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Citation: 2024 FPSLREB 10

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

TREASURY BOARD

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Treasury Board v. Public Service Alliance of Canada

In the matter of applications, pursuant to s. 71 of the *Federal Public Sector Labour Relations Act*, for an order declaring that positions are managerial or confidential

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Richard Fader, counsel

For the Respondent: Janson LaBond, Public Service Alliance of Canada

Decided on the basis of written submissions, filed February 14, March 13 and 27, and April 28, 2020, and May 25, June 4 and 9, and September 14, 2021, and heard via videoconference, September 14, 2021.

REASONS FOR DECISION

I. Applications before the Board

[1] The Treasury Board applied under s. 71(1) of the *Public Service Labour Relations Act* (now the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") for an order declaring 39 health-and-safety officer ("HSO") positions managerial or confidential, to exclude them from the Technical Services ("TC") Group bargaining unit ("the bargaining unit") of the Public Service Alliance of Canada ("PSAC", "the union", or "the respondent").

[2] For ease of reading, in this decision, "applicant" refers to the Treasury Board, and "employer" refers, depending on the context, to either the Treasury Board or Employment and Social Development Canada ("ESDC") or both. "Board" refers to the current Federal Public Sector Labour Relations and Employment Board and any of its predecessors. "*Act*" refers to the *Federal Public Sector Labour Relations Act* and to any of its prior iterations.

[3] The incumbents of these positions work in ESDC's Labour Program ("the program") in a regulatory compliance and enforcement capacity under Part II ("Occupational Health and Safety") of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"). They are classified in the Technical Inspection ("TI") occupational group at the TI-05 and TI-06 group and levels. Both parties used the term "health and safety officer" or "HSO" to refer to both the TI-05 and TI-06 positions and their incumbents. This decision will do the same.

[4] The HSOs exercise delegated authority from the Minister of Labour to inspect workplaces and investigate complaints. They determine if a violation occurred under s. 145 of the *Code* and whether there is "danger" or "no danger" in the context of a work refusal under s. 129. They issue legally binding directions, subject to appeal to the Canada Industrial Relations Board ("CIRB"). Previously, those appeals were decided by the Occupational Health and Safety Tribunal Canada ("the former appeals tribunal").

[5] The applicant asked the Board to apply s. 59(1)(g) of the *Act* and declare these positions managerial or confidential for reasons of conflict of interest or by reason of their duties and responsibilities to their employer. It submitted that the HSOs are in a conflict of interest when they deal with health-and-safety matters in the federal public

sector because their duties and responsibilities to their employer require neutrality, which is incompatible with being in the bargaining unit.

[6] PSAC objected on the basis that the HSOs do not carry out managerial or confidential duties for ESDC. Their responsibility is to the Minister of Labour, whose delegated authority they apply when carrying out their duties. It submitted that occupational health and safety is not just an aspect of adversarial labour relations, that it is, or should be, everyone's concern, and that neutral decision making and doing one's job responsibly is not incompatible with being in a bargaining unit.

[7] This matter proceeded initially by written submissions, after which the Board scheduled a hearing and invited the parties to bring forward oral testimony. The respondent called no witnesses. The applicant called Renée Roussel, Senior Director, National Operations, ESDC Labour Program. No HSO testified.

[8] For the following reasons, I deny the applications. Section 74(3) of the *Act* puts the burden on the applicant to show that a managerial or confidential declaration, which will result in an exclusion from the bargaining unit, is warranted. The applicant did not meet that burden.

II. The witness's testimony

[9] During her examination-in-chief, Ms. Roussel related her previous experience in occupational health-and-safety positions with the Royal Canadian Mounted Police ("RCMP"), the Department of Fisheries and Oceans, and the Parks Canada Agency ("Parks"). She has worked as an HSO in the past. In her current role with ESDC, she deals with five regions, monitors all investigations, and generally acts as an intermediary between the HSOs in the field and senior management. She is responsible for creating positions and job descriptions and for resource allocation. She works directly with managers and regional directors and only indirectly with the HSOs.

[10] Ms. Roussel explained that the Labour Program receives support and services from ESDC but that the HSOs have delegated powers from the Minister of Labour as they work in a regulatory capacity. They work toward both proactive and reactive compliance. She said that they are not there to regulate or dictate; the objective is always to have the parties resolve the matter. Starting with voluntary compliance, the HSOs try to get employers to promise to resolve issues within a specific time. If a

matter is not resolved or is serious, the next step is a compliance document, which is a legal and binding determination that can be appealed. In serious cases, there is also the possibility of prosecution and, as of 2021, monetary penalties.

[11] The TI-06 position was created in 2014 to deal with more critical issues, national matters, and situations of systemic non-compliance. For example, when a TI-05 has conducted an inspection, investigated a complaint, or provided counselling, but the continuing or systemic issues remain, a TI-06 may become involved. As well, employers have become more complex in general, and some operate nationally; an issue in one Canada Post location, for example, can impact terminals across the country. The work of a TI-06 is often more national in scope than that of a TI-05; however, they are both decision makers who can provide direction to an employer and tag-out machines. Policy recommends that a TI-05 consult a TI-06 before issuing a direction on a national or complex case, but it is not required, as they both have the requisite authority.

[12] Ms. Roussel said that the public sector is the Labour Program's third highest-priority sector and that over time, it has generated more work, and that it now accounts for 24% of the work volume. She said that at times, it is difficult to cover the demand. She did not provide PSAC's percentage of the public sector workload.

[13] Ms. Roussel said that there is a need for both TI-05 and TI-06 exclusions because although the TI-06 position was created to help with assigning and carrying out the work, the program is a 365-day, 7-day-a-week operation. There are only a small number of TI-06s, and the program cannot have them on call, at all times, to attend to the public sector, if necessary. Therefore, the employer must have both the TI-05 and TI-06 HSO positions excluded to deal with the public sector, but it has tried to keep down the numbers proposed for exclusion.

[14] Ms. Roussel described a work-refusal scenario. She explained that any employee who believes that something in their work is dangerous can inform their supervisor that they are refusing to work and then participate in the investigation process. The danger must be immediate and tangible. The employer investigates and may decide that there is an immediate danger. If it does not, the matter is referred to the joint health-and-safety committee. With the employee's participation, a committee of two

investigates and reports back to the employer as to whether it found danger. PSAC often represents the refusing employee in this process.

[15] Once a committee has either found no danger or is split on the decision, an HSO can be called in. The employee can continue to refuse to work until the HSO decides the matter. Another employee can do the work if they are told about the work refusal, but there is still an impact on the workplace until the decision is made. The program takes work refusals very seriously and treats them as priorities. Ms. Roussel did not say how many work refusals are typically dealt with by the program.

[16] Asked whether it is safe to say that the HSOs adjudicate work-refusal disputes, Ms. Roussel agreed that she would describe it that way. She elaborated that it is most important to hear from the refusing employee but that the HSO must gather all available information from all three parties. If the HSO's decision is that there is no danger, the employee must return to work. If danger is found, the HSO can issue a direction to the employer, typically to fix something before the employee must return to work. This decision can be appealed to the CIRB.

[17] When an issue has reached the point of needing an HSO to issue a direction, typically, the employer and the union deal with it. When appeals went to the former appeals tribunal, only the employer, the employee and their representative were involved. The Labour Program was invited at times but otherwise was not part of the process; now, the program can present evidence and participate at appeals.

[18] Ms. Roussel noted that the inspection and complaint aspects of the work are much broader than the work refusals in that the HSOs must consider and can issue directions on all aspects of Part II of the *Code*. An inspection does not typically arise from a complaint; it is just part of the program's role to inspect employers on a rotating basis such that a given employer will be inspected every few years.

[19] Ms. Roussel was asked in examination-in-chief if it was in the public sector that she saw a conflict of interest; she confirmed as much. When asked to describe the conflict-of-interest issue as she sees it, she said this:

> *The basis of it is that when you have a third party that comes into play, the bargaining agent can influence the potential decision. We have seen it, in Parks Canada and other cases… We have members*

> *sitting on PSAC health-and-safety committees. We've told them there's a conflict of interest.…*

[20] Ms. Roussel said that the risk is that the HSOs might take off their regulator hats and act as employees. It could become difficult, for example, when the respondent is in a strike position and an HSO must make a work-refusal decision. Such a situation would be the most direct conflict of interest, especially for union officers for whom taking off their union hats can be difficult.

[21] Ms. Roussel said that in a recent case, a TI-06 was investigating a complaint and felt that PSAC was not representing the involved employee well. As she described it, "due to his own history as a PSAC member", the HSO had reached out to a colleague who was not involved in the case, for the union's perspective. Whether this meant the union's perspective on the complaint or on the sufficiency of the representation provided to the employee, was not indicated.

[22] The respondent challenged this as hearsay evidence presented with no names, locations, or any other particulars. Ms. Roussel then offered that it had occurred in the border services group at an unspecified airport location. Although hearsay evidence can be admissible in an administrative hearing, this comment was not particularized and could not be tested in cross-examination or challenged by reply evidence. It was on the level of a vague workplace rumour and could not be given any weight.

[23] Ms. Roussel was asked to elaborate about HSOs sitting on health-and-safety committees and on whether, generally speaking, she saw a conflict of interest in that circumstance. She replied that she did, stating, "because you are working with those parties, you want to go to committee, but for those who work as union officers, it is difficult to take that hat off". No specific example was given of an HSO sitting on a health-and-safety committee or of anything that had occurred on a committee that the employer would consider a conflict of interest.

[24] The only actual example of an alleged conflict of interest that Ms. Roussel identified in her examination-in-chief was the Parks case. This was presented to the Board as the "high water mark" example of the kind of impact an HSO's decision can have on a workplace and what can happen when a "third party" (the union) comes into play and influences an HSO's decision. Only in response to questions on cross-

examination did Ms. Roussel provide more detail about the case other than this characterization of it.

[25] She confirmed on cross-examination that she had worked at Parks from 2006 to mid-2010 as the national occupational health-and-safety coordinator. She agreed that everyone knew about HSO Grundie and confirmed that Parks was not at all pleased with the direction he had issued. She made it clear that she also strongly disagreed with it and felt that it had been the result of union influence. She said that HSO Grundie had gone beyond the workplace parties to determine whether a danger existed, which he should not have done. She remembered it (incorrectly) as a work refusal and added that the refusing employee had one specific goal in mind — to secure sidearms for park wardens.

[26] Ms. Roussel explained that her disagreement with the HSO's direction was that it included a specific remedy (to issue sidearms to the park wardens) and that it would have been difficult for any employer to comply with it. She was on the Parks task force that was created to implement what ultimately became the federal government's decision to provide sidearms to the park wardens and the challenge was being unable to make a proper risk assessment to implement the direction. She felt that while there might have been a danger, it should have gone back to the workplace parties to determine the remedy.

[27] It was put to her that both parties appealed HSO Grundie's direction — PSAC on the remedy because his direction had not directed Parks to issue sidearms. She did not recall this and reiterated that she had been responsible only for implementing the federal government's ultimate decision to provide them.

[28] It was put to Ms. Roussel that years later, Parks had complained to Human Resources and Skills Development Canada ("HRSDC", as ESDC was then called) about HSO Grundie, alleging a conflict of interest and collusion with the union. The complaint resulted in HRSDC and Parks joining forces to launch multiple investigations aimed at finding evidence of misconduct. All the allegations against HSO Grundie were disproved, and HRSDC was found to have colluded with Parks to carry out a reprisal against him for simply doing his job.

[29] Ms. Roussel seemed unaware of any of this, despite those facts being detailed in the Board's published decision in *Grundie v. Treasury Board* (*Department of Human*

Resources and Skills Development), 2015 PSLREB 95. She seemed familiar only with the "high water mark" characterization that she had forcefully presented in her examination-in-chief. She told a story of a "third party" (the union) intervening to influence an HSO's decision, a false narrative that continued to hold sway and clearly still rankled 20 years later. (HSO Grundie's direction was issued on February 1, 2001.) While I believe that she presented it to the Board as she genuinely recalled it, or as it had been told to her, nevertheless, this testimony was highly misleading.

[30] Unfortunately, I found much of Ms. Roussel's testimony unreliable. Her strong negative feelings about the effects of union involvement in health-and-safety matters clearly affected her understanding or memory of what actually took place in the Parks matter. And although she initially said, "We have seen it — in Parks and other cases", she offered only two other examples.

[31] The first was an unparticularized allegation of a TI-06 who she said had reached out to a union colleague "due to his own history as a PSAC member". It was unclear what she alleged that he had reached out about, and the only identifying specifics provided (and only on cross-examination) were that he was investigating something in a border services airport location. The second was her reference to HSOs sitting on health-and-safety committees and the risk that, in her opinion, they might have difficulty taking their union hats off. Again, no particulars were provided.

[32] Ms. Roussel was led through a good deal of her evidence on crucial points and, at times, did not seem to appreciate the importance of being accurate or specific in her comments. Her opinions and characterizations were presented as fact. In general, the neutral information she provided as to the program's workings was helpful and seemed reliable. I have accepted that evidence. However, I can accord little to no weight to much of her testimony, in particular her comments relating to alleged or perceived conflicts of interest.

III. Summary of the submissions

A. For the applicant

[33] These positions should be declared managerial or confidential because they should not be in the bargaining unit for reasons of conflict of interest or by reason of their duties and responsibilities to the employer.

[34] The issue arises only in the public sector, and the applicant seeks to exclude only 28 of the 211 TI-05 positions and all 11 TI-06 positions, for a total of 39 out of 222 positions. The work has been arranged to minimize the impact on the respondent. These numbers reflect an increased volume of public sector work; the Labour Program must ensure that inspections, investigations, and interventions are carried out accordingly. The positions proposed for exclusion are in regions with higher concentrations of public sector work. The intention behind creating the TI-06 positions and the nature of their work requires that all 11 of them be excluded.

[35] PSAC has long advocated for occupational health and safety — a legitimate and important role, but it does not advance neutral positions on health and safety but rather advocates for what it sees as the best interests of the employees it represents. It is the largest federal public sector union, representing employees in every department and agency. This can put the HSOs in a position of investigating work refusals and alleged *Code* violations involving fellow employees in the bargaining unit. Given that, the conflict of interest is direct and obvious; an incumbent could participate in an internal PSAC decision on a health-and-safety issue while investigating the same issue as a neutral.

[36] The HSOs can also testify at appeal hearings, which puts them on both sides of a dispute, on one hand acting as neutrals on behalf of the regulator, on the other hand as employees in the bargaining unit represented by a bargaining agent that is either a party to the appeal or that represents a fellow employee in the bargaining unit. As the applicant may act only through its representatives, its officials must be, and must be seen to be, loyal to its interests.

[37] Section 59(1)(g) applies when a position does not meet the criteria specified in the other paragraphs of s. 59(1), and it has two parts, exclusion by reason of either conflict of interest or the position's duties and responsibilities to the employer. The latter was the only criterion before 1992, when the express wording "for reasons of conflict of interest" was added.

[38] While being on the management team typically entails a conflict of interest, all cases of such conflict are not necessarily linked to being on the management team. As well, conditions other than an express conflict of interest may justify exclusion by reason of the duties and responsibilities to the employer, for example, the sensitivity

of the work. It is difficult to enumerate all circumstances of incompatibility with being part of a bargaining unit, Therefore, s. 59(1)(g) was intended to provide the Board with the discretion to assess individual cases.

[39] The Board has found conflicts of interest when employees were not part of the management team; for instance, an auditor in *Office of the Auditor General of Canada v. Public Service Alliance of Canada (Scientific and Professional Category - Library Science and Auditing Groups)*, [1980] C.P.S.S.R.B. No. 2 (QL; "*Lalonde*"), and the Canadian International Development Agency's ("CIDA") head of aid section in Barbados in *Treasury Board (Canadian International Development Agency) v. Public Service Alliance of Canada*, [1982] C.P.S.S.R.B. No. 148 (QL; "*Dare and Bédard*").

[40] A nurse who gave input to management about employee sick leave claims was found in a conflict of interest because her duties affected other employees' working conditions in *Professional Institute of the Public Service of Canada v. National Film Board of Canada*, [1990] C.P.S.S.R.B. No. 78 (QL; "*NFB*"). That case presents an obvious parallel to the case at hand, as the HSOs' decisions also have a profound effect on their fellow employees in the bargaining unit.

[41] A security intelligence officer position was found to be in a conflict of interest in *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada)*, 2012 PSLRB 46 ("*SIO*"). The Board noted that s. 59(1)(g) is an umbrella provision in which the phrase "conflict of interest" is somewhat ambiguous and the phrase "duties and responsibilities to the employer" is even more open-ended. It cautioned against fettering discretion by trying to provide a more restrictive definition and said that "duties and responsibilities to the employer" could cover situations in which being part of a bargaining unit could impair performing duties essential to the employer. Despite lacking the traditional hallmarks for exclusion, the security intelligence officer's duties conflicted with the obligations to fellow employees in the bargaining unit, which is a concept that applies directly to this case, given that the HSOs investigate work refusals by fellow employees in the bargaining unit.

[42] In *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84 ("*National Border Operations*"), national border operations centre positions were found to be in a conflict of interest, and the Board commented on the divided loyalty incumbents could face in job-action situations. The low volume of such work was

noted by the Board but was not found to decide the issue. The concept of "divided loyalty" applies directly to this case.

[43] In *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80 ("*ESDC senior investigators*"), employees who investigated alleged employee misconduct were not part of the management team and did not make decisions about discipline, but their investigative role vis-à-vis other employees in the bargaining unit put them in a conflict of interest. The Board expressed dissatisfaction over the employer's delay making its application to designate the positions managerial or confidential, but this did not impact its s. 59(1) analysis.

[44] The applicant submitted that the case most directly on point is *Public Service Alliance of Canada v. Treasury Board*, [1988] C.P.S.S.R.B. No. 316 (QL; "*SLROs*"). The senior labour relations officers ("SLROs") of the Canada Labour Relations Board ("CLRB", as it then was) were, like the HSOs, intended to operate independently of employers and unions. They investigated applications and mediated complaints made to the CLRB. They had no decision-making authority (unlike the HSOs), although their recommendations were routinely adopted in CLRB decisions. Unlike this case, in which the HSOs make decisions that affect federal government departments and agencies, the CLRB had no jurisdiction over public sector employers; however, PSAC represented employees within the CLRB's jurisdiction.

[45] The former Public Service Staff Relations Board found that the conflict of interest was obvious, stating, "In acting in matters involving the PSAC, the Senior Labour Relations Officers are themselves placed in a situation of potential conflict of interest and the CLRB's role as a neutral body is rendered questionable and, perhaps, undermined." The SLROs had to operate as neutrals, and the conflict of interest was that their perceived neutrality was compromised by their inclusion in the bargaining unit. In the same way that this undermined the CLRB's role, including the HSOs in a bargaining unit undermines the Minister of Labour's neutrality when acting in a regulatory compliance and enforcement capacity. Being in the bargaining unit precludes the HSOs from enjoying perceived neutrality, especially when investigating the work conditions of other employees represented by PSAC.

[46] "Conflict of interest" is undefined in the *Act* but is a well-established concept in Board jurisprudence; the test is whether a reasonable person would think that there

was a realistic possibility that including an HSO as an employee in a bargaining unit could influence the performance of their official duties (see *Atkins v. Treasury Board (Ministry of Transport)*, Board File No. 166-02-889 (19740321); and *Assh v. Canada (Attorney General)*, 2006 FCA 358). As well, *Assh* stands for the proposition that a finding of conflict of interest can be based on practical judgement and logical inference, a relatively low standard of proof.

[47] Occupational health and safety is of significant interest to PSAC. Its website refers to its former president's speech at a 2007 health-and-safety conference in which he announced that PSAC had filed a challenge to the structure of the former appeals tribunal and that it was using legal action to push health-and-safety issues. A 2019 article on the current Customs and Immigration Union's website refers to using work refusals, among other strategies, in that component's bid to arm border officers. As employees in the bargaining unit, the HSOs have the right to hold union office, participate in union activities, and promote the union's agenda, but the Board has recognized a conflict of interest based on obligations to fellow employees in the bargaining unit. An employee in the bargaining unit can be torn between the role required of a Minister of Labour delegate versus their union's position.

[48] PSAC's argument that the HSOs' duties are owed to the Minister of Labour and not to the applicant deflects the analysis from where it should be; that is, whether there is a conflict of interest. The HSOs are not Governor-in-Council appointees; they are employees in the core public administration, and the duty they owe to their employer is to act as neutrals in a regulatory capacity for the Labour Program. The conflict of interest is between their duty to be a neutral versus being part of the bargaining unit when PSAC advocates for the interests of the employees that it represents.

[49] To determine work refusals or *Code* violations, the HSOs do not merely apply technical rules to a neutral factual proposition. They are faced with an employer and a union that have been unable to resolve the matter internally; they step in and adjudicate the dispute. Their decisions are final and binding, subject only to appeal (and in some cases, judicial review). That their decisions are subject to review does not make them less adjudicative.

[50] The applicant presented a list of eight appeal decisions in which PSAC was either a party or representing an employee and submitted that in many cases, PSAC challenged the HSOs as an appellant seeking to overturn a no-danger finding. It submitted that an HSO who testifies at an appeal does so as an independent party providing a rationale for their decision in an adversarial forum in which the parties have competing interests. As they can exercise the rights flowing from being part of the bargaining unit by holding union positions, for example, on health-and-safety committees, the HSOs could be involved in instructing PSAC counsel and then be cross-examined by PSAC counsel at the appeal hearing. The conflict of interest could not be more direct or obvious.

[51] The overall structure of Part II of the *Code* implicitly recognizes the different set of interests involved in identifying, investigating, and resolving health-and-safety issues — employers and employees and their bargaining agents are bound in an adversarial environment. The *Code* sets out important checks and balances through which the parties share equal footing when resolving health-and-safety concerns, and dispute resolution at the lowest possible level is encouraged. However, the *Code* recognizes that workplace parties do not always share the same interests; ultimately, if there is an impasse, an HSO must investigate and can issue a direction, or a danger or no-danger decision. With respect to employees represented by PSAC, the respondent plays an active role throughout the process, from the lowest level up to appeal hearings before the CIRB.

[52] An HSO acts as an objective authority and weighs facts and evidence to decide as their judgment dictates. Their decisions carry the weight of legal, enforceable orders and can seriously affect the employer's operations, even to the point of shutting down the enterprise; their conclusions are not negotiable or reviewable except on appeal. The HSOs are called to exercise their delegated authority only when a dispute between the parties has remained unresolved. As they act on their own and exercise their judgment, they must be seen as unbiased and free from any real or perceived conflict of interest.

[53] While a health-and-safety committee is not an adversarial forum, the same is not true for an HSO position. The HSO's role is to listen to the evidence and arguments of both sides and to make binding decisions relating to the continued right to refuse work and, more generally, to alleged *Code* violations. While some parts of the health-and-safety scheme are not adversarial, some are, including an HSO's work. This is

particularly evident when they testify at an appeal in which they represent neither side and must remain neutral in a clearly adversarial environment.

[54] On the union's point that health and safety is not a labour relations issue, the applicant acknowledged that *Treasury Board v. Association of Justice Counsel*, 2020 FPSLREB 3 ("*AJC 1*"), applied a very restrictive definition of the concept of "labour relations" but noted that it was under judicial review. (The Federal Court of Appeal upheld it on February 26, 2021, in 2021 FCA 37 ("*AJC 2*").) It also noted that these applications do not propose to exclude the HSOs under s. 59(1)(c) (labour relations) but rather under s. 59(1)(g), which includes conflict of interest.

[55] Not all conflicts of interest must relate to labour relations; had Parliament intended to restrict them to matters involving labour relations (narrowly defined), it would have done so. In *Treasury Board (Department of Justice) v. Association of Justice Council*, 2020 FPSLREB 59 (upheld by the Federal Court of Appeal in 2021 FCA 87), the incumbent did not provide labour relations advice but was found to be in a conflict of interest. Positions can be excluded when their duties have potential impacts beyond labour relations to much broader matters of interest to PSAC, such as federal government department audit reports and financial aid to Caribbean countries.

[56] In the alternative, occupational health and safety was recognized as a labour relations issue in *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*, 2008 CanLII 10519 (ON LA), and every federal public sector collective agreement has a health-and-safety provision. Those provisions have been adjudicated by the Board, and Part 3 of the *Act* deals with occupational health and safety.

[57] To the respondent's point that the HSOs have no authority over the employment conditions of fellow employees, in fact, the HSOs deal with the most important employment condition — health and safety. If a fellow employee in the bargaining unit refuses to work, the HSO will ultimately find danger and issue a direction to the employer or find no danger in which case the employee must return to work.

[58] Some of the paragraphs in s. 59 require a certain threshold for exclusion. Only those positions involved in high-level policy of general application (s. 59(1)(d)) or true manager positions with authority over employees (s. 59(1)(e)) are to be excluded. For some paragraphs, it can be a matter of degree, but the opposite is true for s. 59(1)(g).

This is borne out by the decisions that have excluded positions with responsibility to hear grievances, even when the incumbent has never been called upon to hear one.

[59] Apart from the conflict-of-interest aspect of s. 59(1)(g), the phrase "duties and responsibilities to the employer" must operate independently and be given its full meaning. In *SIO*, the Board said that this term was even more open-ended than "conflict of interest" and that it gave the Board a very broad discretion that should not be fettered by attempting to provide a more restrictive definition. The Board said that the test would be met if including an employee in a bargaining unit could impair the effective performance of the duties essential to their employer. While a finding of conflict of interest would certainly engage the exclusion criteria, independent of such a finding, including the HSOs in the bargaining unit could impair the effective performance of their duties exercising the delegated authority of the Minister of Labour as independent arbitrators of occupational health-and-safety matters.

[60] The exclusion provisions should not be interpreted narrowly but rather given their ordinary construction based on accepted principles of statutory interpretation. The applicant has organized its affairs to limit the impact; accordingly, the further suggestion that s. 59(1)(g) be interpreted narrowly is inconsistent with the principles of legislative interpretation.

[61] Finally, the respondent has advanced a *Charter* values argument (*Canadian Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11; "the *Charter*") that any interpretation of the *Act* should be guided by the fact that collective bargaining is a constitutionally protected right. However, the Supreme Court of Canada has made a distinction between *Charter* values and *Charter* rights. If there is no ambiguity, the Board cannot read down legislative provisions to be consistent with *Charter* values; if it finds that a conflict exists, it must apply the statute as written. To advance a *Charter* values argument in these circumstances, the respondent would have to directly challenge the constitutionality of the legislation (see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Doré v. Barreau du Québec*, 2012 SCC 12; and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12).

B. For the respondent

[62] The respondent submitted that the burden of proof was squarely on the applicant to satisfy the Board that a conflict of interest exists.

[63] The Board has ruled that each application under s. 59(1)(g) is to be determined on its own particular merits and has applied the provision narrowly, sparingly and only in those unusual situations where inclusion in the bargaining unit was fundamentally incompatible with the position's duties and responsibilities, and even then only if the application did not fall within any of the other paragraphs in s. 59. Applications under s. 59(1)(g) should not be assessed on a lesser standard; the Board can be no less rigorous in its judgment of factors that may be relevant to the exercise of its discretion. (See *Public Service Alliance of Canada v. Treasury Board (Purchasing and Supply Group Bargaining Unit)*, [1977] C.P.S.S.R.B. No. 3 (QL) at para. 21.)

[64] The applicant seeks to frame occupational heath and safety as an extension of an ongoing industrial relations war between the employer and its largest union, bound together in the adversarial environment that is Part II of the *Code*. But occupational health and safety is not labour relations. The HSOs are not involved with collective bargaining, grievance and adjudication strategy, or interpreting collective agreements for their employer. Their jurisdiction is occupational health and safety — a shared responsibility and a common goal that is separate and distinct from labour relations. This has long been recognized in labour board jurisprudence, and the Board recently rejected a characterization of occupational health and safety as being part and parcel of labour relations in *AJC 1* (which the Federal Court of Appeal upheld in *AJC 2*).

[65] The applicant argued that the union does not take neutral positions on health-and-safety issues. This applies equally to the employer. The respondent does not dispute that although everyone should be concerned with health and safety, such issues can be controversial, and employers and unions, at times, approach them with different interests in mind. Acknowledging that reality does not mean that health and safety is simply an aspect of adversarial labour relations or that the HSOs are labour relations practitioners. Rather, they are occupational health-and-safety professionals whose duties are to enforce two specific sections of the *Code*.

[66] The HSOs regularly inspect workplaces on their own initiative for health-and-safety compliance. They investigate complaints, work refusals, and workplace incidents, including fatalities. Their work is prescribed and technical; their conclusions are based on facts. They make factual decisions as to whether a danger within the meaning of the *Code* exists when employees exercise their right to refuse to work in what they believe are unsafe working conditions. Their decisions can be upheld or

overturned on appeal to the CIRB, and in turn, its appeal decisions are subject to judicial review.

[67] The HSOs are not the arbitrators or adjudicators that the applicant asserts they are but are more akin to regulatory officers or police officers enforcing a law. PSAC represents thousands of regulatory and law-enforcement employees across multiple jurisdictions, including police officers. That their enforcement work takes place in PSAC-represented workplaces does not mean that the HSOs are in conflict of interest and incapable of performing their duties in a professional, unbiased manner, independent of whatever position their union may take on an issue. Police officers are unionized in many jurisdictions and are trusted to deal with all issues of public safety, including demonstrations, picketing, and different forms of job action. In the past, only RCMP members were excluded from collective bargaining, but they too won the right to organize, in 2015.

[68] The applicant presented a list of appeals of HSOs' decisions. In some, the employer was the appellant; in others, it was the union. It is evident from these appeals that the HSOs reach their conclusions independent of any union influence. The HSOs are more than capable of providing a professional, unbiased defence of their appealed decisions. The applicant offered no evidence to substantiate its claim that the HSOs are perceived as anything but neutral or to show that they are somehow "torn" between their jobs and their union. The facts demonstrate that they are not beholden to their union.

[69] The applicant recognizes that the HSOs are not part of a management team and does not argue for their exclusion on that basis. Clearly, they are not managers. However, neither are they "representatives" of the applicant as was asserted; they do not represent the federal government departments that they investigate or the Treasury Board. They represent the Minister of Labour and enforce federal health-and-safety law.

[70] The Board decisions provided by the applicant in support of these applications can all be distinguished from this case. The incumbent in *Lalonde* worked closely with senior financial officers of the client organization; the HSOs work independently of everyone, including the applicant. The *NFB* company nurse made recommendations on sick leave that clearly affected her fellow employees' terms and conditions of

employment; the HSOs have no authority over their fellow employees' employment conditions — that is labour relations terminology. They have delegated authority to issue health-and-safety directions that result in safer working conditions for all employees in a workplace, unionized or not. The *NFB* case is most definitely not "… an obvious parallel to the case at hand …", as the applicant asserts.

[71] The incumbent in *Treasury Board (Department of National Defence) v. Public Service Alliance of Canada*, 2000 PSSRB 85 ("*DND*"), advised management on staff relations, staffing, and classification; the HSOs perform none of those labour relations functions for the employer. The security intelligence officer in the *SIO* case was the eyes and ears of senior management for security risks and was privy to information that implicated fellow employees in misconduct; the HSOs operate independently, not as employer representatives. Unlike the HSOs, the incumbents in *National Border Operations* carried out critical labour relations work for their employer. Unlike the HSOs, the incumbents in the *ESDC senior investigators* case investigated employee misconduct, and their reports to management had direct disciplinary consequences for fellow employees.

[72] The excluded position in *Dare and Bédard* was not analogous to an HSO position, and that decision does not explain how the "disclosures affecting commerce and labour", to which it referred, could result in a conflict of interest. As to the applicant's suggestion that the case most directly on point is that of the SLROs who investigated and mediated labour relations applications and complaints, the HSOs are not labour relations practitioners or mediators in the employ of a labour relations board, and the enforcement of occupational health and safety is not labour relations.

[73] For over 60 years, labour boards and the courts have applied a narrow interpretation to managerial and confidential exclusions, lest the majority of employees be excluded from collective bargaining. The Board has also consistently taken this approach since its early decisions in *Sisson* (*Treasury Board v. Public Service Alliance of Canada (Correctional Group)*, [1979] C.P.S.S.R.B. No. 9 (QL); and *Treasury Board v. Public Service Alliance of Canada*, [1997] C.P.S.S.R.B. No. 143 (QL; "*Andres and Webb*"). And, since those earlier decisions, a monumental shift has occurred with respect to the now constitutional right of employees to organize and collectively bargain. This further heightens the importance of avoiding unnecessarily interfering with collective bargaining rights.

IV. Reasons for decision

[74] Section 59(1)(g) of the *Act* reads as follows:

Managerial or Confidential Positions	*Postes de direction ou de confiance*
…	…
59 (1) *After being notified of an application for certification … the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that*	***59 (1)*** *Après notification d'une demande d'accréditation … l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants:*
…	…
(g) *the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer ….*	***g)*** *poste dont le titulaire, bien que ses attributions ne soient pas mentionnées au présent paragraphe, ne doit pas faire partie d'une unité de négociation pour des raisons de conflits d'intérêts ou en raison de ses fonctions auprès de l'employeur;*

[75] Under s. 59(1)(g) of the *Act*, the Board's task is to first determine whether the occupants of the positions at issue have duties and responsibilities not otherwise described in s. 59(1). If they do, then the Board will determine whether the positions should not be included in the bargaining unit for reasons of conflict of interest or by reason of their duties and responsibilities to the employer.

[76] In this case, it is clear that the occupants of the positions at issue have duties and responsibilities not otherwise described in s. 59(1). Accordingly, if the Board determines that the positions fall under s. 59(1)(g) due to conflict of interest or by reason of the duties and responsibilities to the employer, they will be declared managerial or confidential (see s. 74(1)).

[77] In *Association of Justice Counsel v. Canada (Attorney General)*, 2021 FCA 87 at para. 9, the Federal Court of Appeal commented as follows on the broad wording of s. 59(1)(g):

> *[9] Moreover, the wording of paragraph 59(1)*(g) *of the* FPSLRA *is uncircumscribed, leaving considerable scope for the FPSLREB to infuse the provision with meaning. As noted in* Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46, 2012 CarswellNat 1341 at para. 70, the provision "[…] confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities […]."*

[78] This matter proceeded initially by written submission, including supplementary submissions with respect to the decision issued in *Treasury Board v. Public Service Alliance of Canada*, 2021 FPSLREB 24. (That decision has since been judicially reviewed, was found to lack adequate reasons with respect to s. 59(1)(g) and has been remitted to the Board (See *Canada (Attorney General) v. Public Service Alliance of Canada*, 2022 FCA 204). At paragraph 8 of that decision, the Federal Court of Appeal cited and repeated the above comment and continued as follows:

> *[8] … Each application under paragraph 59(1)(g) must be "decided on its own circumstances by reference to the jurisprudence that has developed" (*Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 46 at para. 31).*

[79] Accordingly, I begin my analysis with these principles in mind. Each application under s. 59(1)(g) must be decided on its own circumstances by reference to the jurisprudence that has developed. The provision's uncircumscribed language confers on the Board a broad discretion to bring to the task.

A. Collective bargaining rights are not to be lightly cast aside

[80] Labour boards and courts have consistently approached applications for managerial or confidential exclusions cautiously, to ensure that most employees have access to collective bargaining; see, for instance, *United Steelworkers of America v. Cominco Ltd.*, [1980] CarswellNat 698 at paragraph 24, as follows, where the CLRB cited with approval its decision in *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Vancouver Wharves Ltd.*, [1974] CarswellNat 419 at para. 179:

> *There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the Provincial Legislatures is committed to the fundamental policy that* ***collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a***

> ***concession, not a favour, they are a basic right which will not be withdrawn from any employee unless there are very serious reasons****.…*
>
> [Emphasis added]

[81] The Board expressed the same view in its 1979 *Sisson* decision at paragraph 73, as follows: "We must also ensure that the maximum number of persons enjoy [*sic*] the freedoms and rights incidental to collective bargaining." In its 1997 *Andres and Webb* decision at paragraph 28, the Board stated: "It is particularly important, when interpreting paragraph 5.1(1)(d) to remember that the right to membership in a bargaining unit (unionization) should not be removed lightly." And in many decisions over the years, most recently in *Treasury Board v. Public Service Alliance of Canada*, 2020 FPSLREB 41 at para. 36, the Board stated this: "When interpreting those words [s. 59(1)(g)], the Board has been very cautious and cognizant that it should not lightly deprive an employee of his or her right to collective bargaining." (See also *SIO*, at para. 71; and *ESDC senior investigators*, at para. 101.)

[82] In *AJC 1*, affirmed in *AJC 2*, the Board said this:

> …
>
> *[37] … In addition, as the Board's predecessor (the Public Service Labour Relations Board or PSLRB) stated in* Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 at para. 71, "The loss of the bargaining agent's protection and of the benefit of a collective agreement could have significant implications for an employee. Those advantages should not lightly be cast aside."*
>
> …

[83] The applicant submitted that the respondent was advancing a *Charter* values argument by suggesting that the exclusion provisions should be narrowly interpreted. The applicant argued that in the absence of any ambiguity, the Board could not read down the legislative provision to be consistent with *Charter* values. The Supreme Court of Canada has said that when interpreting an unambiguous statute, decision makers must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result. (See, for example, *Bell ExpressVu Limited Partnership*, at para. 66.)

[84] To decide these applications, there is no question of reading down the legislative provision to be consistent with *Charter* values. Rather, this decision concerns the application of s. 59(1)(g) of the *Act*. In applying this provision, I agree with the many decisions that have long recognized the importance of collective bargaining rights and that have repeatedly cautioned that they are not to be lightly cast aside.

B. The test for finding a conflict of interest in an application under s. 59(1)(g)

[85] The applicant noted that the term "conflict of interest" is undefined in the *Act* but referred to the *Atkins* and *Assh* decisions to suggest that it is a well-established concept in Board jurisprudence.

[86] *Atkins* dealt with a marine regulator who was suspended when he started his own marine business, raising the issue of whether the public interest in the proper administration of marine regulation clashed with his interest in his private economic affairs. The Board held that it did.

[87] *Assh* dealt with a federal government official who was bequeathed a sum of money in the will of a person he had helped with pension issues. The Federal Court of Appeal held that the test was whether a reasonable person would think that there was a realistic possibility that accepting the gift could influence the employee's future performance. The applicant submitted that this is the legal test for conflict of interest.

[88] I do not accept that the "reasonable person" test as described in *Assh* is the applicable test in the context of an application under s. 59(1)(g). It has not been so applied in Board jurisprudence.

[89] That test has been cited in decisions involving disciplinary grievances dealing with conflicts of interest (see, for example, *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62 at paras. 160 to 166), but not in this context. The issues raised in *Atkins*, *Assh*, and *Brazeau* were significantly different from those before me — they dealt with real or potential conflicts of interest between federal government officials' duties and their private economic interests.

[90] The Board has long rejected the proposition that this analysis should be done through the eyes of a third party and has stated that rather, the Board should decide it,

based on its view of all relevant facts (see *Public Service Alliance of Canada v. Treasury Board (Public Service Commission)*, [1985] C.P.S.S.R.B. No. 51 (QL; "*Brownlee*")).

[91] The Board interpreted s. 59(1)(g) as follows in *SIO*, at paras. 69 through 72:

> ***69*** *Paragraph 59(1)(*g*) of the* PSLRA *is an umbrella provision that seems meant to catch situations in which excluding an employee can be justified on one of a broad range of grounds not captured by the more specific descriptions in the other paragraphs. The term "conflict of interest" could mean either that the conflict must be identified by examining the duties and responsibilities performed by the employee as a whole (rather than by referring to any specific exercise of managerial authority, decision-making power or labour relations function) or that the specific feature of the position that gives rise to the conflict of interest is not caught by the other paragraphs because not every instance in which a conflict could occur can be anticipated when a statute is drafted.*
>
> ***70*** *The second ground for exclusion under paragraph 59(1)(*g*) of the* PSLRA *— "… the person's duties and responsibilities to the employer …" — is even more open-ended. That phrase confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities and to call on adjudicators to carefully consider, under that paragraph, the overall relationship between the position and the applicant's interests. In that context, it is perhaps not surprising that the case law has failed to articulate a set of clear criteria for applying that provision. At one point, in* Gestrin and Sunga, *the former Board speculated that the earlier version of that provision might require determining whether an employee is a member of the management team. Later cases, like* Andres and Webb, *held that the management team idea would not capture all the conflicts of interest that might justify exclusion under that provision and that adjudicators should consider the issue more broadly. Although the decisions put before me often treat the concepts of the "management team" and "conflict of interest" as being closely related and as part of a holistic approach to assessing a position, they do not provide much in the way of definition or concrete criteria for making such an assessment. To be fair, since this provision seems designed as a catch-all that gives the PSLRB wide scope to consider positions for exclusion that are not ordinary and that cannot be anticipated, the PSLRB should not be expected to fetter its discretion by attempting to provide a more restrictive definition of its task.*
>
> ***71*** *Adjudicators have on many occasions counselled caution when deciding whether a position should be excluded from a bargaining unit. The loss of the bargaining agent's protection and of the benefit of a collective agreement could have significant implications for an employee. Those advantages should not lightly be cast aside.*

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

[92] In *Treasury Board v. Public Service Alliance of Canada*, 2020 FPSLREB 41, the Board referenced the *SIO* decision with approval, as follows:

> …
>
> *[39] After reviewing the rather scant jurisprudence on exclusions made under s. 59(1)(g) and its preceding legislative embodiments, the Board concluded that the position should be excluded. According to the Board, s. 59(1)(g) provides an additional ground to the employer to exclude a position that is not clearly managerial or involved in labour relations yet that creates an untenable conflict of interest or is untenable as part of the bargaining unit by its very nature. As the Board states, "… in some circumstances, including an employee in a bargaining unit could impair the effectiveness of that employee's performance of duties essential to the applicant."*
>
> *[40] The following paragraphs detail the Board's reasoning behind the exclusion:*
>
> > **76** Paragraph 59(1)(g) of the *PSLRA* provides me considerable discretion when deciding whether this position should be excluded. Of course, I cannot simply remove the position from the bargaining unit without a rationale. I agree with counsel for the applicant that the jurisprudence invoking that paragraph or its predecessors has not provided any clear definition of the range of circumstances under which it might be applied. That paragraph's clear intention is to permit the PSLRB to consider situations that cannot be aligned with any of the usual rationales for excluding a position from the bargaining unit. Therefore, it is not surprising that no specific outline of the circumstances covered by that paragraph has been produced. One would expect that paragraph to be used sparingly and that any situation in which it is held to apply would be unusual.
>
> …

[93] I agree with the reasoning in those decisions that suggest that s. 59(1)(g) can be appropriately applied to declare a position managerial or confidential when there is either a conflict of interest with the inclusion in a bargaining unit or a fundamental incompatibility between the employee's duties and responsibilities essential to the applicant, as determined by the Board based on its view of all relevant facts.

[94] The applicant also relied on *Assh* for the proposition that a finding of conflict of interest need not be based on direct evidence but can be based on practical judgement and logical inference, a relatively low standard of proof.

[95] I note that as follows, the Court in *Assh* reached that conclusion in a very different context — when the private interests of a federal government official (and a fiduciary in a solicitor-client relationship) might have conflicted with his official duties:

> …
>
> ***76*** *In my opinion, the relevant question to ask under section 27 in this case is whether a reasonable person would think that there was a realistic possibility that acceptance of the legacy could influence the employee's future performance of official duties. A* ***relatively low standard of proof is also consistent with the context from which the issue arises: a solicitor client relationship. As a fiduciary, a pensions advocate is in a position of confidence and influence. There will rarely be independent evidence of what passed between them or of the dynamics of the particular relationship****.*
>
> …
>
> [Emphasis added]

[96] Although *Assh* was decided in a different context, it is important to note that a conflict of interest under s. 59(1)(g) can be both real or potential (see *Treasury Board (Department of Justice) v. Association of Justice Counsel*, 2020 FPSLREB 59 at paras. 30 and 39; and *Association of Justice Counsel v. Canada (Attorney General)*, 2021 FCA 87). Accordingly, it makes sense that practical judgements and logical inferences can be relied on in some circumstances, such as when a potential, rather than an actual, conflict of interest is alleged.

[97] However, inferential reasoning can be used to show a potential conflict of interest in the absence of direct evidence, only if it is grounded in objective facts that allow such inferences to reasonably be made. Otherwise, it is speculation. See *Sherman*

Estate v. Donovan, 2021 SCC 25 ("*Sherman Estate*") at para. 97, where the Supreme Court of Canada stated this:

> *[97] … But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).*

C. Jurisprudence under s. 59(1)(g) and its previous versions

[98] Early Board jurisprudence declared positions managerial or confidential in cases related to managers, including near-managers and some advisory positions considered part of the management team. The management-team concept was first developed in *Professional Institute of the Public Service of Canada v. Treasury Board*, [1971] C.P.S.S.R.B. No. 8 (QL; "*Gestrin and Sunga*"). As the Board noted in *Sisson*:

> …
>
> *64. In Gestrin and Sunga (supra) the Board developed the concept of the "management team". It established a direct relationship between the duties and responsibilities that delineates [sic] membership on the management team and the probability of conflict of interest, if the person is at the same time a member of a bargaining unit. The Board said at K725:*
>
> > *Heads (vii) and s.2(u) rests in the Board a wide discretion. Its language provides little guidance for the Board as to the principles that the Board ought to apply in making a determination that a person falls within that head. A perusal of the discussions before the Special Joint Committee of the Senate and of the House of Commons on Employer-Employee Relations in the Public Service and in the debates on Bill C-170 both in the House of Commons and in the Senate also offers no assistance other than that it was not possible at the time the Bill was under consideration "to foresee all the circumstances under which it might be proper for the employer to put forward a proposal to exclude an individual as being employed in a managerial capacity";* ***the inclusion of a "catch all" clause was deemed necessary to enable the Board to deal with special situations. Since we are left to our devices, it seems to us that head (vii) should be used to permit the designation of persons who, although not otherwise described in heads (iii) to (vi), are in essence to be regarded as members of what might be referred to as "the management team"*** *…*
>
> …

[Emphasis added]

[99] This concept was taken a step further than the management team itself in *Public Service Alliance of Canada v. Treasury Board (Purchasing and Supply Group Bargaining Unit)*, Board file no. 174-02-250 (19770214; "*Lemieux*"). At paragraph 17, the Board added this:

> *17. … However, if it can be said that all cases of membership on the management team entail the likelihood of conflict of interest, it does not follow that all cases of conflict of interest are necessarily linked to membership on the management team. In other words**, a person may be excluded under paragraph (g) even if he could not be considered a member of the management team provided that the proven conflict of interest is latent in duties and responsibilities to the applicant which are not otherwise described in paragraphs (c) to (f).**…*
>
> [Emphasis added]

[100] The Board indicated that it had to be persuaded that there was a real likelihood of a conflict of interest between Mr. Lemieux's duty to his employer as an auditor and his interests as an employee in the bargaining unit.

[101] In the *Brownlee* decision, the Board considered an alleged conflict of interest involving auditors who made recommendations on matters such as reclassifications or whether new technology should be introduced that would reduce the number of employees in the workplace. The Board declined to declare these positions managerial or confidential. It found that many employees face conflicts of interest, large and small, almost daily by reason of their duties and responsibilities to their employer. Some feelings of unease were not significant enough to exclude the positions.

[102] In *Andres and Webb*, the Board applied then s. 5.1(1)(d) (similar to s. 59(1)(g) as noted in 2020 FPSLREB 41 at para. 45), as follows:

> …
>
> *27 Under paragraph 5.1(1)(d), the Board has some discretion in determining **whether the duties and responsibilities of a position so closely associate the incumbent of that position with the applicant as to warrant exclusion or whether there is likelihood of serious conflict of interest between the duties of the position and membership in the bargaining unit. It is under this heading that the "management team" concept developed by the Board over the years has some application.***

…

[Emphasis added]

[103] In the *SIO* case mentioned earlier in this decision, the Board considered a security intelligence officer position at a regional psychiatric centre. The position was excluded because of its unique "relationship of confidence" with the institution's senior managers, who relied on the incumbent's advice about security risks. His relationship with management had to be one of absolute trust, which was held to create a fundamental incompatibility between his job duties and being part of a bargaining unit. The Board stated as follows:

…

> ***77*** *I have concluded that the situation presented by this case calls for the application of paragraph 59(1)*(g) *of the* PSLRA*.* ***Although the typical hallmarks for exclusion — the exercise of managerial functions, expansive decision-making authority and involvement in labour relations issues — are not associated with the SIO position, it is evident … that the SIO's duties are thoroughly enmeshed with the decision-making process about security issues at the highest levels of the institution****… An SIO has the heavy burden of ensuring that the intelligence provided is based on an accurate weighting and prioritizing of information, that any recommendations represent a reliable assessment of the nature and extent of any threat, and that senior managers can make the necessary decisions with confidence. Those decisions must often be made under demanding and time-sensitive conditions, and* ***it is vital that the managers and the SIO have a relationship of mutual trust****.*
>
> *78 … However, in this case, it is critical that the senior managers of a correctional institution have access at all times to the assistance that can be offered only by the SIO.* ***They must be able to discuss sensitive information and to canvass operational options in an atmosphere of absolute confidence. In my view, that creates a fundamental incompatibility between the SIO's role and membership in a bargaining unit.***
>
> ***79*** *… Were the SIO position included,* ***the unique relationship of confidence between the SIO and the institution's senior managers would give rise to a conflict between that relationship and the SIO's obligations to fellow members of the bargaining unit****.…*
>
> …
>
> [Emphasis added]

[104] In *Treasury Board v. Public Service Alliance of Canada*, 2020 FPSLREB 41, mentioned earlier, the Board found that there was a proper basis upon which to exclude two legal support coordinator positions, commenting that the wording of s. 59(1)(g) was peculiar, being a sort of catch-all phrase, and that therefore, it heeded the Board's previous guidance for this particular phrase. Citing the reasoning in *SIO* with approval, the Board found that although the legal support coordinators were not at an especially high classification level, they were part of the management team due to the way their work was organized. Following *Gestrin and Sunga*, the Board ruled that this would create an untenable situation — the incumbents were too closely linked to management to be part of the bargaining unit.

D. The jurisprudence that the applicant relied on is distinguishable

[105] The applicant did not suggest that the HSOs were part of the management team. It referred the Board to a number of case authorities and asserted that, in those decisions, the Board had found employees who were not on the management team to nevertheless be in conflicts of interest.

[106] However, in all but two of those cases, the position's duties either involved the incumbent in managing the organization, or required a relationship of absolute trust and confidence with management, or required an unambiguous alignment with and commitment to management's interests, which thus resulted in a fundamental incompatibility with being part of a bargaining unit.

[107] See, for example, the Board's assessment of the *NFB* nurse, whose duty was to give management her assessment as to whether an employee was sick or lacked "personal discipline":

> …
>
> *In the usual situation, nurses are found to be properly in the bargaining unit because in the exercise of their professional duties they are not part of the management team. It could be, however, that a nurse's role could be different in that in addition to her strictly professional duties she can be called upon, perhaps, because of the relatively small size of the organization in which she works, to assume other additional* ***duties which would call for her involvement and input into the management of the organization*** *and thus call for her exclusion from the bargaining unit because of a conflict of interest. I believe we have such a case in the instant matter.…*

…

[Emphasis added]

[108] The director in *DND* was very involved in providing advice to management on staff relations, staffing, and classification. The Board was clear, as follows, that the conflict of interest that it found was related to those particular functions:

…

[23] Furthermore, ***given the nature of the functions performed by the occupant of the position in the areas of collective bargaining, grievances and classification****, I find that the position should not be included in a bargaining unit for reasons of conflict of interest which in this case would be both apparent and real.*

…

[Emphasis added]

[109] Another example is the security intelligence officer in the *SIO* case who was "the eyes and ears" of senior management which relied on his advice about potential security risks, and who was also privy to information about alleged employee misconduct. While not on the management team, his duties required a relationship of confidence and absolute trust with the employer that created a fundamental incompatibility with being part of the bargaining unit.

[110] Consider also the incumbents in the *ESDC senior investigators* case, who investigated alleged employee misconduct and provided the factual bases upon which management made decisions to revoke security clearances or to discipline or discharge employees. As well, their employer called them to testify before the Board in support of such decisions. The Board concluded as follows:

…

100 *Although I do not consider the occupants of the positions in question members of the management team, and I am cognizant that they do not participate in decision making, I am satisfied on the evidence on a balance of probabilities that a conflict of interest is latent in their duties and responsibilities to the employer within the meaning of s. 59(1)(g) of the* Act*,* ***not unlike the nurse's situation in*** **National Film Board of Canada.**

…

[Emphasis added]

[111] And then there are the positions considered in *National Border Operations*, about which the Board said this:

> …
>
> ***60*** *I can think of few, if any, more important aspects of management's conduct of labour relations than the sure and steady hand on operations during the critical times of job actions, collective bargaining, and strikes.…*
>
> …
>
> ***65*** *… **I am following the management team concept traced back to*** **Gestrin and Sunga, Lalonde,** ***and*** **Lacombe** ***and in particular the words of Mr. Finkelman cited earlier with respect to staff not being on both sides of the table during collective bargaining.***
>
> …
>
> ***67*** *The employer must be able to operate and organize its affairs such that it is free from any apprehension that* ***its officials involved in critical business operations*** *might have divided loyalties.*
>
> …
>
> [Emphasis added]

[112] None of the duties considered in those cases cited by the applicant are in any way analogous to the HSO role. Independent of all parties, the HSOs are tasked with investigating and assessing specific working conditions or alleged dangers in a workplace to help ensure a safe and healthy workplace for all, including senior management and other employees who are outside the bargaining unit. The HSOs' duties and responsibilities are not aligned with management interests. They do not require a relationship of trust and confidence with management. They are not linked to management at all. To the contrary, they must be neutral between employers and employees or unions, and their decisions can affect everyone in the workplace.

[113] The applicant argued that the HSOs have authority over the employment conditions of fellow employees because they make decisions about the most important employment condition — health and safety. The HSOs' role as neutral, independent Minister of Labour delegates applying the *Code* in a manner that can affect all employees is not analogous to the authority that management, or management-aligned employees, have over the employment conditions of bargaining unit employees.

[114] Only two of the decisions cited by the applicant in support of its applications were not clearly based on the notion of duties that required a close alignment and trust relationship with management. They are *Dare and Bédard* and the *SLROs* decision.

[115] *Dare and Bédard* is an opaque decision that does not explain the basis upon which it was made. Mr. Dare was CIDA's head of aid section in Bridgetown, Barbados. PSAC was the bargaining agent in that case, and it submitted that "[w]hile conflict of interest is latent in the activities of every public servant …", there was a lack of evidence of a sufficient conflict of interest inherent in Mr. Dare's duties to warrant an exclusion. It also submitted that a conflict of interest had not been "a feature of the Examiner's Report" and that "[w]hile the Board may infer conflict of interest, the lack of overt evidence in this regard should be persuasive."

[116] The Board did not address those submissions and simply stated that while there was insufficient evidence to show that Mr. Dare was a member of the management team, there was more than enough to show that if he was to play his role fully and effectively, he was "… exposed to a situation of possible conflict of interest." It also stated the following:

> …
>
> *As a member of a bargaining unit, Mr. Dare could find himself in a conflict of interest situation when dealing with heads of Caribbean governments by virtue of disclosures affecting commerce and labour in that area, and because of the intercessions Mr. Dare is expected to make on behalf of Canadian enterprise with respect to the Caribbean Development Bank. This conflict could influence the recommendations that Mr. Dare is expected to make in Ottawa.…*
>
> …

[117] The decision does not mention any evidence that would support such a finding. It does not attempt to explain the nature of the conflict of interest or how it could have influenced Mr. Dare's recommendations. Nor, in the absence of direct evidence, does it identify any factual basis upon which the Board could have made a practical judgement or inference that Mr. Dare's duties would create a conflict of interest with him being in the bargaining unit. The only time that the decision even mentions the bargaining unit is the introductory phrase to the concluding paragraph, which simply states, "As a member of a bargaining unit…".

[118] Even the applicant, although seeking to rely on that decision, seems to find it less than persuasive. In its first submission, it simply listed that decision but made no comment with respect to it. In a later submission, it stated this:

> …
>
> *It is respectfully submitted that the inference drawn between the interests of the PSAC with respect to funding decisions affecting commerce and labour in Caribbean countries is far less direct and obvious than the current application (where the decisions made by HSOs have a direct and immediate effect on a critical aspect of employment, i.e., health and safety).*
>
> …

[119] In my view, the decision in *Dare and Bédard* is questionable at best, and given its impenetrable reasoning, it can provide no guidance to the Board for analyzing the matter at hand.

[120] The applicant acknowledged that the *SLROs* decision was the case most directly on point. In my view, it is the only case provided to the Board that bears any semblance to this fact situation. The senior labour relations officers of the CLRB dealt with applications for certification and decertification, strike and lockout cease-and-desist orders, unfair-labour-practice complaints (including the duty of fair representation), and work-refusal-reprisal complaints. Their role was to investigate applications and mediate complaints. They did not make decisions, but the CLRB often relied on their recommendations. At page 8, the Board found that the SLROs should be excluded from the bargaining unit, as follows:

> *… A conflict of interest or potential for conflict of interest which undermines the very role of the employer, diminishes the effectiveness of the Senior Labour Relations Officers and which necessitates the shifting of burdensome duties and responsibilities to Directors to whom the Senior Labour Relations Officers report, cannot be tolerated and must be terminated at the earliest possible moment. Any reasonable reading of paragraph (g) of section 2 demonstrates that the Board has jurisdiction to bring an end, through the exclusion process, to a situation where "by reason of his duties and responsibilities", as described in this decision, the Senior Labour Relations Officers are in conflict or potential conflict of interest. In support of this position reference is made to the decision in The Office of the Auditor General of Canada and the Public Service Alliance of Canada (Board File 172-14-297).*

[121] The only jurisprudence that the Board cited as supporting its decision was *Lalonde*, which dealt with an auditor whose duties entailed working closely with senior financial officers and required close alignment with management interests. It did not deal with an alleged conflict of interest of the kind the Board found "obvious" in the *SLROs* situation; therefore, it is not clear how that decision provided support for the Board's finding.

[122] In any event, the Board's finding of a conflict of interest was based on the SLROs direct involvement in adversarial labour relations matters in every aspect of their job. In my view, it is distinguishable from this case for that reason. The HSOs are not labour relations practitioners in the employ of a labour relations board, and their duties do not involve dealing with labour relations matters.

[123] The CLRB's then vice-chairperson testified that it was the perception of the parties appearing before it that was the problem and that the CLRB had received expressions of concern and a written complaint that the SLROs were in the bargaining unit. It is not surprising that the CLRB received such expressions of concern given the SLROs direct and constant involvement with the parties' adversarial labour relations. No such evidence was presented in this case.

[124] Apparently, the HSOs have been performing their duties satisfactorily for quite some time without anyone complaining about a potential conflict of interest (save for the spurious allegations that Parks and the employer made against HSO Grundie), and without the applicant seeking to remove them from the bargaining unit until it made these applications. If there was a conflict of interest with their inclusion in the bargaining unit or a fundamental incompatibility between their duties and their inclusion in the bargaining unit, surely, it would have already been raised.

[125] There was also evidence in the *SLROs* case that to deal with the public sector work, "burdensome duties" had to be done by directors, which was a solution that in the Board's view, could be accepted only as a temporary measure. Ms. Roussel mentioned that there is more public sector work than there used to be and that at times, it is difficult to provide coverage. However, there was no suggestion that managers have ever had to do the HSOs' work due to a potential conflict of interest, or that such a measure has ever been contemplated.

[126] An increase in public sector work would be relevant only if there were already some excluded HSOs handling that work and these applications sought additional exclusions to cover the increase. That is not the case. There was no suggestion that the HSOs have not always handled all the public sector work.

E. The HSOs are compliance officers

[127] The HSOs are classified TI and are under the TC group definition, which reads as follows: "The Technical Services Group comprises positions that are primarily involved in the performance, inspection and leadership of skilled technical activities."

[128] The applicant stressed what it views as an adjudicative aspect of the role, stating that the HSOs hear evidence and arguments from both sides and make binding decisions; that they do not just apply technical rules to neutral factual propositions but rather must step in to arbitrate disputes that the parties have been unable to resolve. In her examination-in-chief, Ms. Roussel was asked if the HSOs could be described as adjudicating work-refusal disputes, and she agreed that it could be described that way. As this answer was offered in agreement to a leading question, I give it little weight.

[129] However, she also elaborated that it was most important to hear from the employee and to gather all available information. This accords with her response to a question on cross-examination as to whether the HSOs are akin to police officers given that they secure scenes, take witness statements, advise of the right to remain silent, and gather evidence for prosecution. She responded that although the RCMP trained the HSOs in the past, she did not think that they thought of themselves as peace or police officers but rather as investigators.

[130] The Board did not hear from an HSO as to how they carry out their duties. However, it is clear that they do not hear evidence and argument to arbitrate or adjudicate disputes, as the applicant submitted. The evidence suggests that they gather all available information, listen to what everyone has to say, do their own research, make their own independent observations, inquiries, and assessments. That is investigating, not adjudicating or arbitrating.

[131] While the parties may disagree as to how the *Code* should be interpreted or applied, the HSOs are not there to resolve a dispute between the parties; they are there

to apply and ensure compliance with the *Code* and the *Canada Occupational Health and Safety Regulations* (SOR/86-304; "the *Regulations*"). As Ms. Roussel said of the HSOs in her description of how the Labour Program operated: "They work toward both proactive and reactive compliance".

[132] As the former appeals tribunal stated in *Canadian Food Inspection Agency v. Public Service Alliance of Canada*, 2015 OHSTC 1:

> …
>
> *[16] The present application raises an important question about the interests that are at play in the context of an appeal against a direction issued by a health and safety officer under the Code.*
>
> *[17] An investigation by a health and safety officer usually begins, as it* [*sic*] *was the case here, by a request for intervention or complaint made by an employee.* ***The role of the health and safety officer is not to resolve a dispute between the two parties, but as in this case, to determine whether there has been a contravention to the Code or its*** **Regulations.** *The HSO thus conducts an investigation to gather the facts that will enable him or her to make an informed judgement on the question.*
>
> *[18] If the HSO concludes that a contravention of the Code has occurred, he or she may issue a direction enjoining the employer or the employee concerned, or both, to conform to the requirements of the Code. Such direction is legally binding and enforceable immediately, or within the time period specified by the HSO, unless an appeals officer directs that it be stayed pending an appeal.*
>
> *[19]* ***Once issued, a direction which is aimed at correcting a situation which the health and safety officer has found to constitute a contravention of the Code, serves a public policy dimension, which goes beyond the mere interests of the parties. It is an order of a public officer enjoining, in most instances, the employer, to comply with its obligations under the Code. Failure to comply with such an order constitutes an offence under the Code.*** *The HSO himself is not legally authorized to modify his/her direction once it is issued and only an appeals officer may vary or rescind a direction, on appropriate legal or factual grounds going to the validity and merits of the direction in the circumstances at hand. This is the task conferred on appeals officers by section 146.1 of the Code.*
>
> …
>
> [Emphasis added]

[133] The applicant also submitted that an HSO testifying at an appeal hearing is in a conflict of interest that was variously described as being on both sides of a dispute

(regulator on one hand, employee in the bargaining unit on the other) or as being a neutral representing neither side in an adversarial environment.

[134] Testifying at an appeal does not put an HSO on both sides of a dispute; the HSOs appear as neutrals, to explain their decisions. This indicates that they are not decision makers like arbitrators or adjudicators who do not defend or explain their decisions on appeal or judicial review. Some aspects of their role, including appearing at appeals, is analogous to enforcement officers, such as police, who also make on-the-spot decisions, carry out lengthy investigations, and testify to explain what led them to make a decision or take an action. And, like police officers, they also secure accident scenes, inform witnesses of their rights, ask questions, investigate, and write reports.

[135] The respondent noted that PSAC represents thousands of regulatory and law-enforcement employees across multiple jurisdictions in Canada, including police officers, most of whom work in the federal public service. The applicant did not suggest otherwise or challenge that statement in any way. This brings to mind the Board's comment in the *Brownlee* decision to the following effect:

> …
>
> *36. … **Many employees may meet almost daily with conflicts large and small by reason of their duties and responsibilities to their employer.** The test is whether the potential or actual conflict between one's duties and obligations to the applicant and one's interests as a member of a bargaining unit is sufficiently great as to require exclusion.…*
>
> …
>
> [Emphasis added]

[136] I take from the evidence that the HSOs are not adjudicators or arbitrators who resolve issues between disputing parties but rather are technical advisors, investigators and compliance officers who ensure that health and safety law is complied with by all.

F. Appeals of HSO decisions

[137] The applicant submitted that, "The HSO, in many cases, is challenged by PSAC as appellant looking to have their finding of no-danger (or the Direction) overturned in a quasi-judicial trial process." To illustrate this, it presented a list of eight former appeals tribunal decisions issued in the period of 2013 to 2017. Seven were appeal

decisions; one was a decision on the employer's request for an extension of time to file an appeal.

[138] The list did not show that in "many cases", PSAC challenged HSO decisions looking to overturn a no-danger finding. Rather, it showed eight decisions, rendered over a five-year period, of which only two were issued in PSAC appeals of no-danger decisions. Two no-danger appeals in five years can hardly be described as many cases. The applicant characterized its list as a "selection" of appeal decisions, but if there were others it chose not to list them. In any event, I have only what is before me.

[139] The list does support the allegation that PSAC involves itself in appeals, although slightly more frequently as respondent than as appellant. Besides PSAC's two appeals, the other six decisions listed were of five employer appeals of HSO directions and one employer request for more time to file an appeal. Although the employer was shown to be the more active appellant on this list, a total of eight decisions in five years, seven of which were actual appeal decisions, does not strike me as a hot bed of health-and-safety litigation by either party.

[140] As for outcomes, the union was unsuccessful in its two appeals. The employer was successful in having two directions rescinded and was granted its request for a late filing. It was unsuccessful in its three other appeals. These numbers are much too small to lead to any hard conclusions, but they certainly do not suggest that the HSOs are incapable of making neutral decisions as their job demands.

[141] The applicant did not meet its burden of establishing that there is a conflict of interest under s. 59(1)(g) of the *Act* because the respondent participates in and initiate appeals.

G. **The duty of neutrality and divided loyalties**

[142] The applicant submitted that, "As the employer may only act through its representatives, officials must be loyal to its interests and be seen to be loyal to its interest." It submitted that the concept of divided loyalties was applicable in the context of these applications and that the HSOs owe it a duty of neutrality, which creates a fundamental conflict with their inclusion in a bargaining unit.

[143] This assumes that an employee in a bargaining unit cannot be neutral, even when their job duties and responsibilities require exactly that, and that the assumed

loyalty they will feel toward the union or fellow employees in a bargaining unit will inevitably outweigh their obligation to do their job properly. Or, at least, that they will feel "torn" between the two.

[144] The respondent countered that that is a long-outdated view of the purported effects of unionization and the collective bargaining regime.

[145] I agree and note that this observation has been made in many decisions since the late 1970s, as noted by the CIRB in *Local Union 1574, International Brotherhood of Electric Workers v. NorthwesTel Inc.*, 2007 CIRB 377, citing the decision in *Cominco* as follows:

> …
>
> *[17] …*
>
> *As we said our test is one of conflicting interests, but it is no longer as it was perceived in the 60s or even early 70s. Views about the compatibility of collective bargaining and job responsibilities have changed. Collective bargaining and trade union membership are no longer viewed as incompatible with the performance of responsibilities as teacher, police officer, firefighter, professional or public servant. Society accepts that citizens may exercise duties of social trust and find no conflict with their exercise and membership in trade unions or participation in collective bargaining.…*
>
> …
>
> *(*Cominco Ltd. *(1980) … [1980] 3 Can LRBR 105* [at para. 18.] …*)*
>
> …

[146] And see the CLRB's following comments in *Telecommunications Employees Managerial and Professional Organization v. British Columbia Telephone Co.* (1979), 38 di 145 at para. 28:

> *For those who think we have mistaken Parliament's intent in its application to specific persons here, we wish to say similar decisions by this Board have borne the test of time and proven hypothetical fears to be unfounded. For example, the employer argument in The Canadian Press 52 CLLC 16,615 that pro-union bias would result in the national news with the unionization of its editorial staff can hardly be said to have occurred.…*

[147] The applicant argued that an HSO is in an inherent conflict of interest because they could become an active union member and seek union office or sit on a health-

and-safety committee. Then they might actively advise the union or instruct union counsel on a matter while also deciding it as an HSO and then defend their decision on appeal while being cross-examined by the union counsel they have instructed. Ms. Roussel said that an HSO deciding a work refusal when the union is in a strike position would be a conflict of interest because the HSO might take off their regulator hat and act as an employee. She said that especially for union officers it could be difficult not to do so, and that this would be the most direct kind of conflict of interest.

[148] The Board rejected that kind of speculative argument in the *SIO* case. That decision turned on the necessity for absolute trust and confidence in the security intelligence officer's relationship with management, yet even in that context, the Board did not accept speculation about the difficulties that such an officer might encounter in a labour dispute, on the picket line, or holding union office. It stated as follows:

> …
>
> ***78*** *I am mindful of the caution expressed in a number of earlier decisions to which I was referred that an employee's rights to collective representation should not be removed lightly. I do not think it necessary, in making this decision, to accept the speculation in counsel for the applicant's argument about the difficulties that the SIO might encounter in the context of a labour dispute, on the picket line or as the incumbent of an elected position with the bargaining agent.* ***There are many circumstances in which the status of an employee who is privy to important information must be balanced in favour of continued membership in the bargaining unit. An employer would be asked to suffer a certain amount of inconvenience****.…*
>
> [Emphasis added]
>
> …

[149] The applicant's concern about HSO activity on health-and-safety committees or as union officers was entirely speculative. Ms. Roussel simply commented that some HSOs sit on health-and-safety committees, that the employer had told them that it was a conflict of interest and that, in her opinion, it could be hard, at times, for union officers to remove their union hats. The applicant's submissions speculated about scenarios that could occur, all of which featured the HSOs potentially engaging in obvious conflicts of interest; however, no evidence about any actual problem was presented.

[150] That is not to say that it could not happen. But from the complete absence of evidence on the subject, I draw the inference that the parties are capable of dealing with such issues should they arise. They must be, or surely, the applicant would have made this application long before it did. I can only assume that the HSOs know how and when to recuse themselves from a particular issue, as many public sector employees must do, at times, and that the possibility that such an issue could arise and not be managed effectively and in good faith between these parties is remote.

[151] The HSOs are employees of the core public administration, and they exercise a delegated authority from the Minister of Labour. The employer is represented by the Treasury Board (s. 2(1) of the *Act*). The applicant referred the Board to the decision in *Southeast Kootenay Principals' and Vice-Principals' Association v. British Columbia (Attorney General)*, 2021 BCLRB 82 ("*Southeast Kootenay*"). At paragraph 130, referring to *Cowichan Home Support Society v. United Food and Commercial Workers International Union, Local 1518*, [1997] B.C.L.R.B.D. No. 28 (QL; "*Cowichan*"), the British Columbia Labour Relations Board ("the B.C. Board") wrote this:

> ***130*** *The purposes for the managerial exclusion discussed in* Burnaby *were reaffirmed in* Cowichan*, which involved a comprehensive review of the past and current Board policy for both managerial exclusions under Section 1(1) of the Code and the policy of appropriateness in relation to supervisory units under Section 29 of the Code. The panel's comments in* Cowichan *include the following in relation to the purpose of, and need for, the managerial exclusion:*
>
> > *This brings us to a more detailed examination of the two most important factors to be measured in determining whether a person falls within the definition of "employee" or is excluded under the Code by reason of managerial status.* ***This involves those functions that have a collective bargaining and/or labour relations nexus. The broad purpose of the managerial exclusion is, as we have stated, to ensure the undivided loyalty of the managers to the enterprise. This is consistent with the arm's length model of collective bargaining that safeguards the adversarial relationship (in both labour and management's interest) and is consistent with the underlying purpose of the statute.***
> >
> > *If there has been any change in this view, it probably lays within the concept of undivided management loyalty.* ***Loyalty in the labour relations context means putting the company's interests first. From the union perspective, it means putting the members' interests first. By keeping managers out of any bargaining unit,***

> ***their loyalty will not be divided between the functions of their jobs (the company's interests) and the interests of members of the bargaining unit.****…*
>
> *…*
>
> [paras. 104 to 106]
>
> [Emphasis added]

[152] Although *Southeast Kootenay* and *Cowichan* were rendered in a different legislative and factual context, they considered the type of conflict of interest that can occur in the context of managerial or confidential exclusions. That context is standard across Canadian jurisdictions.

[153] The B.C. Board stated that a conflict of interest in this context can arise from the existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit. Loyalties in the labour relations context are described as either putting the employer's interests first or putting the bargaining unit members' interests first. Dual loyalties result when job duties and responsibilities demand the former while being part of a bargaining unit demands the latter.

[154] It is undisputed that the HSOs exercise a delegated authority from the Minister of Labour and that they must act independently of the employer, bargaining agent and other employees. Their job duties demand that they be neutral, not that they put the interests of the employer, the bargaining agent or the bargaining unit members first. The applicant has not adequately explained how or why the HSOs would have divided loyalties arising out of the performance of their duties in exercising their delegated authority.

[155] Whether an HSO with the delegated authority to apply the *Code* and *Regulations* is in a bargaining unit with other employees, or not, conflicts of interest can arise simply because they have the same employer as others in the bargaining unit or because the entity they work for is sometimes a party in cases that these officers must nevertheless approach with objectivity and professionalism. However, being part of a bargaining unit, in itself, does not render a compliance officer incapable of acting independently or susceptible to acting for improper purposes.

[156] Should actual or potential conflicts of interest arise from time to time, I heard no evidence to suggest that they could not be managed appropriately and in good

faith. There was no suggestion that an HSO had ever felt the need to recuse themself from a file, or that a file had ever been assigned to a manager due to a conflict of interest, but both of those options are available to deal with exceptional cases. As the Board said in the *SIO* decision at paragraph 78:

> *… There are many circumstances in which the status of an employee who is privy to important information must be balanced in favour of continued membership in the bargaining unit. An employer would be asked to suffer a certain amount of inconvenience.…*

H. Duties and responsibilities to the employer

[157] The applicant focussed primarily on its argument that the HSOs are in a "direct and obvious conflict of interest". There was little discussion of the second criterion in s. 59(1)(g) — whether they should not be in the bargaining unit by reason of their duties and responsibilities to the employer. It was noted that the *SIO* decision found that the test for the second criterion could be met when inclusion in a bargaining unit could impair the effective performance of essential duties.

[158] The applicant argued that while a finding of conflict of interest would certainly engage the exclusion criteria, that independent of such a finding, including the HSOs in the bargaining unit could impair the effective performance of their duties exercising the delegated authority of the Minister of Labour as independent arbitrators of occupational health-and-safety matters. As noted earlier in this decision, I do not accept that HSOs are arbitrators of occupational health-and-safety matters. Further, there was no adequate explanation as to how or why inclusion in a bargaining unit would impair the performance of their duties and responsibilities, apart from the assumption that it would inevitably create a conflict of interest.

[159] As the two criteria in s. 59(1)(g) were inextricably linked in the evidence and submissions before the Board, the reasons in this decision should be understood to apply to both. Based on the evidence, I see no basis for the application of s. 59(1)(g) of the *Act* to declare the HSO positions managerial or confidential by reason of their duties and responsibilities to their employer.

V. Conclusion

[160] The applicant provided neither cogent evidence nor circumstantial objective facts from which practical judgments or logical inferences could be drawn, that these positions should no longer be in the bargaining unit for reasons of conflict of interest or because their duties and responsibilities to the employer are fundamentally incompatible with being in a bargaining unit.

[161] Accordingly, I see no basis on which to apply s. 59(1)(g) of the *Act* to the circumstances of this matter.

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

(The Order appears on the next page)

VI. Order

[163] The applications are dismissed.

January 24, 2024.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board