Date: 20191115

File: 561-34-872

Citation: 2019 FPSLREB 110

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

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Public Service Alliance of Canada v. Canada Revenue Agency

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

Before: Dan Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Amy Kishek, Public Service Alliance of Canada

For the Respondent: Jena Montgomery, counsel

Heard at Sudbury, Ontario,
September 9 to 11, 2019.

REASONS FOR DECISION

I. Introduction

[1] Effective June 19, 2017, the Sudbury Taxation Centre/Tax Services Office ("the Sudbury Tax Office") of the Canada Revenue Agency ("the respondent") changed the hours of work for a number of employees in the bargaining unit represented by the Public Service Alliance of Canada ("the complainant"). The new policy, formally announced at a Union-Management Consultation Committee meeting on March 28, 2017, affected access to certain flexible hours and variable work schedules and introduced limitations deemed necessary by local management to implement an organization-wide "Service Renewal" initiative.

[2] The principal issue to be determined in this decision is whether the changes implemented effective June 19, 2017, comprised a violation of the "statutory freeze" provision, which was triggered when the complainant served notice to bargain on the employer on October 31, 2016. For the reasons outlined later in this decision, I find that the respondent committed a violation.

II. The complaint

[3] On September 18, 2017, the complainant filed a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") under s. 190(1)(c) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). It alleged that the respondent failed to comply with s. 107 of the *Act*, which reads as follows:

> ***Duty to observe terms and conditions***
>
> ***107*** *Unless the parties otherwise agree, and subject to 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 arbitral 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).*
>
> [Emphasis in the original]

[4] The complainant is the bargaining agent for members of the Union of Taxation Employees (UTE or "the union"), a component of the complainant, classified in the Service and Program (SP) and the Management (MG – SP5) groups working at the Sudbury Tax Office. (The bargaining unit is described as the "Program Delivery and Administrative Services Group" in the certificate issued by a predecessor board in 2001.)

[5] The complainant contended as follows:

> *… that the Respondent has violated section of [sic] by unilaterally and arbitrarily imposing changes with respect to Hours of Work in violation of Article 25 of the Collective Agreement between the CRA and PSAC, as well as section 107 of the Federal Public Sector Labour Relations Act.*

[6] As corrective action, the complainant requested the following:

(1) a declaration that the respondent violated s. 107 of the *Act*;

(2) an order that the respondent cease and desist from introducing new hours of work;

(3) a posting of the Board's decision for a period of no less than 90 days;

(4) the Board remain seized for the implementation of its decision; and

(5) "Any other remedy that the Complainant may request and that this Board may allow."

[7] In its submission dated October 24, 2017, the respondent contended that the complaint was unfounded because it had acted within its authority to schedule hours of work in accordance with the collective agreement between the complainant and the respondent that expired on October 31, 2016 ("the collective agreement"). In addition to maintaining that it did not violate s. 107 of the *Act*, the respondent outlined two preliminary objections: (1) the complaint was untimely because it was not filed within 90 days of the March 28, 2017, announcement at the Union-Management Consultation Committee meeting, as required by s. 190(1)(c) of the *Act*; and (2) the Board should exercise its authority to refuse to entertain the complaint because the matter could be referred to adjudication under Part 2 of the *Act*.

III. Stipulations and admission

[8] At a case management conference convened on July 22, 2019, the complainant stipulated that it would not argue an alleged violation of article 25 of the collective agreement at the hearing, which it reconfirmed at the hearing.

[9] For its part, the respondent dispensed with its preliminary objections at the hearing.

[10] The respondent accepted as uncontested that the complainant served notice to bargain on October 31, 2016. It admitted that the measures announced at the Union-Management Consultation Committee meeting on March 28, 2017, comprised a change in terms and conditions of employment within the meaning of s. 107 of the *Act*.

[11] According to the complainant, the evidence, viewed in light of the case law, reveals a violation of s. 107 of the *Act*. The respondent contended that applying the principles enunciated by the Supreme Court of Canada in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp*, 2014 SCC 45 ("*Walmart*") to the facts establishes that it was conducting business as usual and thus did not violate the statutory freeze.

IV. Summary of the evidence

[12] The parties led evidence at the hearing through four witnesses, three on behalf of the complainant, and one on behalf of the respondent. I have considered all the testimony led through the four witnesses but report in the following summary only those elements I consider more relevant in determining whether a breach of s. 107 of the *Act* occurred.

[13] On application by the respondent, which was unopposed by the complainant, I issued an order for the exclusion of witnesses, save for Shane O'Brien, who advised counsel for the complainant throughout the hearing.

A. Witnesses called by the complainant

1. Chris Heywood

[14] Mr. Heywood is a team leader in the Payments Processing section of the Sudbury Tax Office. He has worked for 10 years in the public service, all with the respondent.

He has served 6 years on the executive of Local 00042 of the UTE and currently holds the position of second vice-president. At the time the complaint was filed, he was its president.

[15] Mr. Heywood testified that he first learned that the respondent intended to change hours of work as part of the Service Renewal initiative when he was briefed informally by Director Yvan Bouchard in mid-March 2017. The respondent then formally outlined its plans at the quarterly Union-Management Consultation Committee meeting held on March 28, 2017, at which Mr. Heywood presided.

[16] The minutes of that meeting (Exhibit C-2, tab 2) describe the respondent's proposed changes to hours of work as follows:

> …
>
> - *Maximum 8.5 hour work day for all employees.*
> - *Maximum 8.00 hour work day for all team leaders.*
> - *Maximum 7.5 hour work day for all middle managers.*
> - *Maximum 7.5 workday for all employees subject to shiftwork and/or workspace flexing.*
>
> ***Any exceptions to the above must be reviewed and approved***
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[17] The respondent offered several rationales in support of the changes, including its concern that some existing work schedules resulted in a loss of productivity, that there were particular coverage problems on Mondays and Fridays and issues related to insufficient supervision, and that the increased workload resulting from Service Renewal required different measures.

[18] Mr. Heywood indicated that the respondent asked for feedback from the union about the proposed changes, but he felt that the respondent had already made its decision. The union indicated that it did not support the changes. Mr. Heywood's view was that the respondent's proposal was not the best way to handle issues that might have occurred and that there were other ways to address individual situations rather than adopting blanket changes.

[19] Following the consultation committee meeting, the union summarized its concerns about the respondent's plan to change work schedules in an email to

Mr. Bouchard and another employer representative dated April 7, 2017 (Exhibit C-2, tab 4).

[20] Mr. Heywood testified that Mr. Bouchard first informed him about Service Renewal the previous November but that he was given no indication at that time that hours of work would change.

[21] Mr. Heywood described the practice of "desk-sharing" that was in place before the complainant served notice to bargain. During peak tax-filing season, work was sometimes allocated to two shifts sharing the same workspaces, the first from 07:00 to 15:00, and the second from 15:30 to 23:30. Temporary changes to employee work schedules did occur when two shifts were running.

[22] Mr. Heywood outlined that desk-sharing before Service Renewal was primarily confined to data-entry activities for T1 personal tax returns. He indicated that the respondent had not previously raised issues about desk-sharing as a general problem and that any such issues had been addressed in the past on an individual-situation basis. After Service Renewal, desk-sharing spread into steps subsequent to initial data entry. Its impact on the workplace was significant but was still essentially restricted to the T1 processing areas.

[23] As to the respondent's concern about insufficient supervision on-site before Service Renewal, Mr. Heywood reported that the respondent had not previously identified it as an issue. He also indicated that in the past, there had not been any difference in hours-of-work provisions for team leaders as opposed to regular employees; this distinction is not found in the collective agreement.

[24] On April 27, 2017, Mr. Bouchard sent an email entitled, "Important Notice" to his managers, asking that they distribute it to all employees (Exhibit C-2, tab 6). It confirmed "new workload schedules effective June 19, 2017", as announced at the consultation meeting in March.

[25] Mr. Heywood testified that the Local's members responded to the announcement with confusion, outrage, anger, and shock. Many expressed the sense that they were losing control of their schedules, that their "work-life balance" would be adversely affected, and that the respondent's actions comprised "another attack on us". Adding to the widespread problems caused by the Phoenix pay system and the

difficulties in ongoing contract negotiations, employee morale "took a dive", according to Mr. Heywood. When the changes came into effect, 24 employees grieved (Exhibit C-2, tab 7), many of whom were more active union supporters. Other employees were reticent, given the stigma attached to filing a grievance.

[26] The union tried to convince Mr. Bouchard to delay implementation until after the summer months, but his answer was, "No." It also later drew to his attention a Board decision issued in July 2019 that found that changes to hours of work in the Atlantic Region of the respondent had violated the statutory freeze (see *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16 ("*CRA*")) and asked him to reconsider his decision. Mr. Bouchard stated to Mr. Heywood that he spoke with his labour relations advisors about the decision but that he determined that he would not rescind the changes.

[27] Mr. Heywood estimated that the changes implemented on June 19, 2017, affected approximately one-quarter of the workforce at the Sudbury Tax Office. He admitted that it was hard to be precise about the impact.

[28] Summarizing his experience, Mr. Heywood indicated that he had asked his supervisors to approve variable and flexible work hours virtually from the beginning of his time at the Sudbury Tax Office and that his requests were routinely granted. Most of the time, he worked a "super-compressed" schedule, which was a 4-day workweek consisting of 3 days of 9.5 hours, and 9.0 hours on the fourth day. His hours were flexible, sometimes falling between 07:00 and 17:00 and sometimes between 07:00 and 16:30. The super-compressed schedule allowed him to better manage his childcare responsibilities. He testified that his supervisors never asked for any proof or documentation in support of his requests. Those requests, renewed every 12 weeks, were approved verbally, after which Mr. Heywood entered the details of his schedule into the respondent's online time-reporting system.

[29] Mr. Heywood confirmed that the respondent never imposed a work schedule on him. He stated that he had never been criticized about his productivity working a super-compressed schedule and knew of no productivity issues having been raised about other members of his team on super-compressed schedules.

[30] More widely, Mr. Heywood indicated that supervisors might sometimes have asked other employees about the reasons for their requests for compressed schedules

but that those requests were never denied. In individual situations, when too many employees might be off work at the same time, colleagues voluntarily resolved the coverage issues.

[31] Mr. Heywood's loss of super-compressed hours after June 2017 increased his childcare expenses and caused him to spend less time with his family. He grieved the denial. That grievance and the other ones filed by employees have been held in abeyance pending the results of this hearing.

[32] Mr. Heywood confirmed that he does not desk-share and that he never works night shifts.

[33] In cross-examination, Mr. Heywood provided answers as follows:

(1) Service Renewal was one of the reasons the respondent cited for changing hours of work at the consultation committee meeting of March 28, 2017;
(2) Service Renewal resulted in an increase in workloads and in overtime;
(3) desk-sharing had previously been introduced when needed, but it definitely increased with Service Renewal;
(4) more work schedules were changed as a result of Service Renewal;
(5) the respondent had never previously raised issues about supervision with him;
(6) the respondent had not previously identified concerns about Mondays and Fridays in any formal fashion;
(7) he knew that his experience of having requests for compressed work hours approved was the normal experience for other employees because the union did not receive complaints from other employees;
(8) some employees were working super-compressed schedules as of April 2017;
(9) the respondent had changed work hours in the past but only temporarily and not generally; and
(10) after June 2017, the respondent still allowed compressed hours.

[34] When the respondent asked him whether he had knowledge of previous restrictions on hours of work in May 2015, in June and July 2015 (in the Business Returns Controls Section), and in June 2016, Mr. Heywood answered in the negative for each instance.

[35] In re-examination, Mr. Heywood reconfirmed that he understood that when Service Renewal was announced, there would be changes in the workplace but that he did not know about a correlation to changes in hours of work. He expected that in some periods, restrictions would continue to apply temporarily, as in the past.

2. Tracy Marcotte

[36] Ms. Marcotte has worked for 17 years in the public service, all with the respondent. She currently works as a team leader in the Individual Returns and Benefits Division (T1 Accounts). She is also the sitting president of Local 00042, having served on its executive for 8 years. In 2017, she was its first vice-president.

[37] Ms. Marcotte first learned about the respondent's intention to change hours of work from Mr. Heywood after his meeting with Mr. Bouchard in March of 2017. She was present at the consultation committee meeting on March 28, 2017, and agreed that the minutes of that meeting (Exhibit C-2, tab 2) reflect the Director's presentation and the rationales he gave for changing work schedules. She summarized the union's concerns as focusing on how the changes "were going against" the collective agreement, that the difference in the treatment of team leaders and employees did not make sense, and that the respondent provided no real documentation substantiating any problems with productivity.

[38] Ms. Marcotte testified that the respondent had previously claimed that there were problems with coverage and supervision in one-on-one meetings with union representatives, although not with her personally. She stated that the respondent did not advance formal proposals to address the alleged issues. She also recalled that Mr. Bouchard would sometimes talk about productivity during the last hour of work but that no productivity issues were raised in formal meetings with the union.

[39] According to Ms. Marcotte, each area of the Sudbury Tax Office operated with its own production standards. No general directives or policies concerning quotas were published. She was unaware of any productivity deficiencies.

[40] In April 2017, Ms. Marcotte, as a team leader, received questions and answers about the changes to hours of work from her manager (Exhibit C-2, tab 10, pages 51 to 53) and was instructed to inform her staff. Ms. Marcotte declined because she disagreed with the changes and felt that her manager should conduct the staff

briefing. All the team leaders in her area worked compressed hours. She knew that they would not be happy and that there would be a backlash among team employees.

[41] Concerns quickly emerged with the implementation of the changes. Team leaders complained about the new restrictions on their compressed work hours and did not understand why they were being treated differently from their employees. The Local's members were very upset, citing the impact of the changes on family responsibilities, childcare arrangements, and work-life balance. Morale was low. Given her position with the Local, she could appreciate the sentiments of people in the building and was informed by the number of complaints that she personally received. When she was approached to help file grievances, she did so (Exhibit C-2, tab 7), but the union did not solicit grievances from its members. It hoped that more employees would grieve but knew that many were afraid to.

[42] Ms. Marcotte outlined how she assisted three or four members to submit requests for exceptions from the changes to the senior management committee mandated for that purpose after June 2017. The requests all involved medical or family status accommodations, and all were approved.

[43] Turning to her own situation, Ms. Marcotte outlined that she had worked flexible hours for 14 years, from 07:00 to 15:00 at first, and later, from 08:00 to 16:00. For the last 4 or 5 years before the respondent implemented the changes in June 2017, she worked from 09:00 to 17:00. (She never worked a compressed workweek.) The modifications to her schedule over time reflected changes in her childcare responsibilities. During her 17 years of service, her requests for flexible hours, submitted by email, were routinely approved without her having to provide a rationale. When she became a team leader, she was authorized to decide requests from her team members for flexible hours or compressed workweeks, which she granted unless there was a reason not to. The respondent did not provide policy guidance on how to approve requests. After June 2017, team leaders no longer were authorized to consider requests. Instead, requests were sent to senior managers.

[44] After June 2017, Ms. Marcotte worked from 07:00 to 15:00 and was told that she had no other choice. She does not desk-share. She has not formally requested a different schedule since June 2017, and she noted that her manager has informally stated "no" to that possibility. When she was asked if any of her team members

continued to work compressed hours, she confirmed that some did as long as they were not desk-sharing. If the respondent introduced an afternoon shift in her area, she understood that affected employees would be required to work from 07:00 to 15:00.

[45] In her experience as a team leader, productivity in the last hour of work had never been an issue; nor had she ever needed to raise any final-hour productivity problem with a member of her team. Similarly, she was not aware that working super-compressed hours had raised issues or that there had been coverage concerns. Team leaders always worked together to ensure coverage, and they might themselves "rotate" to ensure supervisory presence. Finally, Ms. Marcotte confirmed that the respondent had never imposed hours on team leaders and that managers did not intervene in supervising team-member hours.

[46] In cross-examination, Ms. Marcotte testified as follows:

(1) she noticed an increase in workload as a result of Service Renewal;

(2) she had not seen any real change in workflow or how work was done as a result of Service Renewal;

(3) there were new procedures for new work, but not in her area;

(4) there was now an afternoon shift starting at 15:30 and ending at 23:30;

(5) there was desk-sharing, and no overlap existed between the day and afternoon shifts;

(6) the matter of supervisory coverage was never mentioned more than in passing in the past;

(7) she had heard in multiple informal conversations that many managers were concerned about capacity on Mondays and Fridays, but those days were not a problem, in her experience; and

(8) there never had been a meeting with Mr. Bouchard to discuss his issues with productivity.

[47] Ms. Marcotte further testified in cross-examination that she did not know how many exception cases came before the senior management committee after June 2017 and confirmed that union representatives did not play a role in the committee. She also indicated that the union had not tracked how many members approached it with hours-of-work problems.

[48] In her 17 years with the respondent, she agreed that restrictions on compressed hours sometimes were put in place to meet higher-than-normal work demands, usually but not always in the February-to-June period. Those restrictions normally applied in 3 areas (not in T1 Processing) — Keying, Error Inspection, and Sorting and Numbering — and perhaps, "a couple" more. She explained that in desk-sharing situations, employees on the day shift had to leave the building by 15:30. The respondent permitted employees to work compressed hours provided that their hours fell within the limits of the policy implemented in June 2017. Finally, she agreed that the Sudbury Tax Office started desk-sharing in certain areas because the building was full.

[49] The complainant's representative did not re-examine the witness.

3. Mr. O'Brien

[50] Mr. O'Brien serves as the senior labour relations officer at UTE headquarters advising the national president and a number of national committees, including the collective bargaining committee. He has been active in the UTE for 41 years in a series of progressively more responsible elected and staff roles. Of most direct relevance to this case, he is designated the official UTE representative at its headquarters for any issue about hours of work across the respondent. In his words, "I'm the hours-of-work guy for the union."

[51] In the past, there were very few problems concerning hours of work at the Sudbury Tax Office, according to Mr. O'Brien. Those cases were resolved. At times of the year when workloads peaked, there was a justifiable business case for restrictions on hours of work for finite periods. Mr. O'Brien could not recall an example of restrictions being imposed outside such periods.

[52] Mr. O'Brien became aware of the new policy at the Sudbury Tax Office shortly after the Union-Management Consultation Committee meeting of March 28, 2017, when he was contacted by the UTE's regional vice-president, Cosimo Crupi. He told Mr. Crupi that grievances were not the right way to respond and mentioned the statutory-freeze complaint filed by the UTE concerning changed hours of work in the Atlantic Region, a complaint that Mr. O'Brien had drafted. Later, he sent a copy of the Board's decision in that case to Mr. Heywood via Mr. Crupi to show to Mr. Bouchard.

[53] Mr. O'Brien stated that the UTE viewed the situation at the Sudbury Tax Office as very similar to the one that gave rise to the complaint in the Atlantic Region. Both concerned a unilateral decision imposing a blanket policy that changed variable and flexible hours of work during the statutory-freeze period.

[54] Mr. O'Brien was the UTE's lead in national consultations about the Service Renewal initiative. He testified that when it was first put to the union, there was no mention of flexible or variable hours of work. He confirmed that the respondent never engaged him in discussions under Service Renewal about restrictions on hours of work, either nationally or at the Sudbury Tax Office.

[55] Mr. O'Brien rejected the proposition that the restrictions on hours of work implemented at the Sudbury Tax Office were analogous to previous restrictions imposed during peak tax-filing season. The situations were not similar, and no real business case was presented to the union to substantiate the new policy. Mr. O'Brien confirmed that no other tax centre, call centre, or tax services office had changed its policy in the manner implemented at the Sudbury Tax Office, even in locations where workloads and the workforce had also increased as a result of Service Renewal and where desk-sharing was a feature.

B. Witness called by the respondent

1. Mr. Bouchard

[56] As the director, Mr. Bouchard was the senior executive responsible for the Sudbury Tax Office.

[57] Mr. Bouchard described the experience at the Sudbury Tax Office with respect to super-compressed hours, defining "super-compressed" schedules as involving workdays of greater than 8.5 hours. He indicated that before June 2017, managers had agreed that "there would not be a lot of super-compressed", but everyone knew that super-compressed schedules were worked. The Sudbury Tax Office did not encourage the practice because those schedules were difficult to manage, particularly in processing areas. Employees tended to become tired in repetitive processing work and "production was just not there", according to Mr. Bouchard. In his words, the concern about productivity was "an assumption we have."

[58] As early as 2014-15, there was consensus among local managers to limit super-compressed schedules, according to Mr. Bouchard. He described a "gentlemen's agreement" to attempt to keep them to a minimum — again, in his words, to "really try to tie that down". In contrast, managers did not view regular compressed schedules as a problem.

[59] When he was asked why super-compressed hours had been permitted, Mr. Bouchard testified that requests for those schedules did not often come to his attention and that he would not have approved them had he received them. They were granted at a lower level by managers and team leaders. To be sure, Mr. Bouchard indicated that there was "a fight" among managers at the table about why some of them allowed super-compressed schedules and some did not. He did understand that there were exceptional situations in which super-compressed hours made sense, as in the example of auditors working in the field.

[60] Mr. Bouchard described as a "common and customary practice" restricting hours of work during peak periods, usually February through June, but also towards the fall in certain sections. Sometimes, small projects assigned by the respondent's national headquarters also required suspending compressed schedules. He qualified restrictions on hours of work as palatable for shorter periods and as business as usual and stated that they did not happen often. He did not see any grievances on the subject.

[61] When he was presented with a series of documents describing specific examples from 2013 through 2016 of when restrictions were placed on hours of work in certain areas, Mr. Bouchard testified that he could not recall seeing the documents and that he had no specific recollection of the situations.

[62] Mr. Bouchard first learned of the Service Renewal initiative in April 2016 during a teleconference with the national headquarters Service Renewal team. At that time, he was required to sign a document pledging that he would not disclose information about Service Renewal as a matter of Cabinet secrecy. Service Renewal came to him as a fully developed plan. He was bound to implement "their plan" on "their timeline". Had he not supported the plan, Mr. Bouchard believed that he would have been removed from his position. Mr. Bouchard was unable to discuss Service Renewal with his executives and managers until the end of October or early November 2016, when

he was given approval to proceed. He created a team (also pledged to secrecy) to consider the implementation details, especially with respect to workload movements and timelines. Subsequently, he briefed local union representatives, after which employees were provided general information about Service Renewal by an email dated November 18, with further information shared on the office's InfoZone intranet site (Exhibit R-1, tabs 5 and 22).

[63] The main purpose of Service Renewal at the Sudbury Tax Office was to reorient its work in recognition of the greater digitization of services, all to improve service to Canadians. Service Renewal involved consolidating the number of large centres across the country from nine to four, with the Sudbury Tax Office receiving more new work than any other centre. Before Service Renewal, its workforce numbered 1650 to 1850. With it, significant new hiring was required to bring staff levels to approximately 3200 by 2018, with attendant new training requirements.

[64] Mr. Bouchard testified that to accommodate the larger workforce in the existing physical space, a number of measures were required; in particular, establishing an evening shift from 15:30 to 23:30, encouraging telework, and densifying workspace (more people per square foot). More desk-sharing was necessary, although management tried to limit it to the areas most impacted and to peak periods.

[65] The new measures required changes in hours of work, according to Mr. Bouchard. Employees on the day shift who desk-shared had to leave work by 15:00, before the afternoon shift started at 15:30. The risk of failing to meet client requirements in the face of new and greater workloads was high. Management needed to take more control of the workforce than in the past, especially given the number of new employees.

[66] Changing maximum hours of work outside desk-sharing situations was also a requirement. Mr. Bouchard stated that management wanted to maintain some compressed schedules — "where we can give, we give" — but restrictions were required in other situations. Executives and senior managers could not typically access compressed hours and needed to be present 5 days per week. Team leaders classified at the MG-1 and MG-2 group and levels could not work more than 8.0 hours per day. Management actually preferred a limit of 7.5 hours for team leaders but felt that an 8.0-hour restriction could work.

[67] Mr. Bouchard stated that in March 2017, he told the complainant about changes to work hours and that shortly after that, the directors informed their employees (Exhibit C-2, tab 6). He confirmed the accuracy of the minutes of the March 28 consultation committee meeting (Exhibit C-2, tab 2), describing the changes at that point as "proposals". He asked for feedback from the union, which responded that the restrictions were not needed and that they would adversely affect employees' lives. The union's feedback was not enough to persuade Mr. Bouchard to alter course because it did not bring his management team to a comfort level about the risks of Service Renewal not succeeding. Management had to become more conservative in its handling of compressed schedules.

[68] Mr. Bouchard testified that he would not have implemented the changes to hours of work had there been no Service Renewal. He repeated that had Service Renewal not happened, they "would not have put something together like that." At the time Service Renewal was announced in November 2016, he was not in a position to discuss hours of work with the union because more time was needed to decipher how to implement Service Renewal at the Sudbury Tax Office.

[69] Mr. Bouchard described the process established to consider individual exceptions from the new policy implemented in June 2017. He reported that a senior management team granted a few temporary exemptions in extraordinary situations, giving employees more time to adjust to the new regime. Management also had to respect situations in which employees had accommodation requirements.

[70] The complainant's representative canvassed a wide range of issues with Mr. Bouchard in cross-examination. His most salient responses, in my view, were the following.

[71] Mr. Bouchard accepted that in the past, team leaders and managers normally dealt with requests for super-compressed schedules. Those requests normally did not come to his level. He agreed that requests for regular compressed hours were usually allowed unless there was a reason not to, but he could not state whether requests for super-compressed hours were handled in the same way. He conceded that the gentlemen's agreement to limit super-compressed schedules, of which he spoke, was not consistently applied.

[72] When he was asked to confirm that there were no restrictions on flexible hours in the past, Mr. Bouchard disagreed. He did accept that a 09:00 to 17:00 schedule had been permitted. He stated that he did not know of any policy or directive on hours of work that guided granting requests, other than the collective agreement. Without using the term "super-compressed", the variable-work-hours provisions of the collective agreement were the authority covering requests for super-compressed schedules. He did not concur that working super-compressed hours was a long-standing practice but agreed that there were "pockets of it" within the office. He testified that working a super-compressed schedule for many years was "beyond the norm". He did not know how many people had chosen a super-compressed schedule before June 2017 and was not familiar with any reports containing that information. He confirmed that when he announced the changes to hours of work at the March 2017 consultation committee meeting, he was not aware whether data had been compiled portraying the number of employees that would be affected.

[73] Mr. Bouchard testified that flexible hours and regular compressed hours were common and that they remain common.

[74] When he was asked whether he had considered changing the hours-of-work policy before November 16, 2016, when he advised Mr. Heywood about Service Renewal, Mr. Bouchard replied in the negative. He conceded that the changes to hours of work implemented at the Sudbury Tax Office were not part of the "fully developed plan" for Service Renewal handed down by national headquarters but speculated that "perhaps it was assumed". Neither the original nor any updated version of the notice from the Deputy Commissioner about Service Renewal (Exhibit R-1, tab 5) mentioned changes to hours of work.

[75] Mr. Bouchard indicated that he would be surprised if consultations held at the national level about Service Renewal had not addressed hours of work.

[76] Mr. Bouchard stated that it was clear to employees and to the union that there would be impacts when they were presented with information about Service Renewal. It was no secret that there would be shift work and an impact on compressed hours. Management considered other options but was under pressure to proceed quickly.

[77] Mr. Bouchard consulted with human resources advisors on more than one occasion concerning compliance with s. 107 of the *Act* but was not involved in any effort to secure the consent of the union to the new policy on hours of work.

[78] As for the reasons given for changing hours of work at the March 2017 consultation committee meeting (Exhibit C-2, tab 5), Mr. Bouchard stated that he had previously mentioned some of them informally in conversations with local union representatives but that there had not been formal consultations on the matter. When he was asked whether the approach to hours of work outlined at the meeting changed prior practice, Mr. Bouchard replied that the measures were "what we needed to see happen". He stated that the announced change to hours were "there before for some people".

[79] Mr. Bouchard outlined that he held meetings with his direct reports, as well as with human resources advisors, to consider the feedback received from the union. On the basis of those discussions, he felt that it was not good to deviate from the original plan and that he should not change what was proposed. Increased volumes of work meant a complete change in work culture and the need to address requirements fundamentally.

[80] In response to a final series of summary questions from the complainant's representative, Mr. Bouchard testified as follows:

(1) he recalled receiving the Board decision from Mr. Heywood in late summer 2017, which he shared with Human Resources;

(2) consideration of changes to hours of work began shortly after November 2016;

(3) super-compressed hours did occur before October 31, 2016, but were not permitted after June 2017;

(4) "stacking" compressed days off with weekends and holidays was not permitted after June 2017 unless in truly exceptional circumstances;

(5) flexible daily hours other than 07:00 to 15:00 were allowed in the past but were not widely encouraged after June 2017 under the new policy, which set firm hours; and

(6) requests to change hours were handled by team leaders or managers before October 2016 but were no longer within their discretion under the new policy.

[81] In re-examination, Mr. Bouchard confirmed that employees who did not desk-share and who wanted to work 7.5 hours each day could have had the option of working those hours from 08:00 to 16:00 or from 09:00 to 17:00. He did not want such hours to be widespread, but they were possible for "a few people here and there".

V. Summary of the arguments

A. For the complainant

[82] Given the respondent's admissions, the complainant argued that very little was factually in dispute.

[83] On October 31, 2016, notice to bargain was served. The respondent acknowledged that on March 28, 2017, it formally advised the complainant that it was changing terms and conditions of employment by altering its policy on variable work hours and flexible hours with effect on, and after, June 19, 2017.

[84] Mr. Bouchard testified that with respect to the period before notice to bargain was served, the respondent suspended some hours-of-work schedules in response to peak workloads. He stipulated that the changes were in effect for limited periods and affected some work units but "didn't happen a lot." He also outlined that hours of work sometimes changed when national headquarters assigned certain small projects.

[85] In the complainant's argument, the respondent's pattern of suspending certain variable work hours and flexible schedules in some discrete areas for limited periods is the practice that was frozen when the complainant served notice to bargain. It agreed that the respondent may introduce restrictions to work hours in accordance with that pre-established pattern.

[86] Starting on June 19, 2017, all employees were subject to a new policy, which circumscribed work hours. Employees who "desk-shared", as well as some employees who did not, suffered the outright loss of super-compressed hours and certain other compressed schedules. Team leaders classified at the MG-1 and MG-2 group and levels lost the right to work compressed hours involving more than eight hours per day. With

a few exceptions, employees who worked the day shift lost access to flexible hours outside the period of 07:00 to 15:00.

[87] The blanket changes implemented on June 19, 2017, constituted a complete deviation from business as usual before October 31, 2016.

[88] In interpreting s. 107 of the *Act*, the Board must adopt a purposive approach that recognizes that the statutory freeze applies beyond what is expressly stated in the collective agreement. The purposive approach has been endorsed by the Board in a number of decisions. See, for example, *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46 ("*CBSA*"); *CRA*; and *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11 ("*Correctional Service*").

[89] A violation of s. 107 of the *Act* is a "strict liability" offence. It does not depend on the respondent's intent. Nor does it matter whether the respondent meant well in its actions; see *Ontario Nurses' Association v. Oakville Lifecare Centre*, [1993] OLRB Rep 980 ("*ONA*"). As in *Correctional Service*, in which the Board adopted a strict-liability approach, the respondent also did not need to demonstrate that changes it implemented adversely impacted collective bargaining.

[90] A statutory freeze is not static. The case law recognizes that the employer has the right to implement changes within an established pattern; see *CBSA*, at para. 167, and *CRA*, at para. 71. In the circumstances of this case, the respondent acted outside "business as usual" by adopting a policy different from the pattern of limited changes to hours of work in specific areas that prevailed before notice to bargain was given.

[91] As well as constituting a violation of s. 107 of the *Act* within the ambit of the "business as usual" model, the respondent's actions may also be understood as a violation under the "reasonable expectations test" found in the case law. Under the latter test, the question to be posed is whether a change implemented by an employer during a statutory-freeze period was, or could have reasonably been, expected by employees before notice to bargain was given.

[92] The business as usual test does not exclude, or is at odds with, the reasonable expectations test. See, for example, *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB

68 ("*CAPE*"), and *Correctional Service*, at para. 63, adopting *CAPE*. In cases in which no business as usual pattern can be established, and particularly in "first instance" cases, the reasonable expectations test is useful.

[93] The evidence clearly established the respondent's practice with respect to hours of work in the period before the complainant served notice to bargain, including the pattern of varying that practice in limited situations. The evidence was also uncontroversial that the respondent changed its hours-of-work policy during the freeze period without the complainant's consent.

[94] Therefore, the complainant favours the business as usual approach. Nonetheless, the evidence satisfies both the business as usual and reasonable expectations tests. As for the latter, employees reasonably expected that the variable- and flexible-hour schedules in place before notice to bargain was served would continue during the freeze period, subject to the pre-established pattern of limited changes.

[95] Mr. Heywood's testimony established that the union was not consulted about the changes. When it was advised sometime in November 2016 about the pending Service Renewal initiative, the respondent did not address hours of work. At the Union-Management Consultation Committee meeting of March 28, 2017, when the respondent announced changes to hours of work, the union was asked to provide feedback. It did so, disagreeing with the rationales offered by the respondent for the changes. Mr. Heywood indicated that the respondent had previously raised some of those reasons informally but that the union did not know they were "live issues". Mr. Bouchard's testimony confirmed that point.

[96] Members of the union reacted to the changes with confusion, anger, shock, and a sense of loss of control over their lives, according to Mr. Heywood. Some filed grievances; others felt deterred from grieving out of fear of repercussions. In total, approximately one-quarter of the workforce at the Sudbury Tax Office was impacted by the changes. Before June 2017, Mr. Heywood recalled that there had been very few complaints about denied work schedules. When issues arose, they were usually addressed successfully on a case-by-case basis.

[97] As for Mr. Heywood, he worked a super-compressed schedule for 8 of the 10 years before the respondent changed the policy. His requests to team leaders to work

those hours required no additional information because they were understood to be normal practice. Mr. Heywood did not desk-share, other than for 1 period of 2 weeks, and never worked a night shift. Nothing ever prevented him from being at the workplace beyond 16:00.

[98] Ms. Marcotte's testimony confirmed that the respondent did not formally raise reasons for changing work hours before March 2017; nor had it ever offered data about productivity or other issues with hours of work. She described the changes as a "real blow to morale". After the changes were implemented, she outlined how she assisted members seeking exceptions before a senior management committee. As confirmed by Mr. Bouchard, the committee granted exceptions for reasons related to the accommodation of medical or family circumstances. That new process was a clear deviation from past practice. Previously, employees were able to secure exceptions or accommodations at the team-leader level. Ms. Marcotte formerly approved such requests as a team leader and did so in the absence of a directive or formal policy guidance. After June 2017, schedules were imposed, and employees seeking exceptions or accommodations bore the onus of proving their need to the senior management committee. In the complainant's submission, the process changes for securing exceptions implemented by the respondent also comprised a departure from the past pattern, in violation of the statutory freeze.

[99] Ms. Marcotte described her experience working flexible hours for 14 years. Her requests for flexible hours were always approved without requiring additional information. When issues arose, they were resolved by team leaders. After June 2017, she lost access to her long-standing pattern of working from 09:00 to 17:00, even though she never desk-shared. In her words, she was given "no choice".

[100] Mr. O'Brien's testimony indicated that the union was merely briefed, but not consulted, about changes to work schedules at the Sudbury Tax Office. The union did not anticipate that hours of work would change based on the consultations about the Service Renewal initiative. Mr. O'Brien confirmed that no other call centre or tax centre required changes to hours of work as part of Service Renewal.

[101] The complainant contended that Service Renewal was never tied to changing hours of work. It was not part of the "fully formed plan" developed at the national

level, as described by Mr. Bouchard; nor is there any other evidence establishing the link or demonstrating why productivity issues required changes.

[102] Turning to the case law, the complainant described the "eerie" similarity between what occurred at the Sudbury Tax Office and the circumstances examined in *CRA* when, during the freeze period, the employer required employees to start work at 08:00 rather 07:00. In that case, both variable and flexible hours were affected in a change found by the Board to violate s. 107 of the *Act*.

[103] In *CBSA*, the employer implemented a new policy on professional standards investigations during the freeze period. Adopting the business as usual test, the Board found that the new policy violated s. 107 of the *Act* (see, especially, paragraphs 78 to 80).

[104] In *CAPE*, the Board rejected the argument that the employer had the right to modify work hours during the freeze period under the authority of the *Financial Administration Act* (R.S.C., 1985, c. F-11) at ss. 7 to 12.

[105] In *Correctional Service*, the employer reduced hours of work for term employees in its Pacific Region either from 37.5 to 30 hours or from 40 to 32 hours during the freeze period, which was an authority that it enjoyed outside the freeze period but that it had not exercised. In that light, employees reasonably expected that the employer would not change their hours after notice to bargain was served. In declaring a violation of s. 107 of the *Act*, the Board found no evidence to indicate that the union had consented to the change or that the change had been justified under either the business as usual or reasonable expectations approaches.

[106] In *Canadian Federal Pilots Association v. Treasury Board*, 2006 PSLRB 86 ("*CFPA*"), the Board substantiated a violation of the statutory freeze based on evidence that the employer imposed daily changes to normal scheduled hours of work on two employees during the freeze period.

[107] In *ONA*, the Ontario Labour Relations Board found that the employer's past practice gave rise to a reasonable expectation that it would not alter job-sharing and shift-work arrangements. That the employer did so during the statutory freeze violated the law. (*ONA* is an example of a first instance case.)

[108] Anticipating the respondent's argument, the complainant maintained that *Walmart* can be distinguished. The Supreme Court of Canada's decision interpreted s. 59 of the Quebec *Labour Code* (CQLR, c. C-27). It concerned a different fact situation surrounding the negotiation of a first collective agreement (see paragraph 35). In reaching its finding, the Court did not refer, for example, to case law from Ontario or from the Canada Industrial Relations Board that has helped guide the Board's approach to interpreting s. 107 of the *Act*.

[109] As corrective action, the complainant asked the Board to declare a violation of s. 107 of the *Act*, order the respondent to cease and desist with the June 19, 2017, changes to hours of work, return employees to the prior practice with respect to hours of work, and require the respondent to post the Board's decision in all prominent worksites across the country. The complainant asked the Board to remain seized for purposes of implementation.

[110] Citing the prior violation of s. 107 of the *Act* by the respondent in *CRA*, the complainant argued that additional, stronger corrective action is required. To that end, it urged the Board to consider a further order for the respondent to reimburse financial losses incurred by employees (childcare, transportation, and other costs) as a result of their changed hours of work.

B. For the respondent

[111] The policy changes on hours of work implemented by the respondent on June 19, 2017, were integral to the Service Renewal initiative that was in motion before the complainant served its notice to bargain and were consistent with its normal business practice in the past. On that basis, it submitted that there was no breach of s. 107 of the *Act*.

[112] The respondent adopted the business as usual approach mandated in *Walmart*. It accepted that the specific facts examined in *Walmart* differ from the those in the complaint before the Board but argued that the underlying situation involving a statutory freeze is similar. As such, *Walmart* outlines the binding law about the business as usual test that the Board must apply.

[113] Paragraphs 55 and 56 of *Walmart* outline the test as follows:

> *[55] Regardless of who adduced the evidence to be considered by the arbitrator, there are two ways for the arbitrator to determine whether a specific change is consistent with the employer's normal management practices. First, for the employer's decision not to be considered a change in conditions of employment within the meaning of* s. 59 *of the* Code, *the arbitrator must be satisfied that it was made in accordance with the employer's* past *management practices. In the words of Judge Auclair, the arbitrator must be able to conclude that the employer's decision was made [TRANSLATION] "in accordance with criteria it established for itself before the arrival of the union in its workplace":* Pakenham, *at p. 202. (See also* Woolco (No. 6291), *at pp. 7-8;* Gravel & Fils Inc., *at p. 90;* Plastalène Corp.*;* Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries, *at pp. 6-7;* Société des casinos du Québec inc., *at pp. 16-19;* Association des juristes de l'État v. Commission des valeurs mobilières du Québec, *at para.* 75.*)*
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> *[56] Second, the courts have held that the employer must continue to be able to adapt to the changing nature of the business environment in which it operates. For example, in some situations in which it is difficult or impossible to determine whether a particular management practice existed before the petition for certification was filed, the courts accept that a decision that is [TRANSLATION] "reasonable", based on "sound management" and consistent with what a "reasonable employer in the same position" would have done can be seen as falling within the employer's normal management practices (Gagnon et al., at p. 600; Burkett et al., at p. 171;* Plastalène Corp.*;* Syndicat des employés de Télémarketing Unimédia (CSN)*;* Association des juristes de l'État v. Commission des valeurs mobilières du Québec*;* Société du centre Pierre-Péladeau v. Alliance internationale des employés de scène et de théâtre, du cinéma, métiers connexes et des artistes des États-Unis et du Canada (I.A.T.S.E.), section locale 56, *2006 CanLII 32333 (T.A.);* Travailleurs et travailleuses de l'alimentation et du commerce, section locale 501).

[114] Business as usual and reasonable expectations are separate approaches. There is no need to demonstrate reasonable expectations to fulfil the business as usual test. To be sure, reasonable expectations has no application to the complaint at hand.

[115] C. Rootham, in *Labour and Employment Law in the Federal Public Service*, at page 240, outlines the difficulties in reconciling the "business as usual" and reasonable expectations tests.

[116] In a number of its decisions, the Board and its predecessors have intermingled the business as usual and reasonable expectations tests; see, for example, *Professional Association of Foreign Service Officers v. Treasury Board*, 2003 PSSRB 4 at paras. 124

and 127 ("*PAFSO*"); and *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107 at paras. 47 and 48 ("*PSAC*").

[117] In *Federal Government Dockyard Chargehands Association v. Treasury Board*, 2016 PSLREB 26 at para. 63 ("*Chargehands*"), the reasonable expectations test was not needed. In *CFPA*, at para. 355, the Board properly drew a distinction between the two approaches.

[118] Therefore, there is no consistent determination across the Board's case law as to whether the business as usual and reasonable expectations approaches may both be used in an analysis or should be considered separate. In the respondent's view, based on *Walmart*, it is clear that the Board should clarify its approach and not intermingle the two tests. In answer to my question, the respondent confirmed that it was arguing that the Board must reorient its case law concerning s. 107 of the *Act* to a consistent application of the business as usual test as outlined in *Walmart*.

[119] The employer's national headquarters, which had developed the Service Renewal initiative, first informed Mr. Bouchard about it in April 2016. He was responsible only for its implementation at the Sudbury Tax Office. He faced unique circumstances in that he was not permitted to tell anyone about it, even his executive staff. Only in late October 2016 was he was permitted to discuss it with his executives, and only later in November was he was able to inform the union about it.

[120] The respondent accepted that it notified the union and employees about the Service Renewal initiative and that there would be a change in work hours after notice to bargain was served.

[121] The only issue for the Board to decide is whether the policy implemented on June 19, 2017, during the freeze period fell outside business as usual by the respondent as assessed under the *Walmart* test.

[122] *Walmart* is clear as follows concerning what the respondent must show to defend itself against the complaint: (1) the decision to change work hours was consistent with normal business practices or that it would have proceeded with the same changes if no notice to bargain had been served, and (2) the wheels for the change were in motion before notice to bargain.

[123] As outlined by Mr. Bouchard, the Service Renewal initiative was very wide in scope. It greatly increased the workload at the Sudbury Tax Office, which required new hiring and changes in workflows, among other changes. Addressing maximum hours of work was only one of the necessary implementation elements and was integral to the initiative.

[124] Mr. Bouchard testified that with Service Renewal, he could not foresee continuing as before. Under the initiative, the office was not, and could not, stay the same. For example, he could not continue with the past gentlemen's agreement, which resulted in inconsistent approaches to allowing super-compressed hours. Instead, he needed to eliminate uncertainty and risk. The approach to hours of work was an element within his control and one of the strategies necessary for the success of Service Renewal. Though possibly not the best or only option, it was a reasonable option.

[125] The Board's decision in *CFPA* can be distinguished because it predates *Walmart* and involves an attempt to influence collective bargaining, which is not at issue in this case.

[126] The *ONA* decision is dated but appears to indicate at paragraphs 29 to 32 that the business as usual and reasonable expectations approaches are separate; i.e., as the expression states, "you can have one without the other".

[127] The *CRA* decision is a hybrid of the two approaches, while the respondent asked the Board to take a different view.

[128] *CBSA* also predates *Walmart*. At paragraphs 194 to 199, it assesses whether the reasonable expectations approach applies and decides in the negative.

[129] As for corrective action, the respondent objected to the complainant "tacking on at the very end" its position that the Board should order compensation for losses incurred by employees whose hours of work changed. Because the respondent had no foreknowledge that losses would be an issue requiring corrective action, it did not canvass evidence about the alleged costs arising out of the change to work hours and thus was prejudiced by the complainant's late corrective action claim.

[130] The issue of losses is perhaps better addressed by the panel of the Board that considers the grievances that have been filed by employees.

C. Respondent's rebuttal

[131] There is a good reason that the Board has not surveyed *Walmart* in its recent case law — the facts underlying that decision simply are very different, indeed, unique. Frankly, it is difficult to make out how either the business as usual or the reasonable expectations test applies. That said, *Walmart*, at para. 60, does cite *Spar Aerospace Products Ltd. v. Spar Professional and Allied Technical Employees Association*, [1979] 1 C.L.R.B.R. 61 ("*Spar Aerospace*"), a seminal decision underlying the case law on statutory freezes. That case, as summarized in *Walmart*, holds that an employer "… does not lose its right to manage its business …" with the advent of a union but must "… from that point on, exercise that right as it did or would have done before then …". The Board's case law has been consistent with that approach.

[132] *ONA* provides helpful guidance on when the business as usual and the reasonable expectations tests may be used. The Board's decisions have always found that the two approaches are not mutually exclusive; that is to say, there is always an "or" in its cases.

[133] The facts in the complaint establish clearly that the business as usual pattern was in place before the complainant served notice to bargain on October 31, 2016. The respondent did not dispute those facts but argued as if the test applied to its actions at the Sudbury Tax Office during the statutory freeze should be, "What would a reasonable employer have done in the circumstances?"

[134] The second prong of *Walmart*, as styled by the respondent, asks whether the wheels for the change in hours of work were in motion before the complainant served notice to bargain. However, Mr. Bouchard's testimony proves that the respondent did not know how Service Renewal would be initiated as of the date notice to bargain was given. Only after Mr. Bouchard notified his management team in late October or early November 2016 about Service Renewal did his team begin to plan approaches to implementing it. Subsequently, it came to him with options, including changing work hours. By Mr. Bouchard's evidence, changes to hours of work were not in motion when notice to bargain was served.

[135] The complainant accepted that this is a strict business as usual case. The Board does not need to make a finding based on the reasonable expectations test, but the reasonable expectations of union members at the Sudbury Tax Office that hours of

work would not change in the manner implemented on June 19, 2017, do form part of the business as usual pattern proven by the evidence.

VI. Reasons

[136] This complaint was filed under s. 190(1)(c) of the *Act*. It alleged a violation of the statutory freeze provision found in s. 107. Such a provision is common across federal and provincial labour laws. It serves a function vital to the collective bargaining regimes that lie at the hearts of those laws, as often canvassed in the Board's decisions. (Among the many discussions of the purpose of the s. 107 statutory freeze provision in the case law submitted by the parties, see, in particular, Mr. Justice LeDain in *Canada (Treasury Board) v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.), quoted in *CFPA*, in *CRA*, and in others.)

[137] In cases involving s. 107, the Board often conducts what is, in effect, a two-stage analysis. First, it tests whether a complainant has met its principal evidentiary burden of establishing that notice to bargain was served, that an employer subsequently changed a term and condition of employment that might have been included in a collective agreement and that was in force on the date notice to bargain was served, and that the complainant did not consent to that change. In the second stage, the Board considers any defence offered by the employer that despite the fact of a change in a term and condition of employment within the meaning of s. 107, its action did not comprise a violation of s. 107, most often because it was conducting "business as usual". In some cases, the Board views business as usual as an approach permitting a complainant to discharge its burden of proof by demonstrating that a term and condition of employment was in place before notice to bargain was served but subsequently was changed by the employer, in violation of s. 107.

[138] The complaint before the Board in this case requires a two-stage analysis. In that sense, it is not unique. However, the respondent introduced a new argument challenging the foundations of the Board's case law. In effect, the respondent argued that my decision must reorient the Board's case law to a consistent application of the approach to interpreting a statutory freeze provision outlined by the Supreme Court of Canada in *Walmart*. The respondent contended that doing so in the circumstances of this case results in a finding that it followed normal management practices as characterized in *Walmart* when it implemented changes to hours of work on June 19, 2017, and that therefore, it did not violate s. 107 of the *Act*.

[139] For its part, the complainant submitted that facts specific to *Walmart* distinguish the Supreme Court of Canada's decision — primarily, it involved the operation of a statutory freeze under Quebec law during a period when a newly certified bargaining agent was attempting to negotiate a first collective agreement. The complainant also contended that the decision did not refer to influential case law from outside Quebec that has played an important role in the Board's decision making. (The complainant, in rebuttal, did allow that the Supreme Court of Canada cited *Spar Aerospace*.)

[140] Certainly, the facts in *Walmart* differ from those in the complaint before me. The employer in question at a Walmart store in Jonquière, Quebec, decided to close the store and terminate the employment contracts of all employees during the statutory-freeze period when the newly certified bargaining agent was attempting to negotiate a first collective agreement. As the Supreme Court of Canada summarized at paragraph 23, it was called upon to decide whether the statutory freeze provision in the Quebec law, applicable to a first contract situation, "… can be used to challenge the resiliation of the contracts of employment of all the employees of an establishment."

[141] Negotiations in the circumstances of a new certification and first collective agreement may well differ substantially from negotiations for a renewal agreement in a mature bargaining relationship. However, I am not convinced that that possibility alone or that *Walmart* was determined largely within the contours of Quebec case law means necessarily that *Walmart* does not provide guidance in cases before the Board.

[142] For the purposes of this analysis, I will examine where *Walmart* leads in considering the merits of the complaint at issue. In other words, I will assess whether, by the respondent's theory, there is reason to find a successful business as usual defence in the circumstances of this case. In doing so, I must emphasize that I am not necessarily endorsing the proposition that the Board has somehow erred by not applying *Walmart* in the fashion urged by the respondent. Instead, I will proceed from the perspective that if the respondent cannot mount a persuasive defence based on what *Walmart* requires, a business as usual defence would very likely not succeed in this case if presented instead along the lines usually argued in the Board's decisions.

[143] At paragraph 39, *Walmart* describes as follows the elements that a union must show to discharge its burden of proving that an employer has made a unilateral change to terms or conditions of employment during a statutory-freeze period:

> *[39] … (1) that a condition of employment existed on the day the petition for certification was filed or a previous collective agreement expired; (2) that the condition was changed without its consent; and (3) that the change was made between the start of the prohibition period and either the first day the right to strike or to lock out was exercised or the day an arbitration award was handed down, as the case may be….*

[144] The evidence depicting the hours-of-work regime at the Sudbury Tax Office when, and before, the complainant served notice to bargain on October 31, 2016, is quite clear and is essentially unchallenged. Based on the testimonies of Mr. Heywood and Ms. Marcotte, as well as the evidence given by Mr. Bouchard, I make the following main findings of fact:

(1) some or many employees were able to work different variable work schedules permitted by the collective agreement, which compressed their hours, including a super-compressed schedule, which made possible a four-day workweek;

(2) some or many employees had access to flexible daily hours, generally between the period of 07:00 to 17:00;

(3) requests by employees for compressed work schedules or flexible daily hours were normally decided at the team-leader or lower-manager level;

(4) such requests tended to be routinely granted unless there was a reason not to and normally did not require a detailed rationale substantiating them;

(5) in peak workload periods or in some special project situations, the respondent imposed limitations on variable and flexible hours of work in some work areas for temporary periods; and

(6) the limitations imposed reduced the maximum daily hours allowed (preventing, for example, super-compressed schedules), restricted the time frame within which flexible daily hours were possible, and required desk-sharing to accommodate day and afternoon shifts.

[145] The foregoing facts satisfy the complainant's evidentiary burden set by the Supreme Court of Canada in point (1) at paragraph 39 of *Walmart*.

[146] The respondent did not dispute that it changed its policy on hours of work after the complainant served notice to bargain on October 31, 2016, when it implemented a new policy effective June 19, 2017. Essentially, the evidence established that, as it conceded, the respondent changed terms and conditions of employment by applying restrictions that were previously temporary and limited in scope, transforming them into permanent constraints applied across the board. It restricted maximum daily hours, limiting the range of acceptable compressed schedules, and eliminated entirely super-compressed hours. It constrained flexible hours on a daily basis. It differentiated between regular employees and team leaders in an unprecedented manner. The evidence also showed that the process for granting requests for compressed schedules and work hours changed by taking away the authority previously enjoyed by team leaders and lower-level managers. The respondent took all those actions without the complainant's consent. In my view, points (2) and (3) of paragraph 39 of *Walmart* are amply satisfied.

[147] How, according to *Walmart*, should an analysis then proceed to determine whether the change in terms and conditions of employment was permitted during a statutory-freeze period?

[148] *Walmart*, at para. 46, states as follows:

> *[46] To prove that the change made by the employer is a "change in conditions of employment" within the meaning of. s.59, the union cannot simply show that the employer has modified how it runs its business. It must also establish that this modification is inconsistent with the employer's "normal management practices".*
>
> …

[149] *Walmart* has more to say about "normal management practices" at paragraphs 47 and 48, outlining that a statutory freeze is not static, a finding echoed in Board cases (see, for example, *CBSA*, at para. 167, and *CRA*, at para. 71):

> *[47] Although s. 59 of the* Code *might seem, if interpreted literally and in isolation, to have the effect of completely "fixing" or "freezing" the employer's business environment, the opposite is in fact true: to avoid paralyzing the business, the section leaves the employer with its general management power, which survives the union's arrival on the scene but is then circumscribed by the law. This power must be exercised [TRANSLATION] "in a manner consistent with the rules that applied previously and with the employer's usual business practices from before the freeze" ….*

> *[48] In this context, the employer cannot simply argue that its decision is consistent with the powers conferred on it in the individual contract of employment and by the general law before the petition for certification was filed.* It must continue acting the way it acted, or would have acted, before that date ….

[150] *Walmart* summarizes how to decide whether a practice or policy is consistent with normal management practices at paragraphs 55 to 57 as follows, as cited by the respondent:

> *[55] … there are two ways for the arbitrator to determine whether a specific change is consistent with the employer's normal management practices. First, for the employer's decision not to be considered a change in conditions of employment within the meaning of s. 59 of the* Code, *the arbitrator must be satisfied that it was made in accordance with the employer's* past management *practices. In the words of Judge Auclair, the arbitrator must be able to conclude that the employer's decision was made [TRANSLATION] "in accordance with criteria it established for itself before the arrival of the union in its workplace" ….*
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> *[56] Second, the courts have held that the employer must continue to be able to adapt to the changing nature of the business environment in which it operates. For example, in some situations in which it is difficult or impossible to determine whether a particular management practice existed before the petition for certification was filed, the courts accept that a decision that is [TRANSLATION] "reasonable", based on "sound management" and consistent with what a "reasonable employer in the same position" would have done can be seen as falling within the employer's normal management practices ….*
>
> *[57] Thus, a change can be found to be consistent with the employer's "normal management policy" if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. In other words, a change [TRANSLATION] "that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which section 59 of the Labour Code applies" ….*

[151] Looking at the first prong of the *Walmart* test, was the new policy restricting hours of work at the Sudbury Tax Office implemented on June 19, 2017, "… consistent with the employer's normal management practices …" or, to use the more common expression, business as usual?

[152] The evidence persuades me that the modifications introduced by the respondent were **not** consistent with "normal management practices" before notice to

bargain was served. Summarizing the thrust of the evidence led through the complainant's witnesses, it is clear that restrictions on hours of work under "normal management practices" before October 31, 2016, were imposed temporarily and only in some work areas. After June 19, 2017, as indicated by the evidentiary findings noted earlier in this decision, the new regime imposed comprehensive constraints, some elements of which had been seen before but that now applied at all times and in all areas and that were subject to different authorization processes.

[153] Mr. Bouchard's testimony reinforces that what happened after June 19, 2017, was not "normal" compared to the past. In his testimony about the pre-existing practice, he qualified restrictions on hours of work "as palatable for shorter periods" and as business as usual and stated that "they did not happen often"; when they did, they were limited in scope. Then the world changed with Service Renewal. He admitted that he "would not have implemented the changes to hours of work had there been no Service Renewal" and repeated that if there had been no Service Renewal, they "would not have put something together like that." He stipulated that "management had to become more conservative in its handling of compressed schedules." Crucially, he testified that "increased volumes of work meant a complete change in work culture and the need to address requirements fundamentally."

[154] By Mr. Bouchard's evidence, supported by the testimonies of the complainant's witnesses, I do not hesitate to conclude that there was nothing "normal" about the business practices that came into play at the Sudbury Tax Office on June 19, 2017. The new restrictions were much more expansive, were no longer temporary, were no longer limited in scope, differentiated between employees in a new way, and altered granting authorities.

[155] The second prong of the test expressed in paragraph 56 of *Walmart* posits that "… the employer must continue to be able to adapt to the changing nature of the business environment in which it operates." It appears to recognize that a "reasonableness" measure can apply — what would a "reasonable employer in the same position" have done? *Walmart* restates the question at paragraph 57 as follows: Is the action taken by the employer "… consistent with the decision that a reasonable employer in the same position would have made in the same circumstances"? In effect, it then adds that an employer does not violate the statutory freeze if it would have acted in the same fashion had there been no attempt to form a union or negotiate a

first collective agreement. Applied to this complaint, the respondent suggested that the question to ask is whether the respondent would have acted in the same way had there been no notice to bargain.

[156] Answering the questions suggested by paragraphs 56 and 57 is challenging. However, I would emphasize that paragraph 56 also implies a precondition, which may well mean that the second prong of the test is not necessary when past management practice is clear. The key phrase in paragraph 56 preceding the reference to reasonableness as a consideration outlines that some courts have accepted a reasonableness approach "… **in some situations in which it is difficult or impossible to determine whether a particular management practice existed before** [the statutory freeze took effect] …" [emphasis added]. There is certainly no obstacle in the complaint at hand to determining whether a previous practice can be identified. Following paragraph 56, it could well be said that there is no need to go further to consider whether the respondent's actions were those of a reasonable employer.

[157] **If** reasonableness must be considered — and the presence of ample evidence about past management practice casts considerable doubt in my mind on whether it should — I cannot safely conclude that the measures implemented at the Sudbury Tax Office would have been handled the same way by a reasonable employer facing the same or similar circumstances. To be sure, the undisputed evidence in this case, given by Mr. O'Brien, is that no other tax office across the country, many of which were affected by Service Renewal, although perhaps not to the same degree as the Sudbury Tax Office, felt it necessary to impose the restrictions on hours of work decided by Mr. Bouchard and his colleagues. If the changes at the Sudbury Tax Office were, in fact, the option that a reasonable employer would have pursued facing the requirement to implement Service Renewal, does it make sense that no other location pursued that strategy, in whole or in part? If the "fully developed plan" for Service Renewal handed down by national headquarters failed to address hours of work, and if the subsequent communiqué issued nationally to introduce Service Renewal to employees also did not mention hours of work (Exhibit R-1, tab 5), is there any basis to find that changing hours of work in the manner chosen by the Sudbury Tax Office was reasonably necessary as part of Service Renewal? I think that the answer must be, "No."

[158] I have no other sound evidentiary basis to assess the reasonableness of the new policy at the Sudbury Tax Office. Mr. Bouchard's description that there was a

"complete change in work culture and the need to address requirements fundamentally" forestalls the argument that what was done was simply more of what occurred in the past; therefore, it was reasonable. While I do not necessarily conclude that the respondent acted unreasonably, it is apparent to me that it did not mount a convincing defence based on reasonableness.

[159] Would the respondent have acted in the same fashion had there been no notice to bargain? Once more, the precondition implied in paragraph 56 may well mean that it is unnecessary to answer that question given clear evidence about past management practice. I am also mindful that considering a counterfactual question always risks straying too far into the realm of speculation. Nonetheless, **if** I do confront the question, what is the result? We do know that, as reported earlier in this decision, Mr. Bouchard testified that he would not have implemented changes to hours of work were it not for Service Renewal. However, Service Renewal was his new reality. Given that reality, would he have proceeded in the way he did in the absence of a notice to bargain?

[160] It does seem safe at least to conclude that on the balance of the evidence, the implications of s. 107 of the *Act* were never in the forefront of management's analysis. Mr. Bouchard testified that he asked his human resources advisors at least once about s. 107 of the *Act* but what his advisors told him is unknown, only that he did not change course. Through the union's intervention, he later learned about the decision in *CRA* enjoining the same employer in another region from altering hours of work during an earlier statutory-freeze period. Mr. Bouchard was not deterred.

[161] The balance of the evidence indicates that Mr. Bouchard's determination to implement a new policy on hours of work was driven, exclusively for all intents and purposes, by his belief and that of his senior management team about was required in his workplace to succeed with Service Renewal. Mr. Bouchard made a unique choice, to avoid the risk that he be perceived of failing. As proven in testimony, changing hours of work was not "baked into" Service Renewal. The "wheels" were not already "in motion". There is no evidence to show that the "fully developed" Service Renewal plan handed down from national headquarters touched upon hours of work at all. As mentioned earlier in this decision, no other tax office followed suit. Mr. Bouchard acted based on his judgment and assessment for reasons he formed and that were

convincing to him, and he was apparently not influenced by the possible impact of s. 107 of the *Act* or the reality of how Service Renewal was implemented elsewhere.

[162] Thus, I am led to the conclusion that the respondent might have acted in the same fashion had there been no notice to bargain. Does that mean then that the respondent's action was reasonable within the meaning of paragraph 57 of *Walmart* and that consequently, its defence should succeed?

[163] As stated as follows at paragraphs 94 and 96, *Walmart* records that the original arbitration decision in that case found no evidence that the employer would have closed its business in the absence of the certification petition, which had triggered the statutory freeze:

> *[94] … the arbitrator was right to maintain that invoking the closure (or the right to close its business) did not on its own suffice to justify the change for the purposes of s. 59 (para. 26). As I mentioned above, an arbitrator who hears a complaint based on that section cannot merely find that the employer has the power to manage its business and, in so doing, to close it. The arbitrator must also be satisfied that the employer would have closed the business even if the petition for certification had not been filed. Given the absence of evidence to that effect, however, it was reasonable to find that the closure did not flow from a normal management practice.*
>
> …
>
> *[96] … it must be understood that the arbitrator's statement that the employer had not shown the closure to have been made in the ordinary course of the company's business was grounded in his view that the Union had* already *presented sufficient evidence to satisfy him that the change was not consistent with the employer's past management practices or with those of a reasonable employer in the same circumstances. It was in fact reasonable to find that a reasonable employer would not close an establishment that "was performing very well" and whose "objectives were being met" to such an extent that bonuses were being promised.*

[164] To that extent, my finding based on the evidence that the respondent in this complaint might have acted in the same fashion had there been no notice to bargain could suggest a path to a different conclusion about a violation of the statutory freeze. However, on balance, I do not believe that I can follow that path.

[165] Once more, I remain unconvinced that a second-prong "reasonableness" analysis — the only reason for asking what the respondent would have done had notice to bargain not been served — is required, given the presence of clear evidence about past

management practice (see *Walmart*, at para. 56). Beyond the issue of the implied precondition in paragraph 56, I cannot ignore other critical observations in *Walmart*, which very much caution against subverting the force of a statutory freeze.

[166] Consider what I take to be one of the most significant statements in *Walmart*, at para. 49, as follows:

> *[49] … I wish to stress that to accept the opposite argument — that the employer can change its management practices in all circumstances because it had the power to do so before the union's arrival — would be to deprive s. 59* [the statutory freeze] *of any effect. Thus, s. 59 was enacted for the specific purpose of preventing the employer from [TRANSLATION] "exercising its great freedom of action at the last minute by being particularly generous or adopting any other pressure tactic" (Morin et al., at p. 1122).* ***To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit.***
>
> [Emphasis added]

[167] The context for paragraph 49 is illuminated earlier in *Walmart* at, for example, paragraphs 34 and 35, which discuss as follows the purpose of the statutory freeze, albeit in the specific circumstances of a first contract negotiation:

> *[34] In my opinion, the purpose of s. 59 in circumscribing the employer's powers is not merely to strike a balance or maintain the* status quo*, but is more precisely to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith ….*
>
> *[35] The "freeze" on conditions of employment codified by this statutory provision limits the use of the primary means otherwise available to an employer to influence its employees' choices: its power to manage during a critical period … By circumscribing the employer's unilateral decision-making power in this way, the "freeze" limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.*

[168] Then, shortly after paragraph 49, *Walmart* observes as follows as paragraph 51:

> *[51] An interpretation that would leave the employer with all the freedom it had before the petition for certification was filed would be contrary to* s. 41*of the* Interpretation Act*, CQLR, c. I-16, which favours a broad and purposive interpretation of the provision. It seems to me that such an interpretation would also overlook the*

> *fact that the employer ceases to have sole control over labour relations in its business after the union arrives on the scene.…*

[169] My approach to applying s. 107 of the *Act* cannot leave the respondent with unfettered freedom of action; I must similarly give the statutory freeze real meaning and force. To be sure, s. 12 of the *Interpretation Act* (R.S.C. 1985, c. I-21) in the Board's jurisdiction imposes the same requirement that I give to s. 107 of the *Act*, which is, as per s. 12, "… such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[170] Mr. Bouchard had the power to change hours of work before notice to bargain was served, as conceded by the complainant, as long as the changes were consistent with the rules set by the collective agreement. Had the complainant not triggered the protection afforded by s. 107 of the *Act* by serving notice to bargain, Mr. Bouchard could probably have continued to make changes, including stronger restrictions that were not temporary or limited in scope, subject once more to what the collective agreement permitted. However, just as his world changed with the coming of Service Renewal, so too did his world as a representative of the employer change when the complainant served notice to bargain. To suggest that Mr. Bouchard could continue to exercise his powers and significantly alter past management practice after notice to bargain was served as if nothing changed would be to do exactly what *Walmart* says should not happen: "**To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit**" [emphasis added]. A finding that the respondent might have proceeded to change hours of work in the way it did had the complainant not served notice to bargain — a finding that may not even be required or appropriate given the precondition stated at paragraph 56 of *Walmart* — is, in my view, far from a compelling reason to fail to give s. 107 of the *Act* its required broad and liberal application.

[171] If the collective bargaining regime that lies at the heart of the *Act* is to function effectively within the purposes stated by the *Act* in its preamble, it is essential that an employer respect the injunction against unilateral changes in terms and conditions of employment during the s. 107 statutory-freeze period. The grounds for a business as usual exception must be constructed conservatively, in my view, to not frustrate the compelling purpose of s. 107. That, once more, a reasonable employer might have exercised its powers in a certain way in counterfactual circumstances should not be a

sufficient defence in most circumstances. More will normally be required unless, following *Walmart* at paragraph 56, there is no evidence with respect to past management practice upon which a defence can rely. Even then, caution will be necessary. Otherwise, the force of the statutory freeze may be frustrated.

[172] In summary, I find that the respondent has not offered a defence that meets the bar set by *Walmart*, understanding that *Walmart* does not relieve me of the requirement to give the statutory freeze a broad and liberal interpretation. The respondent changed a term and condition of employment that might have been included in the collective agreement after notice to bargain was served, without the consent of the bargaining agent. The change did not conform to past management practice. Based on the evidence, it cannot safely be concluded that a reasonable employer would have acted in the same fashion in the same or similar circumstances. While one might accept that Mr. Bouchard and his team would have implemented the same changes in the absence of the notice to bargain, to hold that therefore, the respondent was free to exercise its powers in the way that it did as if nothing happened, would risk rendering s. 107 of the *Act* meaningless.

[173] I do not propose to canvass here in detail how the Board's decisions and other labour board cases argued by the parties have defined and applied the business as usual approach and how they compare to *Walmart*. However, I closely reviewed those decisions, and I found that I would have reached the same conclusion reflecting on those cases as resulted from my analysis based on *Walmart*. They reinforce my conclusion that the respondent cannot shield itself from the statutory freeze in s. 107 of the *Act* based on a business as usual defence in the circumstances of this case. Were I to emulate what I believe to be the thrust of the other cases cited by the parties, I would find that the business as usual pattern in force on, and before, the complainant served notice to bargaining — the pattern frozen by s. 107 — involved restrictions on flexible and compressed hours of work that were temporary and limited in scope, did not differentiate team leaders from regular employees, and vested team leaders and lower-level managers with the authority to approve hours of work. The respondent changed that pattern after notice to bargain, thus breaching s. 107.

[174] As an aside, examples applying the business-as-usual approach include *Spar Aerospace*, quoted in *ONA*, at para. 30; *CBSA*, at paras. 162-190; *Correctional Service*, at

paras. 61 and 96 to 98; *CAPE*, at paras. 132 to 135; *CFPA*, at paras. 707 to 709; *Chargehands*, at paras. 57 to 60; *PAFSO*, at para. 127; and *CRA*, at para. 77.

[175] Given that both parties founded their arguments principally on the business as usual approach, I have not felt it necessary in these reasons to comment on the respondent's contention that the reasonable expectations approach is inappropriate in this case, essentially inconsistent with *Walmart*, or that the business as usual and reasonable expectations approaches are separate and should not be intermingled. The Board has relied on a reasonable expectations in some of its decisions. (See, for example, *CBSA*, at paras. 174 and 175; *CFPA*, at para. 79; *ONA*, at para. 48; *CRA*, at paras. 72 and 77; *Correctional Service*, at para. 99; *Chargehands*, at para. 61, and *PSAC*, at paras. 52 and 58.) Whether the Board risks being in error, based upon an interpretation of *Walmart*, by conducting a reasonable expectations analysis will be for another panel of the Board to decide. I will observe only that *Walmart* is not without its own reference to reasonable expectations. At paragraph 42, it contains the following statement referring to the dependence of workers on their jobs: "In this context, it can be said that employees have a reasonable expectation that their employer will not terminate their employment except to the extent and in the circumstances provided for by law."

VII. Corrective action

[176] Section 192(1) of the *Act* grants the Board broad authority to fashion corrective action in a complaint filed under s. 190(1), as follows:

> ***192 (1)*** *If the Board determines that a complaint referred to in subsection 190(1) is well founded, the Board may make any order that it considers necessary in the circumstances against the party complained of, including any of the following orders:*
>
> > ***(a)*** *if the employer has failed to comply with section 107 or 132, an order requiring the employer to pay to any employee compensation that is not more than the amount that, in the Board's opinion, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee ….*

[177] The complainant sought relief in the following forms:

(1) a declaration that the respondent violated s. 107 of the *Act*;

(2) an order requiring the respondent to cease and desist with the offending changes to hours-of-work schedules and to return employees to the prior practice; and

(3) an order requiring the respondent to post this decision in all prominent workplaces across the country; and

(4) that the Board remain seized of the matter.

[178] The Board grants all those corrective actions as justified and appropriate in the circumstances of this case.

[179] The complainant also asked the Board to consider further corrective action in the form of an order requiring the respondent to compensate employees for financial losses incurred as a result of the changes it implemented in June 2017.

[180] Compensation for financial losses is linked to "remuneration" in s. 192(1)(a) of the *Act*. Thus, there is an argument that the type of compensation sought by the complainant is not contemplated by that provision. However, the wording of s. 192 (1) makes it clear that the Board may "… make any order that it considers necessary in the circumstances …" and that s. 192(1)(a) only outlines an example. In my view, I have the authority to consider the possibility of compensation of the type urged by the complainant.

[181] Without commenting on the respondent's objection that it was prejudiced by the late notice of corrective action in the form of financial compensation, I decline to act on the complainant's request. The testimony about the nature and extent of the financial losses experienced by bargaining unit members as a result of the respondent's violation of s. 107 of the *Act* was very brief and not readily generalized. The evidence did not prove how many employees actually experienced a change in their hours of work or how widespread were the resulting financial losses. To secure that evidence, I would need to reopen the hearing and solicit further testimony from the parties, which would unnecessarily prolong these proceedings, in my view. I am also concerned that even with better evidence, constructing and implementing an appropriate process for approving applications for compensation could be administratively complex and time-consuming and might lead to new disputes.

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

(The Order appears on the next page)

VIII. Order

[183] The complaint is allowed.

[184] The Board declares that the respondent violated s. 107 of the *Act*.

[185] Effective within 30 days of the date of this decision, the respondent shall rescind the changes to hours of work implemented on June 19, 2017, at its Sudbury Tax Office and respect the normal practices on hours of work there that were in effect when, and before, notice to bargain was served, until such time as a new collective agreement is signed or employees in the bargaining unit are in a position to conduct lawful strike action.

[186] The respondent shall post this decision in all prominent workplaces for a period of 90 days.

[187] The Board shall remain seized of the complaint for the purpose of addressing any implementation issues for a period of 90 days.

November 15, 2019

Dan Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board