Date: 2020-02-18

File: 590-02-39494

IN THE MATTER OF

A PUBLIC INTEREST COMMISISON

UNDER THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT*

BETWEEN

THE PUBLIC SERVICE ALLIANCE OF CANADA
AND
THE TREASURY BOARD OF CANADA

FOR THE PROGRAM AND ADMINISTRATIVE SERVICES GROUP (PA)

Before: Morton Mitchnick, chairperson,

Carol Wall and Jean-François Munn, nominees

For the Bargaining Agent: Gail Lem, Pierre-Samuel Proulx, Omar Burgan

For the Employer: Daniel Cyr, Greg Enright

Heard at Ottawa,
December 4 to 7, 2019 and January 16 and 17, 2020.

PUBLIC INTEREST COMMISSION REPORT

[1] This is the Report of a Public Interest Commission (PIC) established under the *Federal Public Sector Labour Relations Act* relating to renewal of the collective agreement between the Public Service Alliance of Canada and the Government of Canada's Treasury Board, for the unit of the Core Public Administration (CPA) referred to as "Program and Administrative Services" (PA). The PA is by far the largest and most diverse of the federal public service bargaining groups, comprising some 85,000 employees, and made up of the following subgroups:

- Administrative Services (AS): 30,716 employees
- Information Services (IS): 3,646 employees
- Program Administration (PM): 24,552 employees
- Welfare Programs (WP): 3,637 employees
- Communications (CM): 6 employees
- Data Processing (DA): 42 employees
- Clerical and Regulatory (CR): 22,042 employees
- Office Equipment (OE): 1 employee
- Secretarial, Stenographic and Typing 106 employees

I. The Bargaining History

[2] With such a large and diverse group, one can see the Alliance having an extensive list of issues that its members wished to have brought forward for discussion. Similarly, the employer has its own list of items in the collective agreement that it is seeking to modify. That said, each party ultimately has to make decisions about what it can realistically hope to achieve in a single round. A number of issues here were common as well to the ongoing bargaining between the parties at three other tables, being SV, TC and EB, and the parties agreed that the outcome of those issues at the PA table would be adopted as the outcome at the other tables (each of the other tables were given representation at the PA table in light of that). In all the combined list of changes sought in this round numbered upwards of 90 (by far the bulk of those, as is normal, coming from the side of the Union). None of that, as indicated, may be surprising in itself. What *is* surprising, in this Chair's experience, is the total inability of the parties, for whatever reason this round (and across the sector), to "prioritize" their needs and make compromises as they proceeded so that the list of outstanding issues could gradually be reduced, to the point where the number

outstanding becomes manageable in a way that allows a "path to settlement" to begin to materialize. When we say "total inability", that does not over-state the matter. This collective agreement expired June 20th, 2018, close to 18 months before the convening of the PIC session in December 2019. The parties by that time had met in bargaining on 21 occasions, with another 7 days being spent bargaining on the "common issues" separately. At the point where the parties came before the Commission, the sum total of their success in winnowing this massive list was to agree on four items of pure "house-keeping", including updating the names of the governing statutes, and replacing the word "mileage" with "kilometric". Each party of course is before us blaming the other for that; the truth, it may be said, generally lies somewhere in between.

[3] Given the pace of bargaining, the Alliance first applied to the Board for the establishment of a PIC on December 11th, 2018. The Chair of the Board by decision dated January 29, 2019, advised the parties that she was not recommending the establishment of a PIC at that stage, and directed the parties to resume their bargaining. With no change in the pace, the Alliance again applied for a PIC on May 7th, 2019, and the present Commission was then established. With the hearings ultimately scheduled for December 4-7, the parties did meet over a September week-end to attempt to break the impasse, but that effort ultimately ended in failure. As a result all of the outstanding items in dispute between the parties continued to be on the table. It was agreed between the Commission and the parties in scheduling the matter that the Commission would first hear the parties on their Briefs, and then use the remainder of the four days to try to assist the parties with conciliation. As it happened the presentation of the Briefs consumed the entire four days and more, so that the anticipated conciliation session was not able to take place until January 16th and 17th. Once again, while there was discernible movement on both sides, the talks ultimately failed, and the Commission must respect the "without prejudice" nature of the efforts, and make no reference to any changes in position not subsequently made part of a party's "official" position in the bargaining.

II. General Commentary

[4] A Public Interest Commission under the Act has no power to dictate the terms of a collective agreement between the parties. Its task, as section 172 sets out, is to "endeavour to assist the parties to the dispute in entering into or revising a

collective agreement". That "assistance" may take various forms, depending on the circumstances. Any party, should it so choose, can engage the Commission process simply as a necessary step to adding pressure to the bargaining by way of a more imminent threat of the resort to sanctions. Alternatively, and more constructively, both parties can use the experience and relative objectivity of a tripartite panel to help them find a way to reach settlement. That may be done by way of a Report; but again, the shortcoming of a Report is that, in the PIC context, it does not resolve the dispute between the parties unless the parties are persuaded to adopt it. The ideal result of the PIC process, therefore, is for the panel, once educated through the Briefs on the issues, to help lead the parties to a settlement that *will* mean an end to the dispute. The closer the parties are to a deal when they arrive before the PIC, the more likely it is that the Commission will be able to help them "close the loop", whether by way of a Report or a conciliated settlement. Here, there is no loop to close. The effective bargaining has continued to be at zero. In the face of that, any collection of "recommendations" from the Commission, whether endorsing or rejecting, either expressly or by omission, particular items on the parties' massive list, would be so extensive as to ensure that some or other points in it would cause both sides to reject it as a solution, and would only serve to entrench the parties in positions to which the other side remains unlikely to accede. The focus of the present Report therefore, is to encourage the parties to approach the bargaining in a way that might get them over the current impasse, and allow them to proceed with accommodation of each other's needs in a way that will facilitate their path to a settlement.

III. The Present Dispute

[5] No matter what form the Report of a PIC may take, the Commission must always be mindful of the factors it is specifically mandated by the Act to consider. These are set out in section 175 and, as always, include:

> *(e) the state of the Canadian economy and the Government of Canada's fiscal circumstances.*

[6] The current bargaining occurs in a period of at least modest economic growth, and the Alliance quite properly refers to that in support of its position on economic increases. At the same time, however, no economic forecasts today fail to note the immediate potential for upheaval in the world economy, arising from a variety of

sources, including the perceived instability of Canada's major trading partner and neighbour to the south. That is a consideration that fairly supports the cautious position of the government in these proceedings.

[7] Another factor enunciated by the Act is:

> ***(a)*** *the necessity of attracting competent persons to, and retaining them in, the public service in order to meet the needs of Canadians;*

[8] The government cites this as a justification to put no more money on the table than it needs to find and maintain the qualified staff it requires. Subsection (a) clearly supports the position of the government in that regard. But the government in its own legislation goes on to recognize as factors beyond that:

> ***(b)*** *the necessity of offering compensation and other terms and conditions of employment in the public service that are comparable to those of employees in similar occupations in the private and public sectors, including any geographic, industrial or other variations that the public interest commission considers relevant;*
>
> ***(c)*** *the need to maintain appropriate relationships with respect to compensation and other terms and conditions of employment as between different classification levels within an occupation and as between occupations in the public service;*
>
> ***(d)*** *the need to establish compensation and other terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered.*

[9] *All* of these factors must properly be taken into account, as exemplified in the recently-released Report of the Public Interest Commission dealing with the specific issues of the Education and Library Science (EB) group.

IV. The "Pattern" issue

[10] There are, from the Commission's perspective, two additional key factors underlying the currently intractable dispute between the parties. One is the success that the government has achieved in reaching settlements this round with 15 different bargaining agents for 34 federal public sector bargaining groups, including 17 in the CPA and 17 at the CRA and other separate agencies, covering a total of some 65,000 employees (and including, the government notes, the Economist group). Out of those

settlements a clear pattern has emerged on a number of important issues, including the fundamental question of wage adjustments themselves. From that latter perspective what the pattern shows is a four-year agreement with general wage increases totalling 7 per cent, plus an additional 1 per cent to be used for special adjustments as needed. Where such are not needed, the one per cent is applied to the general increase, typically in the first and second year. That pattern provides an obvious "path to settlement", at least of the wage issue, should both parties be willing to embrace it. The Alliance, however, is decidedly not. The Alliance notes that it is by far the biggest Union presence in the federal public sector, and that it historically has always made its own judgment with regard to settlement, notwithstanding that to which other Unions in the sector may have acceded. It notes as well that the size of this PA unit alone substantially outnumbers the totality of the employees covered by the units that have now settled. For the current collective agreement the Alliance has proposed a three-year deal, at 3.25 % per year – all of which to be applied after effectively a 4% adjustment to a number of the most populous classifications, for a total increase to the current Wage base of roughly 17 and a half per cent. Additionally the Alliance seeks increases and extensions to Allowances estimated to total somewhere between .5 and .6 %. Along with all of the other "monetary" improvements that were and officially continue to be on the table, Treasury Board costs the total "ask" by the Alliance this round at close to 29% of the current wage base. It appears to the Commission that that massive gap in the monetary positions has had an over-riding influence on the willingness of the parties to move, no matter what the specific topics for discussion may otherwise have been.

[11] The employer relies heavily on the "replication" principle in support of its decision to date to hold fast to the now very extensive "pattern" existing on the wage front. That reliance is not surprising. It must be said, however, that the replication principle is largely a tool used in interest arbitration for arbitrators to attempt to provide some kind of "objective" perspective on what a settlement, based on trends in the marketplace, might be expected to look like. That is done because on the arbitration track there is no ability to test the outcome of the parties' "subjective" perspectives by way of access to the strike/lock-out mechanism. But this is not an interest arbitration – and this Report conceivably could read quite differently if it were. Rather, the Commission in the circumstances here is limited to attempting to divine

what initial modifications in the positions of the parties might open the door to an overall settlement, and to urge the parties to consider those modifications.

[12] The first consideration, it is clear from our dealings with this matter, must be given to the wage package. In that regard it must be added that the replication principle cannot be said to be of no significance for the parties in the situation at hand. Bargaining strength can vary by bargaining agent to bargaining agent, and indeed from bargaining unit to bargaining unit depending on the size and strategic importance of the unit. That said, the government has now arrived at good-faith settlements with a wide range of its other bargaining partners, and, notwithstanding any difference in bargaining strength, those settlements at the very least create parameters beyond which the government cannot realistically be anticipated to move in a very large way. What stands out in the present case is the narrow range within which the parties at this table may be apart, at least on the question of Wages themselves. If the Alliance were to consider a four-year deal, it has made it clear that the general increase, must take into account inflation, and must stand on its own, quite apart from the case it believes can be made for special adjustments or extensions that should be made to Allowances. In that regard the Alliance has a demand with respect to Indigenous Languages, "Primary Responsibility", Public Safety, Fishery Officers, members in the Translation Bureau, and those dealing with Compensation and the "Phoenix" problem (more on that later). Treasury Board, again, maintains that any such adjustments must fall within the combined ceiling of their "pattern". The reality in this particular case, however, is that, because of the population of the classifications involved, the total impact on the wage base, even if Treasury were to agree to all of the aforementioned Alliance demands, would amount to just .66%. Half of that is represented by the proposed Public Safety Allowance, and if the parties were to continue discussion of ways of addressing the Alliance's concerns through program supports targeted for the individuals that may require it, the gap could be closer to .33 of a per cent. The fight would then be whether that .33 per cent falls inside or outside the amount that the parties agree upon as a general increase, and we do not see that distance between them to be insurmountable.

V. The "Phoenix" Problem

[13] Having mentioned earlier that we see two key factors at play in this decidedly unsuccessful round of bargaining, here is the second one. The public has a general

awareness of the debacle that the new public-service pay system has been; but only these parties appreciate the full scope and extent of the problems that it has caused the employer administratively, and the vast number of employees that have been seriously affected by it. The Commission has had the benefit of both the Senate Report on the Phoenix Pay Problem and oral testimony, and is aware of the measures that the employer continues to take to remedy this problem.

[14] Whatever problems Phoenix may have caused, and continues to cause to payroll administration on an ongoing basis, the ability of the system to handle *retroactivity* following the consummation of a new collective agreement in an accurate and timely way takes the challenge to a whole new level. Treasury Board has accordingly worked extensively with PSPC to attempt to develop the best methods of dealing with this. Those methods we are advised were developed in consultation with a number of bargaining partners across the sector. All of that has led to a Memorandum of Understanding on "Implementation" applicable only to the current round of bargaining that has now been signed off by all of the sector's bargaining agents save the Alliance. That Agreement, apart from carefully setting out the steps that have been agreed to be followed, seeks to recognize in a balanced way the impact that Phoenix is having on the employer by a relaxing of the timelines; and at the same time on the impact it will have on the employees by specifying compensation for the extraordinary delay. As consistency, on this matter in particular, will be a major factor in the administration's ability to meet its obligations, the Alliance might consider accommodation on this one-time initiative across the sector, and look in return for accommodation on the employer's part on the outstanding issue of Phoenix "damages".

[15] There have, outside the bargaining for renewal of the sector's collective agreements, been side discussions between the government and its Unions on the burning question of compensation for the harm or damages that have already been visited upon the members. Once again all of the government's other bargaining partners have signed off on an Agreement dealing with this; the difference in this instance is that it has been expressly recognized in the Agreement that the Alliance may have more leverage than other Unions in dealing with the government on this compensation, with the result that the other Unions' Agreement contains a "me too" clause in the following terms:

> *The employer agrees to incorporate into this agreement any damages measures negotiated with any other bargaining agents representing Core Public Administration employees that are more generous than those in this agreement.*

[16] It may be that much of the impetus for the Alliance's markedly long (and steadfast) list of demands this round is generated by the mood of the membership over "Phoenix". Paradoxically, it may be that a satisfactory resolution of the Phoenix damages issue away from but in tandem with the bargaining table is the ultimate antidote to the impasse otherwise locking the parties into their current stand-off.

[17] With those thoughts we turn it over to the parties.

February 18, 2020.

Morton Mitchnick,
chairperson
Public Interest Commission