequency of these notices and to ensure consistency within the CCRA. He was the only one with delegated authority to do this but, for a short period, two other colleagues of Mr. Fillion's were involved in the process. By November 2000, he was the only one responsible for approving the posting of notices on bulletin boards on the premises of the CCRA. For the period that he was responsible, Mr. Fillion approved 41 documents for posting and 23 were turned down. The test he used for making a determination was, from the point of view of the employer, does the document go against its interests. He explained that the notices that were refused fell into three categories which can be described as: (1) attacking or ridiculing management representatives; (2) reference to various forms of strike action, which included the slowdown of work or any concerted activity to try to restrict or limit output; and (3) providing incorrect information which would disrupt the workplace, such as on job security or on a position of the employer at the bargaining table.

[12] Moreover, these criteria are generally applied without regard to the accuracy or the validity of the contents of the document, which the bargaining agent wishes to post.

[13] The following chart provides a summary of Mr. Fillion's testimony where he identified in each exhibit the text that he found went against the employer's interest and under which category, as described above, the posting of notices was refused:

ITEMS RELEASED DURING THE NEGOTIATIONS THAT COMMENCED ON JANUARY 24, 2000	EXHIBIT #	CATEGORY UNDER WHICH POSTING WAS REFUSED
January 2000 Negotiations Update – Day 1	G-3	3
January 2000 Negotiations Update – Day 2	G-2 E-3	1, 2
Letter to Mr. Robin Wright, January 26, 2000 – from Nycole Turmel and Susan Giampietri	G-5	1
PSAC News Release, January 31, 2000 – CCRA Negotiations Stall, PSAC Calls a Strike Vote	G-6 E-4	1, 2
January 2000 CCRA Negotiations Update – Day 5	G-1	1
Bargaining Bulletin No. 5	G-4	2
Bargaining Bulletins No. 6	G-7	1
Bargaining Bulletins No. 7	G-8	2
Bargaining Bulletins No. 12	G-9	2
Bargaining Bulletins No. 13	G-10	1, 2
Bargaining Bulletins No. 16	G-11	1, 2
ITEMS RELEASED DURING PERIOD OF NEGOTIATIONS THAT COMMENCED ON OCTOBER 24, 2000		
Bulletin No. 5, October 23, 2000 – Employer Bargaining Proposals	G-12	1, 3
News Release, October 24, 2000	G-13	1
Bargaining Update – Day 2	G-14	3
Bargaining Update – Day 5	G-15	1
Bargaining Update – Day 6	G-16	1,2,3
Bargaining Update – Day 7	G-17	3, 2
Bargaining Update – Day 9	G-18	3
Bargaining Update – Day 10 and Day 11	G-19	1, 2,3
Bargaining Update – Day 13	G-20	3
Bargaining Update – Day 14	G-21	3
Bargaining Update – Day 15	G-22	2,3
Open Letter from John Gordon to PSAC Negotiating Team –November 14, 2000	G-23	3

[14] Mr. Fillion explained that, as for the first category, notices would ridicule the employer's negotiating team (Exhibit G-13), make derogatory comments concerning CCRA Management (Exhibit G-5) or unfairly attack CCRA commissioners (Exhibit G-11).

[15] With respect to the second category, Mr. Fillion explained that it is a normal strategy of the bargaining agent to try and raise the interest of its membership but he made a distinction here as employees of the CCRA could not legally be on strike as a result of the PSSRB decision to deny the request for the appointment of a conciliation

board (see *Public Service Alliance of Canada and Canada Customs and Revenue Agency and Professional Institute of the Public Service of Canada and Social Science Employees Association*, 2001 PSSRB 36 (190-34-309 to 312). Mr. Fillion also acknowledged that Mr. Wright, Commissioner of the CCRA, in November 2000, authorized leave for the CCRA employees to conduct a strike vote at the workplace. Mr. Fillion confirmed that the employer had no statistics to show that strike alert activity disrupted production. However, he indicated that there were several examples that could be provided where the activities had been disruptive in offices of the CCRA.

[16] As for the third category, Mr. Fillion explained that several of the notices had a countdown clock where it was written Job Security Alert: # Days and counting. Mr. Fillion explained that he could not accept these documents because the legislation establishing the CCRA as a separate employer guaranteed that no lay-off would occur during the first two years after the creation of the CCRA. This was in addition to the Workforce Adjustment Directive and therefore the CCRA employees would have an additional two years on top of what other public servants were entitled to.

[17] In cross-examination, Mr. Fillion recognized that Exhibit G-26 Bargaining Update, dated November 2, 2000, had been approved for posting even though it had a Job Security Alert box. He recognized that, in November 2000, he was the only one approving the posting of notices and therefore it appears that there was an inconsistency. There were also documents such as Exhibits G-12 and G-14 that contained false information on the employer's position at the bargaining table. As for Exhibit G-23, Mr. Fillion explained that it was inappropriate and contrary to the employer's best interests to post a document accusing the government, which in a broad sense is the employer, of stealing the thirty billion dollars surplus that had accrued in the Public Service pension plan. As the CCRA is part of the broad public service and is part of the pension system, it is against the interests of the employer to post such a document.

Arguments for the Bargaining Agent

[18] Under clause 12.01 of the collective agreement, there are no requirements to obtain authorization from the employer to post notices relating to the business affairs of the Alliance. Mr. Done submitted that all the documents that were denied posting, with the exception of Exhibit G-23, were news about negotiations for the first and second rounds. The primary function of the Alliance is negotiations since it is a

bargaining agent. Therefore, all notices on negotiations come under the exception as they are related to the business affairs of the Alliance and do not require prior approval.

[19] Alternatively, if it is found that these notices on negotiations do not come under the exception in clause 12.01, then the submission of the Alliance is that the employer withdrew its approval to post when the local Alliance officials were notified that some notices were unacceptable for posting and would have to be taken down in a walkabout.

[20] Mr. Done also argued that specific prior approval was sought when Ms. Meston requested approval to post electronically some notices. It was understood that when it was granted it included permission to post on bulletin boards.

[21] The interests of both parties have to be balanced. The potential harm to the Alliance far outweighed the potential harm to the employer. The impact of this refusal is great on the Alliance as it has a duty to communicate with members, which ultimately creates harmony in the workplace. The employer tipped the scales in its favour as not every employee reads bulletin boards and it is certainly not as effective as the pop-up message that appears automatically on the computer screen of all the employees. The employer can also communicate with employees through the Intranet. On one hand, the employer denies the posting of notices such as Exhibit G-5 but on the other hand, it posts its response in a pop-up message.

[22] Mr. Done submitted that it has to be appreciated that the public could not view the bulletin boards, which in arbitral jurisprudence is a positive factor. The employer did not provide an explanation or rationale at the time of denial. Mr. Fillion has acknowledged that the employer was not consistent in approving or refusing the posting of notices (Exhibit G-26).

[23] Mr. Fillion developed his own criteria that had nothing to do with the collective agreement. He was overly concerned with the reference to any strike action and found fault in the Alliance preparing for a strike. The fact remains that those 27,000 employees will have the right to strike at one point. When asked about the Strike Alert buttons, he acknowledged that this right of employees was recognized by the Federal Court. Mr. Done submitted that strikes are a fact of life, in Canada, and the Federal Court has upheld the right to communicate about them. Mr. Fillion had concerns

about the productivity of employees when strike action was referred to, but the employer had no statistics to demonstrate that this had disrupted production. Mr. Done submitted that Mr. Fillion was over-sensitive regarding documents which he felt attempted to ridicule management or its negotiating team. It is common place, in bargaining, to point a finger. This is a normal and usual tactic. It can be stressful but Mr. Done submitted that the documents were not offensive and the posting of these notices could not be reasonably denied.

[24] Mr. Done concluded his arguments by asking if it was possible for this decision to provide some guidelines for the future, on the use of the bulletin boards. In support of his arguments, Mr. Done relied on the following decisions: *Public Service Alliance of Canada and Treasury Board (Employment and Immigration Canada) (*Board File 169-2-508); *The Canadian Union of Postal Workers and Treasury Board* (Board File 169-2-349); *The Canadian Union of Postal Workers and Treasury Board (*Board File 169-2-344); *The Canadian Union of Postal Workers and Treasury Board (*Board Files 169-2-159 and 160); and *Parkwood Hospital and Ontario Nurses (1986)*, 25 L.A.C. (3d) 125.

Arguments for the Employer

[25] Clause 12.01 of the collective agreement specifies that the posting of notices needs specific approval of the employer unless it concerns the business affairs of the Alliance. Ms. Kurian submitted that the Alliance is trying to expand the meaning of business affairs. If the interpretation of the Alliance were to be accepted, this would be equivalent to a blanket right to post because everything that the Alliance does relates to its affairs. What was intended by the parties when they agreed to this exception was that minutes of meetings, list of executives, social and educational events, etc., did not need to be approved by the employer to be posted.

[26] Ms. Kurian submitted that, at no time, did the Alliance seek prior approval before posting on bulletin boards, as witnesses have made quite clear. In the employer's view, this brings to an end the question as the Alliance has not met the threshold requirement of clause 12.01.

[27] Putting aside this argument, whether approval to post was asked or not, Ms. Kurian submitted that the employer was reasonable in denying the posting. This is not a question of balancing the interests of the parties as the employer made a decision

based on its own interests. The bargaining agent has interests but not the right to post notices that are an enticement to strike action. The pop-up message that the employer has been using does not have to be balanced by a liberal posting policy on bulletin boards. The parties have agreed on posting on bulletin boards and this agreement is contained in clause 12.01.

[28] Mr. Fillion testified that the documents that were denied posting fell under three categories. In the first category, the employer submits that its interests could be adversely affected if individual managers are ridiculed in the workplace. In regard to the second category, strike action and messages encouraging strike action cannot be promoted on a bulletin board, as they are contrary to the interests of the employer. Mr. Done suggested that the bulletin board promotes harmony in the workplace, but certainly an enticement to strike action or discussion about it would create division in the workplace by itself and this discussion would disrupt the workplace and the productivity of the employees.

[29] As for the third category, it is the employer's submission that misleading information on job security or the employer's position at the bargaining table created a climate of fear in the workplace. It was certainly in the employer's interest to refuse posting of the notices that contain misleading information which, if posted, would have created turmoil in the workplace.

[30] Ms. Kurian concluded that all the documents that were refused for posting were misleading, disparaging and contrary to the employer's interests and the Board should declare there was no violation of the collective agreement.

[31] In support of her arguments, Ms. Kurian relied on the following decisions: *MacKenzie* (Board Files 166-2-21187, 21188, 21189 and 169-2-501*), Canadian Labour Arbitration, 3rd Edition, Brown and Beatty, 9:1410, Canada (Attorney General) v. Public Service Alliance of Canada (P.S.A.C.)* (F.C.A.) [1993] F.C.J. No. 611 (Q.L.), *Public Service Alliance of Canada and Treasury Board* (Board File 169-2-530), *Re Metropolitan Authority and Amalgamated Transit Union, Local 508* (1972), 27 L.A.C. (4th) 36.

Reasons for Decision

[32] The first question to answer is to establish the meaning of the expression "business affairs" in clause 12.01 of the collective agreement. In order to understand what the parties agreed to by these words, clause 12.01 has to be read as a whole. The exception to the general rule requiring prior approval reads as follows:

> *…except notices related to the business affairs of the Alliance, including the names of the Alliance representatives and social and recreational events.*

[33] The inclusion at the end of the exception of "the names of Alliance representatives and social and recreational events" gives an indication of the nature of the exception. To give a broad interpretation to the words "business affairs" to include news of bargaining would render meaningless the general rule, in clause 12.01, that posting of notices shall require the prior approval of the employer. Clearly, the intention of the parties was that notices, relative to the internal affairs of the Alliance, would not necessitate prior approval of the employer. *Robert's Dictionary of Industrial Relations*, Fourth Edition, BNA Books, give this definition of "internal affairs of unions" which can be useful in the instant case:

> *Those activities, which involve the relationship of the union to its members and the local union to its international organization. The relationships are generally set forth in the constitution and bylaws which deal with the procedures for elections, holding meetings, appointments for committees…*

[34] This interpretation is consistent with arbitral jurisprudence (see *Canadian Air Traffic Control Association and Treasury Board (Transport Canada)* (Board File 169-2-396)). In *Re FBI Brands LTD and United Food & Commercial Workers, Local 1230* (1987) 29 L.A.C. (3d) 189 (Q.L.), Adjudicator Willes came to the same conclusion and specifically found that "notices of union activities" did not include notices that attacked "the employer's stance, at future collective bargaining negotiations".

[35] I have reviewed the material that was refused by the employer to be posted in Exhibits G-1 to G-23 and find, for the above reasons, that it does not fall within the exception in clause 12.01 of collective agreement, as it does not relate to "the business affairs of the Alliance".

[36] Since the exception in clause 12.01 does not apply, the general rule is that the material required prior approval of the employer before posting. Reading clause 12.01 as a whole, it is only when prior approval is sought that "such approval shall not be unreasonably withheld". I cannot agree with Mr. Done's arguments that the employer withdrew its approval when, in the London office, it would do a walkabout with the local Alliance representatives to remove material on bulletin boards. Ms. Poole testified that management, at all meetings, reiterated that prior approval was necessary. The Alliance did not comply and prior approval was not sought by the local Alliance officials.

[37] The only time that prior approval of the employer was sought was by Ms Meston for the electronic posting of documents. The employer had indicated that when it granted authorization for electronic posting, this included posting on bulletin boards. As Ms. Meston testified, two documents (Exhibits G-13 and G-14) were approved for posting and later this approval was withdrawn because Headquarters had decided against the posting. No additional reasons were given. Clause 12.01 applied in this situation as approval had been sought and the employer could not unreasonably withhold its approval to posting. Exhibit G-13 is a News Release where the second round of bargaining is characterized in a positive way as a change from the past. Mr. Fillion identified the text in Exhibit G-13 that went against the employer's interests as it ridiculed the employer's negotiating team (category 1). This text reads as follows:

> *In its first round of negotiations as an Agency, the employer conducted most of its negotiations in Treasury Board style. Face-to-face negotiation meetings were short, delays between meetings were long, and little or no progress was made until the very end of the process.*

[38] These comments are somewhat critical of the employer but remain relatively innocuous. An individual is not singled out in this criticism and the comments are not grossly disrespectful as was found in *Re Metropolitan Authority and A.T.U. Local 508* (*supra*). Neither are those statements illegal, abusive, defamatory or fraudulent.[1] They are fairly common in labour negotiations where bargaining agents will often use this

[1] See *Canadian Union of Postal Workers and Treasury Board* (*supra*)

type of rhetoric.[2] I do not find that in the context of this News Release the employer could reasonably regard these comments as adverse to its interests.

[39] As for Exhibit G-14, it is a Bargaining Up-date that contained, as Mr. Fillion testified, some text with false information. This text reads as follows:

> *In the Consolidation sub-committee, the employer has so far maintained its position that consolidation means moving to the lowest common denominator.*

[40] This comment expresses the point of view of the Alliance on the employer's position at the bargaining table. Even if it is not true as Mr. Fillion testified, the Alliance is not prevented under clause 12.01 from expressing a point of view which is different than that of the employer. The test is not the veracity of the criticism but whether the employer could reasonably regard the notice to be contrary to its interests. Again, this type of comment is relatively innocuous and in a rhetorical style that is fairly common in labour relations. I do not find that in the context of the whole document, the employer could reasonably regard this comment as adverse to its interests.

[41] As Board Member Pierre-André Lachapelle indicates in *Canadian Union of Postal Workers and Treasury Board* (*supra)* (at page 5):

> *The intent of clause 36.02 of the collective agreement is not to prevent the bargaining agent, in the legitimate exercise of its right to promote its professional interests and those of the employees whom it lawfully represents, from expressing an opinion which differs from that of the employer or criticizing the latter's action. Nor is it the intent of the clause that only those documents of the bargaining agent which support or commend the employer should be posted.*
>
> *Moreover, these criteria are generally applied without regard to the accuracy or the validity of the contents of the document which the bargaining agent wishes to post.*

[42] For the above reasons, I allow partially the bargaining agent's references in Board files 169-34-635 and 639. As redress, I declare that the employer contravened the provisions of clause 12.01 of the collective agreement by not allowing the posting

[2] See *Burns Meats Ltd. and Canadian Food & Allied Workers, Local P139*, (1980), 26 L.A.C. (2d) 379 (Q.L.).

of Exhibits G-13 and G-14 on the bulletin boards. I deny the reference in Board file 169-34-630 as it was filed on July 12, 2000 and did not cover the notices where prior approval of the employer was sought by the Alliance (Exhibits G-13 and G-14).

[43] Mr. Done asked, in his arguments, if the decision in the instant case could assist the parties in the future by providing some guidelines for the interpretation of clause 12.01 regarding the use of the bulletin boards. I will try to do so in these recommendations. Prior approval should be sought by the Alliance for the posting of material on the bulletin boards, except for notices relating to the business affairs of the Alliance as set out in paragraphs 33 and 34 of this decision.

[44] The evidence was that these notices were prepared at the national level by the Alliance. It made sense to have these bulletins considered, as the employer did, at the Headquarters of the CCRA and to have a determination made nationally to ensure consistency for all of the CCRA's workplaces. The Alliance should submit for prior approval to the employer at the Headquarters of the CCRA notices that it wants to see posted on bulletin boards at the CCRA offices. The employer could then, in an efficient and timely manner, approve or deny the posting of these materials. When the approval for posting is denied, the employer should indicate to the Alliance why it considers the documents adverse to its interests or the interests of its representatives. By providing those reasons, the employer would enable the Alliance to avoid in future a request for posting which the employer, acting reasonably, could consider adverse to its interests or the interests of its representatives. As to the standards to be used to grant or withhold approval for the posting of material on bulletin boards, the employer should not be over-sensitive and the Alliance should not be too provocative.

[45] The language of clause 12.01 encourages dialogue between the employer and the bargaining agent. It provides for both parties to be reasonable. These are the basis for good labour relations and I hope that these recommendations can help the parties to attain this.

Guy Giguère
Deputy Chairperson

OTTAWA, October 9, 2001.