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File: 561-02-41630

Citation: 2021 FPSLREB 76

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

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

NATIONAL POLICE FEDERATION

Complainant

and

TREASURY BOARD

Respondent

Indexed as
National Police Federation v. Treasury Board

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

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Malini Vijaykumar and Amanda Le, counsel

For the Respondent: Kieran Dyer, counsel

Heard at Ottawa, Ontario, via teleconference,
March 9, 10, and 11, 2021.

REASONS FOR DECISION

I. Complaint before the Board

[1] The National Police Federation (NPF), the authorized bargaining agent for all of the employees who are RCMP members (excluding officers and civilian members) and all the employees who are reservists, and the complainant in this matter, alleged that that respondent, the Treasury Board, violated s. 107 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") when it changed the terms and conditions of employment of the members at the Red Deer City Detachment ("the detachment") in Red Deer, Alberta, during the statutory freeze period, contrary to that section. The complainant alleged that the implementation of paid parking at the detachment headquarters constituted a change to the terms and conditions of employment for its members as they had previously been allowed to park for free.

II. Summary of the evidence

[2] The parties submitted an agreed statement of facts, which is reproduced here without the attachments:

…

> *1. The Royal Canadian Mounted Police (RCMP) is Canada's police force. The RCMP has an agreement with the City of Red Deer to provide municipal policing in the City. The RCMP also has an agreement with the Province of Alberta to provide provincial policing in Alberta. The RCMP in Red Deer only provides municipal policing services.*
>
> *2. The RCMP works out of 2 detachments in Red Deer. The detachment in question in this complaint is located in the downtown area at 4602 – 51st Avenue. The RCMP has approximately 175 members providing municipal policing in this detachment.*
>
> *ALERT*
>
> *3. The Alberta Law Enforcement Response Team (ALERT) is a separate organization created by the Government of Alberta to combat organized and serious crime. The ALERT team in Red Deer occupies office space at the detachment building at 4602 – 51st Avenue with 18 policing positions and two civilian employees.*
>
> *Municipal Policing Services*
>
> *4. The City of Red Deer's Municipal Policing Services (MPS) department provides administrative support to the RCMP.*

> *Municipal Policing Services has 103 employees working in the detachment building at 4602 – 51st Avenue.*
>
> ***The Statutory Freeze***
>
> *5. On July 12, 2019, the National Police Federation (NPF) was certified as the sole bargaining agent for all regular members and reservists of the RCMP below the rank of Inspector.*
>
> *6. On July 15, 2019, the NPF served Treasury Board with its Notice of Intention to Bargain ….*
>
> *7. The City of Red Deer owns parking lot P10. P10 is located at the north of the same block as the downtown detachment. When the statutory freeze began, RCMP Members, ALERT employees and MPS employees could park their personal vehicles for free in lot P10.*
>
> *8. On January 2, 2020, the City of Red Deer converted lot P10 into a monthly paid parking lot.*
>
> *9. On February 26, 2020, the NPF filed the present complaint with the Board under section 190(1)(c) of the* Federal Public Sector Labour Relations Act*.…*
>
> *10. Treasury Board responded to the complaint on July 24, 2020.…*
>
> *11. The NPF filed its reply submission on August 21, 2020.…*
>
> *12. Currently, the City of Red Deer's monthly rate for parking at the P10 lot is $55 per month.*
>
> …
>
> [Emphasis in the original]

[3] According to the complainant, the RCMP had a cost-sharing agreement with the Alberta Law Enforcement Response Team (ALERT) for the detachment's premises. ALERT vehicles were allowed within the secure parking compound, in exchange for which ALERT was to lease parking lot P10 from the City of Red Deer ("the City") for the use of NPF members, without charge. The members had been displaced from the secure compound because of the limited parking being taken up by ALERT vehicles.

[4] Before ALERT moved into the building, members parked their cars in the secure lot in the empty spaces intended for police vehicles. When ALERT moved in, their police vehicles required space in the compound, so 12 spaces were no longer available for RCMP members to park their personal vehicles, according to Geoff Greenwood.

[5] Mr. Greenwood testified that he had been posted to the detachment since it moved to the new premises on 51 Avenue in 2013. He never paid for parking after he moved there. He testified that officers would park at unmetered spaces along the road

adjacent to P10 or in the secure lot, if spaces were available. This continued until the spring of 2014 when, at a morning briefing, Detachment Commander Warren Dosko advised those assembled that ALERT was renting P10 for members to park in, at no cost to them. In exchange, parking in the secure lot would no longer be available to them.

[6] Mr. Greenwood entered into evidence an email that he testified was sent to all new RCMP members arriving at the detachment. The email from the detachment's administrative non-commissioned officer mentioned a parking pass authorizing the member to park in P10, which was also known as the "employee lot" (Exhibit 2, tab 10). Nowhere did the email mention a cost to the members for parking in P10. The detachment building is owned by the City and is used to house both federal and municipal policing employees.

[7] In 2015, Mr. Greenwood became a member of the Detachment Management Team, which was composed of three City representatives who were members of Municipal Policing Services (a group that shared the detachment building and that provided the detachment with administrative support) and three members of the detachment. Among other things, the team discussed issues and concerns related to the detachment building. At a meeting held on February 1, 2018, it discussed ice removal from P10 after a slip-and-fall injury was reported. According to Mr. Greenwood, the City's works department had to be asked to clear P10, which was not the RCMP's responsibility. The minutes of the meeting reflect this discussion (Exhibit 2, tab 55B).

[8] Mr. Greenwood testified on cross-examination that if an RCMP member had a complaint about the condition of P10, the member would bring it to his or her RCMP manager, who would follow up with the appropriate City manager. Problems with P10 might have been discussed at the management team meetings, but City employees were responsible for any action and follow up with the City.

[9] At the end of 2019, the management team was advised that the City intended to implement paid parking for everyone using P10. Members were then briefed to this effect. A notice was sent to all members from the City advising of the changes (Exhibit 2, tab 27). This was the first that the members heard about having to pay for parking, according to Mr. Greenwood, and it arrived in time for the December 2, 2019, member

briefing, at which it was explained. The implementation date was January 2020. On cross-examination, Mr. Greenwood was asked about the notice he received on December 2, 2019, about the changes to P10. He testified that the notice made no sense. The members had received no notice verbally or otherwise. There had been no consultation, discussion, or mention of the agreement with ALERT that it would lease P10 for the use of the detachment's members.

[10] According to Mr. Greenwood, he never consented to the change to paid parking. The RCMP never offered to cover the cost of the new parking charge; no one did. He was upset by the change and did not understand why it was implemented. He testified that the members were not provided with a rationale for the change or an explanation of why there had to be an additional cost for parking. He was aware that City employees did not receive paid parking.

[11] According to Mr. Greenwood, he did not expect that he would not have to pay for parking. He also did not understand why there was a change when no one had paid between 2014 and 2019. The members wanted to know why there had to be a change just because the City said that it did not pay for its employees' parking. At his previous detachment, Mr. Greenwood paid for parking at a meter. He did not expect that he would receive free parking when he moved to Red Deer. He never claimed the free parking in P10 as a taxable benefit when he filed his income tax returns. He expected that ALERT would pay the rent for P10 and that the members would be allowed to park there.

[12] Robert Marsolier testified that he has worked at the detachment offices at 4602-51 Avenue in Red Deer since 2013, when members parked their personal vehicles on the surrounding streets or within the confines of the secure lot, if they were able to secure a spot. He remembers that when the City installed parking meters on the streets, the detachment secured an agreement with it that its members could park in the City-owned lot, P10, at no cost. Without this option, members had to park at the meters, since the first spots to go were those inside the secure compound.

[13] Lot P10 was gravel and is owned by the City. Before the detachment took it over, the businesses in the area used it. According to Mr. Marsolier, he began parking there early in 2013. Also according to him, from 2013 on, no one from the detachment paid for parking. The parking at P10 was free, based on an agreement between the

detachment and ALERT that allowed ALERT to park its surveillance vehicles in the secure compound. That removed the scramble parking that had otherwise been available to the members for their personal vehicles. Superintendent Dosko brought the agreement to his attention.

[14] The agreement was made, and members were given parking passes to hang from their rear-view mirrors, indicating that they could park in P10 (Exhibit 2, tab 10). Sergeant Sokowlowski handed them out to new members on their arrivals at the detachment for them to use while assigned there.

[15] According to Mr. Marsolier, everyone at the detachment referred to P10 as the employee parking lot. Members did not pay to park there between 2013 and 2019, when that December, they were told that they would have to start paying for parking. Mr. Marsolier testified that he attended a briefing attended by three City employees, at which he was advised that changes were being made and that members of the detachment would have to start paying for parking in P10. The members later received an email to that effect (Exhibit 2, tab 27).

[16] The detachment members had no say in the decision to implement paid parking. No consideration was given to alternatives, according to Mr. Marsolier. The members were told that if they did not want to pay the monthly cost of parking in P10, they could find parking in the residential areas, blocks away from the detachment building. The cost of the parking was ultimately reduced to $55 per month, once people found cheaper lots elsewhere. When Superintendent Grobmeier became the officer in charge, he tried to negotiate with the City to reinstate free parking, but was unsuccessful, according to Mr. Marsolier, even though members at the City's north-end detachment do not pay for parking.

[17] Mr. Marsolier described the impact of the City's decision on the members at his detachment. They felt unappreciated for what they did for the City and its residents. He also did not understand why the RCMP were not treated the same as those who worked for fire and emergency medical services; they received free parking.

[18] Dan Konowalchuk testified that he was seconded from the RCMP to ALERT to be the officer in charge of the team that worked from the same building as the regional detachment on 51 Avenue in Red Deer. ALERT was a joint task force of departments plus the RCMP and the Alberta Sheriffs department that was created to work on gang-

related and organized crime. ALERT was to be housed in the north wing of the detachment building. According to Mr. Konowalchuk, the plan was that all the policing for the community would be housed in that building: municipal, ALERT, and RCMP.

[19] Mr. Konowalchuk did not remember whether ALERT paid rent for the space it used, although it was able and willing to, according to him, because in other regions where ALERT's offices were housed in detachment offices, written agreements existed, and rents were paid. According to his testimony, he was aware that the regional detachment had parking issues when the decision was made for ALERT to co-locate in the detachment building on 51 Avenue.

[20] According to his testimony, Mr. Konowalchuk intervened with the detachment commander about how their teams could be accommodated. In the later part of 2012, he spoke to Mr. Dosko about the parking pressures created by the addition of ALERT and how they could find additional parking for the members. Parking was required for ALERT's surveillance vehicles within the secure compound. The detachment required parking for its marked and unmarked vehicles. Members used extra parking spaces for their personal vehicles.

[21] They explored the possibility of a lease agreement with Imperial Oil for parking space, which was refused because of the responsibility for ground contamination. The City found another spot of land (P10), which it was agreed ALERT would lease. In exchange for the RCMP allowing ALERT surveillance vehicles to be parked within the fenced compound, the members would be offered parking in P10. This arrangement never came to fruition, according to Mr. Konowalchuk, but since the City was looking for parking for its employees in the building at 51 Avenue, ALERT and the RCMP joined with the City, and the members were provided with parking in P10.

[22] Edward (Ted) Miles testified that he was the chief executive officer of ALERT when the Red Deer office was opened. He testified that the cost of the office space ALERT used in the detachment building was provided out of his budget. He worked with contractors on the requirements and design of ALERT's space. ALERT was a funding organization, according to Mr. Miles, and not an organization separate from the RCMP. RCMP officers were seconded to this organized-crime and gangs unit but were paid through ALERT programs.

[23] Mr. Miles testified that he had no direct discussions with the City or the RCMP about parking; however, he stated that he believed that Mr. Konowalchuk did. He did remember that there were issues with parking ALERT vehicles within the secure compound at the regional detachment. Parking surveillance vehicles had to be considered as part of the implementation plan. He did not recall any agreement being reached with the City or the RCMP on parking for members or civilians. He had no idea whether an agreement to pay for members' parking ever materialized, although he would have been the person responsible for making that decision.

[24] Mr. Dosko testified that he was the commander of the detachment in 2013 and that he had oversight of the administration and operation of policing at that detachment until December 2013. He recalled that in 2011, RCMP vehicles were parked within the secure compound surrounding the detachment building on 51 Avenue. Empty spaces were filled on a first-come, first-served basis. Anyone who could not find a space parked on the surrounding streets. At no time did the RCMP and the City have an agreement to provide members with free parking; the only services provided were set out in the Municipal Police Services agreement for the City, and the accommodations provided were set out in the accommodations agreement (Exhibit 12). The only parking identified in the agreement was for police vehicles and visitor parking.

[25] As the officer in charge, Mr. Dosko's opinion was that parking for officers' personal vehicles close to the detachment building was essential for response time. In 2011, there was no designated right to park in the area near the building. Mr. Dosko raised the issue with Dave Kingston, the senior municipal manager, several times and was told that City policy was not to provide its employees with paid parking.

[26] In ALERT role, Mr. Dosko had authority only over the internal management of policing services. He had no authority over space or the impact that policing services would have on that space, including parking. The availability of parking had zero operational impact. The impact was on the employees, according to Mr. Dosko. They were looking for parking. The idea of ALERT paying for them to use P10 was never part of any discussion with the City concerning locating ALERT with the detachment at 51 Avenue. Nor did it have any impact on Mr. Dosko's decision to support locating ALERT at that location.

[27] Mr. Dosko testified that he did not recall when the discussion started about using P10 for the detachment building's staff. His decision to locate ALERT there was made long before any discussion about P10 ever happened, according to him. In any event, P10 was not an RCMP lot. It was used by everyone who worked at 51 Avenue: those with the RCMP, those with municipal policing, and ALERT personnel.

[28] The pass system was implemented by Mr. Kingston, who was in charge of City policing services at 51 Avenue, because P10 was full, and the City wanted to ensure that no one from the local businesses around it used it for parking. City employees implemented and maintained the parking-pass system. If the lot was full, members and employees had to find parking elsewhere. Mr. Dosko was clear in his evidence that he never took any steps to secure parking for RCMP members. Any complaints about P10 were addressed to the City works department, which maintained the lot.

[29] On cross-examination, Mr. Dosko reiterated that he had no authority or oversight over the allocation of resources to ALERT. He would have been involved in discussions across agencies about that allocation, but he had no decision-making authority. Had an agreement been made that bound the RCMP or ALERT with respect to P10, he would have been involved only indirectly. He would not have been responsible for negotiating a lease for P10, but he would have been aware of one.

[30] Mr. Kingston was his point of contact for ALERT concerning the possibility of leasing P10, and Mr. Dosko presented the P10 option to ALERT on behalf of Mr. Kingston. But the entirety of the conversation was limited to advising ALERT's decision makers that P10 was available for lease from the City for parking personal vehicles. Leasing it would have addressed the impact of ALERT displacing personal vehicles from the secure lot. To the best of his knowledge, according to Mr. Dosko, the final decision was to proceed with ALERT using the secure compound parking without assuming the obligation for leasing additional parking.

[31] Paul Goranson testified that he was the general manager and director of protective services for the City when ALERT joined the RCMP on 51 Avenue. He was the point of contact for the RCMP for city services. The City had contracted policing services from the RCMP. The contract said nothing about the City providing members with parking for their personal vehicles. It laid out the general categories of what the City would provide and pay for and what accommodations the RCMP would receive. It

did not include the use of P10. Between 2013 and 2019, the City received no payment from the RCMP, ALERT, or municipal workers who used P10.

[32] In 2018, the City Council made changes to the City's corporate parking policy, which set a new direction for managing parking services. The Council wanted parking to become financially viable and to be run as a business. Parking was eliminated for City staff; any member of City staff who required a vehicle had to find a parking space at his or her own cost. If that person required a vehicle for work, he or she received a parking allowance.

[33] This policy was eventually extended to include P10 in late 2019. A notice was sent to all RCMP and municipal-policing staff in early December 2019, advising them that effective January 2, 2020, they would be charged to park in P10. Parking blocks, lighting, and other minor improvements were made to the lot in anticipation of the change.

[34] City Council received complaints from RCMP members, but the response that was issued was that the changes were consistent with the City's new parking policy and that it was the second phase of its implementation. Other options were available to members for parking in the area: lot P9, lot P1, a hospital lot south of 45 Street, or on-street parking. And a transit stop is immediately in front of the detachment building. P10 was not the only option open to members to park their personal vehicles.

[35] The parking of personal vehicles is not explicitly excluded from the Municipal Police Services agreement between the City and the RCMP. There is no mention of parking for personal vehicles. The parking anticipated under the agreement is for the security of police vehicles and equipment. P10 was called "the RCMP lot" because of its location and because it was primarily used by people working at the detachment. which included those with municipal policing and ALERT and RCMP members.

[36] Gerald Grobmeier testified that he was the officer in charge of the detachment in 2019. He was not aware of an agreement for the City to pay for RCMP member parking. He was aware that the members and civilian employees used P10 for scramble parking. It was generally full on weekdays, and if there were no spaces, those looking for parking had to find it elsewhere. He emailed all detachment employees on December 2, 2019, to advise them of the City's intention to convert P10 to a paid lot.

The costs of parking there were outside the Municipal Police Services agreement and were passed on directly to the members.

III. Summary of the arguments

A. For the complainant

[37] The purpose of a statutory freeze like the one in s. 107 is to allow parties to start bargaining on an even footing. The statutory freeze provisions are strict liability. No anti-union animus need be proven (see *National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2020 FPSLREB 71 at paras. 38 and 39; "*Whistler*").

[38] RCMP members enjoyed free parking in lot P10 from 2013 to 2019 after discussions among the RCMP, the City, and ALERT on renting the lot for overflow parking so that ALERT had space within the secure compound for its surveillance vehicles. Members and employees became accustomed to the free parking in lot P10 that came about after the City installed meters on the streets surrounding the detachment building. The metered parking contributed to the lack of parking that was brought to the attention of RCMP management at the same time the discussions were occurring about vehicle overflow from the secure compound.

[39] Six months after the start of the freeze period, unionized members were advised that they would now have to pay for parking. This was a breach of s. 107 of the *Act*. The legal test is set out in *Whistler*. The complainant had to show the following:

1. that a term and condition of employment existed on the date on which notice to bargain was served;
2. that the respondent changed the term and condition of employment without the complainant's consent;
3. that the change occurred during the freeze period; and
4. that the term and condition of employment could have been included in a collective agreement.

[40] If the complainant successfully answers these four questions in its favour, the respondent must then prove to the Federal Public Sector Labour Relations and Employment Board ("the Board") that it did not violate the statutory freeze provision of the *Act*. The Board will consider what the respondent would have done if it was not possible for it to do its business as usual. The respondent may avoid liability if it can

show that the change is consistent with its business as before or that is making the change consistent with what a reasonable employer would have done.

[41] According to *Whistler*, it is one or the other; either it was consistent with business as usual, or there was no choice. The respondent does not get two kicks at the can. The reasonable-employer analysis comes into play only if the business-as-usual analysis is not workable.

[42] In this case, the complainant successfully met all four criteria set out in *Whistler* and in *National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2020 FPSLREB 72 ("*Victoria*"). An obligation to provide a free parking benefit in P10 or elsewhere has been established. The evidence shows that free parking was a term and condition of employment. It was known that the RCMP was contracted by the City to provide police services. The members always parked on City-owned land for free. P10 was the lot of first choice if no space was available in the secure lot. Failing this, members would have to find someplace else, requiring payment.

[43] The contextual indicators establish the existence of the term and condition of employment (see *Canadian Union of Public Employees, Local 1840, v. New Brunswick (Board of Management)*, 2014 N.B.L.E.B.D. No. 27 (QL); and *Ontario Nurses' Association v. Scarborough Centenary Hospital Association*, 1979 CanLII 839 (ON LRB)). P10 was used exclusively for detachment members, who had always been provided with free parking either there or on the street. The members would contact the City with maintenance requests. They were accustomed to using the lot *ex gratia*, which can become a term and condition of employment, according to *Whistler*.

[44] The members understood that ALERT and the City had an agreement for the use of P10. It did not matter that it had never been signed. Their right to park in the secure lot was taken away with the addition of ALERT vehicles, so something had to be given in kind to replace that right. The complainant had a reasonable expectation that the RCMP had an agreement with ALERT and the City that would ensure that its members would be provided with free parking in P10. The RCMP relied on the existence of that agreement when it gave up parking space in the secure lot.

[45] In the alternative, if the City was to charge the members, it was ALERT's duty to pick up the cost of parking for the complainant. The evidence supports the assertion that it was willing to, in exchange for the essential parking required for its vehicles

inside the secure compound. If the RCMP did not enforce the agreement with ALERT to pay for parking in 2019, it breached its obligations to the members, because it did not pursue its obligation to ensure the continuation of the term and condition of employment.

[46] Despite the fact that the cost of the complainant's members' salaries is charged to the City, they are still RCMP members. The bargaining agent for the applicant did not consent to any change in the terms and conditions of employment of its members. The change to parking policy was clearly made within the statutory freeze period. Parking is commonly included in collective agreements. Therefore, the complainant met the requirements of the test set out in *Whistler*.

[47] Having met the test in *Whistler*, the question then becomes whether the change to parking policy was a change from business as usual for the RCMP. In 2020, the RCMP did not ask ALERT to pay for the cost of parking its members' personal vehicles, as discussed in 2013. This was a change from how business was conducted previously, when there was no longer free on-street parking, and the RCMP brokered an arrangement for its members to park in P10 with ALERT and the City. It was proactive in resolving the situation, contrary to what happened in these circumstances.

[48] The business-as-usual analysis is possible, so a reasonable-employer analysis is not required. Alternatively, a reasonable employer would have enforced the contractual arrangements with ALERT. In 2013, ALERT had the funds and was happy to help, according to Mr. Konowalchuk. The members' sworn testimony was that had payment been necessary to park, ALERT would have paid it. There is room within the interpretation of the Municipal Police Services Agreement for the RCMP to raise the cost of parking because it is silent on the question. The RCMP did not raise it; therefore, it failed to meet its continuing obligations to the complainant.

B. For the respondent

[49] The question to answer is whether the Treasury Board must step into the shoes of a third party to provide a benefit that it did not provide previously. According to Mr. Dosko, in 2011, when he arrived, the RCMP was at the new detachment building on 51 Avenue, and parking was available within the secure compound on a first-come, first-served basis. Others parked on the street, in P9, or elsewhere. When ALERT expressed interest in locating to the detachment building, the City was approached

about parking. It responded that there was plenty of parking for its vehicles at the detachment.

[50] Mr. Kingston negotiated between ALERT and the City for ALERT to move into the detachment building. The RCMP had no part in those negotiations. Parking at the detachment was a problem for everyone working there; City employees had the biggest problem, so the City proposed using P10.

[51] The parking passes used for P10 clearly stated "City of Red Deer". Even though they were distributed by an RCMP member, no one ever thought that the RCMP issued them or had anything to do with them. By distributing them, the RCMP merely stated that free parking was available, courtesy of the City. Mr. Miles testified that there were issues with parking police vehicles, not personal vehicles.

[52] There is nothing in the Municipal Police Services Agreement between the City and the RCMP on parking personal vehicles. Anyone working at the detachment had access to P10 on a first-come, first-served basis. Parking issues related to P10 were raised at meetings of all the managers in the detachment. These meetings were not exclusive to RCMP managers. P10 was not on RCMP premises.

[53] In 2018, the City developed a change to its parking policy to cover the entire city. Mr. Grobmeier was an innocent bystander. He tried to intervene with Mr. Goransen on behalf of the members, to no effect. Employees' expectations are not part of the test in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 ("*Walmart*"). Reasonable expectations come into play only once the term and condition of employment has been established under the old framework. The RCMP employees blamed the City for taking away parking in its discussions with Mr. Goransen.

[54] This is the four-part *prima facie* test that the complainant had to pass:

1. Did a term and condition of employment exist?
2. Did the employer change it?
3. Was it changed within the statutory freeze period?
4. Could it have been included in a collective agreement?

[55] Only once these questions are answered in the affirmative is it necessary to move on to the test set out in *Walmart*. To prove that the change made by the employer was a change to the terms and conditions of employment, the union cannot

simply show that the employer modified how it runs its business. It must also establish that the modification was inconsistent with the employer's normal management practices, which are what would have been done regardless of the bargaining situation.

[56] The *Walmart* test has two parts: (1) past management practices, and (2) consistency with decisions the employer would have made had there been no notice to bargain. The two-part test is not an alternative. The burden is on the complainant to respond to both questions. In this case, the wheels to change the parking situation were in motion at the time notice to bargain was given. A reasonable employer would have allowed the City to continue to deal with its policies about its property and its uses. The *Sudbury Tax Centre* (*Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110) case is incorrect.

[57] The Supreme Court of Canada was clear in its test in *Walmart*. Administrative tribunals must follow its decisions (see *Air Canada Pilots Association v. Kelly*, 2012 FCA 209).

[58] The complainant failed to establish a *prima facie* breach of the *Act*. A related term and condition of employment never existed, and the respondent did not make any changes to it. There was never any cost-sharing agreement between ALERT and the RCMP, which does not have the mandate to negotiate free parking for its members. Paragraph 137 of *Whistler* confirms that personal vehicles were not to be included within the definition of "accommodations" under the Municipal Police Services Agreement.

[59] The Treasury Board determines the terms and conditions of employment for public servants, not the City (see s. 7(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11)). If there ever was a term and condition of employment about parking, the Treasury Board did not make the change. The alleged breach is that the RCMP did not enforce the agreement with ALERT to rent P10. There is no proof that such an agreement ever existed. The City never considered that any agreement for P10 existed; according to Mr. Goransen, one did not exist.

[60] Even if a term and condition of employment has been established, under *Walmart*, the Treasury Board would have done the same thing regardless of the notice to bargain. It would have allowed the City to proceed with its policy changes. The fact

that RCMP management might have advocated for the members is not proof of business as usual to provide free parking or of a past practice of intervening (see *Whistler*, at paras. 163 and 165).

C. The complainant's rebuttal argument

[61] *Walmart* is not clear and is open to interpretation. The Treasury Board's interpretation is at odds with the purpose of s. 107, which is to allow the complainant to bargain from a point of certainty. That point of certainty is whether a past practice existed. Factoring into that question what a reasonable employer would do would defeat the purpose of s. 107.

[62] *Victoria* reproduces the *Walmart* analysis from *Whistler*. In this case, the City and the RCMP are intertwined and synonymous. The RCMP was acting in place of the City. It was under a positive duty to do more than nothing when the City moved toward paid parking. It should have gone to ALERT; it should have asked for a delay in implementing paid parking until after bargaining concluded. Instead, it did nothing.

IV. Reasons

[63] The complainant must first establish that a term and condition of employment normally granted to the members of the bargaining unit was discontinued during the freeze period. A term and condition of employment is fundamental to the employment relationship. I do not accept that free parking in P10 was a term and condition of employment of the members whose place of employment was the detachment building on 51 Avenue. The evidence does not support the complainant's assertion that it was. Contrary to what was argued, the contextual factors do not establish a term and condition of employment.

[64] The evidence was that only after the City installed parking meters in the area did members and civilian employees who worked in the detachment building begin parking in lot P10. The evidence also does not support the statement that members used it exclusively, as initially, the businesses in the area used it, and ultimately, everyone working in the detachment building used it, including Municipal Policing Services, ALERT, RCMP members, and civilians. It was a general-use lot intended for anyone in the general area, according to the rules and regulations established by the City, which included the requirement of a City-issued parking pass.

[65] The City determined that because of the demand for parking in P10 from businesses and from the detachment building, parking passes would have to be displayed. The evidence is clear on this point. The RCMP administrative officer did not prepare and assign the passes but rather distributed them, according to the requirements set out by the City if a member wished to park in P10. The RCMP exercised no ownership or control over P10, and contrary to the rumours, there was no agreement for ALERT to rent P10 in exchange for using the parking available within the secure compound. The evidence simply does not support the allegations.

[66] The City was responsible for parking. It made changes throughout the city to how it administered parking. It started with installing parking meters in the relevant area. Then, as in other areas of the city, it converted P10 to a paid lot. The respondent was not involved in that decision; nor did it have any authority over it. I need not even pose the question of whether the respondent has shown that it passed the business-as-usual test described in *Walmart*, as the complainant did not meet the test set out in *Whistler*.

[67] The fact that the Municipal Police Services Agreement was silent on whether the City would provide free parking to the RCMP members stationed at the detachment is not sufficient to meet the strict liability tests set out in *Whistler* and *Victoria*. The agreement must have obligated the City to provide parking at the time the statutory freeze period came into effect, and the respondent must have had a right to enforce that provision of the agreement at that time. There was no onus on the respondent to seek additional rights under an agreement through an alternative interpretation of it post-statutory-freeze to ensure that the members would be able to park in P10 at no cost.

[68] No term and condition of employment was altered during the freeze period. Without this, all else fails. The members lost nothing other than a convenience when ALERT vehicles took over the overflow parking in the secure lot. The parking that had been available to them was not a guaranteed contractual right; it was open to anyone who worked at the detachment building on a first-come, first-served basis, according to the evidence. Those who were lucky enough to secure a spot were able to park inside the compound. Others were forced to find parking elsewhere in the surrounding neighbourhood. The lack of any enforceable agreement, which existed only in rumour,

is fatal to the argument that the complainant should benefit from the agreement between ALERT and the City for the use of P10.

[69] Cases such as these are driven by the evidence. The parties provided me with numerous cases to support their arguments, many of which were common to both parties involved. While I read each one, I referred only to those of primary significance, as the application of those cases to the evidence led me to my conclusions.

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

(The Order appears on the next page)

V. Order

[71] The complaint is dismissed.

June 24, 2021.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board