Date: 20201119

File: 561-02-40874

Citation: 2020 FPSLREB 102

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

PUBLIC SERVICE ALLIANCE OF CANADA

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: Stefan Kimpton, counsel

For the Intervenor: Andrew Astritis, counsel

Decided on the basis of written submissions, filed January 2, March 10, and May 1, 15, 22, and 29, 2020, and following a hearing via videoconference on July 23, 2020.

REASONS FOR DECISION

I. Complaint before the Board

[1] This decision concerns a preliminary question raised in an unfair labour practice complaint made by the National Police Federation ("the NPF" or "the complainant") on August 19, 2019.

[2] In its complaint, the NPF alleged that the Treasury Board ("the employer" or "the respondent") through the Royal Canadian Mounted Police ("the RCMP") 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 regular members and reservists.

[3] The complaint was made in response to a decision of the RCMP, announced on May 23, 2019, to create and fill five new instructor/facilitator positions with public service employees classified at the AS-04 group and level at the RCMP Depot Division located in Regina, Saskatchewan ("the Depot"). The Depot is where the Cadet Training Program (CTP) is delivered to new RCMP recruits. The new employees will deliver portions of the Applied Police Sciences (APS) course, which is a core part of the CTP.

[4] Previously, and as of the announcement, the APS component of the CTP was delivered by regular members of the RCMP. According to the NPF, the assignment of the APS instructor role to those regular members constituted a term and condition of employment. As such, the assignment of that work to positions outside the NPF's proposed bargaining unit constituted a change to the terms and conditions of employment made during the freeze period, in violation of s. 56 of the *Act*.

[5] In its reply to the complaint, the respondent took the position that the freeze provision applies only to terms and conditions of employment that "… may be included in a collective agreement …" (quoting s. 56 of the *Act*). In that reply, it took the position that collective agreements in the federal public service cannot contain provisions that constrain the ability of the employer to organize the public service, assign work, or classify positions or to appoint public service employees to those positions. As such, the decision to create new AS-04 positions and staff them did not engage s. 56. Alternatively, the respondent argued that the decision to use public

service employees to deliver portions of the CTP was made in accordance with its "business-as-before" practices, which would also justify dismissing the complaint.

[6] Following input from the parties, and a case-management call on January 14, 2020, the Federal Public Sector Labour Relations and Employment Board ("the Board") agreed to hear the parties' written and oral submissions on the following preliminary question:

> *Does the* Federal Public Sector Labour Relations Act *prevent the National Police Federation and Treasury Board from including in a collective agreement, as a "term or condition of employment", a prohibition on appointing or assigning a public service employee to perform duties that were being performed at the time by regular members of the RCMP?*

[7] The parties agreed that if this question were answered in the negative, as the complainant sought, then the Board would proceed to hear the freeze complaint on its merits, allowing the parties to call additional evidence about the alleged change and to make arguments as to whether it constituted a violation of s. 56 of the *Act*.

[8] However, if this preliminary question were answered in the affirmative, as the respondent sought, the matter would be dismissed.

[9] After the complaint was made, the parties suggested notifying the Public Service Alliance of Canada ("PSAC") of it. PSAC is certified as the bargaining agent for the Program and Administrative Services (PA) bargaining unit, which includes represented employees classified under the Administrative Services (AS) standard, including at the AS-04 group and level.

[10] On December 4, 2019, I directed that PSAC be added as a "… person who may be affected by the proceeding" per s. 4 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[11] Subsequently, PSAC applied to intervene in the complaint. It proposed not to call evidence with respect to the preliminary question but asked to make written and oral arguments on it. Should the preliminary question be answered in the negative, it reserved the right to request permission to call evidence.

[12] Section 14 of the *Regulations* permits any person "… with a substantial interest in a proceeding before the Board …" to request to be added as an intervenor and gives

the Board the power to add an intervenor after giving the parties the opportunity to make representations in respect of the application. The NPF took no position on PSAC's application. The respondent did not oppose it.

[13] On February 6, 2020, I granted PSAC's request for intervenor status.

[14] The hearing of the preliminary question proceeded as follows:

1) The complainant and respondent provided an agreed statement of facts and joint book of documents on January 2, 2020.
2) The complaint provided its written arguments on March 10, 2020.
3) The respondent provided its written arguments on May 1, 2020.
4) The intervenor provided its written arguments on May 15, 2020.
5) The respondent provided its written reply arguments on May 22, 2020.
6) The complainant provided its written reply arguments on May 29, 2020.
7) Supplementary oral arguments were made (following the same order just outlined) during the hearing on July 23, 2020.

[15] I will note that the COVID-19 pandemic did result in extensions to the original deadlines for steps 3 to 6 of the written submission process. It also resulted in the rescheduling of the oral arguments hearing and the decision to conduct it via videoconferencing software, following the adoption of the Board's *Videoconferencing Guidelines* on July 8, 2020.

[16] In the reasons that follow, I find that it would be possible for the parties to voluntarily include in a collective agreement a provision that would reserve cadet teaching duties for regular members. Whether that is a likely outcome of the collective bargaining process is not the question before me. The question is whether the *Act* **prevents** such a provision. I have carefully considered the preliminary question in relation to the underlying facts of the case and conclude that the question must be answered in the negative. Beyond that preliminary question, I make no judgement on the merits of the case and order that it be scheduled for a hearing.

II. Summary of the evidence

[17] This summary of the evidence is drawn from the agreed statement of facts submitted by the parties for use in considering the preliminary question. The parties submitted that evidence adduced at a future hearing on the merits of the complaint would not contradict these facts, and they reserved the right to call additional evidence to supplement and provide context to these facts.

[18] 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; "the *RCMP Act*") and civilian members.

[19] The announcement that the RCMP intended to use public service employees to deliver parts of the APS program was made on or about May 23, 2019.

[20] When the announcement was made, 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).

[21] The NPF made this complaint on August 19, 2019, citing s. 56 of the *Act*.

[22] The complaint concerns how training is delivered to cadets seeking to become future regular members of the RCMP. At the Depot, the CTP is an extensive 26-week basic police training program offered in both official languages. Cadets are part of a diverse 32-member troop. After they successfully complete the CTP, they may be offered employment as regular members and given peace officer status.

[23] The APS is one component of the CTP. It is divided into 15 modules, which focus on problems that police officers face in the field. Woven throughout the modules is training on the RCMP's mission, vision and values, community policing problem-solving model (CAPRA), and Incident Management Intervention Model (IMIM). As expressed in the agreed statement of facts, "… [o]verall, this component of the Cadet Training Program supports cadets in learning the intricacies of policing situations, discussing alternative responses, developing techniques for handling varied situations, and engaging in cooperative problem solving."

[24] Before the change that gave rise to this complaint, 87 regular RCMP members staffed the APS unit at the Depot. The job title for these regular member positions is "Cadet Training Facilitator/Team Leader – Depot".

[25] At some point, the RCMP decided that it would create public service employee instructor positions. Following a classification exercise that concluded in or about the spring of 2019, the positions were classified at the AS-04 group and level. The job title for these positions is "Instructor/Facilitator – Applied Police Sciences Unit".

[26] On or about May 23, 2019, the Commanding Officer of the Depot held a town-hall meeting with APS staff and announced the implementation of the AS-04 public service employee (PSE) positions. This news was summarized in an email to APS staff dated May 27, 2019. The summary reads as follows:

> *Specialization (previously referred to as Civilianization): Five PSE positions are being advertised for APS facilitators in the very near future. They will be classified as AS-04. Not only will this ensure consistency in program delivery, but also it will keep more RM positions in the field and save money. At the 18-24 month mark, this initiative will be evaluated. If successful, we can expect the number of PSEs to be doubled. At the five year mark, the initiative will be evaluated again and a determination will be made of whether to expand or dismantle. For the initial five PSE positions, they will be looking for ex RMs from the RCMP, ideally with facilitation experience at Depot.*

[27] The selection process for the five AS-04 positions began in June 2019. By February of 2020, two individuals had started working in them. By the date of the oral hearing, the parties reported that one additional individual had started, while two bilingual AS-04 positions remained vacant.

[28] The parties also agreed that no regular member experienced a change to employment status as a result of the respondent's decision to staff the AS-04 positions.

III. Summary of the arguments

A. For the complainant

[29] The NPF argued that the answer to the preliminary question is "no". The phrase "term or condition of employment" is extremely broad and includes all matters that have a real connection to the employment relationship, which can include provisions covering job protection, prohibiting contracting out, or protecting bargaining unit work.

[30] The NPF argued that the RCMP's decision to use public service employees for instructing cadets concerns the concept of "civilianization," which it defined as "… the use of non-sworn police officers to perform duties on behalf of a police force."

[31] The NPF submitted three examples of collective agreements in the police sector that set limits on civilianization. For example, the collective agreement between the

City of Winnipeg and the Winnipeg Police Association (expiry date December 31, 2021, at article 9 and in the letter of understanding #11) includes a commitment to negotiate civilianization and a mechanism to resolve disputes about it via arbitration. The collective agreement between the Vancouver Police Board and the Vancouver Police Union (expiry date March 31, 2010, at article 7) contained a provision requiring that certain court duties be performed only by police officers. The collective agreement between the Province of Ontario and the Ontario Provincial Police (OPP) Association (expiry date December 31, 2018, at article 36) limited the secondment of civilian employees to perform work normally performed by members of the OPP bargaining unit.

[32] Without indicating specifically what provisions it might propose to the Treasury Board when bargaining for RCMP members, the NPF gave these three examples of possible collective agreement provisions that could address the APS instruction role at the Depot (the first in its written submissions, the second and third in its oral arguments):

1) that "… all training of cadets at Depot be provided by members of the RCMP …";
2) "… that duties performed by regular members as of date XXX will continue to be performed by regular members…"; or
3) after listing certain duties, a provision stating that those duties "… will not be performed by public service employees, contractors or other employees who are not regular members."

[33] The NPF emphasized that even though it raised the civilianization issue, it did not seek to place that issue before the Board. It wanted only to indicate the issue's importance to its membership. It submitted that in the context of the *Act*, it has a heightened interest in negotiating the issue during collective bargaining because the *Act* restricts the NPF to representing regular members of the RCMP, unlike many other police associations or unions in Canada that have the right to represent both police officers and civilian employees.

[34] Turning to the preliminary question, the NPF argued that the *Act* governs three categories of potential collective agreement provisions. The first category consists of provisions that cannot be bargained because Parliament has reserved the related matters for itself. In the case of the NPF's members, the prohibition is found at s. 238.19 of the *Act*, which reads as follows:

> ***238.19*** *A collective agreement that applies to the bargaining unit determined under section 238.14 must not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if*
>
> ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or*
>
> ***(b)*** *the term or condition is one that has been or may be established under the* Royal Canadian Mounted Police Superannuation Act*, the* Royal Canadian Mounted Police Pension Continuation Act*, the* Public Service Employment Act*, the* Public Service Superannuation Act *or the* Government Employees Compensation Act.

[35] The second category consists of those provisions that can be bargained but that cannot be imposed upon the employer by an arbitration board, found at s. 238.22.

[36] The third category is everything else that can be bargained or included in an arbitral award.

[37] Discussing the first category, the NPF noted that the list of Acts in s. 238.19(b) does not include the *RCMP Act*. The power to create a position for RCMP members or to determine the work assigned to them is governed by s. 20.1 of the *RCMP Act*. Because the *RCMP Act* is not listed in s. 238.19(b), this section would not prohibit any collective agreement provision governing the work assigned to RCMP members.

[38] The NPF also argued that such a collective agreement provision would not require a statutory amendment to the *RCMP Act* and therefore would not be prohibited by s. 238.19(a).

[39] Anticipating the respondent's argument, the NPF argued that the central issue the Board needs to resolve is whether a provision about assigning instructor duties to civilian employees has been or may be established under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"), which is listed in s. 238.19 (b).

[40] The employer's authority to appoint or assign a public service employee to perform duties that regular members of the RCMP performed does not stem from the *PSEA*, argued the NPF. Instead, it flows from powers that reside in the *Financial Administration Act* (R.S.C., 1985, c. F-11; "the *FAA*"). A distinction must be made

between creating a position and selecting a candidate for that position. The power to do the former derives from ss. 11.1(a) and (b) of the *FAA*.

[41] The *PSEA* addresses only the power to select a candidate for a vacant position, when at s. 29 it gives the Public Service Commission (PSC) the exclusive right to make appointments and sets the rules by which that right can be delegated to deputy heads. At s. 30, the *PSEA* defines merit and grants the PSC the power to consider the organization's current and future needs when deciding between qualified candidates. It does not give the PSC the right to determine those current or future requirements, the complainant argued.

[42] In other words, the complainant argued, "The NPF does not care if Mary or Joanne is appointed to the position; it cares whether a position has been created in the first place."

[43] In support of the argument that a distinction is to be made between creating a position and the appointment process, the NPF cited the Supreme Court of Canada's decision in *Canada (Attorney General) v. Brault*, [1987] 2 SCR 489. That ruling distinguished those powers that flow from the *FAA* (creating and financing a position) from those governed by the *PSEA* (appointing a person to the position), the NPF argued.

[44] When answering the preliminary question, the NPF argued that the Board should be careful to distinguish between the first category of collective agreement provisions (those prohibited by 238.19) and the second category (those that can be bargained but that an arbitration board cannot impose). The preliminary question engages only the first category, it argued. While the *Act* restricts the authority of an arbitration board to impose on the parties any term or condition of employment that affects the employer's ability to classify positions or to assign duties to persons employed in the public service (at s. 238.22(c)(i)), the restriction does not prevent an employer from voluntarily agreeing to such a provision during the collective bargaining process.

[45] Over 30 years ago, the Federal Court of Appeal (FCA) gave a broad interpretation to what an employer can voluntarily negotiate (see *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1987] 2 FC 471 (C.A.); "*PSAC Language Teachers 1*"), the NPF argued. Shortly after that, the FCA applied that concept to a freeze complaint, following a notice to bargain (in *Public Service Alliance of Canada v. Canada (Treasury*

Board), [1987] F.C.J. No. 240 (QL)(C.A.): "*PSAC Language Teachers 2*"), ruling that "[t]he government, like the union must take the inconveniences of collective bargaining along with its advantages."

[46] Furthermore, by explicitly laying out the restrictions on what an arbitration board can award at s. 238.22(c)(i), Parliament distinguished between the classification of a position and the assignment of duties on one hand and terms and conditions that are or may be established under the *PSEA* on the other. The rule against tautology provides that Parliament is presumed to avoid superfluous or meaningless words (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed., at paragraph 8.23; "*Sullivan*"). If the *PSEA* governed or could govern the classification of a position or assignment of duties to an employee, it would not have been necessary to add those words to s. 238.22(c)(i), as the *PSEA* is already listed in s. 238.22(b), the NPF argued.

B. For the respondent

[47] The respondent's central argument is that the *PSEA* governs the appointment of public service employees. Therefore, a collective agreement provision that prevents the employer from appointing a public service employee to perform certain duties would interfere with its ability to effect an appointment under the *PSEA*. As s. 238.19(b) of the *Act* prohibits a collective agreement from containing any provision that has been or may be established under the *PSEA*, the answer to the preliminary question is "yes", and the complaint must be dismissed.

[48] The respondent made these arguments without admitting or acknowledging that a term or condition of employment assigning instructor work to regular members existed or that any such term or condition of employment was breached as defined in s. 56 of the *Act*. In fact, it specifically denied those allegations.

[49] The respondent argued that the prohibition on the content of a collective agreement at s. 238.19(b) applies to any term or condition that has or that may be established under the *PSEA*, which would include any term or condition that could have a direct or an indirect impact on one that has been or may be established under the *PSEA*.

[50] Public service employees are appointed under the *PSEA* under the PSC's exclusive authority, as provided in s. 29 of the *PSEA*, not under the *RCMP Act*. A term

and condition of employment that eliminates the possibility of appointing a public service employee to a position would prevent appointing that employee under the *PSEA*. The term and condition of employment that the complainant alleged exists would alter or eliminate the legislative authority under the *PSEA* for appointing public service employees. Therefore, it would not be permitted under s. 238.19(b) of the *Act*.

[51] The *PSEA*, at s. 29, gives the PSC the exclusive right to appoint public service employees, provided that a deputy head requests that an appointment be made. At s. 30, the *PSEA* sets out the requirement that the PSC make that choice based on merit and with regard to any current or future requirements and needs of the organization that the deputy head may identify.

[52] In other words, a collective agreement may not say that the employer "shall not appoint" a public service employee. The term proposed by the NPF has the same effect — it would remove the PSC's ability to make an appointment to a public service position.

[53] The fact that s. 238.19(b) does not list the *RCMP Act* has no bearing on the determination of the question before the Board, argued the respondent. The *RCMP Act* recognizes different categories of employees, including public service employees. Section 10 of the *RCMP Act* states that "[t]he civilian employees that are necessary for carrying out the functions and duties of the Force shall be appointed or employed under the *Public Service Employment Act*."

[54] Furthermore, there is no relationship between the Depot instructor positions and the RCMP's process of transitioning some members into public service employees. The *Enhancing Royal Canadian Mounted Police Accountability Act* (S.C. 2013, c. 18), at s. 86, provided the Treasury Board with the authority to deem that certain civilian members were appointed under the *PSEA*. But that authority has no bearing on the appointments of public service employees, who were already appointed under the *PSEA*.

[55] The respondent argued that the case of *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 ("*AJC*"), stands for the broad interpretation of s. 238.19. I shall review its arguments about *AJC* in more detail later in this decision.

[56] The facts of this situation, concluded the respondent, are that the RCMP decided to appoint public service employees to carry out some of the duties of instructing cadets. The *PSEA* exclusively governs matters related to appointing public service employees. Therefore, a prohibition on appointing them engages the *PSEA*. A term and condition in a collective agreement cannot dictate who **will be** appointed as public service employees. Logically, it also cannot dictate who **will not** be appointed.

[57] In response to the complainant's arguments about the distinction between creating a position and appointing a person to that position, the respondent argued that the distinction is false. It goes beyond organization. It is a question of the ability to appoint public service employees, which engages the *PSEA*, not the *RCMP Act*.

C. For the intervenor

[58] Like the complainant, the intervenor argued that the preliminary question should be answered in the negative.

[59] The intervenor also emphasized the distinction between the sections of the *Act* that restrict what can go into a collective agreement and those that restrict what can be in an arbitral award. It noted that s. 238.19, which places restrictions on the content of a collective agreement covering members of the RCMP, is similar to s. 113, which places similar restrictions on what can be in a collective agreement for public sector employees in general. While the Board has not yet interpreted s. 238.19, it has issued decisions on s. 113 that are of importance to this discussion.

[60] For example, the intervenor pointed to the former Public Service Labour Relations Board's (PSLRB) decision in *Pelletier v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 117, which provided a historical analysis of the distinction between staffing matters and labour relations. In *Pelletier*, the employer argued that the PSC has the responsibility to make appointments, as set out in the *PSEA*, while the Treasury Board has the authority to act on all matters related to terms and conditions of employment that do not relate to staffing under the *PSEA*. The issue in *Pelletier* was whether an employee's grievance about a staffing action could proceed under the *Act* (then named the *Public Service Labour Relations Act*). In ruling that it did not have jurisdiction, the PSLRB quoted from s. 113 and concluded as follows:

…

> *43 As may be seen from the above provisions as well as from the history of the legislative scheme set out in the employer's argument which I have reproduced earlier in this decision, the statutory regime has clearly established two self-contained and mutually exclusive spheres of labour relations and staffing. As the Treasury Board is specifically denied the right to act in matters of staffing, it appears to me that an overlap between those two spheres is not intended by the statutory regime. In signing the collective agreement, the Treasury Board did not have the authority to bind the Public Service Commission or the deputy head in relation to any matter concerning staffing. Accordingly, any collective agreement provisions that concern performance reviews can only refer or apply to such reviews in the context of labour relations. Thus, in my view, any inadvertent use of collective agreement language that could give rise to its importation into the staffing process cannot serve to found a grievance that contests a staffing action.*

…

[61] PSAC argued that the purpose of the *PSEA* is to give the PSC the authority to make appointments to the public service or to delegate that authority to deputy heads, while applying the definition of merit set out in the *PSEA*. It addresses non-partisanship and other values governing staffing. It establishes accountability and complaint mechanisms. However, it does not govern the organization of the public service, the determination of human resource requirements, or the allocation and use of human resources. Those authorities are reserved for the Treasury Board in accordance with the *FAA* and s. 7 of the *Act*. The *PSEA* does not give the PSC any role to deal with the organization of the public service or the classification of positions.

[62] The intervenor argued that at paragraph 10, the agreed statement of facts clearly describes what took place leading up to the May 2019 announcement at issue: "Following a classification exercise which concluded in or about the spring of 2019, a work description was created for public service Instructor positions. The positions were classified at the AS-04 group and level." Neither a staffing action nor an appointment process took place. Instead, it was an organizational exercise, which flowed from s. 11.1(1)(b) of the *FAA*, not from the *PSEA*.

[63] For PSAC, the question is whether the subject matter at issue falls exclusively within the ambit of the *PSEA* or whether some or all of it falls within the Treasury Board's authority. In the latter case, it is possible that a provision could be negotiated

that binds only the Treasury Board with respect to its powers under the *FAA* and the *Act*, which would therefore be permissible under s. 238.19(b) of the *Act*.

[64] In answering the preliminary question, the Board should consider the purpose of the freeze provisions in the *Act*, argued PSAC. The case law reinforces the purpose as preserving a level playing field from which bargaining can proceed (see *Treasury Board v. Canadian Air Traffic Control Association*, [1982] 2 FC 80 at para. 24, and *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19 at paras. 73 to 75). The freeze is intended to preserve the status quo on all issues that can be the subject of collective bargaining between the parties, which necessarily includes those issues related to rights that an employer may surrender in bargaining.

[65] As such, s. 238.19(b) should play only a very limited role in a complaint of this nature. Where the parties could possibly negotiate a permissible provision, the statutory freeze should be maintained. While at times, the Board or its predecessors have ruled that certain proposals ran afoul of a similar section (s. 150) of the *Act*, it did so only after closely considering the specific collective agreement language proposed by the parties (see, for example, *AJC*, *The Professional Association of Foreign Service Officers v. Treasury Board*, 2018 FPSLREB 16, *Professional Association of Foreign Service Officers v. Treasury Board*, 2004 PSSRB 144, and *Professional Institute of the Public Service of Canada v. Treasury Board*, 2008 PSLRB 72). The party objecting to the inclusion of a proposal in the terms of reference for an arbitration board cannot simply make assertions or speculations; it must specifically demonstrate that a proposal is caught by a statutory bar.

[66] If there is any ambiguity over the application of s. 238.19(b) of the *Act*, PSAC argued that the Board should look to s. 2(d) of the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*") and the protection it provides to meaningful collective bargaining. The Supreme Court of Canada has repeatedly affirmed the importance of s. 2(d) and its role in allowing employees to address common issues of concern with their employers through the bargaining process. If s. 238.19(b) is ambiguous, which PSAC maintained is not the case, it should be interpreted in accordance with *Charter* values. (See, for example, *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, *Mounted Police*

Association of Ontario v. Canada (Attorney General), 2015 SCC 1, and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.)

IV. Reasons

A. The preliminary question

[67] I will start by reviewing the preliminary question in relation to the relevant provisions of the *Act*.

[68] 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.*
>
> [Emphasis added]

[69] 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).*

[Emphasis added]

[70] In a recent decision involving the same parties, the Board set out the framework for the analysis of complaints made under s. 56 of the *Act* (*National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2020 FPSLREB 71 ("*Whistler Parking*"). At paragraph 34, the Board recognized that the essential element in both the certification and bargaining 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" [emphasis in the original]. The Board then analyzed the jurisprudence with respect to certification and bargaining freeze provisions and concluded that complaints must pass through a first stage of analysis, consisting of this four-part test (at para. 38):

> …
>
> *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.*

[71] In *Whistler Parking*, the Board concluded that a complaint that passes through that first stage of analysis is then evaluated at a second stage, which determines whether the change made by the employer was consistent with its business-as-before practices.

[72] The preliminary question addressed in this decision concerns only the fourth test, i.e. whether the condition of employment is capable of being included in a collective agreement. The other three tests at the first stage, and the analysis at the second stage, will be considered only if the condition of employment at issue is capable of being included in a collective agreement and this matter proceeds to a hearing on the merits.

[73] Let me repeat the preliminary question proposed by the parties and approved by the Board:

> *Does the* Federal Public Sector Labour Relations Act *prevent the National Police Federation and Treasury Board from including in a collective agreement, as a "term or condition of employment", a prohibition on appointing or assigning a public service employee to perform duties that were being performed at the time by regular members of the RCMP?*

[74] The respondent's position is that the *Act* prevents a collective agreement between the NPF and the Treasury Board from containing a condition of employment that would limit its ability to appoint or assign a public service employee to perform work that regular members of the RCMP had performed. Its written and oral arguments focussed on s. 238.19 of the *Act*, which sets out the restrictions on the contents of collective agreements specific to RCMP members and reservists as follows:

> ***238.19*** *A collective agreement that applies to the bargaining unit determined under section 238.14 must not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if*
>
> ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition; or*
>
> ***(b)*** *the term or condition is one that has been or may be established under the* Royal Canadian Mounted Police Superannuation Act*, the* Royal Canadian Mounted Police Pension Continuation Act*, the* Public Service Employment Act*, the* Public Service Superannuation Act *or the* Government Employees Compensation Act.

[75] Specifically, the respondent argued that the reference to the *PSEA* in s. 238.19(b) should lead the Board to answer "yes" to the preliminary question. While its original reply to the complaint raised issues related to a variety of other sections of the *Act* (namely, ss. 6 and 7 and its management-rights powers that reside in the *FAA*), its written and oral arguments before me focused on the *PSEA* and s. 238.19(b) of the *Act*.

[76] Therefore, the preliminary question in this complaint boils down to whether or not a collective agreement provision that might address the Depot situation is one that could, directly or indirectly, alter, eliminate or establish a term or condition of employment that has been or may be established under the *PSEA*.

[77] What kind of collective agreement provision is at issue?

[78] I agree with the intervenor that answering the preliminary question in the absence of a specific collective agreement provision or proposal is difficult. The Board and its predecessors have often had to interpret a similar prohibition at s. 150(1)(b) of the *Act*, which limits the content of arbitral awards, but always did so with respect to specific bargaining proposals.

[79] In this case, no specific proposal is in hand; instead, it is a more general concept that the NPF called "civilianization", which is referred to in the agreed statement of facts as "specialization."

[80] The NPF did offer three examples of provisions that it might want to negotiate to address the general issue of civilianization and the particular circumstances at the Depot. To review, the first was that "… all training of cadets … be [done] by [regular] members of the RCMP …". This example would have the effect of reserving one specific duty, training cadets at the Depot, for regular members.

[81] The second example was that "that duties performed by regular members as of date XXX will continue to be performed by regular members." This is a far broader proposition, which could be characterized as the protection of bargaining unit work.

[82] The third example falls somewhere in between the first two. With it, the NPF suggested that the collective agreement could list a number of duties, including training cadets, along with a statement that those duties would be done only by regular members.

[83] As presented, I do not find that these three examples purport to prevent the appointment or the assignment of duties to public service employees. On the surface, they are about reserving certain duties for regular members of the RCMP; e.g., reserving cadet training specifically, reserving everything regular members do for them generally, or reserving some middle ground between those two.

[84] Therefore, in my view, it would not be correct to focus entirely on the word "appointing" when answering the preliminary question. Were the question to end there, an analysis focused entirely on the *PSEA* might be relatively straightforward and easy to answer in the affirmative. But the question goes beyond appointing a public

service employee: it is about appointing or assigning duties to public service employees that regular members of the RCMP had performed.

[85] The proper framing of the preliminary question has to be consistent with the facts behind the dispute that gave rise to the complaint — a point made several times in the respondent's arguments. Let me review those facts.

[86] This complaint was made in relation to an announcement in May of 2019 that the RCMP had created five public service employee positions to deliver portions of the APS program to cadets at the Depot. As stated in the agreed statement of facts, the process started with a decision to create positions. Then, "[f]ollowing a classification exercise which concluded in or about the spring of 2019, a work description was created for public service Instructor positions." At that point, the positions were classified at the AS-04 group and level. Shortly after that, an announcement was made at a town-hall meeting with the APS team. In its announcement, the RCMP said that the goal was to improve consistency in program delivery but also to save money and that the employer hoped to recruit former regular members of the RCMP with facilitation experience at the Depot.

[87] It was only later on that the actual staffing process took place. In June of 2019, the RCMP launched the selection process for the position. On September 23, 2019, according to the parties, two candidates were issued letters of appointment. By February of 2020 two employees had commenced work in the new positions. By the time of the hearing, it was reported that one additional position had been filled for a total of three employees.

[88] In other words, this complaint was triggered by the decision to create civilian positions to instruct cadets and by the announcement that they would be classified at the AS-04 group and level. It is, in effect, about the decision to assign duties to public service employees that used to be performed solely by regular members of the RCMP. It was not a complaint triggered by the staffing action. The remedy sought would compel the RCMP to continue to deliver all cadet training using the services of regular members, until the certification freeze ends.

[89] In effect, the goal of the complaint is to stop the assignment of duties to and the subsequent appointment of public service employees until a collective agreement has been concluded, so that the NPF will have the opportunity to negotiate the issue at

the bargaining table. As discussed, the NPF is considering proposing a range of collective bargaining proposals that would have the effect of reserving certain kinds of work and duties for the members of its bargaining unit.

[90] The preliminary question asks whether the *Act* **prevents** the NPF and the Treasury Board from including in a collective agreement a provision that would address the issue in this complaint. I agree with the intervenor that I should dismiss the freeze complaint on the basis of this preliminary question only if I am convinced that **no possible provision** could be negotiated on the subject matter raised in it, without contravening s. 238.19(b) and specifically its reference to the *PSEA*. I will proceed with the remainder of my analysis on that basis.

B. The Treasury Board's powers under the *FAA*

[91] Both the complainant and the intervenor took the position that a clear distinction must be made between an employer's actions when it comes to organizing the public service and creating and classifying positions and the action of appointing a specific person to such a position. They argued that the power to organize the public service and to create and classify positions lies within the *FAA*. The *PSEA* engages only the appointment process.

[92] The relevant section of the *FAA* reads as follows:

> …
>
> ***11.1 (1)*** *In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may*
>
> ***(a)*** *determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;*
>
> ***(b)*** *provide for the classification of positions and persons employed in the public service ….*
>
> …

[93] The Treasury Board's right to organize the public service and classify positions is referenced at s. 7 of the *Act*, which reads as follows:

> ***7*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions*

> *and persons employed in those portions of the federal public administration.*

[94] Furthermore, they argued that no explicit constraints are placed on the content of collective agreements, with respect to the organization of the public service or the classification of positions, in either s. 238.19 of the *Act* (which limits the content of collective agreements for regular members of the RCMP) or in the equivalent provision in the main part of the *Act* at s. 113 (which limits the content of collective agreements for public service employees generally).

[95] Such limits can be found in the provisions of the *Act* that deal with the content of an arbitral award. For public service employees generally, those limits are found at s. 150(1). In the context of RCMP members, the restrictions on the content of an arbitral award are found at s. 238.22(1), which reads as follows:

> ***238.22 (1)*** *The arbitral award that applies to the bargaining unit determined under section 238.14 must not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;*
>
> ***(b)*** *the term or condition is one that has been or may be established under the* Royal Canadian Mounted Police Superannuation Act*, the* Royal Canadian Mounted Police Pension Continuation Act*, the* Public Service Employment Act*, the* Public Service Superannuation Act *or the* Government Employees Compensation Act*; or*
>
> ***(c)*** *doing so would affect either of the following:*
>
> > ***(i)*** *the organization of the public service, the categories of members as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or the assignment of duties to, and the classification of, positions and persons employed in the public service, or*
> >
> > ***(ii)*** *the right or authority of the Commissioner of the Royal Canadian Mounted Police under the* Royal Canadian Mounted Police Act *to ensure that police operations are effective.*

[96] The provisions at ss. 238.22(1)(a) and (b) effectively repeat what is found at ss. 238.19(a) and (b). However, s. 238.22(1)(c) goes further than s. 238.19. In particular, at s. 238.22(1)(c)(i), the *Act* prohibits an arbitral award from affecting the organization of

the public service, the assignment of duties to positions or persons employed in the public service, or the classification of positions or persons employed in the public service.

[97] Both the NPF and PSAC argued that by placing additional restrictions into s. 238.22(1)(c), Parliament intended to expand the restrictions on what an arbitral award could contain beyond those already outlined in s. 238.22(1)(b). In other words, they argued that if a provision affecting the organization of the public service, the assignment of duties, or the classification of positions was already prohibited because it was or may be established under the *PSEA*, then s. 238.22(1)(c)(i) would be redundant. The NPF cited *Sullivan*, at paragraph 8.23, which reads as follows:

> *It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose… For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statue meaningless or pointless or redundant.*

[98] In other words, provisions under s. 238.22(1)(c) fall into what the NPF called the second category of collective agreement provisions, meaning those that an employer and a bargaining agent can voluntarily bargain but that an arbitration board cannot impose on the parties.

[99] This begs the question as to whether the types of collective agreement provisions that the NPF seeks to negotiate affect the organization of the public service, the duties assigned to positions within the public service, and the classification of positions.

[100] While the issue before me is not what is appropriate to include in an arbitral award, the NPF clearly argued that by its complaint, it seeks an outcome that would prevent the RCMP from assigning cadet instruction duties to public service employees. It effectively disagrees with how the RCMP wishes to organize the public service. It disagrees with the assignment of duties historically performed by regular members to public service employees classified at the AS-04 group and level. Put another way, it wishes to negotiate which duties are assigned to regular members, as opposed to which are assigned to other public service employees.

[101] A term or condition of employment that constrains or prevents the RCMP from making these decisions would be quite likely to engage s. 238.22(1)(c)(i). I say "quite likely" out of an abundance of caution, as this is not the issue before me and a board faced with ruling on that section would normally do so in the context of a precisely worded collective agreement proposal. Yet, in general, the types of terms and conditions that the NPF offered as examples would affect the organization of the public service and the assignment of duties to public service employees.

[102] I also agree with the NPF and PSAC that the employer's authority to make decisions about the organization of the public service and the assignment of duties flows from the *FAA* and not the *PSEA*. The Supreme Court of Canada's 1987 decision in *Brault* articulated the distinction between the powers flowing from the two Acts. The creation of a position and the appointment of a person to it follow a series of steps that the Court summarized as follows at pages 500-501:

> …
>
> *1. The Minister or deputy head of a Department, in the exercise of his management authority, determines what positions are required in the Department and determines the qualifications for appointment to them;*
>
> *2. Financial approval for a position must be obtained from the Treasury Board, which has the authority under s. 7 of the* Financial Administration Act *… to classify positions in the Public Service for renumeration [sic] and other purposes;*
>
> *3. The deputy head makes a request to the Public Service Commission to make the necessary appointment or makes the appointment himself under a delegation of authority; and*
>
> *4. The appointment is made pursuant to the particular selection process required by the* Public Service Employment Act *and* Regulations.
>
> …

[103] I noted earlier the intervenor's reference to the PSLRB's decision in *Pelletier*, which provided a historical analysis of the distinction between staffing matters and labour relations. To further elaborate this point, PSAC cited a secondary source (R. Caron, *Employment in the Federal Public Service*, at paragraph 1:200), which speaks to the distinction between appointments and other matters going back to the passage of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) in 1967. Caron writes as follows:

…

> *… The overlap which had historically existed between the Civil Service Commission and the Treasury Board was eliminated: the new agency, the Public Service Commission, focused primarily on ensuring that appointments were made based on merit and that public servants were non- partisan. The* Financial Administration Act *was amended to confirm the Treasury Board's role as employer and consolidate its authority over the organization of the public service, classification, remuneration, demotion, suspension and dismissal.…*

…

[104] Section 11.1(2)(b)(i) of the *FAA* reinforces the separation of powers between the Treasury Board and PSC when it states that the Treasury Board's powers do not include or extend to "… any power specifically conferred on the Public Service Commission under the *Public Service Employment Act …*".

[105] This distinction of authority is important because when it comes to the Treasury Board's powers under the *FAA*, the FCA and the Board have recognized that parties may voluntarily agree to include provisions in a collective agreement affecting those powers. I noted earlier the NPF's citation of the FCA's decisions in *PSAC Language Teachers 1* and *PSAC Language Teachers 2*. In the former case, the FCA held that two bargaining proposals that implicated the management rights set out in s. 7 of the *Act* could not be the subject of an arbitration award but that "[t]here is no question that the two proposals could be made legitimate subjects of bargaining" (at paragraph 5). In the latter case, the Court decided that a provision limiting teaching hours that had already been voluntarily negotiated into a collective agreement should continue in force during a freeze period.

[106] The PSLRB drew on the FCA decision in *PSAC Language Teachers 2* in *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2014 PSLRB 57 ("*PIPSC*"), concluding that the employer could not escape the freeze provisions of the *Act* because a collective agreement provision fell within the scope of s. 7 of the *Act*.

[107] An employer's ability to voluntarily agree to such provisions was also reinforced by the Federal Court's decision in *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1988] F.C.J. No. 633 (T.D.)(QL). In that case, the Court concluded that certain provisions concerning the organization of the public service and the

assignment and classification of duties could not be referred to a binding conciliation (arbitration) process. In reaching its conclusion, the Court noted that those provisions not only could have been but also were the subject of voluntary negotiations between the parties.

[108] Section 11.1(1) of the *FAA* outlines the Treasury Board's power to determine the "… allocation and effective utilization of human resources in the public service …" and to classify positions. Section 7 of the *Act* establishes the right of the Treasury Board and other employers to determine the organization of the public service, the assignment of duties to positions, and the classification of positions. Section 238.22(1)(c)(i) prevents an arbitration board from making any award that affects the organization of the public service, the assignment of duties to positions, and the classification of positions. However, I find that nothing in the *Act* prevents the Treasury Board from voluntarily agreeing to such a provision in a collective agreement.

C. Is the *PSEA* nevertheless engaged?

[109] The employer's reply to this argument was that any prohibition on creating a public service position would nevertheless constrain its ability to appoint someone and therefore would engage the prohibition related to the *PSEA* found in s. 238.19(b) of the *Act*.

[110] It argued that s. 238.19(b) prohibits a collective agreement from directly or indirectly establishing a term or condition of employment if it has been or may be established by the *PSEA*. The words "directly or indirectly" and "has been or may be established" demand a broad interpretation, it argued.

[111] The facts of the case are such that the RCMP wanted to appoint public service employees as instructors, and the NPF argued that a term or condition exists that would prevent doing that during the freeze period. The *PSEA* governs, among other things, matters related to appointing public service employees. The respondent argued that no collective agreement can dictate who will be appointed as a public service employee and that logically, a collective agreement also cannot dictate who will not be appointed.

[112] The respondent highlighted the provisions in the *PSEA* related to the process of appointing public service employees. It pointed out that s. 29(1) provides that the PSC

has the exclusive authority to make appointments and that s. 29(2) provides that it does so at a deputy head's request. The criteria for making appointments on the basis of merit is set out in s. 30, and s. 30(2) allows the PSC to include in its assessment of merit any current or future operational requirements or needs that the deputy head may identify. Finally, s. 31 states that the employer may establish qualification standards related to education, knowledge, experience, and other qualifications with respect to the nature of the work being performed and the present and future needs of the public service.

[113] In short, a provision that would prevent a deputy head from even considering appointing a public service employee would remove the PSC's ability to make an appointment, which would interfere with the *PSEA*. That is prohibited by s. 238.19(b) of the *Act*.

[114] The respondent relied significantly on the PSLRB's decision in *AJC*, which set out the terms of reference for an arbitration board under s. 150(1) of the *Act*. At that time, s. 150(1) read as follows (as quoted in *AJC* at paragraph 14):

> ***150 (1)*** *The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;*
>
> ***(b)*** *the term or condition is one that has been or may be established under the* Public Service Employment Act*, the* Public Service Superannuation Act *or the* Government Employees Compensation Act*;*
>
> ***(c)*** *the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*
>
> ***(d)*** *in the case of a separate agency, the term or condition relates to termination of employment, other than termination of employment for a breach of discipline or misconduct; or*
>
> ***(e)*** *doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*

[115] The respondent focused in particular on the PSLRB's interpretation of s. 150(1)(b) of the *Act*, which is substantially similar to the prohibition in s. 238.19(b) restricting the content of collective agreements affecting RCMP members.

[116] In *AJC*, the PSLRB emphasized that the use of the words "directly or indirectly" in s. 150(1) requires a broad interpretation of the relevant provision. The respondent highlighted the PSLRB's following conclusions, made at paragraph 28:

> ***28*** *Where parliamentary intent is clear from the language of the statute, I am not free to ignore that intent. In this case, there is no ambiguity in the statutory provisions. Subsection 150(1) of the Act is clear on what an arbitral award can include. First of all, an arbitral award cannot "directly or indirectly" alter, eliminate or establish a term or condition of employment under certain circumstances.* ***This is very broad language, and if Parliament had intended the scope of exclusions to be narrow, it would not have used the term "indirectly."*** *…* ***Paragraph 150(1)(b) is also not ambiguous.*** *The arbitral award cannot directly or indirectly establish a new term or condition of employment where that term or condition is one "that has been or may be established" under the* PSEA *or the* PSSA *(the* Government Employees Compensation Act *is not relevant in this case). The bargaining agent suggested that a real or fundamental inconsistency between the term or condition and the relevant statute was required.* ***A plain reading of the provision shows that it is enough to demonstrate that the term or condition either has been or could be established under one of the cited Acts.****…*
>
> [Emphasis added]

[117] I do not question the relevance of the PSLRB's decision in *AJC* or its conclusion that s. 150(1) is constructed broadly. However, it is important to ground the PSLRB's conclusion in *AJC* to the facts of that case.

[118] The first two proposals in *AJC* that the PSLRB removed from the terms of reference of the arbitration board as a result of its interpretation of s. 150(1)(b) were as follows (at paragraph 52):

> ***52*** *The proposal is as follows:*
>
> *19.01 Each employee in the bargaining unit shall be entitled to receive reasonable notice of, and to apply to, any competition respecting a bargaining unit employee position.*
>
> *19.02 The Employer will consult with AJC over the rules governing the filling of vacancies.*

[119] Another proposal that the PSLRB rejected using s. 150(1)(b) would have dictated the rate of pay and promotion of employees based on years of experience.

[120] In my assessment, those provisions are very different from the ones at issue in this matter. The first *AJC* proposal (19.01) would have affected the process for advertising vacant positions. That is clearly a PSC responsibility. The second (19.02) would have engaged the bargaining agent in discussions about the rules governing filling vacancies, and as the PSLRB indicated, it interfered with consultation processes already laid out in the *PSEA*. The proposal on promotion directly addressed how years of experience would relate to the appointment process.

[121] It does not appear that in *AJC*, the PSLRB faced any argument that these provisions were caught by both ss. 150(1)(b) and (e), the second of which is equivalent to s. 238.22(1)(c)(i) with respect to the organization of the public service, the assignment of duties, and the classification of positions.

[122] In short, I conclude that *AJC* can be distinguished on the basis that it involved entirely different collective agreement provisions.

[123] The respondent also argued that its wide interpretation of s. 238.19(b) is supported by the decision of the Quebec Court of Appeal (QCA) in *Procureur général du Canada v. Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN)*, 2019 QCCA 979 ("*UCCO-SACC-CSN*"). In that case, the bargaining agent challenged the constitutional validity of s. 113 of the *Act*, which sets out the same restrictions on the content of a collective agreement (for public service employees) as those found at s. 238.19. A Quebec Superior Court had found s. 133(b) unconstitutional; the QCA overturned that finding.

[124] In the course of its analysis, the QCA noted that "[d]ue to the legislative framework … neither staffing nor the pension plan can be dealt with in a collective agreement" (at paragraph 11). At paragraph 24, it cited a broad dictionary definition of staffing, "… comprising all the administrative steps taken to fill a vacancy in an administrative unit … [including] selection, placement, training and mobility of employees." It also noted, at paragraph 31, that "… the complete prohibition on negotiating staffing and the pension plan has existed since 1967 …" (the inception of collective bargaining for the federal public service). The QCA accepted the submission of Treasury Board that the restriction in the *Act* reflects a basic constitutional reality

that as employer, it cannot amend a statute of Parliament through a collective agreement.

[125] I agree with the respondent that the QCA has given a broad interpretation to the definition of "staffing". Its treatment of the concept might lead to the conclusion that the matter at issue in this case is staffing and therefore prohibited by s. 238.19(b). However, the QCA had a very different task in front of it. It was assessing whether s. 113(b) is constitutional, at a broad level. It was not faced with a specific language proposal, as the Board normally is when setting out the terms of reference for an arbitration board, as in *AJC*, or when assessing whether a particular collective agreement provision is subject to the *Act*'s freeze provisions, as in *PSAC Language Teachers 2* or *PIPSC*.

[126] The NPF noted that the QCA also stated (at paragraph 44) that the objective of excluding staffing from collective bargaining is "… to ensure the survival of the merit system …". Later, at paragraph 59, it defines the merit system as including political neutrality. It ultimately concluded that s. 113(b), while infringing on freedom of association, is justified under s. 1 of the *Charter*.

[127] The NPF also noted that the QCA's definition of "staffing" extended to matters such as training, a subject addressed in almost every federal public service collective agreement, and mobility, which is covered in collective agreement provisions negotiated under the auspices of the National Joint Council.

[128] The preliminary question at issue in this decision is much different than the issue that was before the QCA. Instead of examining the broader objectives of s. 238.19 and staffing in the public sector, the specific question in this case, as submitted by the parties, is whether a prohibition on appointing or assigning a public service employee to perform duties that were being performed at the time by regular members of the RCMP would be a provision that, directly or indirectly, alters, eliminates or establishes a term or condition of employment that has been or may be established under the *PSEA*.

[129] I note that the QCA said the core purpose of excluding the *PSEA* from collective bargaining is to protect the merit principle and the associated principle of political neutrality.

[130] The collective bargaining issues raised in this freeze complaint do not impinge on the application of the merit principle or political neutrality as laid out in the *PSEA*. As pointed out by the NPF, it does not care who is appointed into the public service positions created by the employer; it challenged the creation of the positions in the first place.

[131] None of the *PSEA* provisions that the respondent cited convinced me that the PSC has a role to play in organizing the public service, in deciding which employees will do which tasks, or in classifying the work of public service employees. The jurisprudence cited reinforces my conclusion that those powers lie with the Treasury Board and that Parliament set out to clearly separate those powers belonging to the Treasury Board (in the *FAA*) from those belonging to the PSC (in the *PSEA*).

D. Conclusion

[132] The respondent argued that any collective agreement provision restricting the performance of cadet instruction duties to regular members would ultimately impact the *PSEA* because the downstream effect of such a provision would be that the deputy head could not ask the PSC to make an appointment.

[133] It is true that a provision that restricts cadet instruction to regular members would mean that the PSC would not make an appointment it might have otherwise been asked to make.

[134] That does not mean that such a provision interferes with or infringes upon the PSC's role or is a term or condition of employment that has been or may be established under the *PSEA*.

[135] The constraint on the employer of such a provision is on the deputy head, which occurs well before the PSC and the *PSEA* are ever engaged. I cannot logically conclude that the downstream impact in the form of the deputy head not requesting an appointment to be made under the *PSEA* means that the provision runs afoul of s. 238.19(b). Furthermore, I do not find that either the PSLRB's decision in *AJC* or the QCA's decision in *UCCO-SACC-CSN* leads to that conclusion.

[136] To conclude, I find that the *Act* does not prevent the parties from voluntarily including in a collective agreement a provision that would have the effect of ensuring that only RCMP regular members perform certain instructional duties vis-à-vis cadets.

[137] Ultimately, in the face of s. 238.22(1)(c), it is not clear how the NPF might obtain the kind of clause it seeks in the face of the employer's refusal to voluntarily agree to one, given that its only route for resolving an impasse in bargaining is to take the issue to an arbitration board. But it is not my role to predict how the collective bargaining process might unfold. The question before me is whether the *Act* **prevents** the parties from agreeing to such a term and condition voluntarily. In accordance with the reasons outlined earlier in this decision, I find that it does not.

[138] The intervenor asked that I consider its *Charter* arguments if I found any ambiguity in interpreting s. 238.19 in relation to this matter. I have concluded that is not necessary. Essentially, there was no debate in the jurisprudence to which I was directed that suggested that the parties cannot voluntarily agree to the kind of collective agreement language at issue in this case.

[139] I wish to emphasize that this decision does not mean the complaint is upheld. It means only that the Board will hear the complaint on its merits, understanding that the parties and the intervenor may bring additional evidence and arguments to bear on the question of whether the respondent violated s. 56 of the *Act*.

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

(The Order appears on the next page)

V. Order

[141] The preliminary question is answered in the negative.

[142] The matter is to be set down for hearing.

November 19, 2020.

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