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Citation: 2021 FPSLREB 48

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

NABIL FARHAN, SLAVEK KSHONZE, ANTHONY GREEN, YURI GRINCHUK, GARY KAKIS, DANIEL MACLEAN, AND RAJ PATIL

Grievors

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Farhan v. Canada Revenue Agency

In the matter of individual grievances referred to adjudication

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

For the Grievors: Meira Gisser, Professional Institute of the Public Service of Canada

For the Respondent: Alexandre Toso, counsel

Heard via videoconference,
November 30 and December 1, 2020.
(Written submissions filed January 13 and February 12 and 26, and April 12, 2021.)

REASONS FOR DECISION

I. Introduction

[1] Salary protection following a downward reclassification is well established as a term and condition of employment across most of the federal public service. With salary protection, when an employee's position is reclassified to a group and level with a lower maximum rate of pay, the employee's salary is protected at their former group and level.

[2] The issue raised by these grievances is what happens to an employee's salary protection when the employee's former group and level ceases to exist following a classification conversion that applied to that former group and level.

[3] Until November 2002, the seven grievors in this matter, Nabil Farhan, Slavek Kshonze, Anthony Green, Yuri Grinchuk, Gary Kakis, Daniel MacLean, and Raj Patil, were employed by the Canada Revenue Agency ("the CRA" or "the employer"), classified at the PM-06 group and level in the bargaining unit represented by the Public Service Alliance of Canada ("PSAC"). They were then reclassified to the CO-02 group and level in the bargaining unit represented by the Professional Institute of the Public Service of Canada ("PIPSC").

[4] As the maximum PM-06 rate of pay was higher than the maximum CO-02 rate of pay, the grievors were told that they would be salary protected at the PM-06 rate of pay.

[5] In 2007, the CRA implemented a new classification plan covering most employees in the PSAC bargaining unit, called the Services and Programs Group (SP). The PM-06 classification ceased to exist, and the CRA and PSAC stopped negotiating a PM-06 rate of pay. After November 1, 2007, the grievors were paid at a PM-06 salary-protected rate of pay calculated by the CRA.

[6] The majority of the PM-06 positions were placed into the SP-10 group and level. The grievors argued that salary protection entitles them to be paid at the SP-10 rate of pay, which is approximately $3000 per year higher than the PM-06 salary-protected rates they have been receiving. They filed grievances between May 22 and 29, 2013.

[7] The employer made two preliminary objections.

[8] The first was that the issues raised in this grievance were already settled in a decision of the predecessor Public Service Labour Relations Board ("the PSLRB"): *Motamedi v. Canada Revenue Agency*, 2013 PSLRB 50. It said the grievances should be dismissed in accordance with the principle of "issue estoppel", or alternatively, "abuse of process," which it related closely to the rule against "collateral attack." The grievors raised the same issue, on the basis of the same facts, and seek the same remedy as did the grievors in *Motamedi*. The matter should not be relitigated, it argued.

[9] PIPSC argued that the criteria for issue estoppel and abuse of process are not met in this matter. These are not the same grievors as those in *Motamedi*. It also said that the grievors would produce evidence that the CRA had provided them with "assurances" that they would be paid at the SP-10 level, facts that were not before the PSLRB in *Motamedi*.

[10] The employer's second objection was that the grievances were untimely; they were filed more than 10 years after the grievors were reclassified and more than 5 years following the implementation of the SP rates of pay.

[11] PIPSC took the position that the grievances were of a continuing nature and that they should not be found untimely.

[12] I determined that I would hear the parties' evidence and then hear their arguments on both the preliminary objections and the merits of the grievances. The evidence was provided through an agreed statement of facts, a joint book of documents, and two days of witness testimonies. The parties provided their arguments through written submissions.

[13] On the timeliness objection, I conclude that the grievances were of a continuing nature and thus are timely.

[14] I take seriously the employer's arguments with respect to issue estoppel. The case meets most of the criteria required for the objection to succeed. However, in this case, I have exercised my discretion and decided that it would be fairer to provide the parties with finality to the grievances on their merits.

[15] I also analyze the employer's arguments regarding abuse of process (related to the integrity of the adjudicative process) and collateral attack (related to the motives

of the parties). I do not find that these grievances amount to an abuse of process or a collateral attack.

[16] On the merits of the grievances, I conclude that the CRA has been applying salary protection correctly. The collective agreement (between the CRA and PIPSC with an expiry date of December 21, 2014) does not provide the result the grievors are looking for: compensation at the SP-10 rate of pay. I find the grievors' evidence about the CRA's assurances both unreliable and not relevant to the interpretation of the collective agreement.

[17] The grievances were referred to adjudication on September 29, 2014. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) (the *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the PSLREB") to replace the 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 *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *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*.

[18] 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* ("the *Board Act*"), and the *Federal Public Sector Labour Relations Act* ("the *Act*").

II. Summary of the evidence

[19] As noted, most of the evidence was provided through an agreed statement of facts, supported by a joint book of documents. In addition, two of the grievors were called to testify, Daniel MacLean and Gary Kakis. The employer called one witness, Odette Cyr, Assistant Director of Classification and Operations at the CRA.

[20] I will start by summarizing the evidence from the agreed statement of facts and joint book of documents and evaluating the similarity between these grievances and those at issue in *Motamedi*. I will then turn to and evaluate the grievors' additional evidence.

A. The agreed facts of the case

[21] The grievors are (or were) employed in the CRA's Scientific Research and Experimental Development (SR&ED) Program. Until November of 2002, they were classified at the PM-06 group and level and were in a bargaining unit represented by PSAC. Their position was called regional science advisor, with a national job description numbered PM0757.

[22] By letters dated either November 18, 2002, or November 22, 2002, the employer informed the grievors that their positions were to be classified at the CO-02 group and level, reflecting changes in program direction. They were provided with a new work description, titled "Research and Technology Advisor", for a position numbered CO0007. The new CO position combined former positions from both the PM-05 and PM-06 group and levels.

[23] The parties agreed that there was no change to the grievors' duties as a result of the classification change, and there had been none as of the date the grievances were filed.

[24] As the CO-02 maximum rate of pay was lower than the PM-06 maximum rate of pay, the employer's letters informed the grievors that they would be entitled to salary protection in accordance with the Treasury Board's *Regulations Respecting Pay on Reclassification or Conversion* ("the *Regulations*"). The letters specified the following:

> …
>
> *In accordance with these Regulations, you will continue to receive the pay entitlements for the PM-06 group and level. This salary protection will continue until you leave this position or until such time as the CO-02 maximum salary surpasses the PM-06 maximum salary. Please note that for all other purposes, your terms and conditions of employment, including leave and hours of work, will derive from the PIPSC collective agreement, as of the effective date of this decision.*
>
> …

[25] The CRA "delimited" the PM0757 position on May 31, 2004. Ms. Cyr testified that this meant that the position was deleted as an active position from the CRA's human resources system, except for historical purposes.

[26] Until October 31, 2007, the grievors were salary protected at the PM-06 rate of pay negotiated between the CRA and PSAC.

[27] In 2007, the CRA completed a comprehensive classification reform program for the occupational groups represented by PSAC to replace the Treasury Board classification systems with one tailor-made for itself. As noted, most PSAC-represented employees were assigned to the SP Group. The majority of PM-06 positions were converted to the SP-10 group and level. The grievors' positions were not converted; they continued to be classified at the CO-02 group and level.

[28] On December 3, 2007, the CRA and PSAC signed a collective agreement (expiry date: October 31, 2010; "the *2010 PSAC Agreement*"), which included rates of pay for the new SP Group and its levels. The maximum SP-10 rate of pay, effective November 1, 2007, was $96 011. That collective agreement no longer contained a PM-06 rate of pay.

[29] After November 1, 2007, the grievors were salary protected at a PM-06 rate of pay calculated by the employer based on its interpretation of the *Regulations*. It relied on section 7 of the *Regulations*, which reads as follows:

> *7. If the group or level at which the employee's salary is protected ceases to exist, pay entitlements shall be adjusted to reflect revisions approved from time to time for the more recently identified position level.*

[30] In other words, the CRA has adjusted the PM-06 rates of pay from time to time to reflect percentage increases in annual rates of pay it negotiated with PSAC for the SP-10 group and level. At November 1, 2007, the grievors were paid an annual salary of $93 174, just under $3000 less than the SP-10 rate of pay. Over time, the difference between the salary-protected PM-06 and SP-10 maximum rates of pay increased to slightly over $3000.

[31] In their agreed statement of facts, the parties reported that no revisions had been made to the grievors' salary since November 1, 2015. However, on November 13, 2020, shortly before this matter was heard, a new collective agreement was signed

between the CRA and PSAC. It contained revisions to pay retroactive to November 1, 2016. The Board asked the parties to clarify the grievors' situation. In submissions made April 12, 2021, they confirmed that pay increases for the grievors as a result of the signing of the new PSAC-CRA collective agreement had not yet been processed.

[32] In other words, those grievors still employed by the CRA remain salary protected at the PM-06 rate of pay calculated by the CRA.

[33] The seven grievors presented their grievances to the employer between May 22 and 29, 2013. The grievances asserted that salary protection to the PM-06 group and level entitled the grievors to be paid at the SP-10 rates of pay. They requested payment at that level retroactive to November 1, 2007. However, before the Board, the grievors requested payment at the SP-10 rates of pay retroactive to 25 days before their grievances were filed.

[34] I find that there are no appreciable differences between these core facts and those in *Motamedi* (as summarized at paragraph 2 of that decision). Those two grievors (Mr. Motamedi and Mr. Parmar) were also regional science advisors at the CRA paid at the PM-06 group and level. In November 2002, they were also reclassified to the CO-02 group and level. After the SP Group was created, they also filed grievances and sought salary protection at the SP-10 rate of pay. They were represented by their bargaining agent (PIPSC) at adjudication. The only significant difference is that the grievances in *Motamedi* were filed on March 3, 2009, more than four years earlier than those before me.

B. Alleged assurances during the conversion process

[35] I turn now to the testimony provided by the witnesses and to the question of whether the grievors were provided with assurances that they would be salary protected at the SP-10 group and level.

[36] Both Dr. MacLean and Dr. Kakis testified that when they were reclassified in 2002, they understood that for matters of salary, they would continue to occupy the PM-06 group and level. They believed that the reclassification letters they received made a promise that they would continue to be treated as if they were at the PM-06 group and level.

[37] When the SP standard was being finalized, the grievors received information about the conversion process, along with other CRA employees. On November 6, 2007, they received an "Advance Employee Notification" (AEN) about the conversion to the SP standard. It was directed to employees in 16 classifications, including Programme Administration (PM). The AEN invited employees to follow a link that would inform them of their new SP classification level.

[38] On December 3, 2007, the day that the CRA and PSAC signed a new collective agreement containing SP rates of pay, the CRA sent an "Official Employee Notification" (OEN) directed to the same group of employees as the AEN. The notification confirmed that "… all jobs currently classified within the occupational groups noted above are converted to the new Services and Programs (SP) group effective November 1, 2007." Employees were once again provided with a link to access information on their new SP level and salary. They were also provided with a link to information about the conversion project, including grievance rights. The OEN stated that the implementation of the SP standard was not a reclassification exercise but a conversion.

[39] The OEN said that the conversion involved applying the new classification standard to existing jobs, with no impact on work descriptions, assigned duties, or reporting relationships.

[40] Both Dr. MacLean and Dr. Kakis testified that they thought that the AEN and OEN applied to them, as they were salary protected at the PM-06 group and level. They said that this was commonly understood by all the members in their group. They believed that they would be converted to the SP-10 group and level because all their former PM-06 colleagues had been so converted. They believed that the AEN and OEN promised it. They understood that they were in a unique situation and that the conversion process would take some time to be implemented but believed that eventually they too would receive the SP-10 rate of pay.

[41] In cross-examination, both Dr. MacLean and Dr. Kakis were asked why they testified that the AEN and OEN applied to them, while their grievances stated these two documents had **not** directed them. They said that their grievances asserted that the AEC and OEN **should** have been applied to them.

[42] Both were also asked in cross-examination if they followed the link in the AEN or the OEN. Neither could recall having done that.

[43] Ms. Cyr testified that the links in the AEN and OEN took employees to a new "short form" position description and the classification result (i.e., which level of the SP Group they would occupy after conversion). She testified that no short-form work description had been created for positions classified CO because they were not affected by the conversion. Neither Dr. Kakis nor Dr. MacLean could recall having received a short-form work description.

[44] Dr. Kakis also testified that he understood that the classification reform project began before he received his reclassification letter in 2002. He stated a belief that the November 2002 letter should have acknowledged the employer's plan to eliminate the PM classification.

[45] Ms. Cyr testified that a classification-reform project was begun in 2003 but that it was suspended after the customs portion of the Canada Customs and Revenue Agency was transferred to the core public administration in late 2003. She stated that the SP classification conversion project was started in May of 2005 and that it culminated in November of 2007. She explained that the CRA provided employees with access to information about the conversion process through an internal website.

[46] My conclusions about this evidence are as follows. The grievors have not established that the AEN and OEN applied to them. The wording of both notices clearly stated that they applied to employees in 1 of 16 occupational groups, including the PM Group. When the AEN and OEN were sent to employees, the grievors occupied positions classified at the CO-02 group and level. That is the group and level listed on their work description.

[47] I have no doubt that the grievors now believe that the AEN and OEN should have applied to them. However, I am entirely unconvinced that the notices provide any reliable assurance of this. Had the grievors believed in the fall of 2007 that the notices applied to them, it would have made perfect sense to click on the link in the notices, to see their result. Neither witness could recall doing that. Had they done so, Ms. Cyr's testimony convinces me that they would have found that employees in positions classified in the CO Group were not provided with a result because they were not impacted by the conversion process. It did not apply to them.

[48] In other words, the grievors have not established that either the AEN or the OEN represented an assurance from the CRA that they should expect to be converted to or to be paid at the SP-10 group and level.

C. The email assurances provided by a compensation advisor

[49] The grievors also asked me to consider as evidence of the CRA's assurances an email provided to one of their colleagues by one of its compensation advisors. As neither person appeared before me, I will call the colleague "Mr. M" and the compensation advisor "Ms. Y".

[50] The first email was dated March 3, 2008, with a subject line that read, "Regarding your inquiry into … rate of pay in salary protected CO and date of changes due to SP conversion". In the email, Ms. Y stated that if Mr. M's pay did not reflect the SP rates by June 2008, he should contact compensation services. She also said, "As salary protection is not my strength, I have re-directed your request to my unit QAT (similar to a resource officer) for clarification."

[51] Two days later, she wrote as follows: "I recently talked to my unit QAT regarding your request. She did confirm my calculations that your CO-02 salary will incease [*sic*] to the salary associated with an SP-10 at the fourth level of $93 215".

[52] The grievors' representative asked for a summons to call Mr. M as a witness, and I issued one. At the hearing, she indicated that Mr. M had agreed to testify but then had stopped responding to PIPSC's inquiries. It was unable to serve the summons on Mr. M, and he did not testify. The employer originally intended to call a compensation advisor as a witness but did not. PIPSC did not ask to call her.

[53] Both Dr. Kakis and Dr. MacLean testified that Mr. M was a colleague of theirs and a regional science advisor salary protected to the PM-06 group and level. Although they were not direct recipients of the email, the information in it was shared within the group, they said. The email had convinced them that they would eventually be paid at the SP-10 level and was proof that the CRA had assured them of that.

[54] The employer objected to this email being accepted as evidence. Mr. M was not one of the grievors, it argued. Because Mr. M's inquiry to Ms. Y was not included in the email provided to the Board, the assumptions on which Ms. Y's answer was based

cannot be known. Neither Mr. M nor Ms. Y was called to testify to the email's accuracy and authenticity.

[55] In cross-examination, the employer asked the grievors when they first received a copy of the email in question. Dr. MacLean said he believed that it was in 2013. Dr. Kakis said that he could not recall but that it might have been after he filed his grievance.

[56] The employer also questioned both grievors about another email, dated May 12, 2009, from another compensation advisor, "Ms. L", to Mr. Farhan. This email stated that "[a]s you are currently performing the duties of the CO 02 conversion does not apply and you will continue to receive the revised PM 06 rates of pay." Ms. L explained that he would receive economic increases of 2.5% per year for each of 2007, 2008, and 2009, and attached a document containing the salary-protected rates of pay for the PM Group. Neither witness recalled seeing this email before the hearing.

[57] I accept that the email to Mr. M appears to confirm that he should have expected to be placed on the SP-10 pay grid by June of 2008. I do not entirely dismiss it as a piece of evidence, but I do not accept it as reliable evidence that the CRA intended the SP conversion to apply to the grievors. Ms. Y's answer might have been based on different information. Her answer might also have been misinformed about the SP conversion process; in the email, she admits that she is not an expert in salary protection. Or her answer might simply have been wrong.

[58] In any case, I do not find credible the grievors' assertion that they relied on this email as a group. They testified that they had been in regular communication with each other and that they had sought clear answers from the employer as to when they would be converted to SP-10. After they failed to receive clear answers, the email helped convince them that they were correct. However, they provided no explanation as to why the March 5, 2008, email to Mr. M **did** receive circulation among them, while the May 12, 2009, email to Mr. Farhan **did not**. I do not know if Mr. Farhan failed to receive that email, forgot about it, or simply chose not to circulate it to the group.

[59] Moreover, the grievors provided me with no argument as to how Ms. Y's email — even if it was a reliable assurance of the CRA's intentions — ought to guide my interpretation of the provisions on salary protection in the collective agreement or the *Regulations*. They did not argue that her email represented a promise to them by the

employer upon which they relied (promissory estoppel). For the reasons outlined as follows, my decision relies on analyzing the collective agreement and the *Regulations*.

D. The timing of these grievances in relation to those in *Motamedi*

[60] The final section in this summary of evidence is about the timing of these grievances in relation to those in *Motamedi*, which is relevant to my analysis of the employer's preliminary objections. As noted, Mr. Motamedi and Mr. Parmar filed their grievances on March 3, 2009. They were heard by Michael Bendel, sitting as an adjudicator for the PSLRB, on February 12 and 13, 2013.

[61] Dr. MacLean testified that in April 2013, he reviewed a CRA-PSAC collective agreement that contained the SP-10 rates and that he noted the discrepancy in pay between his rate of pay and that of an SP-10. He said that it gave rise to the drafting of the grievance wording. Six of the seven grievors signed their grievances on May 3, 2013; the seventh was signed on May 27, 2013. Dr. MacLean testified that only later did he learn of the grievances in *Motamedi*. Dr. Kakis testified that PIPSC had told them about the case and that they were advised to wait for that result before filing their grievances.

[62] The PSLRB's decision in *Motamedi* was released on May 13, 2013.

[63] A PIPSC representative signed the bargaining agent's approval for the presentation of the grievances between May 22 and May 28, 2013.

[64] The employer contended that the grievances were a collateral attack on the decision in *Motamedi*, filed deliberately by PIPSC before the deadline for filing a judicial review had even passed.

[65] I am not convinced that the grievors intended to attack the PSLRB's decision in *Motamedi* by filing their grievances. The evidence is that most of them signed their grievances on May 3, 10 days before *Motamedi* was released. I would not assume that news of the decision's release would have made it down to the relevant level of PIPSC when it signed its approval to file the grievances later in May.

[66] However, it is clear that at every level of the grievance process, the employer relied on the PSLRB's decision in *Motamedi* when denying these seven grievances. It is also clear from the grievance presentation notes submitted as part of the joint book of

documents that the grievors and their representatives were aware of that decision and that at each level of the grievance process, they took the position that the *Motamedi* decision was wrong.

[67] I also note that the publication of *Motamedi* on the Board's website reports that the grievors in that case filed for judicial review but that they later withdrew their application (Federal Court file T-1049-13).

[68] I will return to the relevance of these additional facts when I consider the employer's preliminary objections.

III. Reasons

[69] I will analyze the parties' arguments and provide my reasons for decision under the following headings:

A) Should the grievances be dismissed as untimely?
B) Should the grievances be dismissed on the basis of issue estoppel, or alternatively, abuse of process or collateral attack?
C) Has the CRA failed to provide salary protection in accordance with the collective agreement?

A. Should the grievances be dismissed as untimely?

[70] I noted earlier the employer's argument that the grievances were untimely. This objection was raised at each level of the grievance process and upon the referral to adjudication.

[71] The grievors argued that their grievances are of a continuing nature because they address their salaries. In response to the employer's argument, they revised the remedy sought to payment retroactive to 25 days before the grievances were filed.

[72] The employer's arguments that the grievances were untimely were focused on the classification decisions made by the employer (the reclassification in 2002, and the classification conversion in 2007). While the grievors were clearly upset about these decisions, their grievances were about salary protection. On that basis, I am prepared to accept the grievors' argument that their grievances were of a continuing nature. As I dismiss the grievances on their merits, I do not believe that a lengthy analysis of the parties' arguments on this objection is required.

B. Should the grievances be dismissed on the basis of issue estoppel, or alternatively, abuse of process or collateral attack?

[73] As noted, the employer argued that these grievances should be dismissed based on issue estoppel, or alternatively, abuse of process or collateral attack. It argued that in all material respects, these grievances are identical to those already decided by the PSLRB in *Motamedi*. The matters are so similar that the entire statement of facts at paragraph 2 of *Motamedi* could be used in the context of these grievances, it said.

[74] PIPSC should not be able to relitigate this matter, it argued. If it disagreed with the PSLRB's decision in *Motamedi*, it could have pursued a judicial review of it. Allowing PIPSC to proceed to adjudication would "… grant a license to bargaining agents to relitigate identical grievances years after they have been decided, simply by bringing forward different grievors", it said.

[75] PIPSC argued that issue estoppel should not apply as these seven grievors were not parties to *Motamedi*. These grievors rely on new facts that were not before the PSLRB and have new arguments to make that were not made in *Motamedi*.

[76] The employer asked me to apply issue estoppel in accordance with the decision of the Supreme Court of Canada (SCC) in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. At paragraph 25, the SCC set out these three necessary preconditions for issue estoppel:

> …
>
> *(1) that the same question has been decided;*
>
> *(2) that the judicial decision which is said to create the estoppel was final; and,*
>
> *(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.*
>
> …

[77] I find that the first precondition is easily met in this case. The issue in these grievances is identical to that in *Motamedi*. They involve the same bargaining agent, the same bargaining unit, and the same collective agreement. They involve the same reclassifications (from PM-06 to CO-02, in 2002) and the same classification conversion process (from PM-06 to SP-10, in 2007). The same remedy is sought; in both matters, the grievors argued that they should be paid at the rates found in the SP-10 pay grid.

[78] The second precondition is also met. In accordance with what is now s. 34(1) of the *Board Act*, Board decisions are final, subject only to the judicial review process. A similar provision (within the *PSLRA* itself) governed the PSLRB's decisions. In the case of *Motamedi*, the grievors filed for judicial review but later withdrew their application. That decision was final.

[79] On the third precondition, the employer argued that although the grievors are different, the bargaining agent is a privy to them. It took the position that the concept of privity must be decided on a case-by-case basis (see *Danyluk*, at para. 60, and *Ontario v. O.P.S.E.U.*, 2003 SCC 64). It argued that the Board has accepted bargaining agents as privies for individual grievors (see *Bishop-Tempke v. Treasury Board*, 2017 PSLREB 3 at para. 35). It should do the same in this case, because the grievors require their bargaining agent's support to both file a collective agreement grievance (per s. 208(4) of the *Act*) and to proceed with it to adjudication (per s. 209(2)).

[80] The extent to which a bargaining agent can act for a grievor has been a matter of some debate in Board decisions. I have noted the PSLREB's decision in *Bishop-Tempke*, which accepted the bargaining agent as a privy for the grievor. In *Godbout v. Treasury Board (Office of the Co-ordinator, Status of Women)*, 2016 PSLREB 5 at para. 64, it found that the requirement that a bargaining agent represent a grievor in a collective agreement grievance means that it is the owner of that grievance. In *Kruse v. Treasury Board (Canada Border Services Agency)*, 2020 FPSLREB 85 at para. 35, the Board found that the withdrawal of bargaining unit representation means that the matter may not proceed to a hearing.

[81] On the other hand, in *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)*, 2020 FPSLREB 117 at para. 22, the Board found that representing a grievor at adjudication does not make a bargaining agent the same party for the purposes of determining the application of *res judicata* (a similar concept to issue estoppel). Similarly, in *Renaud v. Canadian Association of Professional Employees*, 2009 PSLRB 177 at para. 51, the conclusion reached was that individual grievances do not "belong to the bargaining agent", as the *PSLRA* clearly required that the employee make the referral (as does the *Act* today). In *Fontaine v. Robertson*, 2021 FPSLREB 19, the Board ruled that individual grievances belong to an employee and that bargaining agents cannot accept settlements on behalf of a grievor.

[82] In assessing whether the third precondition for issue estoppel is met in this matter, I am guided by the thinking and the conclusions of the Board and its predecessor in *Godbout*, *Bishop-Tempke*, and *Kruse*. In a collective agreement matter such as this, the bargaining agent's decision to support the grievance at every stage in the process, including at adjudication, is fundamental to its progress through the system. Had the bargaining agent decided **not** to support the grievance during the grievance process or **not** to provide representation at adjudication, it would have stopped this matter in its tracks. PIPSC provided representation at each stage of the internal process, supporting the grievors' arguments in front of the CRA's decision makers. It supported them at adjudication, just as it did in *Motamedi*. It clearly is their privy in this matter.

[83] However, a determination that the three preconditions laid out in *Danyluk* are met does not automatically lead to upholding the employer's objection. The employer argued that in *Danyluk*, the SCC set out limited discretion for decision makers to deny issue estoppel, once the three preconditions are met. It set out seven factors for doing so.

[84] I note that in *Danyluk*, the SCC ruled that lower courts had failed to use discretion when they should have. I also note that the SCC adopted a more flexible approach to the exercise of discretion in applying issue estoppel in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19. At paragraph 69, the SCC concluded that "[i]ssue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties. It is a flexible doctrine that permits the court to respond to the equities of a particular case."

[85] When the employer first made its objection based on issue estoppel, the grievors indicated that they had new evidence to introduce and new arguments to make that were not at issue in *Motamedi*. I determined it best to hear that evidence and those arguments at the hearing, in conjunction with the parties' arguments on both the preliminary objections and the merits of the matter. The only further judicial economy to be had is with respect to my analysis of their arguments and my writing of these reasons for decision.

[86] In my assessment, a dismissal of the grievances on the basis of issue estoppel, almost seven years after they were referred to adjudication, would be unfair and would

not provide finality to these grievors in understanding why the collective agreement does not entitle them to the SP-10 rate of pay. After the conversion to the SP standard took place in 2007, they believed that eventually, the CRA would conclude that fairness would require paying them at the same rate as their former PM-06 counterparts. Since filing their grievances in 2013, they have been seeking finality to their assertion that they should be paid at the SP-10 level. The grievors may apply a PhD level of scientific knowledge to their work for the CRA, but they testified that they did not understand the PSLRB's reasons in *Motamedi* and that they still seek an answer to **their** grievances. Providing them with that answer involved hearing all of their evidence and weighing all of the arguments they put forward.

[87] The preamble to the *Act* recognizes that "… the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment …". I find it is fairest and most efficient to give finality to these grievances on their merits.

[88] The employer made an alternative argument that if the "strict requirements of issue estoppel are not met," the Board should apply the doctrine of abuse of process. It submitted that "[a]buse of process is closely related to the rule against collateral attack, which holds that an order should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it." Among several authorities cited, it took me to *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63 at paras. 51 and 52, *Boucher v. Stelco Inc.*, 2005 SCC 64 at para. 35, and *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 34.

[89] I understand that the SCC has ruled that mal intent is not required for abuse of process to be established. Abuse of process is about the integrity of the adjudicative process, as summarized in *Toronto (City)*, at para. 51:

> *51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself,*

> *will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.*

[90] However, all three SCC decisions cited by the employer (*Toronto (City)*, *Boucher*, and *Figliola*) involved the **same** parties — not their privies. The grievors in this matter did not have the right to file an application for judicial review on *Motamedi*. I have accepted that PIPSC is a privy to grievors for the purposes of issue estoppel. However, **these** grievors were not entitled to seek judicial review of *Motamedi*.

[91] Furthermore, the employer's arguments here were that the grievors engaged in a collateral attack on *Motamedi*, an action it described as "particularly egregious." It took the position that the grievors deliberately filed their grievances in response to *Motamedi*, in lieu of a judicial review. I do not find this concurs with the evidence. Most of the grievors signed before their grievances before the PSLRB's decision in *Motamedi* was released. Their bargaining agent representatives approved the presentation of the grievances only very shortly after the release of the decision. In fact, a judicial review of *Motamedi* was filed by the grievors in that matter. However, these grievors are different, and are seeking an answer to the grievances they signed.

[92] I do not find that the grievances before me amount to an abuse of process or collateral attack.

C. Has the CRA failed to provide salary protection in accordance with the collective agreement?

[93] I turn now to the merits of the grievances.

[94] The grievors' arguments focused on two documents. The first is a memorandum of understanding (MOU) between PIPSC and the Treasury Board signed on July 21, 1982, concerning pay upon reclassification ("the *PIPSC MOU*"). The second document is the aforementioned *Regulations*, which is a document of the Treasury Board of Canada Secretariat dated November 1, 1991, but with an effective date of December 13, 1981.

[95] The *PIPSC MOU* is incorporated into the Audit, Financial and Scientific (AFS) Group collective agreement between the parties in effect at the time the grievances were filed (expiry date: December 21, 2014) by virtue of clause 44.06, which reads as follows:

> ***44.06*** *This Article is subject to the memorandum of understanding signed by the Treasury Board Secretariat and the Professional Institute of the Public Service of Canada dated July 21, 1982 in respect of red-circled employees.*

[96] Article 44 is titled "Pay Administration" and concerns how the employer administers pay. The identical wording of this provision is found in both previous and subsequent AFS collective agreements between the parties (expiry dates were and are December 21 of 2007, 2010, 2018, and 2022).

[97] Although clause 44.06 states that the *PIPSC MOU* is "in respect of red-circled employees", in fact, the *PIPSC MOU* provides for salary protection. Its Part I applies to incumbents of positions that "… will be reclassified to a group and/or level having a lower attainable maximum rate of pay after the date this Memorandum of Understanding becomes effective." The key provision at issue in this matter is paragraph 2 of Part I, which reads as follows:

> *2. Downward reclassification notwithstanding, an encumbered position shall be deemed to have retained for all purposes the former group and level. In respect to the pay of the incumbent, this may be cited as Salary Protection Status and subject to Section 3(b) below shall apply until the position is vacated or the attainable maximum of the reclassified level, as revised from time to time, becomes greater than that applicable, as revised from time to time, to the former classification level. Determination of the attainable maxima rates of pay shall be in accordance with the Retroactive Remuneration Regulations.*

[98] A virtually identical MOU was entered into by PSAC and the Treasury Board and was dated February 9, 1982 ("the *PSAC MOU*"). It is also incorporated into the different collective agreements between PSAC and the CRA (see, for example, the one with the expiry date of October 31, 2021, at clause 63.05, reproduced at Appendix F). The wording of paragraph 2 of Part I of the *PSAC MOU* is identical to that of the *PIPSC MOU*.

[99] The employer argued that the *PIPSC MOU* does not apply to the grievors; it applies only to those employees who are reclassified **from** PIPSC groups. When the grievors were reclassified, they were in the PSAC bargaining unit, but they are no longer covered by a PSAC-CRA collective agreement. Following *Janveau v. Canada (Attorney General)*, 2003 FC 1337, the grievors' entitlement to salary protection flows

only from the employer's *Regulations*, which reside outside the collective agreement and therefore outside the Board's jurisdiction, it said.

[100] I do not agree. Considering both the specific wording of the collective agreement at issue and its overall scheme, it is clear that the employer has agreed, through collective bargaining, to provide employees who were reclassified downwards after 1982 with salary protection. It has agreed to identical language in its agreements with both bargaining agents, PIPSC and PSAC. Clause 44.06 clearly provides that pay will be administered in accordance with the *PIPSC MOU*; the PSAC agreements provide the same thing with respect to the *PSAC MOU*. Both MOUs were signed in 1982, the *PSAC MOU* to cover all PSAC bargaining units, and the *PIPSC MOU* to cover all PIPSC bargaining units. Both MOUs contain identical language at Part I, paragraph 2. The CRA, as a separate agency, has maintained the same collective agreement provision and the same MOUs in its collective agreements with both PSAC and PIPSC.

[101] *Janveau* provides clear guidance as to which collective agreement applies to an employee when the employee is reclassified from one bargaining agent to another and as to which bargaining agent must represent the employee. The grievor in that case was a former Computer Systems (CS) Group employee, represented by PIPSC. He was reclassified to an Engineering and Scientific Support (EG) Group position, represented by PSAC. The Federal Court held that he could only file a grievance under the collective agreement covering his EG position, and only with PSAC's support. That is not the issue in this case — there is no dispute that the collective agreement that applies to the grievors is the AFS one between the CRA and PIPSC and no dispute that PIPSC is the legitimate bargaining agent representing them.

[102] The idea that grievors crossing from one unit to another fall into some kind of collective agreement no man's land when it comes to salary protection is not found in the PSLRB's ruling in *Motamedi*. The argument is also inconsistent with the decision in *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 61 (upheld in 2017 FCA 111), which concerned salary protection for employees transferred into bargaining units at the Treasury Board from separate employers. At paragraph 102, it was concluded that "[t]he intent of the 1982 Memorandum is clear: employees of the CPA [core public administration] should be protected in the event that through no fault of their own, their positions are reclassified to a group and level having a lower maximum rate of pay …".

[103] While I have concluded that the grievors have enjoyed the protection of paragraph 2 of Part I of the *PIPSC MOU* since their reclassification to a CO-02 position in 2002, I do not find that it provides the results they seek concerning the SP-10 level.

[104] The grievors argued that the words "… retained for all purposes the former group and level" should include the subsequent conversion of all PM-06s to the SP-10 group and level. Since positions classified at the PM-06 group and level were converted to the SP-10 group and level in 2007, the phrase "for all purposes" should entitle the grievors to pay at the SP-10 level, they said.

[105] The problem with this argument is that the 2007 conversion from PM to SP was not a part of the grievors' terms and conditions of employment when they were reclassified in 2002. The employer began developing the SP standard in 2005, long after the grievors were reclassified to the CO-02 group and level, within the AFS bargaining unit. The SP conversion was completed in December 2007. The grievors were not subject to the conversion process.

[106] Furthermore, the SP-10 group and level was not reserved for PM-06s. Employees previously classified at the AS-07, IS-06, and PG-05 groups and levels also became SP-10s. Many of the SP Group levels combined employees from several of the 16 occupational groups affected by the conversion, as evidenced by Appendix B of the *2010 PSAC Agreement*. Some of the SP Group levels combined employees from as many as 6 previous groups and levels.

[107] Also, while most of the PM-06s became SP-10s, it was not the only possible result of the classification conversion process. While it does not appear that any PM-06s were classified downwards, it could have happened. In fact, in the *2010 PSAC Agreement*, the CRA and PSAC agreed on salary-protected rates of pay for several former classifications that had ceased to exist (e.g., AS, DA, GS, and PI). Subsequent collective agreements between the CRA and PSAC have maintained these salary-protected rates of pay.

[108] The grievors' former group and level was PM-06, not SP-10. The *PIPSC MOU* entitles them only to the salary of a PM-06, as revised from time to time. The concept of "pay for all purposes" does not entitle the grievors to the subsequent classification conversion to the SP-10 group and level experienced by most PM-06s.

[109] The *PIPSC MOU* is silent on what happens if the former group and level ceases to exist. However, there is a specific provision for this scenario at section 7 of the *Regulations*, which reads as follows:

> *7. If the group or level at which the employee's salary is protected ceases to exist, pay entitlements shall be adjusted to reflect revisions approved from time to time for the more recently identified position level.*

[110] In *Motamedi*, the grievors had accepted that section 7 had been correctly applied but argued that the *PIPSC MOU* superseded the *Regulations*. In this case, the grievors argued that the employer has not complied with section 7. They argued that the words "revisions approved from time to time" are not restricted to annual increases but ought to include the classification conversion.

[111] I disagree. I do not find any support for the notion that the conversion was a salary revision "approved from time to time". Once again, while the vast majority of PM-06s were converted to the SP-10 group and level, it was not the only possible result of the classification conversion. In a classification conversion, some employees may end up receiving higher rates of pay, while others might be converted to a group or level with a lower rate of pay, for example, if in this case, some PM-06s had been made SP-09s.

[112] Furthermore, the first rate of pay put into place for the SP-10 group and level was not a revision "approved from time to time". Clearly evident from the *2010 PSAC Agreement* is that the parties first agreed to establish a new "from" rate for the SP-10 group and level. Following that, they negotiated economic increases to the SP rates of pay for each November 1 of 2007, 2008, and 2009.

[113] I find that the establishment of a brand-new pay grid for a brand-new group and level did not constitute a pay revision for the purposes of section 7 of the *Regulations*. The subsequent economic increases did constitute pay revisions, and the record shows that these economic increases were used when the CRA calculated the PM-06 salary-protected rates paid to the grievors.

[114] This interpretation is consistent with the meaning given the phrase "pay revision" in *Harrison v. Canada Customs and Revenue Agency*, 2004 PSSRB 178 at para. 10. In that decision, the former Public Service Staff Relations Board (PSSRB) concluded

that a pay revision was a change in the rates of pay for an occupational group and level, not a change in salary as a result of a promotion. My analysis takes this a step further, concluding that a pay revision does not include the establishment of the pay rates for a newly created classification.

[115] The grievors' argument about the *Regulations* also ignores the clear provisions of sections 13 to 16, which apply to classification conversions. They provide salary protection for employees if the pay rate of the new plan is less than the pay rate of their previous group and level. Section 13 clearly states that this part of the *Regulations* applies "… where an employee is subject to conversion to a new group …".

[116] These grievors were not subject to the SP conversion. They were formally classified at the CO-02 group and level in 2002. When the conversion took place in 2007, they were no longer classified at the PM-06 group and level. The AEN and OEN were not directed to them. They were not provided with a short-form job description. They were not given an SP classification. None of the employer's alleged "assurances" have convinced me that the CRA ever intended that the grievors be converted to the SP standard.

[117] As argued by the employer, unlike section 7, which generally references revisions to rates of pay, sections 13 to 15 set out precisely which rate of pay is to be paid to an employee subject to a classification conversion. In other words, where the *Regulations* seek to spell out which rate of pay is to be used, they do so. Section 7 does not do that; it speaks only to the more general concept of revisions to rates of pay.

[118] I will note that the employer argued that the *Regulations* do not form a part of the collective agreement and therefore are outside the Board's jurisdiction. This same argument was addressed in *Motamedi.* While the PSLRB did not conclude it had jurisdiction over the *Regulations*, it found CRA had properly applied them.

[119] I am guided by the PSSRB's reasoning in *Harrison* at paragraph 12, in which it found that employer policy documents can be useful for determining the common understanding of compensation-related terms. The *Regulations* have been in place since before the signing of the 1982 MOUs. They are, in fact, an essential document for understanding what "Salary Protection Status" means when referred to in the MOUs.

[120] Finally, the grievors argued that if the Board found either the *PIPSC MOU* or the *Regulations* ambiguous, they should be paid at the SP-10 rate out of a sense of fairness. All their former PM-06 colleagues were turned into SP-10s. The CRA should treat them the same way. The CRA had promised to treat them as if they were still PM-06s, but now they have fallen well behind in terms of compensation.

[121] First of all, as already discussed, I do not find the collective agreement ambiguous.

[122] Second, I think that the grievors' arguments misunderstand the significance of salary protection as a negotiated provision in the collective agreement. This was also evident in Dr. Kakis' testimony, when he expressed the view that the CRA was legally bound to salary-protect him, or it would be open to a charge of having demoted him.

[123] The grievors are not due salary protection out of fairness or some general legal requirement. The CRA has the power to reclassify positions. Clause 44.06 and the *PIPSC MOU* were negotiated by the grievors' bargaining agents (both former and current) to describe what happens to an employee's salary if the employee is reclassified downwards.

[124] The plain language of clause 44.06 and the content of the *PIPSC MOU* indicate that salary protection was negotiated to **replace** holding rates of pay — what is commonly known as red-circling. This is clearly evident in Part II of the *PIPSC MOU* (as well as the *PSAC MOU*), which address the status of employees that were subject to "holding rates of pay" when those documents were signed. Those employees were not provided with salary protection status. However, they too received superior treatment to holding rates of pay; Part II provided for the payment of lump sums equivalent to any economic increases negotiated for an employee's former group and level.

[125] In the event of a downward reclassification, salary-protection status is far superior to red-circling. Salary protection exists because it was negotiated, in 1982. The grievors are not left to the CRA's whim to establish the rates of pay it sees fit; the employer is bound, via the *PIPSC MOU* and the *Regulations*, to revise the PM-06 rates of pay upwards from time to time, applying the same economic increases it negotiated with PSAC for the SP Group.

[126] Finally, I agree with one final assertion made by the employer, which is that if PIPSC did not want its members to be dependent on rates of pay determined by the CRA, it was always open to it to negotiate salary-protected rates of pay for these employees in the context of bargaining for the AFS Group collective agreement. PSAC did not have the authority to bargain on behalf of the grievors, who were CO-02 employees represented by PIPSC. PSAC could negotiate salary-protected rates of pay only for its members, and it did so. PIPSC could seek to negotiate PM-06 salary rates of pay for its CO-02 members.

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

(The Order appears on the next page)

IV. Order

[128] The grievances are dismissed.

April 29, 2021.

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