Date: 20200626

File: 561-02-40397

Citation: 2020 FPSLREB 72

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

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

In the matter of a complaint made under section 190 of the *Public Service 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

Heard at Victoria, British Columbia,
March 4 and 5, 2020.

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 RCMP headquarters in Victoria, British Columbia ("the Victoria parking complaint"; file 561-02-40397). The related case affects RCMP members working in the Regional Municipality of Whistler, B.C. ("the Whistler parking complaint"; file 561-02-870), which I will rule on in a separate decision.

[6] Located in Victoria is the RCMP's Island District Headquarters (IDHQ). Approximately 172 staff work there, including about 60 to 70 RCMP members now represented by the NPF.

[7] The IDHQ parking lot has approximately 124 parking spaces. Until June 3, 2019, only about one-fifth (25) of them were reserved for specific police vehicles. The

remaining spots were available for other RCMP vehicles, federal or municipal vehicles, and visitor and employee parking. It operated on a first-come, first-parked basis, which both parties termed "scramble" parking.

[8] Effective June 3, 2019, the RCMP implemented a new policy for the use of the IDHQ parking lot under which approximately 80% of the spots were assigned to specific RCMP police vehicles. This change reduced the number of spaces available for scramble parking.

[9] The NPF alleged that the new policy violated the freeze provision found at s. 56 of the *Act*. It asked that the Board declare that the respondent violated the *Act*, order that free parking be reinstated at IDHQ, and pay affected members the cost of public parking passes retroactive to the date on which they were no longer permitted to park at IDHQ.

[10] Although this complaint raises many similar issues to those in the Whistler parking complaint, my decision in this case turns on very different factors. In this case, the NPF had the burden of demonstrating that the new policy represented a change to terms and conditions of employment under s. 56 of the *Act*. If successful at this first stage, it would then have had to show that the change was inconsistent with the respondent's "business as before" practices. For the reasons that follow, I find that the NPF has failed to establish that the employer contravened s. 56, and the complaint is dismissed.

II. Complaint before the Board

[11] 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).

[12] The changes to the parking policy for the IDHQ lot were initially announced in an email to some IDHQ staff, including some members, dated March 6, 2019.

[13] The NPF filed this complaint on May 8, 2019.

[14] The new policy was detailed in an email to all IDHQ staff dated May 9, 2019, and went into effect on June 3, 2019.

[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 filed with 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] In August 2019, I was assigned as a panel of the Board to hear this complaint, and I case-managed it in conjunction with the Whistler parking complaint. Following a number of pre-hearing case conferences, the parties agreed to submit an agreed statement of facts and a joint book of 25 documents in advance of the hearing.

[17] 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 hearing of the case.

[18] As noted earlier, the oral hearing in this complaint was held back-to-back with the March 3, 2020, oral hearing into the similar Whistler 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.

[19] 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.

[20] 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).

[21] 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 of the *Act*. 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.

[22] Thus, this decision and its companion (the Whistler 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*

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

[24] 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*").

[25] 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.

[26] 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.

[27] 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

[28] 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.*

[29] 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).*

[30] 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.

[31] 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 ….*

[32] 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.*

[33] 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

[34] 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.

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

C. The second stage of the analysis

[36] 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.*

[37] 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*").

[38] 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.…*

[39] 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.

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

[41] 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.

[42] 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.

[43] 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.

[44] 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).

[45] 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.

[46] 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*.

[47] 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*.

[48] 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.*

[49] 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

[50] 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.

[51] 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).

[52] 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).

[53] 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).

[54] 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).

[55] 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.

[56] 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 ….*

[57] 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.

[58] 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*

[59] 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*.

[60] 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.

[61] 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.

[62] 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.

[63] 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.

[64] 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).

[65] 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.

[66] 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.

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

[68] 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."

[69] 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.*

[70] 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 ….*

[71] 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.

[72] 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).

[73] 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*.

[74] 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*).

[75] 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.*

[76] 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.

[77] 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).

[78] 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.

[79] 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).

[80] 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*.

[81] 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*.

[82] 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).

[83] 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.

[84] 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.

[85] 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.

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

F. Summary

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

[88] 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.

[89] 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.

[90] 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*.

[91] 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.

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

IV. Summary of the evidence

[93] In addition to the agreed statement of facts and the joint book of documents, the respondent called one witness, Sean Sullivan, the chief superintendent (CS) of the RCMP's Island District. The following summary reflects what I consider are the most salient points from the agreed facts and CS Sullivan's testimony.

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

national and provincial police services and delivers municipal policing to a large number of small and medium-sized municipalities.

[95] The RCMP divides itself into divisions based predominantly upon provincial boundaries. Within "E" Division (the province of B.C.), there are four Districts. The Island District encompasses Vancouver Island, its related coastal islands, and the north half of the Sunshine Coast located on B.C.'s mainland.

[96] The IDHQ building is located on Nanaimo Street in Victoria. An average of 172 people work there including the following, as of the hearing:

1) 70 members, of which 7 held the rank of inspector or higher and 10 were working off-site temporarily;
2) 19 civilian members;
3) 5 reserve constables;
4) 39 federal public service employees;
5) 21 municipal police officers and 10 municipal employees;
6) 1 cleaner; and
7) 7 commissionaires.

[97] Given that commissioned officers are excluded from the bargaining unit, I have concluded that RCMP members represented by the NPF comprise about one-third of the total employee count at IDHQ.

[98] CS Sullivan testified about the different roles and functions at IDHQ. Some, like him and those he directly supervises, oversee and provide support to the RCMP's 27 Island District detachments, which house 1 100 employees in total. Some other IDHQ units do not report to him. One of the larger units at IDHQ is the Vancouver Island Integrated Major Crime Unit (VIIMCU), which brings together municipal police officers and RCMP members who are predominantly involved in homicide investigations across the Island District.

A. The parking situation at IDHQ before June 2019

[99] The parking lot on IDHQ property has 124 parking spaces. Before June 2019, only about 25 spaces were reserved for specific vehicles. The remaining approximately 100 spaces had to accommodate RCMP police vehicles (which totalled just over 100), other federal or municipal vehicles, visitors, and employees working at IDHQ, including members.

[100] As the IDHQ parking lot was not nearly large enough to accommodate every vehicle, individuals working at IDHQ had to compete for parking spots in the first-come, first-parked system referred to locally as scramble parking.

[101] Given the lack of parking, many employees who worked at IDHQ often had to park their personal vehicles on adjacent streets. There are time limits for street parking in IDHQ's neighbourhood, generally two hours. Members (and other employees) who parked on the street frequently had to leave the office to relocate their personal vehicles to avoid being ticketed by City of Victoria by-law officers.

[102] Often, employees relocated their personal vehicles into IDHQ parking lot spots that had been vacated during the day by RCMP police vehicles taken out for patrols or investigations.

[103] The scramble parking situation also applied to RCMP police vehicles. When the IDHQ parking lot was full, members returning to the building often had to park those vehicles on the street.

[104] Over the years, there were numerous incidents of damage to police vehicles both within the IDHQ parking lot and on the surrounding streets. There were other incidents, including trespasses, thefts, suspicious persons photographing police cars, and persons under the influence of drugs or alcohol entering the lot.

[105] As a result, in about 2015, the RCMP initiated a construction project to build a fence around the parking lot to protect IDHQ and the police cars assigned to it. Work on a detailed conceptual plan for the fence took place in the first half of 2017. As of the hearing, the project was nearly completed but was still awaiting the installation of security gates.

[106] CS Sullivan started in his chief superintendent role at IDHQ in September of 2017. He testified that at that point, he quickly learned about the problems with the parking situation.

[107] He testified that most IDHQ employees work from Monday to Friday between the hours of 7 a.m. and 5 p.m.

[108] As noted earlier, the parking lot had 124 spots, of which only 25 were reserved. This left approximately 100 spots unreserved. However, not all were available for employee parking, as many police vehicles were parked there overnight.

[109] CS Sullivan testified that in the morning, normally, there were about 35 scramble spots available for employee parking but that they were usually all taken by 7 a.m.

[110] CS Sullivan explained that once staff reported for work, the RCMP vehicles being taken out normally left in a couple of waves, first at around 7:30 a.m., and second between 9:00 and 10:30 a.m.

[111] According to CS Sullivan, during the day, staff would regularly go to the windows overlooking the parking lot to see if spots had opened up. They would then leave their workstations or meetings, exit the building, and move their personal vehicles into the vacant spots. He testified that once the waves of RCMP vehicles had departed, the total number of personal vehicles parked in the lot numbered in the 50s or 60s.

[112] As noted, when members returned with a police vehicle and could not find a spot in the IDHQ lot, they had to park on the street. CS Sullivan explained that at one stage, the City of Victoria by-law officers did not ticket marked RCMP vehicles or would void the tickets. However, they stopped that practice and were very active in the neighbourhood, resulting in the frequent ticketing of police vehicles.

[113] While managers used to cover the cost of the tickets, at some point, RCMP Corporate took the position that the member who parked a vehicle had to pay any parking tickets, which normally were for $40, but that fine was cut in half if it was paid within 20 days. The RCMP would reimburse parking tickets only if a vehicle was involved in covert operations.

[114] CS Sullivan stated that the lack of parking for both employee and fleet vehicles generated many complaints from managers and employees.

[115] CS Sullivan explained that after he started at IDHQ, he struck a committee to examine the parking problems. In February 2018, the IDHQ Employee Parking Integration Committee (EPIC) began collecting data and discussing parking options for employees. The EPIC worked for about 7 months. It conducted a survey of employees,

which found that 69 of 87 respondents needed to park their personal vehicles. The survey generated several pages of employee comments and concerns.

[116] The EPIC also investigated local commercial parking options. It discussed improvements to motorcycle and bicycle parking and access to park-and-ride lots and transit. It also explored the option of seeking exemptions from tickets with the City of Victoria or increasing parking times from two hours to four, although to no avail.

[117] Updates on the parking situation were also provided at some staff meetings, including those of the VIIMCU held in April and May of 2018.

[118] CS Sullivan testified that at one point, the work with the committee "hit a wall", and he organized a town-hall meeting on IDHQ's main floor to discuss the situation and answer questions. After that, he met with management to discuss the next steps.

B. The change to the parking policy, June 2019

[119] On March 6, 2019, in an email to members of the VIIMCU, an inspector communicated that IDHQ would move to a new parking model at the building. He stated as follows:

> …
>
> *The new model is based on a recognition that there is insufficient parking available in the lot, that the RCMP has a responsibility to provide parking for police cars and a sense of fairness that not all employees will be able to access the remaining spots. The building will be transitioning to a model where the lot will have a [sic] parking spots assigned to police cars. The remaining spots will be assigned for employees, visitor and accessible spots. Those spots assigned for employees will be doled out by lottery on an [sic] pay basis.*
>
> …

[120] The inspector's email explained that he did not yet know what the parking charges would be. He said that the new system might start in May 2019. He acknowledged that it would "… not be good news for many of you" and that some may "… choose to continue to do the two hour walk" (referring to the practice of having to relocate vehicles parked on the street every two hours, to avoid tickets).

[121] That email was the source of the NPF's complaint.

[122] In May 2019, a number of emails about the new parking plans were sent to IDHQ employees, including RCMP members. Several details with respect to the new system changed during the course of these communications. The lottery system was dropped from the plans in favour of maintaining scramble parking within a limited number of spots. Employees were referred to a list of resources created by the EPIC, including a list of places they could park privately near IDHQ.

[123] CS Sullivan testified that there had been many negative reactions to the new plan and that as a result, a number of concessions were made.

[124] A parking lot map was emailed to all employees on May 30, 2019, along with a reminder that the new system would be in effect on Monday, June 3, at 7 a.m. Of the 124 spots, 35 were marked "green" as employee and visitor parking. The remainder were marked "red" as reserved for specific RCMP vehicles. A few spots had specialized purposes.

[125] Included in the joint book of documents was a July 4, 2019, document entitled, "Island District Parking Guide." Among other things, it instructed employees that each police vehicle would be given a designated numbered space and that only those vehicles would be authorized to use those spaces. It informed them that a one-for-one exchange with a non-police vehicle could be approved if the police vehicle were out for overnight custody or travel. It explained the permit and ticketing policies being put into effect.

[126] CS Sullivan also testified to how the parking situation has evolved since June of 2019. Among the points he made, I consider the following the most salient:

1) The exact allocation of red and green spots has been subject to some fluctuation, as the requirements for fleet vehicle parking increase or decrease, and it could change in the future.
2) The layout and location of the red and green spots changed as the perimeter fence project proceeded.
3) Despite what was written in the policy document, managers have been given the discretion to allow swaps during the day, such that personal vehicles can sometimes be parked in a red spot when the designated fleet vehicle is out on day assignment, rather than just overnight.
4) As of January 2020, 35 green spots were still available for employee and visitor scramble parking.
5) As of March 2020, the average number of personal vehicles parked in the lot on any given day is in his words "perhaps" 45, including the official (green)

scramble parking spots and the managed swapping of personal vehicles into the red spots.
6) Currently, a staff team works at an alternate location. When it returns, the number of scramble spots will be reduced by 10.
7) CS Sullivan is the only member of the management team who has a red spot reserved for his personal vehicle; other managers declined to request one.
8) There are a large number of in his words "regular parkers" who have opted to rent spots elsewhere, with a monthly fee. A large number of employees continue to park on the street.

[127] In cross-examination, CS Sullivan testified that when the new policy was introduced, he was aware that the NPF had applied for certification. He said that he spoke to the RCMP's labour relations section about the issue. He confirmed that he did not consult the NPF. He stated that he has a close working relationship with a member who serves on the NPF's executive board but that he did not consult that member about the change.

V. Analysis and reasons

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

[129] The parties agree about the several elements of the tests at the first stage of analysis, as follows:

1) a notice of application for certification was filed on April 18, 2017;
2) a change to parking arrangements took effect on June 3, 2019, 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.

[130] However, the parties differ with respect to whether the change to parking arrangements represented an alteration to a term and condition of employment.

[131] The complainant explained that it filed this complaint when the respondent informed the members that all parking would be assigned and that any parking spots available for employees would require payment and be offered on a lottery basis.

[132] After the application was filed, the respondent advised the members that it would not implement the lottery system and that it would continue to provide free scramble parking. However, the number of scramble parking spots was reduced significantly, according to the complainant. Before the change, close to 100 spots were

available for scramble parking. After the change, only 19 were to be available, and then only on a first-come, first-served basis. While the respondent's evidence indicated that there are currently 35 spots, CS Sullivan clearly testified that a reduction of 10 spots is expected soon and admitted that the number of green scramble spots could be reduced further.

[133] In short, the NPF argued that there was a sufficient and material change from the status quo that existed before the freeze commenced, which constituted a change to a term and condition of employment.

[134] The respondent acknowledged that the parking change did result in an increase in the number of designated spots for police vehicles. However, those police vehicles were parked in the lot before June 3, 2019, and they continued to be parked there after that. Increasing the number of designated spots for police vehicles did not represent a change to a term and condition of employment.

[135] As for employee parking, the respondent argued that employees were able to park in the lot before the change and that they continue to be able to park there after June 3, 2019, in approximately the same number of spaces. Before the change, members were able to swap police vehicles for personal vehicles; after the change, this option continues, albeit with management approval. There was no alteration to a term and condition of employment captured by s. 56 of the *Act*, it argued.

[136] My assessment of whether a term and condition of employment was altered must start with an analysis of what was in place both before and after the freeze.

[137] In many freeze complaints, the state of affairs before the freeze was written down in the form of a policy, directive, or rule (see for example *Parliamentary Translators* or *RCMP Promotional Rules*). That is not so in this case. No such evidence was provided. I must rely on the agreed statement of facts and CS Sullivan's testimony.

[138] Having reviewed that evidence, the following list represents what I consider are the key conclusions about the parking arrangements before the freeze:

1) There were 25 spots in the lot designated for specific police vehicles, leaving approximately 100 spots for other police vehicles and guest and employee parking.
2) Overnight, a large number of police vehicles were parked in the lot. On any given morning, the lot would have approximately 35 vacant spots available to

employees for scramble parking. On most mornings, those spots were taken by 7 a.m.
3) Clearly, the lot could not accommodate all the employees who wanted to park their personal vehicles. Many parked on nearby residential streets, kept an eye out for the departure of police vehicles, and then went out, to park their personal vehicles in the lot.
4) In the absence of spaces in the lot, employees would have to move their vehicles every two hours to avoid being ticketed by City of Victoria by-law officers.
5) Alternatively, employees could have paid for parking in private lots, taken public transit, or walked or bicycled to work.

[139] To what extent did this arrangement provide a free-parking benefit to employees, specifically to members?

[140] The only evidence about the number of employees who wanted to use the parking lot came from the employee survey in 2018, in which 69 of 87 respondents said that they required a parking spot. Given that approximately 172 employees work at IDHQ, clearly, the survey was not exhaustive. No evidence was provided as to why only 87 participated. I can conclude only that at least 69 wanted to park in the lot regularly. The actual number could be greater. Therefore, I can also conclude that the 35 spots normally available at 7 a.m. could at best accommodate only half (35 out of 69) of the employees wanting to park there. The actual accommodation could amount to less than half.

[141] I was not presented with any specific evidence about the RCMP members' use of these parking arrangements, as distinguished from employees generally. Recall that members comprise about one-third of the total employee population at issue.

[142] As for the change that took effect on June 3, 2019, I note that there were contradictory messages within the written communications. For example, the May 9, 2019, announcement to all employees stated that "… no employee parking will be provided, with the exception of certain circumstances that have been discussed with your Unit Commander." However, it also included a map of the lot and the statement, "The Green stalls are employee/visitor scramble and are on a first come, first served basis." The May 30, 2019, reminder email to all employees included the map with the 35 green parking spaces.

[143] Another contradiction in the initial communications is that there was no mention of swapping police and non-police vehicles. However, the Island District Parking Guide stated, "Police Vehicle stalls can be used as a one-for-one exchange with

a non-police vehicle if the Police Vehicle is being used off-site for overnight custody or travel." Employees were told that they would need to place a parking permit in their non-police vehicles while parked in such stalls.

[144] That section of the policy is not consistent with the practice currently in place, according to CS Sullivan's testimony. He stated that managers have been allowed to authorize swapping if police vehicles are out for the day, and police vehicles are sometimes still parked on the street (but only for a maximum of two hours). He also stated that the use of parking permits for non-police vehicles is not being enforced.

[145] Having reviewed all the evidence, the following list represents what I consider are the key conclusions about the parking arrangements after June 3, 2019:

1) Approximately 89 spots in the lot are designated for specific police vehicles, leaving approximately 35 spots for guest and employee scramble parking.
2) A police unit is working off-site. When it returns, the number of scramble spots will be reduced by 10. Once the security gate is installed, or if other requirements arise, the number of scramble spots could be reduced again.
3) With the permission of their managers, employees may swap their personal vehicles and park them in red spots if the vehicle designated for a given red spot is out on assignment for the day or overnight.
4) The lot still does not accommodate all employees who want to park their personal vehicles there.
5) Some employees still park on nearby residential streets and go out to move their vehicles every two hours to avoid being ticketed by City of Victoria by-law officers. Alternatively, employees can pay for parking in private lots, take public transit, or walk or bicycle to work.

[146] Does this change to parking arrangements represent an alteration to the terms and conditions of employment?

[147] I do not believe that the increase in the number of designated parking spots for police vehicles, in and of itself, is an alteration under the meaning of s. 56 of the *Act*. In practice, this alteration was designed to protect police vehicles and reduce the number of parking tickets they attracted.

[148] The issue that must be considered is the impact of the change on employee parking and specifically, in this complaint, on the parking affecting RCMP members.

[149] Had the respondent imposed a lottery system, or had it imposed paid parking in the lot, I might have concluded that an alteration had taken place and have moved to the next stage of analysis.

[150] However, the respondent acted differently. CS Sullivan testified that after the initial plans were announced, management endeavoured to respond to employee concerns about the new policy and changed course as a result.

[151] The respondent has maintained scramble parking, and the evidence is that the number of spots that were available in the morning before the change is the same as the number currently available under the new policy — about 35. While a reduction of at least 10 parking spots is looming, I do not consider that future reduction, in and of itself, a significant enough reduction to be considered an alteration of a term or condition of employment within the meaning of s. 56 of the *Act*.

[152] The facts show that the parking spots available in the morning before the change (approximately 35) at best met half the demand for parking. The parking spots currently available in the morning (35 green) still meet at best only half that demand.

[153] As for swapping personal cars into spots vacated by police vehicles during the day, before the freeze, this practice appears to have freed up an additional 15 to 25 spots. The practice was disruptive as it was not managed. Vehicle swapping is still allowed but is more carefully managed as it is subject to approval by one's supervisor.

[154] I was presented with no specific evidence as to how many employees are currently able to take advantage of swapping their vehicles into the spaces of police vehicles. CS Sullivan testified that "perhaps 45" are able to benefit during the day from a green (scramble) or red (swapping) spot.

[155] Finally, I was provided with no evidence as to the impact of the new swapping system on members as a subset of employees. Members may be more disadvantaged by the new system because they may be called out of the office more often, or they may be better able to take advantage of it because they know when police vehicles are to leave the lot.

[156] I find that the NPF failed to establish that the employer altered a term and condition of employment under s. 56 of the *Act*. Employees did not enjoy a clear right to free parking in the IDHQ lot before the freeze took effect. This is underlined by the very name of the arrangement: scramble parking. Before the freeze, employees had to jockey for limited parking spots in the morning and as the day proceeded. After the freeze, this situation persists, with only a few more constraints.

[157] Furthermore, I find that the NPF failed to establish the specific impact of these arrangements on its members as distinguished from the employee population generally working at IDHQ.

[158] On the basis of that conclusion, I could end my analysis at the first stage and make my decision on that basis alone. However, I would like to still consider the parties' business-as-usual arguments, as these turn on the same set of conclusions I have just reached on the evidence.

[159] The NPF argued that there was no evidence of a business-as-usual defence that would have justified the change that the respondent made. While it had commenced discussions about the installation of perimeter fencing in the lot before the freeze, the fence construction has no impact on the use of the lot within the fence. The discussions about the fence did not include discussions about changing who could park in the lot.

[160] While the NPF acknowledged that many discussions were held with employees about the parking situation, it argued that those discussions did not commence until the fall of 2017, at which point the freeze was already in effect.

[161] The respondent argued that it had put into place a process of change well before the freeze. The problems with parking were well known to managers and employees alike. The fencing project was initiated to address the security issues involving police vehicles when they were parked either in the lot or on the street. The RCMP had a past management practice of designating some spots for police vehicles before the freeze, and its decision to increase the number of designated spots after the freeze is not evidence of a change to a management practice.

[162] In my analysis, the evidence clearly demonstrates that before the freeze came into effect, the parking lot was not large enough to accommodate the needs of its vehicles and the need for employee parking. The RCMP attempted to manage the parking situation in a way that balanced the operational need to park police vehicles with the need for employee parking. It was a poorly functioning system that resulted in the ticketing of police and personal vehicles and disruptions to the workday, and it still did not provide enough parking for employees.

[163] In my analysis, the changes that took effect on June 3, 2019, were consistent with that past practice. The increased use of designated spots for police vehicles appears to have reduced the parking violations for those vehicles, while maintaining as much employee parking as possible within the limits of the lot. The respondent accomplished this by dropping the ideas of a lottery system and paid parking.

[164] Neither party provided me with detailed arguments in relation to the reasonable-employee-expectations test that often forms such an important part of the business-as-usual analysis. However, given the way the pre-freeze parking system worked, I cannot find that employees had a reasonable expectation of being able to park in the IDHQ lot on a day-to-day basis. In my view, a reasonable employee looking at that situation would have known that it did not provide an assurance that one could expect to park in the lot. A reasonable employee would have expected that some kind of change would come, to reduce the uncertainty over where to park police vehicles, and that such a change might impact employee parking.

[165] I agree with the complainant that the respondent's creation of the EPIC, launching of the employee survey, and holding of a town-hall meeting all took place during the freeze period. As such, they alone cannot be cited by the respondent as evidence that the wheels were in motion. At the same time, by the time the June 3, 2019, changes were put into place, employees could hardly have been expected to be surprised.

[166] As in the Whistler parking complaint, the respondent missed an opportunity to formally consult with the NPF about the policy change before putting it in place. As in the Whistler situation, I do not conclude that its failure to is significant enough to change my decision on the merits of the complaint.

[167] In summary, even had I found that the June 3, 2019, change represented an alteration to the terms and conditions of employment for RCMP members, per s. 56 of the *Act*, I would conclude that the change was consistent with the RCMP's business-as-usual practices and that it was not out of line with what I believe the reasonable expectations of members should have been.

[168] The respondent argued that I should apply a would-have-done-the-same-thing test that would require the NPF to demonstrate that the change would have been handled differently had there been no attempt to unionize the workforce. As per my

analysis in section III of this decision, I have concluded that the freeze provision remains a strict liability test that is separate and distinct from one considering anti-union animus, and I will consider the respondent's arguments no further.

[169] 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 framework for analysis outlined in section III of this decision, I do not believe that I need to consider that argument, as the case has been decided at the first and second stages of analysis.

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

(The Order appears on the next page)

VI. Order

[171] The complaint is dismissed.

June 26, 2020.

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