

Date: 20201222

Files: 572-26-3095, 3128 to 3155, 3236, and 3422

Citation: 2020 FPSLREB 120

*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

CANADIAN ENERGY REGULATOR

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as

Canadian Energy Regulator v. Professional Institute of the Public Service of Canada

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

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

For the Applicant: Jock Climie, counsel

For the Respondent: Cara Ryan, Professional Institute of the Public Service of Canada

Heard at Calgary, Alberta,
April 12 to 14 and November 14 to 16, 2018.

REASONS FOR DECISION

I. Application before the Board

[1] On October 6, 2014, the National Energy Board (NEB or “the employer”) applied to the Public Service Labour Relations Board (PSLRB) for an order that 31 director positions, set out in Appendix A to this decision, be designated, pursuant to ss. 59(1)(c), (e), (g), and (h) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) managerial and confidential. The employer submitted that the occupants of each of the positions should not be included in a bargaining unit because of a conflict of interest or because of the duties and responsibilities to the employer.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365: *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[3] On November 7, 2014, the Professional Institute of the Public Service of Canada (PIPSC or “the bargaining agent”) wrote to the PSLREB, objecting to the exclusion proposals and submitting that the positions in question did not meet the criteria for exclusion proposed by the employer.

[4] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (“the Act”).

[5] Initially, only the applications in files 572-26-3135, 3140, 3150, and 3151 were scheduled for the hearing, which began on April 10, 2018. The hearing proceeded for the balance of that week ending on April 13, 2018. It did not finish as the employer was still calling evidence in support of its case.

[6] During the course of the initial hearing week, it became clear that there did not seem to be any reason that the balance of the applications, the other 27, had not been scheduled with the 4 being heard. After the first week was completed, the other applications were assigned to me, and the parties were advised that they would form part of the continuation of the hearing. The hearing continued on November 14 to 16, 2018, with the employer still calling evidence.

[7] I take notice that subsequent to the hearing, the name of the National Energy Board was changed to the Canadian Energy Regulator and the Board files for these applications have been amended accordingly.

II. Summary of the evidence

[8] The employer is a federal tribunal that regulates the construction, operation, and abandonment of pipelines that cross provincial or international borders; international and designated interprovincial power lines; imports of natural gas; exports of crude oil, natural gas, refined petroleum products, and electricity; and oil and gas exploration and production activities in certain areas. It is also charged with providing timely, accurate, and objective information and advice on energy matters. Its headquarters are in Calgary, Alberta, and it has regional offices in Montreal, Quebec, and Vancouver, British Columbia. As of the hearing, it employed close to 500 people.

[9] At the top of the employer's organizational structure is a chief executive officer (CEO), to whom three executive vice-presidents (EVPs) and two vice-presidents (VPs) report directly, while seven other VPs report indirectly through the EVPs. The director positions at issue in these applications report to the VPs. As of the hearing, Charles Watson was the chairperson and CEO of the employer. He started in the position at some point in 2014.

[10] The employer has its own classification scheme. It uses the prefix "NEB", followed by a number between 01 and 16, with 01 being the lowest and 16 the highest. The executive cadre is classified NEB-13 through NEB-16. The CEO is classified NEB-16,

EVPs are classified NEB-15, VPs are classified NEB-14, and directors are classified NEB-12.

[11] The employer is set up into business units, which may contain one or more teams. The business units are headed by VPs, or in some circumstances an EVP, and typically, teams are led by directors. Not all teams have the same number of personnel, and not all EVPs or VPs have the same number of directors reporting to them.

[12] As of the hearing, Alexis Williamson was the EVP of people and knowledge. The responsibilities included being the head of human resources (HR). She had been with the employer for 1½ years, having come from the BC Oil and Gas Commission. She had been the VP of HR there and had worked there from 2010 to 2016. As of the hearing, 5 (including 1 on an acting basis) of the 31 directors whose positions are the subjects of the applications reported to her.

[13] As of the hearing, Paula Futoransky was the VP of projects, a position she had held since October of 2017. She joined the employer in December of 2009 as a technical specialist. After that, she held the following positions before becoming the VP of projects:

- between August of 2016 and October of 2017, she was the VP of performance and results and the chief financial officer (CFO);
- between January of 2015 and August of 2016, she was the EVP of business integration and the CFO;
- between September of 2014 and January of 2015, she was the VP of people and corporate solutions; and
- between November of 2011 and August of 2014, she was the director of regulatory approaches.

[14] As of the hearing, Barbara Van Noord was the VP of systems operations with the employer and had been with it for two years and three months. Four directors reported to her.

[15] Mr. Watson and Ms. Williamson, Futoransky, and Van Noord testified on behalf of the applicant, as did Christian Iniguez and Sandy Levesque, both directors. However, Mr. Levesque's position is not one of the 31 that the employer seeks to exclude. The bargaining agent called 2 witnesses, Sylvia Marion and Meghan Ruholl, both directors.

[16] Mr. Iniguez joined the employer in 2012 as a marketing analyst. He was made an acting director in August of 2015 and was made permanent in the position in 2017. As of the hearing, he was the director of the energy trade team, which had eight members.

[17] Mr. Levesque joined the employer in 2011 as an internal audit specialist. He became a director in December of 2014. His position is not covered by the 31 exclusion applications as it is already excluded due to the responsibility for collective bargaining calculations.

[18] Ms. Marion joined the employer in 2005. In May of 2008, she was appointed to the precursor of the director position, which was the team leader position, classified at the NEB-12 level. In November of 2013, she was the director of planning, coordination, and reporting. In April of 2016, she became the director of environmental protection. In February of 2017, up to and including the hearing, she was the director of tolls and tariffs.

[19] Ms. Ruholl joined the employer in 2006. In 2010, she was appointed to an indeterminate director position, and in 2015 and 2016, she was in a VP position on an acting bases. She has been a director of the Operations Business unit and the Energy Supply Data Team. As of the hearing, she was the director of the programs and evaluation team and about 10 people reported directly to her.

[20] The relevant portions of s. 59(1) of the Act are as follows:

59 (1) After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that

...

(c) the occupant of the position provides advice on labour relations, staffing or classification;

...

(e) the occupant of the position has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Part 2 or Divisions 2 of Part 2.1;

...

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

(h) the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).

[21] Entered into evidence was a copy of the collective agreement entered into between the employer and PIPSC for November 1, 2014, to October 31, 2018 (“the collective agreement”).

[22] Section H of the collective agreement is entitled “Labour Relations”, and article H-5 is entitled “Dispute Resolution – Grievance Procedure”. It states as follows:

...

H5.03 *There shall be two (2) levels in the grievance procedure. These levels shall be as follows:*

(a) *First Level: Responsible Vice President or, where agreed by the parties, the Chief Operating Officer;*

(i) *The purpose of this level is to provide disclosure of all information relating to the problem or disagreement to facilitate open discussions and the exploration of a voluntary resolution acceptable to all parties to the grievance. Where agreed by the parties, problem-solving options such as an external mediator may be used.*

(ii) *A written reply with reasons shall be provided.*

(b) *Final Level: Chief Operating Officer or, where the Chief Operating Officer has replied at the first level, the Chief Executive Officer of the National Energy Board.*

(i) *The purpose of the final level is to provide the COO or the Chief Executive Officer the opportunity to hear representations from the Institute and a representative of the Employer regarding the matter in dispute. A reply will be based on the information presented by the parties.*

(ii) *A final level reply shall include the reasons for the decision.*

...

[23] Entered into evidence was a copy of a generic director job description as well as a draft job description that as of the hearing was not in effect. The relevant portions of the generic job description are as follows:

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

...

Summary of Responsibilities

The Director is committed to the vision, objectives and goals of the Board and their Business Unit. The Director is committed to assisting the Board in meeting its mandate through the activities of the Team and by providing expert information and advice to internal and external stakeholders of the Board.

The Director is responsible for Team and individual performance. The Director must lead in defining and meeting internal measures of quality. He/she achieves team excellence through personal coaching and guiding of Team Members, encouraging Team cohesion, fostering Team development and morale, removing obstacles to achieving work team objectives, and by encouraging communication with all levels in the organization. The incumbent must have a balance of leadership and technical skills to understand the areas of responsibility of the work team, to plan priorities, assign and coordinate activities, and continuously review processes for potential improvements and updates to procedures and guidelines.

The Director is responsible for scanning internal and external environments to be cognizant of issues and upcoming work assignments that may impact the team. The incumbent must also be able to balance both internal client needs and diverse external interests. In providing information about Board processes to external participants the Director maintains absolute impartiality.

Major Responsibilities

- *Ensure that Team Members are aligned with and work toward the strategic vision of the Business Unit and the organization as a whole and understand NEB processes that affect the work of the Team*
- *Strengthen team cohesiveness; foster improved morale and team growth; resolve internal Team Member conflicts and inter-team conflicts to ensure that business needs are met*
- *Taking responsibility for performance management within the Team by:*
 - *Communicating, measuring and discussing team and individual performance expectations, service standards and competency requirements with team members*
 - *Coaching and guiding team members to achieve individual and Team performance excellence with the help of Professional Leaders and Human Resources as appropriate*
 - *Planning with Professional Leaders and/or Human Resources for professional training and development of Team Members in line with the needs of the Team and the long-term needs of the NEB*
 - *Taking responsibility for reviewing appropriateness of classification levels relative to work requirements for team*

members, especially as they change or in new hire situations; identifies possible issues or problems and initiates reviews and makes changes as appropriate

• Contribute collaboratively to the Business Unit Leadership Team by:

- Representing his/her Team in formulating strategic direction and vision of their team in order to achieve Business Unit outcomes

- Giving in put [sic] into overall allocation of human, financial and material resources and identifying resourcing needs for Team projects

- Providing the BUL with information from outside stakeholders needed for decision-making and planning

- Contributing resources/support to other BU and NEB priorities as required

• Prioritize, co-ordinate and assign work activities to his/her Team Members taking into account equitable workload levels, unique technical expertise, opportunities for staff development and other staff issues including possible needs of other teams

• Manage financial resources to accomplish Team results

• Remove obstacles to Team success by facilitating processes, solving problems, and recommending changes in policy, procedures and guidelines affecting how work is done; develop agreements within the Business Unit and among other Business Units on behalf of the Team that will increase success

• Continuously review processes for potential improvements to update procedures and guidelines as necessary; prepare process procedures and guidelines for the Team; encourage and enable Team Members to think creatively about better ways to provide the services, products and methods (processes) that are the responsibility of the Team

• Develop external relationships with companies, organizations and/or government departments with shared interests; facilitate relationship building of team members with internal and external contacts

• Manages human resources activities of the Team including recruitment, compensation, managing team schedules and workload priorities

• Manage external contracts for additional resources as required according to materiel management guidelines

...

Decisions and/or Recommendations

• Decisions regarding implementation of NEB policies and guidelines impact external organizations and clients and how they interact with the NEB

- *Decisions made collaboratively with team members impact Team and BU Members in the areas of resource allocations and requirements, human resources activities and workload leveling*
- *Decisions at the Team level involving prioritizing work plans, planning and distributing accountabilities, and coaching team members in activities and/or behaviours impact the success of the work team*
- *Decisions and recommendations must be made based on corporate policies and guidelines with additional focus on professional standards and ethics, where information may be incomplete or contradictory, or in a form that is not readily available*
- *Does research where needed to obtain information necessary to ensure that decisions and recommendations around team issues are appropriately made*
- *Leads and implements change within the work unit and may occasionally implement strategic change throughout the NEB*
- *Develops ideas which result in the creation of new processes, methods, services and/or products*

...

[24] Entered into evidence was a portion of the employer's "Leave With or Without Pay Policy". The relevant portion referred to me was section 2.0, which states as follows:

2.0 Policy

Leave with or without pay may be authorized in accordance with the clause/section in the collective agreement or the appropriate terms and conditions of employment. Leave is to be granted under this policy only where there is no provision elsewhere in the agreement/terms and conditions and cannot be combined with any other type of leave approval to extend a period of leave with pay. Other Leave with Pay may be granted in cases deemed by the Business Leader to be a situation where the employee allows the Business Leader to recognize the need for time off while maintaining continuity of employment.

[25] Entered into evidence was a copy of the employer's "Delegation of Human Resources Authorities" ("the HR delegation"). It sets out, in a table format, the delegated authorities that different positions hold within the organization with respect to several functions, of which 113 are listed. There are 6 levels of authority: CEO, chief operating officer, EVP, VP, director, group leader or leaders, and HR advisors. The following are functions over which a director has authority:

CLASSIFICATION & ORGANIZATIONAL DESIGN

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

- ...
6. *Assign duties and responsibilities to positions within the team;*

...

STAFFING SUB-DELEGATION

- ...
11. *To initiate action to staff a position;*
12. *To choose a staff option (indeterminate, term, casual, acting, deployment, secondment, *students, etc);*
13. *To establish Statements of Merit Criteria;*
14. *To consider and appoint priority appointments;*

- ...
16. *To determine the appointment process (advertised or non-advertised);*
17. *To establish an area of selection;*

- ...
19. *To exclusively target employment equity groups in an area of selection or to expand an area of selection to include these groups;*

20. *To choose assessment method(s);*
21. *In an external appointment process, to give preference to a person with war service, veterans and Canadian Citizens in the order they are listed;*
22. *To informally discuss with persons who were eliminated from consideration at any stage of an internal process;*
23. *In an internal advertised process, to inform persons in the area of selection who participated in the process, of the name of the person(s) being considered for an appointment;*
24. *In an internal non-advertised process, to inform persons in the area of selection who participated in the process, of the name of the person(s) being considered for an appointment;*

- ...
26. *To propose a person for appointment to all other NEB positions;*

- ...
28. *To appoint a person indeterminately or on a term basis to all other NEB positions [not in the Executive Group] following an advertised or non-advertised process;*
29. *To extend a term appointment for up to two years;*

32. To appoint a person on an acting basis for less than 12 months;

...

34. To appoint a person on a casual basis;

35. To deploy a person [on consultation with the VP];

...

37. To appoint a person under a professional development program;

38. To establish the rate of pay on appointment to the public service [consultation with a compensation advisor and HR advisor is mandatory];

...

47. To accept a resignation;

...

TERMS & CONDITIONS

...

HOURS OF WORK

58. Authorize employees' work time, banked time and leave;

...

60. Authorize employees' overtime;

61. Authorize the weekly time report;

LEAVE

62. Authorize any leave with pay for periods of three months or less;

...

LABOUR RELATIONS

71. Facilitate a resolution to a problem or informal discussion;

72. Receive a grievance from an employee, date, sign and pass to the delegated grievance step officer;

...

76. Reprimand an employee (oral or written reprimand)

...

CODE OF CONDUCT

...

EMPLOYMENT EQUITY

...

HARASSMENT

...

WORKPLACE HEALTH & SAFETY (WHS)

...

WORKFORCE ADJUSTMENT (WFA)

...

PUBLIC SERVICE DISCLOSURE PROTECTION ACT (PSDPA)

...

98. Authority to report possible wrongdoings or refer the disclosure to the Designated Senior Officer (DSO);

...

AWARDS & RECOGNITION

...

102. Instant award approvals . . . Director may only approve gift levels 1 & 2;

...

PERFORMANCE MANAGEMENT

...

108. Responsible for establishing and assigning accountabilities to their direct reports, monitoring results achieved and assessing individuals;

...

LEARNING & DEVELOPMENT

109. Authorize training [to the extent that FAA approval allows]

OFFICIAL LANGUAGES

...

111. Delegated to coordinate with NEB leaders to plan and develop action plans to ensure NEB meets its obligations under the OLA;

...

113. Comply and support staff in complying with the NEB's OL Policy and guidelines.

...

[26] The evidence disclosed that the following tasks set out in the HR delegation with respect to staffing, classification, and labour relations were not within the delegated authority of directors:

...

CLASSIFICATION AND ORGANIZATIONAL DESIGN

1. Authorize organizational changes to the NEB;

2. Respond to classification grievances;
3. Authorize organizational changes to the business unit;
4. Authorize classification requests within the business unit;
5. Authorize an effective date that is retroactive more than 6 months for encumbered positions that are reclassified;

...

7. Authorize classification of positions NEB-1 to NEB-16;

STAFFING SUB-DELEGATION

9. Sub-delegate appointment and appointment-related authorities, and make changes to the List of Sub-delegated Staffing Authorities;
10. Restriction or revocation of sub-delegation as conditions may warrant;

...

18. To restrict an area of selection below the established minimum;

...

25. To propose a person for appointment in the Executive Group (NEB-13 to NEB-16)

...

27. To appoint a person indeterminately or on a term basis in the Executive Group (NEB-13 to NEB-16) following an advertised or non-advertised process;

...

30. To extend a term appointment for a period beyond a total of two years;

31. To convert the status of an employee from term to indeterminate after 3 years;

...

33. To appoint a person on an acting basis for more than 12 months;

...

36. To review a grievance related to a deployment;

...

40. To revoke an internal appointment and take corrective action after investigating the process;

41. To appoint to another position a person whose appointment has been revoked by the CEO, the PSC or Public Service Staffing Tribunal;

42. *To extend the exemption period to meet language requirements in non-imperative appointments for NEB-13 to NEB-16 levels;*
43. *To extend the exemption period to meet language requirements in non-imperative appointments for NEB-01 to NEB-12 levels;*
44. *To reject an employee on probation;*
45. *To approve assignments under the Interchange Canada or Interdepartmental secondment agreement;*
46. *To declare an employee surplus to requirements or lay an employee off;*

...

48. *To review employment systems, policies and practices;*

TERMS & CONDITIONS

49. *Create, modify and amend Terms & Conditions of employment for the Executive group;*
50. *Create, modify and amend Terms & Conditions of employment for the Excluded group;*
51. *Enter into a collective agreement with certified bargaining agents;*
52. *Create, modify and amend Terms & Conditions of employment for students;*
53. *Determine the rate of pay on appointment for employees at the NEB-13-15 level;*
54. *Determine the rate of pay on appointment or promotion consistent with minimums in the guidelines;*
55. *Determine the rate of pay on appointment or promotion, where the increase is greater than the minimum in the guidelines (5-10%);*
56. *Determine the rate of pay on appointment or promotion, where the increase is greater than the minimum in the guidelines (more than 10%);*

...

HOURS OF WORK

...

59. *Authorize employee to exceed banked time limit of 37.5 hours;*

...

LEAVE

...

63. *Authorize leave without pay;*

64. Authorize education allowances in lieu of salary;
65. Authorize advancement of sick leave credits;
66. Authorize participation in the self-funded leave program;
67. Authorize Leave with Income Averaging;
68. Authorize leave without pay for an employee who has been elected to the Union and is to serve in a full-time position;
69. Recommend to the Public Service Commission (PSC) that leave without pay for an employee be approved to seek nomination or election to, or to serve a term in, municipal, provincial or federal elections;
70. Recommend to the PSC that leave without pay for an employee be approved to serve in the office of a Minister of the Crown or to the Leader of the Opposition;

LABOUR RELATIONS

73. Acknowledges receipt of grievance by signing, dating and returning two copies to the employee/union representative;
74. Respond to a grievance at the first level;
75. Respond to a grievance at the second level (final level);
- ...
77. Suspend (without pay) or terminate an employee for disciplinary reasons;
78. Demotion or termination for non-disciplinary reasons;
79. To reject an employee on probation;

CODE OF CONDUCT

80. Ensure compliance with and enforcement of the Code of Conduct;
81. Decide whether an employee with an immediate family member working for, or on behalf of, present or likely to add as a hearing participant continues to be assigned to the hearing;
82. Review declarations filed by employees and advise employees and the COO of any violations of the Code that may be revealed;
83. Review and advise upon questions related to conflict of interest referred to the COI Committee by employees or management;
84. Determine whether or not a breach of the Code has occurred in a disputed matter;
85. Require an employee to restrict post-employment activities;

EMPLOYMENT EQUITY

86. Pursuant to the Employment Equity Act ensures application of the National Energy Board's Employment Equity Policy;

HARASSMENT

87. Application of the National Energy Board Harassment Prevention Policy;
88. Manage all activities related to the implementation and ongoing effectiveness of the Harassment Prevention Policy;

WORKPLACE HEALTH & SAFETY (WHS)

89. Ensure WHS requirements are met and that the Committee meets as required;

WORKFORCE ADJUSTMENT (WFA)

90. Declare an employee surplus to requirements due to either (a) lack of work or (b) discontinuance of a function;
91. Lay off an employee whose services are no longer required;
92. Authorize Workforce Adjustment payments;

PUBLIC SERVICE DISCLOSURE PROTECTION ACT (PSDPA)

93. Establish an internal disclosure and investigation mechanism;
94. Establish NEB procedures and guidelines for the secure and confidential handling of records created or provided under the PSDPA;
95. Ensure that all NEB employees and supervisors are aware of, and trained in the provisions of the PSDPA, the NEB policy and procedures;
96. Designate a Senior Officer of PSDPA
97. Accept disclosure of wrongdoings, conduct investigations and make recommendations;

PERFORMANCE MANAGEMENT

105. Accountable for the overall performance of the National Energy Board;
106. Responsible to ensure NEB's Performance Management Program is developed, documented, communicated and executed in a timely, consistent manner and that all Leaders carry out their performance management responsibilities in an effective, efficient and consistent manner.
107. Responsible for the coordination of the NEB's performance management programs and processes;

...

OFFICIAL LANGUAGES

110. Responsible for NEB's compliance with the Official Languages Act;

...

112. Responsible for communicating with Commissioner for Official Languages regarding investigations pursuant to OLA;

...

[27] Entered into evidence were three postings for director positions, which closed on October 3 and 16, 2017, and on March 21, 2018, respectively.

[28] Entered into evidence was a document entitled, “Directors positions brought forward for Exclusion to the FPSLREB”, which set out in a spreadsheet all the positions the employer seeks exclusion for. Among other information, it set the number of people who report to the position, as well as the respective units’ salary and operation and maintenance (O&M) budgets.

[29] Also entered into evidence was a document entitled “NEB and PIPSC Exclusions Applications - List of Excluded”. It was prepared for the purpose of the applications and sets out 10 subheadings under which it lists the duties that the employer contends are carried out by directors and that thus qualify them for exclusion. The 10 subheadings are as follows:

- “Discipline/Performance Management”;
- “Manages Employee Accommodations”;
- “Exercises Managerial Responsibility”;
- “Staffing”;
- “Acting in Executive Roles”;
- “Grievance Process”;
- “Performance Appraisals”;
- “Actively Involved in Developing and Applying Policies”;
- “Manage Budgets”; and
- “Part of Strategic Decision-Making”.

[30] On its own, that list of duties was not evidence of the work carried out by the directors but was a road map that the employer used to assist the hearing, in the direction of its case. Its counsel put this document to Mses. Williamson and Futoransky. Counsel then put it to Messrs. Iniguez and Levesque, who were asked to see if it stated anything that did not accurately describe their roles. Both answered in the negative.

A. Discipline/ Performance Management

1. Discipline

[31] As set out in the HR delegation, the oral evidence disclosed that those in a director position deal very little with misconduct and discipline. With respect to discipline, Mr. Levesque confirmed that he has written a letter of reprimand. Both Mses. Marion and Ruholl stated that they have not disciplined an employee. Mr. Iniguez did not testify about disciplining any employees.

2. Performance Management

[32] No document was submitted that defined “performance management”. This term can be used to describe monitoring and assessing employees’ performance in general and can culminate in annual or bi-annual performance appraisals, or it can be used to refer to a formal plan implemented by management to manage an employee who is not performing at the expected level. It appears that the HR delegation uses the term “performance management” to mean monitoring and assessing an employee’s performance in general, as opposed to imposing a management plan to address an underperforming employee. During the course of the hearing, the term was used in both senses.

[33] In this decision, the term “performance appraisal” will be used when referring to the assessment of an employee’s performance, and the term “performance management” will be used to refer to managing an employee who is not performing at the level expected of an employee at that employee’s level.

[34] The following was stated with respect to performance-managing employees:

- Mr. Levesque testified that he had performance-managed employees over the course of a number of years. He did not specify how many employees or over how many years. He did state that he did so both formally and informally.
- Mr. Iniguez testified that he continued a performance management plan for an employee that the previous director had put in place.
- Ms. Ruholl indicated that she has had to performance-manage some employees.
- Ms. Marion stated that she has never had to put an employee on a performance management plan.

B. Manages Employee Accommodations

[35] The HR delegation does not refer to accommodation procedures and processes.

[36] Mr. Levesque testified about his involvement with accommodation procedures and processes. He indicated that he dealt with informal ones, such as providing computer equipment like a special mouse or keyboard, and that they came out of his budget. He also talked about a formal accommodation process. However, his involvement was limited to asking HR to carry out an ergonomic assessment of an employee's workstation, which the employee refused.

[37] When he was asked about his experience with respect to sending employees for an independent medical examination, Mr. Levesque stated that he had experience with that. However, he did not elaborate on his role but stated that the reports were sent to HR and not to him.

[38] Ms. Marion stated that she has had to deal with the accommodation process twice, once formally, and once informally. She described the informal situation as an employee needing flexible work hours approved, which was within her authority. The formal situation involved an employee needing extra breaks during the workday, which she sanctioned when she was presented with a note from the employee's doctor.

[39] Ms. Ruholl testified she has had to deal with the accommodation process three times, other than arranging for an ergonomic assessment. However, she did not provide details of her involvement in those three situations, other than stating that her role was to ensure that the accommodation measures were put in place and followed. She indicated that she worked with HR and with the provided medical information.

C. Exercises Managerial Responsibility

[40] Ms. Williamson stated that under this heading, the director carries out all the duties listed, as follows:

- assigns work;
- approves vacation;
- approves overtime;
- approves lieu time;
- approves when lieu time is cashed in;
- manages and approves training and professional-development opportunities;
- manages attendance;
- approves time sheets; and
- makes recommendations on promotions and reclassifications, which are almost always approved.

[41] Ms. Williamson said that in her experience, promotion recommendations are always approved. I was not provided with any details with respect to the number of recommendations or promotions available or put forward in any given fiscal year.

D. Staffing

[42] The HR delegation indicates that directors have a fair amount of discretion when it comes to staffing, including determining whether to proceed with an internal or external staffing process and whether to appoint someone indeterminately. They do not have the authority to deploy employees.

[43] Ms. Marion testified that one of her employees went on maternity leave and that she tried to fill the position with a casual hire. However, she said that a VP denied this option as there was no money in the budget. Entered into evidence was a document entitled “Financial Directive on Salary Management of NEB Workforce Staffing Activity” (“the Financial Directive on Staffing”), which states as follows:

1. Effective date

1.1 This directive takes effect on 11 May 2018.

2. Purpose

2.1 This directive documents the National Energy Board’s (NEB) salary and all staffing activity recommendations and approval processes.

2.2 This directive supersedes any previous NEB staffing directives.

3. Context

3.1 This directive is to be used by leaders who hold delegated financial and human resource management authority to initiate staffing actions as outlined in financial and human resource delegation instruments. NEB financial delegations of authority are in line with Treasury Board Secretariat’s Directive on Delegation of Spending and Financial Authorities.

3.2 The requirements of this directive provide for accountability, transparency and effective control in the management of the NEB’s salary funding and staffing process.

...

4. Roles and Responsibilities

4.1 The Resource Management Committee (RMC) is responsible for effective oversight of the NEB’s financial plan, budget and related allocations of enterprise-wide staffing requirements.

4.1.1 The RMC serves as an advisory board to the Chief Executive Officer (CEO) with respect to reviewing systemically, all staffing

activity requests with the Vice President (VP), Performance and Reporting and Chief Financial Officer and the VP People and Knowledge and Head of Human Resources bringing staffing recommendations to the CEO on an as needed basis for enterprise wide workforce planning purposes

4.1.2 The RMC is governed by terms of reference (RDIMS #1029876).

4.2 The CEO considers and approves RMC recommendations through Records of Decision.

4.3 The CFO as the chair of the RMC, provides financial management guidance to the RMC members, and presents management recommendations to the CEO for approval.

4.4 The Head of Human Resources is responsible for ensuring Senior Management Committee (SMC) and RMC members are informed of enterprise-wide workforce planning pressures and needs prior to RMC making recommendations for the CEO's approval consideration

4.5 RMC discusses the following potential in-year adjustments to Business Unit (BU)/program allocations:

4.5.1 transfer of funded Establishment positions between Bus;

4.5.2 allocation of temporary funding received during the fiscal year;

4.5.3 high-risk staffing actions (>10% over BU allocations) that would result in a BU/program exceeding its salary allocation and unable to risk-manage;

4.6 SMC Executive Vice President and VP member are responsible for:

4.6.1 or less over BU allocation) that seek to fill unfunded Establishment positions;

4.6.2 Tabling high-risk staffing actions that would result in a BU/program exceeding its salary allocation

4.7 VPs are responsible for:

4.7.1 managing salary and staffing during the fiscal year within the approved BU salary allocation;

4.7.2 ensuring an annual staffing plan is developed for each BU/program in advance of the upcoming fiscal year consistent with the approved allocation;

4.7.3 initiating the return of surplus salary funding on a quarterly basis through the RMC to be used by another BU or held in a corporate reserve;

4.7.4 seeking EVP approval for medium-risk staffing actions.

4.7.5 Determining if the staffing activity that is required within their BU should be an indeterminate or term position based on

available funding and organizational workforce planning pressures;

4.8 The Financial Management Group is responsible for:

4.8.1 Monitoring the Departmental Results Framework-Resource Allocation Plan (DRF-RAP) Salary Forecast Report;

4.8.2 Providing a challenge function to ensure a BU/program does not exceed its salary allocation without approval (i.e. issuance of green checkmark for a DRF-RAP Salary Plan in accordance with RAP Staffing Approval Procedure on the Process DashBoard);

4.8.3 Assisting with the administrative process for initiating the return of surplus salary funding as noted in para.4.6.3.

...

[Sic throughout]

[44] Included in the Financial Directive on Staffing is a table that summarizes the approvals required for staffing actions. Someone at the director level can only recommend to hire. Depending on the type of staffing and the budget allocations, the approvals are at the VP, senior management committee executive member, and CEO levels. On the last page of the document is the following:

Job Development Ladder Reclassifications and Appointments Less than Four Months

4.11 Job Development Ladder reclassifications will be processed by HR in accordance with the relevant guidance and instructions, and do not require a green checkmark from Financial Management. Job Development Ladder reclassifications are included in the DRF-RAP Salary Forecast Report as Salary Plans require BU leader approval prior to being actioned by HR.

4.12 Acting, term, or casual appointments of less than four months can be approved at the Director level with BU leader approval and do not require a green checkmark from Financial Management.

...

[45] Ms. Marion testified that the Financial Directive on Staffing set out the staffing authorities and approvals. She stated that this means that positions are funded and that monies for them are allocated in the budget, so the VP has approved the established positions. She also stated that some positions may arise out of necessity. She stated that as a director, she looks at her team's deliverables and what a person missing from the team would do. She stated that the VP looks at a broader group and prioritizes within the VP's budget. Therefore, a VP can determine that there is another priority elsewhere in the budget. She said this:

- the director's role is to make recommendations;
- directors have no control over the timeline of a staffing approval;
- she has had staffing requests denied;
- she does not have control over the process; and
- she has had staffing processes stopped halfway to completion and has had approvals revoked.

[46] Also entered into evidence was a copy of the "Job Development Ladder Policy", effective September 25, 2018. The portions relevant to these applications states as follows:

1.0 Purpose

The National Energy Board (NEB) works to attract and retain employees with the skills and experience required to meet its commitments to industry, to Canadians and to the Public Service. Through this policy the NEB has defined a mechanism which allows Leaders to hire employees at entry or intermediate of jobs and train them to the full working level of that job. Employees are offered meaningful structured promotions through job development ladders to attain the experience and competencies required to reach the full working level in the ladder.

1.0 Policy

A job development ladder is a progressive series of levels within a job, which distinguish among entry to full working level.

Job development ladders may be created to enable the NEB to hire employees who do not yet have the required skills, knowledge, experience or the competencies to perform at the full working level for a specific job.

Employees enter into a job development ladder through various types of staffing actions (appointments) and are then eligible for promotion through to the full working level of the job through non-advertised appointment processes, provided they meet the requirements of this policy. Movement through a job development ladder is based on an individual's capability and readiness to perform at the next highest level in the ladder.

Job development ladder promotions are managed with respect to the values embodied in the Public Service Employment Act (PSEAP) - the Core Values of merit and non-partisanship and the Guiding Values of fairness, access, representativeness, and transparency - and the NEB performance management processes.

The human resource disciplines of staffing, classification, labour relations, performance management and learning and development are utilized in the execution of movement of an employee through a job development ladder.

...

2.1 Job Development Ladder Framework

The decision to create and modify job development ladders resides with the Chair and Chief Executive Officer (CEO); this authority cannot be sub-delegated.

...

2.4 Roles and Responsibilities

...

2.4.2 Directors

Directors are responsible for:

- *Working with employees in determining Accountabilities and learning opportunities to meet future promotion requirements;*
- *Making the recommendation for promotion;*
- *Compiling and completing the documentation to support a promotion decision;*
- *Communicating a promotion decision to the employee.*

2.4.3 Executive Champions

Executive Champions are responsible for creating an environment that is supportive of employee development and promotion. They contribute to the success of this policy by assisting in human resources planning activities, identifying development opportunities; reviewing promotion recommendations; and providing oversight on the intent and execution of this policy.

2.4.4 Human Resources

The Head of Human Resources supports this policy by providing oversight, guidance and support by:

- *Initiating communicating and setting timelines for the annual promotion process;*
- *Establishing a monitoring and oversight function to support consistent application of this policy by Leaders;*
- *Supporting the development process by providing employees and their Leaders with training, coaching and other initiatives which support employee growth; and*
- *Annual reporting to the Executive Champions.*

2.4.5 Chair/CEO

The Chair/CEO is responsible for:

- *Approving the development of any new job development ladders; and*
- *Approving the retirement of any job development ladders.*

...

[Sic throughout]

[47] Ms. Ruholl stated that she requires EVP approval for staffing. She has to send a note to her VP, who has to make a case for the adequate budget amount to pay for the position. If that is approved, it goes to the resource management committee.

E. Acting in Executive Roles

[48] The evidence disclosed that from August of 2015 to April of 2016, Ms. Ruholl was in a VP role on an acting basis, and that once, for a day or two, she was an EVP on an acting basis. There was no evidence that any of the other three directors who testified before me were ever in an executive role on an acting basis.

F. Grievance Process

[49] The part of the grievance process that a director is involved in is receiving a grievance from an employee and passing it to the appropriate person in the process. The evidence disclosed that the directors' role is only to transmit the grievance to the person who can acknowledge receiving it.

[50] Ms. Marion testified that she has never received a grievance or been part of the grievance process.

G. Performance Appraisals

[51] The employer has a performance pay plan. Ms. Williamson testified that there are four performance appraisal levels: marginal ("M"), or performing below expectations; performing ("P"), also known as "meets expectations"; superior ("S"), also known as "exceeding expectations"; and outstanding ("O"), also known as "far exceeds expectations". She stated that the performance pay that an employee receives (above and beyond salary) is based on the employee's performance appraisal. The rating translates into a percentage added to the employee's remuneration. But if an employee is rated "marginal", he or she receives no performance pay. The performance appraisal system information is entered into a computer data system called "Halogen".

[52] Entered into evidence was a document dated May 18, 2017, and entitled, "Leadership Message". Its topic is "Methodologies to Determine Performance Pay for 2016-2017". It states as follows:

As we approach the end of the 2016-17 Year-end Performance Management Assessment Process (formerly called Results), and the subsequent issuance of performance pay, I want to provide

information on the determination of performance pay for the fiscal year under review.

It is currently anticipated that the final Corporate Performance rating will be known by May 30th, 2017. Leaders will share individual ratings with their employees in late June as part of the Performance Management Program's 2016-2017 Year-End Process. Compensation will endeavor [sic], to the extent possible, [sic] issue performance pay by September 30, 2017.

The NEB Performance Pay Plan (PPP) consists of two components, measured in the following way:

The following will apply to performance pay for the 2016/17 cycle:

1. Individual rating component:

The same individual performance ratings distribution approved by the CEO last year will be applied this year. The NEB's individual performance ratings distribution will follow a normal spread of 70-75% performing, 20% superior and 5% outstanding.

NEB senior management have considered both the advantages and disadvantages of utilizing a normal distribution and have chosen to follow for the second year in a row, the same methodology that was applied last year. The goal is to maintain a credible, fair and transparent performance management process. A normalized distribution increases rigor around the assignment of ratings and helps improve consistency across the organization.

...

[53] Entered into evidence was a document entitled "Performance Management Program Leader Review Process Second and Third Level Review Processes". It states that its purpose is to assist leaders and employees with the second- and third-level review processes in the performance-management year-end process.

[54] Ms. Williamson said that performance appraisals cover a year and that each employee's supervisor is supposed to assess the employee's performance based on a performance plan that outlines accountabilities. She stated that the directors had full autonomy to assess their employees and that the EVPs and VPs would not interfere with their assessments or overrule a specific rating given to a certain employee. She stated that she did not review performance appraisals that the directors drafted. She also stated that performance appraisals can and have been grieved and that the person defending one in the grievance process originally completed it.

[55] Mr. Levesque testified that when carrying out performance appraisals, his only constraint is the bell curve. He said that if he has an outlier, he would expect a challenge. He said that he was not aware of a VP overturning a performance appraisal at the first level. However, he stated that he did not participate at the second or third level. Mr. Iniguez stated that the VP he reports to has never interfered with any performance appraisal or rating that he has put forward.

[56] Mses. Marion and Ruholl testified that at the beginning of each year, they set the accountabilities for the members of their respective teams. They stated that they have a generic set of responsibilities, competencies, and accountabilities. Ms. Marion stated that she has monthly meetings with the employees that report to her, so that she can check in with them to see how they are doing against those accountabilities. Ms. Ruholl said that she meets with her employees over the course of the year.

[57] Ms. Marion testified that the performance appraisal process involves a number of different levels of review and that the director level is the first for the employees that the directors supervise. These appraisals go to the second and third levels. The third level involves VPs and EVPs. She stated that she was aware that once, a director was told to change a rating.

[58] Both Mses. Ruholl and Marion indicated that they complete the initial performance appraisal, recommended a rating, and then meet with the responsible VP and other directors. Then, a discussion takes place. Ms. Ruholl stated that in the end, the responsible VP decides to make a suggested rating that is brought to the next level of the assessment process. After this, a meeting takes place in the absence of directors, at which it is possible that further questions could be brought to her about an employee or suggested rating. Both stated that ratings that they recommended were overturned in the process by VPs or EVPs. In cross-examination, Ms. Ruholl said that about 20% of ratings were overturned at a level higher than that of the director. She provided the names of four VPs who overturned ratings put forward by directors.

[59] Ms. Marion stated that a bell curve is used. She brought up as an example a curve with a 25% superior rating, which would mean that on a team of 10 people, 2.5 could receive that rating. She stated that often, more people are proposed for the higher rating than fit on the curve, which leads to a discussion and hopefully, a consensus. She stated that as a director, she does not have a say in the quota (the

percentage allowed of employees rated superior). She said that since the introduction of the bell curve, she reviews the people on her team. However, the VPs review the larger group of employees, and not everyone proposed for a superior rating will receive it, because of the curve. In cross-examination, it was suggested to Ms. Marion that as long as the suggested ratings were within the bell curve, they were not changed. She disagreed, stating that if a director proposes a rating that a VP disagrees with, it will change.

[60] When she was asked how many performance appraisal ratings have come back to her changed, Ms. Ruholl stated, "Too many to count."

[61] In cross-examination, Ms. Ruholl admitted that when she submitted her appraisal ratings, she submitted more superior ratings than she was allowed to under the bell-curve constraint. She confirmed that as of her testimony, for the appraisal year last completed, she carried out the initial performance appraisals for 13 employees, of which she submitted 1 as outstanding and 4 as superior. At the end of the process, 1 employee received an outstanding rating, and 2 out of the 4 put forward as superior received that rating.

[62] Entered into evidence during Ms. Ruholl's cross-examination was a spreadsheet with respect to her direct reports and the performance appraisal process for a particular unidentified year ("spreadsheet A"). For the purpose of the performance appraisal process, it sets out in columns the name of each direct-report employee, the employee's position, the employee's level; the proposed performance rating, the performance rating from the previous year, and comments from the overall ratings box (from the performance appraisal).

[63] Ms. Ruholl identified spreadsheet A and stated that during discussions, it is gone over, and that the comments can and do change. When it was suggested to her that she had entered the information in the comments boxes, she indicated that she could not say that it was her document.

[64] In cross-examination, Ms. Ruholl was subjected to extensive questioning about the performance appraisal process and the number of employees she supervised during different appraisal periods, along with whom she put forward for each rating. It was suggested that she put forward at least two if not three people on the list to be rated as superior. However, she stated that that was not so and that a particular VP put

them forward for a superior rating. She stated that when the VP did it, it put her “quota” of superiors over the bell-curve limit. She stated that when a VP weighs in, she follows the VP’s recommendation.

[65] When it was suggested to Ms. Ruholl that because she was over her limit of outstanding ratings, the VP was required to make the decision, she stated that she was not over it. The VP’s suggested ratings for other employees put her numbers over the limit, so the VP then made the decision.

[66] In his examination-in-chief, Mr. Iniguez was asked if any VP had ever interfered with his performance appraisal assessments. He replied that none has interfered. He also stated that once, he rated an employee’s performance as unsatisfactory, which he said triggers a demotion or termination. He said that in this particular case, the organization went with a demotion. Entered into evidence was a copy of the letter he authored to that employee dated July 6, 2016, the relevant portion of which is as follows:

...

Therefore I will be recommending to the delegated authority, [name withheld] Vice President, [team name withheld] that action be taken to demote or terminate your employment for unsatisfactory performance in accordance with section 12. (1)(d) of the Financial Administration Act.

As indicated at the meeting, we are moving forward to identify a position, at a lower level, that aligns with your skills and competencies. A further meeting will be scheduled on or after 8 August 2016 to provide you with the decision of the delegated manager.

...

[67] The employer called Ms. Van Noord in reply.

[68] In her examination-in-chief, Ms. Van Noord was asked about the performance appraisal process and was shown spreadsheet A. When she was asked if she changed the ratings, she stated that the final ratings were changed. She described the process and said that a challenge function is carried out with the directors. Together, they go through the documents (spreadsheet A and the spreadsheets for the other teams), exchange information, and discuss the ratings. She stated that she has one meeting with the directors and then one with the EVPs and VPs. She stated that the meeting with the directors is one on one.

[69] Ms. Van Noord stated that changes could be made on the spot in the one-on-one meeting with a director. When she was asked a second time if she made changes, she replied, “No, what goes into Halogen . . . may provide feedback . . . to make a call . . . it is a bell curve . . . very painful process.”

[70] Ms. Van Noord was then asked if Ms. Ruholl’s team spreadsheet reflected what Ms. Ruholl wanted for her team members’ ratings. Ms. Van Noord replied that she did not know. She stated that she did not know the version of the document she was reviewing. When she was asked if she directed Ms. Ruholl to enter a specific rating for any of the employees on the Ms. Ruholl’s team spreadsheet, she stated, “Not that I recall.”

[71] In further reviewing Ms. Ruholl’s team spreadsheet, counsel for the employer brought Ms. Van Noord to a specific employee, whose proposed rating was marked as both P and S. She indicated that the employee had two roles and that the P rating aligned for one role and the S aligned for the other. When she was asked if she gave an opinion as to her rating, she stated, “I was impressed by [employee A]; I don’t recall that conversation.”

[72] Entered into evidence during Ms. Van Noord’s examination-in-chief were two other spreadsheets listing employees and several items of information about them, which was used in the performance assessment process for the performance year ending in 2018. She indicated that during a performance cycle, at least two persons that Ms. Ruholl submitted did not receive her proposed ratings. She also stated that sometimes, other teams are below the curve with respect to ratings. That increases the number of outstanding ratings that other teams can assign.

[73] In cross-examination, Ms. Van Noord was asked about a specific individual during a particular performance cycle who had been rated as superior and who was downgraded to the performing rating. She stated that she did not know the reason for the downgrade. However, she said that she must have received additional information that would have led her to change it. When it was put to her that the curve is not just a quota and that there are other considerations, she replied that a conversation always took place on how to balance performance pay and that it was never just as trivial as a matter of numbers.

[74] Ms. Williamson said that group leaders also carry out performance appraisals.

H. Actively Involved in Developing and Applying Policies

[75] Mr. Levesque testified that he was involved in developing and applying human resource and hiring policies, financial policies by way of providing updates and guidance, and the travel policy, when it was part of his team's mandate. He was asked if he was involved in the salary management policy. He answered in the affirmative and then indicated that its name was changed from being called the staffing directive.

[76] Mr. Iniguez stated that he was involved in drafting a particular energy program in that he had input into it. It was a program particular to his business unit. It had to deal with managing applications brought to his unit with respect to gas exports. He indicated that he reorganized how the system worked, for efficiency.

[77] Neither Ms. Marion nor Ms. Ruholl indicated that she was involved in developing and applying policies.

[78] Ms. Futoransky testified that as a VP, she would ask directors to act for the team and to work with HR to develop policies within the business unit for their team. She stated that directors apply the telework policy within their business units.

I. Manage Budgets

[79] Entered into evidence was a spreadsheet dated April 9, 2018, that set out the 31 director positions at issue in these applications. It identified the Board's file number ascribed to each application as well as other data, including the incumbent director and the budgets for the unit that the director was responsible for. Also entered was a second spreadsheet setting out similar information that was undated but that referred to budget information for the 2018-2019 fiscal year.

[80] From the evidence adduced, these documents were created for the purpose of the exclusion applications to the Board. They were created for the purpose of this litigation. Both budget spreadsheets refer to a salary budget and an O&M budget. The salary budget is the amount each business unit is allotted for personnel salaries, and the O&M budget is for everything but salary.

[81] Ms. Marion testified that as a director, she has no input into the employer's general budget. She stated that budget decisions are made at a level above hers.

[82] Ms. Ruholl testified that she was responsible for the budget of her unit and that the money was spent in the way it was allocated. She stated that if money was allocated for specific items in the unit's budget, she did not have the discretion to spend it on other things. She did confirm that she had signing authority for up to \$25 000, as did all directors. However, she stated that given the way the budget monies were allocated to each business unit, there was very little discretionary spending. She stated that the budgets are notional and that at the end of the day, she makes recommendations, but that the VPs or EVPs make decisions.

[83] In cross-examination, Ms. Ruholl stated that directors make lists of what they need for the upcoming year and that the information goes up the organizational chain. She said that if she needs equipment, such as toner cartridges for printers that would be included in the list for her O&M budget, when the budgets are approved, it would be covered. She stated that she might have a plan for a number of specific items but that they have to go up the chain and be approved elsewhere before they become part of her budget. If she has a budget approved for \$1000 of toner cartridges, she can spend up to that amount on them. She said that if she needs more, she has to ask for it. In short, she stated that she can sign off on items preapproved in her budget. But if they are not in her budget, she cannot sign off on them. She said that she could not think of anything in her O&M budget over which she had discretion.

[84] In cross-examination, with respect to training for the members of her business unit, Ms. Ruholl said that it is included in the budget estimates prepared before the start of a fiscal year and that they may or may not be approved. She did confirm that sometimes, training is not forecast for an upcoming fiscal year. If opportunities arise during the fiscal year after the budget has already been set, because there are limits, they go to the business unit leadership team, which consists of directors and VPs.

[85] In cross-examination, Ms. Ruholl conveyed the example of a meeting held when she was a VP on an acting basis that involved a number of unapproved contracts with respect to business units. She said that she had to go to the Finance Resource Management Committee. Through discussions with an EVP and the CFO, it was determined that it was likely that money would be made available and a budget would be increased. She stated that in her director role, with respect to things not budgeted for and included in the budget, she goes to the VP and makes a request. She stated that

if a business unit's O&M budget is silent on an issue, she does not have discretionary authority; the question of spending on that item is bumped up to the responsible VP.

J. Part of Strategic Decision Making

[86] When she was asked about whether directors are involved in strategic decision making, Ms. Futoransky said that it depends on the team. She said that she recalled memos and meetings about regulatory changes. She said that directors were involved in meetings with the CEO and employer members.

[87] Mr. Levesque was asked about strategic decision making. He answered by stating that he was involved in an annual strategic planning process in which all directors were put in a room, and a consolidated list of information was pushed up to the senior executive levels.

[88] Both Mses. Marion and Ruholl testified that they were not involved in any strategic decision making.

K. Other

[89] Both Mses. Marion and Ruholl testified that as directors, they had no input into collective agreement negotiations or labour relations. In addition, Ms. Ruholl testified that as a director, she has never had any input into classification, while Ms. Marion was not asked any questions about that subject. In addition, in cross-examination, Ms. Marion testified that she was not aware of the HR delegation and stated that if she had an HR question, she would contact an HR advisor.

[90] During the course of Ms. Ruholl's cross-examination, evidence was brought forward with respect to an incident that took place involving some employer inspectors and alleged bullying from an organization other than the employer.

[91] Mr. Iniguez was asked questions about how union stewards had treated him. He stated that they did not treat him professionally or fairly and gave examples of what happened. He said that he was involved in performance-managing an employee who was being represented by the bargaining agent's president. At the performance management meetings, the president treated him unprofessionally. He indicated that he was the target of disrespectful and inappropriate behaviour, including racist comments. He further stated that during the discussions, another bargaining agent representative treated him in an inappropriate, a racist, and a disrespectful manner.

The representative mocked how he spoke English because he is a naturalized citizen, and English is not his first language.

[92] When Mr. Iniguez was asked if he made recommendations with respect to reclassification, he spoke about promoting a person from one level to another, as opposed to reclassifying a position.

III. Summary of the arguments

A. For the applicant

[93] The applicant referred me to *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84, *Humber River Regional Hospital v. ONA*, 2014 CarswellOnt 16646, *Public Service Alliance of Canada v. Canada (Treasury Board)*, PSSRB File No. 174-02-250 (19770214), [1977] C.P.S.S.R.B. No. 3 (QL) (“*PSAC v. TB 1977*”), *Treasury Board (Department of National Defence) v. Public Service Alliance of Canada*, 2000 CanLII 21089, 2000 PSSRB 85, *The Professional Institute of the Public Service of Canada v. Canada (Treasury Board)*, PSSRB File No. 172-02-31 (19710714), [1971] C.P.S.S.R.B. No. 8 (QL) (“*PIPSC v. TB*”), and *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 (“*TB v. PSAC 2012*”).

[94] The applicant seeks that the 31 director positions set out in Appendix A of this decision be excluded under ss. 59(1) (c), (e), (g), and (h) of the *Act*, as the following applies to occupants of the positions:

- they provide advice on labour relations, staffing, or classification;
- they have substantial management duties and authority over employees;
- they have responsibilities that cause them to otherwise not be included due to a conflict of interest or due to other responsibilities to the employer; and
- they have duties and responsibilities that are confidential, in addition to labour relations duties and responsibilities.

B. For the bargaining agent

[95] The bargaining agent also referred me to *PIPSC v. TB* and *TB v. PSAC 2012*. It then referred me to *British Columbia (Labour Relations Board) v. Canada Safeway Ltd.*, [1953] 2 S.C.R. 46, *Canada (Treasury Board) v. Public Service Alliance of Canada*, PSSRB File No. 176-02-287 (19791009), [1979] C.P.S.S.R.B. No. 9 (QL) (“*Canada v. PSAC*”), *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11, *Treasury Board v. Association of Public Service Financial Administrators*, PSSRB File Nos. 172-02-1003 and 1004 (19981202), [1998] C.P.S.S.R.B. No. 106 (QL), *Treasury Board v. Professional*

Institute of the Public Service of Canada, 2008 PSLRB 55, *Public Service Alliance of Canada v. Communications Security Establishment*, 2009 PSLRB 121, *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80, and *International Longshore and Warehouse Union Local 517 v. Prince Rupert Port Authority*, 2002 CIRB 203 (“*Prince Rupert Port Authority*”).

[96] There is no application by the employer under ss. 59(1)(b), (d), and (f), so only the confidential aspect alleged under s. 59(1)(c) can be addressed in this decision. The employer failed to demonstrate that directors are more appropriately placed in the executive group.

[97] These questions and issues are to be answered:

- Do directors have substantial management duties over employees?
- Do directors deal formally on behalf of the employer?
- Are directors in a conflict of interest?
- Are directors in a conflict of interest with respect to labour relations, and do they have confidential duties and responsibilities?

[98] If the answers to the questions meet the threshold, then the second question is whether what the directors do outweighs their right to be members of the bargaining unit.

IV. Reasons

A. The sealing of documents

[99] Although neither party requested that any documents be sealed, the five exhibits entered into evidence as Exhibits E-12, E-13, E-15, E-16, and G-11 all deal with the performance appraisal process and specifically identify employees and, depending on the specific document, their classification levels, a suggested performance rating, a performance rating, or a summary of their appraisals.

[100] The test for sealing documents is set out as follows in *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120:

...

[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for

confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as Dagenais and Mentuck. These decisions gave rise to what is now known as the Dagenais/Mentuck test.

[11] The Dagenais/Mentuck test was developed in the context of requests for publication bans in criminal proceedings. In Sierra Club of Canada, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:

...

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

...

[101] I am satisfied that the test in *Basic* has been met. I find that the salutary effects of a confidentiality order with respect to the documents that reference individual employees and their personal information with respect to the performance appraisal process outweigh its deleterious effects; accordingly such documents should be sealed.

B. Evidence of Mr. Levesque

[102] While Mr. Levesque is a director, the position he occupies has already been excluded. In applications under s. 59 of the *Act*, the position is excluded, not the person. Much of what he testified to was germane to either his position or his particular experience in it.

C. The merit of the applications

[103] Section 59(1) of the *Act* sets out the criteria for excluding positions from a bargaining unit. The applicant brought the 31 separate applications, as set out in Appendix A to this decision, all of which were with respect to director positions

classified at the NEB-12 level. In all the applications, it cited ss. 59(1)(c), (e), (g), and (h). It had the burden of proving that these positions should be excluded.

[104] In *Canada v. PSAC*, at paras. 44 to 46, the PSSRB stated as follows:

44. . . . Since the Canada Safeway Limited decision a three-fold test was evolved to determine confidentiality in matters relating to industrial relations. This three-fold test is a consensus of labor [sic] boards in Canada and it and its rationale were stated in Bank of Nova Scotia [(1977), 77 CLLC 16,090] as follows:

The denial of collective bargaining rights to persons employed in a confidential capacity in matters relating to industrial relations is also based on a conflict of interest rationale. The inclusion of that person in a unit represented by a union might give the union access to matters the employer wishes to hold close in its dealings with the union. These include bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedom and the rights conferred by Part V.

To this end this Board and other Boards have developed a three-fold test for the confidential exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as formulae (e.g. Calona Wines Ltd. [1974] 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21). It does not include personal history or family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it

. . .

45. . . . The person must be “employed” in a certain “capacity”; we are concerned with functions which are a substantial and regular part of a person’s job, not just a matter of occasional and accidental involvement. Moreover, the person must be employed in a “confidential” capacity and this requires a judgment about the

seriousness of the need for secrecy for the information which the employee is privy to.

...

... The employer has an onus to organize its affairs so that its employees are not occasionally placed in this position of a potential conflict of interest if that result can readily be avoided.

46. In Hayes Trucks Ltd., and United Steel Workers of America, Local No. 3253 [1974] 1 Canadian LRBR 284, Mr. Weiler elaborated further on the nature of the confidential exclusion at page 287:

Simply having access to labour relations material of a confidential nature does not, of itself, meet the standard of involvement required. The question under the statute is not to be determined by the test of whether the employee has incidental access to this information; it is rather whether between the particular employee and the employer there exists a relationship that bears the special quality of confidence.

Although a person need not be occupied for the majority of his time in order to be employed in a confidential capacity in matters relating to labour relations, there must be a "regular, material involvement". (Falconbridge case (1966), OLRB M.R. 388). The involvement with the confidential material must be part of the employee's regular duties; some isolated functions that may be described as confidential in matters relating to labour relations, which are merely incidental to the employee's main function, are not adequate to meet the precondition required for exclusion.

[105] At paragraphs 54 and 56 of *Canada v. PSAC*, the PSSRB stated, with respect to supervisory functions, as follows:

54. A very important function of a supervisor is to be a link in the chain of communication between management and employees. The supervisor is expected to relay and interpret the policy and administrative decisions of his superiors. In addition to responding to the needs of management he must advise his superiors of difficulties with the implementation of policy and the concerns and complaints of his staff. This may require him to receive and transmit grievances and make reports or recommendations concerning them. Obviously, some of these communications may be of a confidential nature to one or more persons, but the exchange of such confidences is an integral part of the role of any supervisor. The relationship of Mr. Sisson and Mr. MacKeen in the grievance process is the normal and usual relationship of a supervisor to his superior. It is not "a relationship that stands out from the generality of relations and bears a special quality of confidence."

...

56. . . . If the employer distributes the responsibility for investigating grievances in such a manner as to expose a number of employees to an occasional conflict of interest rather than assigning the responsibility to the smallest practical number it cannot expect to find this Board sympathetic to such an action. If the Board were to designate Mr. Sisson under paragraph (f) of the definition, because on occasion he engaged in the exchange of confidential information relating to grievances with his superior it would establish a precedent that would lead to proposals that other supervisors, similarly involved on occasion with the exchange of confidential information relating to grievances, should be designated as persons “employed in a managerial or confidential capacity”. In doing so we would fail to ensure that the maximum number of persons enjoy the freedom and rights to [sic] collective bargaining.

[106] At paragraphs 151 and 152, *Humber River* states as follows:

151 It is clear that certain of the APN’s [advanced practice nurses] lower-level and higher-level duties and responsibilities have broadly “managerial” aspects in that they transcend what could be regarded as “professional supervisory” tasks. I regard the APN’s role in determining nurses’ educational requirements and her responsibilities with respect to new program initiatives and policy-setting [sic] as falling in the broader managerial category. The exercise of these responsibilities clearly does affect the day-to-day work of the Program’s nurses. However, in my view it does not affect the nurses’ fundamental terms and conditions of employment. Consequently, the exercise of these duties and responsibilities does not put the APN in a conflict of interest with other nurses in the Program.

152 Performance reviews, program changes, budgetary decisions, and decisions made at Management Team Meetings are matters that could conceivably affect bargaining unit nurses’ employment with the Hospital. The evidence indicates that the APN participated in a performance review, and that she has input into program changes, budget allocation decisions, and decisions made at Management meetings. With respect to performance reviews, the process itself ensures that Program Manager retains ultimate authority. Authority with respect to program changes, budget allocation and other high-level decisions is less clear-cut. However, in my view, the evidence sufficiently establishes that the APN either does not have direct authority in respect of these matters, or does not have greater authority than does the Program Manager. I therefore find that the Mental Health and Addictions APN is not above the rank of Program Manager.

[107] Paragraph 17 of *PSAC v. TB 1977* states as follows:

17. . . . While it may be true, as counsel for the Employer argued, that the concept of management team has not yet been

*“accurately defined”, the Board has nevertheless enunciated a number of guidelines that have been applied consistently. We need not elaborate them here except to point out that they imply a real likelihood of conflict of interest because the persons involved participate in, or are privy to, the processes of formulating policies, or decision-making, or administrative management at the higher levels of the particular sector of the public service in which they are employed. However, if it can be said that **all** cases of membership on the management team entail the likelihood of conflict of interest, it does not follow that **all** cases of conflict of interest are necessarily linked to membership on the management team. In other words, a person may be excluded under paragraph (g) even if he could not be considered a member of the management team provided that the proven conflict of interest is latent in duties and responsibilities to the employer which are not otherwise described in paragraphs (c) to (f). . . .*

[Emphasis in the original]

D. Does the exclusion fit under s. 59(1)(c) of the Act?

[108] Section 59(1)(c) of the *Act* refers specifically to the occupant of the position providing labour relations, staffing, or classification advice.

[109] “Advice” is defined in the *New World Dictionary of the American Language, Second College Edition*, as “opinion given as to what to do or how to handle a situation; counsel”. “Advise” is defined “to give advice or an opinion to; counsel; to offer advice; recommend”.

[110] The evidence clearly disclosed that in general, directors have almost no role in labour relations or classification. Under the heading of classification and organizational design in the HR delegation are listed eight subject accountabilities. Of those, directors are listed under only one, the assignment of duties and responsibilities to positions within the team. That can hardly be considered as providing labour relations or classification advice.

[111] The evidence disclosed that in the HR delegation, under the heading of labour relations, the only discipline a director can impose is either an oral or a written reprimand.

[112] In the HR delegation, under the heading of staffing sub-delegation are 10 listed functions that a director is authorized to conduct. However, the purpose of these functions is not to provide staffing advice; instead, they are involved when carrying out a staffing process.

[113] Mr. Iniguez was asked if he had ever been involved in a reclassification. He answered that he had been involved in a promotion process, in which he provided recommendations. That was not classification advice as set out in s. 59(1)(c) of the *Act*.

[114] Generally, grievances would fall under the subject matter of labour relations. The evidence did not disclose that the directors played any role with them other than being allowed to accept one and transmit it to the delegated grievance-step officer.

[115] Generally, collective agreements would fall under the subject matter of labour relations. Again, the evidence did not disclose that the directors played any role in negotiating the collective agreement.

[116] Given the evidence, the applications cannot succeed under s. 59(1)(c) of the *Act*.

E. Does the exclusion fit under s. 59(1)(e) of the *Act*?

[117] Section 59(1)(e) of the *Act* refers to two distinct subject matters that could justify excluding a position. They are 1) substantial management duties, responsibilities, and authority over employees; and 2) dealing formally on behalf of the employer with grievances presented in accordance with the grievance process. I will deal with the second one first.

1. Dealing formally on behalf of the employer with grievances presented in accordance with the grievance process

[118] The evidence disclosed that directors have no authority in the grievance process except to receive a grievance from an employee and pass it to the delegated grievance-step officer. That is not formally dealing on the employer's behalf with grievances presented in accordance with the grievance process.

2. Substantial management duties, responsibilities, and authority over employees

[119] "Substantial" is defined in the *New World Dictionary of the American Language* as "of or having substance; real, actual, true, not imaginary; strong, solid, firm, stout; considerable, ample, large; of considerable worth or value, important; with regard to essential elements; in substance".

[120] The evidence disclosed that directors have some management duties and some responsibilities and authority over employees. It is clear that they have day-to-day

supervisory functions over the people in their business units. The HR delegation discloses that this included the following:

- authorizing employees' hours of work, banked time, and leave;
- authorizing overtime for employees; and
- authorizing leave with pay for periods of three months or less.

[121] In *Prince Rupert Port Authority*, at paras. 69 and 70, the Canada Industrial Relations Board (CIRB) stated as follows:

[69] The Board is familiar with the arguments related to an exclusion sought under the managerial rubric. Board jurisprudence, however has drawn a clear distinction between managerial functions, as referenced in the Code's definition of employee, and supervisory duties. The Board's predecessor, the Canada Labour Relations Board (CLRB), described the nature of a "management function" in British Columbia Telephone Company (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107 (CLRB no. 98), as follows:

. . . There are numerous functions which are recognized as being "management functions": the preparation of the budget, decisions as to the organization of the enterprise and staffing levels, the representation of the employer in collective bargaining or in contract administration, the formulation of corporate policy, the hiring, firing, promoting and disciplining of employees, authorizing time off or overtime, etc. Some of these functions are so important that they warrant a finding that a person performs management functions even if that person exercises only a few of these functions or does so only infrequently. Others are of lesser importance and will not warrant a finding that a person performs management functions unless they represent a major component of the person's job.

(pages 376; 396; and 650)

[70] In Cominco Ltd. (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240), the CLRB described the nature of "supervisory work" as follows:

. . . To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the "management presence" is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.

The fact that employees influence corporate policy or commit an enterprise to expenditures is equally not grounds for

finding a conflict. These are common characteristics of the functions of professionals. They have been given collective bargaining rights. They are also common characteristics of the functions of specialists generally, whether tradesmen, technicians or other groups of employees.

Similarly, the fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men and equipment, evaluates or assesses new and longstanding [sic] employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedules holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict or potential conflict that disentitles him to the freedom to associate. The loyalty and integrity of such a person is not altered by union membership or representation. . . .

[Emphasis in the original]

[122] The evidence in this area included the day-to-day management and supervision of employees within the business units that the director or directors were responsible for, including assigning and monitoring tasks, monitoring hours of work, and approving leave.

[123] I also heard a significant amount of evidence about addressing workplace accommodations. The related evidence indicated that at best, the directors played a minor role when dealing with workplace accommodation issues. They included an authorization to purchase a specialized mouse and keyboard and allowing employees to work flexible hours and take extra breaks based on advice by treating physicians. The exact extent and nature of the directors' role and what they can and cannot authorize was not clear. From the evidence of the four directors who testified and the VP who had been a director, their involvement in accommodations appeared both rare and tangential.

[124] By far the most evidence I heard was about the performance appraisal process and the directors' role in it. Ms. Williamson was the first witness. She testified that directors had full autonomy to assess their employees and that EVPs and VPs did not interfere or overrule any specific rating that a director assigned to an employee. As the hearing progressed, it became clear that in fact, this was not quite accurate.

[125] Employees, in addition to their salaries, can earn performance pay. I was not provided with specifics as to the exact amounts available for distribution; however, the amounts have as their basis the performance rating that an employee receives. The better the rating, the more the performance pay. As only a limited amount of money is available under the performance pay rubric, a bell-curve system was set up, which limited the number of employees who could receive the highest (O) and second-highest (S) ratings. Each director was limited as to the number of O and S ratings he or she could award as part of the performance assessment process, depending on the bell curve set by the employer and the number of employees in each business unit.

[126] As the hearing progressed, it became clear that EVPs and VPs played a significant role in the appraisal process. It became apparent that at least with respect to Ms. Ruholl's business unit, she had put forward specific employees for certain levels of assessment and that her recommended assessments did not carry the day; changes were made against her wishes, and the changes occurred at either the VP or EVP level.

[127] The employer called Ms. Van Noord in reply. Her evidence was to counter that of Ms. Ruholl with respect to the performance appraisals. When Ms. Van Noord was shown spreadsheet A and was asked if she had changed the ratings, her answer was that they had been changed. After some back and forth with the questions, she was asked if the spreadsheet reflected the ratings that Ms. Ruholl wanted. She stated that she did not know as she did not know which version of the document she was reviewing. When she was asked if she had instructed Ms. Ruholl to put specific ratings for certain employees, her answer was not "No"; she stated that it was not that she recalled.

[128] I have no doubt that the directors play an important role in the performance appraisal process. However, it is plain that they are only one piece in the process and that despite what Ms. Williamson might have said, ratings do change. While the employer suggested that it occurs with the directors' acquiescence, at least two of the four directors who testified stated that such changes were made without their concurrence and against their wishes.

[129] Based on the evidence, it is clear that the directors have a supervisory role over employees within their business units. However, the jurisprudence makes it clear that supervisory functions are not necessarily management functions and that there is a

distinction between supervising employees and management duties. Based on the evidence adduced before me, clearly, the directors' functions are limited when it comes to true management duties, which clearly lie at the VP and EVP levels.

[130] Given these facts, the employer did not satisfy me that on a balance of probabilities, the directors' positions should be excluded under s. 59(1)(e) of the Act.

F. Does the exclusion fit under s. 59(1)(g) of the Act?

[131] In *TB v. PSAC 2012*, the Board discusses s. 59(1)(g) of the Act as follows:

...

68 *The use of the term “conflict of interest” in paragraph 59(1)(g) of the PSLRA is somewhat ambiguous. The rationale often provided in the jurisprudence for excluding employees on the grounds that they have “authority over employees” (paragraph 59(1)(e)), are “. . . involved in the process of collective bargaining on behalf of the employer . . .” (paragraph 59(1)(f)), or that they provide “. . . advice on labour relations, staffing or classification . . .” (paragraph 59(1)(c)), is that those functions create a conflict between the duties associated with an employee’s position and the employee’s status as a member of a bargaining unit.*

69 *Paragraph 59(1)(g) of the PSLRA is an umbrella provision that seems meant to catch situations in which excluding an employee can be justified on one of a broad range of grounds not captured by the more specific descriptions in the other paragraphs. The term “conflict of interest” could mean either that the conflict must be identified by examining the duties and responsibilities performed by the employee as a whole (rather than be referring to any specific exercise of managerial authority, decision-making power or labour relations function) or that the specific feature of the position that gives rise to the conflict of interest is not caught by the other paragraphs because not every instance in which a conflict could occur can be anticipated when a statute is drafted.*

70 *The second ground for exclusion under paragraph 59(1)(g) of the PSLRA — “. . . the person’s duties and responsibilities to the employer . . .” — is even more open-ended. That phrase confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities and to call on adjudicators to carefully consider, under that paragraph, the overall relationship between the position and the applicant’s interests. In that context, it is perhaps not surprising that the case law has failed to articulate a set of clear criteria for applying that provision. . . Although the decisions put before me often treat the concepts of the “management team” and “conflict of interest” as being closely related and as part of a holistic approach to assessing a position, they do not provide much in the way of definition or concrete criteria for making such an assessment. To be fair, since*

this provision seems designed as a catch-all that gives the PSLRB wide scope to consider positions for exclusion that are not ordinary and that cannot be anticipated, the PSLRB should not be expected to fetter its discretion by attempting to provide a more restrictive definition of its task.

71 Adjudicators have on many occasions counselled caution when deciding whether a position should be excluded from a bargaining unit. The loss of the bargaining agent's protection and of the benefit of a collective agreement could have significant implications for an employee. Those advantages should not lightly be cast aside.

72 On the other hand, in some circumstances, including an employee in a bargaining unit could impair the effectiveness of that employee's performance of duties essential to the applicant. Paragraph 59(1)(g) of the PSLRA suggests that the reasons for making a finding of that risk could include factors not ordinarily considered. When a finding is made of a fundamental incompatibility between an employee's duties and inclusion in a bargaining unit, the employee's position may legitimately be excluded.

...

76 Paragraph 59(1)(g) of the PSLRA provides me considerable discretion when deciding whether this position should be excluded. Of course, I cannot simply remove the position from the bargaining unit without a rationale. I agree with counsel for the applicant that the jurisprudence invoking that paragraph or its predecessors has not provided any clear definition of the range of circumstances under which it might be applied. That paragraph's clear intention is to permit the PSLRB to consider situations that cannot be aligned with any of the usual rationales for excluding a position from the bargaining unit. Therefore, it is not surprising that no specific outline of the circumstances covered by that paragraph has been produced. One would expect that paragraph to be used sparingly and that any situation in which it is held to apply would be unusual.

...

[132] The evidence presented did not disclose any situation that could not be considered under the usual exclusion criteria under s. 59(1) of the Act. Therefore, the applications cannot be sustained under that section.

G. Does the exclusion fit under s. 59(1)(h) of the Act?

[133] The wording of this section of the Act specifically references that the occupant of the position has, "in relation to labour relations matters", duties and responsibilities confidential to the occupant of a position described in ss. 59(1)(b), (c), (d), or (f). As a

condition to being excluded under this section, the occupant would already be responsible for some labour relations matters.

[134] As set out earlier in this decision, the evidence did not disclose that the director position was responsible for providing labour relations, classification, or staffing advice.

[135] In *Prince Rupert Port Authority*, at para. 71, the CIRB stated as follows:

[71] As for functioning “in a confidential capacity in matters relating to industrial relations,” the key element is not that one has access to confidential information but, more to the point, that the employee has access to the employer’s confidential industrial relations information. In the case of Bank of Nova Scotia (Port Dover Branch) (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91), the Board described the exclusion as:

To this end this Board and other Boards have developed a three fold test for the confidential exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as product formulae (e.g. Calona Wines Ltd., [1974] 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21) It does not include personal history of family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it. . . .

. . .

[136] With respect to discipline, the HR delegation allows directors to issue at most a written reprimand. With respect to the grievance process, their involvement is to receive and pass along any grievance that was filed.

[137] There is no evidence that directors play any role in negotiating collective agreements.

[138] While there was some evidence that the directors that testified had some role to play in an accommodation process with respect to employees, it is clear from that evidence that their roles were minor at best.

[139] In short, there is no evidence that would suggest that the director position has access to confidential information related to industrial-relations matters. The one director position that appears to be different was held by Mr. Levesque as of the hearing. However, it is unique and different from the other positions as it involves providing collective bargaining information and is already excluded.

[140] When leading its evidence, the employer brought forward that at times, some directors, specifically Ms. Ruholl, were in VP positions on an acting basis and that from time to time, other directors would be asked to do the same. In *Association of Public Service Financial Administrators*, at para. 78, the Board stated as follows:

78 That case differs from the present one in that Dr. Larivière and Dr. McQuade shared with the Director the decision-making process and participated in the planning, formulation and development of government policy relating to the provision of clinical care abroad. They replaced the Director as part of their own duties when making an overseas tour. This was in addition to acting in his job when he was absent. Prior to the changes to the legislation in 1993, the person was excluded; now it is the position that is excluded. The possibility of replacement of someone in an excluded position does not justify in itself the exclusion of another position unless that position entails exercising the power of the excluded position as part of the regular duties of that position such as when Dr. Larivière was doing an overseas tour as the Assistant Regional Director. We have no such responsibilities in the Manager, Financial Planning and Analysis (Atlantic) nor in that of Manager, Financial Services (Ontario).

[141] I agree and accept the reasoning set out in that case. While it is 22 years old, I cannot see why its reasoning would not still be valid and apply today. Therefore, unless on their own merits, the director positions would otherwise be excluded under s. 59(1) of the *Act*, they cannot be excluded simply due to the fact that at times, incumbents of those positions are required to be in higher-level excluded positions on an acting basis.

H. Miscellaneous

[142] Spreadsheets were entered into evidence that set out information about the budgets of the business units. Depending on the work of the business unit, monies are allocated to it to ensure that it can meet its mandate. Budgets are split into salary dollars and O&M monies. While some evidence suggests that directors have some

discretionary spending powers, I accept the evidence of Ms. Ruholl and Marion that in reality, the discretionary power to spend budget monies is limited.

[143] As salary dollars are fixed based on the positions and salaries of those in the positions, most of the evidence brought forward related to the O&M budget monies. The evidence disclosed that while there may be some discretion with respect to the O&M budget monies, it is clear that largely, the budget monies are fixed.

[144] An example of discretionary spending would be training courses and travel for training. Depending on the monies allocated in the O&M portion of the budget for each business unit, the director can determine how these monies are spent. This is certainly not large-scale budget decision making that would qualify for an exclusion under any part of s. 59.

[145] During the course of Ms. Ruholl's cross-examination, evidence was brought forward with respect to an incident that took place involving some employer inspectors and alleged bullying from an organization other than the employer. It is not clear how exactly it fits into the areas of exclusion. If it does, it was certainly a one-time incident that involved one director, and it certainly does not appear that it could otherwise fall under the exclusion criteria.

[146] I also heard evidence about the disrespectful manner in which certain members of the bargaining agent treated Mr. Iniguez when he was dealing with issues involving the performance management of a member of his business unit. The evidence disclosed that while he was aware that he was also a member of the bargaining unit and therefore represented by the bargaining agent, he was not aware of its internal policies and procedures dealing with inappropriate behaviour. This is not relevant to whether a director position should be excluded under s. 59 of the Act.

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

(The Order appears on the next page)

V. Order

[148] The applications are dismissed.

[149] The documents entered as Exhibits E-12, E-13, E-15, E-16, and G-11 are ordered sealed.

December 22, 2020

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

Appendix A

572-26-3095

572-26-3128

572-26-3129

572-26-3130

572-26-3131

572-26-3132

572-26-3133

572-26-3134

572-26-3135

572-26-3136

572-26-3137

572-26-3138

572-26-3139

572-26-3140

572-26-3141

572-26-3142

572-26-3143

572-26-3144

572-26-3145

572-26-3146

572-26-3147

572-26-3148

572-26-3149

572-26-3150

572-26-3151

572-26-3152

572-26-3153

572-26-3154

572-26-3155

572-26-3236

572-26-3422