Date: 20200626

File: 561-02-870

Citation: 2020 FPSLREB 71

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

NATIONAL POLICE FEDERATION

Complainant

and

TREASURY BOARD
(Royal Canadian Mounted Police)

Respondent

and

THE RESORT MUNICIPALITY OF WHISTLER

Intervenor

Indexed as

National Police Federation v. Treasury Board (Royal Canadian Mounted Police)

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

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

For the Complainant: Chris Rootham, counsel

For the Respondent: Sean Kelly, counsel

For the Intervenor: Adrienne Atherton, counsel, and Nicholas Krishan, articling student

Decided on the basis of written submissions, filed November 5 and December 16, 2019, and February 10, 21, and 28, 2020, and oral arguments made March 3, 2020, in Victoria, British Columbia.

REASONS FOR DECISION

I. Summary

[1] Parking is a hot button issue. For those who must drive to work, the question of where one can park, and what one must pay to park there, can be of significant importance.

[2] That is clearly the case for some of the newly certified regular members of the Royal Canadian Mounted Police (RCMP). Their bargaining agent, the National Police Federation ("the NPF" or "the complainant") filed two complaints concerning changes to parking conditions affecting RCMP regular members ("members" or "RCMP members").

[3] The complaints allege that the Treasury Board and the RCMP ("the respondent") violated s. 56 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") by making a change to the terms and conditions of employment during the freeze period that follows a certification application. On April 18, 2017, the NPF made a certification application under the *Act* to represent the RCMP's members and reservists. Approximately 19 000 members work across Canada.

[4] The complaints relate to alleged changes made to parking arrangements affecting RCMP members in two specific locations in British Columbia, which were implemented after the NPF filed its certification application.

[5] Although both cases deal with parking and were heard back-to-back by the same panel of the Board, this decision concerns only the complaint made about the parking changes at the RCMP detachment in Whistler, B.C., ("the Whistler parking complaint"; file 561-02-870). The related case affects RCMP members working at its Island District Headquarters in Victoria, B.C. ("the Victoria parking complaint"; file 561-02-40397), which I will rule on in a separate decision.

[6] The RCMP's services in the Resort Municipality of Whistler (RMOW) are part of the RCMP's Sea-to-Sky Detachment, which provides municipal and provincial police services. Approximately 32 RCMP members work from the Whistler location.

[7] Historically (from at least 1993 until 2012), RCMP members were able to park their personal vehicles in a parking lot adjacent to the Whistler Public Safety Building,

which houses the RCMP and the Whistler Fire Department. The RMOW owns both that building and the adjacent parking lot ("the Public Safety Lot").

[8] In 2012, a so-called "temporary" structure was installed in the Public Safety Lot, reducing the number of spaces available on a first-come-first-served basis. Members who could not park there parked in a municipal parking lot across the street. They were not charged for that parking through a practice that involved entering their vehicle licence plates into the RMOW by-law enforcement database.

[9] In 2016, the RMOW began reviewing the parking arrangements throughout Whistler, including the use of the Public Safety Lot and the municipal parking lots across the street. Flowing from that review, in early May 2017, the RMOW informed the RCMP that it would prohibit all personal vehicle parking in the Public Safety Lot and that it would end the arrangement by which RCMP members parked for free in the municipal lots. The RMOW indicated that both changes would take effect on June 1, 2017.

[10] The NPF alleged that these changes violated the freeze provisions found at s. 56 of the *Act*. It asked that the Board declare that the respondent violated the *Act* and order the RCMP to reinstate free parking, retroactive to June 1, 2017.

[11] Particularly unique about this complaint was the RMOW's role in the decision-making process that led to the change to working conditions. I find that the evidence demonstrates that the decision to alter the parking arrangements for RCMP members was made by the RMOW, not the RCMP. The RMOW is not an employer under the *Act*. I have considered each of the NPF's arguments that suggest that nevertheless, the RCMP was responsible for maintaining the free parking during the freeze period. However, for the reasons that follow, the complaint is dismissed.

II. Complaint before the Board

[12] As noted, the NPF submitted its certification application on April 18, 2017, in which it sought to represent a bargaining unit comprising all RCMP members and reservists, other than those who are RCMP "officers" as defined in s. 2(1) of the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10).

[13] The changes to the parking arrangements in Whistler were communicated to the members there on May 19, 2017, and took effect on June 1, 2017.

[14] The NPF filed this complaint on August 2, 2017.

[15] At the time the complaint was filed, the certification application had not yet been decided. However, the NPF was certified as the bargaining agent on July 12, 2019 (see *National Police Federation v. Treasury Board*, 2019 FPSLREB 74). It should be noted that as per s. 56(b) of the *Act*, the freeze period ends 30 days after an employee organization is certified. Thus, at the time that this complaint was brought to the Board, the freeze period was in effect. However, once the newly certified bargaining agent served notice to bargain (on July 15, 2019), the freeze provision at s. 107 took effect.

[16] Initially, this complaint was assigned to a panel of the Board composed of Stephan Bertrand. He heard the complaint during oral hearings in Vancouver, B.C. (in February 2018), and Whistler (in May 2018). However, he had not yet rendered a decision at the time of his unfortunate and sudden passing in May 2019, while still a full-time Board member.

[17] Consequently, in June 2019, the complaint was assigned to a new panel of the Board. A case teleconference of the parties was held on July 18, 2019, to discuss how to proceed with hearing the case anew. At that time, the parties agreed that they would prepare a joint book of documents and an agreed statement of facts and would attempt to limit the number of witnesses, to facilitate a timely rehearing of the case.

[18] At that time, I also sought the parties' positions on the RMOW's role, which Mr. Bertrand had accepted as an intervenor during the course of the previous hearing. I asked the parties if they could agree on a role for the RMOW. They proposed that it be accepted as an intervenor on the basis that it would not call evidence but that it would be able to attend the hearing and make written and oral arguments. Their agreement was also on the understanding that the order would be without prejudice and that it should not constitute a precedent for the RMOW's or any other municipality's right or capacity to intervene in a future Board proceeding.

[19] After giving the RMOW a chance to make submissions on its role, I ordered that it would be given intervenor status in this case on the basis proposed by the parties.

[20] Two other case conferences were held with the parties and intervenor to discuss the process and dates for hearing the case. In the end, neither party called any witnesses, and the case proceeded as follows:

1) the parties submitted a joint book of documents on November 5, 2019;
2) they submitted an agreed statement of facts on December 16, 2019;
3) the complainant made written submissions on February 10, 2020;
4) the respondent made written submissions on February 21, 2020;
5) the intervenor made written submissions on February 28, 2020; and
6) the oral hearing was held on March 3, 2020, in Victoria, at which the Board asked the parties to clarify certain aspects of their agreed facts and at which the parties and the intervenor made supplementary oral arguments.

[21] I want to thank the representatives of both parties for the cooperation they demonstrated in preparing the agreed statement of facts and book of documents, which greatly assisted with the efficient rehearing of the case.

[22] As noted earlier, the oral hearing of this complaint was held back-to-back with the March 4 and 5, 2020, oral hearing of the similar Victoria parking complaint. Given the cases' similarities, many of the parties' core arguments were repeated, and they used the same books of authorities for both cases. I briefly contemplated issuing a single decision to cover both complaints. As my decision in each case turns on facts and analysis unique to the local situations, I have decided to issue two separate decisions.

[23] However, given this situation, I begin each decision with a common analytical framework used for both freeze complaints, before turning to the particulars of each case.

[24] At the time the case was argued, the parties noted that the Federal Public Sector Labour Relations and Employment Board (and its predecessors, the Public Service Labour Relations Board and the Public Service Labour Relations and Employment Board; collectively, in this decision, "the Board") had yet to issue any decision in relation to s. 56 of the *Act*. Unlike s. 107 (the freeze provision following notice to bargain), which has been in place since the inception of collective bargaining in the federal public service in 1967, s. 56 was added only in 2005 when the *Public Service Labour Relations Act* replaced the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35).

[25] However, subsequent to the hearing into this matter, the Board released its decision in *National Police Federation v. Treasury Board*, 2020 FPSLREB 44 ("*RCMP Promotional Rules*"), which involved the same parties and a complaint pursuant to s. 56. Therefore, that decision stands as the Board's first involving s. 56. In it, the Board found that the respondent had violated s. 56 when, during the freeze period, it changed the promotional rules affecting RCMP members' applications to sergeant and corporal positions.

[26] Thus, this decision and its companion (the Victoria parking complaint) will be the Board's second and third decisions with respect to s. 56 of the *Act*.

III. Analytical framework for freeze complaints under the *Act*

[27] I will start by laying out the general framework that I will apply in assessing this freeze complaint as well as the related Victoria parking complaint.

[28] In many areas, the parties agreed about the legal or analytical framework to apply. However, they differed sharply with respect to several aspects of how the Board should apply the decision of the Supreme Court of Canada (SCC) in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 ("*Wal-Mart*").

[29] The complainant generally argued that I should follow the Board's ruling in *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110 ("*Sudbury Tax Centre*"), which analyzed the application of *Wal-Mart* to a s. 107 freeze complaint involving changes to the use of variable hours of work.

[30] The respondent generally argued that the Board's ruling in *Sudbury Tax Centre* was at odds with the SCC's direction in *Wal-Mart*. It argued that the SCC's ruling endorsed new tests for analyzing freeze complaints, which the Board must apply. It argued that the Board has failed to properly apply those tests not only in *Sudbury Tax Centre* but also in other decisions, to be discussed later in this decision.

[31] The purpose of this section is to assess these arguments in general terms before applying them to the complaint at hand.

A. The purpose of the freeze provisions

[32] The freeze provision following an application for the certification of a bargaining unit is set out at s. 56 of the *Act* as follows:

> ***Continuation of terms and conditions***
>
> ***56*** *After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer is not authorized, except under a collective agreement or with the consent of the Board, to alter the terms and conditions of employment that are applicable to the employees in the proposed bargaining unit and that may be included in a collective agreement until*
>
> ***(a)*** *the application has been withdrawn by the employee organization or dismissed by the Board; or*
>
> ***(b)*** *30 days have elapsed after the day on which the Board certifies the employee organization as the bargaining agent for the unit.*

[33] This is similar to the freeze provision following a notice to bargain, which is set out at s. 107 as follows:

> ***Duty to observe terms and conditions***
>
> ***107*** *Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or*
>
> ***(a)*** *if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or*
>
> ***(b)*** *if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).*

[34] The essential element of these provisions is very similar in that an employer is prohibited from making **unilateral** changes to terms and conditions of employment once a certification application or a notice to bargain is served. Section 56 contains a provision under which an employer can seek the Board's permission to alter terms and conditions. While that does not exist in s. 107, the latter allows for the parties to reach agreement on a change to terms and conditions.

[35] While the two types of freezes have a similar impact, their purposes have been recognized as somewhat different. The Ontario Labour Relations Board (OLRB) has described the purpose of a bargaining freeze as follows (see *Canadian Union of Public*

Employees v. Scarborough Centenary Hospital Association, 1978 CanLII 506 (ON LRB) at para. 8):

> *… to maintain the status quo of the employment relationship so that the union is given an opportunity to enter negotiations and bargain for a collective agreement from a fixed point of departure and in an atmosphere of industrial relations security that is undisturbed by alterations in conditions of employment ….*

[36] The purpose of the freeze following certification is different; the SCC recognized it (in *Wal-Mart*) as being to "facilitate certification" (at paragraph 34). The certification freeze affects the employer's ability to manage and does the following (at paragraph 35):

> *… limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.*

[37] Despite the differences in purpose, labour boards have generally treated both types of complaints similarly. The Board described this in *RCMP Promotional Rules*, at para. 45, as follows:

> *[45] Both freezes are found in the labour relations legislation of every provincial jurisdiction as well as federally in the* Act *and the* Canada Labour Code *(R.S.C, 1985, c. L-2; "the* Code*"). Labour board jurisprudence in all jurisdictions has largely applied the same analytical approaches to both types of freezes, and both parties suggested that the Board should do the same. I propose to do so, while bearing in mind that while both types of freezes are of crucial importance to our labour relations scheme, the s. 56 freeze serves the somewhat heightened purpose, in my view, of facilitating certification itself, which is the very basis of the bargaining relationship.*

B. The first stage of the analysis

[38] The analysis starts with a first stage, in which the decision maker assesses whether the complaint meets the following four-part test (see, for example, *Sudbury Tax Centre*, at para. 137, and *Wal-Mart*, at para. 39):

1) that a condition of employment existed on the day the application for certification was filed (or following notice to bargain, in the case of a bargaining freeze);

2) that the employer changed the condition of employment without the consent or approval of the Board (or the bargaining agent, in the case of a bargaining freeze);
3) that the change was made during the freeze period; and
4) that the condition of employment is capable of being included in a collective agreement.

[39] The parties agreed that for a complaint to succeed, it must pass all four tests.

C. The second stage of the analysis

[40] Complaints are then evaluated as to whether the change that an employer made to the terms and conditions is justifiable using one or more criteria established in the jurisprudence. As the Board stated in *RCMP Promotional Rules* at paragraph 52:

> *[52] … The jurisprudence has recognized that employers still need to run their operations, especially given the sometimes lengthy period from application to certification and from the notice to bargain collectively to a finalized collective agreement.*

[41] Thus, the bargaining and certification freezes are not what has been termed a "deep freeze", under which employers are prevented from making any changes whatsoever to the workplace during the freeze (see *Ontario Public Service Employees Union v. Royal Ottawa Health Care Group Institute of Mental Health Research*, 1999 CanLII 20151 (ON LRB) at para. 85; "*Royal Ottawa*").

[42] Employers have generally been found not to have violated a freeze provision when the change made is consistent with what is called the "business as usual" or "business as before" test. Once again, an often-cited OLRB decision, *Spar Professional and Allied Technical Employees Association v. Spar Aerospace Products Ltd.*, [1979] 1 C.L.R.B.R. 61, [1978] OLRB Rep. September 859 at para. 23; "*Spar Aerospace*"), sets out the approach as follows:

> *23 The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union.…*

[43] Another test is whether the change made to the terms and conditions of employment was consistent with what is termed the "reasonable expectations of employees." In other words, was it reasonable for employees to have expected the term or condition to be maintained? If so, the complaint will succeed. Often, this analysis examines whether an employer had already put in motion a process of making the changes to the terms and conditions of employment and whether it had communicated that to employees.

[44] I will briefly examine a few cases in which the Board applied these principles together.

[45] The first is another freeze complaint involving changes to employee parking, *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26 ("*Chargehands*"). In 2015, the Department of National Defence implemented paid parking at CFB Halifax approximately six months after notice to bargain was served. The Board found that the employer had been reviewing its parking policies for several months before notice to bargain was served and that further changes were "looming" (at paragraph 51). As such, "the wheels were in motion" (at paragraph 52) before the freeze took effect. Furthermore, the employer had informed both the bargaining agent and employees that changes to parking might be coming well before notice to bargain was served, and the Board concluded that the employees could not have reasonably expected that free parking would continue (at paragraph 61). The complaint was dismissed.

[46] The Board reached similar conclusions in *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107 ("*CFAV Firebird*"), which involved changes to shift schedules among ship's crews working on the Canadian Forces Auxiliary Vessel (CFAV) *Firebird* in 2015. While agreeing that changes to shift schedules were made during the freeze period, the Board found at paragraph 46 that the "… process for change had begun before notice to bargain was given" and that CFAV employees had been put on notice that such a change was pending.

[47] The Board also adopted the intertwining of the business-as-usual and reasonable-expectations tests in a decision involving a reduction in work hours from full to part time in 2014 for a group of about 50 employees working at federal penitentiaries in the Correctional Service of Canada's Pacific region (see *Public Service*

Alliance of Canada v. Treasury Board (Correctional Service of Canada), 2017 FPSLREB 11; "*Correctional Services*"). The Board found that the employer had an established pattern of not reducing employees' work hours, which led to a reasonable expectation on their part that they would keep working full-time following notice to bargain (at paragraph 99). The complaint was upheld.

[48] The Board also upheld a complaint about a 2015 change made by the Translation Bureau to the work schedules of parliamentary translators when Parliament was not in session (*Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)*, 2016 PSLREB 68, "*Parliamentary Translators*"). The Board focused primarily on the business-as-usual test outlined in *Spar Aerospace* but again stated that this test is not exclusive of the reasonable-expectations test. In other words, the employer's normal approach to managing the work schedules when Parliament was not sitting was directly related to the parliamentary translators' expectations (at paragraph 129).

[49] In this case, the NPF argued that the business-as-usual and the reasonable-expectations tests are related concepts that the Board may assess together. The respondent disagreed with this approach and argued that *Wal-Mart* changed the analytical framework.

[50] This debate also was evident in *RCMP Promotional Rules*, in which the respondent challenged the Board's intermingling of the business-as-usual with the reasonable-expectations-of-employees test. It argued that the two tests are distinct and that considering them together runs counter to the SCC's analysis in *Wal-Mart*.

[51] Consequently, in *RCMP Promotional Rules*, the Board conducted a careful analysis of the historical evolution of freeze jurisprudence and a very careful analysis of the SCC's direction. That included an analysis of the Board's conclusions in *Chargehands*, *CFAV Firebird*, *Correctional Services*, and *Parliamentary Translators*.

[52] I concur with the Board's conclusion in *RCMP Promotional Rules*, which was stated succinctly as follows:

> *[70] The concept of employees' expectations is an inherently logical aspect of a business-as-usual analysis. If employees have a reasonable expectation that something will happen, in the absence of evidence to the contrary, one can assume that they have that*

> *expectation because it happened before, because it usually happens, or because they were told it would happen. Their expectations are not made out of whole cloth but are based on their workplace experiences or on what they have been told. It is a simple matter of logic and probability.*

[53] I will now turn to two other areas of debate between the parties with respect to how to properly analyze these types of complaints. The first is the issue of where the burden of proof lies with respect to the business-as-usual test. The second concerns how and when to apply the tests the respondent stated are required given the SCC's findings in *Wal-Mart*.

D. Business as usual - the burden of proof

[54] On this issue, the complainant's submissions described the analysis at the second stage as potential "defences by the employer." In other words, it is up to the employer to justify a change as consistent with business as usual. It referred to the Board's analysis in *Sudbury Tax Centre*, which found that the employer in that case (the Canada Revenue Agency) was not able to demonstrate that the changes it made to work hours accorded with past practice.

[55] The respondent argued that the complainant was reversing the burden of proof in a way inconsistent with the SCC's direction in *Wal-Mart*. In accordance with the principle of *stare decisis*, the Board is bound to follow that direction (in other words, the Board cannot depart from the SCC's decision; only that Court may overturn a legal precedent that it established).

[56] The respondent specifically challenged the Board's analysis in *Sudbury Tax Centre*, when it stated that when evaluating a business-as-usual test, it "… considers any defence offered by the employer …" (at paragraph 137). The respondent argued that the error was repeated when the Board found that "… the respondent has not offered a defence that meets the bar set by *Walmart* …" (at paragraph 172).

[57] The respondent argued that *Wal-Mart* makes it clear that the burden of proof lies with the complainant, as follows: "Unlike s. 17 of the [Quebec Labour Code], s. 59 does not create a presumption 'of change' or automatically reverse the burden of proof, which continues to rest with the employees and the union" (at paragraph 54).

[58] The SCC repeated this conclusion when it reviewed the original arbitrator's decision (which had found the company in violation of the freeze provisions). In

finding his decision reasonable, it stated that he "… did not place an inappropriate burden of proof on the employer" (at paragraph 95). A little further along, the SCC noted that the arbitrator "… neither created a legal presumption nor reversed the onus" onto the employer (at paragraph 97).

[59] I agree with the respondent that the SCC was clear that the burden of proof in a freeze complaint such as this lies with the complainant not only at the first but also at the second stage of the analysis.

[60] At the same time, the concept that an employer is expected to defend itself does not necessarily equate to a reversal of the burden of proof. At adjudication or arbitration, a respondent is expected to actively defend itself. The SCC clearly recognized as much. After recognizing that the burden of proof lies with the union, it explained as follows (at paragraph 54 of *Wal-Mart*):

> *[54] … However, nothing prevents the arbitrator hearing the complaint from drawing presumptions of fact from the whole of the evidence presented before him or her in accordance with the general rules of the law of civil evidence … as normally applied. As a result, if the union submits evidence from which the arbitrator can infer that a specific change does not seem to be consistent with the employer's normal management practices, a failure by the employer to adduce evidence to the contrary is likely to have an adverse effect on its case ….*

[61] Following from that analysis, I do not think that the Board reversed the onus by referring to employer defences in *Sudbury Tax Centre*. In that case, the union alleged that the employer's restrictions to variable hours of work represented a significant change from past practice. The union presented evidence to that effect; the employer presented evidence to defend itself. The Board weighed the employer's evidence against the union's evidence and found in favour of the latter.

[62] That said, I think it appropriate to clearly state that the burden of proof does lie with the complainant.

E. The tests in *Wal-Mart*

[63] The respondent argued that with *Wal-Mart*, the SCC endorsed new tests that must be considered in every freeze complaint. It argued that in many of its recent decisions, the Board has failed to properly apply those tests, most notably in *Sudbury Tax Centre*.

[64] Firstly, the respondent argued that *Wal-Mart* established a "would have done the same thing" test. In other words, if an employer can show that the change to terms and conditions of employment would have been made even in the absence of an application to unionize, a freeze violation did not occur.

[65] Secondly, the respondent argued that *Wal-Mart* established a "reasonable employer" test. For cases under the *Act*, this requires that the Board examine whether a change to terms and conditions is consistent with what a reasonable employer in the same position would have done. If so, a violation did not occur.

[66] With this test, the respondent argued that *Wal-Mart* established a requirement that to succeed with a freeze complaint, a bargaining agent must demonstrate on two **separate** grounds that (a) the change in question is inconsistent with the employer's past practice, **and** (b) the change in question is inconsistent with the decision that a reasonable employer would have made in the same circumstances.

[67] The respondent repeated its argument that via the *stare decisis* principle, the Board is bound to follow the SCC's direction and apply the tests.

[68] On the other hand, the complainant argued that the Board's analysis in *Sudbury Tax Centre* should apply. In that decision, the Board concluded that the reasonable-employer test is effectively a third stage of analysis that is engaged only if the issue cannot be settled at the second stage (business-as-usual and reasonable-expectations).

[69] The complainant argued that the Board should follow its own decisions (what it called "horizontal *stare decisis*") unless they are manifestly wrong, which *Sudbury Tax Centre* is not.

[70] There is no doubt that *Wal-Mart* refers frequently to the would-have-done-the-same-thing concept. There is also no doubt that in that case, the SCC applied the reasonable-employer test as it sought to assess the unique circumstances in that case (the closing of a successful and profitable store in Jonquiere, Quebec, just after the union had applied for first-contract arbitration following successful certification). On the basis of those tests, the SCC upheld the finding that Wal-Mart had violated the freeze provisions of the Quebec *Labour Code* by closing that store.

[71] The question is how these ought to fit into analyzing freeze complaints in situations more straightforward than *Wal-Mart*.

[72] In *Sudbury Tax Centre*, the Board discussed the would-have-done-the-same-thing test and concluded that it should not be applied in a way that subverts the purpose of a statutory freeze. At paragraph 166, it quoted from *Wal-Mart* (at paragraph 49) as follows: "To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit."

[73] I agree with that conclusion. Furthermore, I am not convinced that the SCC endorsed the would-have-done-same-thing concept as a distinct test. As I read *Wal-Mart*, it is simply a way of restating the business-as-usual test. This is evident via the SCC's introduction of the term as follows at paragraph 52 as another way of describing business as usual:

> *[52] In this context, to find that there has been no unlawful change in conditions of employment within the meaning of s. 59 of the*[Quebec Labour] Code*, an arbitrator must do more than simply determine that the employer had the power to act the way it did before the union's arrival. He or she must also be satisfied that the employer's decision was consistent with its normal management practices or, in other words, that it would have done the same thing had there been no petition for certification.*

[74] This is also evident at paragraph 60, where, as follows, the SCC cited *Spar Aerospace*, among other cases, as the authority for this conclusion:

> *[60] … In all the general labour relations schemes in Canada, therefore, although the employer does not lose its right to manage its business simply because of the arrival of a union, it must, from that point on, exercise that right as it did or would have done before then ….*

[75] As noted earlier, *Spar Aerospace* remains the leading case law on the business-as-usual justification for making a change to terms and conditions of employment.

[76] The Board also considered this question in *RCMP Promotional Rules*, and it found that importing employer intent into the analysis would be "… tantamount to importing some suggestion of a requirement of anti-union animus to prove a freeze violation" (at paragraph 110). The Board maintained that the certification and bargaining freezes remain strict liability provisions (at paragraph 38) and found that interpretation consistent with *Wal-Mart* (see *RCMP Promotional Rules* at paragraph 111, quoting from *Wal-Mart* at paragraph 38).

[77] As for the proper application of the reasonable-employer test, none of the respondent's arguments convinced me that the Board misapplied *Wal-Mart* in *Sudbury Tax Centre*.

[78] In *Sudbury Tax Centre*, the Board carefully analyzed the SCC's ruling and found that it said that the reasonable-employer test should be applied "… in some situations in which it is difficult or impossible to determine whether a particular management practice existed before …" (at paragraph 156, quoting from paragraph 56 of *Wal-Mart*).

[79] The Board further concluded as follows:

> *[171] If the collective bargaining regime that lies at the heart of the* Act *is to function effectively within the purposes stated by the* Act *in its preamble, it is essential that an employer respect the injunction against unilateral changes in terms and conditions of employment during the s. 107 statutory-freeze period. The grounds for a business as usual exception must be constructed conservatively, in my view, to not frustrate the compelling purpose of s. 107. That, once more, a reasonable employer might have exercised its powers in a certain way in counterfactual circumstances should not be a sufficient defence in most circumstances. More will normally be required unless, following* Walmart *at paragraph 56, there is no evidence with respect to past management practice upon which a defence can rely. Even then, caution will be necessary. Otherwise, the force of the statutory freeze may be frustrated.*

[80] The respondent argued that *Wal-Mart* was correctly applied in a number of cases in a way that should allow the Board to dismiss *Sudbury Tax Centre*. I am not convinced that any of the cases cited provide a basis for me to depart from it.

[81] Take, for example, *Canadian Helicopters Ltd. v. Office and Professional Employees International Union*, 2020 FCA 37, which was a judicial review of a decision of the Canada Industrial Relations Board (CIRB) upholding a freeze complaint involving pilots' work schedules. Towards the end of the decision, the Federal Court of Appeal (FCA) noted that the CIRB had not applied the reasonable-employer test. However, as argued by the complainant, the FCA's conclusion was highly speculative, in fact concluding that *Wal-Mart* "… cannot provide a proper basis to set aside the [CIRB]'s decision, even if it might have resulted in a different outcome before the [CIRB] if it had been raised" (at paragraph 36).

[82] The respondent also cited the FCA's decision in *FedEx Freight Canada Corp. v. Teamsters Local Union No. 31*, 2017 FCA 78, which considered applications for judicial review filed by both the union and the employer of both a CIRB decision and its own reconsideration decision. While the FCA did refer to the importance of the *Wal-Mart* principles, it did not directly address the question of how and when the reasonable-employer test should be employed. The principal conclusion of the relevant sections of the decision was that it was not unreasonable for the CIRB to remove anti-union animus from its freeze analysis.

[83] The respondent also pointed to the CIRB's decision concerning changes to terms and conditions of employment during a certification freeze involving teachers working in northern Quebec. The original decision was *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit - CSN v. Conseil des Innus de Pessamit*, 2016 CIRB 831 ("*Conseil des Innus 2016*"). In the reconsideration application (*Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit - CSN v. Conseil des Innus de Pessamit*, 2017 CIRB 861 ("*Conseil des Innus 2017*")), the union argued that the original panel had disregarded the teachings in *Wal-Mart*, which "… constitutes a historic and legal paradigm shift because it establishes that the purpose of the freeze provision is … to facilitate certification and encourage good faith bargaining" (at paragraph 20). The CIRB then quoted extensively from *Wal-Mart*. However, it finally concluded that *Wal-Mart* "… does not substantially change the [CIRB's] jurisprudence in its analysis and application of the freeze provision of the terms and conditions of employment" (at paragraph 26).

[84] Finally, the respondent argued that a third FCA decision (*Canadian Federal Pilots Association v. Attorney General of Canada*, 2020 FCA 52) reinforced the application of the reasonable-employer test to freeze complaints. In reviewing a decision of the Board (*Canadian Federal Pilots Association v. Department of Transport, Transportation Safety Board and Treasury Board Secretariat,* 2018 FPSLREB 91), the FCA stated that it was not necessary to have applied the reasonable-expectations test, and that "…what is relevant is whether the impugned changes commenced before the onset of the freeze or were part of the way in which the employer previously operated or could reasonably be expected to operate" (at paragraph 12). While I agree that this passage does support considering the reasonableness of an employer's decisions, I do not think it alone can be relied upon as authority to contradict the detailed

consideration of exactly how such a test is to be applied that was provided by the Board in *Sudbury Tax Centre*.

[85] The Board has had many opportunities to consider the application of *Wal-Mart* to freeze complaints under the *Act* besides *Sudbury Tax Centre*. The Board's decisions in each of *Chargehands*, *CFAV Firebird*, *Correctional Services*, and *Parliamentary Translators* were issued well after *Wal-Mart*.

[86] The only one of the four to even mention *Wal-Mart* was *Chargehands*. In that case, the **bargaining agent** argued that the Board should apply the reasonable-employer test. The Board rejected that argument, concluding that "the motivation and the soundness" of the decision to implement paid parking was "irrelevant to the issue at hand" (at paragraph 28). Further along, it concluded that "… it matters not that the change implemented by the employer was potentially unreasonable, arbitrary, or ill conceived, which I do not believe it was, in any event" (at paragraph 56).

[87] For the record, the respondent argued that the Board was wrong in that part of *Chargehands* and that it might have sought judicial review of the decision but for the fact that the Board dismissed the complaint on other grounds, as discussed earlier.

[88] Ultimately, *Sudbury Tax Centre* explained that if a case can be settled one way or the other on the basis of the business-as-usual test, one does not need to consider the reasonable-employer test. That test should be applied only in unique situations, like *Wal-Mart*, in which a business-as-usual analysis cannot conclude the matter one way or the other.

[89] In arguing that a complainant must succeed on both a business-as-usual and a reasonable-employer basis, the respondent was seeking two kicks at the can. While it was quite prepared to forego the reasonable-employer test if it succeeded via a business-as-usual analysis, it argued that a loss on that test requires the use of the reasonable-employer test as a completely alternative approach to having a complaint dismissed.

[90] In accordance with this reasoning, I find no basis for sustaining the respondent's argument.

F. Summary

[91] To summarize, I find that the proper analytical approach to apply consists of two, or in some cases three, stages of analysis.

[92] At the first stage, one must examine whether an employer made an unapproved change to the terms and conditions of employment during a freeze period, provided that the changed term and condition is capable of being included in a collective agreement.

[93] At the second stage, one must consider whether that change was consistent with the employer's business-as-usual practices. Often at this stage, considering whether the changes were (or were not) part of the employee's reasonable expectations is required.

[94] A third stage is required in those situations in which it is difficult or impossible to apply the business-as-usual or reasonable-expectations tests. In that case, one should apply the reasonable-employer test articulated in *Wal-Mart*.

[95] Finally, while recognizing that employers must be able to continue to manage their operations, the analysis must proceed on the basis that a freeze provision is a strict liability one, not one requiring anti-union animus. Conclusions must respect the purpose of freeze provisions, which is to create a stable labour relations environment within which certification, or bargaining, can proceed.

[96] Before applying that analytical framework to this case, I will briefly summarize the background facts.

IV. Summary of the evidence

[97] The parties submitted an agreed statement of facts as well as a joint book of 32 documents. Certain aspects of these facts and documents were clarified during oral arguments. The following summary reflects what I consider the most salient points of agreement.

A. The RCMP in Whistler

[98] The RCMP is a national organization that in addition to providing policing throughout the country provides them under contract to three territories and eight provinces. In B.C., it provides both national and provincial police services and delivers

municipal policing to a large number of small- and medium-sized municipalities, including the RMOW.

[99] In the RMOW, the RCMP employs approximately 32 members, of which 24 provide municipal police services and 8 provide provincial policing. Their work is overseen by an inspector, who is the officer-in-charge (OIC) of the RCMP's Sea-to-Sky Detachment, which includes the RMOW, Pemberton, Squamish, and Bowen Island. The OIC splits most of his or her time between the RCMP's RMOW and Squamish offices.

[100] The 32 RCMP members are part of the bargaining unit now certified by the NPF. As a commissioned officer, the OIC is excluded from that bargaining unit. Police support services are provided by 1 federal public service employee (classified at the AS-01 level) and approximately 8 RMOW employees.

[101] The RCMP's provision of police services to the RMOW is governed by two agreements between the Government of Canada and the Government of British Columbia, one for providing provincial police services, and the other for providing municipal police services. In turn, the RMOW and the Government of British Columbia have a third agreement that sets out their respective obligations for providing policing in the RMOW.

[102] None of the three agreements directly addresses the employee parking issue. The municipal police services agreement provides that each municipality will provide and maintain an accommodation that includes office space, jail cells, and, if required, heated and lighted garage space.

[103] In Whistler, the RCMP works out of the Public Safety Building, which is owned by the RMOW. The building also houses municipal fire services and some other RMOW functions. In August 2015, the RCMP and the RMOW entered into an occupancy agreement related to the police services run out of that building ("the occupancy agreement"). The agreement specifies that the municipality will cover the occupancy costs associated with municipal policing and that it will bill the RCMP for the share of the costs associated with provincial policing responsibilities.

[104] The only mention of parking in the occupancy agreement is found at point 2.1, which reads as follows:

> *2.1 The Municipality hereby grants an Occupancy Agreement providing the right to the municipal and non-municipal RCMP to occupy the Detachment Building. This grant of occupancy shall include the right of the RCMP, its employees, servants, agents, customers and invitees to access and use the Detachment Building and also includes the right to access and use all driveways, parking areas, sidewalks, common loading and stopping areas in and about the Detachment Building.*

[105] Adjacent to the building is the Public Safety Lot. Its location is at the corner of Blackcomb Way and Village Gate Boulevard, in a portion of the RMOW called the Village. Directly across Blackcomb Way are five lots termed "day parking lots", owned by the Province of British Columbia, and co-managed by the RMOW and Whistler Blackcomb, which is the ski resort. Day Lots #2 and #3 are directly across the street. Day Lot #1 is across the street and about half a block to the south. Day Lots #4 and 5 are a few hundred metres to the north.

B. The evolution of parking arrangements affecting RCMP members

[106] Before 2010, the RMOW allowed firefighters and on-duty RCMP members to park in any residual parking spaces in the Public Safety Lot not used for operational vehicles. Firefighters and on-duty members parked their vehicles elsewhere if that lot was full. Before 2010, there was no charge for using the day parking lots.

[107] In 2010, the Winter Olympics were held in Vancouver, and many events were held at Whistler. After the Olympic Games, the RMOW began charging for parking in Day Lots #1, #2, and #3 (which were paved), while the unpaved Day Lots #4 and #5 remained free.

[108] After the Olympics, members were allowed 9 to 10 personal parking spots in the Public Safety Lot. This accommodated most of their personal parking requirements during all but the busiest times of the week. They were asked to use that lot only while they were at work and not for personal errands in the Village.

[109] This arrangement was described at length in an email to the RCMP members in Whistler dated July 29, 2011, from Inspector Neil Cross, then the OIC of the Sea-to-Sky Detachment. The email started by explaining that originally, the RMOW was to exclude all personal parking in the Public Safety Lot, but it went on to state the following:

…

> *It was put forward that our officers were subject to emergency call outs as well as starting shift or off at various late hours and there would be a safety risk for our officers departing the detachment and walking over to the day lots after shift. This rational was accepted by RMOW Sr. Management on the condition that our officers did not utilize the lot for personal parking, skiing, biking, shopping, attending restaurants or festivities in the Village. This was agreed to and we were allotted 10 parking spots for officers to utilize for personal vehicles for operational requirements at no costs.*
>
> …
>
> [*Sic* throughout]

[110] The email went onto explain that a number of times, off-duty members had been seen parking in the Public Safety Lot and walking into the Village for matters not related to their work. Insp. Cross warned the members as follows:

> …
>
> *I would remind everyone with the pay parking issue heating up recently, and the pending changes towards pay parking of all lots (1-5) we will need to be sure we are using the Public Safety Parking Lot as had been agreed upon or we could end up losing the parking (no cost) that we currently have. We also must be sensitive to the fact that our internal Muni employees currently have to walk from lot 5 and will soon be required to pay for parking.*
>
> …

[111] In late 2012, a temporary building (a portable) was placed in the Public Safety Lot to house additional municipal staff. Although it was called a temporary building, it remains in place today. After it was installed, the number of spaces available to RCMP members for personal parking was reduced (to between six and eight, depending on the season and configuration). A practice was put into place by which members parked in Day Lot #3 and gave their licence plates to RCMP Sergeant Robert Knapton, who in turn provided the plate numbers to by-law officers to enter into a database. This allowed members to park their vehicles in Day Lot #3 without charge.

[112] The evidence showed that the allocation of spots within the Public Safety Lot was adjusted from time to time between the different purposes (RCMP vehicles, emergency vehicles, and personal parking spots). The availability of spots was reduced in the winter (due to piles of snow).

[113] In 2016, in response to continued growth and increased parking demand, the RMOW began reviewing all available parking in the municipality. As part of its

response to those demands, the RMOW updated its licence-plate-reader equipment. At that point, the RMOW's general manager, Norm McPhail, who had been working for the RMOW since 2010, first became aware of the practice of providing RCMP members with free parking in Day Lot #3.

[114] The parties agreed that there was no explanation as to why Mr. McPhail was not aware of this practice earlier, despite it having been in place since 2012.

[115] On October 26, 2015, Mr. McPhail wrote to Insp. Cross to advise him that the practice had come to his attention and that the RMOW would review it with the day lot operating committee (DLOC), which exists because the parking lots are jointly managed by the RMOW and the ski resort operator. He advised Insp. Cross that free parking is a taxable benefit that should be reported on individual tax returns. He noted that the RMOW had received similar requests for free parking from other departments, all of which were denied.

[116] Mr. McPhail went on to write, "I am not sure of the expectations that have been created among RCMP members to date and do see that this may be a controversial issue for some. I am hoping that we can meet in advance of the next DLOC to set into place a workable plan."

[117] Insp. Cross replied the next day, explaining that the plan had been put into place following the installation of the temporary building. He indicated that the same arrangement was in place for firefighters. Mr. McPhail responded, asking that they keep the issue "within management" until the RMOW came up with a strategy.

[118] Mr. McPhail raised the issue again in December 2017 with a new OIC. Once again, he explained that in reviewing all parking in the RMOW, he had discovered the arrangement under which RCMP members received free parking in Day Lot #3. He said that "… it seems it was a side bar deal not approved by senior management nor RMOW Council." He indicated that "[t]he RMOW will in time, make more overt requests that personal parking for RCMP and Fire staff be moved into day lots 4 & 5", or into paid parking in Lot #3. He said that the RMOW was "… beginning inquiries towards this goal early as [he appreciated] that parking can be a hot button issue for some." He ended by stating that the RMOW was considering an effective date of April 1, 2017. He also asked her to keep it confidential among the RCMP's managers.

[119] On or about January 31, 2017, the RMOW finalized a parking study that had been undertaken in the winter and summer of 2016.

C. The change to the parking policy

[120] On May 4, 2017, the RMOW wrote to both the RCMP and the Whistler Fire Service to inform them of its decision to prohibit personal parking in the Public Safety Lot, effective June 1, 2017. Only municipal, police, and emergency fleet vehicles could be parked there after that date.

[121] The RMOW followed up the next day with an email to the acting OIC and some other RCMP staff indicating that related to the change, free parking in the day lots would end for RCMP members. In that email, Mr. McPhail explained that no free parking in paid parking lots was provided to any other staff. He reiterated that the arrangement had been put into place without the approval of RMOW management.

[122] On May 17, 2017, Sgt. Knapton (who had been in charge of passing on the personal vehicle plate numbers to by-law officers) wrote to a new OIC, Insp. Jeff Christie, asking about the status of the decision. He complained about the lack of consultation, questioned whether the RCMP could use the occupancy agreement to challenge the RMOW's decision, and raised a number of health and safety concerns about not being able to park in the Public Safety Lot.

[123] On May 19, 2017, Insp. Christie informed all RCMP members in Whistler of the RMOW's decision. Describing it, he indicated that "[t]he re-allocation [*sic*] of this area from current use (free parking) – is in alignment with the direction that RMOW is taking to be balanced and fair for all employees, visitors and citizens." He acknowledged that "[p]ay Parking is no doubt a concern for those who traditionally accessed this area at no cost."

[124] The new parking arrangements went into effect on June 1, 2017. After that date, RCMP members have had the option of parking in Day Lot #3 at the rate of $60 per month or in Day Lots #4 and #5 ($30 per month in the peak season, and free in off-peak months).

[125] After the change, RCMP management (the OIC) and members discussed several issues of concern, which resulted in a few exceptions to the no-personal-vehicle-parking rule for the Public Safety Lot. These included allowing some personal vehicle

parking in case of an emergency and issuing parking passes during overnight shifts (as the day lots close from 3 a.m. to 6 a.m.). Concerns were also expressed about the risk to members parking in Day Lots #4 and #5 and walking to the RCMP detachment in uniform. Insp. Christie said that he was prepared to install additional lockers in the RCMP's offices so that members could walk in their civilian clothing.

D. Other facts in agreement

[126] The parties put forward three other points in their agreed statement of facts, which do not fit into the chronology.

[127] First, the parties agreed that the RCMP does not have a mandate from the Treasury Board to obtain personal parking for members when negotiating policing or occupancy agreements. Further, the RCMP does not reimburse members for personal parking at any workplace that charges for parking, except as set out in RCMP, Treasury Board, or National Joint Council policies.

[128] Second, the parties stated the following when it comes to employee and management expectations about parking:

> *The Members working at the RMOW expected that they would be able to park their personal vehicles free of charge when attending work. RCMP contracting, RCMP management, and the RMOW expected that parking in the Public Safety Parking Lot was limited to police services vehicles. RCMP contracting, RCMP management and the RMOW also expected that Member personal vehicle parking in any RMOW parking lot, including the Public Safety Parking Lot, was an* ex gratia *benefit provided by the RMOW that could be cancelled at any time.*

[129] Finally, the parties noted that the RMOW provides certain *ex gratia* (free) benefits to RCMP members, including a recreation pass granting free access to the RMOW's gym.

V. Analysis and reasons

[130] I will now apply the analytical framework for freeze complaints outlined in section III of this decision to the facts of this complaint.

[131] The parties agreed that several elements of the tests at the first stage of analysis were met, as follows:

1) a notice of application for certification was filed on April 18, 2017;

2) the change to parking took effect on June 1, 2017, during the freeze period;
3) the NPF did not consent to the change; nor did the respondent seek Board approval for it; and
4) free employee parking is a condition of employment that may be contained within a collective agreement.

[132] However, this leaves two critical elements to consider, which are (a) whether the ability to park in the Public Safety Lot or park free in Day Lot #3 was, in fact, a term and condition of employment for the RCMP members in Whistler, and (b) whether the respondent changed the parking arrangements.

[133] The respondent argued that it never provided RCMP members in Whistler with free parking. It was an *ex gratia* benefit provided by the RMOW, not the RCMP. Moreover, the decision to prohibit personal parking in the Public Safety Lot and to end the free parking arrangement in Day Lot #3 was not made by the RCMP or the Treasury Board. The RMOW made that decision; it is not an employer under the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). Therefore, as the *Act* defines "employer" by reference to the *FAA*, the RMOW is not an employer under the *Act*. As such, s. 56 of the *Act* is not engaged, and the complaint should be dismissed on that basis, argued the respondent.

[134] The intervenor made similar arguments, adding that this Board lacks jurisdiction over how the intervenor exercised its rights to control the use and access of its parking lots. As such, the Board cannot hold the RMOW liable for the changes it decided to make or impose upon it a remedy that dictates how it manages its parking.

[135] I started this analysis with the respondent's and intervenor's arguments because my finding on these points significantly affects my approach to analyzing the remainder of the parties' arguments with respect to this complaint.

[136] On the issue of whether the free parking was a term and condition of employment, there are arguments on both sides. From the perspective of the RCMP members, I certainly understand why they felt that the parking arrangements were a part of their terms and conditions of employment. Many of them drive to work. They have to park their personal vehicles before reporting for duty. Most had been able to make use of spots set aside for them in the Public Safety Lot for years, although the number of spots had declined over time. The ability to park for free in Day Lot #3 had

been in place since 2012, and for those members using that lot, the ability to park there for free would have been a daily, work-related activity.

[137] On the other hand, from the respondent's perspective, it was not responsible for obtaining or negotiating free parking. It appears that the parties accepted this understanding as a matter of fact. As stated in the agreed statement of facts, the RCMP "… does not have a mandate from Treasury Board to obtain free parking for Members in negotiating police service agreements or occupancy agreements." The parties also agreed that the RCMP does not reimburse members for paid parking for personal vehicles. As such, the parking has to be understood as an *ex gratia* benefit provided by the RMOW. The respondent argued that the RMOW chose to provide the free parking and so can choose to take it away, just as a restaurant can decide whether to provide a free meal.

[138] There is another angle to this issue, which neither party argued. The primary purpose of the RCMP's presence in Whistler is to deliver police services **to the municipality**. It is not there to operate a store or restaurant with employees who happen to benefit from free parking. It is there because the RMOW contracted it through the agreements between it and the province and between the province and the RCMP. Members work for the RCMP, which works for the RMOW to deliver services to it. From that point of view, I accept as reasonable that members saw free parking as a part of their terms and conditions of employment.

[139] However, even were free parking accepted as a term and condition of employment, one would still have to address the question of whether **the respondent** provided it and more importantly whether the respondent **altered** it. Recall that s. 56 of the *Act* states that "… the employer is not authorized, except under a collective agreement or with the consent of the Board, to alter the terms and conditions of employment that are applicable to the employees in the proposed bargaining unit …".

[140] This is a much tougher challenge for the NPF. Although it expressly denied that the RMOW was entirely responsible for the decision to cancel free parking, I find that the evidence is clear that the RMOW took the entire initiative to change the parking arrangement. It initiated the parking review. It raised the possibility of the parking changes with RCMP management in October and December of 2016. Its chief administrative officer signed the May 4, 2017, letter announcing that personal vehicle

parking would no longer be permitted in the Public Safety Lot after June 1, 2017. Its general manager, Mr. McPhail, sent the follow-up email of May 5, 2017, explaining that free parking in Day Lot #3 would also end.

[141] Mr. McPhail's words clearly explained the locus of decision making as follows: "The RMOW management decision on this is that no free parking in paid parking lots will be provided to RCMP members for personal vehicles – which is the case for all RMOW staff."

[142] Similarly, Insp. Christie's May 19, 2017, email to all RCMP members clearly communicated that the RMOW was implementing the parking changes.

[143] In short, the RMOW and not the respondent altered the parking arrangements at issue. The RMOW is not an employer under the *Act*. The Treasury Board is the employer of RCMP members. As such, s. 56 of the *Act* is not engaged, and the complaint should be dismissed on that basis alone.

[144] Following from this, the only basis for upholding the complaint is if the NPF could successfully argue that nevertheless, despite the RMOW's role, the RCMP is responsible for the cessation of free parking and therefore should be held responsible for maintaining it during the freeze period.

[145] In other words, does the freeze provision oblige the RCMP to step into the void and provide free parking for members in Whistler?

[146] I will continue the analysis of the parties' arguments on that basis. In doing so, I will note that this line of analysis no longer engages the intervenor's interests. Therefore, I will not discuss its arguments further.

[147] The complainant argued that whether the RMOW or the RCMP has legal ownership over the parking spaces is not determinative of the case. The RCMP members received free parking as a condition of their employment, and the RCMP has the capacity to address this condition of employment through choices within its control. The focus should be on the capacity to control the condition of employment, not the decision making. The RCMP can allow members to use its parking spaces in the Public Safety Lot or it can reimburse them the costs of private parking.

[148] In making this argument, the NPF conceded that rarely, events occur that are entirely outside an employer's control and that prevent it from complying with a statutory freeze.

[149] For example, in *Conseil des Innus 2016*, the employer had reduced the number of teaching days in a school year by replacing every second Friday with aboriginal education days. The school board used non-teaching staff for those days. When, following a certification application, the school board reversed that decision and made teachers attend work every Friday, the union filed a freeze complaint. The CIRB determined that there had been no freeze violation because the federal government had ordered the employer to return to a full school year or face budget cuts. This gave the school board no other choice. The CIRB upheld that ruling in *Conseil des Innus 2017*.

[150] The NPF argued that the only other example of third-party actions excusing a breach of a statutory freeze was *The Ottawa-Carleton Public Employees Union Local 503 v. Ottawa Public Library Board*, (1995 CanLII 9953 (ON LRB), "*Ottawa Public Library*"). In that case, the library had promised certain low-paid employees a 3% wage increase. After the union applied for certification, the City of Ottawa reduced the library's budget, which led to it not implementing the wage increase. The OLRB concluded that the library's decision did not violate the freeze because the employees understood that the increase was dependent on the City of Ottawa.

[151] The NPF argued that unlike in *Conseil des Innus* and *Ottawa Public Library*, the RCMP has choices within its control to maintain the free parking benefit. It argued that the employer's position that it cannot do so is similar to the common law "doctrine of frustration", under which intervening events outside a party's control makes it impossible for a party to fulfil a contract. It argued that a party cannot claim this frustration if it had an opportunity to avert the event and to exhaust all means to challenge or appeal the third party's decision. Applying that principle to this situation, the NPF argued that the RCMP could have challenged the RMOW's decision or appealed it under the terms of article 7 of the occupancy agreement. As it did not, it cannot claim that it is unable to step in and fulfil the term and condition.

[152] This line of argument by the NPF is closely tied to its argument that the occupancy agreement gave the RCMP the right to the use of the Public Safety Lot for its

employees. It pointed to the wording of section 2.1, which I will repeat for the sake of convenience, with the NPF's highlighted emphasis:

> *2.1 The Municipality hereby grants an Occupancy Agreement providing the right to the municipal and non-municipal RCMP to occupy the Detachment Building. This grant of occupancy shall include* ***the right of the RCMP, its employees,*** *servants, agents, customers and invitees to access and use the Detachment Building and also includes* ***the right to access and use all*** *driveways,* ***parking areas****, sidewalks, common loading and stopping areas in and about the Detachment Building.*
>
> [Emphasis added]

[153] For the NPF, this clause of the occupancy agreement establishes that the RCMP has a right to the use of the detachment building and the driveways and parking areas associated with it and that it may extend that right to employees. As such, the RCMP could use the spots still available for operational vehicles (i.e., police cars) to allow personal parking. In fact, it used that right when it granted the members the ability to park in the Public Safety Lot in cases of emergency and the ability to park there during overnight shifts, the NPF argued. It exercised that right without any indication of having sought the RMOW's permission or agreement.

[154] The respondent argued that the third-party case law cited by the complainant is not relevant. Both *Conseil des Innus* and *Ottawa Public Library* arose in situations in which an employer provided and changed a term and condition of employment as a result of third-party action. That is not so in this case. The RMOW owns and operates the building and the Public Safety Lot. The Province of British Columbia owns Day Lot #3, and the RMOW manages it in conjunction with the ski resort. There is no case law about an employer stepping into the shoes of a third party to provide a benefit that employer has never provided.

[155] The respondent argued the relevance of a case involving a third-party contract before the B.C. Labour Relations Board (BCLRB) (see *Galt Western Personnel Ltd. v. CAW-Canada Local 3000*, [1998] B.C.L.R.B.D. No. 306 (QL) (affirmed in [1998] B.C.L.R.B.D. No. 360). The employer in that case was under contract to the Vancouver International Airport to provide different clerical services for a project. Under the contract's terms, the airport could direct Galt Western to remove employees from the project. It did so, for three employees, shortly after the union applied to certify Galt Western's employees. The union filed a freeze complaint, which the BCLRB denied. It

concluded that the British Columbia *Labour Relations Code* (RSBC 1996 C 244) "… does not protect employees from a third party's bona fide exercise of its rights under the terms of a pre-existing contract with the employer" (at paragraph 50).

[156] Furthermore, the respondent argued, neither the NPF nor the members are parties to the occupancy agreement between the RMOW and the RCMP. Citing the "privity of contract" principle, it argued that the NPF cannot make a claim based on a contract to which it is it not a party (see *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299). That principle has been upheld in the labour context (see, for example, *Timberwest Forest Co. v. United Steelworkers, Local 1-1937*, [2013] B.C.C.A.A.A. No. 7 (QL) at para. 38). The only exception to it occurs when using a third-party contract as a "shield" to defend one's interests, it argued, but in this case, the complainant tried to use the occupancy agreement as a "sword" to gain a benefit.

[157] Even were the occupancy agreement considered as enforceable by the Board, the respondent argued that it does not clearly provide for employee parking. When read in the context of the agreements between the province and the RCMP to provide policing, the occupancy agreement cannot be read as a lease granting the RCMP exclusive use of the Public Safety Lot. The agreement's primary purpose is to provide for cost sharing between the municipal and provincial portions of the RCMP's operations. It should be read as applying only to police operations, and to the extent that it grants the RCMP the ability to use and access the Public Safety Lot, it grants that only for police operations, not personal parking.

[158] Although I have explored the NPF's line of argument, none of what it offered by way of argument or case law alters my conclusion that the change to parking arrangements was made by RMOW management, not RCMP management. I agree with the respondent that unlike *Conseil des Innus* and *Ottawa Public Library*, this is not a case in which a third-party action forced an employer to make a change to employment conditions. In this case, the RMOW changed its parking rules.

[159] As such, the entire line of argument on the meaning and enforceability of the occupancy agreement is something of a red herring. Had that agreement clearly indicated that the RCMP had negotiated the right for employees to use the Public Safety Lot for personal parking, I might have delved into the extensive case law cited by the parties with respect to the privity-of-contract principle. But I agree with the

respondent's analysis that the occupancy agreement simply sets out the occupancy of the building and establishes how costs will be shared. Even had I concluded otherwise, I still would have had to return to the question of whether the respondent altered the term and condition of employment.

[160] Only one other line of argument might be considered as a reason for the RCMP to step in to take over providing the RMOW's parking benefit, which is to consider whether there is any business-as-usual rationale for such an action. In other words, is there any evidence that the RCMP's normal management practice, in response to the RMOW's parking changes, is to step into its shoes and fix the problem?

[161] The history of parking arrangements shows that regular changes were made to how RCMP members were able to use the Public Safety Lot and Day Lot #3. All the changes came at the RMOW's initiative. Paid parking was implemented in Day Lots # 1 to 3 after the 2010 Olympics, and the use of the Public Safety Lot became more regulated after that. In 2012, the RMOW installed the temporary building, which reduced the spaces available. From time to time, the arrangement of the parking spots in the Public Safety Lot was altered.

[162] What was the response of RCMP management to these changes made by the RMOW? The evidence demonstrates that the primary response was to communicate the RMOW's decisions. Insp. Cross's 2011 email to members made it clear that the RMOW controlled the use of the Public Safety Lot. In response to concerns that members were using it for personal trips into the Village, the RCMP's role was to remind members about the rules set by the RMOW.

[163] There is some evidence that RCMP management advocated to the RMOW for the members' parking. Insp. Cross's 2011 email explained that in response to the implementation of paid parking in Day Lots #1 to 3 after the Olympic Games, "… it was put forward that our officers were subject to emergency call outs …". He stated that RMOW senior management accepted that rationale and then agreed to allow members to park in the Public Safety Lot. This at least implies that RCMP management went to bat in creating the arrangement.

[164] In 2016-2017, in response to the RMOW's general manager's surprise at discovering the free parking arrangement, for Lot #3, RCMP management also took pains to explain the genesis of the arrangement, which dated back to the installation of

the temporary building, and offered to attend the next DLOC meeting to explain that history.

[165] However, neither action is proof of a business-as-usual practice of stepping in to provide a benefit that the RMOW withdrew.

[166] It is not clear what actions, if any, RCMP management took in 2012 when the practice began of entering members' licence plates into the RMOW's database to provide free parking in Day Lot #3. The RMOW's general manager called it a "side deal" that RMOW senior management had not approved. I have no evidence to suggest that it was put into place following initiatives by RCMP management. In fact, no written evidence regarding the source of the arrangement was adduced before me.

[167] I find that the RCMP's business-as-usual response to the RMOW's parking changes was to communicate them to the employees. That is precisely what it did in the May 19, 2017, communication to the members.

[168] As concluded earlier, it is clear that the members had developed an expectation that free parking was a part of their terms and conditions of employment. Was it therefore reasonable for them to expect that it would continue? I am not convinced it was. Even if they do not live in the RMOW, as police officers, they are part of the community. The evidence is clear that the parking situation in Whistler became more and more challenging, starting with the Olympics and continuing as the Village grew. In short, parking was a hot button issue not only for the members but also for the community. The 2011 email warning members not to park in the Public Safety Lot when not on duty could not have been clearer — their use of that lot was under scrutiny, and the RMOW could remove it. As members of the RMOW community, it should not have surprised the members to learn that the RMOW had reviewed its parking arrangements and would make changes.

[169] Of course, had the municipality and RCMP management not withheld the impending change from the members in the fall of 2016, there would be no question of the members' expectations, akin to the situation in *Chargehands*.

[170] The respondent did argue that "the wheels were in motion" for changes to parking, given the advance notices that the RMOW provided to the RCMP in the fall of 2016. However, I agree with the Board as it wrote in *RCMP Promotional Rules* at

paragraph 82 as follows: “To have any credence, the concept of ‘wheels in motion’ has to mean work being done to implement a firm decision that employees know about. Wheels turning silently on an exclusively inside track mean nothing.”

[171] However, the failure of RCMP management in this case to communicate what the RMOW was thinking of doing is not enough to reverse any of the other conclusions I have reached. Communicating earlier would have been a best practice, but the failure to do so does not alter my assessment of the reasonable expectations of the members.

[172] The respondent also argued that I should apply the reasonable-employer test in *Wal-Mart* and find that to the extent that it did change the parking policy, it was consistent with what a reasonable employer would have done in the same circumstances. In accordance with the analytical framework outlined in section III of this decision, I do not need to consider the respondent’s reasonable-employer arguments, as the case has been decided at the first and second stages of analysis.

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

(The Order appears on the next page)

VI. Order

[174] The complaint is dismissed.

June 26, 2020.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board