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Citation: 2024 FPSLREB 13

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 under subsection 71(1) of the *Federal Public Sector Labour Relations Act* for a declaration that a position is managerial or confidential

Before: Christopher Rootham, 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

Heard at Ottawa, Ontario,
November 9, 2023.
(Written submissions filed January 13, 20 and 26 and September 7 and 29, 2021, and October 6 and November 7, 2023)

REASONS FOR DECISION

I. Overview

[1] The Treasury Board ("the employer") applied to exclude five positions titled Occupational Health and Safety Advisors ("OHS advisors") from the Program and Administrative Services (PA) bargaining unit represented by the Public Service Alliance of Canada ("the bargaining agent"). The Board initially dismissed the employer's application; however, that decision was set aside on judicial review and returned to the Board for redetermination of one of the two grounds on which the employer based its application.

[2] This redetermination decision raises two issues.

[3] First, the parties raised an issue about whether I should hear oral evidence on this redetermination. I decided not to hear that oral evidence. I advised the parties of my decision on October 10, 2023, by way of what is termed a "line decision". As I will explain in detail below, the Federal Court of Appeal's decision left me with the discretion to decide whether to hear this evidence. I decided not to hear this evidence for four reasons: (1) neither party challenged the Board's initial decision on the basis that proceeding by written evidence was procedurally unfair; (2) the Court of Appeal severed and returned one issue only so that if I heard new evidence the case would be decided on the basis of different evidence for each of the two grounds; (3) the Board has generally not heard new evidence when reconsidering a case that a reviewing court has remitted to it; and (4) the employer's request that I hear this evidence was too vague about what the evidence would be and why it would impact the case.

[4] I also concluded that, if I was mistaken, I would not have admitted the oral evidence because it was not relevant to the issues raised in this case. The employer wanted to adduce oral evidence to explain how the positions had changed or evolved since the Board's initial decision. However, an application for exclusion is decided on the basis of the duties as of the date of the application, not as of the date of the hearing. Evidence of duties performed after the date of the application is only relevant if it retrospectively clarifies the nature of the duties of the position as of the date of the application.

[5] Second, the employer sought to exclude these positions because there is a conflict between their duties and their incumbents being represented by a bargaining agent. This is a borderline case; however, I have concluded that there is a sufficiently concrete potential for a conflict of interest between the duties of these positions and being represented by a bargaining agent to justify excluding the positions. This conflict of interest derives from the positions' duty to advise management about workplace violence complaints, and most specifically because those duties include advising management whether an employee (either the complainant or alleged perpetrator) should be removed from the workplace or work team as a result of a workplace violence complaint. Given the role of a bargaining agent in representing one, or sometimes both, employees who could be implicated in such a decision, being represented by a bargaining agent gives rise to the potential of a conflict between affiliation with that bargaining agent and being able to advise management against the interests of that same bargaining agent.

[6] I have therefore granted the application and declared that the five positions are excluded from the bargaining unit.

II. Procedural background

[7] The employer filed this application for an order declaring that five OHS advisor positions are managerial or confidential positions on January 9, 2018. The employer based its application on paragraphs 59(1)(g) and (h) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The bargaining agent objected to the application in a timely fashion. The Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision also refers to any of its predecessors) initially set this matter down for a hearing on January 11, 2021. The bargaining agent, though, applied to the Board for an order to have this application dealt with in writing. The Board agreed, over the strong and repeated objection of the employer. The parties filed written submissions in January 2021. The employer's written submissions included the evidence forming the basis of the Board's decision: the job descriptions for the OHS advisor positions, an organization chart, a detailed rationale for their exclusion, and a short will-say statement of the manager responsible for these five positions. The bargaining agent did not file any evidence in this matter.

[8] On March 9, 2021, the Board dismissed the employer's application in a decision bearing citation 2021 FPSLREB 24. The employer applied for judicial review of the

Board's decision. On December 1, 2022, the Federal Court of Appeal granted the employer's application for judicial review. The Court of Appeal concluded that the Board had not adequately address the employer's application under s. 59(1)(g) of the *Act*. The Court of Appeal therefore set aside the portion of the Board's decision relating to the employer's application under s. 59(1)(g) of the *Act* and remitted "the paragraph 59(1)(g) element" to the Board for redetermination (see *Canada (Attorney General) v. Public Service Alliance of Canada*, 2022 FCA 204).

[9] The appointment of the member of the Board who issued the initial decision had come to an end. The Court of Appeal therefore ordered that the redetermination be conducted by a different member of the Board. I was assigned as a panel of the Board to conduct this redetermination of the employer's application under s. 59(1)(g) of the *Act*.

[10] As I will discuss in detail later in this decision, I heard this case on the basis of the written submissions and evidence filed with the Board in January 2021. I gave the parties permission to file supplemental written submissions. The employer filed short submissions, but the bargaining agent did not. I also heard oral argument by both parties. I have based my decision on both the written and oral submissions of the parties. The parties submitted a number of authorities. While I do not list or refer to every authority cited by the parties, I read them all while preparing my decision.

[11] I want to thank both parties' representatives for their submissions, both oral and written. In particular, both parties' representatives acknowledged and conceded any weaknesses in their case (as I sometimes set out later in this decision) and also answered my questions directly and clearly. This was not an easy case, but their advocacy made my job deciding this case easier. I thank them for it.

III. Decision not to hear new evidence

A. Process followed to resolve the new-evidence issue

[12] As I stated earlier, the Board made its initial decision on the basis of written submissions and as part of those submissions the employer filed documents and a will-say that the Board relied upon. The bargaining agent objected to those documents and the will-say, arguing that they should have been supported by affidavit evidence from the employees occupying the positions at issue. The Board rejected that argument, stating at para. 99:

> *[99] The respondent made much of the lack of evidence in the applicant's submissions as to the degree upon which management relies on the advice that the OHS advisors provide to it. The applicant raised an objection to this argument, stating that but for the respondent's request that this matter proceed by way of written submissions, which the Board granted,* viva voce *evidence of that nature would have been called. I agree with the applicant that the respondent's comment was disingenuous. I have drawn no negative inference from the applicant not providing me an affidavit or other evidence, as requested by the respondent. My decision is based solely on the submissions before me.*

[13] The bargaining agent did not challenge that conclusion at the Federal Court of Appeal.

[14] When this matter was returned to the Board, I convened a pre-hearing conference to discuss the appropriate method of proceeding with this redetermination. The employer stated that it wished to adduce oral evidence in support of this application. The bargaining agent contested that request. I ordered that this preliminary issue should be dealt with in writing. I specifically directed the parties to address these four questions:

1) May the Board hear evidence in this matter beyond the evidence already filed by the parties when the Board initially heard these applications?
2) If so, should the Board hear evidence or, alternatively, is the existing evidence sufficient?
3) If so, may the Board hear evidence of any changes to the duties of the positions at issue after January 13, 2021 (the date the applicant filed its evidence in the initial Board proceeding)?
4) If so, should the Board hear that evidence?

B. Parties' submissions

[15] The employer submitted that there was nothing in the Court of Appeal's order that prohibited the Board from hearing new evidence, that the Board is the master of its own proceedings, and that it could hear this evidence. The employer went on to submit that the Board should hear the evidence because "[i]n this case the duties and responsibilities of the position have changed in a material way. The existing record is not sufficient to accomplish the analysis of whether the positions, as they are now, should be excluded." The Board should treat this application as if it were hearing it for the first time in November 2023.

[16] Further, the employer argued that the Board's decision might depend upon the nature of the duties at a particular point in time, stating, "The Board would decide the matter with the possibility that positions would be excluded for the entire period (and on a go forward), that the positions not be excluded at all, or that the positions be excluded for one period but not the other." Finally, the employer cited *Canada Air Traffic Control Assn. Inc. v. Canada (Treasury Board)*, [1977] C.P.S.S.R.B. No. 1 (QL) ("*Gibson*") for the proposition that the duties and responsibilities of a position can evolve, which then will impact whether it should be excluded.

[17] The bargaining agent disagreed. It reasoned that the Court of Appeal could have directed that the parties be provided the opportunity to file new evidence. It relied upon *Association of Justice Counsel v. Treasury Board*, 2016 PSLREB 119, and *Lloyd v. Canada Revenue Agency*, 2017 PSLREB 33, in support of that argument. It also submitted that "[t]he clock does not continue to run for an employer to 'paper a file' while it pursues an appeal …" and that allowing evidence at this stage would encourage an employer to make post-application changes to a position's duties to buttress an application to exclude it. For these reasons, an exclusion application is assessed as of the date of the application. The bargaining agent cited *NAV Canada*, 2000 CIRB 88, in support of that proposition.

[18] The bargaining agent also stated that the Canada Industrial Relations Board (CIRB) "routinely determines" that exclusion applications could be dealt in writing, citing *Coastal Shipping Limited*, 2005 CIRB 309, and *Sperry Rail Canada Limited*, 2022 CIRB 1013. The bargaining agent submitted the Board should do likewise. Finally, it distinguished *Gibson* by pointing out that that case involved a different issue, namely, whether an employee remained excluded while temporarily absent from the workforce.

[19] In reply, the employer distinguished *Coastal Shipping Limited* by stating that it was a CIRB decision that expressed concern about the resources cost of hearing exclusion cases. The employer suggested that the Board has more resources and therefore is better able to conduct oral hearings. It ended that point by stating this:

> …
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> *… Simply put, an oral hearing is widely regarded as the* gold-standard *when courts engage in procedural fairness analysis. While the PSAC cites the* Sperry Rail *decision of the CIRB for the proposition that the CIRB routinely does hearings by written submission, the history of the FPSLEB is different.*

…

[20] On October 10, 2023, I issued a line decision advising the parties that I would not allow the employer to file this new evidence. I stated that I would provide detailed reasons for that decision; these are those reasons.

C. Analytical path to decide whether to hear new evidence in a redetermination

[21] As I will explain in detail, I followed this analytical path when deciding whether to hear new evidence on redetermination:

1) Does the reviewing court's order expressly answer this question? If so, the Board will follow that order.
2) Does the reviewing court's order implicitly answer this question, when read in light of the court's judgment and any other surrounding context? If so, the Board will follow that implicit order.
3) If the reviewing court's order is silent, the Board will exercise its discretion about whether to hear the evidence in light of the surrounding context, which starts with the nature of the issues raised by the reviewing court and its decision and may also include other relevant features of the case.

1. Context behind the issue of how to conduct a redetermination

[22] The issue of how an administrative tribunal should conduct itself when a case is remitted to it after judicial review has received scant attention from courts and academic literature. The decisions and commentary that exist on this point typically concern the question of whether a case that has been remitted to a tribunal should be heard by the same or a different member of that tribunal. There is very little discussion about whether a tribunal should hear new evidence or rehear old evidence when a reviewing court sets aside a decision and remits that decision to the tribunal for redetermination.

[23] However, this issue will become more common in light of the decisions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21. Those decisions, among thousands of others from lower-level reviewing courts, have oriented judicial review to focus on the reasons provided by a tribunal instead of the result. Thus, tribunal decisions are vulnerable to judicial review if the reasons are not intelligible or transparent and if the reasons are inconsistent with the legal and factual constraints on decision makers.

[24] Importantly, one of the ways in which a decision is inconsistent with those constraints is if it fails to "… meaningfully grapple with key issues or central arguments raised by the parties …" (see *Vavilov*, at para. 128, and *Mason*, at para. 74). That is what happened in this case. The Court of Appeal concluded that the Board's first decision did not meaningfully grapple with the employer's argument about para. 59(1)(g) of the *Act*. In such cases, the usual remedy is for the reviewing court to remit the matter to the original decision maker unless a particular outcome of the case is "inevitable" (see *Vavilov*, at para. 142, and *Mason*, at para. 120).

[25] The "meaningfully grapple" basis for judicial review has become prevalent in the past four years since *Vavilov* was decided. The Board, like other tribunals, can expect more decisions to be remitted to it when a reviewing court is dissatisfied with the quality of its reasons. Therefore, I have taken some time to articulate the analytical path I took to decide whether to accept new evidence in a court-ordered redetermination.

2. Nature of the redetermination: whether to redraft, start over, or carry on

[26] First, I have considered the nature of redetermination after a reviewing court has remitted a case to a tribunal. There are three conceptual approaches to this redetermination, what I will call the "redraft", "start over", and "carry on" approaches.

a. Reject the redraft approach

[27] The bargaining agent in this case suggested the Board's role in this case was simply to provide responsive reasons "… so that the employer can understand why it lost this portion of its application as well." This is what I refer to as the "redraft" approach.

[28] I cannot agree with the redraft approach because it is inconsistent with the purpose behind reasons and with the meaning of the term "redetermination".

[29] Reasons serve two purposes. First, reasons explain the result to other people — the parties, the legal and labour relations professionals, and the public. As the Supreme Court of Canada put it in *Vavilov*, at para. 79:

> *[79] … Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as*

> *the perception of arbitrariness in the exercise of public power: Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine, at paras. 12-13. As L'Heureux-Dubé J. noted in Baker, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S. A. de Smith, J. Jowell and Lord Woolf, Judicial Review of Administrative Action (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 S.C.L.R. (2d) 211, at p. 220.*

[30] Second, preparing reasons helps the decision maker reach the right result. As the Supreme Court of Canada explained in *Vavilov*, at para. 80:

> *[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: Baker, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": Good Judgment: Making Judicial Decisions (2018), at p. 134; see also Sheppard, at para. 23.*

[31] Failing to provide reasons that meaningfully grapple with an issue is not wrong just because the parties, the profession, or the public is confused or disappointed. It is also wrong because inadequate reasons may reflect fuzzy thinking, a knee-jerk reaction to a case, or even an unconscious bias. That second mischief cannot be cured by simply providing a more detailed explanation for the same result — it requires that the decision maker look at the issue afresh. Drafting reasons disciplines a decision maker against coming to the wrong result by requiring them to think carefully about a case and then articulate the result.

[32] I pause to acknowledge the irony, or maybe hypocrisy, of my paean to reasons when I issued a line decision on this point. Despite that, this case is an example of the benefits of reasons. During the pre-hearing conference I held early in this proceeding, I expressed skepticism of the bargaining agent's position that I should not hear new evidence at this stage. My instinctive, knee-jerk reaction was to allow the evidence. However, after reading the parties' submissions and beginning to sketch out my reasons on this issue, I developed a more informed view about the issue. Even though

my decision was issued before the reasons were provided to the parties, the process of drafting reasons sharpened my thinking.

[33] Additionally, the Court of Appeal ordered that this case be remitted for "redetermination." Redetermination means redetermination, not redrafting. It is open to a tribunal "… on redetermination, to conduct a complete assessment and to reach a different conclusion …" (see *Patricks v. Canada (Citizenship and Immigration)*, 2023 FC 745 at para. 18, and *Dobson v. Canada (Attorney General)*, 2007 FC 565 at para. 25). As I discussed earlier, if the result of the case was inevitably in favour of the bargaining agent, the Court of Appeal could have denied the judicial review application. By remitting the matter to the Board, the Court of Appeal indicated that there was some doubt about the ultimate disposition of this case.

[34] Therefore, a redetermination requires me to reassess this case, not just redraft the reasons for the Board's original decision.

b. Reject the start-over approach

[35] On the start-over approach (or, if you prefer Latin, the *de novo* approach), there is a suggestion that when a matter is redetermined by a different member of a tribunal, the matter "must be reheard in its entirety" because of the "he who hears [must decide]" principle; see Macaulay, Sprague and Sossin, *Practice and Procedure Before Administrative Tribunals (loose-leaf)* (1988), at chapter 35.12, and Brown and Evans, *Judicial Review of Administrative Action in Canada (loose-leaf)* (1998), at chapter 12.62. However, in my view, the principle is not that a redetermination means that the tribunal is starting over; the principle is that a redetermination must be procedurally fair. A tribunal may decide that it must start over because that is the only procedurally fair way to conduct a redetermination. This does not mean that starting over is an inherent part of a redetermination.

[36] The two cases cited by the authors of *Judicial Review of Administrative Action in Canada* for the start-over proposition involved a reviewing court specifically ordering that the tribunal start over in its redetermination because of serious procedural flaws in the initial decision.

[37] In *Floris v. Director of Livestock Services* (1986), 76 N.S.R. (2d) 320 (T.D.), the reviewing court quashed an administrative tribunal's decision for exceeding its

jurisdiction by misinterpreting a statute. The Court referred the matter back to the Director of Livestock Services for "proper consideration" after hearing "fresh closing submissions" but stated that it would "… not require that any additional evidence be adduced." A problem emerged that the Director of Livestock Service's term had expired in the meantime and that a new Director had been appointed. The reviewing Court changed its order (see (1987), 77 N.S.R. (2d) 419 (T.D.)) to expressly require a *de novo* hearing because the original case turned on oral testimony. This case stands for the proposition that a rehearing is necessary only to safeguard procedural fairness, not that it is always required.

[38] In the second case, *Johannessen v. Alberta (Workers' Compensation Board Appeals Commission)*, 1998 ABQB 72 at para. 14, the Court stated specifically that a redetermination was **not** a new hearing and that the tribunal acted appropriately by relying on the evidence presented to it the first time, buttressed by additional arguments provided by the applicant's solicitor. With due respect to the learned authors of that text, the case cited does not support the start-over proposition.

[39] Therefore, I reject the proposition that all redeterminations require that a tribunal start over. Starting over may be required to ensure procedural fairness, but it is not automatic.

c. Adopt the carry-on approach

[40] I prefer the authorities supporting the carry-on approach. Those authorities posit that an order setting aside a decision and remitting the matter to a tribunal for redetermination means that the redetermination is a continuation of the original matter but starting from the point of error. This in turn means that a tribunal does not have to hear fresh evidence, but it may do so if required to dispose of the matter correctly from the point of error.

[41] In *Canada (Director of Investigation and Research) v. Air Canada*, [1994] 1 F.C. 154 (C.A.), the Federal Court of Appeal described this as follows at paragraph 33:

> *33 The Tribunal, as it was constituted for the hearing, heard a great deal of evidence and argument. The additional material required to be added to the case in order to dispose of the matter correctly should be relatively slight, if any. Since a reconsideration in accordance with an order of this Court is, in my view, a continuation of the same "matter" within the meaning of*

> *subsection 5(4) of the Competition Tribunal Act, the Tribunal may think it expedient to have the same panel continue and complete the hearing.*

[42] While that case was a statutory appeal and not a judicial review, the principle applies equally to orders granted on judicial review. Additionally, the Federal Court in *Laroche v. Canada (Attorney General)*, 2013 FC 797, quoted with approval the following passage from *Judicial Review of Administrative Action in Canada* at paragraph 12:6320 (as it read in 2013; it is now chapter 12.61 in the current edition):

> *Generally, a decision-maker may redetermine a matter after its original decision has been set aside or declared invalid on an application for judicial review. Thus, a tribunal may decide a dispute for a second time where its first decision was quashed for breach of either the duty of fairness or a statutory procedural requirement. And despite some earlier decisions to the opposite effect, it now seems clear that a tribunal may make a redetermination even though, when quashing the original decision, the reviewing court did not order that the matter be remitted.* ***This is so because technically the effect of quashing a decision on a declaration of invalidity is to leave the parties, and the tribunal, in the position that they were in prior to the making of the invalid decision.***
>
> [Emphasis added]

[43] When a judicial review application is based on substantive (instead of procedural) grounds, the tribunal has admitted evidence "… prior to the making of the invalid decision". Therefore, the tribunal may go back to that point and decide the case on the basis of the evidence already admitted prior to the point at which it made the invalid decision.

[44] I prefer this approach for two reasons aside from comity with the cases listed earlier. First, this approach is more consistent with the principle that a reviewing court has a broad range of remedies available to it on judicial review. If a redetermination always required a tribunal to start over, it would limit a reviewing court's ability to carefully tailor its remedy. Second, this approach has the pragmatic benefit of reducing hearing time, which is consistent with the broader "culture shift" towards proportionate adjudicative processes whenever possible; see *Saskatchewan (Attorney General) v. Witchekan Lake First Nation*, 2023 FCA 105 at para. 52. In that case, the proportionate adjudicative process was proceeding by way of summary judgment; in

this case, it is proceeding in writing and with only one opportunity to adduce written evidence.

[45] In conclusion, if redetermination means redraft, then new evidence would never be admissible. If redetermination means starting over, then new evidence would always be required. However, since redetermination means that the tribunal is carrying on from the point of error, there will be new evidence when necessary but not necessarily new evidence. Since the character of redetermination is not dispositive of the question of when to hear new evidence, a different analytical path is needed.

3. Following the analytical path

a. No express provisions in the Federal Court of Appeal's order

[46] The analytical path I set out earlier starts with the express terms of the reviewing court's order. This follows what should be an uncontroversial principle that tribunals should follow court orders. As the Federal Court of Appeal put it bluntly in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53 at para. 54, "On redetermination, the duty of a tribunal is to follow the directions of the reviewing court." If a reviewing court orders a tribunal to accept or deny new evidence, the tribunal must follow that order. The Board followed that rule in *Chopra v. Deputy Head (Department of Health)*, 2016 PSLREB 89 (in which the reviewing court limited the Board to the facts already in the record).

[47] In this case, the Court of Appeal did not issue any express directions about new evidence. Therefore, I move to the second step along the analytical path.

b. No implicit instructions in the Federal Court of Appeal's order or judgment

[48] This second step is to examine the judgement and order together to discern whether they contain any implicit instructions. I admit that I feel some queasiness about delving into the mind of a reviewing court to discover implicit terms in a court order. However, the legal rules about interpreting court orders are similar to the rules about interpreting other documents: they must be interpreted contextually. This means that a judgment or order must be construed according to its ordinary meaning but that it should be read as a whole, using a broad and liberal interpretation to achieve the court's objective in making the order and taking into account the context in which the order was issued and the specific and particular circumstances of the case; see *Royal Bank of Canada v. 1542563 Ontario Inc.*, 2006 CanLII 32639 (ON SC) at

para. 4, *Alberta Health Services v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 263 at paras. 29 to 32, and John Tarrant, "Construing undertakings and court orders" (2008), Australian Law Journal 82 at page 91.

[49] Both parties in this case argued that the Court of Appeal implicitly ordered that evidence could or could not be accepted. They pointed out that there are other cases in which a reviewing court provided explicit instructions to a tribunal on redetermination. Both parties argued that the Court's silence in this case has meaning. The employer said that it means that the Court did not prohibit new evidence (because it could have), and the bargaining agent said that it means that the Court did not permit new evidence (because it could have).

[50] While the parties did not rely upon them, two decisions from the Saskatchewan Labour Relations Board illustrate their arguments.

[51] In *Retail, Wholesale and Department Store Union, Local 568 v. Saskatchewan Association of Health Organizations Inc.*, 2016 CanLII 30539 (SK LRB), the Saskatchewan Court of Queen's Bench (as it then was) remitted part of a decision of the Saskatchewan Labour Relations Board for redetermination. The reviewing Court did so because the labour board failed to address one of the arguments advanced by a party. The reviewing Court's order was this:

> …
>
> … *The one exception* [to the reasonableness of the board's decision] *is the Board's failure to explain how it dealt with the issue of whether K-Bro was a common and/or related employer with any of the other respondents. Given that this was a central issue on the application, I am referring this matter back to the Board to enable it to make that decision….*
>
> …

[52] The union asked the labour board for permission to introduce fresh evidence or to reopen its case. The labour board refused, relying upon the silence in the reviewing Court's order, and stating this (at paragraphs 17 to 19 and 23):

> ***[17]*** *With respect, we concur with the position of the Respondents regarding this matter. Our jurisdiction to reconsider this matter derives from the Order of Mr. Justice Barrington-Foote arising from his Reasons given on September 23, 2015. In his decision, it is clear, we believe, that he found that the Board had not sufficiently*

> *considered the issues surrounding the common and/or related employer. While he suspected that the Board concluded that there was no such relationship, he was unable, as he put it, "to connect the dots" to see that the conclusion reached was justified, transparent, or intelligent as required by* Dunsmuir v. New Brunswick.
>
> ***[18] Different and stronger words would, we submit, have been used by Mr. Justice Barrington-Foote if he wanted the Board to, as suggested by the Union, conduct a "do over" of the hearing and determine the matter* de novo.** *In his decision, he made it clear that the only issue that he found fault with was the reasoning applied by the Board to reach its conclusion.*
>
> ***[19]** It is arguable that the Board would not be required to consult further with the parties with respect to its reasoning, as was suggested by K-bro during its arguments. However, the Board wished to provide the parties with an opportunity to bring forth arguments in support of their positions so that the Board's reasoning would be fully informed.*
>
> …
>
> ***[23]** We can find nothing in the directions given by Justice Barrington-Foote, or the arguments made, to support the application by the Union. It is therefore, dismissed. An appropriate order will accompany these reasons.*
>
> [Emphasis added]

[53] The reasons in that case are like the bargaining agent's argument in this one.

[54] On the other hand, in *SEIU-West, Saskatchewan Government and General Employees' Union and Canadian Union of Public Employees v. Saskatchewan Association of Health Organizations and Saskatchewan Health Authority*, 2019 CanLII 120617 (SK LRB), the Saskatchewan Labour Relations Board allowed the union's request to introduce new evidence. In that case, the Saskatchewan Court of Appeal set aside the original labour board decision because the labour board improperly disregarded evidence relevant to the issue before it in light of the proper legal test (as articulated by the Court of Appeal). The Saskatchewan Court of Appeal's judgment stated this:

> …
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> *… This omission on the part of the Board leads me to conclude that the appropriate way to proceed is by setting aside its decision insofar as it concerns direct bargaining and by remitting that issue for reconsideration in light of the relevant evidence and the governing legal principles as explained in this decision. In so doing, I do not presume to suggest how the Board might resolve the s. 11(1)(c) issue….*

…

[55] The actual order just stated that the matter should be remitted to the labour board for reconsideration. The labour board concluded that the only reasonable interpretation of the court's silence on whether or how to deal with new evidence was to require a *de novo* hearing. The reasons in that case are like the employer's argument in this one.

[56] In both cases, the Saskatchewan Labour Relations Board read something into the court's silence. In one case, the silence indicated that there should be no new evidence, but in the other case the silence indicated that there should be new evidence.

[57] With due respect to the parties in this case and to the Saskatchewan Labour Relations Board, sometimes silence is just silence.

[58] This is one of those times.

[59] I have reviewed the Court of Appeal's judgment carefully, along with the Board's initial decision, to understand the context of that judgment. Nothing in the Court of Appeal's judgment indicates that it turned its mind to this issue one way or another. Nothing in the context of this case, especially in the reasons for judgment, indicates an implicit order one way or the other.

c. Exercise of discretion not to hear new evidence

[60] This leads me to the third stage of the analytical path. In the absence of a direction from a reviewing court, a tribunal is — as the employer puts it — "master of its own procedure"; see also *Gal v. Canada (Revenue Agency)*, 2015 FCA 188 at para. 5. This answers the first question that I put the parties: I **may** hear new evidence, in the sense that the Court of Appeal's order does not expressly or implicitly prohibit me from doing so.

[61] But should I? I have concluded that I should not, for four reasons.

[62] First, neither party challenged the Board's initial decision on procedural-fairness grounds. The employer properly points out that it requested an oral hearing with oral testimony the first time the Board heard this case, so its request is nothing new. However, it also had the opportunity to argue before the Court of Appeal that the

decision to hear this case in writing was a breach of procedural fairness or that the evidentiary record was incomplete as a result. It did not.

[63] Most other decisions requiring a *de novo* hearing or a hearing with new evidence after the matter was remitted to a tribunal on judicial review involved a breach of procedural fairness; see, for example, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited*, 2017 CanLII 20059 (SK LRB), in which the Saskatchewan Labour Relations Board conducted a *de novo* hearing because the reviewing court set aside its original decision on procedural-fairness grounds, and *Benjamin's Park Memorial Chapel v. Bereavement Authority of Ontario*, 2023 ONSC 3281 at para. 18, in which the reviewing court ordered a *de novo* hearing because the tribunal agreed that there had been a breach of procedural fairness.

[64] Second, the Court of Appeal did not remit the entire case back to the Board. The Court severed one issue (namely, whether the positions fall within the scope of s. 59(1)(g) of the *Act*) and remitted only that issue to the Board. The Court of Appeal has been clear in the past that "… caution must be exercised when considering severance …" when remitting a matter to a tribunal; see *Hillier v. Canada (Attorney General)*, 2019 FCA 44 at para. 43. I assume that the Court of Appeal was cautious before severing the s. 59(1)(g) issue this time as well.

[65] My concern is that the Board would decide whether to exclude these positions under s. 59(1)(h) of the *Act* on one set of facts and then decide whether to exclude them under s. 59(1)(g) on a different set of facts. The employer wants to lead new evidence about the change in the duties of these positions since 2021, presumably with a view to demonstrating why the new duties buttress its case that the positions fall within s. 59(1)(g) of the *Act*. That new evidence, though, may impact whether the positions fall within s. 59(1)(h) of the *Act* as well. This could lead to the bizarre result that the Board's initial decision on s. 59(1)(h) would stand on the basis of one set of facts but that the decision on s. 59(1)(g) would be reconsidered on the basis of a different set of facts. The Federal Court of Appeal's decision to sever the two issues and to remit only one of them to me could lead to an absurd result were I to accept this new evidence.

[66] Third, the Board has been fairly consistent in not accepting new evidence when reconsidering a case that a reviewing court has remitted to it. The bargaining agent cited *Association of Justice Counsel* and *Lloyd* as two examples of that approach. In the first case, a Board adjudicator rejected the evidence because "… it constitutes fresh evidence, which [the decision maker did] not admit …" (at para. 32). In *Lloyd*, the Board rejected the evidence because of the wording of the Court of Appeal's judgment, which was to redetermine the matter in light of particular findings of fact that the Board made the first time. While the reasons in each case were different, the result was the same.

[67] To those two cases, I add that in *Stringer v. Treasury Board (Department of National Defence)*, 2014 PSLRB 5, a Board adjudicator did not hear new evidence when reconsidering a case that the Federal Court remitted to it without specific directions. Neither party asked to admit new evidence, but the result in that case is consistent with the Board's pattern of redetermining cases remitted to it without reopening the evidence, whenever possible. I also add that in *Basra v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 131, a Board adjudicator also refused to hear new evidence even though the Court of Appeal's order permitted such evidence.

[68] The employer did not provide any examples of the Board reopening evidence after a reviewing court remitted a matter to it. In my own research, I found a case in which the Board considered new evidence when the reviewing court specifically ordered it to (*Gale v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 88; upheld in 2006 FCA 117), one in which the Public Service Staffing Tribunal (a Board predecessor) conducted a hearing *de novo* after a successful judicial review application without explaining why (*Brown v. Deputy Minister of National Defence*, 2010 PSST 12), and one in which the Board allowed fresh evidence after an order was remitted to it because there was no evidence in the file as the original order was on consent (*Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2011 PSLRB 34; upheld in 2012 FCA 92).

[69] With the exception of *Brown*, the Board has not heard new evidence on reconsideration after a successful judicial review application unless ordered to by the Court or there would otherwise be an evidentiary void. In my view, *Brown* is an outlier. While a general consensus within the Board is not dispositive, consistency with it is still a factor in favour of not hearing the new evidence.

[70] Fourth, the employer's request to submit this evidence was too vague about its nature. The employer's submissions are that "… the duties and responsibilities of the positions in question have evolved such that the employer's original submissions of January 13, 2021 are no longer current" and that "… the duties and responsibilities of the position have changed in a material way." However, it has not explained how these duties have changed and how the change might impact its case. In fact, the employer submitted, "The employer would argue that both sets of duties warrant exclusion …", so I am left to speculate on how or whether the evidence of new duties would impact my decision.

[71] For these four reasons, I exercise my discretion not to hear this new evidence.

D. The proposed new evidence is not relevant because the duties are assessed as of the date of the application, not the date of the hearing

[72] The decision that I have just rendered is based on the premise that the evidence that the employer sought to present would be relevant, which the parties also disputed. Their dispute over the relevance of this new evidence turns on the question of whether an application to exclude a position from a bargaining unit must be determined on the basis of the position's duties at the time of the application or at the time of the hearing.

[73] I have decided to address this issue for two reasons. First, I have addressed it out of an abundance of caution in case my decision not to hear any new evidence (even if it is relevant) is wrong. Second, this issue will arise again in other proceedings. When the largest employer and bargaining agent governed by the *Act* disagree about an issue of law, there is a broader benefit to resolving that issue, to provide guidance to those parties in future cases. Since both parties addressed this issue, so will I.

[74] I have concluded that the question of whether to exclude a position from a bargaining unit must be determined on the basis of the duties of the position at the time of the application. Any evidence about the duties that the occupant of that position performed after the date of the application is relevant only if it helps retrospectively clarify the nature of the position as of the application date.

[75] To reach this result, I began by reviewing the Board's case law, which proved unhelpful in resolving this question. I then turned to the case law in other jurisdictions, which are generally consistent that the duties are assessed as of the

application date. While I am not required to follow the approach by other labour boards, this pattern is persuasive. Finally, I considered the consequences of each party's position. Ultimately, I agreed with the bargaining agent (and the reasons provided by other labour boards) that it is better to consider the duties as of the date of the application.

1. The Board's case law is unhelpful

[76] As I mentioned earlier, the employer relied upon *Gibson* in support of the proposition that the duties of the position should be considered as of the date of the hearing. However, *Gibson* does not support that proposition.

[77] To understand *Gibson*, it is necessary to consider its statutory context. When the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; "the *PSSRA*") was enacted in 1967, managerial exclusions attached to people and not positions. The *PSSRA* defined the term "employee" to exclude "… a person employed in a managerial or confidential capacity." That phrase was also a defined term that meant "any person" who performed certain duties. On a strict reading of the legislation, once a person was excluded by a Board order, they remained excluded until a new Board order was issued even when the person transferred to a different position with different duties.

[78] *Gibson* was a case in which the Board had to grapple with one of the more absurd consequences of this employee-based approach to managerial exclusions. The employee was appointed to a position that had managerial duties. Therefore, the Board excluded that employee from the bargaining unit, with the bargaining agent's consent. However, the employee was then sent on French-language training for several months. The bargaining agent applied to the Board to include the employee in the bargaining unit again during his French-language training, on the grounds that French-language classes are not a managerial duty. The Board rejected the bargaining agent's proposition, explaining as follows (in the passage cited by the employer):

> …
>
> *Clearly, the basis for a person's exclusion is dependent on whether or not his duties and responsibilities meet the criteria set out in heads (c) to (g) of the definition of a "person employed in a managerial or confidential capacity" in section 2 of the Act.* ***However, a person does not lose his "excluded" status simply by virtue of the fact that, temporarily, he is not fulfilling the duties and responsibilities of his position by reason of illness, the***

> ***taking of language training, or some other form of temporary leave****. Provided that the person concerned is the incumbent of the position, the duties and responsibilities of which are the basis of his exclusion, he continues to be excluded from the bargaining unit during such temporary absences. On the other hand, if the person concerned ceases to be the incumbent of that position or ceases, other than for a temporary period, to perform the duties on which his exclusion was based, in our opinion he would not retain his excluded status. Moreover, should the employer propose any new occupant of the position for exclusion, it would then be open to the Bargaining agent to make an objection. Were it otherwise and a person excluded from a bargaining unit irrevocably retained his excluded status simply because there once existed grounds for his exclusion, regardless of the duties later assigned to him, there inevitably would evolve over a period of time a substantial number of persons, without managerial or confidential duties, who nonetheless would be excluded from bargaining units. This surely was not the legislative intent of the provisions of the Act relating to managerial and confidential exclusions.*
>
> …
>
> [Emphasis added]

[79] All the Board said in that passage was that an employee did not lose their excluded status as a result of temporarily not performing managerial duties because of an absence.

[80] The bargaining agent applied for reconsideration of *Gibson*, and the Board upheld its decision (*Canadian Air Traffic Control Assn. Inc. v. Canada (Treasury Board)*, [1977] C.P.S.S.R.B. No. 5 (QL)). In that reconsideration decision, the Board addressed the later point raised in the passage just quoted; i.e., what happens when an employee transfers to a position without managerial duties. The Board stated that there was no mechanism under the *PSSRA* for a bargaining agent to apply to have an employee's exclusion revoked. The Board suggested that the employer might have a duty to make that application (or at least that bargaining agents had tools available to make life so irritating for the employer that it would want to), but there was no legal mechanism for a bargaining agent to undo an exclusion, even if the employee transferred to a new position.

[81] Parliament fixed this problem in the *Public Service Reform Act* (S.C. 1992, c. 54, s. 32) by changing from excluding employees towards the current formulation of excluding the occupants of certain positions. The *Act* also excludes the occupants of

managerial positions, meaning that when an employee transfers out of an excluded position, their exclusion does not travel with them.

[82] *Gibson* is unhelpful in resolving the issue before me of whether the duties of a position should be considered as of the date of the application or as of the date of the hearing. The Board was dealing with a very different issue, in a different legal regime.

[83] There are other old Board decisions that address the issue of at what date the duties should be considered. By way of background, the Board used to appoint officers called "examiners" to conduct certain duties on its behalf. One of those duties was to examine employer applications to exclude employees (or, after 1992, positions) from bargaining units. As described in the leading text at the time, Finkelman and Goldenberg, *Collective Bargaining in the Public Service: The Federal Experience in Canada* (1983) at page 47:

> *If the parties are unable to resolve the issue . . . the Board appoints an examiner, an officer of the Board, to inquire into and report to the Board on the duties and responsibilities of the person concerned. The examiner usually tries to mediate between the parties. If he is unable to bring the parties to an agreement, he conducts a hearing in the presence of both parties and prepares a report. The report simply presents facts; it does not contain conclusions or recommendations. A copy is served by the registrar on each of the parties and they are given an opportunity to make representations about the report's accuracy or the conclusions the Board should reach in view of the report. They may do so in writing, or either party may request a hearing before the Board in connection with the report.*

[84] The Board's approach was to consider the duties being performed "at the time of the examination"; see *National Research Council v. Professional Institute of the Public Service of Canada*, unreported (February 11, 1977; Board file no. 172-09-238) at para. 5 and *Treasury Board v. Professional Institute of the Public Service of Canada*, unreported (July 20, 1978; Board file no. 172-02-262) at para. 38.

[85] However, the issue in those cases was not whether there had been a change in duties between the date of the application, the date of the examination, or the date of the hearing. The issue was whether the duties of the position were as stated in the job description. The Board adopted the approach common across Canadian labour boards of considering the actual duties being performed and not the duties that could be performed based on a job description. Even if using the duties as of the date of the

examination was analogous to using duties as of the date of the hearing (something I am not convinced of), the Board did not turn its mind specifically to the issue raised in this case. Additionally, the Board stopped using examiners over 20 years ago. I do not believe that I can draw any conclusions from the Board's approach in the 1970s, given that it no longer uses examiners.

[86] Finally, I note that in *Treasury Board v. Association of Justice Counsel*, 2020 FPSLREB 3, the employer filed its exclusion application in 2015 and that the Board heard the case over two days in July and September 2017. The Board considered evidence of a reorganization that occurred in April 2017 in deciding that case. Neither party objected to this post-application evidence, and the Board did not address whether it was relevant. Since the Board did not expressly consider this issue, I cannot draw any conclusions from it.

[87] For these reasons, I have not found this Board's previous decisions helpful to resolving this issue.

2. Other labour boards consider the duties as of the date of the application

[88] Other labour boards across Canada have considered this issue more explicitly. There is a pattern that labour boards consider the duties of a position as of the date of the application to exclude them from a bargaining unit and not as of the date of the hearing. While there are some cases that are an exception to this approach, they are outliers and other labour boards treat them as such.

a. The CIRB

[89] The bargaining agent cited the CIRB's *NAV Canada* decision in support of this proposition. That decision was a reconsideration of an earlier CIRB decision, in which the CIRB considered the duties of the position at the time of the application. The employer applied for reconsideration, alleging that the CIRB acted on the basis of assumptions and not evidence. In the CIRB's reconsideration decision, it set out its approach to this issue as follows:

> …
>
> *36 As for the employer's allegation that the original panel relied on assumptions, the reconsideration panel must disagree. The original panel found that the substantive duties of the two positions in question,* ***as they existed at the time of the original panel's decision and based on the submissions received****, were*

> *not sufficiently managerial in nature to warrant exclusion from the bargaining unit. That is a question of fact that the reconsideration panel will not revisit.*
>
> *37 This finding is consistent with the Board's policy of assessing the duties at the time of the application (see* Greater Moncton Airport Authority Inc.*, [1999] CIRB no. 20, page 7). Indeed, the original panel concluded that the positions were similar to the bargaining unit positions that had been eliminated following the employer's reorganization. It noted that, if the substantive managerial duties of the two positions were to increase in the future, their exclusion could be revisited. The fact that the original panel canvassed a future hypothetical situation by way of* obiter dictum *does not detract in any way from its conclusion on the facts that are the basis for its decision….*
>
> …
>
> [Emphasis in the original]

[90] The bargaining agent also cited *Swan River - The Pas Transfer Ltd.*, [1974] 1 Can L.R.B.R. 254 (CLRB), in support of this proposition. But that case was about whether a union should be judged on whether it has the majority support of the employees working on the date of the certification application or on the date of the CIRB's hearing. That issue is not the same as the one raised in this case, and answering it involves very different considerations. I have not relied upon *Swan River* in this decision.

b. The British Columbia Labour Relations Board

[91] The British Columbia Labour Relations Board ("BCLRB") stated the following in *Saanich (District) v. Saanich Fire Fighters' Association, Local No. 967*, 2016 CanLII 66946 (BC LRB) at para. 57: "… I found the inclusion in reply of documents relating to the performance of duties by the incumbents since the Application was filed, was not proper reply and such documents would not be considered."

[92] The result in that case was set aside on reconsideration on unrelated procedural-fairness grounds (see *Corporation of The District of Saanich v. Saanich Fire Fighters' Association, Local No. 967*, 2017 CanLII 846 (BC LRB)), and the case was ultimately decided by arbitration instead (see *Corporation of The District of Saanich v. Saanich Fire Fighters' Association, Local No. 967*, 2017 CanLII 14032 (BC LRB)). Nevertheless, the BCLRB did not comment on this issue in reconsideration, and it reflects that board's approach, namely, an exclusion application is decided on the basis of the duties performed up to the date of the application: see also *Vantageone Credit*

Union v. Canadian Office and Professional Employees Union, Local 378, 2017 CanLII 32145 (BC LRB) at para. 72 (the duties must have "crystallized" prior to the date of application) and *Watson and Ash Transportation Co. and CBRT&GW, Local 100*, 1987 CarswellBC 3828 at para. 26 (the BCLRB considered the employee's responsibilities "to the date of this application").

c. The Alberta Labour Relations Board

[93] The Alberta Labour Relations Board ("ALRB") "[g]enerally… examines the duties the individual performed on or around the date of the application"; see *Canadian Union of Public Employees, Local 1099 v. Bike Edmonton Society*, 2022 CanLII 30038 (AB LRB) at para. 88. In that case, the "or around" being referred to was about whether to consider the duties only at the moment the application was made or several months previous to that date. The ALRB decided to go back only a matter of weeks (from "late January" to February 7) when considering the employee's duties. Importantly, the ALRB refused to look forward from the application date.

d. The Manitoba Labour Relations Board

[94] The Manitoba Labour Relations Board has stated that "[t]he evidentiary cut-off date is the date upon which the Application was filed …" (see *Manitoba Government and General Employees' Union v. Southern Health - Santé Sud*, 2015 CanLII 37991 (MB LB) at para. 13) and that "… the Board has consistently used the date of application as the evidentiary cut-off" (see *Seven Oaks General Hospital v. Manitoba Nurses' Union, Local 72*, [1995] M.L.B.D. No. 10 (QL) at para. 55). I will come to the exception to that approach later when discussing *Flin Flon General Hospital v. Flin Flon Nurses, Local 14 of the Manitoba Nurses' Union* (1992), 18 C.L.R.B.R. (2d) 218 (MB LB) later in this decision.

e. The New Brunswick Labour and Employment Board

[95] The New Brunswick Labour and Employment Board has stated that "… the critical issue for assessment of their responsibilities … [is] the date of the filing of this application" (see *United Food and Commercial Workers of Canada, Local 1288P v. Covered Bridge Potato Chip Company*, 2013 CanLII 86976 (NB LEB) at para. 15).

f. The Newfoundland and Labrador Labour Relations Board

[96] In *I.U.O.E., Local 904 v. OIS-Fisher Inc.*, [2004] N.L.L.R.B.D. No. 4 (QL) at para. 43, the Newfoundland and Labrador Labour Relations Board indicated that it "…will examine the duties, responsibilities and activities of the employees at the relevant time." In that case, the relevant time for two of the positions was the date of the application for certification and the period of time immediately prior and subsequent to that date. For another position, the Board considered duties well prior to the date of certification because the employee moved to another plant outside of the bargaining unit months before the application for certification, and the issue for that position was only relevant for the purposes of an unfair labour practice complaint and not whether the position should be excluded from the bargaining unit.

g. The Ontario Labour Relations Board's main approach

[97] The predominant approach of the Ontario Labour Relations Board ("OLRB"), as described in the leading text about that board (Sack, Mitchell, and Price, *Ontario Labour Relations Board Law and Practice*, 3rd ed.(1997), at paragraph 2.111), is as follows:

> *2.111 The Board's policy, in determining whether persons were managerial, was to consider their duties and responsibilities as of the date of the application, and not duties which it was intended they would perform in the future; and evidence of facts before and after such date was admissible only insofar as it was relevant to such determination.*

[98] The OLRB has also succinctly summarized its approach as follows: "When analysing an individual's job duties, the general rule is that the Board must focus on the individual's actual job duties and responsibilities as they existed at the time of application"; see *Nipissing-Parry Sound Catholic District School Board v. Canadian Office & Professional Employees Union, Local 529*, 2016 CanLII 28985 (ON LRB) at para. 17.

h. *Whitby General Hospital* — an outlier from the Ontario Labour Relations Board

[99] The OLRB did change its approach in one case, *Ontario Nurses' Association v. Whitby General Hospital*, 1989 CanLII 3264 (ON LRB) ("*Whitby*"). In it, the OLRB acknowledged that its policy was to consider the duties only as of the application date. However, it outlined some concerns with that approach. I have quoted as follows large

excerpts from paragraphs 18 to 25 of the OLRB's decision at length in part because its concerns were similar to the employer's arguments in this case:

> *18. Despite retention of the application date, the Board has long recognized the difficulties generated thereby. That is, the Board must reach its determination on the best available evidence, however sketchy and incomplete: … This is particularly critical where the application involves individual, newly-created positions or newly-reorganized corporate structures. One very real consequence is that greater weight must be given not to* **actual** *examples of the exercise of "managerial" authority but to* **theoretical** *powers outlined in a job posting or job description ….*
>
> *…*
>
> *19. The instant case dramatically illustrates the problems just noted. The application date followed by a mere nine days the creation of the position of nurse manager, shift/weekend. By that date, not unexpectedly, there was minimal evidence of "managerial functions" having been exercised. While the job description grants ostensible "managerial" authority, the evidence of actual performance of duties and responsibilities at that point would not sustain their exclusion. By the examination date over four months later, however, there had been ample opportunity to assess whether mere paper powers or actual authority had been bestowed on the nurse managers, shift/weekend. The evidence conclusively established the authority was real and had been exercised.*
>
> *20. In deciding whether to depart from its past reliance on the application date, the Board must consider the various arguments for retention of that date. The representations related to certainty and prevention of abuse. Certainty as to the point at which the evidence and issues must crystallize is neither an absolute virtue nor does it reflect the locus of the burden of proof. Normally the applicant bears the onus (except as otherwise specifically directed by the Act) and, thus, it is usually appropriate to leave to the applicant the choice of date at which the issue is joined and evidence to be adduced. In section 106(2) applications, however, it is the party seeking the exclusion which bears the onus, regardless of the identity of the applicant. Further, if another date were selected in lieu of the application date, that date would become "certain" and whatever other merits the "certainty" argument had would apply equally to that "certain" date. There is nothing in the wording of section 106(2) itself which requires reliance on the application date; the choice, although it should reflect labour relations realities and enable the Board to discharge its statutory duty of determining the "employee" (or "guard") status of the person(s) in dispute, is for the Board. Section 106(2) applications, thus, stand in contrast to certification applications wherein the Act does stipulate that the application date must be utilized to ascertain the number of employees in the bargaining unit (section 7(1)). In that regard, where the determination of the employee*

status of an individual is critical to the certification process (i.e., in connection with the bargaining unit description or determinative of the outcome of the application given the level of employee support), the Board must decide that issue and must do so as at the certification application date. However, where such determination is not critical to the outcome of the certification application, the Board issues a final certificate and permits a section 106(2) application to be brought should the parties be unable to resolve their dispute through negotiations: Robin Hood Multi Foods Inc., *[1985] OLRB Rep. July 1159. One practical consequence of this development in the jurisprudence is that questions of "employee" status, except where unavoidable, are detached from the certification application (where the relevant date is dictated by statute) to a more appropriate point in the parties' bargaining relationship. This evolution in the jurisprudence enhances arguments in support of a date which is appropriate for determining issues of "employee" status in terms of the parties' relationship, rather than a point chosen by one party without regard to what makes labour relations sense.*

21. The second argument for retention of the application date is that potential abuse of the process will be prevented if employers do not have the opportunity to "puff-up" the job functions of the person(s) in dispute between the application and the examination date in order to secure their exclusion. In the Board's view, this concern cannot withstand careful scrutiny. As the cases have discussed, where there is little opportunity for evidence of actual duties because the application date closely follows the creation of a position, the Board must place increasing reliance on the job description. Yet the Board has been properly reluctant to view the ostensible authority outlined in a job description as determinative and the jurisprudence stresses that the status determination should reflect the actual exercise of authority, not paper powers. The freezing of the evidence at the application date, however, reduces the likelihood of a determination which accords with the actual job authority. Such approach is not to be commended. Moreover, given that the job description may assume critical importance in such instances, use of the application date may **encourage** *abuse by employers as it is far easier to concoct a job description on paper which would result in the exclusion of the person(s) in dispute than to manipulate the actual exercise of managerial duties sufficient to warrant exclusion. It is also far easier to detect (through the evidentiary process) a "sham" position if the Board is in a position to focus on the* **actual** *exercise of job functions.*

22. Throughout, the Board has referred to the "examination" date as the alternative. In fact, the respondent's counsel asserted the date the examination of each witness commenced was most appropriate. Viewed solely from a "most current evidence" perspective, other dates might be considered as well, such as, the conclusion of the section 106(2) enquiry or the conclusion of the examination of each witness. The Board is not persuaded that the

adoption of the conclusion of the section 106(2) enquiry or the conclusion (or even the commencement) of the examination of each disputed person and/or other witnesses is feasible or desirable. In the Board's view, although the most current evidence of duties and responsibilities may well be the "best evidence" in one sense, those alternatives would generate numerous procedural and substantive problems. For example, parties undoubtedly would wish to recall earlier witnesses in order to counteract evidence given in respect of a point in time subsequent to the previous witnesses' testimony. Proceedings would become interminable as one or other party would seek to prolong matters to lead yet more recent evidence in support of their respective positions. Thus, the alternatives noted perhaps are theoretically pure models but present substantive and practical difficulties and create procedural uncertainty.

23. The Board regards the date of the actual commencement of the examination of the first witness as a feasible alternative which balances the various competing interests. Such date would be set by the Board where the Board itself conducts the examination or by the Board Officer appointed to conduct the examination. Commonly, examinations commence some months after the application date given the exigencies of the Board's schedule and that of the parties but are completed relatively soon thereafter. Reliance on the first examination date as the cut-off for evidentiary purposes would adequately respond to the problems of "prematurity" discussed earlier by providing an adequate period of time in which to assess the actual duties and responsibilities of the person(s) in dispute. ["Prematurity" connotes not just the difficulty created by the forced reliance on "paper" authority rather than evidence of actual exercise of duties but, in addition, the prospect of a fresh section 106(2) application once there had been adequate opportunity for the exercise of job functions. That is, the Board's initial determination would not conclusively resolve the dispute between the parties.] Concomitantly, concerns flowing from the location of the burden of proof and the identity of the applicant would be addressed. Given that the Board would set the first examination date, the parties would not be tempted to "jockey" for dates perceived to be of advantage (although in the Board's opinion the possible "advantage" of such conduct would be minimal). However, where the parties want a consent adjournment to specific other dates or on a sine die *basis in order to seek a resolution of the dispute without litigation, the use of the date the first examination actually commenced would ensure the Board had current evidence on which to base its decision on the status of the disputed individual(s) without penalizing agreements of the parties and/or efforts to settle. The Board need not reiterate its assessment of the relative potential for abuse as between the application date and the examination date; that has been dealt with above.*

24. One other argument in support of the examination date has not yet been addressed. The application date is an entirely artificial point in time without reference to the parties' collective bargaining relationship or the jobs of the person(s) in dispute.

> *Given the frailties of human memory, it is virtually impossible for an individual to recall with any degree of accuracy what functions may have been exercised some months earlier where the relevant point in time is so arbitrary (from the perspective of the witnesses). In contrast, the examination date is far more immediate and, thus, would be expected to generate more reliable evidence on which the Board can fulfill its statutory mandate. In the instant case, for example, the transcript is replete with responses revealing the considerable uncertainty of the witnesses (testifying in late March, 1988) as to whether particular job functions had actually been exercised prior to November 4, 1987 (as the application was filed November 3) whereas the witnesses were certain as to whether the specific duties had been exercised at all.*
>
> *25. In summary, for evidentiary purposes, the Board regards the selection of the examination date (i.e., the day on which the examination of the first witness actually commences) as the optimum point which balances the various labour relations considerations involved. That date provides a measure of certainty without thereby creating a problem of prematurity. Any dissonance between the location of the burden of proof and the identity of the applicant is ameliorated. The Board's determination of the status issue can reflect the* **actual** *exercise of job responsibilities rather than* **ostensible** *authority and, in consequence, reduce the likelihood of abuse by employers. The use of a date more proximate than the application date eliminates the impact of the latter arbitrary date on the witnesses' memories and, hence, generates more reliable evidence. The examination date as cut-off also readily accommodates parties' consent adjournments and settlement efforts and still provides current evidence on which the Board can make an assessment of status. Counsel for the respondent submitted that the examination date should be adopted as the evidentiary cut-off point for all section 106(2) applications. In the Board's view, the instant application involves a newly-created position and the Board's analysis addressed those circumstances. The broader question need not be resolved in the context of this application.*
>
> [Emphasis in the original]

[100] I will address the practical or policy concerns that the OLRB raised in that passage about an employer "puffing up" duties later in my decision. But at this stage I will point out three things about *Whitby*.

[101] First, the OLRB did not admit evidence as of the date of the hearing but as of the date of the examination. This is the same as the Board's approach before examiners were discontinued over 20 years ago. As I have already explained, an examination is not the same as a hearing, and I have difficulty analogizing an examination to a hearing — particularly as an examination takes place very shortly after an application

(in *Whitby*, it was roughly four months), while a hearing can take place years after an application is made.

[102] Second, the OLRB stated that it changed its approach only when the position was newly created. In that case, the union filed a certification application, triggering the need to immediately decide which positions should be excluded from the bargaining unit. The authors of *Ontario Labour Relations Board Law and Practice* confine *Whitby* to newly created positions.

[103] Other labour boards have dealt with cases in which an employer applied to exclude a new position from an already-existing bargaining unit by requiring the employer to wait for a time (such as six months) before making its application, at which point the evidence is frozen; see *Health Sciences Association of Alberta v. Misericordia Hospital*, [1995] Alta. L.R.B.R. 533 at para. 26, and *Flin Flon General Hospital v. Flin Flon Nurses, Local 14* (1992), 18 C.L.R.B.R. (2d) 218 (MB LB) – although in *Flin Flon*, as this was the first time the Manitoba board articulated this rule, it permitted evidence for a period of time six months from the date the position was created (which meant four months prior to the application and two months after).

[104] This case does not involve newly created positions; even if it did, there are ways to deal with that problem other than allowing post-application evidence.

[105] Third, *Whitby* is an outlier. I am aware of only seven cases that cite it, and most of them do not follow it. For example, the ALRB cited it in *Misericordia Hospital* and then did not follow it. As another example, the OLRB cited it in *Canadian Blood Services v. Ontario Nurses' Association, Local 074*, 2013 CanLII 28255 (ON LRB), but only to justify an employer making a second application to exclude a position some six months after the position was created (after making an application immediately after it was created), as otherwise the bargaining agent could have argued that the evidence should be frozen as of the date of the first application.

[106] The predominant approach in Ontario remains to use the application date as the cut-off for evidence about the duties of a position.

i. The Nova Scotia and Saskatchewan labour boards' approach

[107] The approach adopted in Nova Scotia and Saskatchewan was set out most clearly in *Canadian Union of Public Employees, Local 4406 v. Board of Governors of*

Saint Mary's University, 2001 CanLII 59708 (NS LRB) ("*Saint Mary's University*") at para. 6, as follows:

> *6 … To be clear, what we are saying is that the Board is in principle concerned to determine the nature of the position at the date of application, but in exceptional circumstances may be willing to hear evidence as to what incumbents have done after the date of application* ***if it helps retrospectively to clarify the nature of the position (as originally defined)****. This is one of those exceptional cases — but the exceptions must not be allowed to swallow the rule in the future, and the Board will no doubt be vigilant in this matter.*
>
> [Emphasis added]

[108] The Saskatchewan Labour Relations Board recently adopted this approach in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union v. Davidson (Town)*, 2023 CanLII 62778 (SK LRB), in which it quoted that passage with approval and then decided that post-application evidence was not necessary to retrospectively clarify the duties of the position at issue (in that case, the town foreman position).

j. Conclusion on the approach across other jurisdictions: post-application evidence is admissible only if it retrospectively clarifies the nature of the position

[109] In my view, the Nova Scotia and Saskatchewan approach best encapsulates the predominant approach by labour boards to this issue. The issue in any exclusion application is whether the position involved managerial duties as of the date of the application. Post-application evidence is relevant to determine that issue only when something that happens post-application helps shed light on the duties being performed at the time of the application.

[110] This approach is helpfully demonstrated in the *Saint Mary's University* case. The employees in the positions proposed for exclusion were relatively new to their jobs at the time of the certification application. In the months after the application, they "grew into" their jobs. Therefore, the post-application evidence was helpful in retrospectively illuminating the true duties of the position: the duties did not change, but the confidence of the employees with respect to performing all their duties increased.

3. Other reasons to adopt the approach that post-application evidence is admissible only if it retrospectively clarifies the nature of the position

[111] I have four other reasons for adopting the approach that post-application evidence is admissible only if it retrospectively clarifies the nature of the position.

[112] First, I have reviewed the *Act* and the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*"). The *Act* is not helpful in deciding this approach. The *Act* uses the present tense to describe managerial exclusions: the employer may apply for an order that a position "is a position" (s. 71(1)) that should be excluded, and the Board must decide whether the position "is a position" (s. 74(1)) that should be excluded, but the use of the present tense is simply a drafting convention; the present tense may refer to the past or future tense, and I can attach no importance to the use of the present tense: see the *Interpretation Act* (R.S.C., 1985, c. I-21, s. 10), and Sullivan, *The Construction of Statutes*, 7th ed. (2022), at section 25.09[6].

[113] The *Regulations*, on the other hand, are helpful. Section 33 requires an employer to include details about the positions it seeks to exclude, including (for positions excluded under s. 59(1)(h) of the *Act*) the positions in relation to which the occupant's duties and responsibilities are alleged to be confidential. Section 34 then requires the bargaining agent to set out the grounds of its objection if it objects to the employer's application. It would not be possible for a bargaining agent to meaningfully file the grounds of its objections if the evidence that forms the basis of the employer's application changes after the application was filed. Refusing to admit post-application evidence (other than retrospective evidence) is more consistent with the *Regulations*.

[114] Second, this approach will discourage parties from filing speculative applications in hopes that the duties of a position will change between the date of filing and the eventual hearing. This approach also avoids having an application decided differently depending solely upon the vagaries of the schedules of the Board and the parties.

[115] Third, I agree with the bargaining agent that this approach removes the temptation for an employer to adjust the duties of a position in advance of a hearing, to gain a tactical advantage in that hearing. Other labour boards have noted their concern that an employer would "puff up" a job's functions shortly before a hearing to exclude it from the bargaining unit. I disagree with the conclusion of the majority of

the OLRB in *Whitby* that these concerns cannot withstand scrutiny — in my view, the concern is obvious.

[116] In *Whitby*, the OLRB was concerned specifically about overreliance on job descriptions for new positions. Most applications in this jurisdiction are not about new positions; however, even if they were, the overreliance on job descriptions can be overcome if an employer simply waits a few months to file its application (as is the case in Alberta and Manitoba).

[117] Many of the other labour boards' cases that express the "puff up" concern involve an application to exclude a position in a bargaining unit alongside a certification application. In certification cases, there is an additional mischief that labour boards have had to be wary of, namely, cutting down job functions after the certification application so that a pro-management employee will be in the bargaining unit to vote against the union being certified.

[118] I acknowledge that cutting down job functions to deprive a group of employees of their statutory right and right under the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*") to associate is worse than puffing up job functions to deprive a single employee of their statutory and *Charter* right to associate. Nevertheless, the risk of puffing up remains a concern and can still deprive one (or, in this case, five) employees of their statutory and *Charter* right to associate.

[119] I want to be perfectly clear that there has been no suggestion in this case that the employer has "puffed up" the duties of these positions to help it win this application. I do not suggest that the employer has done this; nor has the bargaining agent. I am not concerned that the employer has puffed up the duties in this case. I am concerned that an employer will be tempted to puff up duties in the future. Adopting the approach that post-application evidence is admissible only if it retrospectively clarifies the nature of the position removes that temptation.

[120] Fourth, considering post-application evidence could prejudice the employer, not just the bargaining agent. As the Nova Scotia Labour Relations Board put it in *Canadian Union of Public Employees, Local 1082 v. Saint Vincent's Nursing Home*, 2008 CanLII 92039 (NS LRB) at paras. 38 and 39:

> *[38] … The Board in Re St Mary's University, supra, noted at para. 4 its concern that employers not be able to "puff up" or "cut down" job functions following an application in order "to distort or manipulate the evidence for the purposes of the proceeding in order to achieve a desired result." While that comment was directed at an employer, the same type of concern may exist in the case of managerial employees who seek (with the help of the Union) to be included in a bargaining unit. In other words, the fact that a managerial employee does not often exercise a particular managerial function—or neglects or refuses to exercise that function—does not on its own justify a conclusion that the employee may no longer be managerial.*
>
> *39. We make this observation because there was evidence, which the Board accepts, that since Ms Psiuk's arrival and more particularly since the filing of this application the supervisors have "backed away" from some of their traditional responsibilities. … Evidence of such actions meant that the Board had to balance the Union's evidence carefully, to ensure that the work responsibilities of the supervisors were what they actually were, rather than what the supervisors might have let them become.*

[121] These four reasons support the approach laid out in Nova Scotia and Saskatchewan that post-application evidence is admissible only if it retrospectively clarifies the nature of the position.

[122] As I discussed earlier, the employer has not explained what the evidence of a change in duties since the Board's earlier decision would be, or whether it was truly new duties or simply something that retrospectively clarified the existing duties of the positions. Therefore, I would have refused to admit the evidence as it was post-application evidence that did not retrospectively clarify the nature of the position pre-application.

[123] I note that there is nothing indicating that the evidence that the employer filed at the first hearing post-dated its application to exclude these positions. As the bargaining agent did not object to that evidence on that basis at the time, I have continued to rely on it in this proceeding. That should not be taken to detract from my conclusion that evidence of post-application duties is relevant only to the extent that it retrospectively explains the nature of a position's pre-application duties.

[124] In summary, the employer's proposed evidence would not have been relevant even had I exercised my discretion to hear it. The evidence is about a change of duties

that post-dates the application, and it is not adduced in an effort to retrospectively clarify the duties that existed as of the date of the application.

IV. Decision to exclude the positions

[125] As I stated earlier in the overview to this decision, I have decided to exclude the five OHS advisor positions. I have divided my reasons for doing so into three parts. First, I will address an issue raised by the parties about the effect of the *Charter* on this application. Second, I will set out the principles in applying s. 59(1)(g) of the *Act*. Finally, I will apply those principles to the facts of this case and explain why I have decided to exclude these positions.

A. The role of the *Charter* in this application

[126] The employer spent some time in its oral submissions, as well as the bulk of its supplemental written submissions, addressing the extent to which the *Charter* has a role in this proceeding.

[127] The employer's argument is that the exclusions regime in the *Act* is consistent with *Charter* values. By way of context, the Board's initial decision (in 2021 FPSLREB 24) cited *Doré v. Barreau du Québec*, 2012 SCC 12, for this proposition:

> …
>
> *[85] When exercising this discretion in matters protected by the* Charter*, as the decision maker, I must consider the statutory objectives of the* Act*. I must ask how the* Charter *values at issue will be best protected in view of the statutory objectives and balance the severity of the interference of the* Charter *protection with the statutory objectives ….*
>
> …

[128] On judicial review, the employer argued that the Board incorrectly applied *Charter* values to dismiss relevant precedent. The Court of Appeal decided not to deal with this argument, stating only that "… it was not clear that the Board's treatment of the Charter values issue had any impact on [the Board's] decision" (2022 FCA 204, at paragraph 13).

[129] During oral argument, the employer made further submissions to the effect that managerial exclusions are consistent with the *Charter*. But ultimately, it acknowledged that I did not need to determine this point because its main submission was that I

should base my decision on existing Board jurisprudence. The bargaining agent did not disagree with that approach when I asked about this issue during oral argument.

[130] The existing case law of this Board and other labour relations boards is that managerial exclusions should be dealt with cautiously because "… an employee's rights to collective representation should not be removed lightly"; see *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 at para. 78 ("*Security Intelligence Officers*"). See also *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84 at para. 29 ("… the exclusion is narrow, to protect the rights and freedoms incidental to collective bargaining for the maximum number of employees …"; "*Border Operations Centre*"); *Treasury Board v. Public Service Alliance of Canada*, [1997] C.P.S.S.R.B. No. 143 (QL) at para. 28 ("… the right to membership in a bargaining unit (unionization) should not be removed lightly"); and *Treasury Board v. Association of Justice Counsel*, 2020 FPSLREB 3 at para. 37 ("… I begin with the premise that as the AJC submitted, the right to join an employee organization and participate in its affairs is not only protected by the *Act* (s. 5) but also is constitutionally protected …", upheld in 2021 FCA 37).

[131] While for obvious reasons the bargaining agent relied more heavily on that principle than did the employer, both parties agreed that the principle continues to apply to exclusion cases. Neither party pointed to any concrete difference in this case between treating the right to collective representation as a *Charter* right instead of a statutory right.

[132] The parties made their submission before the Supreme Court of Canada's decision in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 which addressed the *Doré* framework and stated (at para. 64) that this framework applies when an administrative decision engages the *Charter* directly or when it engages a value underlying one or more *Charter* rights. However, the Supreme Court of Canada stated at paragraph 66 of that decision that one of the times when a decision-maker must consider the *Charter* or *Charter* values is when the parties have raised the issue before the decision-maker. In this case, both parties expressly disclaimed the need to consider *Charter* rights or values to resolve this case. I have concluded that *Commission scolaire francophone des Territoires du Nord-Ouest* does not require me to explicitly address the *Charter* in the face of submissions by both parties that the

Charter is not at issue in this case. Nothing in this decision should be viewed as determining the role of the *Charter* in other exclusion cases one way or another — I am expressly declining to rule on that point in light of the parties' agreement that this case should be decided on the basis of the existing principles set out in earlier case law, and in light of the parties being unable to identify any concrete difference between treating the right to collective representation as a *Charter* right instead of a statutory right in this case.

[133] Finally, the Supreme Court of Canada has heard an appeal from *Association des cadres de la société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 concerning whether the exclusions regime in Quebec violates the *Charter*. I asked both parties whether I needed to wait for the Supreme Court of Canada's decision before rendering my own, and both parties agreed that I should not do so.

B. Principles to the application of s. 59(1)(g) of the *Act*

[134] Paragraph 59(1)(g) of the *Act* permits the employer to apply to the Board to declare that a position is a managerial or confidential position because "… 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 …". Thus, s. 59(1)(g) has these three elements:

1) the duties and responsibilities must not be otherwise described in s. 59(1); **and**
2) the duties and responsibilities must give rise to a conflict of interest; **or**
3) there are other reasons to exclude the position based on its duties and responsibilities.

1. First element: the duties and responsibilities must not be otherwise described in s. 59(1)

[135] The first element in s. 59(1)(g) means that this provision is a residual clause. Before reverting to s. 59(1)(g), the Board must be satisfied that the position should not be excluded under some other paragraph of the *Act*. As the Board put it at paragraph 76 of the *Security Intelligence Officers* decision, "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."

[136] The parties provided two examples of this approach. First, in *Canadian Energy Regulator v. Professional Institute of the Public Service of Canada*, 2020 FPSLREB 120 at para. 132, the Board dismissed an application to exclude several positions under s. 59(1)(g) of the *Act* because "[t]he evidence presented did not disclose any situation that could not be considered under the usual exclusion criteria under s. 59(1) of the *Act*. Therefore, the applications cannot be sustained under that section." Second, and by contrast, in *Treasury Board (Department of Justice) v. Association of Justice Counsel*, 2020 FPSLREB 59 (upheld in 2021 FCA 87; "*Centre for Information and Privacy Law*"), the Board excluded a legal counsel position since it did not provide advice on "labour relations" (and therefore was not excluded under s. 59(1)(c) of the *Act*) but excluded the position under s. 59(1)(g) because advice about privacy law had an "intersection with labour relations issues" (paragraphs 39 and 43) warranting the exclusion of the most senior lawyer in that unit.

[137] The bargaining agent in this case submitted that this first principle means that s. 59(1)(g) should be read narrowly so that it does not capture positions with duties that are similar to the types of duties excluded under the other paragraphs in s. 59(1). I have some sympathy for that argument on a purely textual basis for interpreting s. 59(1) following the rule of *expressio unius est exclusio alterius* (to express one thing is to exclude another). However, the Federal Court of Appeal expressly considered and rejected that argument at paragraphs 8 and 9 of the *Centre for Information and Privacy Law* decision. While technically all the Federal Court of Appeal did in that case was state that the Board was reasonable in rejecting that argument (and, sometimes, there are two reasonable ways to interpret a statute), I have not been convinced that I should depart from this recent Federal Court of Appeal decision directly on this issue. As I put it to the bargaining agent during oral argument, I like the argument, but I like *stare decisis* more.

[138] While the employer initially proposed excluding these positions under s. 59(1)(h), the Board dismissed that application and that decision was undisturbed on judicial review. The duties and responsibilities of these positions are therefore not otherwise described in s. 59(1), and so I will turn to the remaining aspects of s. 59(1)(g).

2. Conflict of interest or other reasons based on the duties of the position

[139] The second and third elements are two ways in which a position may fall within the scope of s. 59(1)(g). The Board explained those two ways in some detail in the *Security Intelligence Officer* decision as follows:

> …
>
> *67 As counsel for the applicant admitted when he placed before me a large number of decisions that interpret variants of paragraph 59(1)*(g) *of the* PSLRA *that have appeared in successive legislation, those decisions provide limited guidance on the criteria that should be used when determining whether a position falls within the scope of that paragraph.*
>
> …
>
> *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.*
>
> …
>
> *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.*
>
> …
>
> *79 The use of the word "or" in paragraph 59(1)*(g) *of the* PSLRA *suggests that there is a distinction between the circumstances that would fall under a conflict of interest and those that would justify the exclusion "… by reason of the person's duties and responsibilities to the employer …" It is somewhat difficult to consider the kind of incompatibility I see between the SIO's duties and membership in the bargaining unit without characterizing it as a conflict of interest, but I think that the SIO position could be excluded in accordance with either description.…*
>
> …

[140] As can be seen from the text immediately quoted, there are no bright-line tests that I can apply to decide this case. I have "a very broad discretion" (paragraph 70) or

"considerable discretion" (paragraph 76), and there is no "… definition or concrete criteria for making such an assessment" (paragraph 70).

[141] With respect to the conflict-of-interest branch of s. 59(1)(g), the employer relied upon *Atkins v. Treasury Board (Ministry of Transport)*, Board file no. 166-02-889 (19740321), and *Assh v. Canada (Attorney General)*, 2006 FCA 358, to argue that a conflict of interest occurs when a reasonable person would think that there was a realistic possibility that the position's inclusion in the bargaining unit could influence the performance of the employee's duties. The bargaining agent argued instead that there had to be evidence of an actual conflict of interest. The bargaining agent drew an analogy to the "managerial authority" line of cases from other labour boards in dealing with exclusions, citing in particular *NorthwesTel Inc.*, 2007 CIRB 377 at para. 15. Those cases stipulate that to exclude a position because it is "managerial" there must be evidence that the position has actually exercised real managerial authority. The bargaining agent submitted that, similarly, there must be evidence of a real conflict of interest and not just the potential for one.

[142] I have not adopted either of those two proposed tests.

[143] I have rejected the bargaining agent's submission that there needs to be an actual conflict of interest because this Board has previously accepted that a potential conflict of interest is sufficient to exclude a position from the bargaining unit; see *Treasury Board v. Public Service Alliance of Canada*, [1997] C.P.S.S.R.B. No. 143 (QL) ("*Andres and Webb*") at para. 28. This Board has also recently in *Treasury Board v. National Police Federation*, 2023 FPSLREB 110 cited with approval the decision in *Cowichan Home Support Society v. U.F.C.W., Local 1518*, [1997] B.C.L.R.B.D. No. 28 (QL), stating:

> *115. Underlying these factors is the rationale for exclusion — conflict of interest. As was originally stated in Burnaby […] the conflict of interest that is at the heart of the collective bargaining scheme is "a potential conflict of interest". No actual conflict need be shown. This conflict of interest arises directly from an objective examination of the actual responsibilities and authority of the individual at issue.…*

[144] I also have two practical concerns with the bargaining agent's approach. First, the cases requiring clear evidence of the exercise of managerial authority are concerned with the mischief that an employer would seek to exclude a position from

the bargaining unit by granting an employee managerial authority on paper but that, in practice, that authority is never exercised. If an employee has real managerial authority, one would expect it to be exercised regularly. Conflicts of interest, on the other hand, can be less frequent and one could easily see how the potential for one may not manifest itself into an actual conflict on a regular basis.

[145] Second, I am also concerned about the practical implications of adopting the bargaining agent's position that a conflict of interest requires evidence of an actual or real conflict of interest as opposed to the potential of one. The bargaining agent posited that there was no evidence and indeed no likelihood that an employee would jeopardize their career by giving the wrong advice to management. But the problem is not just giving the wrong advice but giving advice in cases with two reasonable approaches to an issue. The concern is that in those cases an employee may "pull their punches" — something that the bargaining agent had to admit during oral argument would be impossible for the employer to ever prove.

[146] However, I have also rejected the employer's characterization of the appropriate test — in particular, I have rejected the reasonable apprehension test for a conflict of interest.

[147] The test of a reasonable apprehension of a conflict of interest derives from *Threader v. Canada (Treasury Board)*, 1986 CanLII 6861 (FCA), cited in *Assh*, at para. 31. That case was about whether a public servant could be disciplined for the appearance of a conflict of interest. The Federal Court of Appeal decided that question in the affirmative. However, their reasons for doing so were twofold. First, the conflict of interest guidelines in force at the time expressly prohibited the appearance of a conflict of interest (not just an actual conflict of interest), and the Court concluded that those guidelines had "the force of law" (at page 48). Second, the Court concluded that enjoining the appearance of a conflict of interest on the part of public servants was necessary to maintain the public trust in an impartial and effective public service (at page 53).

[148] By contrast, the *Act* does not use the phrase "apprehension of a conflict of interest" or any similar phrase. Additionally, s. 59(1)(g) of the *Act* is not about preserving the public trust in a fair and impartial public service. It is about preserving the appropriate balance between management and labour. As this Board put it recently

in *National Police Federation*, at para. 198, "The conflict-of-interest purpose of exclusions must be situated within the context of the overall purpose of collective bargaining."

[149] Finally, the reasonable apprehension test as articulated in *Threader* was borrowed from the test for assessing bias in an administrative decision-maker in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, which described the test at p. 394 as that the "… apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information." The purpose behind that test for bias is to ensure public confidence in the justice system. As I have stated earlier, the exclusion regime in the *Act* serves a different purpose. I have therefore chosen not to orient this test around the views held by "reasonable and right minded persons."

[150] The Board in P*ublic Service Alliance of Canada and Treasury Board (Public Service Commission)*, [1985] C.P.S.S.R.B. No. 51 (QL) made a similar point when it refused to exclude certain auditors from the bargaining unit, stating a para. 36 that "… the test to be met here is not the potential for conflict as judged through the eyes of an auditee but rather by the Board based on its view of all relevant facts." In other words, the potential for a conflict of interest is not viewed through the eyes of a "reasonable and right-minded person", but through the eyes of the Board using its labour relations expertise.

[151] For these reasons, the test under the conflict-of-interest branch of s. 59(1)(g) of the *Act* is whether the employer has demonstrated a sufficiently concrete conflict of interest, whether actual or potential, to justify limiting an employee's right to collective bargaining.

[152] I have reviewed the decision of my colleague in *Treasury Board v. Public Service Alliance of Canada*, 2024 FPSLREB 10 ("*HSO Investigators*") released shortly before this decision. I agree entirely with the principles articulated at paragraphs 88-93 of that decision, and the test I have set out immediately above is consistent with that decision. I also agree with what my colleague said at paragraph 97 of that decision that inferential reasoning to show a potential conflict of interest must be grounded in objective facts.

[153] In the second branch of the test, many of the cases to date apply something called the "management team" approach to that question — in other words, whether the employee is embedded within the management team such that, although they do not perform management duties themselves, they must still be excluded. For example, in *Treasury Board v. Public Service Alliance of Canada*, 2020 FPSLREB 41 the Board excluded two relatively junior legal support coordinators because they attended and provided advice at weekly management team meetings making them part of the management team. The employer is not relying upon the "management team" approach and does not suggest that the OHS advisors are part of the management team, so I will say no more about this term. Instead, the employer submitted that independent of a finding of a conflict of interest, the inclusion of the OHS advisors in the bargaining unit could impair the effectiveness of the incumbents' ability to provide advice and guidance to management.

[154] Aside from the "management team" approach, I was given no other guidance by the parties as to how to approach this element of s. 59(1)(g). Similarly, the Board's case law on this point emphasizes my discretion without articulating the limits on that discretion. As set out later, I have resolved this case using the conflict-of-interest part of s. 59(1)(g), so I will say no more about the management team branch of that provision.

3. Other principles

[155] In addition to setting out the three-part analytical path that I should follow, the Board's case law provides four other principles that are relevant to this case.

a. Use s. 59(1)(g) sparingly

[156] First, I am to use s. 59(1)(g) "sparingly" (see *Security Intelligence Officers*, at para. 76).

b. The application must be supported by cogent evidence

[157] Second, exclusions under this paragraph "… must be supported by cogent evidence of potential conflict or association with management by reason of the duties of the position"; see *Andres and Webb*, at para. 28. The burden of proof rests with the employer to provide this cogent evidence; see *Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 46 at para. 34 ("*Canadian Space Agency*"); see also s. 62(3) of the *Act*.

c. The frequency of the offending duties is relevant

[158] Third, I may consider the frequency in which the relevant duties are performed.

[159] The parties disputed whether the frequency in which the positions performed the duties that gave rise to a conflict of interest was relevant. The employer submitted that the frequency did not matter, and analogized this to the exclusion for employees who decide grievances for the employer. In those cases, a position is excluded even if the incumbent may never have been called upon to hear an actual grievance; their authority to do so is sufficient (see *Public Service Alliance of Canada v. Treasury Board*, [1995] C.P.S.S.R.B. No. 41 (QL) at pages 6 to 8 (upheld in [1996] F.C.J. No. 159 (QL)(C.A.)), *Treasury Board (Public Works and Government Services Canada) v. Professional Institute of the Public Service of Canada*, [1998] C.P.S.S.R.B No. 61 (QL) at paras. 16 to 18, and *The Queen in Right of Canada v. Public Service Alliance of Canada*, [1984] 2 F.C. 998 (C.A.)). The employer submitted that the same logic should apply in this case.

[160] The bargaining agent submitted that frequency does matter. The bargaining agent relied upon *Canadian Space Agency*, which stated at paragraph 31 that "… it is the employer's duty to organize its affairs so that its employees are not occasionally placed in a conflict of interest."

[161] I have concluded that the frequency at which duties are performed can matter in s. 59(1)(g) of the *Act*. As I stated earlier on several occasions, s. 59(1)(g) entails significant discretion on the part of the Board in assessing whether a position should be excluded. The text of s. 59(1)(g) provides this discretion by stating that the Board must assess whether the position "… **should** not be included in a bargaining unit …" [emphasis added] because of a conflict of interest or other reasons. This contrasts with s. 59(1)(e), which requires the Board to exclude any position in which the occupant "… **has** duties and responsibilities dealing formally on behalf of the employer with grievances …" [emphasis added]. My role is not simply to decide whether there is a conflict of interest, or the potential of one, but also to decide whether that conflict of interest should result in the position's exclusion from the bargaining unit. The frequency at which this conflict of interest manifests itself is one factor among many that the Board may consider.

[162] This is also consistent with the Board's decision in the *Border Operations Centre* case at paragraph 63, where it stated, "… I take both a quantitative and qualitative view of the work being handled by the staff at issue …", in response to the same argument over whether frequency matters. Taking a quantitative view requires the Board to assess the frequency at which duties giving rise to the apprehended conflict of interest are performed.

d. An applicant does not need to show a change in circumstances as a threshold to an application

[163] Finally, the bargaining agent submitted that the employer's burden included a requirement to explain a change in circumstances justifying the exclusion at the time of the application since the positions were not previously excluded. The bargaining agent relied upon *Thunder Bay (City) v. Canadian Union of Public Employees, Local 87*, 1981 CanLII 861 (ON LRB) at paras. 6 and 7, for that proposition. The employer stated that there was no special burden to show a change in circumstances because there is no limitation period included in the *Act* for these applications. It also cited *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80 ("*Senior Investigators*") at paras. 103 and 104, where the Board was critical of the employer's delay making its application but stated this: "Nevertheless, it is my responsibility to apply s. 59 of the *Act* …" without reference to the delay.

[164] I have concluded that the employer does not have an additional burden to show some change in circumstances to justify this application. As the employer stated, s. 71(1) of the *Act* permits an employer to apply to the Board for an order declaring that any position in the bargaining unit is a managerial or confidential position. That provision does not contain any time limit to do so.

[165] Some labour boards across Canada have adopted a practice of requiring the party seeking to change the status quo by an application to include or exclude a position from the bargaining unit to demonstrate a "… material and significant change in the duties and responsibilities of the individual or position making earlier perceptions, understandings and decisions about this job now obsolete": see Adams, *Canadian Labour Law*, 2nd ed. (1993) at chapter 6.4. That text cites decisions from Ontario, Manitoba, Saskatchewan, and Newfoundland that adopt that proposition, including *Thunder Bay (City)*. None of those jurisdictions have provisions in them similar to ss. 71 and 77 of the *Act* that expressly provide for applications to change the

status quo. Instead, those labour boards have relied upon their general power to review previous orders (as in Ontario and Saskatchewan) or express powers to review bargaining units (as in Newfoundland and Manitoba). I also note that not every jurisdiction appears to require a material and significant change to an existing position before considering whether it should be excluded from a bargaining unit.

[166] Additionally, the requirement of a material change in the duties of a position in those jurisdictions is a policy decision by those boards to promote "… peace and stability between the parties over an issue long thought to have been put to rest between them" (see *Dominion Stores Limited v. Retail Clerks, L409*, [1983] O.L.R.B. Rep. 2006 at page 2007; see also *Association of Employees Supporting Education Services v. University of Manitoba*, (2007), 139 C.L.R.B.R. (2d) 210 at para. 34). I appreciate the value of peace and stability in labour relations. However, the enormity of the core public administration makes it impossible for the parties to have turned their minds to whether to exclude every position when the bargaining agent was certified or when a position is created. The PA Group in which these positions are located comprises approximately 97 000 positions; it is not surprising that a handful of them have "slipped through the cracks". The bargaining agent also provided no evidence that it has relied upon the status quo in some way. In a different case (such as a new exclusion application that follows on the heels of another application that was dismissed) that policy reason may lead the Board to require a party to show a material change in circumstances; but in this case, it does not.

[167] For these reasons, the employer does not bear an additional burden in this case to demonstrate a material change in the duties of these positions. Its burden remains the same as in other cases — to provide cogent evidence that these positions fall within the ambit of s. 59(1)(g) of the *Act*.

C. Application to the facts

[168] The Board summarized the duties of the OHS advisors at paragraphs 6 to 22 of its original decision, and I will not do so again. Instead, I will focus on the main arguments advanced by the employer for why these positions should be excluded.

1. The benchmark decisions are different from this position

[169] First, the employer relied upon a number of previous Board decisions excluding positions under s. 59(1)(g) of the *Act* or the equivalent provision in the *PSSRA*. The

employer referred to these as "benchmarks" for me to follow. The employer relied in particular on eight decisions. Six of those can be summarized quickly, as follows:

- An auditor working in the Office of the Auditor General: *Office of the Auditor General of Canada v. Public Service Alliance of Canada*, [1980] C.P.S.S.R.B. No. 2 (QL). The employer acknowledged that this decision was not as clearly written as it could have been and that it was not very similar to the OHS advisor positions.
- The head of aid section at the Canadian International Development Agency: *Canada (Treasury Board) v. Public Service Alliance of Canada*, [1982] C.P.S.S.R.B. No. 148 (QL). The employer acknowledged that this case was "a bit of a stretch" in two ways — that it is not very similar to the OHS advisor positions and that the Board may not have reached the same result today.
- A nurse in the personnel division of the National Film Board: *Professional Institute of the Public Service of Canada v. National Film Board of Canada*, [1990] C.P.S.S.R.B No. 78 (QL). The employer placed significant weight on this case, in which a nurse who provided recommendations about whether employees' absences were medically justified was excluded. The employer submitted that there is an even more direct conflict of interest in this case. However, the nurse in that case was part of the team that decided whether employees were entitled to sick leave — something that touches more directly on employees' terms and conditions of employment than does the work of the OHS advisors.
- Security intelligence officers at the Correctional Service of Canada: *Security Intelligence Officers*. The employer placed significant emphasis on this case, in large part because of the excerpts I quoted from earlier. I agree that those principles are important, but I found the duties in that case dissimilar to those of the OHS advisors. This is not surprising as the parties to the *Security Intelligence Officers* case agreed that those employees performed a "unique … role" (paragraph 74). Further, the employees in that case were "… enmeshed with the decision-making process about security issues at the highest levels of the institution" (paragraph 77), whereas there is no evidence that the OHS advisors are enmeshed with decision making at the highest levels.
- National Border Operations Centre employees: *Border Operations Centre*. In that case, the Board was most concerned about the work done by those employees in strike planning. While the positions were excluded under s. 59(1)(g) of the *Act*, the Board stated at paragraph 63 that "Even a modest amount of labour relations work that is of critical importance to the CBSA's proper functioning can justify granting an exclusion application." In this case, by contrast, the OHS employees are not performing labour relations work.
- A director at the Department of National Defence; see *Treasury Board (Department of National Defence) v. Public Service Alliance of Canada*, 2000 PSSRB 85. This position was excluded because it provided advice about labour relations, staffing, and classification. The employer made no oral submissions about this case, and I do not consider it analogous to the OHS positions in any way.

[170] The seventh decision is *Centre for Information and Privacy Law*. The employer relied upon that decision in support of its argument around the adversarial context of

occupational health and safety, and so I will deal with that case when addressing that argument.

[171] The eighth and final decision was *Senior Investigators*. Of the decisions cited by the employer, this one seemed the most analogous to the OHS advisors in the nature of the possible conflict of interest. The employees in the *Senior Investigators* decision were responsible for investigating alleged misconduct by other employees in the workplace. While they did not participate in management's decision making about whether to impose discipline, they did recommend a review for cause of an employee's reliability status (which would result in the termination of that employee's employment). The Board concluded that there was a conflict of interest between conducting workplace investigations and being represented by a bargaining agent (which itself represents workers being investigated).

[172] However, the bargaining agent points out that unlike the senior workplace investigators, OHS advisors are not responsible for determining culpability or assigning blame — which is the essence of an investigation into workplace misconduct. While the *Senior Investigators* decision was closest to the OHS advisors, it remains an imperfect benchmark.

[173] The benchmark cases submitted by the employer were useful in identifying the principles I set out earlier, but ultimately the positions in those benchmark cases were too different from that of OHS advisors to determine the outcome of this case.

[174] The bargaining agent presented its own benchmark (although it did not characterize it as such) in *British Columbia Telephone Co.* (1979), CLRB Decision No. 221 (QL) ("*BC Tel*"). The Canada Labour Relations Board (CLRB, as it then was) included safety personnel in the bargaining unit. The safety personnel in that case participated as management's representatives on joint health-and-safety committees. The employer argued that safety matters, including matters proceeding to the joint health-and-safety committees, were adversarial proceedings between employer and employee. The CLRB in that case rejected that argument, stating this:

> …
>
> *We do not agree. First the evidence is clear the safety department does not take disciplinary action nor is it involved in industrial relations matters.…*

> *Of more importance is our interpretation of the intent of the legislation. Safety is not intended to be an adversarial issue. Life and limbs are not intended to be negotiable items. Environment, equipment, procedures and work habits may be the items of vigorous discussion but no one is intended to defend unsafe conditions or seek to enforce them. Employees have an immediate and personal interest in safety. Employers have another interest and interests that may conflict with strict regard for safety. The realization of these two interests generated the need for consultation. The Committee and its minutes are intended to be the vehicle. Dispute generation and decision making about safety rests with the employee and employer, regardless what the Committee does. An individual may disagree with the Committee. He may act on his conviction. So may the employer. The Committee can make no binding decisions. Nominees of either employees or the employer may disagree among themselves. Issues of conscience and knowledge of the work place, not questions of economics, are to guide the expression of points of view on the Committee, regardless of who nominated the member… all Committee members regardless of who nominates them, have a common interest. If, as we think, Part IV does not exclude any person from its protection (except employers) whether he be at the top or bottom of an organization then the Committees must not be viewed as forums for adversarial proceedings.*
>
> …

[175] The employer submitted that *BC Tel* is distinguishable from the present case because the safety personnel were participating in the (non-adversarial) joint health-and-safety committee, while whereas the OHS advisors provide advice to management in adversarial contexts. Their advice is not just provided to the committee — it is provided to management privately as well. I agree that this is an important distinguishing feature, although it is not dispositive. If I were to rely solely on benchmark positions, I would prefer to rely on *BC Tel* ahead of any of the other cases.

2. The possibility of an adversarial context does not justify excluding these positions in light of the evidence about their duties

a. The parties' submissions on this issue

[176] This leads me to the employer's second main argument, which is that occupational health and safety matters can be adversarial and involve litigation in which the interests of the employer and the bargaining agent are opposed. The employer provided eight examples of cases that were litigated in which this bargaining agent represented an employee on one side of the dispute and an employer was on the other side. Of those cases, three involved a different employer (either the Canadian

Food Inspection Agency or the Canada Revenue Agency), and they all involved fairly unique circumstances. But the employer's broader point remains that health-and-safety issues can be litigious, and since they can be, OHS advisors are in a conflict of interest.

[177] The employer also cited the Federal Court of Appeal's decision in *Centre for Information and Privacy Law*, in which the Court of Appeal upheld the decision of the Board excluding the senior lawyer in the centre for information and privacy law in part because:

> …
>
> *[12] At other points in the decision, the adjudicator highlights the duties assigned to the LP-04 position that gave rise to a conflict of interest, such as providing advice in respect of privacy or access to information issues in connection with litigation between the employer and the bargaining agents.…*
>
> …

[178] The bargaining agent responded that health-and-safety issues are not adversarial by nature and are a shared responsibility of management and employees. In addition to *BC Tel*, the bargaining agent cited *Lamoureux* (1993), CLRB Decision No. 1033 (QL), and *Montani v. Canadian National Railway Company* (1994), CLRB Decision No. 1089 (QL), for the proposition that labour relations is distinct from health and safety, the one being adversarial and the other not.

[179] I agree with the bargaining agent that health and safety is not supposed to be adversarial, but I also agree with the employer that sometimes it can be. In my view, this case does not fall to be decided on competing views over the extent to which health and safety is or should be adversarial but, instead, on the evidence of the actual duties of these positions.

b. The focus is on the evidence of the actual duties of the position

[180] As I stated earlier, the burden falls on the employer to provide cogent evidence of an actual or potential conflict of interest. The employer states that the conflict of interest occurs because OHS advisors provide advice to management in health-and-safety disputes that are adversarial. I have reviewed the employer's evidence carefully, and the employer has not proven its case that the advice in adversarial proceedings justifies excluding these positions.

[181] The employer's evidence in this case is based on a detailed rationale for this exclusion, the job descriptions for the OHS positions (which are all identical), and a will-say statement provided with its initial written submissions. I have reviewed all of them carefully.

[182] The detailed rationale is focussed on the interrelationship between the OHS advisors and labour relations issues — an issue that the Board dealt with in its initial decision and that is not before me. The employer also helpfully confirmed in oral argument that the references to work on grievances in the rationale and other documents was part of its case under s. 59(1)(h) and is not relevant to s. 59(1)(g). The rationale also spends considerable time on the risk to management if it does not follow the advice provided by an OHS advisor. I agree that management should usually follow the advice given to it by subject-matter experts. However, it does not mean that the positions must be excluded. The employer's argument was that management would not trust advice given by an employee who was unionized. The rationale states:

> *Management must be able to speak freely to the OHS advisors, without a doubt that he/she solely represents the department's interests. If management does not have that confidence, they could limit their consultation with the OSH* [*sic*] *advisor or not be receptive to their guidance, which could lessen the efforts that ESDC makes to create healthy work environments and safe workplaces.*

[183] I do not accept that this is necessarily the case. Put another way, given the largely non-adversarial dynamic of health-and-safety issues, the employer has not convinced me that a manager could not trust the advice simply because that advice was given by someone who was unionized and the advice may lead to litigation. I have no direct evidence to support that supposition, and I have been given no objective facts on which to ground such an inference.

[184] I also discussed earlier that the employer does not need to prove a material change in circumstances as a threshold requirement to exclude a position. However, these positions have been included in the bargaining unit for decades. I read the will-say carefully and saw nothing in it to suggest that management distrusted the OHS advisors during the decades that they were represented by a bargaining agent. If the employer's fear had materialized, I would have expected the will-say statement to say so or to provide an example of a situation in which a manager distrusted the advice

they were provided. The absence of any such evidence in the will-say statement is telling.

[185] The job description also does not say anything about the OHS advisors' involvement in litigious or adversarial matters. The closest that it comes is stating that they provide "… **strategic advices** [*sic*], guidance, and recommendations to regional management … regarding simple to complex matters **related to occupational health and safety** and Provincial Workers Compensation Boards **cases** …" [emphasis added], but again this is not concrete enough for me to conclude that OHS advisors are actively involved in adversarial or litigious proceedings — merely that they provide advice related to cases, which could be almost anything from analysis after the fact to advice on a case that later becomes litigious.

[186] Finally, the will-say comes closest to providing the necessary cogent evidence of the OHS duties in an adversarial context. That will-say states that OHS advisors are called upon to provide "… fulsome, open advice and guidance to management in matters of: OHS Complaints (in which an employee believes there has been a contravention of the *Canada Labour Code*); and Work Refusals …". However, this is not sufficient to convince me that OHS advisors are working in an adversarial or litigious context. They provide advice after there has been a complaint. However, this does not tell me that they provide advice about adversarial processes. When an employee makes a complaint, the issue is first to be resolved between the employee and their supervisor (see the *Canada Labour Code*, R.S.C., 1985, c. L-2 at s. 127.1). If the employee is not satisfied, the matter proceeds to the workplace health-and-safety committee, which is a joint committee with equal representation from employees and management. If the committee investigates and the employee or employer wants to escalate the matter further, it proceeds to a neutral health-and-safety officer. Finally, an employer, an employee, or a union may appeal a health-and-safety officer's decision. The employer is relying upon this last step, which is the adversarial or litigious stage. However, the will-say is not clear that the advice being provided relates to that last, adversarial step or whether the advice is concentrated at the initial, non-adversarial stages.

[187] The employer has cited eight cases in which the bargaining agent was involved in litigation over a health-and-safety issue; however, the employer has not provided evidence that OHS advisors were involved in any of those cases. Even if it had, the low

frequency of such cases (eight over five years, 2013 to 2017 inclusively) would be a factor against excluding these positions. The employer also listed five cases in a footnote but acknowledged that those cases were not always directly about the sort of issues dealt with by OHS advisors but, instead, were merely examples of health-and-safety issues more generally at this department.

[188] The employer quoted from the President of the bargaining agent who said in 2007 that "[l]egal action is another avenue we are using to push health and safety issues." But the example given was a legal challenge to the entire structure of how appeals are addressed, not any particular advice given by an OHS advisor. I have given this no weight as it does not assist me in determining the nature of the duties of the OHS advisors.

[189] If this were the extent of the matter, I would conclude that the employer has not provided cogent evidence to demonstrate an actual or potential conflict of interest.

3. There is a conflict of interest in providing advice about what to do after an employee makes a workplace violence complaint

[190] However, there is more.

[191] In addition to providing advice about traditional workplace safety issues, OHS advisors also provide advice about workplace violence cases. Their job description (prepared in 2016) requires the skill of "… **resolving** and investigating incidents of workplace violence …" [emphasis added]. The rationale for the exclusion states as follows:

> …
>
> *As an example, in case of a workplace violence complaint, the OHS advisor will review the allegations provided by the employee and/or the union and guide management throughout the resolution process. This involves strategizing with management and guiding them in the process of fact finding, to ensure that the issue is resolved effectively, at the lowest level possible. If the complaint cannot be resolved internally, a competent person may be mandated to investigate. The OHS advisor will then offer support to management as it relates to identifying a competent person and writing the contract to hire that person for the investigation.*
>
> …
>
> *Although there is no right for union representation when it comes to resolving OHS complaints such as workplace violence*

> *complaints, in most cases, the employee will request the support and advice from their union. The OHS advisors are placed in a delicate situation vis-à-vis the employees involved in the complaint (such as the complainants, respondents and witnesses) and the union representative representing them; who are sometimes from the same Bargaining Unit that they belong to. Moreover, the resolution process for violence complaints often requires the OHS advisors to closely work with Labours Relations Consultants, as it is common practice for the complainant to file a grievance and/or a harassment complaint on the same manner* [*sic*]*. This is important as the LR Consultant will guide management through the harassment complaint process while the OHS advisor will guide management through the violence complaint process.*
>
> …

[192] Most importantly, the will-say filed by the employer reads in part as follows:

> …
>
> *… Specifically, in these workplace violence cases, the Regional OHS Advisors have provided the following advice to Management, Director and the Director General level … :*
>
> - *Whether an employee should be removed from a workplace or work team as a mitigation measure to a psychological workplace hazard ….*
>
> …

[193] When an employee makes a workplace violence complaint alleging harassment by another employee, the employer is often required to decide whether the employees have to be separated and, if so, which one is moved. Usually the alleged perpetrator is moved, but not always. According to the evidence filed in this application, the OHS advisors advise management about whether an employee has to be moved and, if so, which one. The interests of the two employees are obviously in conflict; however, the interests of management will also conflict with either or both of those employees. Either or both of those employees could be represented by a bargaining agent in that specific complaint. A bargaining agent also has an interest in negotiating collective agreement terms to limit management's discretion when dealing with harassment and workplace violence complaints; see *Public Interest Commission Report — The PA Group and Common Issues with Other Bargaining Units*, 2023 CanLII 11003 at para. 37, *Public Service Alliance of Canada v. House of Commons*, 2016 PSLREB 120 at para. 24 and *Professional Institute of the Public Service of Canada v. Canadian Food Inspection*

Agency, 2005 CanLII 24003 at paras. 16 to 18 as three examples of bargaining agents attempting to negotiate such collective agreement language.

[194] When it comes to workplace violence and harassment complaints, the complainant, the respondent, management, and the bargaining agent have different interests and want different things.

[195] During oral submissions, I put the bullet point in the will-say directly to the bargaining agent. I put it to the bargaining agent that an OHS advisor would be in a conflict of interest when having to decide which of two employees to move when one employee was represented by their bargaining agent and the other was not. The bargaining agent admitted that this could reasonably be perceived as a conflict of interest but argued that the conflict does not rise to the level requiring exclusion from the bargaining unit. The bargaining agent argued that OHS advisors need to be "straight shooters" (to borrow the bargaining agent's metaphor) who would not "pull their punches" (using my metaphor this time) and that they can make the tough decision while still being part of the bargaining unit.

[196] The bargaining agent successfully made this argument in the *HSO Investigators* decision, as set out in paragraphs 143-146 of that decision. However, the duties in these two cases are different. The positions in the *HSO Investigators* case had to neutrally investigate health and safety issues — they were not supposed to be beholden to management. The Board in that case concluded that being in a bargaining unit represented by a bargaining agent does not prevent an employee from being "neutral" (at paragraph 143). OHS advisors, by contrast, are not neutral investigators of workplace violence complaints; their job is to advise management.

[197] The bargaining agent also suggested that the concern may be hypothetical. However, as I pointed out to the bargaining agent during oral argument, the will-say is clear that the OHS advisors "have provided" this advice — not that they could provide or may provide this advice. The bargaining agent's representative fairly conceded that on the basis of this factual record, the concern was more than hypothetical. This distinguishes this case again from the *HSO Investigators* decision where Board found that the concerns were "entirely speculative" (at paragraph 149).

[198] I have no information about the frequency at which OHS advisors perform this particular duty; as I stated earlier, frequency can sometimes matter. However, I have no

evidence either way — nothing to suggest that these duties are frequent or infrequent. Additionally, using workplace violence complaints to resolve issues of workplace harassment was relatively new at the time the application was filed, in many ways starting from *Tench v. National Defence – Maritime Forces Atlantic, Nova Scotia*, 2009 OHSTC 01 which concluded that harassment aggravating a mental illness could be a "danger" under the *Canada Labour Code*, and becoming more prevalent as a result of 2017 amendments to the *Canada Labour Code* that received Royal Assent in 2018 and came into force on January 1, 2021 along with other regulatory changes; therefore, it does not surprise me that there was limited evidence about the frequency of these duties at the time the application was filed. As I mentioned much earlier in this decision, I have presumed that the evidence in the will-say concerned the nature of the positions as of the date of the employer's application since the bargaining agent did not object to it at the time. However, even if the will-say evidence post-dates the application, I would consider it relevant as it retrospectively clarifies duties concerning workplace harassment that were relatively new at the time the employer filed this application.

[199] I have concluded that the employer has provided cogent, objective evidence about the nature of the duties of OHS advisors that places them in a conflict of interest with being represented by a bargaining agent. Their duty to advise management about workplace violence complaints — in particular, their duty to advise management about whether an employee must be moved as a result of such a complaint and, if so, which one — puts them in a conflict of interest. Given the role of a bargaining agent in representing one, or sometimes both, employees who could be implicated in such a decision and the bargaining agent's role in collectively bargaining issues surrounding workplace harassment, being represented by a bargaining agent gives rise to a conflict between affiliation with that bargaining agent and being able to advise management against the interests of that same bargaining agent. That duty changes what would otherwise be a borderline case not warranting exclusion into one that requires me to exclude the positions from the bargaining unit. It is not enough to hope or trust that the OHS advisors are "straight shooters"; the potential for a conflict of interest is too acute.

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

(The Order appears on the next page)

V. Order

[201] The application is allowed.

[202] I declare that positions numbered 78754, 102859, 102860, 102861, and 102865, titled “Occupational Health and Safety Advisor” and classified AS-04, in the Human Resources Services Branch of Employment and Social Development Canada are excluded positions, effective January 9, 2018.

January 30, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board