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

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

BETWEEN

TREASURY BOARD (DEPARTMENT OF JUSTICE)

Applicant

and

ASSOCIATION OF JUSTICE COUNSEL

Respondent

Indexed as
Treasury Board (Department of Justice) v. Association of Justice Counsel

In the matter of an application, under subsection 71(1) of the *Public Service Labour Relations Act*, for a declaration that a position is a managerial or confidential position

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Richard Fader, counsel

For the Respondent: Christopher Rootham, counsel

Heard at Ottawa, Ontario,
September 22, 2017.

REASONS FOR DECISION

I. Application before the Board

[1] On June 18, 2015, the Treasury Board ("the employer") applied to the Public Service Labour Relations and Employment Board (PSLREB) for an order declaring that position No. 11432, Legal Practitioner LP-04 also, also known as General Counsel, in the Department of Justice ("DOJ") be designated pursuant to s. 59(1)(c) and (g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as managerial and confidential. The employer submits that the position should not be included in the bargaining unit because of conflict of interest or because of their duties and responsibilities to the employer.

[2] On July 6, 2015, the Association of Justice Counsel (AJC or "the bargaining agent") wrote to the PSLREB, objecting to the exclusion proposals under ss. 59(1)(c) and (g) of the *PSLRA* and submitting that the position in question did not meet the criteria for the grounds of exclusion proposed by the employer.

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

II. Summary of the evidence

[4] The position in question is located in the Centre for Information and Privacy Law (CIPL) directorate in the DOJ's Public Law Sector.

[5] As of the hearing, Sarah Geh, the only witness who testified, was in an acting LC-02 excluded manager position, which she had been in for approximately four months, and was the acting director of the CIPL.

[6] Ms. Geh testified that the CIPL was created to try to increase efficiency and to bring together experts in this field, which allows it to identify trends and provide a consistent application of the law.

[7] The CIPL deals with two pieces of legislation, the *Privacy Act* (R.S.C., 1985, c. P-21, as amended) and the *Access to Information Act* (R.S.C., 1985, c. A-1, as amended). Ms. Geh testified that when dealing with issues that arise in such cases, at times, the federal government seeks assistance on how to deal with employee information; for example, contact information and home addresses. A bargaining agent could request such information. As well, there are other labour relations related issues that overlap with the *Privacy Act* and the *Access to Information Act*, including but not limited to employer monitoring of email and telephones; and the video surveillance of employees.

[8] At the time the application was made, the position in question was filled by Denis Kratchanov. A copy of the job description for the position was entered into evidence, the relevant portions of which state as follows:

> . . .
>
> ***Client Service Results*** . . .
>
> *As a recognized expert in a specialized field of law, provides strategic legal advice and expertise to departmental colleagues and client officials on highly complex legal issues, often of national scope, with significant risk and impact where the application of the law is unclear.*
>
> ***Key Activities*** . . .
>
> *As a recognized expert in a field of law, leads others in the provision of legal advice and provides comprehensive and strategic legal advisory services to Department of Justice colleagues and senior officials across Government on highly complex legal issues involving significant risk, integrated and often competing interests, multiple parties, horizontal issues, and broad government-wide impact including:*
>
> *- assessing legal and other risks and providing advice on risk mitigation and management strategies;*
>
> *- providing expert advice on highly complex agreements and arrangements, including contributing to negotiations and the coordination of legal advice;*
>
> *- providing legal and legal policy advice on the development, interpretation and application of proposed and actual legal texts, policies, practices, etc.;*
>
> *- conducting related litigation as required; and*
>
> *- participating in the development of policy and legislation, including the identification of options where no precedent exists.*

Monitors litigation and provides litigation support for matters affecting a specialized field of law, including participating in the formulation of litigation strategy and ensuring the effective, efficient, consistent and coordinated conduct of potential and actual litigation.

Provides direction and leadership and acts as a key resource person to other departmental counsel and clients throughout the Government on highly complex and multidimensional matters related to field of expertise, including proactive knowledge sharing, and reviewing legal work done by colleagues.

Monitors the development of legal and legal policy issues, identifies trends and ensures the quality and consistency of legal advice provided by the centre of expertise and other colleagues in a specialized area of law, including:

- anticipating potential developments and providing strategic advice;

- providing direction and advice on alternative approaches or solutions to problems;

- providing leadership on high risk and highly complex files; and

- assisting departmental and client officials in the preparation of Cabinet documents and communications strategies on high risk and highly complex files related to area of expertise.

Recognizes the need and makes proposals for, designs and conducts legal education activities and other training for departmental colleagues and clients on topics related to specialized field of law (e.g. legislative changes, new interpretations, trends, etc.), and contributes to knowledge management.

Contributes to the effective management of the centre of expertise by:

- anticipating client legal services needs and resulting resource requirements and implications, and assisting with the planning process;

- complying with applicable business and management process, including record keeping, database updates, knowledge management and other relevant procedures; and

- providing comments to managers for performance evaluation and other purposes on the performance of lawyers and staff with whom they have worked.

. . .

[9] Entered into evidence was a copy of the DOJ's rationale for the exclusion proposal. It states as follows:

. . .

1 - Reason of proposal: *The responsibilities of this position require the incumbent to provide expert legal advice on issues relating to privacy and access to information in the labour relations context and would put the employee in a conflict of interest were he to be included in the bargaining unit.*

. . .

3 - Criteria for exclusion:

PSLRA s. 59(1)(c) : *The occupant of the position provides advice on labour relations, staffing or classification;*

PSLRA Section 59(1)(g) : *The occupant 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.*

4 - Key activities

The key activities of this position involve the provision of expert legal advice on the application of the Privacy Act *and the* Access to Information Act.

5 - Justification:

The Centre for Information and Privacy Law (CIPL) is frequently called upon to provide privacy and access to information-related advice to the Department of Justice itself and to line departments (through their legal services units) on labour relations matters. This advice pertains to considerations under the Privacy Act *and the* Access to Information Act*, and may implicate Treasury Board Policy and Directives.*

The demand for such advice is constant, and it is important to have counsel available with different areas and levels of expertise and experience, so that requests can be handled according to their complexity and subject matter. This requires having available a critical mass of excluded counsel at all levels within the CIPL.

There are currently no excluded counsel at the LP-04 level in the CIPL. Nor is there a sufficient number of excluded counsel in the CIPL with expertise and knowledge on labour relations issues. The impact of this gap is felt mainly in terms of reduced options for file assignment, and in the inability to provide an in-depth analysis of the privacy and access to information considerations of a labour relations initiative.

For these reasons, the Public Law Sector is requesting that this position be added to CIPL's roster of excluded counsel. The incumbent is an experienced lawyer at the LP-04 level, with senior-level expertise in privacy and access to information legislation. His substantive knowledge and experience fills gaps in the CIPL's current coverage of "excluded files", both in terms of subject-matter [sic] and level of counsel.

> *The exclusion of Mr. Kratchanov's position would contribute significantly to the CIPL's ability to respond to client requests – including, in particular, questions relating to the LP group. The CIPL requires the exclusion of Mr. Kratchanov's position as a "confidential position" for purposes of s. 59 of the* Public Service Labour Relations Act*, to enable him to provide advice on labour relations and related matters (s. 59(1)(c)), and so as to avoid conflict of interest in providing privacy and access to information law advice on matters pertaining to the bargaining unit of which he is a member (s. 59(1)(g)).*
>
> . . .

[10] Ms. Geh testified that Mr. Kratchanov joined the CIPL's predecessor in the 1990s and that until 2014, just before the application was filed, he was in an excluded manager position. She said that he had spent his entire DOJ career working in the access to information and privacy law area.

[11] Ms. Geh's evidence was that in or about 2014, the role of the CIPL's manager changed in that the manager would no longer give advice. She indicated that Mr. Kratchanov wanted to continue to practise in the area but not as a manager. His request was granted, and he remained there as a subject matter expert (SME).

[12] Ms. Geh stated that as of the hearing, the CIPL comprised 16 counsel, of whom 2 were excluded, including her (the other was a lawyer classified at the LP-03 group and level). In addition to this application, 2 other requests were made because of the number of issues that arose in the labour relations context. Entered into evidence was a copy of the organizational chart. It showed 1LP-01, 9 LP-02s, 4 LP-03s, and only 1 LP- 04.

[13] Ms. Geh stated that the CIPL has a high volume of work and that when she assigns work, she considers a number of factors, including sensitivity and complexity and the lawyers' workloads. Some of the requests come from other excluded lawyers at the DOJ. With respect to the one excluded LP-03, the excluded lawyers outside the CIPL know to contact her directly. She stated that the LP-04 has a role as a resource.

[14] Entered into evidence was a brief of reported cases from the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada that Mr. Kratchanov had provided legal advice on at some point. In reverse order, one was reported in 2014, one in 2010, two in 2003, one in 2002, two in 1998, one in 1997, one in 1994, and two in 1993.

[15] Entered into evidence was a copy of the *Policy on Government Security*.

[16] In cross-examination, Ms. Geh confirmed that Mr. Kratchanov's total workload would have been fewer than 100 files. However, in addition, she said that he would receive hundreds of one-off questions from lawyers throughout the public service and that he would deal with the more difficult questions. As a group, the CIPL would have had about 60 files that would have required an excluded lawyer to deal with them.

[17] Entered into evidence were copies of documents related to a complaint filed by the bargaining agent with respect to an issue involving the home addresses of employees in the bargaining unit represented by the AJC, which was stayed pending the decision in another matter pending appeal that had been brought by the correctional officers' bargaining agent.

III. Summary of the arguments

[18] Both the employer and the bargaining agent made written submissions that largely reflected their oral submissions.

[19] The employer submits the incumbent of the position provides advice in a labour relations context such as workplace human rights, violence in the workplace, harassment, and workplace privacy which is covered by the term labour relations. Issues may find their genesis in an individual file but can have an impact across the federal public administration.

[20] The employer argues that the term "labour relations" is not defined in the legislation. This is a very broad concept generally encompassing labour and employment matters. In the absence of a definition, the term must be given its ordinary meaning in the context of the legislation as a whole. The meaning of labour relations must extend to the subject matters relating to employer and employee relations included in statutes that impact on employment related matters.

[21] The employer also referred to the preamble of the *Act* and put the emphasis on its purpose in respect of labour relations in the public service and that effective labour-management relations represent a cornerstone of good human resource management. There is nothing in the scheme of the *Act* to suggest that the term labour relations should be interpreted narrowly.

[22] Under section 59(1)(g) of the *Act*, the employer submitted two tests for the exclusion of the position:

- whether the person is a member of the management team; and,
- whether there is a likelihood of a conflict between a person's duties and responsibilities to the employer and his interests as a member of a bargaining unit.

[23] The employer submitted that section 59(1)(g) is now largely relevant to assess the exclusion of positions having managerial responsibilities. There must be evidence that the employee's duties or responsibilities to the employer are in conflict with the employee's interests as member of a bargaining unit. The incumbent is required to provide advice to the employer in the context of litigation in the labour relations context. In terms of the security screening standard, the policy instruments apply across the core public administration. The incumbent provided litigation support on four judicial review applications. This raises a clear conflict of interest with membership in the bargaining unit. The incumbent is called upon to provide advice on government action affecting employees.

[24] The employer referred me to the *Department of Justice Act* (R.S.C., 1985, c. J-2), the *Financial Administration Act* (R.S.C., 1985, c. F-11), the *Interpretation Act* (R.S.C., 1985, c. I-21), the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13), the *Act*, *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, *Reference re Firearms Act (Can.)*, 2000 SCC 31, *R. v. Nabis*, [1975] 2 SCR 485, *Pelletier v. Canada (Attorney General)*, 2008 FCA 1, *Canada (Attorney General) v. Public Service Alliance of Canada*, [1989] 2 F.C. 633, *Canada (Attorney General)* v. *Public Service Alliance of Canada*, [1991] 1 SCR 614, *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 172-02-831 (19950426), [1995] C.P.S.S.R.B. No. 41 (QL), *Treasury Board (Public Works and Government Services Canada) v. Professional Institute of the Public Service of Canada*, PSSRB File No. 172-02-1115 (19980721), [1998] C.P.S.S.R.B. No. 61 (QL), *Ryan v. Canada (Attorney General)*, 2005 FC 65, *Vaughan v. Canada*, 2005 SCC 11, *Public Service Alliance of Canada and Canada (Treasury Board) (Purchasing and Supply Group Bargaining Unit)*, PSSRB File No. 174-02-250 (19770214), [1977] C.P.S.S.R.B. No. 3 (QL), *Office of the Auditor General of Canada and Public Service Alliance of Canada (Scientific and Professional Category – Library Science and Auditing Groups)*, PSSRB File No. 172-14-297 (19800319), [1980] C.P.S.S.R.B. No. 2 (QL), *Canada*

(Treasury Board), (Canadian International Development Agency) and Public Service Alliance of Canada, PSSRB File No. 174-02-378 (19820831), [1982] C.P.S.S.R.B. No. 148 (QL), *Professional Institute of the Public Service of Canada and National Film Board of Canada*, PSSRB File No. 172-08-501 (19900406), [1990] C.P.S.S.R.B. No. 78 (QL), *Treasury Board (Department of National Defence) v. Public Service Alliance of Canada*, 2000 PSSRB 85, *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 ("*TB (CSC) v. PSAC*"), *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80, and *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84.

[25] According to the bargaining agent, the exclusions in s. 59(1) are to be interpreted narrowly and restrictively. The right to join an employee organization and participate in its affairs is a constitutionally protected activity. Section 59(1) should be interpreted in a fashion that guarantees bargaining agents independence from management by excluding certain managers and other employees from a bargaining unit, but no more broadly than meets that purpose.

[26] Section 59(1) is fundamentally about conflicts of interest. The purpose of section 59(1)(c) is to prevent employees from being in a conflict of interest with management and the employee's own bargaining agent while at the same time limiting the impact of this section on an employee's freedom of association. The bargaining agent submitted that the phrase labour relations in s. 59(1)(c) refers only to collective bargaining issues or other collective issues set out in Part I of the *Act*. This interpretation is consistent with the maxim same words, same meaning. Part I to the *Act* uses the heading labour relations to describe the topics set out in Part I of the *Act*, topics relating to collective bargaining and other matters relating either to the collective relationship between the bargaining agent and the employer. Under the *Interpretation Act*, R.S.C. 1985, c. I-21, the heading must be taken into consideration to discuss the meaning and application of a provision.

[27] According to the bargaining agent, there is no bright-line test for determining whether a position falls within s. 59(1)(g) of the *Act*. The Board has also been clear that its lack of clarity is deliberate. It is a residual clause to deal with situations not otherwise contemplated in the other paragraphs in s. 59(1). Therefore, the Board cannot come up with a clear test for s. 59(1)(g) without endangering its ability to address unusual situations in the future. Notwithstanding this lack of clarity, the

Board has articulated a number of principles when dealing with s. 59(1)(g) of the *Act*, including the following:

- s. 59(1)g) should be used sparingly and that any situation in which it is held to apply would be unusual;
- access to information on its own does not create a conflict of interest and therefore does not necessarily result in a position being declared confidential;
- the absence of involvement in formulating policies or management decision-makings is a factor against excluding the position;
- employees are presumed to comply with their oath of office and preserve the confidentiality of information; and,
- the level of discretionary decision-making is a relevant factor.

[28] In addition to the *Act* and the *Interpretation Act*, which the employer referred me to, the bargaining agent referred me to the *Canada Revenue Agency Act* (S.C. 1999, c. 17), the *Privacy Act*, *Bell ExpressVu Limited Partnership*, *Canada (Attorney General) v. Marinos*, [2000] 4 F.C. 98 (C.A.), *Treasury Board v. Association of Public Service Financial Administrators*, PSSRB File Nos. 172-02-1003 and 1004 (19981202), [1998] C.P.S.S.R.B. No. 106 (QL), *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, *Public Service Alliance of Canada and Canada (Treasury Board) (Purchasing and Supply Group Bargaining Unit)*, [1977] C.P.S.S.R.B. No. 3, *R. v. Zeolkowski*, [1989] 1 SCR 1378, *R. v. Neil*, 2002 SCC 70, *TB (CSC) v. PSAC*, *Treasury Board and Canadian Association of Professional Radio Operators*, PSSRB File No. 173-02-550 (19920824), [1992] C.P.S.S.R.B. No. 123 (QL), *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80, *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84, *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11, and *Treasury Board v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 60.

IV. Reasons

[29] The employer requested that the occupant of the LP-04 legal advisor position at issue be excluded from the bargaining unit under ss. 59(1)(c) and (g) of the *Act*.

[30] For the reasons that follow, the application is granted, and the LP-04 position is designated as excluded pursuant to s. 59(1)(g) of the *Act*.

[31] The evidence disclosed that Mr. Kratchanov, the incumbent of the position at the time of the application, had formerly been a manager and that as of the hearing, he had spent a lengthy career at the DOJ practising as a senior lawyer in the areas of access to information and privacy law and as a manager he had provided advice on matters that would have fallen into an area of exclusion as dictated by s. 59(1) of the *Act*.

[32] An organizational change occurred in or about 2014 such that the CIPL's manager would no longer provide legal advice. According to Ms. Geh, Mr. Kratchanov wanted to remain in the area not as a manager but as an SME. The evidence disclosed that before the change, he provided legal advice on files that arguably would have fallen within one of the areas of exclusion defined by s. 59(1) of the *Act*. The evidence also disclosed that as of the hearing, the CIPL was dealing with matters that could have a labour-relations-advice component.

[33] Ms. Geh said that the LP-04 position acts as a resource for other lawyers both from the unit and from elsewhere in the DOJ. She confirmed that requests for advice come in from across the DOJ, including from excluded lawyers seeking advice on areas that would fall within the areas of exclusion under s. 59(1) of the *Act*. She stated that as of the hearing, there were two excluded lawyer positions in the unit; her position was one, and the other position was an LP-03. She also stated that when assigning work, she considers a number of factors, including its complexity and sensitivity.

[34] Sections 59(1)(c) and (g) of the *Act* read as follows:

> ***59 (1)*** *After being notified of an application for certification made in accordance with this Part, 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*
>
> *. . .*
>
> ***(c)*** *the occupant of the position provides advice on labour relations, staffing or classification;*
>
> *. . .*
>
> ***(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 . . .*

[35] Paragraphs 69 through 72 and 76 of *TB (CSC) v. PSAC*, on s. 59(1)(g) of the *Act*, state as follows:

> ***69*** *Paragraph 59(1)(*g*) of the* PSLRA *is an umbrella provision that seems meant to catch situations in which excluding an employee can be justified on one of a broad range of grounds not captured by the more specific descriptions in the other paragraphs. The term "conflict of interest" could mean either that the conflict must be identified by examining the duties and responsibilities performed by the employee as a whole (rather than by referring to any specific exercise of managerial authority, decision-making power or labour relations function) or that the specific feature of the position that gives rise to the conflict of interest is not caught by the other paragraphs because not every instance in which a conflict could occur can be anticipated when a statute is drafted.*
>
> ***70*** *The second ground for exclusion under paragraph 59(1)(*g*) of the* PSLRA *— ". . . the person's duties and responsibilities to the employer . . ." — is even more open-ended. That phrase confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities and to call on adjudicators to carefully consider, under that paragraph, the overall relationship between the position and the applicant's interests. In that context, it is perhaps not surprising that the case law has failed to articulate a set of clear criteria for applying that provision. At one point, in* Gestrin and Sunga, *the former Board speculated that the earlier version of that provision might require determining whether an employee is a member of the management team. Later cases, like* Andres and Webb, *held that the management team idea would not capture all the conflicts of interest that might justify exclusion under that provision and that adjudicators should consider the issue more broadly. Although the decisions put before me often treat the concepts of the "management team" and "conflict of interest" as being closely related and as part of a holistic approach to assessing a position, they do not provide much in the way of definition or concrete criteria for making such an assessment. To be fair, since this provision seems designed as a catch-all that gives the PSLRB wide scope to consider positions for exclusion that are not ordinary and that cannot be anticipated, the PSLRB should not be expected to fetter its discretion by attempting to provide a more restrictive definition of its task.*
>
> ***71*** *Adjudicators have on many occasions counselled caution when deciding whether a position should be excluded from a bargaining unit. 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.*
>
> ***72*** *On the other hand, in some circumstances, including an employee in a bargaining unit could impair the effectiveness of that employee's performance of duties essential to the applicant. Paragraph 59(1)*(g) *of the* PSLRA *suggests that the reasons for making a finding of that risk could include factors not ordinarily considered. When a finding is made of a fundamental incompatibility between an employee's duties and inclusion in a bargaining unit, the employee's position may legitimately be excluded.*
>
> . . .
>
> ***76*** *Paragraph 59(1)*(g) *of the* PSLRA *provides me considerable discretion when deciding whether this position should be excluded. Of course, I cannot simply remove the position from the bargaining unit without a rationale. I agree with counsel for the applicant that the jurisprudence invoking that paragraph or its predecessors has not provided any clear definition of the range of circumstances under which it might be applied. That paragraph's clear intention 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. Therefore, it is not surprising that no specific outline of the circumstances covered by that paragraph has been produced. One would expect that paragraph to be used sparingly and that any situation in which it is held to apply would be unusual.*

[36] I agree with the reasoning in *TB (CSC) v. PSAC*, particularly at paragraph 76 with respect to s. 59(1)(g) of the *Act*.

[37] Based on the evidence before me, the LP-04 position at issue is the most senior position in the CIPL. It is clear that as of the date of the hearing, the position was senior to the manager of the unit and the individual occupying the position had been excluded as the manager until the organizational change had been made.

[38] The relevant collective agreement discloses that there are six levels in the LP group, LP-00 position being the first, and LP-05 position being the top. The LP-04 position is the second most senior level in the LP group. The CIPL organizational chart disclosed that there is no LP-05 position and only one LP-04 position in that group, making it the most senior position there.

[39] The evidence disclosed that the CIPL receives inquiries from other legal services units within the DOJ, including requests for advice involving labour and employment matters which would otherwise involve the correlation of the *Privacy Act* and *Access to*

Information Act. Being able to provide fulsome legal advice in relation to access to information and privacy issues as they involve labour relations, staffing and classification would require the person giving that advice to, in many instances, be required to know the full extent of the labour relations, staffing or classification issue and thus would potentially be placed in a position of a conflict of interest. This though would not permit this position to properly fall within the exclusion set out in s. 59(1)(c), as an exclusion under that section specifies the position is one that provides advice on labour relations, staffing or classification and that is not quite accurate. The evidence however disclosed that there is sufficient intersection of labour relations, staffing and classification matters with the mandate of the CIPL that justifies the exclusion of the LP-04 position.

[40] As for it being the LP-04 position, as I understand the DOJ's structure, when moving through the levels of the LP group and reaching successively higher ones, a lawyer will need to acquire a level of knowledge and experience permitting him or her to move to a higher level. It is also obvious that this usually comes through years of practice and experience.

[41] It is somewhat trite to state, but the way the system is set up, the newer, younger, and less-experienced lawyers start at the lower levels and move up to the higher levels as they gain experience. The system is designed so that the more senior levels, such as LP-04, should be occupied by lawyers with extensive knowledge and experience. In turn, the more complex legal questions and issues are directed to those at the higher levels as it is expected that they are best suited to deal with them.

[42] This simply means that for issues involving complex legal questions that fall within an area that should be dealt with by a lawyer occupying a position which is excluded from the bargaining unit, it makes good common sense that the most senior lawyer position be excluded. This is because of the breadth of knowledge that comes with occupying the position of a senior lawyer. A senior lawyer can always do the work that would otherwise be considered excluded and done by less-experienced lawyers at lower levels, but the same cannot be said for the lower-level lawyers with respect to more complex work. The evidence disclosed that there is work both at the lower and higher levels.

[43] By excluding the LP-04 position, any question that involves the work of the CIPL in an area that would otherwise fall into the exclusions of s. 59(1) of the *Act*, and specifically with respect to it's intersection with labour relations issues, no matter how simple or complex, can be dealt with by the occupant of the LP-04 position.

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

(The Order appears on the next page)

V. Order

[45] The application is allowed.

[46] I declare that position no. 11432, titled “Legal Practitioner” and classified LP-04, also known as “General Counsel”, in the CIPL directorate in the Public Law Sector of the DOJ is an excluded position, effective July 6, 2015.

May 26, 2020.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board