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

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

BETWEEN

CANADIAN FEDERAL PILOTS ASSOCIATION

Complainant

and

DEPARTMENT OF TRANSPORT, TRANSPORTATION SAFETY BOARD, AND TREASURY BOARD SECRETARIAT

Respondents

Indexed as
Canadian Federal Pilots Association v. Department of Transport, Transportation Safety Board, and Treasury Board Secretariat

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

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

For the Complainant: Jennifer Duff, counsel

For the Respondents: Karl Chemsi, counsel

Heard at Ottawa, Ontario,
February 27, June 19 to 23, September 25 to 27,
October 10 and 11, and November 27 and 28, 2017.
(Written submissions filed December 18, 2017, and January 22 and February 5, 2018.)

I. Complaint before the Board

[1] On April 21, 2016, the Canadian Federal Pilots Association (CFPA, "the complainant", "the bargaining agent", or "the Association") filed this complaint, alleging that the respondents engaged in a series of unfair labour practices after serving it with notice to bargain in September 2014.

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

[3] In the Association's view, the respondents have engaged in a course of conduct that taken separately or as a whole, strikes at the very core of its members' professional principles and stifles their ability to perform their duties.

[4] In particular, the Association alleged that the respondents refused to engage in full and rational discussions with respect to its proposals on article 47 of collective agreement and the "Professional Aviation Currency Program" (PACP) and that they violated the duty to bargain in good faith, contrary to s. 106 of the *Act*. The Association also alleged that the respondents breached the statutory freeze on terms and conditions of employment, contrary to s. 107 of the *Act*. In particular, it alleged that the respondents did the following:

…

> *(a) Made substantial changes to the terms and conditions of employment of the membership by making unilateral program reductions to the Professional Aviation Currency Program (the "PACP");*
>
> *(b) Made substantial changes to the terms and conditions of employment of the membership by unilaterally cancelling Policy Letter 164 and implementing two Internal Process Bulletins setting out training requirements for Civil Aviation Safety Inspectors;*
>
> *(c) Unilaterally implemented a legislative exemption to the*

> Canadian Aviation Regulations *for the purpose of avoiding its obligations under the PACP;*
>
> *(d) Directly communicated with the Association's members, by means of surveys and meetings with the membership;*
>
> *(e) Made a unilateral decision to hire at least one part-time permanent employee, despite there being no provision for such in the Collective Agreement; and*
>
> *(f) Made a unilateral decision to require fitness-to-work certificates for employees who had been absent from the workplace for more than twenty (20) days.*
>
> …

[5] It is alleged that in so doing, the respondents' conduct constituted a rejection of the CFPA's status as a bargaining agent and amounted to interfering with the formation or administration of an employee organization or the representation of employees by an employee organization contrary to s. 186(1)(b) of the *Act*.

A. <u>The respondents' response</u>

[6] With respect to the duty to bargain in good faith, the respondents submitted that they have always been willing to negotiate at the bargaining table and that the parties are still in discussions. In relation to the CFPA's proposals on article 47, the Treasury Board's position that it was not prepared to have the PACP incorporated into the collective agreement cannot result in a finding of bargaining in bad faith.

[7] With respect to the allegations that the statutory freeze provisions were violated, the respondents submitted that the principles of "business as usual" and "reasonable expectation" developed by the jurisprudence apply to this case.

[8] The employer had discretion with respect to the training of its employees before notice to bargain was served. That discretion continues to apply despite the statutory freeze, especially considering that it had valid justifications for adjusting its employees' training to its economic circumstances and operational needs.

[9] The respondents also submitted that the CFPA did not satisfy its onus of proof with respect to its allegations about the hiring of a part-time employee.

[10] The CFPA also failed to prove a violation of the statutory freeze provisions with respect to the requirements for employees to provide a return-to-work medical note.

The freeze provisions are not intended to place the employer in a kind of straightjacket during negotiations, especially when it has an ongoing obligation to ensure the safety of its employees and the public when prolonged sick leaves occur.

B. Conclusions

[11] For the reasons detailed later in this decision, I have reached these conclusions.

1. Issue 1: Violation of the duty to bargain in good faith

[12] The bargaining agent has not met its onus of establishing on a balance of probabilities that the employer has failed to bargain in good faith. As of the hearing, the parties had not reached an impasse on the PACP issue and were to engage in further direct bargaining on it.

2. Issue 2: Changing the PACP

[13] While the provisions of the PACP, which Transport Canada and the bargaining agent entered into in 2007, are caught by the freeze provisions of s. 107 of the *Act* and must be continued in force in accordance with the statute, I am not persuaded that the employer contravened or changed any of the PACP's provisions. The PACP gives the employer the discretion to determine whether employees are to be assigned to a regular flying program (RFP) or to an agreed-upon alternate PACP (APACP) when they are based in a geographic area that precludes the feasibility of such an assignment, such as when no aircraft are available or a base has been closed.

3. Issue 3: Cancelling Policy Letter 164 and issuing Internal Process Bulletins (IPBs)

[14] A document referred to as "Policy Letter 164" was a management policy not covered by the collective agreement or the PACP, and it was not the subject of an agreement between Transport Canada and the bargaining agent. It had been under review since 2009. A formal review of it in 2012 recommended changes to it. It was not a term and condition of employment that was in force on the day on which notice to bargain was given and was not covered by s. 107 of the *Act*. In any event, it was implemented in 2005, when civil aviation inspectors (CAIs) still routinely conducted flight checks in commercial aviation. Over the years, those checks have largely been delegated to industry pilots, and Transport Canada inspectors do not require the same amount or same kind of training and are engaged in more monitoring and surveillance activities. Given that the assignment of duties to employees has changed over the

years, in my view, the amendment to the IPB brought into line the training requirements for employees whose duties have already changed, which was a matter within management's discretion.

4. Issue 4: Exemption to the *CARs*

[15] With respect to the allegation that the employer unilaterally implemented a legislative exemption to the *Canadian Aviation Regulations* (SOR/96-433; *CARs*) to avoid its PACP obligations, I have concluded that the regulatory requirements for licensing all pilots in Canada and the requirements for maintaining those licences, enacted by the Governor in Council pursuant to the *Aeronautics Act* (R.S.C., 1985, c. A-2), or exemptions to those requirements enacted on behalf of the Minister of Transport are not terms and conditions of employment between the employer and its employees. The employer has the obligation to provide opportunities for employees to maintain the requirements of their pilot licences under both the collective agreement and the PACP. Determining the requirements for a pilot's licence in Canada is not within the purview of the employment relationship.

5. Issue 5: Communicating with the CFPA membership

[16] With respect to the claim that the employer directly communicated with the Association's members through surveys and meetings, the evidence does not support the conclusion that the event of the oversight tour in 2017 addressed the PACP or that management initiated discussions directly with CFPA members on PACP issues, although it did respond to questions from employees about line flying.

[17] The unfair-labour-practice provisions in the *Act* provide a free speech exemption for employers. They do not commit unfair labour practices by reason only of expressing their points of view as long as they do not use coercion, intimidation, threats, promises, or undue influence. There was no evidence adduced that met any of those criteria.

[18] Nor do I conclude that the Transportation Safety Board's (TSB) approach to a subject matter expert, with respect to the qualifications of pilots whose positions were in the bargaining unit, who was a CFPA member, which was unknown to the TSB's chairperson, interfered with the bargaining agent's representation of employees.

6. Issue 6: A part-time permanent employee

[19] Although the bargaining agent's evidence was not as complete as would be preferred, it is not disputed that in late 2015, Transport Canada hired a part-time indeterminate employee. That hiring contravened the provisions of the collective agreement and the statutory freeze period in s. 107 of the *Act*.

7. Issue 7: Fitness-to-work certificates after 20 days' absence

[20] The employer's practice of requiring a fitness-to-work certificate for absences exceeding 20 days existed prior to the notice to bargain; the respondents have not established any new policy on this subject. Accordingly, there was no contravention of the statutory freeze period in s. 107 of the *Act*.

C. The approach

[21] For ease of reference, I will review the evidence, make findings of fact, carry out an analysis, and render a decision with respect to each of the issues raised in the complaint. Although many of the facts in it are not in dispute, the inferences that should be drawn from the facts as a whole are contested.

D. Witnesses

[22] The bargaining agent called two witnesses. Gregory Holbrook is currently its director of operations and is a past chairperson and member of its negotiating team, a position he has held since 1998. Greg McConnell is its chairperson and chief spokesperson and is a member of its negotiating team.

[23] The employer called the following four witnesses.

[24] Richard Arulpooranam, a Treasury Board negotiator for the core public sector, had responsibility in that role for the Aircraft Operations (AO) group from August 2016 to May 2017.

[25] François Collins is the director of national operations in Civil Aviation at Transport Canada. He is responsible for the oversight of the certification of seven major carriers, Air Canada, Rouge, WestJet, Encore, Jazz, Sunwing, and Air Transat. He is also responsible for the training of all pilots who fly for these operators and for the oversight of a simulator program. He is the designated chair of the Professional Aviation Currency Steering Committee ("the steering committee") and is the employer

representative in collective bargaining negotiations for the AO Group.

[26] Denis Guindon, the director general, oversight and transformation at Transport Canada, is responsible for all operational issues as well as budgets. His overall function is twofold: to lead all oversight activities in Civil Aviation, and to develop a transformation plan to improve its delivery through the regulatory process. All directors responsible for operational issues report to him, as do the regional directors.

[27] Jean Laporte is the TSB's chief operating officer. All operational positions report to the director of air, who in turn reports to Mr. Laporte.

E. Background from the CFPA

[28] Transport Canada and the TSB employ 425 pilots, of which 375 are employed at Transport Canada as CAIs, engineering test pilots (ETPs), helicopter pilots, and supervisors. The TSB employs 19 pilots as aircraft accident investigators. The remainder of the Association's membership are pilots in the private sector employed at NAV Canada.

[29] CAIs have a wide range of duties, as reflected in the duties classification. They perform check flights with commercial airline pilots and commercial airline check pilots. During check flights, pilots are subjected to certain exercises and are evaluated to determine whether they meet the standard for either the issuance or renewal of their pilot's licence.

[30] From a flight operations point of view, they inspect airports, air operations, airlines, and flight training schools, and they approve training organizations and inspect NAV Canada as the air navigation service provider.

[31] They oversee and approve the screening of aviation personnel and conduct regulatory compliance investigations, and they review and draft regulations and other standards provided by industry.

[32] Pilots employed in accident investigations at the TSB review, analyze, and certify equipment going into aircraft as meeting all regulatory standards. Some helicopter pilots are CAIs. Transport Canada provides pilots to operate the Coast Guard's helicopters. They carry out a range of duties and operate from the back of the Coast

Guard's ships. The CAIs and ETPs are in the AO classification.

F. Skills currency

[33] It is common ground that it is essential that the CAIs and ETPs be experienced pilots and that they maintain currency by maintaining their skills and keep up to date with new technology in terms of both aircraft equipment and onboard systems.

[34] Mr. Holbrook explained that there are different levels of currency, depending on what the employee is required to do. The minimum is that he or she must maintain a pilot's licence and instrument rating. If required to carry out other activities, such as a pilot proficiency check (PPC) or a monitor ride as an industry delegated check pilot, there are greater levels of currency.

[35] The Minister of Transport has established a program delegating to pilots in industry the authority to conduct duties on the Minister's behalf that CAIs once carried out. As part of that program, the Minister requires that an initial check and authorization of the industry pilot be done by CAIs working at Transport Canada. There is an established table of frequency for the review of an industry pilot's authorization.

[36] A CAI would be tasked with carrying out a monitor "ride" to review the authority of and approval of an industry pilot. The monitor ride would take place on board for smaller aircraft or in a simulator for larger aircraft. To perform the monitor ride, several documents provide that the inspector should at least be qualified and current to the same minimum standard as the pilot being monitored. This relates to commercial flight operations and not to private flight activity, which is an issue that arose in this case.

[37] Depending on the type of air operations and aircraft, the *CARs* set out the qualifications required at a particular level. Complexity rises from small aircraft and small airlines to major airlines. At the minimum are light twin-engine aircraft below a certain weight. There is an individual rating for each type of helicopter and by specific type for large aircraft. Currency is in relation to the specific type of aircraft. There are generic currency requirements for all licenced pilots. However, additional currency requirements arise when getting into the particulars of certain commercial aircraft. Generic currency requirements are in place for private and recreational aircraft.

Additional qualifications apply if a plane carries passengers for hire.

II. Issue 1: Violation of the duty to bargain in good faith

[38] It is alleged that the employer has refused to engage in full and rational discussions with respect to the bargaining agent's proposals on article 47 and the PACP. Thus, it has violated the duty to bargain in good faith, contrary to s. 106 of the *Act*. Its conduct constitutes a rejection of the Association's status as a bargaining agent, which is tantamount to interfering with the formation or administration of an employee organization or representation of employees by an employee organization contrary to s. 186(1)(b).

A. For the CFPA

1. Mr. Holbrook

a. Article 47 of the expired collective agreement

[39] Mr. Holbrook referred to article 47 of the expired collective agreement, entitled "Professional Aviation Currency". It reads as follows:

> ***47.01*** *The parties agree that the maintenance of Professional Aviation Currency is necessary for the Employer to fulfil its mandate and for employees to carry out their duties.*
>
> ***47.02*** *The Employer shall provide each medically fit Civil Aviation Inspector (CAI) with the opportunity to maintain his/her Professional Aviation Currency through the use of Departmental aircraft or an approved alternate professional currency program.*
>
> ***47.03*** *Professional Aviation Currency is deemed to have been met as a minimum, by the possession and maintenance of the Airline Transport Pilot Licence (ATPL) and Group 1 or Group 4 Instrument Rating/Pilot Proficiency Check or a Commercial Helicopter Pilot Licence and Group 4 Instrument Rating/Pilot Proficiency Check.*
>
> ***47.04*** *The Employer shall assign each employee in accordance with the criteria and procedures established between the Employer and the Union to a Professional Aviation Currency Program.*
>
> ***47.05*** *With the exception of clause 47.04 above all changes to the Transport Canada Professional Aviation Currency Policy for Civil Aviation Inspectors and the TBS policy on CAI Professional Aviation Currency shall be accomplished by*

> *means of mutual agreement between the parties.*

2. <u>The PACP</u>

[40] The PACP is referred to in article 47. It is a Transport Canada policy in which it commits to assign employees to a PACP in accordance with the policy, which is not part of the collective agreement.

[41] In the 1998 round of bargaining, the bargaining agent expressed a desire to discuss currency. The parties expressed a shared interest in dealing with currency. It took two years to get the process rolling.

[42] The employer was having issues keeping employees qualified. Budget cuts were coming. The payment of the extra-duty allowance set out in article 46 of the collective agreement was tied to a program that required flying a certain number of hours on departmental aircraft. If an employee flew 100 hours, he or she received 100% of the allowance. It was metered over the course of the year and split into two components. The key component was that the money was tied to the number of hours flown in departmental aircraft. A number of grievances had been filed as the program was not working for either party.

[43] Discussions started in 2001 with Transport Canada management. Article 47 was new to the collective agreement that had been signed in 2003. In discussions at the time, it was decided to reference just a title, i.e., "Professional Aviation Currency Program", in the agreement because the program's content had not been concluded. The bargaining agent and Transport Canada continued their discussions for a number of years. They eventually agreed on the program and put it into a document. It was subject to a ratification vote by the CFPA's membership and came into effect on April 1, 2007.

[44] The PACP's preamble mirrors the authority in article 47 and reads as follows:

> *Civil Aviation Inspector and Engineering Test Pilot employees shall be provided with the opportunity to maintain their Professional Aviation Currency in accordance with the Collective Agreement between the Treasury Board and the Canadian Federal Pilots Association and the employer shall provide them with the opportunity to do so. Transport Canada shall assign an employee to a Professional Aviation Currency Program in accordance with this policy. The program to which an individual pilot is assigned may be a*

> *Regular Flying Program (RFP) of not less than 48 flying hours per year or an Alternate Professional Aviation Currency Program (APACP) described in Appendix A.*

[45] Appendix A to the 2007 PACP, which addresses Alternate Professional Aviation Currency Programs (APACP) has been updated. The current list of approved alternate flying programs has an effective date of April 1, 2010. Each program was reviewed after that date.

[46] The policy is administered by the steering committee, which is composed of the director general of Civil Aviation or a delegate at Transport Canada; the director, flight operations, Aircraft Services, Transport Canada; one headquarters director, Civil Aviation Directorate, Transport Canada; the CFPA's chairperson; one regional director, Civil Aviation; and three CFPA members.

[47] One of the steering committee's duties is to review and approve any new proposals for an APACP. A majority vote of its members is required to approve any new program, which will form part of the approved APACP list. The PACP (effective April 1, 2007) is broken down into two sections, one for medically fit employees, and one for temporarily medically unfit employees. The first one states in part as follows:

…

> ***3.1*** *This policy sets out the requirements and means for a medically fit TC CAI or ETP to maintain his or her Professional Aviation Currency, professional knowledge, and earn the Extra Duty Allowance.*
>
> ***3.1.1*** *All TC employed medically fit CAI and ETP employees shall be assigned by the employer to a Professional Aviation Currency Program. This program could be a Regular Flying Program (RFP) of not less than 48 hours per fiscal year in accordance with the ASD Operations Manual using departmental aircraft, or an Alternate Professional Aviation Currency Program approved by the Professional Aviation Currency Steering Committee.*
>
> ***3.1.2*** *The employer may from time to time change the Professional Aviation Currency Program to which a medically fit CAI or ETP is assigned.*
>
> *This may result from changing job requirements or the availability of a regular ASD flying program. In addition to the criteria listed in Section 5.2.1, a priority status list for the assignment to a regular ASD flying program shall be considered.*

…

[48] Mr. Holbrook explained that a point system was created to ensure that employees had access to a regular flying program (RFP) in a fair and impartial manner as the employer had indicated that it was cutting back on them.

[49] Section 5 of the PACP sets out the policy and the process for assigning CAIs or ETPs to a PACP; it reads as follows:

…

> ***5.1.1*** *The employer shall assign all medically fit CAIs or ETPs to a Professional Aviation Currency Program.*
>
> ***5.1.2*** *All CAIs are eligible for assignment to a Regular Flying Program. The employer shall determine whether a medically fit CAI is to be assigned to a Regular Flying Program consisting of flying departmental aircraft a minimum of 48 hours per year, or an Alternate Professional Aviation Currency Program that meets the criteria of paragraph 5.2.1 of this policy. All ETPs shall be assigned to a flying program that is appropriate to their duties.*
>
> ***5.1.3*** *Notwithstanding Section 5.1.2 above the assignment to a RFP on ASD aircraft will not be considered for those CAIs where:*
>
> *a) the duties of their position within the ASD already provides for full engagement in flying duties;*
>
> *b) the duties of their position either directly or indirectly, require them to maintain currency on a heavy turbo-jet aircraft (over 44,000 lbs) and on-going operational exposure to major airline operations;*
>
> *c) they are employed within the National Operations Branch — Airline Division; or*
>
> *d) they are based in a geographic location that precludes the feasibility of assignment to a RFP.*
>
> ***5.1.4*** *If a medically fit CAI or ETP changes his or her indeterminate position within the department the employer shall re-evaluate whether, in the new position, the CAI or ETP is to be assigned to a regular flying program consisting of flying departmental aircraft a minimum of 48 hours per year, or an Alternate Professional Aviation Currency Program that meets the criteria of paragraph 5.2.1 of this policy.*

[50] Mr. Holbrook stated that seniority determines an employee's status for the RFP. At the beginning of every fiscal year, the employer provides information as to the number of slots available in that program. A list of all eligible CAIs is prepared in accordance with the scoring criteria. Both are published.

[51] The manager applies the criteria set out in section 5.1.2. A written assignment document is provided to each employee for the fiscal year. Individual managers do not have the authority to create their own programs. They have to select from the list approved by the steering committee. If a change is required in a subsequent year, the employee receives a new assignment form. If no change is required, the employee receives the same assignment form. There is a similar program at the TSB. This document remained in effect without change except for adding additional programs to the alternate flying program until notice to bargain was given in September 2014.

B. For the employer: interest-based bargaining

1. Mr. Guindon

[52] Mr. Guindon stated that between March 11 and June 22, 2014, the CFPA and Transport Canada entered into interest-based mediation to update and revise the PACP.

[53] The steering committee was composed of equal numbers of representatives of management and the bargaining agent. Based on the participants' work, the parties reached agreement on a final draft of a proposed revised PACP. Mr. Guindon called it a forward-looking joint approach. The parties agreed that for the CFPA, the changes would be subject to review and acceptance by its membership and that for Transport Canada, the changes would need to be reviewed and accepted by its executive management. Everyone at the table representing both Transport Canada management and the bargaining agent agreed to the proposals. However, the CFPA's president could not convince the bargaining agent's executive to approve them.

C. For the CFPA: notice to bargain

1. Mr. Holbrook

[54] Mr. Holbrook testified that the Treasury Board gave notice to bargain on September 25, 2014. At a later meeting the bargaining agent submitted detailed proposals on October 25, 2015, incorporating its professional currency proposal and

article 47. It sought to incorporate the documents with respect to the PACP and article 47 into the collective agreement.

[55] The whole issue of professional aviation currency for its members was most acute at Transport Canada. There had been a series of cutbacks and reductions over a number of years, and the CFPA's negotiating team was mandated to bring the important elements of the terms and conditions of employment of both Transport Canada and the PACP into the collective agreement.

[56] In addition, the bargaining team was mandated to modify the provisions of article 47 to protect members' qualifications and to ensure that they were always legally qualified to carry out their duties on behalf of the employer. Mr. Holbrook referred to the bargaining agent's bargaining proposals submitted on October 27, 2015, with respect to articles 46 and 47.

2. <u>Proposals for clauses 47.01 and 02 of the collective agreement</u>

[57] The bargaining agent's proposal with respect to clauses 47.01 and 02 reads as follows:

> ***47.01*** *All employees of the employer who are assigned any checking, certification, or oversight function, for which aircraft specific flight operations knowledge is necessary, shall be provided with the training to qualify them as a flight crew member, in accordance with the applicable regulations, for the aircraft type(s) that are the subject of that function.*
>
> ***47.02*** *Where any employee is required to carry out any checking or oversight duties in an aircraft, the employee shall be fully qualified as a flight crew member for that aircraft type in accordance with all regulatory requirements, prior to being assigned such duties.*

[58] Since June 2015, the parties have met six times, and as of the hearing, most recently on February 8 to 10, 2017. In Mr. Holbrook's view, the employer's approach to professional aviation currency has been not to talk about it. The employer has yet to respond and has not even refused the proposal. During the most recent meeting, which was the first one in a number of months due to the Treasury Board's lack of a mandate, the CFPA reiterated its desire to discuss the issue.

[59] In an exchange on the PACP, the employer indicated that it thought that changes to it had been mutually agreed to in 2013. It had to be clarified with the employer's

team that the events being referred to had occurred in the steering committee. The discussions occurred before notice to bargain was given in 2013 and concluded in mid-2014. The agreement reached at the steering committee was subject to the approval of the bargaining agent's executive, which rejected it. It was never taken to ratification.

[60] In the February 2017 negotiation session, the employer agreed that that was the sequence of events. The CFPA bargaining team advised the employer that if it thought that some provisions in the group of recommendations that arose from the steering committee in 2014 should be reconsidered, it was invited to table them, and the bargaining agent would be pleased to discuss them as well as its own proposals. The employer did not identify any, and there were no further discussions on the issue.

[61] Some peripheral discussion centred on how the employer found it difficult to discuss the matter. It did not go further. The employer said it would not discuss the provisions in detail. The bargaining agent said that that was not good enough. At the conclusion of the negotiations in February 2017, the bargaining agent indicated that because there had been changes in the workplace since bargaining had begun, it would have to amend its October 2015 proposals and provide new ones.

[62] Mr. Holbrook started to give evidence on what had occurred on this issue in bargaining during the month of May 2017. The employer objected to this evidence. The original complaint had been amended to encompass events up to March 6, 2017. The witness was testifying about events in May 2017. After hearing the arguments, I ruled that the witness should speak to the events alleged in the amended claim up to March 2017.

[63] In February 2017, the employer responded to the bargaining agent's desire to discuss article 47. It suggested that it might be better handled by discussing the issue with a mediator. The bargaining agent responded that they needed to start a discussion at the bargaining table. While it was not averse to mediation, its perception was that the employer was trying to avoid discussing the issue and to put it off. During the February session, no agreement was reached to proceed to mediation.

[64] The employer also alleged that discussions held between September 2016 and February 2017 focused on article 47. In Mr. Holbrook's view, the September 6, 2016, and January 23, 2017, sessions were not negotiation sessions. The Treasury Board

appointed a new negotiator in late summer 2016. The September 2016 and January 2017 meetings were introductory. Neither bargaining team was present.

D. For the employer

1. Mr. Arulpooranam

[65] Mr. Arulpooranam has held his negotiator position since October 2013. Negotiators are assigned to a number of bargaining units, for which they are responsible, and they work closely with departments, which seek a mandate from the Treasury Board to reach agreement on articles that can be included in a collective agreement.

[66] Mr. Arulpooranam was responsible for negotiating with a number of bargaining units, including the AO Group represented by the CFPA. He took over responsibility as the Treasury Board negotiator for that group in August 2016.

[67] Given the technical nature of the issues presented by the AO Group, he sought to touch base with the bargaining agent as soon as possible to introduce himself as the new negotiator. In August 2016, he contacted Mr. McConnell and sought to set up a meeting with him, Mr. Holbrook, and the Analyst.

[68] They met on September 6, 2016. His objective was to introduce himself, and to bring the bargaining agent up to speed on the change in government and what it meant for collective bargaining. He and the Analyst communicated the current status with respect to sick leave and the short-term disability plan.

[69] He had an understanding of some AO-specific issues as of the meeting. He was fully aware that the bargaining agent's number-one issue was article 47, dealing with aviation currency. This was his first opportunity to discuss the issue with the bargaining agent. It was not a formal bargaining session but more of a meet-and-greet and an opportunity for him to ask questions and to better understand the issues. This enabled him to put into context why the bargaining agent considered it critical to address article 47 in this round of bargaining and set the stage for him to go back to the management team at Transport Canada and the TSB.

[70] He confirmed that generally, this round of bargaining had gone on for some time. Under the new government, a new direction was taken with respect to sick leave and the short-term disability plan. In the fall of 2016, the employer took a different

approach and sought to enter into memoranda of understanding with the bargaining agents to work towards modernizing sick leave. This approach set the stage to reach collective agreements.

[71] Following the meeting with Mr. McConnell and Mr. Holbrook, he met with the management team at Transport Canada by way of teleconference. Much of the meeting was focused on article 47 in preparation for further bargaining sessions.

[72] On November 2, 2016, he emailed Mr. McConnell, advising him that his meeting with the Transport Canada management team had gone well but that they had a challenge before them with respect to what the CFPA was asking for in relation to article 47. He noted that he would be involved in bargaining with other groups for five straight weeks.

[73] Both sides fully intended to find dates on which to resume bargaining in the fall of 2016. They exchanged tentative dates. However, given Mr. Arulpooranam's schedule, they were not able to agree on them. They looked at dates in February 2017. The employer thought that using a mediator or a facilitator to address questions with respect to article 47 might move the discussion along. The management team showed an openness to proceeding with a mediator parallel to the table discussions.

[74] On November 28, 2016, Mr. Arulpooranam emailed Mr. McConnell with respect to the next bargaining sessions. He noted that waiting until February 2017 might not be the bargaining agent's preference but stated that "… this will give time for some of the bigger tables to hopefully settle and allow us time to further explore the idea of engaging in mediator/facilitator to assist in Article 47 discussions."

[75] On November 28, 2016, Mr. McConnell responded with respect to the next bargaining session and stated: "Perhaps you can make the request for a mediator and provide a list that we could jointly agree to." On Tuesday, December 13, 2016, Mr. Arulpooranam confirmed the bargaining sessions in February and suggested the name of a mediator. On Tuesday, December 13, 2016, Mr. McConnell agreed with Mr. Arulpooranam's recommendation.

[76] The employer approached the Board's Dispute Resolution Services on appointing a mutually agreed mediator. The employer recognized that until the bigger tables settled and dealt with the issues of sick leave and family related leave, they

would not be able to reach an agreement with respect to the AO Group. The employer thought that article 47 would be a logjam or an impediment to making a deal. If the parties could reach agreement on article 47, an overall settlement would be imminent.

[77] The parties met on January 23, 2017. Mr. McConnell and Mr. Holbrook attended for the bargaining agent and Mr. Arulpooranam and an analyst for the employer.

[78] Mr. Arulpooranam provided an update as to where things stood with respect to overall bargaining. The Treasury Board had reached a tentative agreement with the Program and Administrative Services group and with most of the PIPSC groups. He provided the bargaining agent with information on the pattern and where global aspects of the settlement would land.

[79] The discussion turned back to article 47. Much of the discussion related to what had been discussed in September 2016. Messrs. McConnell and Holbrook discussed the significance of the issues to their members, what the proposal meant legally, and its impact on industry and the safety of Canadians. Mr. Arulpooranam described it as a healthy exchange of views that dove deeper into article 47.

[80] Mr. Arulpooranam had an opportunity to meet the management team and had a better appreciation of the PACP and some of the challenges arising from budgetary cutbacks on training, which enabled him to have a more fulsome conversation. This allowed the employer side to float some ideas on how best to address the issue.

[81] One of the key messages conveyed in January 2017 with respect to the bargaining agent's demand that the PACP be brought into the collective agreement was that to blindly take Transport Canada's policy and put it into the collective agreement created a challenge. He stated that if the policy were incorporated into the collective agreement, it would make the policy adjudicable. The employer already had it in its mind that it needed to try to find a way to address the bargaining agent's concern by going to a mediator.

[82] It was thought that the best way to address the concerns might have been via a departmental governance process that would add more strength to the PACP by way of exploring a memorandum of agreement.

[83] The employer stated that it was open to discussing ways to get to the root of the issue other than via incorporating the PACP into the collective agreement.

[84] On February 7, 2017, Mr. Arulpooranam emailed Mr. Holbrook to advise him that further to their previous discussion, the employer side would formally propose that the parties tackle article 47 with the help of a mediator in a dedicated session to

be scheduled for some time in March 2017. The employer proposed available dates in March and requested that they discuss the issue the next day, February 8, when the parties were to formally resume bargaining.

[85] The parties had a three-day session scheduled for February 8 to 10, 2017. It was to be the first time the two full bargaining teams had convened in over a year. On day one, both sides brought each other up to speed. The employer side gave an update on the current status of collective bargaining, legislation, and interim measures related to Bill C-4 and Bill C-59 and sick leave. The employer withdrew from its position on sick leave and the short-term disability insurance plan and presented options that had been presented to the PSAC and the PIPSC, to indicate what those settlements looked like.

[86] On day two, the parties discussed some of the low-hanging fruit with respect to some administrative proposals. A handful were discussed and signed off. The first two days were focused on getting the ball rolling and building a relationship with the bargaining agent's team. Mr. McConnell and Mr. Arulpooranam agreed to leave the article 47 issues to the third day.

[87] Mr. McConnell indicated that there had been some recent activities and complaints and indicated that he was considering coming with a revamped proposal with respect to article 47, which would allow the bargaining agent to set the stage again for further discussions. The employer side was quite pleased with how the discussions had gone and thought that they had been constructive.

[88] In Mr. Arulpooranam's view, both sides recognized that the PACP was not as effective as it could be and that there was a need to focus attention on it. The management side believed it was on the same page as the bargaining agent in reviving some of the work that the department and the bargaining agent had done in 2014. Mr. Arulpooranam stated that there was no substantial discussion with respect to change; however, the employer's view was that the stage had been set for further discussion.

[89] In Mr. Arulpooranam's view, going into the final day, there was a willingness to

proceed with a mediator. However, there was a feeling that more might be achieved by proceeding initially without one. Following the meeting, a plan was made to proceed with another bargaining session to deal with article 47 without a mediator.

[90] Both sides looked for available dates in April and May 2017. Mr. Arulpooranam went on parental leave in mid-May and handed off the negotiations to another Treasury Board negotiator, who was to handle the May session for the employer. The focus was to be article 47.

E. The CFPA's submissions

1. Collective bargaining

[91] On September 25, 2014, the employer served its notice to bargain. Since then, the parties have met at the bargaining table on a number of occasions, but no agreement has yet been reached.

[92] The parties exchanged bargaining proposals in the months following the notice to bargain. The respondents' witness, Mr. Arulpooranam, gave evidence that the employer's focus was on its proposed short-term disability plan.

[93] For its part, in October 2015, the Association tabled a detailed, comprehensive proposal on article 47 and the PACP. On behalf of the CFPA, Mr. Holbrook gave evidence that the CFPA's negotiating team was mandated to bring the important elements of the Transport Canada and TSB PACPs into the collective agreement, to protect members' qualifications and to ensure that they were always legally qualified to carry out their duties on behalf of the employer.

[94] Mr. Holbrook testified that for the Association's members, there really is no bigger issue in this round of bargaining than professional aviation currency, given that it strikes at the very core of the pilots' professional standards.

[95] The parties met several times. Mr. Holbrook testified that as of the date the complaint was filed, there had been no meaningful discussions with respect to the PACP. He testified that through several rounds of negotiations, the CFPA asked to discuss article 47 and the PACP. He testified that to date, the employer has refused to discuss the bargaining agent's proposal at the bargaining table and that the Association has been advised that the matter of the PACP would have to wait until a new collective agreement was entered into.

[96] Mr. Arulpooranam corroborated this evidence. The respondents' witness testified that he was fully aware that the number one issue for the bargaining agent was article 47 and professional aviation currency.

[97] He also gave evidence that in the February 2017 bargaining session, no substantial discussions took place on article 47 and that the employer strategically chose not to respond to the CFPA's proposal. Mr. Arulpooranam testified that he instructed his team to be in listening mode, but he did not communicate that to the Association.

a. Section 106 of the *Act*

[98] The Association submitted that Transport Canada's conduct violated the duty to bargain in good faith. The employer circumvented the bargaining process by unilaterally introducing changes to terms and conditions of employment when such matters were included in important proposals at the bargaining table and therefore could be included in the next collective agreement.

[99] The duty to bargain in good faith means showing a willingness to engage the other party and to listen to its position. Despite the Association's clear articulation of its training demands, not only did the respondents not respond at the bargaining table, but Transport Canada also made significant changes to terms and conditions of employment without consulting the Association. The duty to bargain in good faith entails making "… every reasonable effort to enter into a collective agreement", as stated in s. 106 of the *Act*, which the respondents denied by both refusing to enter into discussions and by imposing a new IPB.

F. The employer's submissions

[100] Section 106 of the *Act* contains specific language describing good-faith bargaining, which includes two components: starting the negotiations, and making reasonable efforts to reach a collective agreement.

[101] The general principles on the duty to bargain in good faith can be found in one of the first key cases on the subject in 1977 and involving the PSAC and the Treasury Board, *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 148-02-16 (19770630), [1977] C.P.S.S.R.B. No. 16 (QL). The PSAC alleged that the employer had refused to discuss the possibility of an exemption from the "Anti-Inflation Guidelines".

[102] The employer claimed that it was prepared to discuss an exemption but that the PSAC provided no evidence to support its position that an exemption could be justified. The former Public Service Staff Relations Board (PSSRB) stated that since the good-faith bargaining language of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; *PSSRA*) was almost identical to that of the Ontario *Labour Relations Act*, it would look to Ontario Labour Relations Board (OLRB) decisions as a guide.

[103] The PSSRB emphasized that the duty was intended to recognize rational, informed discussion, thus minimizing the potential for unnecessary conflict, and that the duty depended on how the negotiations were conducted and not on the content of the proposals. It concluded that the test was an open and rational discussion, that the parties must be prepared to explain the rationale for their positions, and that the PSAC bore the burden of proving its allegations.

[104] The PSSRB viewed the negotiations as a whole in light of the jurisprudence and the particular circumstances of the public service and held that there was no breach of the duty to bargain in good faith.

[105] The general principles of good-faith bargaining can also be found in the Supreme Court of Canada's decision in *Royal Oak Mines v. Canada (Labour Relations Board)*, [1996] S.C.J. No. 14 (QL) at para. 42. The Supreme Court indicated that the duty to bargain in good faith has a subjective and an objective component. Entering into negotiations is measured on a subjective standard, while making every reasonable effort to reach a collective agreement is measured on an objective standard.

[106] Furthermore, in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102, the former Public Service Labour Relations Board (PSLRB) reiterated the principle that the duty to bargain in good faith does not impose an obligation to reach an agreement. In referring to a Supreme Court decision (*Canadian Union of Public Employees v. Labour Relations Board (N.S.)*, [1983] 2 S.C.R. 311), the PSLRB also explained the difference between "hard bargaining" and "surface bargaining" as follows (at para. 85):

…

> *… A finding of "surface bargaining" will usually result in a finding of bad faith. A finding of "hard bargaining" will not. Hard bargaining is "… the adoption of a tough position in the*

> *hope and expectation of being able to force the other side to agree to one's terms" (*CUPE*). Surface bargaining occurs when "… one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and*
>
> *hopes to destroy the collective bargaining relationship" (*CUPE*).*
>
> …

[107] In the present case, Mr. Arulpooranam, the negotiator for the TBS, testified that at no time did the employer refuse to discuss article 47. It was clear from the beginning that the CFPA's intention was to attempt to include the PACP into the collective agreement. The employer communicated that the PACP should be reviewed in the respective departments through the governance structure that the parties had already agreed to.

[108] Mr. Arulpooranam confirmed that he did instruct his team to be in listening mode to ensure that the employer fully understood the bargaining agent's propositions and for a proper discussion of article 47. Simply incorporating the PACP as a whole into the collective agreement was not the only option available.

[109] In the February 2017 negotiation session, Mr. Arulpooranam asked a number of questions and clearly indicated that he wanted to understand the bargaining agent's position, considering the very technical and complex PACP matter.

[110] The employer's refusal to include the PACP in the collective agreement cannot be construed as negotiating in bad faith. It took the firm position that the PACP could not be included as a whole, but kept an open mind by trying to find a solution in the review of article 47.

[111] Mr. Arulpooranam testified that he even considered the possibility of incorporating a dedicated memorandum of understanding on the PACP, to deal with the issue of article 47 without necessarily including the PACP in the collective agreement.

[112] As indicated by the jurisprudence mentioned earlier, the duty to bargain in good faith depends on how negotiations are conducted and not on the content of the bargaining agent's proposals. The important factor is the quality of the discussion. Taking a hard position on one aspect of the proposal does not in itself amount to

bad-faith bargaining.

[113] The CFPA had the burden of proving that the employer did not make every reasonable effort to enter into a collective agreement. The evidence shows that the only hard stance the employer took was that the PACP could not be incorporated into the collective agreement per se. Otherwise, it was always open for a meaningful discussion about article 47. It is respectfully submitted that the facts of this case do not support the CFPA's allegations of bad-faith bargaining under s. 106 of the *Act*.

G. <u>The CFPA's reply</u>

[114] At paragraphs 2 and 3 of their submissions, the respondents relied on the PSSRB's long-standing decision in *Public Service Alliance of Canada v. Treasury Board.*

[115] However, contrary to those submissions, in fact, the PSSRB's consideration of the OLRB's jurisprudence fully supports the bargaining agent's position that by failing or refusing to discuss its proposal on article 47 and the PACP, the respondents contravened s. 106 of the *Act*.

[116] At paragraph 13, the PSSRB discussed the relevance of the OLRB's decision in *United Steelworkers of America, Local 13704 v. Canadian Industries Limited*, 76 CLLC 16,104, in which the OLRB found that an employer's refusal to discuss monetary issues in excess of the Anti-Inflation Guidelines violated the duty to bargain in good faith.

[117] The OLRB held that "… satisfaction of the duty to bargain in good faith depends on the manner in which negotiations are conducted, and not upon the content of the proposals brought to the … table." Rather, the important factor in collective bargaining is the quality of the discussion, meaning that "… the parties have a duty to communicate with each other …". The OLRB continued as follows:

…

> *… A careful scrutiny of the negotiations reveals an unwillingness on the part of the respondent to either provide a full justification for its own position on monetary items, or to discuss its objections to the applicant's position in these matters. In our opinion, the respondent's explanation of only the arithmetic guidelines fell short of a full justification for its position on monetary items … By adopting its own interpretation of the anti-inflation regulations and indicating its unwillingness to discuss any other interpretations, it has foreclosed the kind of full discussion required by law. A party*

> *cannot wrap itself in a cloak fashioned from its own interpretation of the guidelines in order to avoid the obligation to bargain in good faith.*
>
> …

[118] The failure of a party to explore a particular bargaining stance with the other party has been held to be bad faith. In *United Electrical, Radio and Machine workers of America (UE) v. DeVilbiss (Canada) Ltd.*, [1976] 2 Can. L.R.B.R. 101 at para. 14, for example, the OLRB held the following about the duty to bargain in good faith (see also *Pine Ridge District Health Unit*, [1977] OLRB Rep. February 65; and *PSAC v. Forintek Canada Corp.*, [1986] OLRB Rep. April 453):

> …
>
> [It] *assumes that when two parties are obligated to meet each other periodically and rationally discuss their mutual problems in a way that satisfies the phrase "make every reasonable effort", they are likely to arrive at a better understanding of each other's concerns thereby enhancing the potential for a resolution of their differences without recourse to economic sanctions — the impact of which is never confined to the immediate parties of an industrial dispute. At the very least rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the "true" differences between them.*
>
> …

[119] In *DeVilbiss*, at para. 16, the OLRB held that rational and informed discussion cannot take place until both sides have a full understanding of the differences between them. It explained that it is "… patently silly to have a trade union 'in the dark' with respect to the fairness of an employer's offer because it has insufficient information to appreciate fully the offer's significance to those in the bargaining unit."

[120] In this case, the evidence clearly demonstrated that the employer refused to discuss the bargaining agent's proposal on article 47 and the PACP. The Association was explicitly told that the matter of the PACP would have to wait until a new collective agreement was entered into. The respondents' witness, Mr. Arulpooranam, conceded that the employer strategically chose not to respond to the CFPA's proposal and that this strategy was not communicated to the CFPA.

[121] The evidence is clear that the respondents have refused to engage in full and rational discussions with respect to the bargaining agent's proposals on article 47 and the PACP.

H. Analysis

[122] The complaint was filed pursuant to s. 190 of the *Act*, which provides that the Board must examine and inquire into any complaint that alleges that the respondent failed to comply with, among other provisions, ss. 106, 107, and 186. Section 106 reads as follows:

> ***106*** *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*
>
> > ***(a)*** *meet, or cause authorized representatives on their behalf, to bargain collectively in good faith; and*
> >
> > ***(b)*** *make every reasonable effort to enter into a collective agreement.*

[123] Federal and provincial labour laws contain similar provisions requiring the parties to meet and bargain collectively in good faith. Section 106 of the *Act* reflects the requirements in it to describe good-faith bargaining. Both the Ontario *Labour Relations Act* and the *Canada Labour Code* (R.S.C., 1985, c. L-2) contain similar language.

[124] In *Public Service Alliance of Canada v. Treasury Board*, [1977] C.P.S.S.R.B. No. 16 (QL), the PSSRB, in adopting the OLRB's guidelines on interpreting the obligation to bargain in good faith and to make every reasonable effort to create a collective agreement, sets out the principles of that duty. That Board (at para. 11) adopted the reasons in *DeVilbiss* as follows:

…

> *… the duty described in Section 14 has at least two principal functions. The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.*

…

[125] The PSSRB summarized the following guidelines from the OLRB's jurisprudence:

- the duty reinforces the employer's obligation to recognize the bargaining agent;
- the duty is intended to recognize rational, informed discussion, thus minimizing the potential for unnecessary conflict;
- both parties have the duty to share the intent of entering into a collective agreement;
- the negotiation process should be looked at as a whole;
- the duty depends on how negotiations are conducted and not on the content of the proposals brought to the bargaining table;
- the important factor is the quality of the discussion;
- the parties have a duty to communicate with each other;
- hard bargaining, albeit ruthless, is not bad-faith bargaining;
- the test is open and rational discussion;
- the parties must be prepared to explain the rationales for their positions; and
- the complainant bears the burden of proving its allegations.

[126] The Supreme Court of Canada in *Royal Oak Mines*, described the duty to bargain in good faith.

[127] In that case, the Canada Labour Relations Board (CLRB) found that the employer had failed to bargain in good faith following a bitter and violent 18-month strike. The CLRB's finding was based on the employer's refusal to negotiate pending the outcome of a competing employee association's certification application, the employer's demand for a probationary clause for all returning employees, and its refusal to discuss a provision for any type of arbitration or to consider questions arising from its discharge of several employees. At issue was the CLRB's jurisdiction to order the employer to table its last offer with other issues in dispute subject to limited bargaining and ultimately binding mediation.

[128] In concluding that there was overwhelming support for the CLRB's finding that the employer had breached its duty to bargain in good faith by imposing an unreasonable condition on the collective bargaining process, Mr. Justice Cory for the court reasoned in part as follows at paragraphs 41 through 46:

> ***41*** *… In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code. In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.*
>
> ***42*** *Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. … as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*
>
> ***43*** *Section 50(a)(ii) requires the parties to "make every reasonable effort to enter into a collective agreement". It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of "reasonable effort" must be assessed objectively, the Board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith.…*
>
> …
>
> ***44*** *In some cases a party's behaviour may be so egregious that it can be reasonably inferred that there is an unwillingness to make a real effort to reach an agreement. In those circumstances, while a party may express a desire to reach a collective agreement their actions may clearly indicate that they do not wish or intend to reach an agreement.…*
>
> ***45*** *… If reasonable parties have agreed to the inclusion of a*

> *grievance arbitration clause in their collective agreement, then a refusal to negotiate such a clause cannot be reasonable. The grounds on which an employer may dismiss an employee is of fundamental importance for any association of employees. For an employer to refuse an employee a grievance procedure or some form of due process, by which the employee can challenge his or her dismissal on the ground that it was not for just cause, is to deny that employee a fundamental right. In those circumstances it would be reasonable for a board to infer that no reasonable union would accept a collective agreement which lacked a grievance arbitration clause and that the employer's failure to negotiate the clause indicated a lack of good faith bargaining.*
>
> ***46*** *To echo the finding of the Canada Labour Relations Board in Iberia Airlines of Spain (1990), 80 di 165, at p. 203, the appellant's bargaining position, in the case at bar, was "inflexible and intransigent to the point of endangering the very existence of collective bargaining"….*

[129] In that case, the CLRB found the employer violated s. 50(a) of the *Canada Labour Code* when for no valid business reason it refused to grant the employees in the bargaining unit the same salary increases that it had granted non-unionized employees and refused to continue collective bargaining if the union did not withdraw an outstanding complaint before the board.

[130] In *Canadian Union of Public Employees (Airline Division), Local 4027 v. Iberia Airlines of Spain* (1990), 80 di 165, at 203, the CLRB stated further as follows:

> *The employer was not engaged in hard bargaining with the aim of protecting its legitimate interests within the framework of collective and negotiated labour relations. The employer was engaged in surface bargaining. At the formal level, it adopted an approach that was at first glance above reproach, as the usual motions are. On closer view, this approach was unlawful, unjustifiable and contrary to what is permitted in good faith bargaining….*

[131] Mr. Justice Cory stated (at paras. 46 and 47) that in his view, "… this conclusion is correct and applicable to the case under consideration. The unreasonableness of the appellant's position in this case can objectively be measured by looking at other cases involving similar fact situations."

1. <u>Application to the facts in this case</u>

[132] Mr. Holbrook testified that in his view, the employer's approach to the

bargaining agent's PACP proposals has been not to talk about them, not to respond to them, and not even to say "no" to them. His view is that the employer wishes to postpone any discussion of the proposals until after bargaining, at which time the department and the bargaining agent would deal with them.

[133] He acknowledged that in February 2017, the employer suggested that the bargaining agent's proposals might be better handled by discussing the issues underlying them with a mediator. He stated that while the bargaining agent was not averse to mediation, its perception was that the employer was trying to avoid discussing the issues.

[134] Mr. Arulpooranam testified that the employer had thought that using a mediator or a facilitator to address questions with respect to article 47 might move the discussion along. In November 2016, he emailed Mr. McConnell to explore the idea of engaging a mediator. Mr. McConnell replied, requesting a list of mediators that the parties could jointly agree to. Ultimately, after approaching the Board's Dispute Resolution Services, they did agree on a mediator.

[135] Mr. Arulpooranam stated that the employer viewed blindly taking Transport Canada's policy and putting it into the collective agreement as creating a challenge as it would make the policy adjudicable. Nevertheless, the employer understood that it needed to try to find a way to address the bargaining agent's concerns either by going to a mediator or by way of a departmental governance process that would add more strength to the PACP. This could be achieved by way of a memorandum of agreement between the parties.

[136] On February 7, 2017, Mr. Arulpooranam emailed Mr. Holbrook to advise him that the employer side would formally propose that the parties tackle article 47 with the help of the mediator in a dedicated session to be scheduled for some time in March 2017. He proposed available dates.

[137] The parties agreed that of the three dates scheduled for negotiations in February 2017, the discussion on article 47 would be held on the last day. Mr. McConnell indicated that due to some recent activities and complaints, he was considering coming with a revamped proposal with respect to article 47, which would allow the bargaining agent to set the stage for further discussions.

[138] Mr. Arulpooranam stated that going into the final day of negotiations in February, in his view, there was a willingness to proceed with a mediator. However, there was a sense that the two sides might achieve more by proceeding without one for that one further day. Following the meeting was a plan to proceed with another bargaining session to deal with article 47 without a mediator in March 2017.

[139] When the complaint was filed in early March 2017, Mr. Arulpooranam testified that he was caught by surprise, as no one on the employer's side had indicated a no-go or had concluded that discussions should end on article 47 and that an impasse should be declared.

[140] Although the employer took the firm position that it did not wish to incorporate the PACP into the collective agreement, I am satisfied on the evidence that it had an open mind about dealing with the bargaining agent's underlying concerns and that it was willing to consider strengthening the governance of the PACP. It indicated a willingness to consider mediation and took the initiative in this respect. It was also willing to consider a memorandum of agreement to strengthen the governance of the PACP. The way the issue was left on the last day of bargaining in February 2017 was that the parties were to meet directly on a date scheduled in March 2017 before involving a mediator. In addition, the bargaining agent had indicated that it would amend its proposals with respect to a revised article 47.

[141] I am not persuaded that the parties reached an impasse on this issue or that the bargaining agent met its onus of establishing on a balance of probabilities that it is more likely than not that the employer bargained in bad faith.

[142] There is no evidence to suggest that the employer refuses to recognize the bargaining agent or wishes to put collective bargaining rights in jeopardy. Nor did the bargaining agent focus its evidence to establish that the employer failed to enter into bargaining in good faith. During the limited number of occasions they met in bargaining, the parties did agree on a number of clauses.

[143] In *Royal Oak Mines*, among other things, the CLRB had found that a refusal to incorporate a grievance arbitration clause into a collective agreement to arbitrate grievances filed when employees had been dismissed was evidence of bad-faith bargaining as objectively, no reasonable union would accept the employer's position.

[144] In this case, no objective evidence was adduced of comparable clauses dealing with a department's operational matters in the federal public sector that have been incorporated into collective agreements that would support an inference that the employer did not make reasonable efforts to enter into a collective agreement. In my view, it is also significant that at least since 2007, the parties have dealt with professional aviation currency by way of a departmental policy developed jointly outside the collective agreement. I am satisfied based on the evidence presented before me that the parties have been communicating with each other and that to date, they have been engaged in rational discussions. Accordingly, and being mindful of all eleven bullet points set out in para. 125 above, I do not find a breach of s. 106 of the *Act* on the facts outlined in this case.

III. Issue 2: Changing the PACP

[145] The Association alleged that the respondents breached the statutory freeze on terms and conditions of employment, contrary to s. 107 of the *Act*, by substantially changing its membership's terms and conditions of employment by making unilateral program reductions to the PACP.

A. For the CFPA

1. Mr. McConnell

[146] Mr. McConnell was referred to a number of emails, in particular to one dated February 3, 2016, which he sent to Laureen Kinney at the Treasury Board. He stated that flying programs were being curtailed in Ontario and Quebec. He was concerned that Transport Canada was not aware of the statutory freeze provisions in the *Act* that came into effect after notice to bargain had been given.

[147] Ms. Kinney replied on February 15, 2016, stating that she had asked the Director General of Oversight and Transformation at Transport Canada to follow up immediately.

[148] On February 22, 2016, Mr. Guindon replied by email to Mr. McConnell as follows:

…

> *We have received communication that the Québec and Ontario Region have and are continuing to ensure that all aspect of the PACP are complied with. Take note however*

> *that there are instances where AO are by choice not choosing to complete their 48 hours and/or there are logistical challenges to schedule AO on initial and or recurrent training especially with ASD due to the volume of initial courses.*
>
> *I suggest we discuss this issue at the next Relationship Committee.*
>
> …
>
> [*Sic* throughout]

[149] Mr. McConnell replied to Mr. Guindon, stating that it was an important issue that could not wait until the relationship committee (i.e. steering committee mentioned earlier in this decision) meeting. He also requested the documentation that he had supporting the fact that AOs were choosing not to complete their programs.

[150] Mr. Guindon replied by email on February 25, 2016, advising as follows:

> …
>
> *how they have been managing the program. At this time, I can confirm that there are no restrictions on the flying and training program in order to ensure that the provisions of article 47.03 of the collective agreement are met for all AOs. The program has never stopped but it may have for a short period continued at a slower pace. In addition, I can also assure you that there are no changes to the PACP and there should be no concerns with regards to article 47.05.*
>
> …

[151] Mr. Guindon also provided information to Mr. McConnell about some AOs who were not able to meet the minimum 48-hour flying requirement for reasons linked to each AO due to circumstances that were outside the employer's control.

[152] The last paragraph of the email reads as follows:

> *I hope that we will be able to work together in ensuring that the AO training and flying program is set up to meet Policy and contractual obligations as per both our expectations. I trust that this addresses your concerns and that the matter is considered closed until we regroup in May to review the data.*

[153] Following his receipt of the email, Mr. McConnell emailed the email chain to the executive of the bargaining agent and to representatives for the purpose of discussing future action. He was not satisfied with the response as it was clear that

there would be no opportunity to collaborate on a solution.

[154] On March 30, 2016, the Association and Transport Canada held a relationship committee meeting at which he was briefed on the coming changes to the flying program. He was advised that he would receive an email later in the day. At the end of the day, he received one that outlined changes to the flying program, with which he was not happy. He had concerns that arose from how the changes were explained at the meeting.

[155] He stated that there had been no consultation with the bargaining agent. He was asked if this was when he first learned of the changes. He stated it was the first time that he had seen them in draft form.

[156] The communications toolkit that had been prepared for managers to use when briefing their staff was provided to Mr. McConnell.

[157] On March 31, 2016, in conjunction with briefings to members held on that date, the employer provided a document to the CFPA outlining changes to the flying program effective April 1, 2016. It reads as follows:

> *CHANGES TO THE FLYING PROGRAM*
>
> ***Executive Summary***
>
> - *Due to current resource reduction pressures*
> - *TCCA is reviewing efficiencies to the Flying program*
> - *Effective April 1, 2016*
> - *Ensure financial resources for flying program equitable across Canada*
> - *Alternate flying program will be increase in the NCR, with the use of established alternate means (Sims)*
> - *Use of the newly acquired B407 Heli & Sim*
> - *Two B206 (underutilized YQM/YOW) will be Removed from service*
> - *Complete review of the business needs will be conducted to identify where national efficiencies can be gained*
> - *PL164 will be replaced with a new policy (eff April 15,*

2016)

General Notes

- *Current resource reduction pressures have forced change*
- *No impact on CFPA contractual obligations (PACP)*
- *No plan to reduce staff*
- *Not a negative reflection of CAI work*
- *CAI expertise is essential to TCCA Safety Oversight Program*
- *TCCA committed to ensuring that appropriate guidance and supervision is provided to those affected by these changes*
- *Impacted CAIs & the CFPA will be kept informed as changes are made.*

Implementation

- ***Effective April 1, 2016***
  - *RFP limited to CAI located close to ASD Bases*
  - *Increased use of AFP in the NCR*
  - *Two underutilized B206 will be removed from service*
  - *Complete review of business needs (type training)*
- ***Effective April 15, 2016***
  - *PL 164 will be replaced with a new policy*

RFP Available to pilot employees located in:

- ~~*Prince George*~~
- ~~*Victoria*~~
- *Vancouver*
- *Richmond*
- *Abbotsford*
- ~~*Kelowna*~~
- ~~*Calgary*~~
- ~~*Edmonton*~~
- ~~*Saskatoon*~~

- *Winnipeg*
- ~~*Thunder Bay*~~
- ~~*Sudbury*~~
- *Hamilton*
- *Toronto*
- *Montreal*
- ~~*Quebec City*~~
- *Moncton*
- ~~*Halifax*~~
- ~~*St. John's*~~

[All emphasis and font effects in the original]

[*Sic* throughout]

[158] After collaborating with the bargaining agent's executive, Mr. McConnell emailed Mr. Guindon on March 31, 2016 stating in part as follows:

…

> *The CFPA believes that Transport Canada's actions are illegal and we have instructed our legal counsel to proceed with filing a complaint to the Public Service Labour Relations and Employment Board.*

…

[159] The employer did not react or respond to Mr. McConnell's letter.

[160] On December 19, 2016, Mr. Collins emailed Mr. McConnell to advise him in advance that the Aircraft Services Directorate planned to swap aircraft between Hamilton, Ontario, and Winnipeg, Manitoba, at the end of fiscal year 2016-2017. The then-current basing strategy included one C90A King Air airplane and one C550 Citation airplane at each location. With only a single aircraft of each type at each location, there was no backup when an aircraft was taken out of service for maintenance or other reasons. To address this, a decision was made to transfer the C550 from Hamilton to Winnipeg and the C90A from Winnipeg to Hamilton.

[161] With respect to the impact of the swap in the employer's Prairie and Northern Region, the email stated in part as follows:

…

> *There will be a slight reduction in the number of locations that can be flown to … including gravel, however there are currently no gravel qualified pilots in PNR as there has*

> *recently been no apparent need to go to those locations. Operations in PNR will also be limited to runways 5,000' or longer.*
>
> …

[162] From a positive perspective, in the employer's Ontario Region, the two King Air aircraft would not cost as much money to operate as the King Air is a less complex aircraft.

[163] Mr. McConnell stated that as a result of the swap, there would be less members flying in the employer's Prairie and Northern Region and likely more flying in its Ontario Region.

[164] He stated that it changed the terms and conditions of employment for some of the bargaining agent's members. Inexperienced aviation inspectors may never qualify to fly a jet such as the C550. Inspectors in Ontario would not be able to keep their qualifications for high-altitude flights above 2500 feet. Training extensions were being sought for pilots to complete their last fiscal year's training.

a. Cross-examination

[165] Mr. McConnell agreed that the employer determined training for employees, in accordance with the procedures established in the PACP. He confirmed that in 2007, the employer and the bargaining agent established and mutually agreed to the PACP and its content. He acknowledged that it is the employer's prerogative to assign employees to a RFP or an alternate flying program.

[166] He was asked whether the determination of who goes into each program is the employer's prerogative. He replied that one section cannot be read in isolation of the others and that from 2007 to 2012, all employees had the option of being assigned to a RFP.

[167] He was asked where it was provided that the bargaining agent had a say in assigning employees to a program. He replied that after an aircraft sale in 2012, draconian cuts were made to the RFP, and the assignment of the employees to the APACP was increased. He replied that the assignment process in section 5.2.1 of the PACP is done in consultation with the employee where it speaks to his or her preference.

[168] Mr. McConnell was asked whether it made sense that the employer would train an employee to perform assigned duties. He replied that this was a really wide-open

question. He was given an example of the swap of the C90A King Air aircraft for the jet in Winnipeg. He was asked about the bargaining agent's issue of an inexperienced inspector in Winnipeg not being able to qualify to pilot a jet. He was asked whether if that inspector was not assigned duties related to the jet, then there would be no need for him or her to qualify for it. He acknowledged that that could be the employee's preference but that it might not be necessary.

[169] He was asked whether the policy changed after notice to bargain was given. He replied that it had not but that the interpretation of it had changed due to the employer's actions. He agreed that the industry had changed significantly and very quickly. One major change had been in commercial flight testing, which resulted in industry conducting the majority of it.

[170] Mr. McConnell was asked if many employees do not reach the required 48 hours. He replied that some do not. He was asked if those who do not are prejudiced by not receiving the extra-duty allowance. He replied that he did not understand the question and that the 48 hours are not linked to that allowance.

[171] It was suggested to him that some members on the RFP do not reach 48 hours. He replied that it was through no fault of their own. It was also suggested to him that some did not reach 48 hours because of their personal situations. He was referred to the email he received from Mr. Guindon, dated February 25, 2016, outlining several reasons linked to the employees who were not able to reach the minimum 48 hours. He replied that if someone is pregnant or leaves for another job, he or she may not reach 48 hours.

[172] He stated that his evidence was that many employees were not current and that many reasons were behind it. If they have not done five takeoffs and landings, they cannot fly with passengers. All inspectors are required to complete 3 takeoffs and landings within 60 days of a flight. If an inspector has not acted as a pilot in command of an aircraft that requires two pilots within the previous five years, he or she cannot exercise the privilege of the licence.

2. Mr. Holbrook

[173] Mr. Holbrook referred to the March 31, 2016, document from the employer entitled “Changes to the Flying Program”.

[174] He stated that the bargaining agent did not see the commitment to ensure that financial resources for the flying program were equitable across Canada as being supported by the facts because he is aware of significant inequities across the country.

[175] The increase to the alternate flying program in the National Capital Region (NCR) by increasing the use of simulators means there will be a reduction to the RFP.

[176] In the bargaining agent’s view, a review of the business needs to identify national efficiencies has to do with achieving further cutbacks. The document states that there is no impact on CFPA contractual obligations. The bargaining agent vehemently disagreed.

[177] There is a list of cities in which pilot inspectors will not have access to the RFP. For a couple of locations, the bargaining agent agreed in 2007 that it was not feasible to have the RFP there. Those locations reflected a long-standing application of the language in the Transport Canada PACP and in particular section 5.1.3(d). Only two locations were struck, St. John’s, Newfoundland, and Thunder Bay, Ontario.

[178] Employees were flying in Prince George, Victoria, and Kelowna, British Columbia; Québec, Quebec; and Halifax, Nova Scotia, until April 1, 2016. The 2012 aircraft sale resulted in the closure of Calgary and Edmonton, Alberta; and Sudbury, Ontario, facilities.

[179] Mr. Holbrook stated that these changes meant that the employer changed the application of the program set out in the PACP, which had to be followed because of article 47. The PACP requires that everyone have equal access to the RFP.

[180] The change in 2016 affected the flying program because members in Victoria or Québec who had had access to a RFP as of March 31, 2016, had their programs cancelled and were signed up to an alternate flying program with no chance of participating again in a RFP. The steering committee did not approve these changes.

[181] On March 31, 2016, the Quebec Regional Director emailed the employees in the Quebec region. He advised them that management was finalizing the 2016-2017 flight

list and that management was standardizing nationally the use of aircraft. He advised that management had been asked to limit flights to those who were within 125 km of the base in Dorval, Quebec. He apologized for having to limit access that year for the pilot in Québec and Alma. He stated that the bargaining agent and management could answer questions and concerns.

[182] From the bargaining agent's perspective, it found it irksome that the Director would say that the bargaining agent could answer questions on a program since that suggested that it was somewhat involved.

[183] Mr. Holbrook stated that the 125 km limit was not being applied outside Quebec and that in his view, the concept of national standardization does not exist.

[184] Victoria is only 68 km from Vancouver, where aircraft are located. In B.C., a different rule was applied than in Quebec. There is no national standard.

a. Cross-examination

[185] Mr. Holbrook acknowledged that the complaint relates to changes to the flying program. He agreed that the language in the clauses did not change.

[186] However, in the bargaining agent's view, the employer changed the way it exercised its prerogative in assigning employees to alternate programs.

[187] It is the employer's decision to assign an employee to a RFP or to an APACP. As long as it is done in accordance with the criteria, there is no need to consult the bargaining agent.

[188] He was asked whether the employer modified how it would assign employees to certain programs due to budgetary constraints. Mr. Holbrook stated that it did not matter why the employer changed how it assigned them; it did so unilaterally during the statutory freeze period without the bargaining agent's consent.

[189] He stated that in his view, even though the program's wording was not changed, the employer changed how it assigns employees and is no longer following the intent of the PACP in several areas.

[190] He was asked to provide an example. He referred to section 5.1.2 of the PACP, which states in part that "… all CAIs are eligible for assignment to a Regular Flying

Program." Although section 5.1.3 lists exemptions, at the time the statutory freeze went into effect, members in Victoria and Québec were eligible for the RFP.

[191] He stated that the bargaining agent's position was that it must agree to whether a geographic location precludes the feasibility of assignment to a RFP. In 2011, when a certain region had no more planes and the members no longer had access to a RFP, the bargaining agent filed a complaint with the PSLRB.

[192] Mr. Holbrook acknowledged that no employee lost the extra-duty allowance as a result of the changes made to the PACP in April 2016.

[193] He was asked whether he agreed that not all employees who had been assigned to the RFP met the required 48 hours due to their particular situations. He replied that he did not know.

[194] He agreed that all the alternate programs are approved through the steering committee and are acceptable to the bargaining agent. They are listed in Appendix A to the policy. He answered that they are acceptable, as long as they are assigned in accordance with the criteria in section 5.2.1 of the PACP.

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

1. <u>Mr. Guindon</u>

[195] Mr. Guindon referred to his email exchange with Mr. McConnell on February 25, 2016, about the alleged cancellation of the flying program in Ontario and Quebec. Due to budgetary constraints, some of his colleagues in the regions were not certain that they had sufficient funds to pay the flying program's expenses. He stated that Civil Aviation had lost a fairly large amount of its funding.

[196] In the Quebec region, and even though Civil Aviation lost several millions of dollars from its budget, it was able to maintain the flying program except for a few weeks.

[197] The flying program was maintained in Ontario based on the normal level of funding. Because some inspectors in the flying program were not flying their full 48 hours, it meant that money remained in the flying envelope to meet demands for training other inspectors.

[198] He was able to confirm to Mr. McConnel that money had been set aside to continue the flying program. As stated in his email, the program was not stopped but moved at a slower pace for a certain period. In Mr. Guindon's view, from a PACP perspective, there had been no change.

[199] Mr. Guindon explained that the document called a "communications toolkit", entitled "Key Messages & Questions and Answers", subtitled "Changes to the Flying Program", and dated April 2016 was to support managers and chiefs when sharing information with staff. It reflects a change in the application of the flying program due to resource reduction pressures. It was necessary to ensure that Civil Aviation maintained its spending within its allocated budget and to maintain the terms and conditions of employment and the collective agreement.

[200] This was a management prerogative. While maintaining the PACP, the decision was made to rationalize the operations where management could, while maintaining the terms and conditions of employment.

[201] Civil Aviation had to reduce spending in some areas. The amount of regular flying time was decreased in some locations, which it had done in the past. It was within management's rights to change the program. Flying ceased in Victoria and Québec.

[202] Some inspectors on multiple programs were on the RFP and were on multiple types of aircraft. It was necessary to rationalize to one program.

[203] Management's prerogative to assign inspectors to a PACP is set out in section 3.1.1, which provides that "… employees shall be assigned by the employer to a Professional Aviation Currency Program." He explained that there is a difference between assigning an inspector to an aviation currency program and a work assignment.

[204] Civil Aviation wanted to ensure that financial resources for the flying program were equitable across the country. For example, the helicopter in Moncton, New Brunswick, was used for training only one inspector and so was underused. The direct cost to maintain it there was $800 an hour. It was used 48 hours per year and sat idle the rest of the time.

[205] The savings from removing the helicopter in Moncton from service were used to invest in new technology, a Bell 407 helicopter. The Inspector in Moncton was impacted by being assigned to an alternate flying program established in the steering committee. Management decides to assign employees to a PACP.

[206] The steering committee reviews and approves proposals for the APACP. It meets two to four times per year.

[207] In April 2016, a full resource review occurred of not just the flying program but of all activities.

[208] Alternate flying programs were increased in the NCR with the use of simulators as well as the newly acquired Bell 407 helicopter. A full review of all business needs was conducted.

[209] Even though there were resource pressures, there was no plan to reduce staff. Civil Aviation needed to maintain expertise and the terms and conditions of employment.

[210] He was asked, since he knew that collective bargaining negotiations were going on, how he felt these changes could be implemented without bargaining them. He replied that they were not changes to terms and conditions of employment. All changes were with respect to whether employees were assigned to the RFP or the APACP. Employees were able to gain their extra-duty allowance and to maintain their currency.

[211] Some employees had difficulty maintaining their currency because of a failed flight test or simulator. There was no evidence adduced of anyone not being able to maintain currency due to the changes to the flying program.

[212] Mr. Guindon was referred to his March 31, 2016, email outlining changes to the flying program to all Civil Aviation staff.

[213] It was necessary to implement the changes effective April 1 of the fiscal year because that is when employees are assigned to a currency program for the following year. The budgetary situation in Transport Canada and Civil Aviation was in crisis.

[214] Mr. Guindon was referred to the list of locations where the RFP was available

for inspectors effective April 1, 2016. He stated that it shows the closures that took place in 2012 and 2013, which included Sudbury, Thunder Bay, and Calgary. In 2012 and 2013, the decision was made at the ADM and DM levels of the Aircraft Services Directorate to rationalize operations. Bases were closed, and equipment and aircraft were sold. In addition, Civil Aviation lost access to the Edmonton Airport, as it was closed. Aircraft were sold in Edmonton, although Mr. Guindon could not recall the type.

[215] The closing of the Edmonton and Calgary bases was planned in 2012. The government's 2011-2012 budget reduced funding and did not allow for salary increases. The departments had to fund their internal services.

[216] Two of the new locations where the RFP would no longer be available as of April 1, 2016, were Victoria and Québec. This was a result of the overall budget discussion among national Civil Aviation executives, who looked at everything including the flying program and who knew the workforce across the board and the RFP's feasibility.

[217] Inspectors in Victoria and Québec, where no airplanes were based, needed to travel to Vancouver or Montreal for access to the RFP and then travel back home. Inspectors in Québec required three days to travel to Montreal and return for two hours of flying. This generated expenses for travel, hotel accommodation, and meals. The decision was made to remove the cities from the RFP.

[218] The PACP allows management to decide who is on the RFP or the alternate flying program. Inspectors in those cities were assigned to the alternate flying program.

[219] Mr. Guindon referred to an email addressed to Transport Canada's management executive and dated December 22, 2015, by the Director General of the department, concerning the 2015-2016 update on the revised operating budget delegation. The email reads in part as follows:

> *You will recall that on November 10th, 2015, I approved a revised budget delegation for 2015-16, following the Budget review exercise that was initiated this past July. Although progress continues to be made in reducing operating forecasts, the department is still falling short of respecting its authorities by $11.8 million.*

> *As I had mentioned previously, all surplus operating funds, including salary dollars, will be used to offset the remaining corporate risk. No new or increased activities can be undertaken with surplus funds before an assessment of the overall departmental financial situation is completed and my approval, or in the case of salary dollars, the approval of the Staffing Management Board, has been obtained.*
>
> …

[220] Mr. Guindon stated that the department had managers in some areas such as Ontario looking for approval for more flying that was not covered by the budget envelope, and in Quebec, managers were worried that there was not enough money in the envelope. He described this as the most challenging budgetary time, stating that it was worse than the budget issues in 2010 to 2012.

[221] On February 26, 2016, the DM and ADMs emailed all employees to share information on the context in which they were working. They attached notes from a Transport Executive Management Committee retreat held the previous month. The email stated in part as follows:

> …
>
> *While we have government approved funding for priorities, projects and staffing as we move into the next fiscal year, we know we will have challenges ahead to continue operating effectively within the available budget. Integrated planning to align our activities and human resources with our budgets will be key and we must review how we can do things differently, re-organize [sic], manage risk, and move forward on our policy agenda. We will also work on breaking down silos to bring a more integrated and comprehensive approach to everything we do across the department.*
>
> …

[222] Mr. Guindon commented that he was starting to see a significant change in approach to ensure that the department was spending effectively.

[223] The next communication to employees was on May 3, 2016, from the new DM. It dealt with resolving spending pressures as the previous year, the department had overstaffed by filling vacancies and ended up with more staff on strength than funding to pay for them. The communication stated in part as follows:

> …

> *We are addressing our financial pressures through the regular turnover of staff instead of job losses. We do recognize that these hiring restrictions are creating pressures in some parts of the department, and the management team will do its best to resolve these pressures as we move forward. That is why our first priority is to build in greater flexibilities in how we allocate people to work in the department….*
>
> …

[224] The communiqué noted that Transport Canada and other departments would be engaged in a comprehensive review with the Treasury Board to identify changes that would help use existing resources to deliver better results.

[225] To illustrate the shortfall, he explained that in 2005-2006, the headcount in Civil Aviation was 1435 person-years, with a budget of $138.2 million. In 2014-2015, it was 1264 person-years, a reduction of 170, with a budget of $142.7 million. In 2015-2016, it was 1344, with a budget of $138.2 million. However, in 2016-2017 the headcount was 1320 person-years, and the budget was $118.2 million. The salary budget had been reduced from $117.7 million to $106.8 million, and the operating budget had been reduced from $20.5 million to $11.4 million.

[226] Mr. Guindon stated that all hell broke loose. Approximately $100 000 is allocated to one headcount. In 2014 and 2015, Civil Aviation lost 3% of its budget. In 2015 and 2016, it lost 14% of its budget, and in 2016 and 2017, it lost 17% of its budget. Of the total budget, 85% is salary. The budgetary figures envisioned having to reduce the workforce by some 200 person-years.

[227] The management team took a number of recommendations to the national executive. There was the need to protect the travelling public, there was no choice but to pay fixed costs, there was the need to maintain training for officers, and there was a need to maintain obligations under the collective agreement.

[228] The attrition rate due to the retirement of baby boomers was generating 8 to 9% per year in terms of budget savings. However, there was still a shortfall of some $3.78 million in salary dollars.

[229] Mr. Guindon went to the Workforce Management Board and explained that he needed to lay off approximately 75 employees unless the board permitted him to continue with a deficit. Civil Aviation was able to keep all positions. However, it knew

that more difficulties would arise to the operations if attrition did not happen fully across the organization, as some areas would suffer more given that they would not be able to replace employees who left.

[230] The commitment was made to keep everyone who wanted to stay. It required reworking the organization, with the realization that people would be unhappy. Provision was made for staffing 15 critical external positions for 6 months where it was anticipated that the organization would not be able to provide service.

[231] He produced the 2016-2017 Civil Aviation budget. It was prepared by staff and management services for discussion with the Workforce Management Board and for its approval. The document lists Civil Aviation's activities in the salary envelope, together with its operating costs. Activities are ranked from high to low in terms of priority of importance. Some activities are noted as not funded.

[232] He referred to the item entitled "Specialty Flying Costs". It has columns representing the different regions in the country, and it shows a total of $2 million. He stated that the usual spending for the last number of years for the flying program, including funds allocated to aircraft services, varied between $3.5, 3.8, and 4.1 million. It rose and fell depending on the funding available. In good years, Civil Aviation could allocate more funds to the flying program. There was another envelope available for inspectors to maintain their qualifications in a specialty flying program so that they could maintain their knowledge on specific aircraft, to ensure that they could perform certification or oversight activities. The funding there was approximately $2.7 million. The funding available for the overall flying program was approximately $6.8 million.

[233] He explained that his challenge with respect to the Workforce Management Board was to continue oversight activities, to not lay anyone off, and to bring the budget down from $6.8 million to $5.5 million. This was achieved by asking Aircraft Service to reduce its costs by $300 000 to $500 000 and to reduce specialty flying costs from $2.7 million to $2 million. This would result in a 19% cut to the specialty flying costs in comparison to a 45% cut to operations. Civil Aviation was not able to reduce its costs on the flying program to $5.5 million. It fell some $300 000 short at the end of the fiscal year.

[234] Civil Aviation was able to achieve the savings by reducing the costs of airport services and in particular the decisions to no longer offer the RFP in

Moncton, Victoria, and Québec. Civil Aviation management believed that it was continuing to honour the collective agreement.

a. Cross-examination

[235] It was suggested to Mr. Guindon that by April 1, 2016, the employer had implemented changes to the flying program. He was not certain what counsel was referring to. It was suggested to him that the employer had changed the application of the program, i.e., it decided who was on a RFP and who was on an alternate program. He stated, "As per management's rights under the PACP."

[236] He was referred to his email of March 31, 2016, on the review of the flying program's efficiencies. It was suggested to him that the department had changed who was on the RFP or the alternate flying program. He replied that the PACP maintains management's right to decide who is on which program. In 2012, the bases in Edmonton and Calgary were closed, and management decided who would be on what program. That is what this email states.

[237] He was asked if the eligibility for a RFP in some locations had been eliminated. He replied that in some locations, pilots were no longer eligible to participate in a RFP.

[238] He was asked whether, as of the date of notice to bargain in September 2014, employees in Halifax, Prince George, Kelowna, and Victoria had access to a RFP.

[239] He stated that Victoria, Québec, and Moncton, where a helicopter was sold, had seen change. Calgary and Edmonton were closed in 2012. He could not recall whether employees in Halifax received training in Moncton. No airplanes were based in Halifax. He stated that the department had not removed a base of operations for aircraft since 2012 other than Moncton, for the one helicopter that flew 40 to 50 hours per year.

[240] Employees in Victoria, Québec, and Moncton were no longer eligible for the flying program as per the PACP as it was management's prerogative to place them on an alternate program.

[241] Before April 1, 2016, some of those employees were eligible for the RFP. After that, the department maintained the same number of hours for a RFP, some of which were still redistributed to larger centres. The department rebalanced hours to ensure that they were equitably distributed across the country.

[242] The budget allocated for the flying program in the Prairie Region that had been allocated to Calgary and Edmonton went to Winnipeg. The total number of hours available for the flying program did not change.

[243] Similarly, more employees could access the flying program in Montreal or Vancouver. Efficiencies were gained. It was suggested to him that the department gained some by eliminating eligibility to the RFP for some employees. He stated that if he brought someone from Québec to Montreal to access a flying program, the department would incur additional costs over and above the flying program. He sought to protect the flying envelope.

[244] It was suggested to him that only an employee in Québec could access the alternate program. He agreed and stated that it was the same in Calgary and Edmonton.

[245] Mr. Guindon was referred to the statement in his March 31, 2016, email that stated, "Alternate flying programs will be increased in the National Capital Region (NCR) with the use of established alternate means such as simulators. This goes hand-in-hand with the implementation of the Bell 407 helicopter and the new helicopter simulator in Ottawa …". It was also noted that "[t]wo underutilized Bell 206 helicopters — one in Moncton, one in Ottawa — will be removed from service". He was asked whether this meant a decrease to the RFP.

[246] He stated that the intention was to replace the Bell 206 helicopters with new-generation equipment and to increase the alternate program for helicopters.

2. <u>Mr. Collins</u>

[247] Mr. Collins was referred to the document entitled Changes to the Flying Program effective April 1, 2016. He stated that to management, these were not changes to the flying program. The employer started managing in another part of the sandbox that had been agreed to with the CFPA. It elected to manage the program within the scope of the PACP differently than in previous years.

[248] The direction is clear that management maintained the AO Group's terms and conditions of employment and that it respected the collective agreement. Nothing was done to affect that.

[249] Changes were made with respect to assigning employees to the flying program, as reflected in the executive summary. There were budget pressures at Transport Canada. Within the resources available, management had to find a way to manage the flying program within the scope of what was and is allowed by the PACP.

[250] What was decided in terms of training was driven by resource reduction pressures. Management reviewed the program's efficiencies. As of April 1, 2016, Civil Aviation delivered a flying program to meet the collective agreement and the PACP. The alternate flying program was increased in the NCR.

[251] A newly acquired Bell 407 helicopter was available for training. Two underused Bell 206 helicopters were removed from service. Moncton had one helicopter that was available for one inspector, which was an inefficient arrangement. Management completed a review of the business needs to identify national efficiencies.

[252] Before April 2016, a few locations that had been available to CAIs or ETPs in the RFP had already been closed, including Edmonton, Saskatoon, and Thunder Bay. As of April 1, 2016, St. John's, Halifax, Québec, Sudbury, Calgary, Prince George, Kelowna, and Victoria would no longer be available for the RFP.

[253] Mr. Collins stated that management continued to manage as it had done in previous years. It was not feasibly efficient to provide the RFP where no aircraft were located.

[254] Employees who had in the past had access to the RFP were assigned to the alternate flying program where they would maintain currency by accessing an alternate program as agreed to by the parties in the PACP.

a. <u>Cross-examination</u>

[255] Mr. Collins agreed that changes to the PACP are to be made by means of mutual agreement in steering committee meetings and not as part of collective bargaining.

[256] He stated that the PACP and its Appendix are the sandbox in which the employer has to work. He was asked that if he wanted to introduce a change, whether he would have to do it through the steering committee.

[257] He replied that it was necessary to define the word “change”. If he wanted to change the criteria for assignment to a currency program, it would be a new thing in the sandbox, which would require the steering committee’s agreement.

[258] He agreed that when determining whether to assign a medically fit CAI to a regular or alternate flying program, the department considers where the CAI works, the department’s needs, and the resources available. Where the CAI works includes the plant, the division, and the CAI’s geographic location. The CAI’s duties must require flying. A geographic location that precludes that feasibility precludes an assignment to a RFP, as set out in section 5.1.3(d) of the PACP.

[259] Section 5.2.1 of the PACP deals with process and sets out the criteria that the employer uses to assign a CAI to an APACP once the decision has been made to assign an employee to an alternate flying program.

[260] He described the process of determining who is entitled to a RFP and the exclusions set out in section 5.1.3. If someone is eligible for a flying program, section 5.3.1 sets out the criteria and process for determining a priority status list. Those who do not have access to a RFP go to the alternate program in accordance with the criteria in 5.2.1.

[261] The employer does not freeze the process during collective bargaining. It works within the PACP sandbox. It is a dynamic process. The employer considers the resources available to manage the program; it is in the sandbox.

[262] Mr. Collins was referred to the changes to the flying program effective April 1, 2016. He was asked whether because of resource pressures, the employer managed the PACP differently. He answered that it did, within the confines of the sandbox.

[263] He was asked where in the sandbox is the employer’s authority to make changes because of resource reductions. He replied that there was no change to the criteria set out in the PACP. The employer’s obligation is to assign a CAI to a program. He acknowledged that none of the criteria in the PACP mention cost.

[264] He agreed that employees in cities without aircraft were not eligible for the RFP as per section 5.1.3(d) of the policy. He agreed that management decided that as of

April 1, 2016, if no aircraft were in a location, the CAIs would not have access to a RFP. He added that in locations where aircraft were available, more people were given access as of that date. Where no aircraft were available, it was not feasibly efficient to assign the CAIs to a RFP.

[265] It also happened the year before. Other geographic locations on the list closed before that. This was not the first time it had happened. In previous years, helicopters had been sold, and airports had been closed. He was asked whether it had happened during the statutory freeze. He stated that in 2015, aircraft had been sold, he believed in Edmonton.

[266] He was asked whether as of the date on which notice to bargain was given, employees in Québec were eligible for the RFP. If they did not have access to it, then employees in Montreal had greater access.

[267] The PACP is evaluated yearly in accordance with the criteria set out in its section 5. What is feasible one year may change the next year as the criteria are re-evaluated. One cannot assume that after being assigned to a program, he or she will be assigned to it next year, as the department's needs are re-evaluated every year. If 10 people were to retire, it would spark that re-evaluation.

[268] It was suggested to him that the budget was changed. He replied that the fact was that no airplane was there and that what changed was the feasibility of having access to a RFP depended on whether or not an airplane was in a given location.

[269] In Moncton in 2015, employees had access to the RFP as a helicopter was available. In 2016, it was sold, and the employees did not have access to the RFP. Mr. Collins stated that as only one employee was located in Moncton, it was no longer feasible to maintain a helicopter for one person there, as that precluded other employees from accessing a RFP. He could not recall whether it had been his decision to sell the helicopter.

b. <u>The RFP and meeting the 48 hours requirement</u>

[270] Mr. Collins clarified that the criteria in section 5.2.1 of the PACP is engaged only after the employee has been assigned to an alternate flying program. He was asked when the resource issue comes into play. Every October, management reviews the resources, including the budget. It asks whether aircraft and equipment are

available. Based on the number of employees to train, it evaluates the feasibility of training either by assignment to a RFP or to the APAC.

[271] He was asked about the kinds of changes to the PACP that must be made by mutual agreement. He replied that if the wording were changed, the text amended, or the sandbox's dimensions changed, it would require mutual agreement. He stated that assigning employees to a PACP does not require mutual agreement.

C. CFPA submissions

[272] All members of the Association, who are employees of Transport Canada and the TSB, are experienced pilots who must maintain recency and currency to satisfy their employment obligations. Piloting aircraft is fundamental to carrying out their duties on behalf of the public. These requirements are set out in the Treasury Board's "Qualifications Standards" and in the AO Group definition.

[273] The parties have recognized these requirements by undertaking to maintain piloting proficiency. This commitment is recognized in article 47 of the collective agreement as well as in the Transport Canada and TSB PACPs, which may be modified only via the mutual agreement of the parties.

[274] In late 2015, the Association became aware of anecdotal information from members relating to a partial or complete cancellation of the PACP, purportedly due to budgetary constraints.

[275] By email dated February 3, 2016, to Ms. Kinney, the ADM, the Association expressed its concern with Transport Canada's apparent lack of observance of the PACP's mandatory requirements, ostensibly for budgetary reasons. Mr. McConnell, the Association's national chair, reminded the employer that the parties were in the process of collective bargaining and that it was subject to the statutory freeze provisions of the *Act*.

[276] When confronted with this information, on February 25, 2016, Mr. Guindon took the position the training and flying programs had no restrictions. He advised that there were no changes to the PACP and that the employer was working hard to ensure that the provisions of article 47 of the collective agreement were met for all members of the AO Group. He advised that he considered the matter closed until the parties could meet in May 2016.

[277] However, on March 30, 2016, Transport Canada advised the CFPA that it would unilaterally make program reductions to the PACP. Effective April 1, 2016, the employer would do the following:

> (1) limit RFPs to pilot employees in Vancouver, Richmond, Abbotsford, Winnipeg, Hamilton, Toronto, Montreal, and Moncton;
>
> (2) eliminate RFPs for pilot employees in Halifax, Québec, Prince George, Kelowna, and Victoria;
>
> (3) increase alternate flying programs in the NCR with the use of simulators; and
>
> (4) remove two Bell 206 helicopters from service.

[278] The reductions to the PACP that the respondents unilaterally imposed are significant. Employees who reasonably expected to be on a RFP at the time notice to bargain was given were no longer eligible to fly aircraft as of April 1, 2016.

[279] The new policy was a real and substantial change to the terms and conditions of employment.

[280] This change occurred less than a month after Mr. Guindon assured the Association that there were no restrictions on the flying program and while the parties were engaged in negotiations, in which the PACP was the number one issue at the table for the Association's members.

a. Section 107 of the *Act*

[281] The respondents' actions violated the statutory freeze provision, s. 107, which provides that any term or condition of employment that could be included in a collective agreement and that is in force at the time that notice to bargain is given remains in effect until a collective agreement is reached or the employees are in a legal strike position. The PACP could be a term or condition of the next collective agreement and is the bargaining agent's top proposal at the bargaining table.

[282] Section 107 of the *Act* is intended to freeze all terms and conditions of

employment during negotiations for a collective agreement. It is designed to ensure that the status quo remains unchanged during the relevant periods. The purpose of the freeze provision was stated in *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.) at para. 24, in which the Federal Court of Appeal held as follows (note that s. 51 of the *PSSRA* was the predecessor freeze provision to s. 107 of the *Act*):

> ***24*** *The purpose of section 51 of the Public Service Staff Relations Act is to maintain the status quo in respect of terms and conditions of employment while the parties are attempting to negotiate an agreement. It is a particular version of a provision generally found in labour relations legislation that is designed to promote orderly and fair collective bargaining. There must be some firm and stable frame of reference from which bargaining can proceed. The provision should not be given a narrowly technical construction that would defeat its purpose.*

[283] Thus, the purpose of a statutory freeze is to maintain a level playing field throughout negotiations by preventing the employer's position from being unilaterally imposed on the conditions to be negotiated.

[284] In *Canadian Air Line Pilots Association v. Air Canada* (1977), 24 di 203 (as cited in *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19 at para. 74, the CLRB put it as follows:

> …
>
> *… The prohibition is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst avoidable legal or illegal industrial conflict. Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the Canada Labour Code, Part V.*
>
> *The scope of the prohibition in section 148(b) is deliberately more expansive than the scope of past collective agreements. Current or prospective negotiations between a trade union and employer are not restricted to the subjects addressed in*

> *previous collective agreements… The trade union may seek to negotiate with respect to any matter that is a term and condition of employment, expressed in either individual contracts of employment or a previous collective agreement, and any other matter, characterized by Parliament as "any right or privilege of the employees in the bargaining unit". It may also seek to negotiate with respect to "any right or privilege of the bargaining agent" whether acquired in a previous collective agreement or otherwise enjoyed by the trade union….*
>
> *Our interpretation of the purposes of section 148(b), namely protecting the exclusive authority of the bargaining agent from being undermined by unilateral employer action, encouraging cooperative collective bargaining practices and the constructive settlements of disputes, is consistent with the requirement in section 148(b) that an employer alteration is permissible with the consent of the bargaining agent. The requirement for that consent requires the employer to recognize the authority and role of the bargaining agent and necessitates communication between the employer and bargaining agent, thereby fostering joint resolution of interests of either party.*
>
> [Emphasis in original]
>
> [*Sic* throughout]

[285] Section 107 seeks to preserve work conditions as they are when bargaining begins, to allow for proper collective bargaining. By changing work conditions after negotiations had started, the respondents imposed another reality on the bargaining agent's starting point.

[286] That section captures not only terms and conditions already found in the collective agreement but also those that "may" be included. The decision in *Canadian Air Traffic Control Association* (C.A.) remains the leading pronouncement on this issue. In that case, the Federal Court of Appeal determined that a term or condition of employment can take the form of an agreement or unilateral exercise of management authority, after consultation. The Court accepted that the overtime policy at issue in that case, which was that employees would work overtime only voluntarily whether it was established through agreement or management authority, was a term or condition of employment because "… the policy was a measure of rights and obligations. It could have legal consequence."

[287] It is beyond dispute that the PACP was established through mutual agreement

and that any changes to it must also be made that way. The respondents have taken the position that even though Transport Canada unilaterally decided to eliminate eligibility for a RFP in several locations, there was no violation of the statutory freeze because all the CAIs continued to be on some kind of program.

[288] With respect, the respondents' position on this cannot stand. The question is, when notice to bargain was given, was eligibility for a RFP a term and condition of employment of the affected employees?

D. <u>The employer's submissions</u>

[289] In *Canadian Air Traffic Control Association* (C.A.) at para. 18, the Federal Court of Appeal set out the purpose of the predecessor section as follows: "*…* after the notice to bargain, the employer-employee relationship existing immediately prior to the notice, in so far as terms or conditions of employment are concerned, should be preserved."

[290] George Adams, in his text *Canadian Labour Law, Second Edition*, at page 10-91, describes the different approaches as follows:

> *… statutory freezes have at least two possible imputed purposes. One is represented by the "business as before" analysis where the emphasis is on the maintenance of the key terms of employment until these matters are bargained… The "business as before" view, however, is not concerned with a freeze of the status quo* per se *but rather with changes out of the pattern of the past. This view asserts that business and workplace life must continue… The other and contrary viewpoint is represented by a literal status quo approach to the freeze… The difficulty with this approach is its failure to accommodate necessary and inevitable changes or the artificially high price for change that may be exacted in such circumstances.…*

[291] The leading case on the business-as-before approach is the OLRB's decision in *S.P.A.T.E.A. v. Spar Aerospace Products Ltd.,* [1978] CarswellOnt 1117 at para. 19, in which it stated that the legislative intention of the statutory freeze was to maintain the prior pattern of the employment relationship in its entirety.

[292] The "business as before" test flows from the wording of s. 107 of the *Act*.

[293] The respondents' position is that the decisions made with respect to managing the PACP were the mere exercise of a discretion that allows the employer to manage its

operations and that they were not captured by the freeze provisions under s. 107 of the *Act*.

[294] The CFPA alleged that the employer unilaterally reduced or cancelled the PACP during the freeze period, which constituted a material change to the terms and conditions of employment of its membership, contrary to s. 107 of the *Act.*

[295] The respondents submitted that the CFPA's claim is misleading, as it leads one to believe that the PACP was amended without it having been negotiated with the CFPA, which is not the case. The PACP has never been amended, and Transport Canada's actions constituted no more than implementing those PACP provisions that were always available as options within the flying program. They might have been promulgated as changes, but they were in fact simply the management and application of the PACP as negotiated initially with the CFPA.

[296] As mentioned in the preamble to the PACP, CAIs and ETPs are provided with the opportunity to maintain their professional aviation currency in accordance with the collective agreement, and the employer provides them that opportunity. Transport Canada assigns an employee to a PACP in accordance with this policy. The program to which an individual pilot is assigned may be a RFP of not less than 48 flying hours per year or an APACP.

[297] The PACP came into effect in 2007, and the employer and the CFPA developed it jointly. It does not form part of the collective agreement. It is administered by the steering committee. The most relevant sections of the PACP in the present case are the following:

…

> ***3.1.1*** *All TC employed medically fit CAI and ETP employees shall be assigned by the employer to a Professional Aviation Currency Program. This program could be a Regular Flying Program (RFP) of not less than 48 hours per fiscal year in accordance with the ASD Operations Manual using departmental aircraft, or an Alternate Professional Aviation Currency Program approved by the Professional Aviation Currency Steering Committee.*
>
> …
>
> ***5.1.1*** *The employer shall assign all medically fit CAIs or ETPs to a Professional Aviation Currency Program.*

> ***5.1.2*** *All CAIs are eligible for assignment to a Regular Flying Program. The employer shall determine whether a medically fit CAI is to be assigned to a Regular Flying Program consisting of flying departmental aircraft a minimum of 48 hours per year or an Alternate Professional Aviation Currency Program that meets the criteria of paragraph 5.2.1 of this policy. All ETPs shall be assigned to a flying program that is appropriate to their duties.*
>
> ***5.1.3*** *Notwithstanding Section 5.1.2 above the assignment to a RFP on ASD aircraft will not be considered for those CAIs where:*
>
> *a) the duties of their position within the ASD already provides for full engagement in flying duties;*
>
> *b) the duties of their position either directly or indirectly, require them to maintain currency on a heavy turbo-jet aircraft (over 44,000 lbs) and on-going operational exposure to major airline operations;*
>
> *c) they are employed within the National Operations Branch – Airline Division; or*
>
> *d) they are based in a geographic location that precludes the feasibility of assignment to a RFP.*

[298] It is important to note that the APACP was approved by the CFPA and Transport Canada. That program provides, in some cases, training on flight simulators instead of flying. However, the decision to assign employees to a RFP or the alternate program resides with the employer, which the CFPA agreed to (section 3.1.1) and does not dispute.

[299] On March 31, 2016, Transport Canada issued a decision to review the efficiency of the PACP. The need for that review came from pressure to reduce resources and included measures consisting, among other things, of the following:

- limiting the RFP in certain locations;
- increasing the RFP in the NCR;
- removing two helicopters from service; and
- replacing Policy Letter 164 with a new policy.

[300] Mr. Guindon testified extensively on the budget reductions and the need for the

employer to rationalize and be more efficient in terms of training pilot employees. The CFPA did not dispute the budgetary constraints that needed to be taken into account in assignments to the RFP or the alternate program.

[301] It is important to note that this is not the first time that Transport Canada had to take similar measures. In 2010, it decided to reduce the size of the aircraft fleet, which impacted the pilots in the NCR. Pilots participating in a RFP had to transition to an alternate program. That decision resulted in the CFPA filing a policy grievance and complaint, which Adjudicator Kydd of the PSLRB decided in *Canadian Federal Pilots Association v. Treasury Board (Department of Transport)*, 2014 PSLRB 64 ("*CFPA 2014*").

[302] Adjudicator Kydd dismissed the policy grievance and the complaint that the employer had engaged in bad-faith bargaining. He emphasized the fact that the PACP gives the employer discretion to determine assignments to training programs and that pilots are not entitled to the RFP. He concluded that reducing the number of aircraft based in Ottawa would not breach the collective agreement. The contractual right was to maintain currency and not to fly.

[303] Similarly, in the present case, Mr. Collins and Mr. Guindon both testified that it is no longer feasible for pilots to come to a main base for training or a mission without Transport Canada incurring unreasonable costs. The PACP already accounts for these situations. Section 5.1.3 specifically states: "Notwithstanding Section 5.1.2 above the assignment to a RFP on ASD aircraft will not be considered for those CAIs where … d) they are based in a geographic location that precludes the feasibility of assignment …".

[304] Therefore, in applying the PACP's terms, Transport Canada determined that when airplanes or helicopters were located too far away and when it incurred unreasonable costs and time, some pilots were precluded from being considered from being assigned to a RFP.

[305] In this case, Transport Canada had the unqualified discretion to reassign pilots from the RFP to the alternate flying program before notice to bargain was given. Therefore, once it was given, Transport Canada maintained the possibility of exercising that discretion, and no change or alteration to a term or condition of employment occurred, specifically considering that the employees do not have a right to fly per se.

[306] A similar situation was examined in *Public Service Alliance of Canada v. Her Majesty in right of Canada as represented by the Treasury Board*, PSSRB File No. 148-02-75 (19820406), [1982] C.P.S.S.R.B. No. 68 (QL) at para. 16 ("*PSAC v. Her Majesty*"), in 1982, in which the PSSRB stated the following:

> *… we find that the Employer did not contravene section 51 of the Act on November 10, 1981, when it implemented a new shift schedule at the Thunder Bay Airport. Paragraph 22.05(b) contemplates the possibility of changes to shift schedules. Stated another way, such potential for change is inherent in the term or condition of employment delineated in paragraph 22.05(b). It existed before notice to bargain was given and it continued to exist during the "freeze" period effected by section 51.*

[307] Moreover, it should be emphasized that in the past, Transport Canada has taken measures to limit the RFP, to close bases in some regions, and to sell aircraft. The decision in *CFPA 2014* and the testimonies of Mr. Collins and Mr. Guindon demonstrate that it is reasonably expected that the employer may adjust and exercise its discretion to reassign pilots to a different training program if financial or budget issues occur.

[308] In a 1995 decision involving the National Capital Commission (NCC), (*Public Service Alliance of Canada v. National Capital Commission*, PSSRB File Nos. 148-29-218 and 161-29-761 (19951016), [1995] C.P.S.S.R.B. No. 101 (QL) at 29 to 31), the PSSRB was faced with an allegation that the freeze provisions were violated when the employer engaged in large-scale privatization and contracting-out services. The decision established that the "business as before" test developed by the OLRB is equally applicable in the federal public administration. It read in part as follows, at pages 29-31:

> *The Board has decided that in this particular case the appropriate interpretation of section 52 to follow is the one adopted by the Ontario Labour Relations Board in the 1978 Spar Aerospace (supra) and the Simpsons (supra) decisions where it addressed a similar statutory provision….*
>
> *In the case of these two complaints, the evidence has disclosed that the NCC has had severe financial problems over the past 10 years. During this period, the NCC has taken a number of measures to reduce its expenditures. It has first cut its capital budget; subsequently cuts were also applied to the operating budget. It has cut back administration costs*

> *through the amalgamation of branches of the NCC and has reduced the number of vice-presidents from eleven to five. The amalgamation of branches has caused a reduction of 229 positions over the past five years.*
>
> …
>
> *In our view, the NCC is not prohibited from exercising express management rights which are preserved by the statutory freeze. The NCC has contracted out services before.…*
>
> …
>
> *ln conclusion, the Ontario Labour Relations Board has recognized the right of management to lay off during the freeze subject to the "business as before" restriction. However, here we have a situation where the government of the day has imposed drastic cuts in the funds allocated to the NCC and the NCC had to operate within a much reduced budget.*
>
> *Since there is a valid reason to reduce its staff and given all of the circumstances surrounding the NCC's decision to lay off half of the employees of the bargaining unit, the Board does not consider that there is any violation of the statutory freeze.*

[309] On the concepts of reasonable expectations, valid justifications, and economic justifications, see *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107; *Royalguard Vinyl Co. v. United Steelworks of America*, [1994] OLRB Rep. January 59; *B.F.C.S.D. v. Simpsons Ltd.*, 1985 CarswellOnt 1207; and *Canadian Air Traffic Control Association v. Treasury Board*, PSSRB File No. 148-02-186 (19910724), [1991] C.P.S.S.R.B. No. 185 (QL).

[310] The respondents submitted that the employer has the right to manage its operations, which is not negated by the freeze provisions. In this case, Transport Canada did nothing more than manage its operations within the confines of the PACP, which was established jointly with the CFPA.

E. <u>The CFPA's reply</u>

[311] The CFPA noted that at paragraphs 25 to 31 of their written argument, the respondents relied heavily on *CFPA 2014*.

[312] The CFPA respectfully submitted that the issues that Adjudicator Kydd considered were in the context of a policy grievance, alleging a breach of a collective

agreement, which is not the issue before the Board in the present case. In Adjudicator Kydd's view, to succeed with the policy grievance, the Association had to prove that the collective agreement had been breached. On the facts before him, he held that reducing the number of aircraft based in Ottawa did not breach it.

[313] The present case is much more akin to the Board's recent decision in *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 6. In it, the bargaining agent argued that a change of policy with respect to how its members were granted paid injury-on-duty leave occurred during the statutory freeze period. The employer's position was that there had been no change in its policy but that certain clarifications had been made to it at the relevant time.

[314] Board Member Perrault found that the employer had breached s. 107 of the *Act* in that there had been a clear practice recognized by both parties, that the policy change had a significant impact on employees, and that whether applying the business-as-usual test or the reasonable-expectation test, a change was made to a term or condition that could form part of a collective agreement.

[315] The PACP constitutes a term or condition of employment. It could be part of the collective agreement. The parties certainly negotiated it.

[316] From the time notice to bargain was served in September 2014 to March 31, 2016, the employer and the CFPA had an understanding that the pilots located in Halifax, Québec, Prince George, Kelowna, and Victoria were eligible for assignment to a RFP. They were no longer eligible to fly aircraft as of April 1, 2016.

[317] Neither the bargaining agent nor the employees expected that the interpretation of the PACP, which the employer and the bargaining agent had committed to in writing, would be flatly contradicted by a unilateral Transport Canada announcement on March 31, 2016, which was that changes were being made to the flying program effective the following day.

F. Analysis

[318] Section 107 of the *Act* provides as follows:

> ***107*** *Unless the parties otherwise agree, and subject to subsection 125(1) [formerly section 132], after the notice to*

> *bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> > ***(a)*** *if the process for the resolution of a dispute is arbitration, an arbitration award is rendered; or*
> >
> > ***(b)*** *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

[319] The Federal Court of Appeal, in *Canadian Air Traffic Control Association* (C.A.), set out the purpose of the predecessor section in the *PSSRA* as follows at para. 18:

> …
>
> *… after the notice to bargain, the employer-employee relationship existing immediately prior to the notice, in so far as terms or conditions of employment are concerned, should be preserved. One of the incidents in that relationship, though not embodied in the collective agreement, was the mutual understanding that the right of the employer to require overtime work within the limits specified in the collective agreement, had been modified to permit the employees to refuse to do so. While that might not have been a right or privilege which could have been enforced as part of the collective agreement it certainly was one which existed or, in the words of the section, was "in force" when the freeze imposed by section 51 came into play.*
>
> …

[320] The provisions of s. 107 of the *Act*, for all intents and purposes, are identical to those of s. 51 of the *PSSRA*.

[321] Labour relations boards have struggled to determine the appropriate approach to interpreting the purpose of freeze provisions in labour relations legislation. The Honourable George Adams, in *Canadian Labour Law*, at page 10-91, describes the different approaches as follows:

> *… statutory freezes have at least two possible imputed purposes. One is represented by the "business as before" analysis where the emphasis is on the maintenance of the key*

> *terms of employment until these matters are bargained… The "business as before" view, however, is not concerned with a freeze of the status quo* per se *but rather with changes out of the pattern of the past. This view asserts that business and workplace life must continue… The other and contrary viewpoint is represented by a literal status quo approach to the freeze. This perception of the freeze sees it as a more significant prelude to bargaining and ascribes greater weight to the collective bargaining process. By making changes subject to the agreement of the parties, this approach provides for "an equal partnership" at least at the commencement of collective bargaining relationships and during the initial stages of bargaining after a relationship's formation. The difficulty with this approach is its failure to accommodate necessary and inevitable changes or the artificially high price for change that may be exacted in such circumstances….*

[322] The leading case on the business-as-before approach is *Spar Aerospace Products Ltd.*, in which the OLRB stated that the legislative intention of the statutory freeze was to maintain the prior pattern of the employment relationship in its entirety. It stated in part at para. 23 as follows:

> *The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union….*

[323] The PSSRB also adopted the "business as before" approach.

[324] Of note, Deputy Chairman Chodos of the PSSRB articulated the approach in *Canadian Air Traffic Control Association v. Treasury Board*, [1991] C.P.S.S.R.B. No. 185 (QL). He referred to Mr. Justice Urie's judgment in *Canadian Air Traffic Control Association* (C.A.) at page 89, that *"… the apparent purpose of section 51 … is that, after the notice to bargain, the employer/employee relationship existing immediately prior to the notice insofar as terms or conditions of employment are concerned, should be preserved."* As Mr. Chodos stated at page 10: *"His Lordship was referring not only to some aspects of the employer/employee relationship, but rather its totality."*

…

[325] In my view, this is an example of the application of the business-as-before test.

[326] As Mr. Adams observed in his text at page 10-81, in *Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Simpsons Limited* (1985), 85 CLLC 16,035, the OLRB concluded that the business-as-before test was effective in assessing the employee privileges frozen by s. 79 (now s. 86) of the Ontario *Labour Relations Act* but was less effective at addressing first-time events. To respond to those situations, the OLRB expressly articulated the "reasonable expectation" approach. It decided that when addressing first-time events, instead of concentrating on "business as before" to focus on the "reasonable expectations of employees".

[327] In the particular circumstances of *Public Service Alliance of Canada v. National Capital Commission*, PSSRB File Nos. 148-29-218 and 161-29-761 (19951016), [1995] C.P.S.S.R.B. No. 101 (QL), the PSSRB determined that the appropriate interpretation to follow of s. 52 of the *PSSRA* was the one adopted by the OLRB in the 1978 *Spar Aerospace Products Ltd.* and the 1985 *Simpsons Limited* decisions.

[328] In that case, the complainant alleged that the NCC's actions of engaging in large-scale privatization and contracting out constituted a fundamental alteration of the terms and conditions of employment of its employees in the bargaining unit, contrary to section 52 of the *PSSRA*.

[329] The bargaining agent argued that the PSSRB should adopt the concept of a static freeze and that once the freeze is triggered, there is a partnership between the employer, bargaining agent, and employees such that there can be no revision of the terms and conditions of employment without the partnership reviewing it.

[330] The PSSRB found that the complainant had failed to meet its onus of proof. The PSSRB was not convinced that on the evidence submitted, the respondent's actions and decisions did not conform to the NCC's normal business practices. The PSSRB stated as follows at page 29:

…

> *The Board has decided that in this particular case the appropriate interpretation of section 52 to follow is the one adopted by the Ontario Labour Relations Board in the 1978 Spar Aerospace (supra) and the Simpsons (supra) decisions where it addressed a similar statutory provision.…*

…

[331] The decision was judicially reviewed in the Federal Court of Appeal, which dismissed the application; see *Public Service Alliance of Canada v. National Capital Commission*, [1996] F.C.J. No. 57 (C.A.)(QL).

[332] Having reviewed the jurisprudence, the first issue to be determined is whether the PACP is a term or condition of employment that may be included in a collective agreement and that was in force on the date on which notice to bargain was given. Unlike the private sector, in the federal public sector, by statute, there are matters that are beyond the scope of collective bargaining and that may not be included in a collective agreement. To be continued by the freeze, the provision must be a term or condition of employment that may be incorporated into a collective agreement and is in force on the day on which notice to bargain is given.

[333] The PACP is reflected in the agreement that Transport Canada and the bargaining agent entered into in 2007 and that was in effect on the date on which notice to bargain was given. Although that agreement is not part of the collective agreement, it was not argued that its provisions may not be included in a collective agreement if the employer in law, the Treasury Board, and the bargaining agent agree to it at collective bargaining.

[334] I conclude that the program's provisions were terms and conditions of employment as of the date on which notice to bargain was given. By the operation of s. 107 of the *Act*, they are continued in force and must be observed by both parties and the employees in the bargaining unit until a new collective agreement is entered into, an arbitral award is rendered, or until such time as a strike could be declared or authorized.

[335] Counsel has referred at times to jurisprudence decided under the analogous bargaining freeze provisions of the *Canada Labour Code*. While often this comparative analysis is helpful, care must be taken to ensure that when referencing those statutory provisions, the obligations are identical.

[336] The statutory freeze provision of the *Canada Labour Code*, while containing language similar to the *Act*, imposes additional obligations on federal private-sector employers that are not in the *Act*.

[337] Section 50(b) of the *Canada Labour Code* provides as follows when notice to bargain collectively has been given:

> ***50 (b)*** *the employer shall not alter the rates of pay or any other term or condition of employment or* ***any right or privilege*** *of the employees in the bargaining unit, or any* ***right or privilege*** *of the bargaining agent until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or* ***such a right or privilege****.*
>
> [Emphasis added]

[338] Section 107 of the *Act* continues in force terms and conditions of employment applicable to employees in the bargaining unit, not their rights or privileges or those of the bargaining agent during the freeze period. The wide range of matters that must be continued in force under the *Canada Labour Code* are not continued in force during the bargaining freeze under s. 107. For example, see *Air Canada Pilots Association v. Air Canada*, 2012 CIRB 644.

[339] At issue in this case is whether the employer continued to observe the terms and conditions of employment in the collective agreement or the PACP after notice to bargain was given on September 25, 2014.

[340] On March 31, 2016, the employer emailed all staff in Civil Aviation, outlining changes to the flying program effective April 1, 2016, due to resource reduction pressures. The RFP was limited to pilot employees located in Vancouver, Richmond, Abbotsford, Winnipeg, Hamilton, Toronto, Montreal, and Moncton. Two locations where the RFP would no longer be available as of April 1, 2016, were Victoria and Québec.

[341] Airport closures had already taken place in 2012-2013 that included Sudbury, Thunder Bay, and Calgary. In addition, the Edmonton airport had been closed. There was evidence that the St. John's airport had been closed in 2007.

[342] Article 47 of the collective agreement provides as follows:

> ***47.01*** *The parties agree that the maintenance of Professional Aviation Currency is necessary for the Employer to fulfil its mandate and for employees to carry out their duties.*
>
> ***47.02*** *The Employer shall provide each medically fit Civil*

> *Aviation Inspector (CAI) with the opportunity to maintain his/her Professional Aviation Currency through the use of Departmental aircraft or an approved alternate professional currency program.*
>
> ***47.03*** *Professional Aviation Currency is deemed to have been met as a minimum, by the possession and maintenance of the Airline Transport Pilot Licence (ATPL) and Group 1 or Group 4 Instrument Rating/Pilot Proficiency Check or a Commercial Helicopter Pilot Licence and Group 4 Instrument Rating/Pilot Proficiency Check.*
>
> ***47.04*** *The employer shall assign each employee in accordance with the criteria and procedures established between the Employer and the Union to a Professional Aviation Currency Program.*
>
> ***47.05*** *With the exception of clause 47.04 above all changes to the Transport Canada Professional Aviation Currency Policy for Civil Aviation Inspectors and the TSB policy on CAI Professional Aviation Currency shall be accomplished by means of mutual agreement between the parties.*

[343] The evidence is not in dispute that in 2007, Transport Canada and the bargaining agent jointly developed the PACP. It is administered by the steering committee, which is composed of an equal number of representatives of both parties. The relevant provisions for this analysis are sections 3.1.1, 5.1.1, 5.1.2, and 5.1.3 of the PACP, as follows.

> ***3.1.1*** *All TC employed medically fit CAI and ETP employees shall be assigned by the employer to a Professional Aviation Currency Program. This program could be a Regular Flying Program (RFP) of not less than 48 hours per fiscal year in accordance with the ASD Operations Manual using departmental aircraft, or an Alternate Professional Aviation Currency Program approved by the Professional Aviation Currency Steering Committee.*
>
> …
>
> ***5.1.1*** *The employer shall assign all medically fit CAIs or ETPs to a Professional Aviation Currency Program.*
>
> ***5.1.2*** *All CAIs are eligible for assignment to a Regular Flying Program. The employer shall determine whether a medically fit CAI is to be assigned to a Regular Flying Program consisting of flying departmental aircraft a minimum of 48 hours per year, or an Alternate Professional Aviation Currency Program that meets the criteria of paragraph 5.2.1 of this policy. All ETPs shall be assigned to a flying program*

> *that is appropriate to their duties.*
>
> ***5.1.3*** *Notwithstanding Section 5.1.2 above the assignment to a RFP on ASD aircraft will not be considered for those CAIs where:*
>
> …
>
> *d) they are based in a geographic location that precludes the feasibility of assignment to a RFP.*

[344] As noted in the evidence, the APACP requires that the programs be approved by both Transport Canada and the bargaining agent. They are listed in Appendix A to the PACP, and some include training on simulators.

[345] The bargaining agent argued that the employer made substantial changes to the terms and conditions of employment of its membership by making unilateral program reductions and that employees who reasonably expected to be on a RFP at the time notice to bargain was given were no longer eligible to fly aircraft as of April 1, 2016.

[346] The employer responded by asserting that the CFPA's claim is misleading as it leads one to believe that amendments were made to the PACP that were not negotiated with the CFPA, which it argues is not the case. It argues that the PACP has never been amended and that its actions constituted no more than implementing PACP provisions that had always been available as options within the flying program. They might have been promulgated as changes, but in fact, they were simply the management and application of the PACP as negotiated initially with the CFPA.

[347] As the employer argued, this was not the first time that Transport Canada had taken such measures; in 2010, a decision was made to reduce the size of the aircraft fleet in the NCR, which required that pilots participating in a RFP had to be reassigned to an alternate program. At that time, the bargaining agent filed a national policy grievance, a bad-faith bargaining complaint, and an unfair-labour-practice complaint that were the subject of a decision rendered by the PSLRB.

[348] In *CFPA 2014*, the PSLRB dismissed both the policy grievance and the complaint. The facts surrounding that bad-faith bargaining complaint are not of assistance in resolving the complaint in this matter.

[349] In the policy grievance, the bargaining agent alleged that the employer had violated its and the employees' rights by requiring pilots working at the employer's headquarters to participate in the PACP exclusively by simulator training, to the exclusion of actual flying experience, which breached clause 47.04 of the collective agreement. In particular, the bargaining agent asserted that the "… PACP requires 'in airplane flight exposure'" and that the "… sale of Transport Canada aircraft will prevent employees from obtaining 'in airplane flight exposure,' in violation of the PACP and Article 47.04 of the Collective Agreement …". By way of corrective action, the bargaining agent requested that the employer be ordered to cease and desist from its planned sale of Transport Canada aircraft. In dismissing the policy grievance, the PSLRB reasoned as follows at paragraphs 83 to 93:

> *[83] In the policy grievance, the bargaining agent claimed that the employer breached clause 47.04 of the collective agreement by requiring pilots working at its headquarters to participate in the PACP exclusively by simulator training, to the exclusion of actual flying experience.*
>
> *[84] No provision in the PACP states that the employer shall assign the CAIs and ETPs to a Regular Flying Program. Instead, section 3.1.1 requires the employer to make the assignment to a PACP, which "could be" a Regular Flying Program "… or an Alternate Professional Aviation Currency Program approved by the Professional Aviation Currency Steering Committee."*
>
> *[85] Section 5.1.2 of the PACP states that "all CAIs are eligible for assignment to a Regular Flying Program …", but it then gives the employer the right to determine whether an employee is to be assigned to a Regular Flying Program or an Alternate PACP. It concludes with the following statement "… [a]ll ETPs shall be assigned to a flying program that is appropriate to their duties."*
>
> …
>
> *[90] Section 5.1.3 of the PACP states that "[n]otwithstanding section 5.1.2 …", the assignment to a Regular Flying Program will not be considered in the following situation:*
>
> …
>
> d) they are based in a geographic location that precludes the feasibility of assignment to a RFP.
>
> *[91] Section 3.1.2 of the PACP states as follows:*

> 3.1.2 The employer may from time to time change the Professional Aviation Currency Program to which a medically fit CAI or ETP is assigned.
>
> This may result from changing job requirements or the availability of a regular ASD flying program….
>
> *[92] Read as a whole, the language of the policy shows the intent to give the employer complete discretion to determine that a Regular Flying Program assignment will not be made because of operational requirements, including the non-availability of aircraft in a location.*
>
> *[93] Therefore, I conclude that reducing the number of aircraft based in Ottawa would not be a breach of the collective agreement. The contractual right was a right to be able to maintain currency and not a right to fly.*
>
> [Emphasis added]

[350] In its reply, the bargaining agent submitted that the issues considered by the PSLRB in that decision were in the context of a policy grievance alleging a breach of the collective agreement, which is not the issue before the Board in this case. The PSLRB held on the facts that reducing the number of aircraft based in Ottawa was not a breach of the collective agreement.

[351] In this case, the bargaining agent alleged that the employer contravened the terms and conditions of employment that were in force on the date notice to bargain was given in both the collective agreement and the PACP. Technically, in the 2014 case, the PSLRB determined that the proposed sale of aircraft in Ottawa would not breach the collective agreement. However, in my view, a fair reading of the decision reflects that the case was argued and based on the interpretation of the PACP as it was integral to the interpretation of article 47.

[352] I find that reasoning persuasive and agree that the language that the parties used is clear and that it gives the employer complete discretion to determine that an assignment to a RFP will not be made because of the non-availability of aircraft in a particular location. There has been no change to the PACP's language, and the employer has exercised its prerogatives as agreed to by the parties.

[353] In reaching this conclusion, I considered the bargaining agent's reply submission that this case is more akin to the Board's decision in *Union of Canadian*

Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada), 2017 FPSLREB 6. In that case, the parties had entered into a global agreement outside the collective agreement that was in place at the time notice to bargain was served, which the Board found was a term and condition of employment within the ambit of s. 107 of the *Act*.

[354] There was no dispute that in that case, the employer changed the injury-on-duty policy after notice to bargain was served. It relied upon the business-as-usual principle as well as its management right to continue to administer the workplace while bargaining was ongoing. The Board found that the change could not be considered business as usual as it was a major departure from the established practice.

[355] In contrast to that case, in the case before me, it is clear that measures to limit the RFP by closing bases or selling aircraft have occurred in the past as reflected in both the evidence and in the PSLRB's decision in *Canadian Federal Pilots Association*. In my view, the practice at issue falls within the business-as-before doctrine. There is no need to consider the reasonable expectation doctrine as there is sufficient evidence to apply the business-as-before doctrine, given the evidence of past practice. Accordingly, I have determined that the bargaining agent has not proven its allegation that the employer breached s. 107 of the *Act* by making unilateral program reductions to the PACP.

IV. Issue 3: Cancelling Policy Letter 164 and issuing IPBs

[356] The Association alleged that the respondents breached the statutory freeze on terms and conditions of employment, contrary to s. 107 of the *Act*, by substantially changing the membership's terms and conditions of employment through unilaterally cancelling Policy Letter 164 and implementing two Internal process Bulletins (IPBs) setting out training requirements for civil aviation safety inspectors.

A. For the CFPA

1. Mr. McConnell

[357] The purpose of Policy Letter 164 was to provide direction to management and CAIs working in commercial and business aviation with respect to training requirements to carry out their duties and responsibilities.

[358] Mr. McConnell first learned that Transport Canada was cancelling Policy Letter 164 at a union-management relationship meeting. The bargaining agent was aware that work was being done on an IPB, that Transport Canada had been drafting it for some time, and that it had been held in abeyance. The bargaining agent had received calls from members that it was being revised.

[359] On November 26, 2015, he wrote to Aaron McCrorie, Director General Civil Aviation and Mr. Guindon, noting that the bargaining agent had been aware of this "proposed ill-conceived IPB" and its existence for quite some time. He stated as follows: "Please tell me that this initiative is not the result of the CFPA tabling of Article 47 at the last round go [*sic*] bargaining with the employer. As you know we are in a period of statutory freeze."

[360] Mr. Guindon replied, stating that they would discuss the matter the next day and that he and Mr. McCrorie never asked for this to be put on the work plan. It had been called for several years ago and had just come up on the work plan. They had asked for the work to cease.

[361] Mr. McConnell considered it good and smart to stop the revision.

[362] On April 15, 2016, Mr. Guindon emailed Mr. McConnell. He enclosed a proposed IPB (that became "IPB 2016-05 v.1") to replace Policy Letter 164. He stated that his intention was to publish the IPB in the next week and that he would appreciate the bargaining agent's feedback by Tuesday, April 19.

[363] On Monday, April 18, 2016, he wrote to Mr. Guindon, stating as follows:

…

> *I asked you during the recent relationship meeting to refrain from publishing this ill-conceived IPB.*
>
> *Given that Notice to Bargain was given by Treasury Board in September 2014 and we are in a period of statutory freeze, each term and condition of employment must be observed by the employer. It is the CFPA's position that this IPB is unlawful and, therefore, Policy Letter 164 remains in effect.*
>
> *The CFPA does not support or consent to this initiative, which is a unilateral attempt by the employer to change the terms and conditions of our members' employment.*

[364] Mr. Guindon did not respond.

[365] Mr. McConnell reviewed the IPB and compared it to Policy Letter 164. He stated that it could have been a good document had the employer collaborated with the bargaining agent. The document was good with respect to recent experience; however, it was silent on training for helicopter inspectors.

[366] A second version ("IPB 2016-05 v.2") was issued on July 6, 2016, which Mr. McConnell considered an attempt to improve IPB 2016-05 v.1. The first version eliminated some of the definitions and programs. One of the immediate changes listed in the second version was that Transport Canada inspectors conducting checking, monitoring, or in-flight surveillance activities would not act as flight crew members. Mr. McConnell commented that the employer was asking inspectors, while in a helicopter or an aircraft and something went terribly wrong, to not act as flight crew members. He stated that people in an aircraft or a helicopter are classified as flight crew members, crew members, and passengers. A crew member is assigned duty on an aircraft, such as a flight attendant. In his view, inspectors were flight crew members. He stated that IPB 2016-05 v.2 created an uproar and put people in a difficult position. In his view, it was more critical for helicopters.

[367] Another IPB was issued on August 17, 2016, on surveillance planning, which in essence meant that there would be no further oversight for commercial air operations involving an aircraft carrying nine passengers or less. In Mr. McConnell's view, this was a change to the terms and conditions of employment because the bargaining unit's members were carrying out that surveillance.

a. <u>Cross-examination</u>

[368] Mr. McConnell was cross-examined on Policy Letter 164. He was asked if he was aware of the studies undertaken in 2012. He replied that he was. He was also aware that the department had chosen not to proceed with implementing the report issued from the studies.

[369] He testified that his view is that Policy Letter 164 continues to be valid as it was cancelled during the statutory freeze period.

[370] He was referred to the Civil Aviation IPB dated August 17, 2016, to the

attention of Civil Aviation staff members involved in surveillance planning, which exempted certain Civil Aviation document holders from surveillance frequency or activity based on the lower level of risk associated with the activity. He stated that his members carried out this type of surveillance.

[371] He agreed that that it was fair to say that when the employer assigns duties to an employee, it is also the employer's prerogative to determine the training needed with respect to the duties. He qualified his answer by stating that the employer cannot assign duties to an employee if he or she is not legally qualified to perform them.

2. Mr. Holbrook

[372] Policy Letter 164 lays out the training requirements for CAIs who check and oversee industry pilots and air operators. CAIs conduct PPCs on commercial pilots. There is also a program that authorizes industry pilots to exercise delegated authority on behalf of the Minister of Transport. Those pilots carry out checks on 90% of commercial pilots. CAIs have to carry out annual checks on those pilots.

[373] Mr. Holbrook referred to the IPB 2016-05 v.1, which cancelled Policy Letter 164 and established qualification requirements specifically with respect to aircraft type ratings, PPCs, and recent experience for civil aviation safety inspectors when assigned to conduct activities for which aircraft knowledge and experience was essential.

[374] He testified that this IPB reflects the employer's perspective on the requirement for the qualifications of and training for flight inspectors when conducting checks. He stated that the IPB relates to Policy Letter 164 in the bargaining agent's proposed clauses 47.01 and 47.02.

[375] The bargaining agent objects to changes to terms and conditions of employment without its involvement. Had the employer approached it with respect to the content of the document, it would have likely agreed to a number of items. For example, recent experience is defined. This is not in Policy Letter 164. However, much of the detail that was in that letter has been eliminated. Under the heading "Flight Checking Proficiency Requirements", the letter states that training shall never be less than that required by the approved training program of the organization with which the CAI undergoes training. That detail is no longer specified in the IPB.

[376] Similarly, for rotorcraft inspectors, Policy Letter 164 required a minimum of 48 hours' flight time on single- or multi-engine Aircraft Services Directorate helicopters to maintain currency. That detail is no longer specified in the IPB.

[377] The bargaining agent considers these changes to the terms and conditions of employment. Members contacted the Association. They were concerned about changes to the training program. In a number of cases, members were advised that they had been assigned to a different program.

[378] The major concern for the bargaining agent in IPB 2016-05 v.2 is one of the immediate changes, which provides that Transport Canada Civil Aviation (TCCA) inspectors conducting checking, monitoring, or in-flight surveillance activities will not act as flight crew members.

[379] Mr. Holbrook stated that in his view, this provision amounts to requiring the bargaining unit members to violate the *CARs*, which is problematic for them.

[380] Mr. Holbrook gave as an example an inspector in a single-engine helicopter qualifying a single pilot. The IPB states that the inspector will not act as a flight crew member; however, under the *CARs*, he or she is required to act as one. In a two-person cockpit, the candidate being checked will occupy the captain's seat, and the inspector will occupy the other seat. The inspector will be required to activate the controls to create an emergency so that the candidate may demonstrate his or her proficiency. In this case, the inspector will function as a flight crew member, as required by the *CARs*. Some managers have advised inspectors to sit in the rear of the helicopter and to carry out the check from there. However, the *CARs* prohibit passengers from being onboard during inspections.

[381] Changes to the IPB have allowed managers to end currency programs, as they are no longer required. Members have filed many grievances with respect to program deletions.

[382] On September 8, 2016, a CAI in the employer's Prairie and Northern Region emailed a Safety Inspector in Flight Crew Training, Evaluation and Examinations, and asked whether a CAI was considered flight crew while conducting a PPC from the left seat in a single-engine single-pilot helicopter. He asked about the CAI's onboard role, taking into account that he or she will manipulate throttles, push pedals, move

switches, etc.

[383] That Safety Inspector expressed an opinion and referred it to another CAI at Transport Canada's headquarters, who expressed the opinion that in accordance with the interpretation of the *CARs*, the CAIs that assume the function of the safety pilot during a flight are flight crew members during that flight.

[384] The employer objected to the introduction of this evidence on the basis that it was both hearsay and opinion without having the witness on the stand, and the employer did not have an opportunity to cross-examine the witness. I ruled that I would admit the evidence. However, since it was hearsay, in the event that I had to decide what the term "flight crew member" meant, I could not base my interpretation solely on the basis of hearsay evidence.

a. Cross-examination

[385] Mr. Holbrook was questioned about the bargaining agent's concern that inspectors conducting checking, monitoring, or in-flight surveillance activities would no longer act as flight crew members. He was asked whether the concern was almost exclusively about helicopters. He answered that it was not and stated that the problem was more acute with helicopters, which were just an example. The problem may also occur with fixed-wing aircraft.

[386] He was referred to an email exchange between two CAIs, that raised the issue of whether an inspector was considered part of the flight crew while conducting a check from the left seat in a single-engine single-pilot helicopter.

[387] In his view, one of the CAI said that the *CARs* require the inspector to act as a flight crew member, but the department states the opposite. Mr. Holbrook referred to "Commercial Air Service Standard 723", which contains specifics on what needs to be done in a PPC.

[388] It was suggested to Mr. Holbrook that the CAI concerned was not in a position to decide policy issues.

[389] Mr. Holbrook reiterated that during a check ride in a helicopter, the inspector moves the flight controls. An inspector is being asked to violate a regulation if he or she is not a flight crew member but just a crew member or passenger.

[390] Mr. Holbrook was referred to s. 4.3(1) of the *Aeronautics Act*, entitled "Delegation by Minister", and some definitions from the *CARs*, which read as follows:

> ***4.3 (1)*** *The Minister may authorize any person or class of persons to exercise or perform, subject to any restrictions or conditions that the Minister may specify, any of the powers, duties or functions of the Minister under this Part, other than the power to make a regulation, an order, a security measure or an emergency direction.*
>
> …
>
> ***crew member*** *means a person assigned to duty in an aircraft during flight time …*
>
> …
>
> ***flight crew member*** *means a crew member assigned to act as a pilot or flight engineer of an aircraft during flight time …*
>
> …
>
> ***passenger*** *means a person, other than a crew member, who is carried on board an aircraft …*
>
> …
>
> ***safety pilot*** *means a pilot who acts as a lookout for another pilot operating an aircraft in simulated instrument flight ….*
>
> [Emphasis in the original]

[391] He was also referred to s. 703.26 of the *CARs*, which states, "No person shall, where passengers are on board an aircraft, simulate emergency situations that could affect the flight characteristics of the aircraft."

[392] He was asked whether when conducting a ride, an inspector may not be a passenger but a crew member. He replied that in his view, a crew member would not operate an aircraft.

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

1. <u>Mr. Collins</u>

[393] Policy Letter 164 was replaced by an IPB. It required some changes, the need for which was established before 2016. The changes resulted from many years of review.

[394] Policy Letter 164 dealt with commercial and business aviation. Its purpose was to provide inspectors and management with directions for air carrier inspectors in commercial and business aviation to ensure that they had the knowledge required to carry out their duties. When it was issued in 2005, it guided Mr. Collins, who was then an inspector, and it allowed his manager to do his job. It was useful at that time.

[395] The purpose of the policy is not related to meeting the terms and conditions of the collective agreement.

[396] Over 12 years, the system had evolved. The decision had been made not to carry out as many PPCs by CAIs employed by Transport Canada. The checks have been delegated to industry. Transport Canada inspectors do not require the same amount or the same kind of training as they had in the past.

[397] Discussions about changes to the policy occurred in 2008 and 2009. A study was conducted at Transport Canada that resulted in a program review in 2012. The document is entitled, "Working Group Meeting Workbook ACP Program Review" and is dated January 17 to 20, 2012. The review examined the then-current situation and recommended developing a revised policy document. The review reads in part as follows:

> ***CURRENT SITUATION UNDER REVIEW:***
>
> …
>
> *Policy letter (PL) 164 is currently the reference document used in establishing training and qualification requirements for Civil Aviation Safety Inspectors - Flight Operations … conducting tasks for which aircraft specific knowledge is essential. PL164 was published in 2005 as an amendment to …* Air Carrier Inspector Manual*.*
>
> *This policy letter speaks to a time when Civil Aviation Safety Inspectors - Flight Operations (formerly known as air carrier inspectors) were still conducting flight checks on a regular basis. Seven years on, this document appears outdated because:*
>
> - *it does not account for the fact that Civil Aviation Safety Inspectors - Flight Operations (CASI - Flight Ops) now mostly carry out monitoring tasks;*
> - *it does not provide guidance on inspector training and qualifications for various tasks (other than flight checking)*

> *for which aircraft specific knowledge is essential;*
>
> - *it applies aircraft weight limits in order to distinguish between different levels of aircraft complexity, an argument that may no longer hold any validity; and*
>
> - *its scope is vague and difficult to define, stating that it applies to the conduct of Pilot Proficiency Checks (PPC) or to any other checking function for which aircraft specific knowledge is essential.*
>
> …
>
> ***RECOMMENDATION:***
>
> …
>
> *1. Therefore,* ***it is recommended*** *that TCCA develop a revised policy document that will provide TCCA management with comprehensive guidance in terms of CASI - Flight Ops training and qualifications towards the competent conduct of not only PPCs and other flight checks, but also for a range of tasks that require various levels of aircraft specific knowledge. Aside from flight checking, such tasks can be grouped under the following headings:*
>
> - *Monitoring*
> - *Surveillance*
> - *Review and approval of company documentation*
> - *Certification*
> - *Simulator condition monitoring*
> - *Licensing*
> - *Subject Matter Expert (SME) representation*
> - *Operational Evaluation (OE)*
>
> …
>
> [Emphasis in the original]

[398] Mr. Collins confirmed that in 2012, a determination was made that Policy Letter 164 did not meet management's requirements with respect to training and that it needed amending.

[399] As a result of the review, a Civil Aviation IPB entitled "Inspector Requirements for Flight Crew Checking Activities" was issued in July 2016. It replaced Policy Letter 164. Its purpose was to "… establish qualification requirements, specifically with respect to aircraft type ratings, Pilot Proficiency Checks (PPCs) and recent experience for Civil Aviation Safety Inspectors … when assigned to conduct activities for which

aircraft knowledge and experience is essential."

[400] It outlines and clarifies guidance for management so that it may be able to train inspectors, depending on the tasks assigned to them. For example, if an inspector will monitor a check pilot, the manager is to follow the guidance as outlined in the document.

[401] Mr. Collins was asked if there was a link in the revised policy to financial constraints. He replied that there was none.

[402] He stated that Policy Letter 164 needed to be changed because in his view, it was unsafe, while at the same time, there was a need to review the program's efficiency and requirements.

[403] One of the immediate changes was that TCCA inspectors conducting checking, monitoring, or in-flight surveillance activities would not act as flight crew members.

[404] Without proper training, inspectors could not act as flight crew members. There had been instances where under Policy Letter 164, this had not been clear. This was both a safety and a liability issue.

[405] The background section of the IPB states that "TCCA inspectors should only be acting as flight crew in aircraft on which they are qualified such as ASD aircraft or through another approved program accepted by TCCA Management." This was unclear in Policy Letter 164.

[406] Mr. Collins was asked about the circumstances in which an inspector may act as a flight crew member. He replied that they occur when the inspector is qualified and is required to perform a flight crew member's duties while carrying out a flight check or conducting a PPC.

[407] In a helicopter with only two seats, the inspector needs to be qualified to sit in the front. If the inspector is in a simulator, he or she does not need to sit at the controls of the aircraft; nor does the inspector need to be current and qualified.

[408] When the aircraft has more than two seats, the inspector may be able to perform his or her duties from a jump seat. The inspector does not need to be at the controls. In that situation, the inspector does not need to be current and qualified.

[409] If there are two seats in the aircraft there will be two pilots, one being checked and a co-pilot, with the inspector occupying the jump seat.

[410] Mr. Collins was referred to the chain of emails initiated by a CAI on September 8, 2016, in which he asked whether a CAI was considered flight crew while conducting a PPC from the left seat in a single-engine single-pilot helicopter, taking into account that he or she would manipulate throttles, push pedals, move switches, etc.

[411] Mr. Collins stated that in this situation, the inspector would be a flight crew member. He or she would need to be trained on that type of helicopter. If not, he or she would not be tasked with conducting the PPC. He stated that he believed there had been some misunderstanding with employees and that some had been tasked when they were not qualified. However, once the situation was clarified, unqualified employees were not tasked with carrying out a PPC.

[412] On February 3, 2017, to address concerns about CAIs providing airborne approved check pilot (ACP) monitors on certain helicopter types associated with aerial work and air-taxi operations, Civil Aviation's director of standards issued an interim extension to the monitor validity for ACPs associated with helicopter operations until February 1, 2018, regardless of the current expiry date. The interim extension document noted that a review was underway to determine an effective long-term solution.

[413] Mr. Collins was referred to paragraph 39(d) of the complaint, which alleged that the Director of Operations had commenced a risk-assessment study with a view to cancelling approved check monitor rights.

[414] He stated that Transport Canada and Civil Aviation identified a concern that the existing nomination and delegation processes and surveillance activities with respect to ACP and advanced qualification program (AQP) evaluators did not allow for a flexible and efficient use of available Transport Canada resources towards the oversight of those evaluator programs. It appeared that a lot of resources were being expended against activities that arguably catered to low-risk situations.

[415] As Transport Canada inspectors conduct monitors or check pilots for seven major airlines, Mr. Collins started to realize in reviewing the data that out of the last 1000 monitors performed, there had been 2 failures. In the spirit of seeing that the use

of Transport Canada's resources was effective, it conducted a risk assessment together with representatives of the air operators to evaluate how they conducted business, including a review of the risk and whether they could reallocate resources where there was little risk.

[416] The assessment demonstrated that the check pilots under the scope of national operations performed very well and that they did not need to be monitored in the same prescribed intervals every two years.

[417] Like other risk assessments, there is nothing prescribed that mandates that management must consult with the CFPA.

[418] The assessment does not say that Transport Canada will stop monitoring for the seven major airlines but that it will monitor differently.

[419] Mr. Collins was asked whether the fact that Transport Canada was in bargaining with the CFPA impacted the decision as to whether to carry out a risk assessment. He stated that every year, Transport Canada reviewed its programs to ensure that resources were allocated from low-risk to higher-risk areas.

[420] The risk assessment has been completed, and Transport Canada is looking to implement an option, in which will be conducted at intervals that are not fixed but rather are risk based. For example, if a check pilot performed well, the interval between monitor rides could be longer; otherwise, they could be monitored more frequently.

[421] Transport Canada is also looking at sharing responsibility with the air operators, i.e., by sharing a database so that they can better monitor and mentor the check pilots that work for them. This mirrors the existing AQP.

[422] Mr. Collins was asked about the impact on the CFAPA. He replied it was just a different way of monitoring using risk-based surveillance and data monitoring.

a. <u>Cross-examination</u>

[423] Policy Letter 164 was outdated, which the 2012 study confirmed. He was asked if it had been cancelled before the statutory freeze. He replied in the negative. It was not considered a term and condition of employment, and it was replaced by an IPB dated April 2016.

[424] Mr. Collins was referred to the statement in the bulletin under the heading "background" that reads as follows: "TCCA inspectors should only be acting as flight crew in aircraft on which they are qualified such as ASD aircraft or through another approved program accepted by TCCA management".

[425] He was referred to the statement in the bulletin under the heading "immediate changes" that reads as follows: "TCCA inspectors conducting checking, monitoring or in-flight surveillance activities will not act as flight crew members."

[426] He was asked how the two statements could be reconciled. He agreed that the bulletin could be worded better. He stated that Policy Letter 164 was not clear and that it did not ensure that inspectors were properly trained to safely exercise their duties.

[427] If an inspector is monitoring an industry pilot in a simulator, the inspector does not need to be current to fly. The inspector needs to be trained or type rated on the aircraft. The manual applies to all check pilots in industry. An inspector who is trained and type rated but not current can conduct a monitor on a check pilot in a simulator.

[428] An inspector conducting in-flight checking or monitoring activities who is qualified on the aircraft but who is not current is not a flight crew member as the inspector is not sitting at the controls of the aircraft. This was not clear in Policy Letter 164.

[429] He confirmed that an inspector conducting a PPC is acting as a flight crew member. In his view, that did not contradict the statements in the bulletin, although he acknowledged that it could be better worded, as the intent was that inspectors were not to act as flight crew unless they were fully qualified. He stated that there has been some misunderstanding.

[430] Mr. Collins was aware that complaints were made under Part II of the *Canada Labour Code* involving occupational health and safety, but he was not privy to the complaints and was not involved with them.

b. <u>Re-examination</u>

[431] He felt the change had to occur at that time because the 2005 policy letter 164 was outdated; there had been a tremendous evolution in simulators, and the inspectors

were less involved in checking activity. When Civil Aviation wishes to qualify someone on a piece of equipment, it is no longer done on an aircraft but on a simulator.

[432] He stated that replacing Policy Letter 164 by the IPB was not about article 47 of the collective agreement. He stated that Civil Aviation did not change the terms and conditions of employment.

[433] An industry segment needed to adapt to simulators.

[434] He was asked how this affected training. He replied that it had no effect as everyone under a program received the training to meet their qualifications, and all employees received the extra-duty allowance.

[435] He was asked why he did not consult the bargaining agent. He replied that policy letters are in management's domain. National CANEX was consulted with respect to replacing the IPB. He did not believe that there were changes to terms and conditions of employment necessitating that consultation.

[436] He advised the bargaining agent that a new IPB was coming, that changes would reduce the specialty flying program, and that an IPB would clarify the role of delegated check pilots. The strategy was to move training for both helicopters and fixed-wing aircraft to simulators.

C. <u>The CFPA's submissions</u>

[437] On March 31, 2016, Transport Canada also announced that it was cancelling Policy Letter 164, which outlined air carrier inspector training requirements, and that it was replacing it with a new policy, effective April 29, 2016.

[438] On Friday, April 15, 2016, Mr. Guindon provided the Association with a draft version IPB of the new policy, which set out the new "Inspector Requirements for Flight Crew Checking Activities". Mr. Guindon advised that the employer would publish the new policy the following week.

[439] By email dated Monday, April 18, 2016, Mr. McConnell advised Mr. Guindon that the Association did not support or consent to Transport Canada's initiative and that it was a unilateral attempt to change the terms and conditions of employment of the Association's members. Mr. McConnell gave evidence that the Association received no response to its email. Instead, Transport Canada cancelled Policy Letter 164 and

issued Internal Process Bulletin, IPB 2016-05, Issue No. 01 (IPB 2016-05 v.1), which was effective April 29, 2016.

[440] By an email dated July 15, 2016, the Association was advised by one of its members that Transport Canada had replaced IPB 2016-05 v.1 with IPB 2016-05 v.2, which was prepared and issued without notice to, or input from, the Association and was made effective as of July 6, 2016.

[441] The new policies, IPB 2016-05 v.2 in particular, are substantively different from Policy Letter 164. Mr. Holbrook gave evidence of a number of significant differences that could be seen from the text of the policies.

[442] Mr. Holbrook pointed specifically to page 2 of the old Policy Letter 164, which detailed the minimum flight training, flying currency, and PPC requirements for inspectors conducting PPCs or any other checking functions. Under item 3, Policy Letter 164 clearly sets out, "Training shall never be less than that required by the approved training program of the organization with which the [inspector] undergoes training". This minimum requirement of at least equivalent training is absent from the new IPB.

[443] Mr. Holbrook also pointed to page 3 of the old Policy Letter 164, which set out the unique requirements for rotorcraft (i.e., helicopter) inspectors. Under that letter, rotorcraft inspectors were to be provided with a minimum of 48 hours of flight time, plus additional helicopter instrument procedures training. These minimum training requirements are not in the new IPB. He testified that the cancellation of Policy Letter 164 created problems for all the Association's members, which were felt most acutely by helicopter pilots.

[444] Finally, Mr. Holbrook testified that the most significant and worrying change for the Association's members was found at page 4 of IPB 2016-05 v.2, which states that Transport Canada inspectors "… conducting checking, monitoring or in-flight surveillance activities will not act as flight crew members." He further explained that this amounted to requiring the Association's members to violate the *CARs*, which are clear that in certain cases, a CAI conducting a PPC must manipulate the aircraft's controls and is definitely a flight crew member. Mr. Holbrook testified that this change put the Association's members in a double bind, in that they would be required to perform their duties in a manner that contravened the *CARs*, or refuse the work

assigned to them. He also testified that indeed some of the Association's members have refused to conduct rides for which they were not qualified or have otherwise filed occupational health and safety complaints.

[445] The new policy is a real and substantial change to the terms and conditions of employment. The CFPA's witnesses testified at length about those changes. The respondents' witnesses acknowledged that the new policy represented a change.

[446] Mr. Guindon testified that the reason for the new policy was that an update was necessary because Policy Letter 164 was outdated. He testified that he did not think to consult with the bargaining agent because in his opinion it was within management's domain.

[447] Mr. Guindon also testified that the employer had undertaken a review in 2012 that had suggested that Policy Letter 164 ought to be amended. And yet, in late November 2015, Mr. Guindon had assured Mr. McConnell that it would continue in effect. By email dated November 26, 2015, Mr. Guindon stated: "Of note, Aaron [McCrorie] and I never asked for this to be put on the workplan [*sic*], it was called for several years ago and just came up on the workplan [*sic*]. Aaron and I have asked for this work to cease."

[448] Mr. Holbrook also testified with respect to the ongoing negotiations between the parties. He stressed the importance of training requirements as a major concern for the Association's members, which is reflected in the demands made at the bargaining table. Both Mr. Holbrook and Mr. McConnell testified at length as to the problems the Association has been experiencing with training to keep its members properly qualified.

[449] Policy Letter 164, even if not part of the collective agreement, governed training requirements for CAIs, which is a crucial part of the workplace reality of the Association's members. Meeting the training requirements permits inspectors to do their jobs. The fact is telling that those requirements are included in the bargaining agent's top priorities in this bargaining round. When it modified the policy, Transport Canada acted on something that could be embodied in a future collective agreement.

[450] Not only is Policy Letter 164 part of the terms and conditions of employment, but also, the evidence of the Association's witnesses, as well as the texts of the old and

new policies, point to significant changes in the way training is carried out under the new IPBs. The alteration of the letter has had a considerable impact on employees, as they have been exposed to at least three major changes, as follows:

1) under Policy Letter 164, the minimum training was never to be less than that required by the approved training programs of the organizations with which the inspectors underwent training;

2) the unique requirements relating to training for rotorcraft inspectors; and

3) the requirement in IPB 2016-05 v.2 that inspectors "… conducting checking, monitoring or in-flight surveillance activities will not act as flight crew members."

[451] The former Board's approach to interpreting the statutory freeze provision was to consider that fundamental changes to working conditions are not business as usual and therefore cannot be considered part of the employer's prerogative to organize the workplace as it sees fit. A statutory freeze is a brake on the respondents' rights in the context of collective bargaining, to ensure a fairer process. See *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46; and *Canadian Association of Professional Employees v. Library of Parliament*, 2013 PSLRB 18.

[452] There can be no dispute that an important policy change occurred to an issue that was the subject of a bargaining agent proposal at the bargaining table, which is precisely what s. 107 of the *Act* seeks to prevent.

[453] The new IPBs constitute a real and substantial change to the terms and conditions of employment, as they substantively modify the policy that previously governed training requirements. It cannot be said that this is business as before. In the statutory freeze period, employees would have reasonably expected that their training requirements would be preserved during the bargaining period. In fact, the Association was assured as much by Mr. Guindon, who advised it that he had asked for work on the amendment of Policy Letter 164 to cease.

[454] The bargaining agent acknowledged the significance of the impact of budgetary constraints on Transport Canada; however, under the freeze provisions of

the *Act*, implementing any of its initiatives must wait until the freeze period expires or, in the interim, for the bargaining agent's consent; see *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 at para. 203.

D. The employer's submissions

[455] The complaint refers to the replacement of Policy Letter 164 by an IPB. The bargaining agent alleged that the implementation of the IPB constituted a material change to the terms and conditions of employment of its membership.

[456] The employer submitted that Policy Letter 164 is not part of the terms and conditions of employment and that it is not referred to in any such way in the collective agreement. It was amended and reissued into the new documentation framework that Transport Canada established to reflect its new need to meet its mandate of surveillance and certification activities. These amendments were made as a result of a need clearly highlighted in 2012 and before notice to bargain was served in September 2014.

[457] Similarly, the new IPB is not part of the terms and conditions of employment and is not referred to in any such way in the collective agreement. Mr. Collins and Mr. Guindon testified that the IPB included the restriction to ensure that any pilot conducting checking, monitoring, or in-flight surveillance activities would not do so as an active flight crew member unless the pilot was trained accordingly and was under an approved program. The objective is also that a pilot would not be held responsible, and thus liable, in the event that an incident or accident occurred without the pilot being fully trained and approved to be an active flight crew member.

[458] The purpose of this IPB is essentially to establish qualification requirements, specifically with respect to aircraft type ratings, PPCs, and recent experience for Civil Aviation safety inspectors in Flight Operations (inspectors), when assigned to conduct activities for which aircraft knowledge and experience is essential.

[459] Mr. Guindon testified that the employees' duties have changed over the last 10 years as Transport Canada became more of an "oversight" organization. It is logical that the training provided should reflect that change. It is management's prerogative to assign the appropriate training to its employees. As mentioned, the employer had an unqualified discretion with respect to its employees' training before notice to bargain

was given. That discretion continues to apply after that notice is served, and its exercise cannot be considered a breach of the freeze provisions (see *PSAC v. Her Majesty*, and *CFPA 2014*).

E. The CFPA's reply

[460] Policy Letter 164 and the new IPB are terms and conditions of employment. Training qualifications set out in it are terms and conditions of employment that may be included in a collective agreement, and as such, s. 107 of the *Act* dictates that they continue in force and must be observed after notice to bargain is given.

[461] The new IPBs constitute a real and substantial change to the terms and conditions of employment. They substantively modify the policy that previously governed training requirements. In the statutory freeze period, employees would have reasonably expected that their training requirements would be preserved during the bargaining period. In fact, the Association was assured as much by Mr. Guindon, who advised it that he had asked for work on the amendment of Policy Letter 164 to cease.

[462] As the OLRB held in *DeVilbiss*, at para. 17, when an employer unilaterally implements changes that were not previously discussed with the union, the inference logically arises that it is a tactic designed to undermine the union by suggesting to employees that they do not need a union to obtain better terms.

F. Analysis

[463] Based on the evidence, the substance of Policy Letter 164 dealt with commercial and business aviation. The purpose was to provide inspectors and management with directions for air carrier inspectors in commercial and business aviation to ensure that they possessed the knowledge to carry out their duties. The policy set out the qualification requirements for them, specifically with respect to aircraft type ratings, PPCs, and recent experience required, when they were assigned to conduct activities for which aircraft knowledge and experience were essential.

[464] It was not argued that the substance of Policy Letter 164 was covered by the collective agreement or unlike the PACP that it was the subject of an agreement outside the collective agreement. It was a management policy document. While such a document may be found to be a term and condition of employment subject to the statutory freeze, the policy was not the subject of an agreement between the parties,

and the letter had been under review at least since 2009 and was formally reviewed in 2012, which led to changes being recommended. Therefore, I conclude that it was not a term and condition of employment that was in force on the day notice to bargain was given and was not subject to the statutory freeze.

[465] Nevertheless, I will consider whether it falls within the exceptions to the statutory freeze. The policy was implemented in 2005, when CAIs still routinely conducted flight checks in commercial and business aviation. The evidence is clear that most of the checks over the years have been delegated to industry pilots and that Transport Canada inspectors do not require the same amount or same kind of training and are more engaged in monitoring activities.

[466] Managerial discussions on changes to the policy occurred as early as 2008 and 2009. A program review in 2012 recommended developing a revised policy. It was placed in a work plan and came forward as a matter of course in late 2015. Although Mr. Guindon advised the bargaining agent that management was halting the implementation, it was decided that a further review was necessary. The department concluded that the policy required updating and that the situation had become urgent due to safety concerns.

[467] Transport Canada cancelled Policy Letter 164 and issued IPB 2016-05, effective April 29, 2016, which was replaced by a second IPB effective July 6, 2016.

[468] The bargaining agent pointed to substantively different provisions in the new IPBs from those in Policy Letter 164, to which it takes exception. The letter set out that training for inspectors should never be less than that required by the approved training program of the organization, i.e., Air Canada, Air Transat etc., with which the inspector undergoes training. That is absent from the new IPB, along with the unique requirements relating to training for rotorcraft inspectors, and it states that Transport Canada inspectors conducting checking, monitoring, or in-flight surveillance activities would not act as flight crew members.

[469] It is clear that the inspectors' duties have changed dramatically over the past 12 years and in particular that they no longer routinely conduct pilot checks on industry pilots and that their mandate is now primarily monitoring, surveillance, and certification.

[470] It has not been argued that management did not have the authority or prerogative to assign or change the duties of its employees. Given that one of the purposes of Policy Letter 164 was to set out the qualifications for inspectors to carry out inspections in commercial and business aviation, duties that it is apparent they no longer routinely perform, I have difficulty accepting the argument that during the freeze period, management is precluded from changing the training requirements for employees whose duties have already changed.

[471] In my view, management continued to exercise its discretion in establishing training qualifications for its employees to carry out their assigned duties as part of the business-as-before doctrine. I am not able to conclude that aligning training with a change in duties is a major departure from established practice.

[472] With respect to the concern that inspectors conducting checking, monitoring, or in-flight surveillance would not act as flight crew members, I accept the employer's explanation that the IPB could have been worded more clearly and that its intent was to ensure that inspectors did not act as flight crew members unless they were qualified to.

V. Issue 4: Exemption to the *CARs*

[473] The Association alleged that the respondents breached the statutory freeze on terms and conditions of employment, contrary to s. 107 of the *Act*, by unilaterally implementing a legislative exemption to the *CARs* for the purpose of avoiding its obligations under the PACP.

A. For the CFPA

1. Mr. Holbrook

[474] Mr. Holbrook explained that the issue for the bargaining agent's members is that they are licenced pilots as Canadian aviation document holders and that under the *Aeronautics Act*, they must comply with the *CARs*. He referred to ss. 401.03 and 05 of the *CARs*, which provide in part as follows:

> ***401.03 (1)*** *Subject to subsection (2), no person shall act as a flight crew member or exercise the privileges of a flight crew permit, licence or rating unless*
>
> > ***(a)*** *the person holds the appropriate permit, licence or rating;*

> ***(b)*** *the permit, licence or rating is valid ….*
>
> …
>
> ***401.05 (1)*** *Notwithstanding any other provision of this Subpart, no holder of a flight crew permit, licence or rating, other than the holder of a flight engineer licence, shall exercise the privileges of the permit, licence or rating unless*
>
> > ***(a)*** *the holder has acted as pilot-in-command or co-pilot of an aircraft within the five years preceding the flight ….*

[475] Mr. Holbrook stated that the Treasury Board's minimum qualifications require all AO Group employees to maintain a valid air transport pilot or commercial pilot licence. The Treasury Board specifies that these qualifications are mandatory for carrying out the duties described in the AO Group, which involve checking and oversight activities. In his view, s. 401.05 of the *CARs* prohibits an employee from carrying out these duties without being qualified. Section 7(3)(3) of the *Aeronautics Act* specifically requires compliance with the CARs. For these reasons, the bargaining agent felt that it was appropriate to establish requirements in the collective agreement that were consistent with the legal obligations of its members.

[476] In Mr. Holbrook's view, the only way a licence holder can stay current is if he or she flies an aircraft. In his view, a simulator is not an aircraft, and the continuing use of simulators by employees will no longer qualify them to carry out check rides. He raised this at the bargaining table.

[477] The employer said that it would take the issue under advisement and that it was working on an exemption to s. 401.05 of the *CARs*.

[478] On August 23, 2016, the Director General, Aviation Safety Regulatory Framework, on behalf of the Minister of Transport, exercising authority under s. 5.9(2) of the *Aeronautics Act*, issued NCR-053-2016 in the public interest, which exempted holders of a Canadian pilot permit or licence who had not acted as a pilot in command or a co-pilot of an aircraft within the five years preceding a flight from the requirements of s. 401.05(1)(a) of the *CARs* and provided another means to meet the recency requirements by providing the option to complete a pilot training program in a full-flight simulator.

[479] From the bargaining agent's perspective, it made a proposal at the bargaining table that members would operate an aircraft once within five years as part of the

currency program. The employer used its authority as the employer and regulator to change the regulations for all pilots in the country to absolve itself of the requirement to deal with the bargaining agent's proposals for article 47 of the collective agreement.

[480] Mr. Holbrook referred to a number of documents that Transport Canada provided with respect to drafting the exemption as a result of a request made under the *Access to Information Act* (R.S.C., 1985, c. A-1). He referred to an email from Mr. Collins on the subject of s. 401.05(3) of the *CARs* that was dated April 28, 2016, and addressed to Mr. McCrorie, which reads in part as follows:

…

> *Earlier this week the CFPA brought forward again the issue of CAR 401.05 (3). Basically the 5 year issue here will not go away and the CFPA will not stop bringing this back on the table until one of two things happens;*
>
> *a) That TC ensure that all AOs get to operate an airplane or helicopter at least once every five years; or*
>
> *b) An exemption is drafted as per below to ensure that class C and D simulators are recognized as an equivalent*
>
> *I trust we all understand that in the bigger picture of the discussion with the CFPA this CAR 401.05(3) issue is a major one and until resolved we are kind of at idle.*

…

[481] On April 28, 2016, Mr. McCrorie replied as follows:

> *I think we still want to issue a Global Exemption. The issue is what are the competing priorities? Bob may need to answer that as it is Commercial Flight Standards that is drafting the issue paper.*
>
> *I think we also need to better understand the operational impact of not having the exemption - how does the 5 year issue impact on an inspector's ability to do their job (e.g. conduct oversight)?*
>
> *Based on my memory of our last discussion, the regulation requires a flight every 5 years to exercise the privileges of a pilot's licence [sic] (i.e. fly an aircraft), it does not speak to the validity of the licence [sic]. I fear the CFPA may be confusing their need to have an ATPL with the ability to exercise the privileges of that licence.*

[482] Mr. Holbrook disagreed with Mr. McCrorie's opinion that the CARs required a flight every five years to fly an aircraft and did not address the validity of the licence. In his view, s. 401.03 of the *CARs* contemplates that the privilege of the licence is more than just flying an aircraft.

[483] Mr. Collins replied on April 28, 2016, as follows:

> *Understood Aaron…I guess this is only brought forward in the context of recency and the ability to exercise the privileges…not the ability to do their job (at last [sic] for now)…in the current context the CFPA would like to ensure that their members operate an aircraft at least every 5 years so that they are able to have the ability to exercise their privileges should they:*
>
> *1. Choose to leave public service and have the same recency has [sic] when they came in (Some Inspectors recently left because of this very concern);*
>
> *2. Be put on the WFA and in search of a job;*
>
> *3. Reintegrate RFP after being on an alternate program for more than 5 years; or*
>
> *4. Get onto a proposed line flying program after being on an alternate for more than 5 years*
>
> *All this so they would not need to have to go through going through the loop of requalifying as per 401.05 (1)(b) which comes at a financial cost and I would think we would want to consider the retention angle here as well.*

[484] Mr. Holbrook's view was that Mr. Collins was postulating as to what motivated the bargaining agent, which did not propose the exemption. In his view, these reasons were not justified. It was not reasonable to the bargaining agent for the employer to conclude that employees were motivated to maintain their recency to find a better job if they left the service. Furthermore, item 4 refers to a line flying program. At that point, there had been no discussions of such a program, and neither party had made a proposal at the bargaining table.

[485] Mr. Holbrook stated that of the 106 pages in the access to information (ATIP) report, only 4 relate to the reasons for the exemption. This indicated to the bargaining agent that Transport Canada did not follow the Civil Aviation directive for exemptions. There was no documented assessment of the public interest. The employer objected to this speculative opinion as it had no probative value.

[486] Mr. Holbrook stated that even though the exemption is now implemented, his members still do not meet the recency requirements. They have been provided with only simulator training. In his view, the employer is not providing the training required under the regulations or the exemption to them. They have to be assigned to a particular airline's training program or to a Transport Canada approved program.

[487] Mr. Holbrook referred to a TCCA directive issued on October 1, 2009, with respect to the criteria to be used in granting exemptions from regulatory requirements. The directive defines an "exemption" as entitling a person to act outside normal regulatory requirements. There are two ways compliance with a regulation governing aviation will not be required. The first is provided for in the regulation itself, and the second is an exemption by executive decision pursuant to s. 5.9(2) of the *Aeronautics Act*, which authorizes the Minister to provide an exemption from the provisions of an Act or regulations on such terms and conditions that the Minister deems necessary.

[488] Exemptions may be granted only in unforeseen circumstances that are unlikely to recur or when the regulation is being amended to address certain situations. The director general or the regional directors of Civil Aviation hold the Minister's delegated authority to issue exemptions. They may be granted if in the Minister's opinion, they are in the public interest and are not likely to affect aviation safety.

[489] The document also indicates that in most cases, exemptions are issued only in exceptional circumstances and may be granted only after a thorough analysis is conducted on the impact granting them may have on aviation.

[490] In Mr. Holbrook's opinion, the exemption process contemplates a client making a compelling request for an exemption. Such a request would involve Transport Canada assessing whether the supporting argument demonstrates that if granted, the exemption will be in the public interest and will not affect aviation safety. He was also of the view that process contemplated a legal review of the exemption documentation.

[491] When he reviewed the documents that were provided as a result of the bargaining agent's ATIP request, Mr. Holbrook did not find evidence of a client requesting an exemption. The only information in the documentation related to a request was about management wanting to address the issues that the CFPA was raising in bargaining.

[492] In his view, nothing in the documentation led to a finding that the exemption was in the public interest; nor did Transport Canada carry out a safety analysis or a risk assessment. Since the process calls for Transport Canada to assess whether a client has successfully argued its case for an exemption, the process is for clients outside Transport Canada and not for it to use.

[493] Based on the ATIP material, there was no request from industry or Canadian pilots. The only request was from the Minister's staff in relation to employees who work for the Minister.

[494] The CFPA was concerned that the global exemption would trigger further discussions about gaining more efficiencies from Transport Canada's flying program. In the bargaining agent's view, the purpose of the exemption is to target the PACP.

a. Cross-examination

[495] Mr. Holbrook was asked whether an exemption differs from an amendment. He agreed that it does. He stated that the CFPA has no issue with s. 401.05 of the *CARs* but that it has an issue with members not receiving training. He was asked whether that issue would be resolved by inserting the CARs into the collective agreement. He replied by stating that the bargaining agent's proposal was to have the collective agreement compliant with the CARs. He was asked if there was no compliance with the regulation, how would inserting it into the collective agreement help? He replied by stating that by inserting it, the employer could no longer contravene the regulations. The liability for violating the CARs is that of the individual licence holder.

[496] The bargaining agent had exhausted all consultative means to resolve the issue and made the bargaining proposal in its clause 47.09 in October 2015.

[497] He was asked whether noncompliance with s. 401.05 of the *CARs* was discussed before October 2015. He replied that when Transport Canada sold aircraft, it was discussed in the context of a town hall meeting. He believed that it was also discussed at a steering committee meeting that he did not attend.

2. Mr. McConnell

[498] Mr. McConnell referred to the *CARs* and the recency requirements set out in s. 401.05 and with respect to instruments in s. 401.05(3)(b).

[499] He was referred to clause 47.03 of the collective agreement and was asked to confirm that all his members were current. He replied that they must meet the requirements of s. 401.05 of the *CARs* and that the only way they could comply with the regulation was by flying.

[500] He was asked whether he was aware that s. 401.05 of the *CARs* has been discussed at least since 2013. He acknowledged that it had been.

B. For the employer

1. Mr. Guindon

[501] Mr. Guindon was aware of the exemption and was involved in discussions about a possible exemption with senior executive of the Department of Transport.

[502] In 1996, when the *CARs* were adopted, simulators were little used. If a holder of a flight crew licence wanted to exercise the privilege of the licence, the holder had to have acted as the pilot in command or the co-pilot of an aircraft within the previous five years. Since 1996, there have been considerable technological advances with respect to flight simulators. Industry check pilots as well as Transport Canada inspectors maintained their currency on state-of-the-art simulator equipment provided by the major airlines. However, the CARs required these licence holders to rent small aircraft with an instructor from a local flight school to meet their currency requirements.

[503] The proposal was discussed with the CFPA before negotiations began. This was an exemption to the regulation, which was not modified, but there was a regulatory plan. Work started in 2018 to change the regulation.

[504] Mr. Guindon was asked why there was a need to create an exemption to the regulation in the interim. He replied that a regulatory exemption is used when the regulatory process will take some time. It is a global exemption deemed in the public interest.

[505] The purpose was to permit licence holders to meet their recency requirements in an approved “Level C” or “D” full-flight simulator, which were the highest levels, taking into account the technological advances made since 1996.

[506] From a safety perspective, the risks attributable to using Level C or D full-flight

simulators were mitigated by restricting their use to pilots who had successfully completed an approved pilot training program.

2. Mr. Collins

[507] Mr. Collins stated that an exemption is always issued in the interests of the public as long as it does not compromise safety.

[508] He was asked what had triggered the need to create an exemption. He stated that in two provisions in the *CARs*, simulators are recognized as equivalent to aircraft. For an Air Canada captain, if he or she has not flown an aircraft in 90 days, he or she must go to a simulator.

[509] The second example is when for the first time, a student flies aircraft with passengers. Up until about 2002, Air Canada had to rent an aircraft to validate a pilot's proficiency check.

[510] The regulations were amended to provide that a level D simulator could replace an aircraft. The intent was to recognize that technology had evolved. The rule was 21 years old.

[511] In or about 2005, Air Canada started hiring retired pilots for pilot checks. They did not fly aircraft, and 12 years later, they still do not fly aircraft. They maintain their currency by simulator. Transport Canada has medically unfit pilots who work as instructors for more than five years and who maintain their qualifications via simulators. Career instructors at CAE (a career training organization) train people in simulators. They do not have the opportunity to fly aircraft.

[512] The exemption applies to all Canadian private pilot licences, commercial pilot licences, and recreational pilots. It serves the interests of many people.

[513] The "Civil Aviation Directive - Exemption from Regulatory Requirements", effective November 1, 2009, defines the parameters and criteria for granting exemptions from regulatory requirements. The first type of exemption is provided for in the regulation itself. The second type is granted via executive decision pursuant to s. 5.9(2) of the *Aeronautics Act*.

[514] Mr. Collins stated that the director general of Civil Aviation holds the Minister's delegated authority to issue exemptions, which must be in the public

interest and must not affect safety. An exemption may be specific to an air operator, or it may be global. He stated that all pilots holding a licence can benefit from using the technology of a simulator instead of using an aircraft.

[515] The policy states that exemptions will be granted only in unforeseen circumstances that are unlikely to recur or when the regulation is being amended to address certain situations. Mr. Collins stated that the second situation applies in this case.

[516] The policy sets out the basic steps to follow in the exemption process in circumstances in which a client requests an exemption.

[517] Mr. Collins stated that this provision did not apply in the circumstances as this was a global exemption that was not a request by an individual client. There is no provision in the policy that addresses a global exemption. Section 5.9 of the *Aeronautics Act* was invoked because an assessment was made that the exemption was in the public interest.

[518] Mr. Collins referred to the assessment paper and recommendation prepared in support of the exemption by Transport Canada inspectors. It is signed by the Inspector in Commercial Flight Standards who prepared the assessment. The assessment refers to the public interest and aviation safety as follows:

…

> *It is in the public interest to allow Canadian Pilot Permit or Licence Holders to meet the recency requirements in an approved Level C or D full flight simulator instead* [of] *having to have flown an actual aircraft within the five (5) years preceding a flight. This exemption will permit pilots that are employed in management positions or by Transport Canada Civil Aviation (TCCA) to meet the recency requirements by means of the recurrent pilot training programs within their company or organization.*
>
> *Taking into account the technological advancements in flight simulation since the promulgation of the* Canadian Aviation Regulations *in 1996, the realism, fidelity and resolution of the current fleet of full-flight simulators provides a standard that is equal to or better than renting a small aircraft and an instructor from a local Flight Training Unit (flight school), which was envisaged during the development of the CARs.*

…

[519] The assessment refers to aviation safety as follows:

…

> *The risks attributable to introducing the option of using an approved Level C or D full-flight simulators are mitigated by restricting their use to pilots who successfully complete a pilot training program approved in accordance with a Subpart of Part VII of the* Canadian Aviation Regulations*.*

…

[520] The assessment was reviewed and approved by the Chief of Commercial Standards; the Director of Standards, who is responsible for ensuring the process was followed; Regulatory Affairs; and the directors general.

[521] Mr. Collins was asked whether Transport Canada took into account the fact that the CFPA had tabled a proposal in collective bargaining with respect to article 47 of the collective agreement. He replied that it did not and that Transport Canada's only obligation was to follow the process set out in the *CARs*. In his view, there was no obligation to consider the collective agreement proposals.

a. <u>Cross-examination</u>

[522] The exemption was not issued with the PACP bargaining proposals in mind. Commercial airlines such as Air Canada employ pilots to conduct evaluations who have retired from flying. The exemption permits those retired pilots to meet recency requirements in an approved simulator as opposed to being required to have flown an actual aircraft within the preceding five years.

[523] Mr. Collins was asked whether the exemption was drafted in part to deal with Transport Canada pilots meeting recency requirements. He stated that he did not draft the exemption.

[524] He was referred to the email that states that the bargaining agent will not stop bringing up this issue. He was asked whether he would agree that the exemption was drafted with the CFPA in mind. He replied that this was discussed with the CFPA in the steering committee. They were not able to reach an agreement.

[525] He stated that they wanted to resolve the issue. He was asked whether the exemption addressed the concern. He stated that it did, but partly. An exemption is

not an obligation. One does not have to follow the exemption. One can still fly on one's own.

[526] He confirmed that it was a global exemption in the public interest and that it applied to anyone at large holding a pilot's licence. The exemption details the practice for the last 15 to 20 years. Training to fly an aircraft in a simulator is deemed sufficient. Transport Canada does not fly aircraft; it carries out surveillance and monitors. If it were to fly aircraft, the story would be different.

C. <u>The CFPA's submissions</u>

[527] Pilots must maintain currency to meet their employment obligations. The employer's minimum qualification standards require maintaining valid licences and ratings. For a licence to be considered valid, a pilot must meet the regulatory requirements for recency and currency, in addition to holding a valid medical certificate. The idea of requiring recency and currency is to ensure that a pilot's skill sets are, at a very minimum, what they were when the pilot earned his or her certificate or ratings and that they are demonstrated in a real-world environment on an ongoing basis.

[528] The recency requirements are found in s. 401.05 of the *CARs* and in the corresponding standard in CAR 421.05. Section 401.05(1) of the *CARs* states that pilots may not exercise the privileges of their licences or ratings unless they have flown as a pilot-in-command or a co-pilot of an aircraft within the previous 5 years or have completed a flight review with a flight instructor and met the appropriate personnel licensing standard for the issuance of the licence within the previous 12 months.

[529] Mr. Holbrook testified that when notice to bargain was served in September 2014, the bargaining agent was concerned that a significant number of its members, including inspectors for major airlines, were not being provided with currency programs that met the regulatory requirements of s. 401.05 of the *CARs*.

[530] As a result, the bargaining agent's proposal on article 47 of the collective agreement and Professional Aviation Currency included the following requirement: "To meet the minimum requirement of the Canadian Aviation Regulations each employee must be assigned to a program that includes flying an aircraft at least once within any sixty (60) month period."

[531] On March 10, 2016, the Association learned that Transport Canada intended to implement a legislative amendment to s. 401.05 of the *CARs*. From then on, a pilot would no longer be required to act as a pilot-in-command or co-pilot of an aircraft but could satisfy the five-year recency requirement only via simulator.

[532] This dubious exemption to the *CARs* would permit maintaining pilot currency only via simulators.

[533] At no time was the bargaining agent consulted with respect to these changes. It was wholly excluded from the process. As a result of information obtained through an ATIP request, the Association learned that Transport Canada's predominant or only purpose for implementing the exemption was so that it would no longer be required to have Association members operate an aircraft at least every five years — an issue that is specifically on the table.

[534] By email dated April 20, 2016, Mr. Collins sent the following to certain members of Transport Canada's senior management:

…

> *Do we know where this stand in terms of priority? As mentioned during our last meeting, the global exemption will trigger the ability to start discussions with allowing for more efficiencies within TC's Flying Program that could be beneficial and in the interest of all parties.*
>
> [*Sic* throughout]

[535] On or about April 28, 2016, Mr. Collins followed up with this second email, reminding his colleagues that an exemption was required to address issues repeatedly raised by the bargaining agent:

…

> *Earlier this week the CFPA brought forward again the issue of CAR 401.05 (3). Basically the 5 year issue here will not go away and the CFPA will not stop bringing this back on the table until one of two things happens:*
>
> *a) That TC ensure that all AOs get to operate an airplane or helicopter at least once every five years; or*
>
> *b) An exemption is drafted as per below to ensure that Class C and D simulators are recognized as equivalent*

> *I trust we all understand that in the bigger picture of the discussion with the CFPA this CAR 401.05(3) issue is a major one and until resolved we are kind of at idle.*
>
> …

D. <u>The employer's submissions</u>

[536] The exemption to the regulations provides that a holder of a Canadian pilot permit or licence has the option to successfully complete a pilot training program in an approved Level C or D full-flight simulator.

[537] The CFPA alleged that the predominant or the only purpose for implementing the exemption to the regulation was so that its members would no longer be required to operate an aircraft at least every five years.

[538] The CFPA's allegation is unfounded as it fails to take into account that the decision to modify a regulation is applicable to the whole aviation industry in Canada and not only to CFPA membership. Transport Canada had to adapt to a new, more modern and fiscally responsible environment taking into account the technological advancements in flight simulation since the coming into force of the *CARs* in 1996.

[539] As indicated in the assessment paper prepared to provide the rationale for the exemption, the realism, the fidelity, and the resolution of the current fleet of full-flight simulators provides a standard that is equal to or better than renting a small aircraft and an instructor from a flight school. Those advanced simulators did not exist when the regulations were developed in 1996.

[540] It is important to outline the fact that the use of simulators, as Mr. Guindon and Mr. Collins testified, was already provided for in the approved APACPs, which had already been agreed to by the CFPA. Furthermore, simulators at Levels C and D are available worldwide and are used by leading carriers across the world for training their pilots.

[541] The simulator issue has already been examined, in *CFPA 2014*. The adjudicator confirmed as follows with respect to CFPA members: "The contractual right was a right to be able to maintain currency and not a right to fly."

[542] The exemption to the regulations, which allows Canadian pilots to meet the recency requirements in an approved Level C or D full-flight simulator instead of

having to fly an actual aircraft, was established in the public interest.

[543] The emails from Mr. Collins, referred to in the CFPA's arguments at paragraphs 535 and 536, do not constitute evidence that the exemption was developed only to prevent CFPA members from operating an aircraft at least every five years.

[544] As Mr. Collins testified, the simulators issue has been an outstanding item for a number of years for the steering committee. In his emails, he addressed the specific impact of an exemption on Transport Canada pilots. He does not have the authority to create an exemption to the CARs and was not involved in that process.

E. Analysis

[545] I find it helpful in approaching this issue to repeat the relevant statutory provisions in the *Aeronautics Act* and the *CARs*. That Act authorizes the Governor in Council to make regulations respecting the licensing of flight crew members, as follows:

> ***4.9*** *The Governor in Council may make regulations respecting aeronautics and, without restricting the generality of the foregoing, may make regulations respecting*
>
> > ***(a)*** *the accreditation or licensing of*
> >
> > > ***(i)*** *flight crew members, air traffic controllers, operators of equipment used to provide services relating to aeronautics and other persons providing services relating to aeronautics, and ….*

[546] The *CARs* provide as follows in ss. 401.03 and 401.05:

> ***401.03 (1)*** *Subject to subsection (2), no person shall act as a flight crew member or exercise the privileges of a flight crew permit, licence or rating unless*
>
> > ***(a)*** *the person holds the appropriate permit, licence or rating;*
> >
> > ***(b)*** *the permit, licence or rating is valid;*
> >
> > ***(c)*** *the person holds the appropriate medical certificate; and*
> >
> > ***(d)*** *the person can produce the permit, licence or rating, and the certificate, when exercising those privileges.*

…

401.05 (1) *Notwithstanding any other provision of this Subpart, no holder of a flight crew permit, licence or rating, other than the holder of a flight engineer licence, shall exercise the privileges of the permit, licence or rating unless*

(a) *the holder has acted as pilot-in-command or co-pilot of an aircraft within the five years preceding the flight; or*

(b) *within the 12 months preceding the flight*

(i) *the holder has completed a flight review, in accordance with the personnel licensing standards, conducted by the holder of a flight instructor rating for the same category of aircraft,*

(ii) *the flight instructor who conducted the flight review has certified in the holder's personal log that the holder meets the skill requirements for the issuance of the permit or licence set out in the personnel licensing standards, and*

(iii) *the holder has successfully completed the appropriate examination specified in the personnel licensing standards.*

(2) *Notwithstanding any other provision of this Subpart, no holder of a flight crew permit or licence, other than the holder of a flight engineer licence, shall exercise the privileges of the permit or licence in an aircraft unless the holder*

(a) *has successfully completed a recurrent training program in accordance with the personnel licensing standards within the 24 months preceding the flight; and*

(b) *where a passenger other than a flight test examiner designated by the Minister is carried on board the aircraft, has completed, within the six months preceding the flight,*

(i) *in the case of an aircraft other than a glider or a balloon, in the same category and class of aircraft as the aircraft, or in a Level B, C or D simulator of the same category and class as the aircraft, at least*

(A) *five night or day take-offs and five night or day landings, if the flight is conducted wholly by day, or*

(B) *five night take-offs and five night landings, if the flight is conducted wholly or partly by night ….*

…

[547] The *Aeronautics Act* provides for exemptions from the regulations as follows, which may be enacted by both the Governor in Council and the Minister of Transport:

…

> ***5.9 (1)*** *The Governor in Council may make regulations exempting, on any terms and conditions that may be specified in the regulations, any person, aeronautical product, aerodrome, facility or service, or any class of persons, aeronautical products, aerodromes, facilities or services, from the application of any regulation or order made under this Part.*
>
> ***(2)*** *The Minister or an officer of the Department of Transport authorized by the Minister for the purpose of this subsection may, on any terms and conditions that the Minister or officer, as the case may be, considers necessary, exempt any person, aeronautical product, aerodrome, facility or service, or any class of persons, aeronautical products, aerodromes, facilities or services, from the application of any regulation, order or security measure made under this Part if the exemption, in the opinion of the Minister or officer, as the case may be, is in the public interest and is not likely to adversely affect aviation safety or security.*

…

[548] On August 23, 2016, pursuant to s. 5.9(2) of the *Aeronautics Act*, the Director General, Aviation Safety Regulatory Framework, on behalf of the Minister of Transport, exempted holders of a Canadian private pilot licence, commercial pilot licence, airline transport pilot licence, multi-crew pilot licence, or recreational pilot permit - aeroplane from the recency requirements set out in s. 401.05(1)(a) of the *CARs*. The exemption reads as follows:

…

> *1. In addition to the recency requirements set out in subsections 401.05(2) and 401.05(3) of the CARs, the holder of a Canadian pilot licence or permit shall not exercise the privileges of the licence or permit unless, within five (5) years preceding the flight, the holder has:*
>
> *a) acted as pilot-in-command or co-pilot of an aircraft; or*
>
> *b) successfully completed a pilot training program, approved in accordance with the applicable Subpart of Part VII of the CARs, in a Level C or D full-flight simulator approved pursuant to section 606.03 of the CARs.*

…

[549] The exemption remains in effect until the earliest of September 1, 2021, the date on which any condition in the exemption is breached, the date on which an amendment to the appropriate provision of the *CARs* comes into effect, or the date on which the exemption is cancelled by the Minister.

[550] The bargaining agent asserted that in exempting all Canadian pilots from meeting the recency requirements of s. 401.05 of the *CARs* by completing a pilot training program in a Level C or D full-flight simulator as opposed to having flown as a pilot-in-command or co-pilot within the previous five years, the Minister of Transport contravened s. 107 of the *Act* by changing terms and conditions of employment after notice to bargain has been given.

[551] The first issue to be addressed is whether s. 401 of the *CARs* is a term or condition of employment between the employer and employees in the bargaining unit. Under the *Aeronautics Act*, the Governor in Council is mandated to make regulations with respect to the accreditation or licensing of flight crew members. The Governor in Council has done as much in s. 401.

[552] The regulation applies to the licensing requirements of all pilots for the entire aviation industry in Canada. Likewise, the exemption to the regulation applies to the licensing requirements, i.e., to maintaining the licences of all pilots in Canada.

[553] The collective agreement recognizes that maintaining professional aviation currency is necessary for both the employer to fulfil its mandate and for the employees to carry out their duties, and it obligates the employer to provide medically fit inspectors with the opportunity to maintain their currency through the use of departmental aircraft or an approved APACP. Currency is deemed to have been met by possessing and maintaining an airline transport pilot licence, which is also reflected in the PACP.

[554] The term or condition of employment provided for in the collective agreement and PACP is an obligation on the employer to provide opportunities to employees to maintain the validity of their licences.

[555] In my view, regulatory requirements for licensing all pilots in Canada as well as requirements for maintaining those licences enacted by the Governor in Council pursuant to the *Aeronautics Act* or exemptions to those requirements enacted on behalf of the Minister of Transport under the authority of that Act are not terms and conditions of employment between the employer and the employees.

[556] The employer has the obligation to provide opportunities for the employees to maintain the requirements of their licences both under the collective agreement and the PACP. This is a term and condition of employment caught by s. 107 of the *Act*. The authority of the Governor in Council or of the Minister of Transport to establish regulatory requirements for licensing all pilots in Canada or for establishing exemptions to those requirements are not terms and conditions of employment subject to s. 107 of the *Act*.

[557] Also of note, in *CFPA 2014*, the PSLRB found that both the collective agreement and the PACP in that context were a right to be able to maintain currency and not a right to fly.

VI. Issue 5: Communicating with the CFPA membership

[558] The Association alleged that by communicating with its members by means of surveys and meetings, the respondents undermined its PACP-related proposals and thus interfered with the formation or administration of an employee organization or the representation of employees by an employee organization contrary to s. 186(1) of the *Act*.

A. For the CFPA

1. Mr. Holbrook

[559] The bargaining agent's unfair-labour-practice complaint refers to meetings that were held and attempts that were made to bypass negotiations. Meetings were scheduled about the PACP, most recently with respect to a line flying option for it. At several meetings, the Director General in Ottawa briefed the bargaining agent's members using a slide deck entitled "Oversight Tour 2017". One slide, under the heading, "Initiating Transformation", states that "[s]everal projects have been closed and changes have taken place: - Establishment of a Project Management Office - Changes to the Transport Canada Civil Aviation Flying Program". The decks were used to brief two industry associations in 2016.

[560] Mr. Holbrook was involved in answering questions from bargaining agent members after the meetings had taken place. They asked the bargaining agent about the possibility of and its involvement in a line flying program. They wanted to know what progress had been made with the PACP and line flying. They were led to believe that the bargaining agent was somehow involved. They were interested in the options that management was discussing. They were disappointed to learn that management and the bargaining agent had had no talks and that the bargaining agent was not involved.

[561] The bargaining agent's view is that line flying could be an option included in Appendix A to the PACP if it were approved by the steering committee. However, it was not raised as an option or approved by that committee.

[562] Mr. Holbrook's opinion was that the fact the employer raised line flying with the bargaining agent's members put the bargaining agent on the defensive with respect to the proposal it had tabled in collective bargaining in October 2015 because the members were aware of the proposal.

[563] The bargaining agent has had involvement with the employer on a line flying program outside collective bargaining. In August 2016, Mr. Holbrook attended an Air Line Pilots Association safety forum in Washington, D.C. He was approached by Mr. Guindon, who indicated to him that the employer wanted the bargaining agent's agreement to a line flying program that it was working on.

[564] Mr. Holbrook advised Mr. Guindon that they were interested in discussing the concept, but because the parties were in collective bargaining negotiations, any discussion and agreement needed to take place at the bargaining table. He reminded Mr. Guindon of the *Act*'s statutory freeze provisions and cautioned him against taking any unilateral action. The issue of carrying out briefings directly with members came up. Mr. Holbrook requested that the employer cease having discussions about a potential line flying program directly with the membership and stated that if it wanted to discuss the possibility, it should do so at the bargaining table.

2. <u>Mr. McConnell - the line flying program</u>

[565] At the bargaining agents Christmas Party in 2016, Mr. Guindon approached Mr. McConnell because he wanted to talk about a few issues, one of which was a line

flying program. The discussion centred on how the bargaining agent needed to accept the line flying program that was being developed. Mr. McConnell told Mr. Guindon that all line flying discussions should be held at the bargaining table. The bargaining agent had tabled a proposal on October 27 of that year with respect to article 47.

[566] Mr. McConnell stated that the bargaining agent would welcome discussions on a line flying program at the bargaining table because it is really interested in such a program.

[567] Mr. McConnell's view was that line flying could have been accommodated within the bargaining agent's proposals with respect to article 47. It was not a new concept. The bargaining agent had proposed it twice to management. Both times, it had been turned down in previous rounds of bargaining.

B. For the employer

1. Mr. Guindon

[568] With respect to the specialty flying program, Civil Aviation conducted an overall review of the specialty training needed across the country. A new tool was created, the NATR, which showed the qualifications of all employees and who was maintaining which qualification. It permitted management to review the services it needed to provide to industry. For example, if Civil Aviation had eight inspectors qualified on the Airbus 320, questions could be asked in light of this information. Does the organization need eight inspectors, less than eight, or more than eight? This was done to ensure that Civil Aviation was properly setting priorities.

[569] Mr. Guindon referred to the Oversight Tour 2017 document, which had been prepared to support a visit to the branches of Civil Aviation and regional personnel with respect to the state of Civil Aviation. Other documents were directed to external stakeholders. They were titled "Air Transport Association of Canada Conference", dated November 16, 2016, and "Helicopter Association of Canada's Convention", dated November 12, 2016.

[570] As the director general responsible for leading the oversight and transformation program, Mr. Guindon needed to visit staff to discuss the department's performance and to share Civil Aviation's vision. For external stakeholders, the purpose of the tour was the same; however, he expected different questions with

respect to regulation development and enforcement activities.

[571] He tried to make these tours three times per year, to engage staff. However, when Civil Aviation encountered financial difficulties, he no longer left the office because there was no funding for the tours.

[572] When he started as the director general in April 2015, Mr. Guindon maintained a 90-day tour schedule. However, in 2016-2017, he conducted only one tour. In 2017, he completed a second tour in the Quebec region. The goal was to engage staff, discuss issues, and let them know where Civil Aviation was in terms of transformation. He wanted to hear their views. No one was better situated than front-line staff to advise him on organizational health and to help him improve his work plans for it.

[573] He was referred to the document entitled "Air Transport Association of Canada Conference November 16, 2016" and to the slide entitled "Initiating Transformation". The slide addresses changes to Civil Aviation. Its last bullet reads, "Changes to the Transport Canada Civil Aviation Flying Program". The audience was the Air Transport Association of Canada, which is a lobby group. Only employees at the leadership level were present.

[574] Mr. Guindon stated that he rarely speaks to bullets on slides. He stated that he did not discuss the bullet; nor did he receive any questions about it.

[575] The Helicopter Association of Canada is a lobby group of helicopter operators. A convention was held in Edmonton. Only senior executives representing the department's Prairie and Northern Region were present.

[576] Oversight Tour 2017 was used to discuss the state of the department's programs across the country to an audience of staff. The tours were attended by several hundred employees. There was nothing in the slide deck on the flying program.

[577] During the tours, the flying program was discussed. He was asked questions on it by employees in the Atlantic region.

[578] Employees wanted to know if any further cuts would come. He stated that the flying program continued to evolve.

a. Cross-examination

[579] Mr. Guindon was referred to an email dated March 31, 2016, giving notice of a videoconference to be held that day for employees in the employer's Prairie and Northern Region about an update to the Civil Aviation flying program.

[580] Mr. Guindon was not aware of the email or of the request. He expected directors general to have meetings of this nature as frequently as possible. It was suggested to him that the meeting was about changes that would be made to how the employer managed the program. Mr. Guindon agreed, stating that it was about the application of the program. He assumed that that was what the meeting was about. He was asked if he recommended that directors general have meetings with staff. He replied that they absolutely should; it is sound management. He was asked whether these types of meetings were held in other regions. He stated that he did not know.

[581] He was asked if he recalled receiving a letter from Mr. McConnell dated March 31, 2016, and entitled "Changes to the Professional Aviation Currency Program at Transport Canada". He replied that he had a vague recollection of it. He was asked if it was fair to say that the bargaining agent did not agree with the employer's actions. He stated that he assumed so and asked to read the letter. He was asked if the bargaining agent had asked him to stop communicating with its members in this manner. He agreed, stating that he had read as much.

[582] He was asked to confirm that clause 47.02 of the collective agreement provides that any alternate program must be approved by the steering committee. He acknowledged that line flying is not approved.

[583] He stated that some civil aviation authorities around the world permit inspectors to fly segments as a normal commercial pilot.

[584] He was referred to Oversight Tour 2017. He acknowledged that it was a presentation that was made to employees. He was asked if he had discussed changes to the flying program. He replied that he was asked questions in some locations. He stated that in some locations, he discussed a line flying program. He was asked if he told some of them that the department had discussed the feasibility of a line flying program with large operators. He said that it had.

C. The TSB communicating directly with employees

1. For the CFPA

a. Mr. McConnell

[585] Mr. McConnell referred to a document with the heading "NewLeaf Performance" and titled "Interview Guide - With Transport Canada Review of the TSB Air Pilot Proficiency (Currency) Training Program".

[586] The bargaining agent became aware through its members that the TSB would carry out a survey and that a service contract had been issued to review the cost of pilot proficiency training.

[587] The bargaining agent had no idea who NewLeaf Performance was and was concerned that NewLeaf would directly contact its members to obtain answers for the purpose of the survey without collaborating with it. It did not know what the impact of the study would be on its members. There could have been information in the document that was important to the bargaining agent.

[588] The complaint refers to the Director of National Operations launching a risk-assessment study with a view to cancelling ACP rides and oversight by CAIs in national operations entirely. Mr. McConnell was asked if he had asked for a copy from the employer. He could not recall that he had; nor did he have a copy.

2. For the employer

a. Mr. Laporte

[589] Mr. Laporte is the TSB's chief operating officer. The TSB operates at arm's length from other departments and agencies to ensure that there are no real or perceived conflicts of interest.

[590] The TSB's objective is to advance air, marine, rail, and pipeline transportation safety by conducting independent investigations into selected transportation occurrences to identify the causes and contributing factors and safety deficiencies evidenced by them. It makes recommendations to reduce or eliminate deficiencies, reports publicly, and follows up with stakeholders to ensure that safety actions are taken to reduce risks and to improve safety.

[591] Mr. Laporte was referred to paragraphs 50 and 50(a) of the complaint, which allege that the TSB was engaged in direct communication with CFPA members. In particular, it was alleged that in February 2016, the CFPA learned that the TSB had hired a consultant to review its PACP and that at least one of the CFPA's members was directed to complete a survey on current pilot training and currency.

[592] It was further alleged that despite multiple requests, the employer refused to provide a copy of the report until the collective bargaining process was complete and a new collective agreement was in place. The TSB advised that discussions on updating its PACP would take place only after a new collective agreement had been entered into.

[593] Mr. Laporte stated that for a number of years, management and the bargaining agent had discussed the program from both a cost and an efficiency perspective. Those discussions led to a difference in opinion concerning licensing requirements and applying the *CARs*. Management decided to obtain an independent opinion with respect to these issues to discuss with the bargaining agent. It hired a contractor to collect facts in an unbiased and objective manner and to render an opinion on the current PACP, under which pilots maintain currency.

[594] At a Labour-Management National Consultation Committee meeting on December 2, 2013, the CFPA's then president reminded the TSB's representatives that should management have an issue that it be brought to his attention before negotiations got underway. Mr. Laporte responded that the TSB was looking into the cost of and how the department was meeting the requirement of maintaining flying proficiency.

[595] The Director of Air Investigations had tasked one of his employees to consult with his colleagues and to make some draft changes to the PACP in preparation for discussions with the CFPA.

[596] However, by the time he got around to it, the contract negotiations had started, so nothing was done with the draft document, and it was placed on hold. The draft is dated September 2014. The employee who was tasked with producing the document was a CFPA representative.

[597] Changes being considered related to the tracking and reporting of the program, clarification, discussions with respect to medically unfit pilots, and proposed

changes to the allowance for medically unfit employees. Once notice to bargain was given, the review stopped, and it went no further.

[598] On February 4, 2016, a Labour-Management National Consultation Committee meeting was held, at which Mr. Laporte briefed both the bargaining agent and management on the development of the new strategic plan for 2016 through 2021.

[599] He provided an update on the corporate risk profile, which the executive committee had approved on January 19, 2016. It included the following key risks: managing workload and expectations in a changing environment, challenges to credibility, maintaining a knowledgeable workforce, managing information effectively, and employee well-being.

[600] The strategic risk of maintaining a knowledgeable workforce was that there would be a medium-to-low likelihood that the TSB would not be able to maintain such a workforce, which could result in a moderate negative impact on its reputation or ability to carry out its mandate.

[601] Factors relevant to this application that were identified and that could affect the TSB's ability to recruit, develop, and retain a knowledgeable workforce included perceived inequities in approving employee learning and development activities and challenges in keeping its employees' skills current with the constantly changing operational environment.

[602] The impact identified was that the lack of currency in employee knowledge and expertise could have a moderately negative impact on the TSB's ability to complete quality investigations, which in turn could result in a loss of credibility. There was a low likelihood that a TSB employee would not be adequately trained or experienced to perform his or her basic duties, and there was a medium likelihood that some employees might not be fully current on all the knowledge and skills required to fulfil their duties in a constantly evolving environment, i.e., of different aircraft.

[603] A number of risk control options were identified, such as having managers identify gaps between current investigator skills and competencies and the evolving job requirements, to prioritize new training, or to explore a broader range of options to address employee learning and development needs. Mr. Laporte stated that one of those options was line flying. These documents were relevant to the strategic plan as

they identified risks upon which the strategic plan was built.

[604] On January 25, 2016, Mr. Laporte sent a draft of the 2016-2021 strategic plan to the TSB for its review and comments and as well to all managers for their review and comments.

[605] On February 5, 2016, the TSB's chairperson sent a copy of the new strategic plan to all employees. On February 6, 2016, the TSB's manager of human resources sent a copy of it to all bargaining agents, noting that it would be presented at an ad-hoc meeting on May 10, 2016.

[606] Mr. Laporte was asked what in the strategic plan was relevant to the PACP. He referred to the second one in the part entitled "Our Strategic Objectives", entitled "Improving", in particular the strategy of "Revising our investigation policies, procedures and tools", and to the third one, entitled "Modernizing", in particular the strategies of "Becoming a learning organization" and "Streamlining corporate policies and processes".

[607] The annual business plan identified action plans over each of five years. It was intended that the PACP review would take place once collective bargaining concluded.

[608] He was asked how the review would fit with collective bargaining. He stated that the TSB was in the five-year plan. The Director of Air Investigations had advised that he would retire. He agreed to take on the assignment of updating information on the PACP while the TSB staffed his position. He felt that he could do some data collection that could be turned over to the new director so that the TSB could proceed once collective bargaining concluded.

[609] Mr. Laporte was not aware of proposals that the CFPA had made in bargaining.

[610] He was asked why the PACP was not discussed in bargaining. He stated that it was discussed and negotiated in the steering committee, separate from collective bargaining.

[611] He stated that the Director of Air Investigations was at the bargaining table.

[612] He was asked how the TSB's intention to resume discussions of the PACP after collective bargaining was conveyed to the bargaining agent. He stated that a discussion

took place at the Labour-Management National Consultation Committee meeting on February 4, 2016. It was not part of the formal discussion. It was indicated that the TSB would start collecting information for later use. There was no reaction from the CFPA's representative present at the meeting.

[613] The decision was made to collect information through a consultant with no vested interest in the outcome; he or she was just to gather data. The Consultant was not a pilot and did not work for Transport Canada.

[614] The request for contract states that the TSB "… requires the services of an external consultant to do an independent objective assessment as to the cost efficiency and effectiveness of the current TSB pilot's proficiency training program."

[615] Mr. Laporte reiterated that he had obtained different interpretations from different people and he wanted to look at the practices.

[616] The contract was awarded to NewLeaf Performance. The partner responsible for the contract was a chartered accountant with expertise in human resources management.

[617] The Consultant was asked to interview five people, the Director of Air Investigations, TSB; the Manager, International Operations and Major Investigations, TSB; the Manager, Regional Operations, Quebec; the Director, Flight Operations, Aircraft Services, Transport Canada; and the Program Manager, Commercial Flight Standards and Licensing, Transport Canada.

[618] He was asked if he was aware whether anyone interviewed was a CFPA member. He stated that at the time, he was not aware that any were CFPA members. He stated that he now understands that the Program Manager, Commercial Flight Standards and Licensing, was a CFPA member. The Director of Civil Aviation at Transport Canada had provided him with the manager's name.

[619] He referred to a chain of emails commencing on February 25, 2016, when the Director General, Aviation Safety Regulatory Framework, at Transport Canada, wrote to the Director of Air Investigations at the TSB, advising that the Program Manager, Commercial Flight Standards and Licensing, at Transport Canada, would be the contact for the survey.

[620] The Program Manager did not make himself available for an interview with the Consultant, although he provided basic regulatory information and recommended that the Consultant contact the CFPA for additional background.

[621] Only after a complaint was made did Mr. Laporte learn that the Program Manager was a CFPA member. All managers at the TSB are excluded from collective bargaining. He assumed that because that person had the title of manager, he was excluded.

[622] On May 5, 2016, in correspondence to the Consultant, Mr. Laporte advised that the Manager was a member of the bargaining agent. The Consultant replied that that explained why the Manager had cancelled interviews and that there was never an opportunity to discuss in detail the practices in place at Transport Canada.

[623] In preparing to respond to the complaint, Mr. Laporte wanted to confirm that the Project Manager was in fact the subject matter expert on the *CARs*. That was confirmed. He was asked if, had he known that the Manager was a bargaining agent member, it would have changed anything. He replied that his interest was finding a subject matter expert. It had nothing to do with the CFPA. It was not intended that he be interviewed as a bargaining agent member but as an expert on licensing commercial pilots in Canada.

[624] As noted, the attempt to interview the Project Manager was unsuccessful. As far as Mr. Laporte was aware, no one else was interviewed.

[625] Mr. Laporte was referred to the list of questions in the interview guide with Transport Canada prepared by the Consultant. It was prepared for an interview with the Director, Flight Operations, at Transport Canada. The Consultant had prepared two lists of questions for the interviews of the three TSB members and the Director, Flight Operations, at Transport Canada, for the purpose of comparing the two organizations. He was asked whether the interview questions were provided to the Program Manager at Transport Canada. As far as Mr. Laporte was aware, the Manager was not asked to answer questions.

[626] Mr. Laporte was referred to the allegation in the complaint at paragraph 50 that the Member was directed to complete a survey. He replied that there was no survey. He was asked whether he knew of any other document that the Member was

required to complete. He stated that he was not aware of any. His role was to provide information on policies, standards, etc.

[627] Mr. Laporte was asked why he chose to pursue this issue when he did as opposed to waiting until collective bargaining ended. The opportunity had been identified in the strategic priorities. He knew it had to be addressed. There was a small budget surplus, and the TSB was about to hire a new director of air investigations. He thought that it was a good opportunity to carry out the preparatory research to be ready to proceed once a new director was in place and collective bargaining had completed.

[628] The Consultant completed the work at the end of March or the beginning of April 2017, which was a few days late. Mr. Laporte reviewed the report. Some areas were not clear, and he required clarification. The Consultant provided him with the final report, which was locked up and was not shared with TSB management. By the time he received the final report, the TSB had received the complaint. The report was locked up. The file was not moved forward and will not until collective bargaining is completed.

[629] On February 17, 2017, he emailed a CFPA Representative who had been asking for background documentation in relation to the TSB's PACP policy. The email reads in part as follows:

…

> *As you know, the employer and the CFPA are currently engaged in collective bargaining and there is a statutory freeze on the terms and conditions of employment. I therefore would like to remind you that I have placed a hold on the review of the TSB's PACP Policy. As I indicated to Greg McConnell on May 10, 2016 (day of LMCC special meeting) and to you on June 23, 2016 (during my visit to the TSB regional office) any work on the review and update of the PACP Policy will remain on hold until two things are completed:*
>
> *1 — a new DOI Air is hired (now completed)*
>
> *2 — collective bargaining is completed (still on-going [sic]).*
>
> *You will recall that we both agreed that there is a clear need to update our policy for a number of reasons. I have committed to working with you and the CFPA in doing such a*

> *review in accordance with the proper protocols and rules. I have also indicated that in the interim there would be no changes to the way we implement the PACP. That is, we will continue to conduct business in the same manner as we have for the past two years (i.e. since collective bargaining has started).*
>
> *The DOI Air and managers have been told not to engage in any discussions on this topic other than approving the 2017-2018 PACP for eligible employees in accordance with the existing policy. Pending the review of the program, should you have any issues or concerns about the PACP Policy please contact me directly.*

[630] Mr. Laporte was asked if he had considered whether the contents of the Consultant's report might be relevant to the CFPA's position at the bargaining table. He replied that as far as he was concerned, he saw no link to collective bargaining.

b. Cross-examination

[631] Mr. Laporte was not part of the bargaining team. The TSB's representative was the Director of Air Investigations.

[632] He was not certain of the exact date that notice to bargain was given. He believed it was in the latter part of 2014. He did not know whether the employer or the bargaining agent provided the notice. He recalled that that was when the TSB stopped its review of the PACP. The Director of Air Investigations decided to stop it. Since he was the TSB's representative on the bargaining team, he was aware of the procedural requirements. Mr. Laporte was aware that a statutory freeze takes place after notice to bargain is given.

[633] Mr. Laporte confirmed that he was not aware of the CFPA's bargaining proposals. He acknowledged that the Director of Air Investigations would have been provided with them, and he was made aware of them in early 2017.

[634] He acknowledged that the collective agreement refers to the PACP at article 47. He was asked if he was aware that the TSB refused to discuss the PACP at the bargaining table. He was asked if the TSB's position was that the PACP was to be negotiated in the steering committee, after collective bargaining. He replied that it has always been that way. He was not aware whether PACP proposals had been made at the bargaining table before the current round.

[635] The steering committee had not met for some time, not since the beginning of the fiscal year. He had instructed management not to discuss revisions to the PACP but to apply the existing program.

[636] In 2014, the Director of Air Investigations instructed an employee to make some draft changes to the PACP in preparation for discussing it with the CFPA. It was pointed out to him that that employee was not a bargaining agent representative. Mr. Laporte replied that he thought that that person was a bargaining agent member, and that at some point, he had been a representative.

[637] Mr. Laporte confirmed that the 2014 review was put on hold once negotiations started. It was suggested to him that in 2016, he started the separate process with a consultant. He stated that the 2016 review was not part of the 2014 review.

[638] He confirmed that at the Labour-Management National Consultation Committee meeting of February 4, 2016, he briefed the bargaining agents on the five-year strategic plan. He was referred to his testimony in which he indicated that updating the PACP fit within the priorities outlined in the plan. He confirmed that no action items listed in the minutes refer specifically to the PACP.

[639] He was asked whether he specifically advised the bargaining agents that updating the PACP fit within the priorities. He stated that at the end of the meeting, he mentioned that the TSB would collect data, in preparation for a future review. He spoke with Mr. Holbrook. He believed that he mentioned that he would hire a consultant. He has a reference to that effect in his notebook. He recalled giving Mr. Holbrook a heads up that data would be collected in preparation for the review.

[640] He confirmed that the Director General of the Aviation Safety Regulatory Framework at Transport Canada had given him the name of the Program Manager of the personnel licensing group at Transport Canada to be interviewed for the TSB review. He confirmed that he was also given the name of the Director, Flight Operations, Aircraft Services, Transport Canada. He was asked whether the Director was on the employer's negotiating team. He replied that he did not know.

[641] He confirmed that he assumed that the Program Manager of Personnel Licensing was not a bargaining agent member. Employees holding the title of "Manager" at the TSB are excluded from the bargaining unit. He also thought that the

Director General, Aviation Safety, at the TSB would not provide a name that would raise any issues related to ongoing collective bargaining.

[642] It was suggested to Mr. Laporte that he was not supposed to deal with bargaining agent members during collective bargaining. He stated that he saw no reason that he could not collect information so that management could be prepared to discuss the PACP with the bargaining agent.

[643] He confirmed that the Manager of Personnel Licensing recommended that management contact the bargaining agent.

c. Re-examination

[644] The Director of Air Investigations, who is on the bargaining team, shares information only on a need-to-know basis with Mr. Laporte, such as when the TSB bargaining team needs to receive instructions.

[645] The TSB did not instruct the Consultant to contact the bargaining agent as it was not part of the contract. The job was to collect information, not to review the current policy. The whole purpose was to collect information from the source. He wanted the Consultant's opinion, not that of management or the bargaining agent.

D. The CFPA's submissions

[646] All this time, Transport Canada and the TSB had reached out to the Association's members to discuss the changes to the PACP and to gather information on training and qualifications. These actions had the consequence of undermining the Association's PACP-related proposals.

[647] Starting on or about March 31, 2016, employer representatives met directly with the Association's membership to discuss the changes it had made to the PACP. Well into 2017, Transport Canada's management gave briefings to Civil Aviation employees, including members of the Association, in Oversight Tour 2017 campaign. Mr. Guindon acknowledged that the PACP and line flying were discussed during these briefings.

[648] Mr. Laporte acknowledged that in early 2016, the TSB sought to collect information on the PACP so that it would be ready to proceed to review it "once collective bargaining was completed."

[649] The TSB engaged NewLeaf Performance to collect information and to produce a report on the cost efficiency and effectiveness of its pilot proficiency training program. The TSB mandated it to interview three of its employees and two from Transport Canada, one of whom was a bargaining unit member.

[650] Mr. Laporte testified that he assumed that both Transport Canada employees were not bargaining unit members, given that the TSB was well aware that it should not hold discussions with bargaining agent members directly, given the ongoing collective bargaining process.

E. The employer's submissions

[651] The CFPA alleged that Transport Canada and the TSB reached out to its members to discuss the changes to the PACP and to gather information on training and qualification, which undermined its proposals.

The CFPA has not provided any evidence that Transport Canada, through Mr. Guindon's Oversight Tour 2017, addressed its decision on the PACP or discussed those issues directly with CFPA members. The only mention to a change to the PACP can be found in the presentations, which were made to the Air Transport Association of Canada and the Helicopter Association of Canada, not to CFPA members. Mr. Guindon's role was to inform these associations and to answer questions about the management of the alternate and RFP of the PACP.

[652] Mr. Guindon testified that in his oversight tour, which was addressed to Transport Canada employees, he always provided a question period to them at each regional visit. They asked questions about the flying program, and he provided answers. He did not discuss the changes to the management of the PACP training programs.

[653] As for the allegations against the TSB, Mr. Laporte testified that the collection of information and the report required by NewLeaf Performance were part of a process separate from the collective agreement negotiations. In fact, article 47 requires the employer to provide its employees with the opportunity to maintain their professional aviation currency. Clauses 47.04 and 05 further indicate that the details as to the criteria, procedures, and policy for the professional aviation currency implementation are to be established via the mutual agreement of the employer and the

bargaining agent.

[654] On one hand, the collective agreement indicates that there must be a PACP. On the other hand, it provides for each government organization to discuss and negotiate with the bargaining agent the specific application of the program within that organization.

[655] Mr. Laporte testified that the CFPA has always recognized and accepted this, until now, and it has always negotiated separate policies with Transport Canada and the TSB. Such negotiations have always taken place after a collective agreement was ratified.

[656] With respect to TSB and Transport Canada employees interviewed by NewLeaf Performance in preparing the report, Mr. Laporte testified that the Program Manager, Commercial Flight Standards and Licensing, at Transport Canada was contacted strictly as a subject matter expert. He was referred to Mr. Laporte by the Director General, Aviation Safety, at Transport Canada.

[657] Mr. Laporte also testified that he had been unaware that the Manager, the expert responsible for pilot licensing standards at Transport Canada, was not an excluded employee. In fact, he is a manager, and Mr. Laporte testified that all managers at TSB are excluded employees. Therefore, at no time was he considered a member of the bargaining unit.

F. <u>Analysis</u>

[658] I understand that the bargaining agent has alleged that ss. 185 and 186(1)(a) of the *Act* were breached, which, at the material times, stated as follows:

> *Unfair Labour Practices*
>
> ***185*** *In this Division,* **unfair labour practice** *means anything that is prohibited by* subsection *186(1) or (2),* section *187 or 188 or* subsection *189(1).*
>
> *Unfair labour practices — employer*
>
> ***186 (1)*** *Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> ***(a)*** *participate in or interfere with the formation or*

> *administration of an employee organization or the representation of employees by an employee organization ….*

[659] Section 186(5) of the *Act* provides that an employer does not commit an unfair labour practice only by reason of expressing its point of view, so long as it does not use coercion, intimidation, threats, promises, or undue influence.

[660] In *Canada Council of Teamsters v. FedEx Ground Package System, Ltd.*, 2011 CIRB 614 at para. 81, the Canada Industrial Relations Board (CIRB) dealt with the virtually identical provision in the *Canada Labour Code*. From the case law, that board derived the following non-exhaustive principles:

- *An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.*

- *In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?*

- *The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.*

- *The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the* Code*; a factual analysis must be conducted to determine whether the manner in which this opinion is expressed contains an element of coercion, intimidation, threats, promises or undue influence.*

- *The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used. Circulation of written material is the preferable mode, as the choice of written text is less intrusive than captive audience meetings or private discussions with employees.*

[661] The Board applied the principles outlined in that CIRB decision in *Lala v.*

United Food and Commercial Workers Canada, Local 401, 2017 FPSLREB 42, in which it found that an employer representative did not commit an unfair labour practice when he made comments that could have been seen as supportive of an employee leading an application for decertification.

[662] In this case, the evidence does not support the conclusion that Mr. Guindon's Oversight Tour 2017 addressed the PACP or that he initiated discussions directly with CFPA members on those issues, although he did respond to questions from employees about a line flying program. He did not discuss changes to the PACP with them. Presentations to the Air Transport Association of Canada and to the Helicopter Association of Canada did refer to changes to the PACP; however, the audiences were not employees who were members of the bargaining agent.

[663] With respect to the allegations about the TSB, Mr. Laporte testified that NewLeaf Performance's collection of information when it prepared the report was to assist the TSB in discussions with the bargaining agent for the purpose of revising the PACP subsequent to bargaining, which had always taken place after the collective agreement had been ratified. In any event, the report was placed on hold.

[664] With respect to the allegation that the Program Manager, Commercial Flight Standards and Licensing, at Transport Canada, who was a bargaining agent member, was identified as a subject matter expert for the purpose of being interviewed by NewLeaf Performance, I accept Mr. Laporte's evidence that he believed that the Manager was excluded from the bargaining unit as all managers in his organization were excluded. When he learned that the Manager was a member, no further attempt was made to interview him.

[665] I am unable to conclude on the evidence that any force, threat, undue pressure, or compulsion was exercised by either representatives of Transport Canada or the TSB in any expression of opinion referred to in the evidence; nor do I conclude that the TSB's approach to the subject matter expert with respect to the qualifications of pilots whose position is in the bargaining unit in the circumstances of this case interfered with the bargaining agent's representation of employees.

VII. Issue 6: A part-time permanent employee

[666] The Association alleged that the respondents breached the statutory freeze on

terms and conditions of employment, contrary to s. 107 of the *Act*, by making a unilateral decision to hire at least one part-time permanent employee, despite there being no provision for doing so in the collective agreement.

A. For the CFPA - witness and submissions

1. Mr. McConnell

[667] Mr. McConnell received information from the Quebec region that the employer was to hire a part-time employee. He contacted Cynthia Nash, a Treasury Board negotiator, on September 14, 2015, for more information.

[668] Ms. Nash replied on October 6, 2015. She advised Mr. Holbrook that she had been able to determine that there was one part-time employee in the Quebec region, and as such, the employer would bring forward part-time language at the next bargaining session for consideration. The email also notes the following:

…

> *Greg* [Holbrook] *thought that perhaps an MOU existed which covered this off. I couldn't find that but I did track down a Compensation Directive [that is archived but still active] that discusses compensation for part-time* [employees] *regarding the EDA* [extra duty allowance]*….*

…

[669] Mr. McConnell stated that if Transport Canada begins to hire part-time employees into the AO Group, provisions should be incorporated into the collective agreement. He stated that there is presently no reference to part-time hours of work in the collective agreement. He also stated that no part-time language was tabled in bargaining by the employer.

a. Cross-examination

[670] Mr. McConnell was asked if he knew who the part-time employee was in Quebec. He replied that he did at the time and that he could recall the circumstances. In August or September 2015, he raised the issue with Ms. Nash, who confirmed to him that a part-time employee had been hired and that the employer would come to the bargaining table with related language, but that did not happen.

2. Submissions

[671] In late 2015, Transport Canada hired a person into a part-time indeterminate position.

[672] The collective agreement makes no provision for indeterminate employees being employed part-time. In fact, article 18, entitled "Hours of Work", requires that the employees' workweek be 37.5 hours consisting of 5 consecutive days, from Monday to Friday. The Association takes the position that part-time employment is neither provided for nor permitted under the terms of the collective agreement.

[673] Upon learning of Transport Canada's actions, the Treasury Board negotiators advised that the employer would propose an amendment to article 18 to permit hiring part-time employees. To date, no such proposal has been presented.

B. The employer's submissions

The CFPA did not provide any evidence on the part-time employee allegation. The only document provided was Exhibit 41, which has no information on that employee's situation and most importantly, no information on the specific circumstances surrounding the employee's hiring. In cross-examination, Mr. Holbrook was also unable to provide any indication on that individual's hiring.

[674] As established in the 1995 decision *National Capital Commission*, the onus rests with the party alleging a breach of the freeze provision. The CFPA did not satisfy its onus of proof on this aspect.

C. Analysis

[675] Although the evidence of the bargaining agent is not as complete as one would prefer, it does not appear to be disputed that in late 2015, Transport Canada hired a part-time indeterminate employee. This was confirmed by the Treasury Board Negotiator, who had been able to determine that there was one part-time employee in the Quebec region.

[676] The collective agreement makes no provision for part-time employment, and the hours-of-work provision mandates only a full-time workweek.

[677] I am satisfied that that hiring of a part-time indeterminate employee contravened the provisions of the collective agreement and the statutory freeze

provision in s. 107 of the *Act*.

VIII: Issue 7: Fitness-to-work after 20 days' absence

A. For the CFPA

1. Mr. McConnell

[678] Mr. McConnell referred to the proposed "Public Service Short-Term Disability Plan (STDP)" dated May 13, 2015, which the Treasury Board tabled. The bargaining agent tabled a counterproposal in article 24, which remains on the table. Article 24 of the expired collective agreement deals with sick leave.

[679] Mr. McConnell was contacted by and was forwarded documents from a Transport Canada air carrier inspector, who was a member of the bargaining unit. She had been absent from work more than 20 days, and the employer had asked her to produce a medical note indicating that it was safe for her to return to her work and that there were no restrictions with respect to her reintegrating into normal work activities. Mr. McConnell referred to an email from Mr. Collins to her dated March 7, 2016, setting out the reasons for the request and stating, "Please note that the CFPA was also consulted with regards to such request [*sic*] in the past so they are familiar with the process and reasons for requesting the note."

[680] Mr. McConnell stated that he was not aware of any such policy and that nothing in the collective agreement deals with that issue. He referred to clause 24.03 of the collective agreement.

[681] He also referred to a series of emails from one of his members, another air carrier inspector, dated February 10, 2016, dealing with an Acting Chief who requested a doctor's note stating that a doctor had agreed that he was fit to return to work following a long-term illness. His doctor was away. The employee returned to work without producing a medical report. He ultimately provided it. Mr. Collins thanked him for providing it and stated as follows:

…

> *I would like to confirm that the expectation is, for those that take extended medical leave, that they provide such a note on the first day they return to work. I trust that you understand that the reason for doing so is to ensure that the person is fit and is not restricted in any way to conduct any activity he is*

> *employed for. This of course is mainly in the interest of safety of the individual.*
>
> …

[682] Mr. McConnell advised him that he did not have to produce a medical report and that a self-declaration was sufficient. Mr. McConnell referred to article 24 of the collective agreement, which reads as follows:

> ***24.02*** *An employee shall be granted sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:*
>
> *(a) he or she satisfies the Employer of this condition in such manner and at such a time as may be determined by the Employer,*
>
> *and*
>
> *(b) he or she has the necessary sick leave credits.*
>
> ***24.03*** *Unless otherwise informed by the Employer, the statement signed by the employee describing the nature of illness or injury and stating that because of this illness or injury the employee was unable to perform his or her duties shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 24.02(a).*

a. Cross-examination

[683] Mr. McConnell was asked to acknowledge that the employer may ask for a medical certificate. He replied that that was not done. The employer wanted a medical certificate after the employee had returned to the workplace. His view was that the employer could ask for a medical certificate to justify an employee being sick but not from someone returning to the workplace. He was asked to confirm that clause 24.03 allows for an employer to ask for a medical certificate. He replied that it does not permit the employer to ask for a medical note for an employee to stay in the workplace. It is not covered under article 24. He stated that the employee had quit employment and that no grievance was filed with respect to this issue.

B. For the employer

1. Mr. Collins

[684] Mr. Collins referred to the email chain involving the Transport Canada air carrier inspector who had been on medical leave for close to a month. Upon her return,

the employer asked her doctor to confirm that she was fit for duty. She had submitted a medical note before going on leave. If an employee is on medical leave in excess of 20 days, the employer requires that the employee produce a medical note stating that he or she is fit to return to work, which he stated he has been doing for many years.

[685] One of Mr. Collins's inspector employees had to have heart surgery. Before the employee could return to a flight deck, Mr. Collins had to ensure that it was safe for the inspector to return to work and that if there were restrictions, they could be accommodated.

[686] Mr. Collins was asked if an employee had been absent on medical leave for one month, why could he not assume when the employee returned to work, he or she was fit for duty? He replied that there have been situations in which employees took ill.

a. Cross-examination

[687] Mr. Collins acknowledged that there is currently no provision in the collective agreement that obligates an employee to provide a sick note on his or her return to work after an absence of more than 20 working days. Similarly, he acknowledged that no policy is in place. He stated that Labour Relations had advised him that requesting a doctor's note in such circumstances is the best practice.

[688] When an employee is absent on sick leave beyond 20 days, both the manager and the employee are emailed about how to proceed, and the duty to accommodate is outlined. "LEX" is the system in which leave applications are submitted and approved. It prompts the email to be sent after 20 working days have passed. Human Resources recommends getting in touch with the employee before he or she returns to work to ensure that the return is safe and that he or she is fit for duty. Mr. Collins is not privy to the reasons an employee proceeds on sick leave. Employees have returned to work in a state unfit for work.

[689] Mr. Collins stated that this was normal practice for the airlines. He was asked whether AOs, who are pilots, have an obligation to self-report. He replied that the fact that they should self-report does not mean that they do.

b. Re-examination

[690] Mr. Collins identified the standard email that the LEX system prompts to send

when an employee has been absent for more than 20 working days. The email requests that the employee contact Compensation Operations to ensure that all the processes and procedures established to provide employees with sick-leave benefits are implemented in a timely manner.

C. The CFPA's submissions

[691] Unilaterally, and without consulting the CFPA, the employer began to require that employees obtain medical assessments before permitting them to return to the workplace or resume their duties.

[692] Following its notice to bargain, the employer presented its sick leave proposal in October 2014. Since the notice was served, Mr. Collins has required some Association members to obtain a medical assessment, at their expense, to demonstrate their fitness to return to work.

[693] By email dated March 7, 2016, Mr. Collins advised that he had chosen to require a fitness-to-work certificate for any employee who has been absent from the workplace due to injury or illness for more than 20 days.

[694] To date, no policy requires AOs to obtain fitness-for-duty medical certificates, at their own expense, before returning to work following a period of sick leave. Similarly, there is no such provision in the collective agreement.

D. The employer's submissions

[695] The CFPA alleged that the employer made a unilateral decision to require these medical certificates.

[696] The respondents would like to re-establish the fact that the employer has always required a fitness-to-work certificate on a case-by-case basis, in the interests of safety. Mr. Collins testified that he always used 20 days as a benchmark and that it is not a new practice. Fitness-to-work certificates were requested to ensure that the employees were fit to resume all their duties after a prolonged period of leave due to illness, especially heart surgery or mental illness.

[697] The employer did not establish any new policy on fitness-to-work certificates. However, it has an inherent obligation to ensure its employees' safety and, in this case, public safety. In *Grover* (see *Canada (Attorney General) v. Grover*, 2007 FC 28 at

para. 65), the Federal Court addressed the employer's obligation to ensure workplace safety and the right to ask for a return-to-work medical note for safety reasons as follows (see the appeal in 2008 FCA 97):

> *65 … it is also well established that employers have an important obligation to ensure a safe workplace. This means employers have the right to know more about an employee's medical information if there are reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace.*

[698] The Ontario Divisional Court affirmed the arbitral jurisprudence in this respect. In *Ontario Nurses' Association v. St. Joseph's Health Centre* (2005), 76 O.R. (3d) 22 at para. 19 and 20, it ruled as follows:

> *[19] We were referred to a number of arbitral cases canvassing the issue of what information an employer can require of an employee returning from a medical leave. Not surprisingly, in view of the privacy interests involved, limits of reasonableness have been developed by arbitrators.*
>
> *[20] The weight of the arbitral cases is that employers are entitled to seek medical information to ensure that a returning employee is able to return to work safely and poses no hazard to others. The employee's initial obligation is to present some brief information from the doctor declaring the employee is fit to return. If the employer has reasonable grounds on which to believe that the employee's medical condition presents a danger to herself or others, the employer may ask for additional information to allay the specific fears which exist, explaining the reasons to the employee. The request must be related to the reasons for absence; no broad inquiry as to health is allowed. In my view, these are sound principles.*

[699] In the present case, the employees were pilots returning from a long period of sick leave. As Mr. Collins testified, he needed to ensure a safe return and that a pilot would be in full control of his or her capacity. The employees work with aircraft and have a responsibility to the flight crew and passengers. This is not a matter of having or establishing a specific policy but rather an obligation, on a case-by-case basis, to ensure that an employee is able to return to work safely and poses no hazard to others.

E. <u>Analysis</u>

[700] The CFPA's allegation is that the respondents made a unilateral decision to

require fitness-to-work certificates for employees who had been absent from the workplace for more than 20 days contrary to s. 107 of the *Act*. The CFPA asserts that this requirement only commenced after the notice to bargain.

[701] The only matter that I must decide here is whether the respondents' practice has contravened s. 107 of the *Act*.

[702] The only evidence before me that this was a new practice post-notice to bargain are the two 2016 cases of air carrier inspectors returning to work after sick leave in 2016, and the testimony of Mr. McConnell that he was not aware of this practice.

[703] I accept that Mr. McConnell may not have been aware of this practice, but he has only been the chairperson since 2015, i.e., after the notice to bargain. In contrast, I have been presented with testimony and documentary evidence that this practice predated the notice to bargain. Mr. Collins testified that he had been engaging in this practice for many years. Moreover, he referred to the March 7, 2016, email to one of the air carrier inspectors that stated, in part: "Please note that the CFPA was also consulted with regards to such request in the past so they are familiar with the process and reasons for requesting the note." Importantly, Mr. Collins was not cross-examined on either his testimony or the above-noted reference in the email.

[704] As George Adams has explained, in his text *Canadian Labour Law, Second Edition*, at page 10-91: "The 'business as before' view … is not concerned with a freeze of the status quo per se but rather with changes out of the pattern of the past."

[705] Based on the evidence before me, I find as a fact that the employer required a fitness-to-work certificate for absences exceeding 20 days prior to the notice to bargain and that it has not established any new policy on this subject. Accordingly, the CFPA has not proven its allegation that the respondents contravened s. 107 in this regard.

IX. Conclusions

[706] The bargaining agent has not met its onus of establishing on a balance of probabilities that the employer has failed to bargain in good faith. As of the hearing, the parties had not reached an impasse on the PACP issue and were to engage in further direct bargaining on the issue.

[707] While the provisions of the PACP are caught by the freeze provisions of s. 107 of the *Act* and must be continued in force in accordance with the statute, I am not

persuaded that the employer contravened or changed any of the provisions of the PACP. The PACP gives the employer the discretion to determine whether employees are to be assigned to a RFP or to an agreed-upon APACP when they are based in a geographic area that precludes the feasibility of assignment to a RFP, such as when no aircraft are available or a base has been closed.

[708] Policy Letter 164 was a management policy document not covered by the collective agreement or the PACP, and it was not the subject of an agreement between Transport Canada and the bargaining agent. It had been under review since 2009 and was the subject of a formal review in 2012 that recommended changes to it. It was not a term and condition of employment that was in force on the day notice to bargain was given and was not covered by s. 107 of the *Act*.

[709] In any event, it was implemented in 2005, at a time when CAIs were still routinely conducting flight checks in commercial and business aviation. Over the years, those checks have largely been delegated to industry pilots, and Transport Canada inspectors do not require the same amount or same kind of training and are engaged in more monitoring and surveillance activities. Given that the assignment of duties to employees has changed over the years, in my view, the amendment to the IPB brings into line the training requirements for employees whose duties have already changed, which is a matter within management's discretion. In my view, were it part of the terms and condition of employment, it would fall under the business-as-before doctrine.

[710] With respect to the allegation that the employer unilaterally implemented a legislative exemption to the *CARs* for the purpose of avoiding its obligations under the PACP, I have concluded that the regulatory requirements for licensing all pilots in Canada as well as the requirements for maintaining those licences enacted by the Governor in Council pursuant to the *Aeronautics Act* or exemptions to those requirements enacted on behalf of the Minister of Transport are not terms and conditions of employment between the employer and the employees. The employer has the obligation to provide opportunities for employees to maintain the requirements of their pilot's licences both under the collective agreement and the PACP. Determining the requirements for a pilot's licence in Canada is not within the purview of the employment relationship.

[711] With respect to the claim that the employer directly communicated with the

Association's members by means of surveys and meetings with them, the evidence does not support the conclusion that the Oversight Tour 2017 addressed the PACP or that management initiated discussions directly with CFPA members on issues related to it, although management did respond to questions from employees about line flying.

[712] The unfair-labour-practice provisions in the *Act* provide a "free speech" exemption for employers. They do not commit unfair labour practices by reason only of expressing their point of view as long as they do not use coercion, intimidation, threats, promises, or undue influence. No evidence was adduced by the Association that either addressed or met any of these criteria.

[713] Nor do I conclude that the TSB's approach to the subject matter expert with respect to the qualifications of pilots whose position was in the bargaining unit, which was unknown to the TSB's chief operating officer, in the circumstances of this case interfered with the bargaining agent's representation of employees.

[714] Although the bargaining agent's evidence is not as complete as would be preferred, it is not disputed that in late 2015, Transport Canada hired a part-time indeterminate employee. That hiring contravened the provisions of the collective agreement and the statutory freeze period set out in s. 107 of the *Act*.

[715] Finally, I find that the employer required a fitness-to-work certificate for absences exceeding 20 days prior to the notice to bargain and that it has not established any new policy on this subject.

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

(The Order appears on the next page)

X. Order

[717] The allegation that the respondents violated the duty to bargain in good faith, contrary to s. 106 of the *Act*, is dismissed.

[718] The allegation that the respondents' conduct constitutes a rejection of the Association's status as the bargaining agent and amounts to an interference with the formation or administration of an employee organization or representation of employees by an employee organization contrary to s. 186(1) of the *Act*, is dismissed.

[719] The following allegations are dismissed that state that the respondents breached the statutory freeze on terms and conditions of employment, contrary to s. 107 of the *Act*:

a. made substantial changes to the terms and conditions of employment of the CFPA's membership by making unilateral program reductions to the PACP;

b. made substantial changes to the terms and conditions of employment of the CFPA's membership by unilaterally cancelling Policy Letter 164 and by implementing two IPBs setting out training requirements for civil aviation safety inspectors;

c. unilaterally implemented a legislative exemption to the *CARs* for the purpose of avoiding its obligations under the PACP;

d. directly communicated with the Association's members by means of surveys and meetings; and

e. unilaterally decided to require fitness-to-work certificates for employees who have been absent from the workplace for more than 20 days.

[720] The allegation that the respondents breached the statutory freeze on terms and conditions of employment, contrary to s. 107 of the *Act*, in that they made a unilateral decision to hire at least one part-time permanent employee is allowed, and the Board so declares.

December 11, 2018.

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