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

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

BETWEEN

TREASURY BOARD

Applicant

and

ASSOCIATION OF JUSTICE COUNSEL

Respondent

Indexed as
Treasury Board v. Association of Justice Counsel

In the matter of an application, under subsection 71(1) of the *Federal Public Sector Labour Relations Act*, for a declaration that positions are managerial or confidential

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Richard E. Fader, counsel

For the Respondent: Christopher Rootham, counsel

Heard at Ottawa, Ontario,
July 7 and September 26, 2017.

REASONS FOR DECISION

I. Application before the Board

[1] The Treasury Board ("the employer") made this application, in which it sought an order declaring three positions within the Law Practitioner (LP) bargaining unit managerial or confidential. The Association of Justice Counsel ("the bargaining agent" or AJC) opposed the application.

[2] The application was filed with the Public Service Labour Relations and Employment Board (PSLREB) on February 6, 2015, under s. 71(1) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*). On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) changed the name of the PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[3] The question to be determined in this case is whether the duties and responsibilities of the three positions fall within the grounds described in s. 59(1) of the *Act* such that they should be declared managerial or confidential positions. Specifically, the employer argued that the occupants of these positions ("the occupants") provide labour relations advice (s. 59(1)(c)) or that in relation to labour relations matters, they have duties and responsibilities confidential to the occupant of a managerial or confidential position (s. 59(1)(h)).

[4] For the reasons that follow, I find that the occupants do not provide labour relations advice; nor, in relation to labour relations matters, do they have duties and responsibilities confidential to the occupant of a managerial or confidential position. As such, I dismiss the applications.

II. Summary of the evidence

A. Public and Labour Law team of the Department of National Defence

[5] The three positions at issue are classified at the LP-01 group and level in the Public and Labour Law ("the PLL") team of the Department of National Defence (DND)

Legal Services unit (positions 6903, 10498, and 21304). The PLL team provides legal advice to management at the DND and the Canadian Armed Forces, including to members of the executive group and labour relations officers. The team's main clients include the assistant deputy minister (human resources - civilian), the chief of defence intelligence, and the assistant deputy minster (review services).

[6] Laurel Johnson is the PLL team's director and senior counsel and was the sole witness at the hearing. She assigns work to the occupants, who report directly to her.

[7] Ms. Johnson described the occupants' work. Generally, it involves handling complaints, providing litigation support, advising on legislative initiatives, and developing policy.

[8] Their complaints work mainly involves human rights. The complainants are Canadian Armed Forces members and the alleged violators are civilian members, or vice versa. At times, their work has included classification and work-description grievances as well as work refusals made under the *Canada Labour Code* (R.S.C., 1985, c. L-2; *CLC*). The occupants make legal risk assessments and advise clients with respect to responding to complaints and will attend mediation and conciliation sessions with management. Their litigation support includes reviewing documents with respect to production requests in litigation files, some of which documents may be subject to cabinet confidence.

[9] They also advise on legislative initiatives that will affect federal public sector employers (for example, with respect to amendments to the *Act*, the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), and the *CLC*). They also advise Canadian Armed Forces members on interpreting and applying the *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.)) and the *Government Employees Compensation Act* (R.S.C., 1985, c. G-5; *GECA*).

[10] In addition, the occupants perform policy development work by advising those responsible for developing and interpreting defence administrative orders and directives (DAODs). DAODs provide administrative direction on a variety of work-related topics, such as internal procedures for disclosing wrongdoings in the workplace (DAOD 7024-1) or the acceptable use of the Internet, defence intranet, computers and other information technology systems (DAOD 6002-2).

[11] The PLL team also sits on certain senior-level review boards as a management representative. Ms. Johnson indicated that when she sits on committees, she has the LP-01s attend with her because they often do the legal work that flows from those discussions, including in relation to values and ethics, occupational health and safety, and official languages.

[12] According to Ms. Johnson, the PLL team's work will be negatively impacted if the three positions are not deemed confidential, given that the rest of the positions in the team are excluded. Absent the exclusion of the three positions, the team would not be able, in her words, to be "two-deep" on any file. That is, it would be difficult for the team to operate properly considering employees on leave and the volume of work.

B. Centre for Labour and Employment Law (CLEL)

[13] In April 2017, some work previously done by the PLL team was assumed by the Department of Justice's Centre for Labour and Employment Law (CLEL). The CLEL is responsible for providing labour and employment-law advice to departments and agencies in partnership with them and in collaboration with legal services units.

[14] The CLEL's mandate is described in the *Protocol on the Management and Provision of Legal Advisory Services in Labour and Employment Law* ("the Protocol"). It is to "… advise departments and agencies on matters stemming from the deputy head's direct or delegated functions as employer." The CLEL provides "… advisory services prior to the referral of a complaint or grievance for hearing or prior to the filing of an action, at which time litigation counsel is assigned." The Protocol further indicates that the CLEL's mandate includes the following:

> …
>
> • *The exercise of a deputy head's delegated authorities or roles under employer (Treasury Board or separate agency) policy instruments and application of collective agreements or other terms and conditions of employment (e.g. performance management, policy on use of electronic networks, harassment)*
>
> • *A deputy head's human resources management authorities under section 12 of the* Financial Administration Act*, or constituting statute, including legal issues relating to administrative investigations*
>
> • *The application of Part II of the Canada Labour Code (including occupational health and safety and violence)*

> *• Human rights and accommodation issues as they arise in the employment context*
>
> *• Staffing issues as they relate to a deputy head's direct and delegated authorities under the Public Service Employment Act or constituting statute*
>
> *• Values and ethics, including codes of conduct, conflicts of interest or disclosures of wrongdoing under the Public Servants Disclosure Protection Act*
>
> …

[15] The CLEL's mandate does not include providing labour and employment law advice to certain departments and agencies in relation to specified subjects. The Protocol specifies that "[h]uman resources and human rights advice regarding members of the Canadian Armed Forces *(Department of National Defence Act)*" remains with the DND's legal services unit.

[16] Legal services units and the CLEL share a litigation support role in relation to files assigned to the National Litigation Sector of the Department of Justice. Legal services unit counsel continue to provide direct litigation support (e.g., relating to document production, affidavit and witness preparation, interactions with and briefing clients, and reviewing a pleading as it relates to the specific departmental context) and act as liaisons with the CLEL and litigation counsel. The CLEL provides specific labour and employment law input as needed in litigation files, including reviewing pleadings and risk assessments prepared by litigation counsel on labour and employment law issues.

[17] In defining the roles between the CLEL, legal services units, litigation counsel, and departments and agencies, the Protocol states that labour and employment law "… requests are to be assigned to counsel who occupy positions that are excluded from the LP bargaining unit pursuant to the *Public Service Labour Relations Act*." In this respect, the Protocol provides that each legal services unit is "… asked to identify an excluded counsel or a manager." That person acts as a point of contact for the CLEL and the department or agency "… to facilitate the provision of legal advice and litigation support, as needed."

[18] When handling legal advice requests, the CLEL communicates directly with the client department or agency. The Protocol goes on to state that when circumstances warrant for a given file, the legal services unit may be part of the discussions with the client and the CLEL "… (e.g. where the [labour and employment law] issue is part of a

larger project or file; where specific operational contexts of the department are raised, where the context for previous [legal services unit] advice may be at issue)."

[19] In terms of the CLEL's impact on the PLL team's work, Ms. Johnson said that any "pure" labour relations work went to the CLEL. That is, the PLL team was not involved in collective bargaining, certification, or essential services applications and did not deal with unfair labour practice complaints. In fact, the PLL team member who previously did some of that work transferred to the CLEL.

III. Summary of the arguments

A. For the employer

[20] Section 59(1)(c) of the *Act* speaks of providing labour relations advice. In the employer's view, "labour relations" is a very broad concept encompassing labour and employment matters in general. It goes beyond issues pertaining to a collective agreement and includes all matters affecting terms and conditions of employment. As such, the meaning of "labour relations" must extend to the subject matter relating to employer and employee relations included not only in the *Act* but also in the *Financial Administration Act* (R.S.C., 1985, c. F-11), the *PSEA*, and other statutes that affect employment-related matters.

[21] According to the employer, it is difficult to imagine federal public administration positions that more squarely fall under the criteria of s. 59(1)(c) than those in this case. The occupants provide advice on practically the entire scope of labour relations matters, almost exclusively, and therefore, their positions should be declared managerial or confidential.

[22] Moreover, the employer stated that by its very nature, legal advice demands that the relationship be one in which the provider of the advice is, as set out in s. 59(1)(h) of the *Act*, "confidential to" the person receiving it. In this case, the advice is to the DND management team and is exclusively related to labour relations matters. On this basis, the positions at issue should be excluded pursuant to s. 59(1)(h) as well.

B. For the bargaining agent

[23] The AJC notes that the right to join an employee organization and participate in its affairs is a constitutionally protected activity. Therefore, s. 59(1) should be

interpreted restrictively so as not to deprive employees of their constitutional right to associate.

[24] In the AJC's view, s. 59(1) of the *Act* is fundamentally about conflicts of interest. It submitted that this Board has interpreted s. 5.1 of the former *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; *PSSRA*) (the managerial and confidential exclusions under that legislation) to apply only to conflicts of interest that arise within an employee's bargaining unit (see *Public Service Alliance of Canada v. Canada (Treasury Board) (Purchasing and Supply Group Bargaining Unit)*, PSSRB File No. 174-02-250, [1977] C.P.S.S.R.B. No. 3 (QL) ("*1977 PSAC*")). The AJC submitted that the interpretation of the term "labour relations" should be limited to collective bargaining and related collective issues within an employee's bargaining unit. This would avoid a conflict of interest as an employee would not be asked to provide advice to management on an issue or matter that may benefit him or her.

[25] With respect to s. 59(1)(h), the AJC submitted that the Board should be particularly careful when applying it to lawyers. That is, all lawyers owe a duty of confidence to their clients, and all federal government lawyers routinely report to and advise managerial or confidential employees, particularly executives. Therefore, to not exclude too many members of the LP group, it is important that the employer demonstrate that the confidential duties and responsibilities relate to labour relations.

IV. Issues

[26] In my view, the circumstances of this case and the parties' arguments raise the following issues, which I must consider and determine:

A. What does the term "labour relations" mean in ss. 59(1)(c) and (h)?

B. Do the occupants provide labour relations advice?

C. With respect to labour relations matters, do the occupants have duties and responsibilities confidential to the occupant of a managerial or confidential position?

V. Analysis

A. What does the term "labour relations" mean in ss. 59(1)(c) and (h)?

[27] To determine this issue, as the Supreme Court of Canada confirmed in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, I must read the words of the *Act* "… in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[28] Sections 59(1)(c) and (h) provide as follows:

59(1) *After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that*	***59(1)*** *Après notification d'une demande d'accréditation faite en conformité avec la présente partie ou la section 1 de la partie 2.1, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :*
…	*…*
(c) *the occupant of the position provides advice on labour relations, staffing or classification;*	***c)*** *poste dont le titulaire dispense des avis sur les relations de travail, la dotation en personnel ou la classification;*
…	*…*
(h) *the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).*	***h)*** *poste de confiance occupé, en matière de relations de travail, auprès des titulaires des postes visés aux alinéas b), c), d) et f).*

[29] There is no definition of the term "labour relations" in the *Act*. I understand the ordinary meaning of that term to signify the relationship between labour, as a collective or group of employees, and its employer. The term "labour-management relations" is used twice in the preamble to the *Act*, which states broadly that "… effective labour-management relations represent a cornerstone of good human resource management …". It speaks specifically of a "… commitment from the

employer and bargaining agents to mutual respect and harmonious labour-management relations …".

[30] The employer and the bargaining agent are the parties to this application, as provided for in ss. 71 to 75 of the *Act*. The terms "employer" and "bargaining agent" are defined for the purposes of the *Act* in s. 2(1). Bargaining agent means "… an employee organization that is certified by the Board as the bargaining agent for the employees in a bargaining unit." Similarly, an employee organization when seeking to be certified as the bargaining agent is party to any initial application under s. 59. Section 2(1) defines "employee organization" in respect of employees who are not Royal Canadian Mounted Police (RCMP) members or reservists as "… an organization of employees that has as one of its purposes the regulation of relations between the employer and its employees for the purposes of Parts 1 and 2 …".

[31] Indeed, s. 59 is found in Division 5, titled "Bargaining Rights", of Part 1 of the *Act*. That part is titled "Labour Relations" and covers a myriad of topics, including employee freedoms, management rights, the certification of bargaining agents, the revocation of such certifications, collective bargaining, collective agreements, essential services, strike votes, and unfair labour practices. As the Board described it in *Brown v. Union of Solicitor General Employees*, 2013 PSLRB 48 at para. 47, Part 1 of the *Act* sets out the "… framework for employer-employee relations in the federal public service." It added the following:

> *[47] … It* [Part 1] *sets out an extensive set of rules governing the relationship between the federal government as an employer (wearing a variety of different hats) and its employees. It sets the framework for the collective bargaining regime, including the certification of bargaining agents and their relationships with both employees and employers. It establishes the Board as the arbitrator of disputes. Much of what is set out in Part 1 of the* Act *addresses the statutory framework for establishing bargaining units for groups of employees, the certification of bargaining organizations as bargaining agents to act on behalf of those employees in those units, and the negotiation and execution of collective agreements with the employer.*

[32] Division 1 of Part 2.1 is also titled "Labour Relations" and covers many of the same topics as in Part 1, with certain exceptions and provisions that are unique to the RCMP. In fact, s. 238.02(3)(a) of the *Act* indicates that "… the provisions of Part 1, in so far as they are applicable, apply to employees who are RCMP members or reservists unless there is an indication to the contrary …". Part 2 of the *Act* is titled "Grievances"

and deals with the presentation of individual, group, and policy grievances and their adjudication before the Board. Similar to Parts 1 and 2, Part 2.1 (provisions unique to the RCMP) separates "Labour Relations" (Division 1) and "Grievances" (Division 2). Part 3 covers "Occupational Health and Safety", while Part 4 enumerates certain general provisions.

[33] Aside from the titles of Part 1 and Division 1 of Part 2.1, or in reference to the Board's title, the term "labour relations" is not used in any of the substantive provisions of the *Act* other than ss. 59(1)(c) and (h). However, I note that its French equivalent, *relations de travail*, is also used in ss. 141, 168, and 182(6). Those provisions deal with the eligibility of a person to act as a member of an arbitration board or public interest commission or to make a final and binding determination as part of an alternate dispute resolution process. As opposed to "labour relations", the English version of these sections uses the term "employer-employee relations", which is used only in those sections. I see no apparent difference between those two terms, especially since the French version uses the term *relations de travail*. In any event, in my view, the common theme is that all these provisions are found in Part 1 of the *Act* under the heading, "Labour Relations".

[34] There is a presumption of orderly and meaningful arrangement in statutes. As Ruth Sullivan suggests at page 210 of *Sullivan on the Construction of Statutes* (6th Ed.; "*Sullivan*"), "Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan." Headings can be used to bring attention to these connections (see *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 376 and 77; and *R. v. Davis*, [1999] 3 S.C.R. 759 at paras. 51 to 53). On the use of headings, *Sullivan* at page 462 suggests that "[t]he chief use of headings is to cast light on the purpose or scope of the provisions to which they relate." In discussing the grouping of provisions under headings, at page 463, the author indicates the following:

> *When provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions. Conversely, the placement of provisions elsewhere, under a different heading, suggests the absence of such a relationship.*

[35] In my view, the title of Part 1 of the *Act*, its focus on the rules governing the labour-management relationship, together with the fact that the only other use of the

term "labour relations" is found in s. 59, which is also in Part 1, supports the bargaining agent's argument that the interpretation of that term for the purposes of s. 59 should relate to the types of issues that fall within the scope of Part 1. While the title of the *Act* includes "labour relations", I am of the view that the clear and plain language of the statute favours such an interpretation.

[36] The employer argued that "labour relations" should be defined more broadly; namely, it encompasses all "labour and employment matters generally speaking" and includes all "… matters affecting terms and conditions of employment …". Put another way, the employer submitted that the term "advice on labour relations" is meant to encompass all matters in support of government actors in their capacity as employer representatives.

[37] Such a broad definition of labour relations seems overly exclusionary. In addressing this argument, I begin with the premise that as the AJC submitted, the right to join an employee organization and participate in its affairs is not only protected by the *Act* (s. 5) but also is constitutionally protected (see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1). In addition, as the Board's predecessor (the Public Service Labour Relations Board or PSLRB) stated in *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 at para. 71, "The loss of the bargaining agent's protection and of the benefit of a collective agreement could have significant implications for an employee. Those advantages should not lightly be cast aside."

[38] Specifically, I find that the employer's characterization of labour relations does not align with the wording of s. 59(1)(c), which provides that "… the occupant … provides advice on labour relations, staffing or classification …". Despite the use of the disjunctive "or" in this provision, indicating that the things listed before and after it are alternatives, the employer's argument would seem to meld all three concepts together (see *Sullivan*, at p. 100). That is, "staffing" and "classification" can also be considered within the employer's description of "employment matters generally speaking" and may both affect terms and conditions of employment. However, such a broad definition of labour relations, to include staffing and classification, would violate the presumption against tautology in legislative texts. As explained as follows at page 211 of *Sullivan*:

> *It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.*

[39] Similarly, if the term "labour relations" for the purposes of s. 59(1) was meant to include all matters affecting terms and conditions of employment, I believe that Parliament would have expressed such language in the statute. As opposed to the term "labour relations", the wording, "terms and conditions of employment" or "term or condition of employment" is used throughout the *Act* (see, for example, the definition of "collective agreement" at s. 2(1); see also ss. 56, 88, 113, 148, 175, 186(2)(a) and (b), and 208(1)(a) and (b)).

[40] Furthermore, the employer's argument that the term "labour relations" encompasses all matters in support of government actors in their capacity as employer representatives is not commensurate with the wording of s. 59(1)(h). That provision excludes a position if "… the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f)." It specifies that the confidential relationship must relate to "labour relations matters". That is, a confidential relationship under s. 59(1)(h) does not include staffing or classification matters as provided in s. 59(1)(c), despite its reference to that paragraph. Similarly, contrary to the employer's submission, the emphasis in s. 59(1)(h) on "labour relations matters" does not include all duties and responsibilities in support of executive group positions (s. 59(1)(b)), positions that formulate and determine Government of Canada policy or programs (s. 59(1)(d)), or positions directly involved in the collective bargaining process on the employer's behalf (s. 59(1)(f)). Rather, s. 59(1)(h) stipulates that the duties and responsibilities must relate to "labour relations matters".

[41] In addition, I note that s. 59(1)(e) is not included in the positions listed in s. 59(1)(h). Section 59(1)(e) excludes the occupant of a position who has the following:

> *… substantial management duties, responsibilities and authority over employees or has duties and* ***responsibilities dealing formally*** *on behalf of the employer* ***with grievances presented in accordance with the grievance process provided for under Part 2 or Division 2 of Part 2.1*** *….*
>
> [Emphasis added]

[42] In my view, the fact that the "labour relations matters" exclusion in s. 59(1)(h) is not applicable to the occupant of a position who deals with grievances under Part 2 or Division 2 of Part 2.1 not only dispels the employer's argument that labour relations encompasses all matters in support of government actors in their capacity as employer representatives but the separate exclusion for Part 2 also reinforces that the meaning of "labour relations" for the purposes of s. 59(1) should relate to the types of issues that fall within the scope of Part 1 of the *Act*.

[43] Finally, with respect to the bargaining agent's contention that "labour relations" should be limited to collective issues within an employee's bargaining unit, I find that the wording of s. 59(1) does not support this argument. Sections 59(1)(c) and (h) speak of "labour relations" advice and matters generally, without any restrictions on the bargaining unit to which the occupant of a position belongs. The AJC's argument is premised on the view that s. 59(1) is fundamentally about conflicts of interest. However, only s. 59(1)(g) specifically mentions conflicts of interest, as follows:

> ***59(1)(g)*** *the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer ….*

[44] It is presumed that every feature of a legislative text has been deliberately chosen and that the legislature does not make the same point twice. Not only does s. 59(1)(g) distinguish itself from the other provisions of s. 59(1) ("not otherwise described in this subsection") but also, it is the only paragraph under s. 59(1) that uses the term "conflict of interest". As stated in 2012 PSLRB 46 at paragraph 76, the clear intention of s. 59(1)(g) is "… to permit the PSLRB to consider situations that cannot be aligned with any of the usual rationales for excluding a position from the bargaining unit."

[45] Similarly, in *1977 PSAC*, the Public Service Staff Relations Board (PSSRB) considered an exclusion under paragraph (g) of the definition of a "person employed in a managerial or confidential capacity" in section 2 of the *PSSRA*, as it then read. That paragraph (g) was similar to s. 59(1)(g); the *PSSRA* version speaks of a person "… who is not otherwise described in paragraph (*c*), (*d*), (*e*) or (*f*), but who in the opinion of the Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer …". At paragraph 16 of *1977 PSAC*, a majority of the

PSSRB, quoting from *Economics, Sociology and Statistics Case No. 1* (1968), P.S.S.R. Reports K 150 at page K 152, indicated as follows:

> *Each of the heads of section 2(u) other than head (vii)* [s. 2(g) of the *PSSRA* as of *1977 PSAC*] *deals with a situation in which there is a specific type of conflict between duty and interest. If the Board comes to the conclusion that a person proposed for designation meets the criteria set out in any of these heads, it must designate that person; it cannot enter upon an inquiry as to whether there is or is not in fact a conflict in any particular case falling under these heads. Then there follows in head (vii) an omnibus clause that applies to situations not elsewhere identified, where a conflict may arise. It is only where this head is applicable that the Board has a discretion to determine whether there is such a real likelihood of conflict between a person's duties, responsibilities, and interest that he should be designated as a person employed in a managerial or confidential capacity.*

[46] While it may not be incorrect to label s. 59(1) as being fundamentally about conflicts of interest, it does not follow that that concept is a consideration in determining whether a position is excluded. To repeat, only s. 59(1)(g) specifically uses the term "conflict of interest". The other paragraphs of s. 59(1) identify specific types of situations in which a position will be excluded, regardless of whether there in fact exists an identified conflict of interest. As such, I see no basis to incorporate the concept of a conflict of interest for the purpose of interpreting ss. 59(1)(c) and (h) or that that concept somehow restricts the term "labour relations" as used in those subsections to issues within an employee's bargaining unit.

[47] Accordingly, I find that to be considered a labour relations matter under ss. 59(1)(c) or (h), the advice or related duties and responsibilities at issue must be related to a matter that falls within the scope of Part 1 of the *Act*. As stated, I find that this interpretation of "labour relations" for the purposes of ss. 59(1)(c) and (h) follows its ordinary meaning, the context of s. 59(1), and the scheme and object of the *Act*.

B. Do the occupants provide labour relations advice?

[48] Having interpreted the meaning of "labour relations" in the context of s. 59(1), I must now apply that interpretation to the facts in this case. Under s. 59(1)(c), the question is whether the occupants provide labour relations advice. Section 62(2) further provides that the burden of proving that a particular position is not referred to in s. 59(1)(c) is on the AJC. In light of the evidence, I find that they do not provide labour relations advice.

[49] Ms. Johnson confirmed that none of the three positions has dealt with complaints under Part 1 of the *Act*, certification matters, or essential services issues and that none has participated in collective bargaining. As she put it, all "pure" labour relations work is done by the CLEL. Rather, the bulk of the work of the three positions was described as falling within the following categories: legislative initiatives, policy development, complaints, and litigation support.

[50] For position 10498, Ms. Johnson's evidence was that close to 100% of its work involved advising on legislative initiatives that would affect client employers. The examples she provided of the work done in this area centred on which statute was being amended and not on the specific nature of the advice provided. While amendments to the *Act*, among other things, fell within the types of legislative initiatives for which advice was provided, it was not clear how it constituted labour relations advice or how it touched any issues pertaining to Part 1 of the *Act*. The employer's submissions went somewhat farther and indicated that the occupants were required to maintain cabinet confidence in the context of drafting legislation affecting core labour matters. Even considering that the occupants' advice could be incorporated into the legislative drafting process, including potential changes to the *Act*, this type of legislative drafting advice seems to me far removed from any advice touching the actual labour-management relationship or framework provided under Part 1.

[51] Positions 10498 and 6903 also involve DAOD work. As indicated, DAODs cover a variety of work-related topics, and the occupants advise those responsible for developing and interpreting them. For position 6903, Ms. Johnson indicated that DAODs account for approximately 5% of the workload. According to the employer, the following examples reflect some of the labour relations issues covered by DAODs: polygraph testing; internal procedures for disclosure of wrongdoings in the workplace; and acceptable use of the Internet, defence intranet, computers, and other information systems.

[52] Leaving aside the fact that DAODs account for such a small percentage of the work of positions 10498 and 6903, and focusing instead on the question of whether this type of work constitutes labour relations advice, I find that it does not. In my view, DAODs fall under the employer's power to establish general administrative policy, manage its human resources, and determine certain terms and conditions of employment (see ss. 6 and 7 of the *Act*). The employer develops them exclusively,

without invoking the labour-management relationship or touching upon any other subject matter covered by Part 1 of the *Act*.

[53] As indicated as follows in *DAOD 1000-0, Foundation Framework for Defence Administrative Orders and Directives*, at s. 2.1: "The DAOD collection establishes mandatory requirements to achieve specific DND and CAF organizational objectives," and "are intended to provide administrative direction". Section 2.4 further indicates as follows:

> *The purpose of the DAOD collection is to provide an integrated approach to the management of the functions and activities of DND employees and CAF members. In conjunction with the orders issued by commanders, DAODs provide direction to orient activities toward the achievement of expected results….*

[54] The lack of a labour relations element to DAODs and, rather, a focus on employer decision making is reinforced by *DAOD 1000-1, Defence Administrative Orders and Directives*, which at s. 2.4 specifies as follows the difference between the two types of DAODs, policy and instructional:

> *A policy DAOD* ***explains the overarching DND and CAF position on a specific topic****, establishes the bounds within which an organization will operate, clearly articulates the goals to be attained, and provides guidance for related management decisions and actions. Information on how a policy will be implemented is found in associated instructional DAODs.*
>
> [Emphasis added]

[55] The occupants are not responsible for taking a position on a specific topic covered by a DAOD or advising on its legality. Rather, as indicated at s. 5.1 of DAOD 1000-1, their role is to provide legal advice on using a DAOD as an instrument of choice and on developing or amending a DAOD. A separate subject-matter legal advisor acts as the lead legal advisor for the legal review of a DAOD, including its legality. Accordingly, I do not consider the DAOD work done by the occupants of positions 10498 and 6903 to constitute labour relations advice.

[56] The occupants also work on complaints. The occupant of position 10498 is the backup PLL team lawyer for workers' compensation claims under the *GECA* and official languages complaints. The occupants of positions 21304 and 6903 mainly work on human rights complaints; however, the occupant of position 6903 also carries out some work with respect to work refusals under Part II of the *CLC* and is the backup for

matters under the *Public Servants Disclosure Protection Act*. Ms. Johnson's evidence was that when dealing with a complaint, an occupant makes a risk assessment and advises the employer on its response. That occupant will also attend any mediation sessions related to the complaint.

[57] I fail to see a labour relations element to the occupants' work on these types of complaints. Rather, it appears to me that they advise on the specific subject matter of a given complaint, such as human rights. This fits with their role and the separation of duties under the Protocol. That is, the CLEL provides any labour and employment law advice, except that the PLL team continues to provide any human resources and human rights advice with respect to Canadian Armed Forces members. Advice on workers' compensation, official languages, human rights, occupational health and safety, and public servant disclosure does not fall within the scope of matters covered by Part 1 of the *Act*.

[58] The only example of a complaint that could potentially fall within the scope of Part 1 of the *Act* was that the occupant of position 10498 once provided advice with respect to bargaining unit representation for a military member posted to a civilian position. However, without more, there is nothing to suggest that that advice strayed from the human resources advice exception provided in the Protocol.

[59] The employer submitted that approximately 75% of all military human rights complaints have a grievance history and that the occupants need access to the grievance file, to defend the human rights complaints. More broadly, complaints may sometimes involve related grievances, and PLL team counsel must then collaborate with CLEL counsel. However, aside from the potential of a related grievance, there was no evidence that the occupants' complaints advice touched upon any grievances or their disposition or, more pointedly, any issues that fall within the scope of Part 1 of the *Act*.

[60] As outlined earlier, occupational health and safety is addressed in Part 3 of the *Act*. Section 240 provides for the application of Part II of the *CLC* (covering occupational health and safety) to the public service. According to the employer, the occupants provide advice with respect to evaluating health and safety risks, the employer's related obligations, and even the employer's right to address health and safety issues without having to involve an employee representative. However, I fail to

see a labour relations element to this type of advice. My understanding is that the advice pertains to the employer's exclusive health and safety duties under ss. 124 to 125.3 of the *CLC*. As with DAODs, I do not see anything in the employer's health and safety duties or the related advice provided by the occupants that invokes the labour-management relationship under the *Act* or any issues that would fall within the scope of Part 1 of the *Act*.

[61] In relation to their complaints work, the occupants also provide litigation support with respect to certain matters. As of the hearing, the occupant of position 21304 was working with an excluded litigator and other counsel from several sections of the Department of Justice (including Treasury Board Secretariat Legal Services) in responding to a class-action lawsuit against the Canadian Armed Forces pertaining to sexual-orientation and gender-discrimination issues. The work involved providing advice on potential resolutions, systematically reviewing files that contained similar allegations to identify individuals who might have been part of the class, and generally ensuring that the Government of Canada had a consistent approach. All three occupants also review documents with respect to requests for information in litigation files, some of which documents may be subject to cabinet confidence.

[62] I find that the occupants' litigation support role does not touch upon the labour-management relationship or Part 1 of the *Act*. The employer seemed to suggest that because they work with other excluded lawyers or review certain types of documents, it somehow affects the nature of their work or the advice they provide. While those factors may be considered under s. 59(1)(h) (confidential duties and responsibilities), in my view, they do not support the employer's argument that in their litigation support role, the occupants provide labour relations advice.

[63] Finally, while it does not fall within the work categories described earlier, the employer emphasized the fact that the PLL team sits on certain senior-level review boards as a management representative and that Ms. Johnson brings the occupants with her to those board meetings because they often handle the legal work that flows from them. That work was described as involving values and ethics, occupational health and safety, and official languages. As with their work on complaints touching upon similar subject matter (official languages and occupational health and safety), there is no indication that the work that flows from those boards falls within the scope of the matters covered by Part 1 of the *Act*.

[64] Similarly, the employer pointed out position 21304's role in providing advice concerning the DND's Sexual Misconduct Response Centre. This centre predominantly provides counselling services to military members, and at times, advising it took up the bulk of the occupant of position 21304's work. The advice provided was described as being related to staffing; namely, whether to hire employees or use contractors, and that occupant worked with the CLEL on this file. To the extent that the employer's emphasis on the advice provided concerning the centre relies on its broad definition of labour relations, which includes staffing, I do not accept that argument for the reasons stated in my interpretation of the term "labour relations". The employer did not argue that any of the occupants should be excluded due to providing staffing advice.

[65] For these reasons, and having considered the evidence with respect to the duties and responsibilities and related advice provided by the occupants, I find that they do not provide labour relations advice pursuant to s. 59(1)(c).

C. With respect to labour relations matters, do the occupants have duties and responsibilities confidential to the occupant of a managerial or confidential position?

[66] The second ground advanced by the employer for excluding the positions at issue is s. 59(1)(h). The question in this case is whether in relation to labour relations matters, the occupants have duties and responsibilities confidential to the occupant of a position described in s. 59(1)(b), (c), (d), or (f). Section 62(3) provides that the employer bears the burden of proving that a particular position is referred to in s. 59(1)(h).

[67] The employer submitted that the occupants provide legal advice in relation to labour relations matters to members of the executive group and to labour relations officers. According to the employer, by its very nature, legal advice demands that the relationship be one in which the provider of the advice is "confidential to" the person receiving it.

[68] However, this argument must fail for the same reasons provided earlier with respect to s. 59(1)(c). That is, I do not accept that they provide labour relations advice.

[69] In its submissions on this issue, the AJC referred to the relatively recent PSLREB decision in *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11 at para. 37, which incorporated the following summary of the principles to be applied

when determining these types of objections, as originally articulated in an earlier decision of the PSSRB, *Canada (Treasury Board) v. Public Service Alliance of Canada (Correctional Group)*, PSSRB File No. 176-02-287 (19791009), [1979] C.P.S.S.R.B. No. 9 (QL)("*Sisson*"):

a. The mere fact that an employee has access to confidential information does not of itself mean that she or he is employed in a confidential capacity.

b. To be considered a confidential exclusion, there must exist between the particular employee and the employer "… a relation of a character that stands out from the generality of relations, and bears a special quality of confidence." There is an element of personal trust which permits some degree of "thinking aloud" on special matters.

c. In many instances, it is of the essence to the confidence that the information not be disclosed to any member of any group or body of the generality of employees.

d. The confidential matters to which the person has access must be related to industrial relations.

e. Disclosing the information would adversely affect the employer.

f. The person must be involved with this information as a substantial and regular part of his or her duties. It is not sufficient that he or she comes in contact with it occasionally.

g. The confidential exclusion is to be narrowly interpreted to avoid circumstances in which the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoys the freedoms and rights incidental to collective bargaining.

h. The denial of collective bargaining rights to persons employed in a confidential capacity is based on a conflict-of-interest rationale. The employer has a duty to organize its affairs so that its employees are not occasionally placed in a position of a potential conflict of interest if that result can readily be avoided.

[70] According to the employer, there is no requirement to read-in restrictions not contemplated in the *Act* by adopting those principles. It submitted that in any event, those principles are met in this case. That is, the occupants deal with confidential matters in relation to industrial relations, including cabinet confidence and providing legal advice; disclosing that confidence and advice would adversely affect the employer; and they are involved with this information as a regular part of their duties.

[71] However, these principles are not new, and as indicated at paragraph 37 of 2017 PSLREB 11, they emerged from a review in *Sisson* of decisions on exclusions from several labour boards. While I am not necessarily bound to follow this jurisprudence, it should not be set aside without good reason. Consistency in the jurisprudence and stability in labour relations, generally, is to be favoured. The employer has not advanced a compelling argument as to why I should depart from *Sisson* or 2017 PSLREB 11. Ultimately, the circumstances of each case determine whether s. 59(1)(h) applies.

[72] In this case, there is no dispute that as lawyers serving the employer as their client, the occupants have a relation of a character that stands out from the generality of employment relations and that bears a special quality of confidence. I accept that the privileged nature of the solicitor-client relationship is such that the essence of the confidence of the information that they provide to clients is not to be disclosed to any member of any group or body of the generality of employees.

[73] However, I do not accept that the confidential matters to which the occupants have access pertain to labour relations. The employer's argument is essentially the same as that under s. 59(1)(c): the occupants are required to maintain cabinet confidence in the context of drafting legislation affecting core labour matters, they are required to engage in policy development on DAODs on core labour matters, and they provide litigation support and legal advice on core labour matters.

[74] Having examined the occupants' duties and responsibilities with respect to legislative initiatives and DAODs and in providing litigation support and legal advice on complaints, nothing leads me to believe that they have duties and responsibilities related to labour relations matters that are confidential to the executive group or other excluded positions. While their clients may include executives and labour relations officers, there was no indication that they provided advice on labour relations matters

or were privy to any such confidential information. The evidence was that CLEL counsel provide advice with respect to labour relations matters falling under Part 1 of the *Act* directly to client departments or agencies. While the employer provided some examples of files in which the occupants had to work in collaboration with CLEL counsel, none of these files pertained to labour relations matters.

[75] Similarly, to the extent that the employer argued that in relation to labour relations matters, the occupants have duties and responsibilities confidential to the other members of the PLL team, I do not accept that premise. Ms. Johnson's evidence was that the PLL team's work would be impacted negatively if the three positions were not deemed confidential, given that the rest of the team is excluded. According to her, without these three positions, the team would not be able to be "two-deep" on any file or, accordingly, handle the volume of work.

[76] The exclusion of the other positions on the PLL team was not challenged, and no evidence was presented with respect to the duties and responsibilities of the other positons. Nor was there evidence indicating that as a result of being two-deep on a file or working as part of the broader PLL team, the occupants have access to confidential labour relations matters. The evidence that was presented established that the occupants do not provide labour relations advice; nor do they have related confidential duties or responsibilities. Therefore, it appears to me that given how the PLL team has already organized its affairs, this decision should have no practical impact on the division of work of that team. Accordingly, I see no basis for the application of s. 59(1)(h) in the circumstances of this case.

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

(The Order appears on the next page)

VI. Order

[78] The applications are dismissed.

January 9, 2020.

Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board