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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

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant and Bargaining Agent

and

CANADIAN FOOD INSPECTION AGENCY

Respondent and Employer

Indexed as
Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency

In the matter of an application for an extension of time referred to in paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations* and in the matter of policy grievances referred to adjudication

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

For the Applicant and Bargaining Agent: Peter Engelmann, counsel, Isabelle Roy-Nunn, counsel, and Sarah-Claude L'Ecuyer, articling student

For the Respondent and Employer: Karl Chemsi and Alexandre Toso, counsel

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Decided on the basis of written submissions, filed August 9 and 21, September 15, October 4, November 10 and 17, and December 15, 2023, and February 2 and 21, 2024, and heard via videoconference, February 26, 2024.

REASONS FOR DECISION

I. Overview

[1] These policy grievances are about whether employees have the right to file classification grievances asking for their former positions to be reclassified.

[2] I have allowed the grievances because they do.

[3] Section 208 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") gives all employees the right to grieve measures affecting their terms and conditions of employment. The classification of their former position is a term or condition of their employment because it has a real connection to their employment. Limiting that statutory right is a violation of the collective agreement in this case. Therefore, I have issued a declaration to that effect, along with some more specific orders designed to ensure that former incumbents (the term used by the parties to describe the affected employees) may grieve the classification decisions that triggered these policy grievances.

[4] I have also granted an extension of time to file these policy grievances. The parties asked me to resolve that issue before deciding whether the grievances were actually filed late, so I did. I concluded that there was a clear, cogent and compelling explanation for any delay in this case, that the delay was not excessive, that the Professional Institute of the Public Service of Canada (PIPSC) acted with due diligence processing the policy grievances and applying for an extension of time, and that the balance of prejudice to the parties favoured granting the extension of time.

II. Procedural background

[5] The underlying dispute between the parties in this matter dates back to 2001. To quote from *Coupal v. Canadian Food Inspection Agency*, 2021 FPSLREB 124 at para. 1:

> *[1] Since 2001, the Professional Institute of the Public Service of Canada … and the veterinarians it represents who work at the Canadian Food Inspection Agency … have been trying to agree with the employer on the veterinarians' work descriptions and classification, at several classification levels — VM-01 through VM-04. As will be seen in more detail later in this decision, the dispute has been long and protracted, although from time to time, it has been marked by agreements between the parties.*

[6] There are three groups of veterinarians impacted by these three policy grievances: supervisory veterinarians, veterinary program officers, and veterinarian program specialists.

[7] In *Coupal*, the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision refers to the current Board and any of its predecessors) dealt with the supervisory veterinarians. Numerous supervisory veterinarians grieved their work description in 2001, 2009, and 2011. In 2016, the Canadian Food Inspection Agency ("CFIA") issued a work description that satisfied PIPSC and the affected veterinarians. Instead of classifying that work description, the CFIA rewrote it in 2019 and classified the rewritten work description at the VM-02 group and level. The Board concluded that the CFIA violated the relevant collective agreement between the CFIA and PIPSC for the Veterinary Medicine group by not classifying the 2016 work description and ordered the CFIA to classify the 2016 work description.

[8] In *Paré v. Canadian Food Inspection Agency*, 2021 FPSLREB 86, the Board dealt with the veterinary program officers. The Board allowed the grievance against the CFIA's work description for those positions and amended that work description to be effective May 1, 2001.

[9] PIPSC and the CFIA resolved the work description for the veterinarian program specialists on the basis of a revised work description that was to be classified retroactively to May 1, 2001. The agreement resolving that job description stated that the outcome of the classification exercise that followed would "… be applied to all substantive incumbents and former incumbents …" of that position and that the "… substantive incumbents and former … incumbents … will be entitled to the applicable retroactive pay …" if the position was reclassified.

[10] The CFIA completed the required classification exercise for those three positions at several points in 2022. The result was that all three positions retained their original classifications (VM-02, VM-03, and VM-04, respectively). The affected veterinarians who are the incumbents in those positions filed classification grievances against those decisions, arguing that the positions should be classified upward.

[11] The CFIA has a policy entitled the *Classification Grievance Procedure*. The *Classification Grievance Procedure* states at section 1.1, "A classification grievance is a written complaint by an employee against the classification of the job description **he or she performs** …" [emphasis added]. It also reads at section 1.3.a. that the deadline to file a classification grievance is 35 days after the day on which an employee "… becomes aware of an action or circumstance affecting the classification of the position **he or she occupies**" [emphasis added]. The CFIA states that this means that only the incumbent of a position has standing to file a classification grievance. I am not asked to decide whether the CFIA's interpretation of the *Classification Grievance Procedure* is correct or reasonable in these policy grievances. In other words, both parties asked me to decide these policy grievances on the assumption that it means that only the incumbent of a position has standing to file a classification grievance.

[12] PIPSC takes the position that the upward classification that should have occurred as a result of the revised work descriptions should include the retroactive reclassification for former incumbents while they occupied those positions after 2001. However, I am not asked to decide whether any upward reclassification would be retroactive to 2001 in these policy grievances, and I will not address this issue.

[13] In these policy grievances, PIPSC takes the position that those former incumbents should be able to file classification grievances to pursue that claim. PIPSC filed these three policy grievances against the part of the CFIA's *Classification Grievance Procedure* denying standing for former incumbents of those positions to grieve their classification decisions made on the basis of the new work descriptions.

III. Reasons for granting the application for an extension of time

A. The CFIA's objection to the timeliness of these grievances

[14] The CFIA objected to the policy grievances on the grounds that they were filed late. In essence, it argues that the 35-day limitation period for filing the policy grievances began to run when it notified PIPSC of the classification exercise results. PIPSC disputes that the grievances are untimely, stating instead that the limitation period began to run on later dates that are, broadly speaking, when it knew that former incumbents of the three positions at issue would be prejudiced by the CFIA's classification grievance policy.

[15] In the alternative, PIPSC applied for an extension of time to file these three policy grievances.

B. Procedure followed to determine timeliness issues

[16] After being assigned the three policy grievances, I directed that the parties provide written submissions on whether to grant the application for an extension of time. I also held a case management conference with them. PIPSC explained that it would have to call evidence to properly explain its position on the grievances' timeliness, and the CFIA stated that if that happened, it would have to call responding evidence. As this would turn what would otherwise be a straightforward hearing into a longer one, I decided that it was preferable to decide the extension-of-time application first on the basis of the parties' written submissions. If I were to grant the extension of time, it would render any dispute over the timeliness of the grievances moot, and the parties could simply argue the merits of the policy grievances. If I were to deny the application for an extension of time, the parties could lead evidence and argue about timeliness. In other words, by reversing the normal order of proceeding and dealing with the application before deciding whether the grievances are untimely, I would save time if I granted the application and be no worse off if I denied it.

[17] Both parties agreed that I may deal with this application for an extension of time in writing. The Board is empowered to decide such an application on the basis of written submissions because of its power to decide "… any matter before it without holding an oral hearing" in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365); see also *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68.

[18] This in turn means that for the purposes of the application, I accept the premise that the grievances were filed late because their limitation period began to run on the date suggested by the CFIA. This does not mean that I agree or disagree with the CFIA that the grievances are "clearly untimely" but merely that I am prepared to accept that as true for the purposes of this decision. I note that the CFIA argues that the third policy grievance was filed on October 22, 2022, but PIPSC provided a copy of the email sending that grievance to the CFIA on October 12, 2022; therefore, I am treating that earlier date as the date on which PIPSC filed that grievance.

C. Relevant time periods

[19] The CFIA's position is that the timeline to file each policy grievance ran from the date on which it informed employees, including former incumbents, of the classification results. There is some dispute between the parties about that precise date for one group, with PIPSC stating that it was not informed about the supervisory veterinarian position until June 12, 2022, not May 19, 2022, as the CFIA states. However, I have accepted the CFIA's proposed deadlines for the purposes of this application, particularly in light of a copy of the email dated May 19, 2022, which it sent to inform PIPSC of its classification decision.

[20] The trigger dates for the limitation period (according to the CFIA), the dates of the policy grievances, and the length of time by which they were filed late follow in this table:

Position and current classification	**Trigger date (according to the CFIA)**	**Date of grievance**	**Days late**
Supervisory veterinarians (VM-02)	May 19, 2022	July 15, 2022	22
Veterinary program officers (VM-03)	February 18, 2022	September 15, 2022	174
Veterinarian program specialists (VM-04)	June 16, 2022	October 12, 2022	83

[21] In its final submission responding to the application for an extension of time, the CFIA argues that the trigger date for all three grievances was February 18, 2022 (i.e., the date on which the first group of employees was informed of the classification decision). I cannot see how PIPSC or its members could have been aggrieved with respect to the other two groups until the CFIA decided not to reclassify those positions. For the purposes of this decision, I will use the CFIA's initial statement of the trigger dates of the three grievances, which are set out in the chart.

D. Reasons for granting extension of time

[22] On November 21, 2023, I granted PIPSC an extension of time to file these three policy grievances by issuing a line decision to that effect. These are the reasons for that decision.

[23] Paragraph 61(b) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") grants the Board the power to extend any period set out in the grievance procedure contained in a collective agreement or the *Regulations* "in the interest of fairness". The Board typically applies what it calls the *Schenkman* factors (from *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1) when deciding whether the interests of fairness justify granting an application for an extension of time. These five factors are as follows:

- whether there are clear, cogent, and compelling reasons for the delay;
- the length of the delay;
- the due diligence of the grievor;
- balancing the injustice to the employee against the prejudice to the employer in granting an extension; and
- the chance of success of the grievance (often expressed in decisions rendered after *Schenkman* as whether there is an arguable case in favour of the grievance).

[24] These criteria are not weighted equally; nor are they each important in every case. As the Board stated in *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93 at para. 77, "… the criteria are not fixed and are not of equal weight and importance …".

[25] PIPSC argues that the *Schenkman* factors should be applied flexibly rather than in a rigid manner, citing *Fortier v. Department of National Defence*, 2021 FPSLREB 41 at para. 30. PIPSC's submission is consistent with how the Board applies the *Schenkman* factors, as the "… criteria are not exhaustive and must be applied flexibly …" (see *Bastien v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 34 at para. 11, also cited by PIPSC).

[26] The CFIA also cited six Board decisions for the proposition that time limits in collective agreements should be respected by the parties and extended only in exceptional circumstances. That is a fair statement of the Board's jurisprudence; however, it is worth noting that even some of the cases that the CFIA cited (namely, *Fragomele v. Canada Revenue Agency*, 2022 FPSLREB 39 at paras. 138 and 139, and *Bowden*, at para. 77) also apply the *Schenkman* principles flexibly, as suggested by PIPSC.

[27] Both parties organized their submissions around the five *Schenkman* factors in that order, so I have organized these reasons the same way.

1. Reasons for the delay

[28] PIPSC's explanation for the delay filing these grievances is that it was not aware that the CFIA had decided not to permit former incumbents of the three veterinarian positions to file classification grievances.

[29] In each case, the CFIA provided correspondence to PIPSC stating that "… incumbents, of positions which have been subject to a classification review may, if not satisfied with the results, file a classification grievance." The CFIA's position is that this started the time limit to file the policy grievances — presumably because stating that incumbents can grieve is tantamount to stating that former incumbents cannot grieve. While PIPSC argues otherwise, as I have stated several times already, I have treated the CFIA's deadlines as if they were correct solely for the purposes of this application for an extension of time.

[30] PIPSC's explanation for this delay is in essence that it was not aware that the CFIA was taking the position that former incumbents could not challenge this classification decision, particularly in light of the Board's decisions in *Coupal* and *Paré* backdating the work descriptions. To provide evidence of its lack of awareness, PIPSC provided a letter dated June 21, 2022, about the veterinary program officers in which it specifically asked this:

> …
>
> *… whether the Employer has sent the impugned rating for the Position to not just current incumbents, but also to former incumbents who were in the Position from May 1, 2001 onwards. If the Employer has not yet provided the rating to all former incumbents, please confirm that it will do so, or if not, why not.*
>
> …

[31] PIPSC also states that it made similar requests "informally" for the supervisory veterinarians on June 15, 2022. PIPSC did not receive a response and so sent a follow-up letter on July 26, 2022, asking for one. The CFIA did not respond. Finally, at least one former veterinary program officer filed a classification grievance and on August 25, 2022, was told that they did not have standing to file such a grievance. PIPSC filed the policy grievance for the veterinary program officers within 35 days of that decision and within 35 days of the time in which it requested a response from the CFIA to its July 26, 2022, correspondence.

[32] While the formal correspondence I have been provided was only about the veterinary program officers and not the other two groups, I agree with PIPSC that it provides some evidence in support of its explanation for the delay — namely, its lack of full awareness that the CFIA would not permit former incumbents to address their classification flowing from the revised and retroactive job descriptions. I appreciate that PIPSC's argument overlaps with the question of whether the grievances were late in the first place, as the deadline began to run from the date that PIPSC had "… knowledge of any act, omission or other matter giving rise to the policy grievance" (clause D6.41 of the agreement between the CFIA and PIPSC for the VM group that expired on September 30, 2022; "the collective agreement"). The argument on timeliness is about the date on which PIPSC had the requisite knowledge to trigger the limitation period. However, even if I am prepared to accept solely for the purposes of this application that PIPSC had some knowledge of the matter giving rise to the policy grievances (i.e., the lack of standing of former incumbents to file classification grievances), it has adequately demonstrated that its knowledge was imperfect and that there was some confusion about that issue.

[33] The CFIA argues that this correspondence is not an adequate explanation for the delay, relying on five Board cases to the effect that discussions to resolve issues do not justify the untimely filing of grievances (including, most recently, *Bowden* at para. 80). But as PIPSC points out, its attempts to get answers from the CFIA were not attempts to discuss or resolve the issue but, instead, attempts to find out whether the CFIA was in fact refusing to permit former incumbents to file classification grievances. The cases cited by the CFIA all involve informal discussions to resolve issues in dispute. This is not a case of informal discussions to resolve a dispute; this is a case in which a grievor was trying to find out whether there was a dispute. I accept that as a cogent explanation for the delay.

[34] PIPSC also explained that it took some time to contact its members to find out whether former incumbents had received classification decisions, and it also assisted at least one of them in filing a classification grievance (which was denied for lack of standing on August 25, 2022) before filing the policy grievances. The CFIA submits that policy grievances do not require the consent of the employees concerned, and therefore, PIPSC did not have to communicate with current or former incumbents of the positions before filing policy grievances. While technically true, it made sense in this case for PIPSC to contact its members to find out whether there was a dispute and

whether any member (in this case, former incumbents) actually felt aggrieved by the classification decision or would have liked to file a grievance under the CFIA's classification policy.

[35] The CFIA also relied upon a line of cases stating that negligence or an error by a representative does not constitute a compelling reason for a delay justifying granting an application for an extension of time. As PIPSC pointed out in its reply submissions, more recent Board decisions, depending on the circumstances, have accepted negligence on the part of a representative as a compelling reason for a delay; see the discussions in *Van de Ven v. Treasury Board (Canada Border Services Agency)*, 2023 FPSLREB 60 at para. 73, and *Barbe v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 42 at para. 48, for these "two schools of thought". However, this case involves policy grievances. This is not a case in which a bargaining agent negligently represented a bargaining unit member when filing a grievance late; the grievor is the bargaining agent, not an individual employee. This is also not a case in which PIPSC is trying to blame its counsel for the delay. Therefore, the negligent-representation line of cases is not relevant to this decision. PIPSC states that the late filing of the grievances is not anyone's fault but its own.

[36] I admit that I have some concerns about PIPSC's explanation for the delay in this case. It has not explained why it filed one policy grievance on July 15, 2022, but waited until October 12, 2022, to file the last policy grievance. The differences between the three policy grievances appear very modest at first glance. If it was clear on July 15, 2022 that the CFIA would not allow former supervisory veterinarians to file classification grievances, PIPSC has not explained why this standing issue remained unclear for the other two positions until it filed the other two policy grievances on September 15 and October 12, 2022, respectively. However, neither PIPSC nor the CFIA submits or even suggests that I could or should come to different conclusions for any of these three cases — i.e., that I should grant the application for one extension of time but deny another extension. I also conclude that it would make little labour relations sense to grant an extension of time in one case but not the others given the similarities between the three cases, as that decision could arbitrarily deny a remedy to one group if I grant the grievance in favour of another group.

[37] In conclusion, PIPSC presented a cogent reason for the delay. It is not the strongest explanation, but it is sufficient in light of my assessment of the remaining factors.

2. Length of the delay

[38] The length of the delay in these three cases ranges between 22 days and just under 6 months. The CFIA submits that a delay measured between 40 days and 6 months is significant or lengthy and provides 4 cases in which applications for extensions of time were denied when the delays were in that range (*Wyborn v. Parks Canada Agency*, 2001 PSSRB 113, *Lagacé v. Treasury Board (Immigration and Refugee Board)*, 2011 PSLRB 68, *Copp v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2013 PSLRB 33, and *Parker v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 57).

[39] PIPSC submits that the delay in this case should be measured against the CFIA's delay implementing *Paré* (roughly one year) and the fact that this dispute has been ongoing since 2001. PIPSC at one point suggests that the CFIA does not have "clean hands" when arguing about delay. I would not go that far; I have no information about why it took roughly a year to classify the revised job descriptions, and there very well may be a good explanation for taking that much time.

[40] However, I disagree with the CFIA's proposition that a delay of the lengths of time in this case is unusual or presumptively unreasonable. In *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59 at para. 14, the Board referred to a delay of four or five months as neither short nor long. In *Guittard v. Staff of the Non-public Funds, Canadian Forces*, 2002 PSSRB 18 at para. 28, the Board found a delay of four months "not unduly excessive." In *Savard v. Treasury Board (Passport Canada)*, 2014 PSLRB 8 at para. 67, the Board characterized a five-month delay as "not an inordinate amount of time". In *Duncan v. National Research Council of Canada*, 2016 PSLREB 75 at para. 147, the Board called a four- to five-month delay "not excessive".

[41] For these reasons, a delay ranging from 22 days to just under 6 months is not excessive, particularly in light of the broader context of this dispute that has been ongoing since 2001.

3. Due diligence

[42] The CFIA argues that PIPSC did not act with due diligence because it could have filed the grievances sooner. Obviously, if grievances are filed late, they could have been filed sooner; this submission tells me nothing about whether PIPSC acted diligently.

[43] The CFIA also argues that PIPSC should have applied earlier for an extension of time and that it waited for the "last possible moment". I reject this argument. Subsection 95(1) of the *Regulations* requires a party to object to the timeliness of a grievance at each level of the grievance process and again within 30 days of the grievance being referred to adjudication. Until the CFIA filed its objection to these grievances on August 9, 2023, PIPSC had no way of knowing whether the CFIA would waive any timeliness objection it might have had despite having raised that objection in its final level decision — it could still change its mind. I agree that PIPSC did not apply for an extension of time when it responded to that objection on August 21, 2023, instead waiting until it filed a sur-reply on October 4, 2023 (responding to the CFIA's more detailed arguments about the timeliness of these grievances), but I refuse to treat this short delay as somehow not showing due diligence. This case is nothing like *Slivinski v. Treasury Board (Statistics Canada)*, 2021 FPSLREB 35, relied upon by the CFIA, in which the grievor waited 3 years, until the outset of the hearing, to apply for an extension of time.

[44] PIPSC acted with due diligence processing these grievances and applying for an extension of time.

4. Balance of prejudice

[45] The CFIA argues that there is no prejudice to PIPSC in dismissing these grievances because they are policy grievances and the Board lacks the jurisdiction to award the type of financial or other remedies common in individual or group grievances. Even if I were to accept that premise, there would still be some prejudice to PIPSC's members (particularly the former incumbents of the three positions who want to file classification grievances) if I do not allow this application for an extension of time. The CFIA argues that "… the Bargaining Agent has not explained how exactly failing to give classification grievance rights to former incumbents will result in them necessarily being denied these benefits." Without a clear and unequivocal undertaking by the CFIA that it would apply the result of any successful classification grievance by

an incumbent to former incumbents of the position, I am not prepared to conclude that there would be no prejudice to PIPSC's members if I were to deny this application for an extension of time.

[46] As it turns out, after I granted the extension of time, the CFIA submitted in its February 2, 2024, written submissions that it was not obliged to pay retroactive compensation as a result of any reclassification.

[47] The CFIA also mentioned three ongoing applications at the Federal Court by former incumbents of these positions. However, I do not have sufficient information about those applications to decide whether they are adequate substitutes for these policy grievances.

[48] Finally, the CFIA provided no evidence of prejudice to itself, aside from asserting that a delay is inherently prejudicial and that it contributes to a lack of stability in labour relations. This argument would have been more persuasive in a short-lived dispute instead of this one that has raged, in one form or another, since 2001.

[49] For these reasons, the balance of prejudice favours granting this application for an extension of time.

5. Chances of success

[50] Both parties agree that this factor should be given little to no weight because I should not dive into the grievances' details at this stage. I agree.

6. Conclusion on granting the extension of time

[51] I have decided to grant this application for an extension of time. I have concluded that there is an explanation for the delay that although imperfect, is at least cogent. The other factors favour granting the application: the delay is not excessive, PIPSC acted diligently in making this application and more generally when addressing this dispute, and the balance of prejudice favours granting this application for an extension of time.

[52] This dispute has been ongoing since 2001. The former incumbents of the three positions should at least have a chance to argue through these policy grievances that

they have the right to challenge the classification of their former positions in light of the Board's decisions in 2021.

IV. Merits of the policy grievances

[53] The CFIA argues that the Board does not have the jurisdiction to hear these policy grievances. Normally, I would set out my reasons explaining why the Board has jurisdiction over this matter before addressing the substance of the grievances. However, in this case I will address the substance of the grievances alongside the jurisdictional objection because understanding the substance of the grievances is important context to understanding my reasons for concluding that the Board has jurisdiction to hear the grievances.

[54] Having read and heard the parties' submissions in this matter, these grievances and the related jurisdictional objection raise the following four issues, which I will then answer:

1) *What is the essential character of these policy grievances?* The essential character of these policy grievances is the standing of former incumbents to file individual classification grievances.
2) *Does the CFIA's policy that former incumbents do not have the standing to file a classification grievance about their former position violate s. 208 of the Act?* Yes.
3) *Does a violation of s. 208 of the Act also violate the collective agreement?* Yes, it violates clauses A4.01 and A5.01.
4) *Does the wording of clause D6.04 of the collective agreement take the issue raised in these policy grievances outside the scope of the collective agreement?* No.

A. The essential character of the grievances is about the standing to file a grievance, not the classification of positions

[55] The first issue I need to resolve is to determine the essential character of these policy grievances: whether they are about standing to file a grievance or about classification.

[56] To provide context for this issue, the CFIA correctly submits that the Board's authority is defined by legislation. The Board has applied the "essential character" test to determine its jurisdiction. This means that the Board must determine whether the essential character of the dispute falls within the limits of its jurisdiction under ss. 209, 216, or 220 and 221 of the *Act*; see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 at para. 98 (upheld in

2015 FC 50), and *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73 at para. 59.

[57] The CFIA submits that the essential character of these grievances is about classification. The CFIA further submits that the Board does not have the jurisdiction to hear these policy grievances because the Board has no jurisdiction over classification disputes.

[58] PIPSC by contrast states that the essential character of these policy grievances is about an individual's standing to file a grievance.

[59] I agree with PIPSC. The essential character of these policy grievances is about standing.

[60] I say this for three reasons. First, the CFIA submits that I should rely on the wording of the grievances. I agree that this is the first step in determining the essential character of the grievances, and in *Swan and McDowell*, the Board determined the essential character of the grievance by examining its text and the remedies sought.

[61] The three policy grievances all state that they are about "… the requirement that classification grievances can only be filed by current incumbents of the Position …" and about the CFIA's decision to "… restrict the filing of grievances to current employees" (by which it means incumbents of the relevant positions). The grievances also seek three remedies (discussed in greater detail later), including an order that "… the CFIA be ordered to process the classification grievances of former incumbents of the Position …". The grievances say that they are about standing.

[62] Second, I have considered the CFIA's response to the policy grievances dated June 23, 2023. In that response, the responsible decision maker in the CFIA stated this:

> …
>
> *… I find that* ***the decision to not allow non-incumbents to grieve classification decisions*** *relating to a position they no longer occupy allows for some certainty, is a reasonable and fair exercise of the Employer's statutory authority regarding classification, and does not violate the managerial rights clause of the collective agreement.…*
>
> …
>
> [Emphasis added]

[63] The CFIA's own response to the policy grievances states that they are about standing to file a grievance.

[64] Finally, I have considered the underlying facts of this dispute. I agree with the CFIA that the essential character of a dispute must depend upon the facts underlying the dispute and not just how the grievance is drafted. As the Alberta Court of Appeal put it, "… the griever [*sic*] cannot, by clever drafting, convert a [non-grievable] public police disciplinary matter into a grievable issue …"; see *Edmonton Police Association v. Edmonton (City of)*, 2007 ABCA 147 at para. 22. The Federal Court has also more recently pointed out as follows (see *Burlacu v. Canada (Attorney General)*, 2022 FC 1177 at para. 10):

> *[10] The jurisprudence recognizes that an employer cannot choose to interpret a grievance in the way it prefers … Similarly, a grievor cannot avoid legislatively prescribed process and procedures through artful drafting where the issue raised engage [sic] matters subject to those prescribed processes.*

[65] There is no doubt that PIPSC's ultimate goal is to have these three positions reclassified. However, PIPSC is not asking the Board to reclassify the positions. PIPSC is asking the Board to allow its members to engage in an intermediate step: filing a classification grievance. The first step along the path to reclassification was the work-description grievances. The Board had the jurisdiction to hear those grievances in *Coupal* and *Paré*. Simply because a grievance is a step toward reclassification does not mean that the grievance itself is about classification. The essential character of a work-description grievance is the work description, not the classification of the position. Similarly, the essential character of these policy grievances is about the standing to file a classification grievance, not the classification of the position.

[66] For these reasons, I have concluded that the essential character of these grievances is about standing.

B. Former incumbents of positions have the right to file a classification grievance about their former position under s. 208 of the *Act*

[67] For ease of reference, s. 208(1)(b) of the *Act* reads as follows:

208 (1) *Subject to subsections (2) to (7), an employee is entitled to*	***208 (1)*** *Sous réserve des paragraphes (2) à (7), le*

present an individual grievance if he or she feels aggrieved	*fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :*
…	[…]
***(b)** as a result of any occurrence or matter affecting his or her terms and conditions of employment.*	***b)** par suite de tout fait portant atteinte à ses conditions d'emploi.*

[68] None of the exceptions to the right to grieve set out in ss. 208(2) through (7) of the *Act* are relevant to this case.

[69] The issue in this case turns on whether the classification of a former incumbent's position falls within the meaning of the phrase "… affecting his or her terms and conditions of employment."

[70] The CFIA submits that the classification of an employee's former position is not a term or condition of their employment. In essence, the CFIA argues that an employee's classification does not conclusively determine their rate of pay because an employee's rate of pay is determined by their certificate of appointment, which may or may not correspond with the classification of the position they are appointed to. Therefore, the CFIA further reasons that the former's incumbent classification is not a term or condition of their employment.

[71] The CFIA relies upon two older decisions to support its position that the classification of an employee's position does not conclusively determine their rate of pay: *Attorney General of Canada v. Jones* (1977), [1978] 2 FC 39 (C.A.), and *Basque v. Treasury Board (Department of Health and Welfare)*, [1984] C.P.S.S.R.B. No. 43 (QL). The CFIA states that those two decisions stand for the proposition that a reclassification of a position has an effect on pay only if employees are appointed or reappointed to the reclassified position.

[72] The CFIA further reasons that this means that a classification or reclassification of a former incumbent's position does not affect their terms and conditions of employment, currently or in the past.

[73] I reject the CFIA's submission, for four reasons. Briefly:

1) If the CFIA is right that the classification of a position does not necessarily or conclusively determine an employee's pay (i.e., there is another step after

classification of a position to determine their pay), then this would apply equally to the classification of current as well as former positions. If the CFIA is right, this also means that all classification grievances fall outside s. 208 of the *Act*. This is clearly contradicted by the case law and *Regulations*, which are clear that the classification of a position is grievable under s. 208 of the *Act*.

2) Even if the CFIA is right that the classification of a position does not determine an employee's pay, s. 208 of the *Act* allows employees to grieve any "terms and conditions of employment", not just pay. Classification is a term or condition of employment because it has a real connection to an employee's employment, and it is about more than just pay.

3) Even if the CFIA is right that the classification of a position does not determine an employee's pay and that "terms and conditions of employment" must be about pay, s. 208 of the *Act* permits grievances about anything **affecting** terms and conditions of employment. Classification affects pay, even if it does not conclusively determine it.

4) Finally, the CFIA has taken the cases it relies upon for the proposition that the classification of a position does not determine an employee's rate of pay out of their factual, legal, and historical context.

[74] I will address each of these points in turn.

1. Classification grievances fall under s. 208 of the *Act*

[75] First, the logical consequence of the CFIA's submission is that even a grievance about the classification of an employee's **current** position would fall outside the scope of s. 208 of the *Act*, as well as their former position. If the classification of an employee's position does not conclusively determine their rate of pay, it means that even the classification of an employee's current position does not conclusively determine their pay. On the CFIA's reasoning, the classification of a position would not affect an employee's term or condition of employment regardless of whether the classification is of a former or current position. This means that on the CFIA's logic, all classification grievances fall outside s. 208 of the *Act*.

[76] This is clearly contradicted by both the case law and the *Regulations*.

[77] In the case law, this point was made most clearly and concisely in *Adamidis v. Canada (Attorney General)*, 2019 FC 331 at para. 33, as follows:

> *[33] The Grievance was presented pursuant to section 208 of the FPSLRA which permits public servants to grieve "any occurrence or matter affecting his or her terms and conditions of employment"*

> *(paragraph 208(1)(b)). This includes disputes regarding the classification attributed to their positions.…*

[78] The Federal Court made a similar comment in *Fischer v. Canada (Attorney General)*, 2012 FC 720 at para. 5. The Board has also concluded that s. 91 of the former *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35; now s. 208 of the *Act*) "… confers upon employees the right to present classification grievances" (see *Boyer v. Marks*, [1989] C.P.S.S.R.B. No. 85 (QL) at para. 56) and that "… an employee has the right to grieve the classification of the position in which he is employed" (see *Burke v. Napoli (Transport Canada)*, [1987] C.P.S.S.R.B. No. 201 (QL) at para. 33).

[79] The *Regulations* set out a series of rules about the processing of grievances under s. 208 of the *Act* and their reference to adjudication under s. 209. Sections 71 and 72 of the *Regulations* contain specific provisions about classification grievances: s. 71 permits a classification grievance to be presented directly at the final level of the grievance process, and s. 72(2) extends the deadline to provide the decision in a classification grievance from 20 to 80 days. Those specific rules are not at issue in these grievances. My point is that the existence of provisions in the *Regulations* dealing with classification grievances is premised on classification being a grievable subject matter under s. 208 of the *Act*.

[80] The logical consequence of the CFIA's argument that the classification of an employee's position is not a term or condition grievable under s. 208 is therefore inconsistent with the case law and *Regulations*.

2. The meaning of "terms and conditions of employment" is broad enough to capture the classification of a former position

[81] Second, the CFIA's argument is inconsistent with the broad meaning of "terms and conditions of employment" in s. 208 of the *Act*. The CFIA argues that there is no right to retroactive compensation for former incumbents of a reclassified position. Even if that were true (and I make no comment about that proposition, as the issue is not before me), terms and conditions of employment are about more than pay.

[82] The *Act* does not define the phrase "terms and conditions of employment". However, the Supreme Court of Canada has explained that a condition of employment is something with a "… real connection with the contract of employment" (see *Isidore Garon ltée v. Tremblay*, 2006 SCC 2 at para. 26). The Supreme Court of Canada has also

described terms and conditions of employment for federal public servants very broadly, as follows (see *Vaughan v. Canada*, 2005 SCC 11 at para. 1):

> *[1]* ***The terms and conditions of employment of the federal government's quarter of a million current workers are set out in*** *statutes, collective agreements, Treasury Board directives, regulations, ministerial orders,* ***and other documents that consume bookshelves of loose-leaf binders****. Human resources personnel are recruited into the system, spend a career attempting to understand it and die out of it. Procedures for the enforcement of employment rights and obligations also differ in some respects from those in the private sector.* ***Almost any workplace issue can be grieved*** *but only some disputes can be carried onwards to third-party arbitration.…*
>
> [Emphasis added]

[83] The qualifier "[a]lmost any" in that passage refers to the exceptions to the right to grieve set out in ss. 208(2) through (7) of the *Act*, none of which apply in this case.

[84] My point is that the phrase "terms and conditions of employment" is about more than pay. These "bookshelves of loose-leaf binders" include classification standards.

[85] An employee's classification impacts their employment in a number of ways. As explained by one human resources expert testifying before the Board in *Canada Customs and Revenue Agency v. Association of Public Service Financial Administrators*, 2001 PSSRB 127 at para. 56, classification affects a broad number of issues and aspects of an employee's employment, including staffing, the area of competition (now called area of selection) for new positions, and training allocation. Additionally, s. 57(2) of the *Act* requires the Board to consider classification when determining the appropriate bargaining unit for employees in the federal public administration.

[86] Given these impacts, the classification of an employee's position — or even a former position — has a real connection to their employment. That makes their classification or former classification a term and condition of employment.

[87] I am further buttressed in this conclusion by the wording of the collective agreement between the parties. Part E of the collective agreement is under the heading "Other Terms and Conditions", and I may consider the headings in a collective agreement as an interpretative aid (see Brown & Beatty, *Canadian Labour Arbitration*,

5th ed., at chapter 4:23). Clause E1.01 requires the employer to provide an employee with a statement of the duties and responsibilities of their position, "including the position's classification level". The parties have thus acknowledged that a position's classification level is a term and condition of employment.

3. Section 208 of the *Act* requires only that the matter is "affecting" terms and conditions of employment, and the classification of a former position does so

[88] Third, the CFIA's argument focusses too narrowly on the phrase "terms and conditions" and ignores the word "affecting" in s. 208(1)(b) of the *Act*. Even if the reclassification of an employee's former position did not entitle that employee to compensation (which is an issue that is not before me), and even if an employee's "terms and conditions of employment" were limited to issues determining their remuneration (which I disagree with, as set out earlier), an employee's former classification still **affects** their remuneration even if it does not conclusively determine it.

[89] The CFIA's counsel candidly admitted during oral argument that an employee whose former position was reclassified could file a grievance about their entitlement to acting pay and that they may be entitled to acting pay. That demonstrates that the reclassification of a former position can **affect** an employee's remuneration, even if (according to the CFIA) it does not determine it automatically.

4. The CFIA's authorities have been taken out of context

[90] Fourth, the CFIA has taken its two cases out of their factual context, out of context for the issue actually decided in those cases, and out of their historical context.

[91] When Parliament introduced collective bargaining for federal public servants in 1967, it also decided to define bargaining units in the federal public service as corresponding to occupational groups. In other words, the requirement in s. 57(2) of the *Act* that the Board merely "have regard to" classification lines when establishing bargaining units was originally a firm rule requiring the Board to establish bargaining units that followed classification lines at the outset of collective bargaining. This meant that the Civil Service Commission (re-named the Public Service Commission at the same time) — which, before 1967, was responsible for determining occupational groups and classifying positions — was expected to define new occupational groups.

To do so, the Civil Service Commission created a new system of classification, a task that needed to be completed by the Public Service Commission 15 days after the *Public Service Staff Relations Act* came into force. See *Public Service Staff Relations Act* (S.C. 1966-67, c. 72), at ss. 26(1) and 26(4).

[92] This obviously led to many changes in job classifications because it was necessary to convert public service positions from the old classification standard into the new one. In this context, bargaining agents negotiated language in their respective collective agreements about how to deal with the pay issues that arose from this conversion. That language remains in place in the collective agreement between these parties in clause G1.02, which states that an employee is to be paid according to the classification of the position to which they are appointed if the classification coincides with that prescribed in the employees' certificate of appointment, **or** the rate of pay prescribed in their certificate of appointment if that certificate does not coincide with the classification of their position. That clause is identical to the collective agreement at issue in *Jones*, negotiated in 1971.

[93] In *Jones*, Mr. Jones was appointed to a position classified as Technical Officer 6 on September 1, 1967. For a period of one year, his "personal classification" (a concept I will return to shortly) was Technical Officer 5, until he was promoted on August 31, 1968. His position was converted to the classification EG-ESS-9 on January 28, 1969, effective back to July 1, 1967. He was paid at the rate of pay for the classification EG-ESS-8 during the period between July 1, 1967, and August 31, 1968 (the lower classification reflecting his old Technical Officer 5 classification), and then at the rate of pay for the classification EG-ESS-9 after that. In a decision effective June 28, 1972, the Treasury Board Secretariat (the organization now responsible for classification) re-evaluated the classification of that position and lowered it to EG-ESS-8. Mr. Jones was issued a new certificate of appointment for the lower-classified position on July 18, 1972. The issue in *Jones* was whether his salary should be as per the certificate of appointment that he received in 1969 (i.e., at the EG-ESS-9 pay level) or 1972. Mr. Jones's main argument was technical, stating that the wording of the collective agreement at the time meant that the pay language applied only when there was a conversion (i.e., the process in 1969) and not a later reclassification. The Federal Court of Appeal rejected that argument. However, the Court went further and said that even if that argument was valid, Mr. Jones' new rate of pay was triggered by the certificate

of appointment that he received in 1972, regardless of how the reclassification transpired.

[94] The CFIA cites paragraphs 49 and 50 of *Jones*, where the Federal Court of Appeal stated that "[t]he reclassification had no consequence so far as the determination of Mr. Jones's pay was concerned" and that it was the certificate of appointment that was the crucial document. However, this portion of the Court of Appeal's decision comes after its reasons for already ruling against *Jones* for other reasons, making it *obiter dicta* and not binding on future decision-makers. Additionally, the Court was clear that it was making its decision in light of the "… relevant circumstances at the time the agreement was first made and at the time of its renewals" — i.e., in the context of the vast classification conversion exercise undertaken in 1967. As I will describe later, the circumstances are very different today.

[95] In *Basque*, the grievors were nurses. The classification standard for nurses at the time required that they have a university degree or similar training to be classified at the NU-CHN-3 classification. The grievors did not have those degrees or other training. Therefore, the employer gave them a "personal" classification of NU-CHN-2 while they occupied positions that would otherwise have been at the NU-CHN-3 classification. The Board (after initially ruling otherwise and having that decision set aside on judicial review in an unreported decision) concluded that the nurses had to be paid according to their "personal" classification.

[96] Both *Jones* and *Basque* used the term "personal classification" to describe what happened in those cases for periods of time. *Basque* also used the term "underfilling" to describe it. The concept was that an employee's position was classified but that the employee also had a personal classification that might or might not correspond to the classification of their position. When a person's personal classification was lower than the classification of their position, this was called "underfilling". As one of the witnesses in *Basque* described as follows, at paragraph 14:

> *… in the case of underfilling, an employee's certificate of appointment normally listed a position classification and a personal classification. The personal classification prevailed for purposes of determining, among other things, the pay of the employee in question.*

[97] This is contrasted with an "overfill", when the employee is paid at a higher classification than the position they occupy.

[98] This concept of a personal classification as distinct from a position classification has been largely phased out of the federal public administration, as I will now describe.

[99] The rate of pay for an employee when appointed to a position is set out at s. 60 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "*PSEA*"). The old *PSEA* was repealed and replaced with this identically titled statute in 2005. Both the old and new versions of the *PSEA* state that the rate of pay on appointment to a position must be the rate of pay for that position or any rate in the scale of rates "… for positions of the same occupational nature and level as that position." In other words, an employee's rate of pay on appointment must fall within the rates established for the classification of their position.

[100] However, s. 38 of the old *PSEA* (R.S.C., 1985, c. P-33) stated that this rule was "[s]ubject to any direction of a special or general character that may be made pursuant to the *Financial Administration Act* …". By contrast, the current *PSEA* does not have the "[s]ubject to" language, meaning that the rule is absolute. The old *PSEA* permitted a pay rate (*i.e.* a "personal classification") when the employer issued a direction to that effect. The current *PSEA* does not permit the employer to do so any longer.

[101] There is an exception to this rule for executives in the public service. Since the enactment of the *Public Service Employment Regulations, 1993* (SOR/93-286), only executives could be appointed to a level that was lower than the classification of the position that they previously occupied (i.e., overfilling), and since the enactment of the *Public Service Employment Regulations, 2000* (SOR/2000-80), only executives could be appointed to a position at a level that is lower (i.e., overfilling) or higher (i.e., underfilling) than the classification level of the position that they occupied. That rule continues to this day in s. 18 of the current *Public Service Employment Regulations* (SOR/2005-334), which states that it applies despite s. 60 of the *PSEA* (an exception permitted under s. 20 of the *PSEA*).

[102] I appreciate that the CFIA is a separate agency and therefore has not been governed by those provisions in the *PSEA* or the *Public Service Employment Regulations* since it was established by legislation (see *Forsch v. Canadian Food Inspection Agency*,

2004 FC 513 at para. 18). However, the point remains that *Jones* and *Basque* were decided during a time when a "personal classification" was, if not routine, at least not focussed in the executive cadre as it is in the core public administration.

[103] In this way, the CFIA has taken *Jones* and *Basque* out of their factual context (i.e., they had nothing to do with the standing to file a classification grievance), legal context (i.e., they were about the interpretation of a provision in a collective agreement, not the interpretation of the *Act*), and historical context (i.e., they were decided at a time when personal classifications were more prevalent instead of an exception largely confined to the executive cadre). Therefore, those decisions do not assist the CFIA in these policy grievances.

[104] For these reasons, I have concluded that s. 208(1)(b) of the *Act* includes the right for the former incumbent of a position to file a classification grievance about the classification of their former position. The classification of an employee's former position has a real connection to their employment, and therefore, it is an event affecting their terms or conditions of employment that is capable of being grieved.

[105] Finally, in this portion of my reasons, I have referred to the right of employees to grieve. As the Federal Court of Appeal explained in *Canada (Attorney General) v. Santawirya*, 2019 FCA 248 at para. 20, a former employee may also file a grievance after they have left their employment when the material facts underlying the grievance transpired while they were employed. My decision includes former employees who would have standing under the principles described in *Santawirya*. As these are policy grievances, and I do not have any information about the individual circumstances involving former employees and whether they would fall within the boundaries of this principle described in *Santawirya*, I can say no more than to reiterate that everything I said about employees having the right to grieve applies to former employees who fit within that principle.

C. The violation of s. 208 of the *Act* also violates the collective agreement

[106] The CFIA correctly points out that s. 220 of the *Act* requires that a policy grievance be about the "… interpretation or application of the collective agreement or arbitral award …". In other words, policy grievances cannot be about any term or condition of employment; they must be about the interpretation or application of the

collective agreement. This is the crux of the CFIA's jurisdictional objection to these policy grievances.

[107] The CFIA further submits that these policy grievances do not involve a breach of the collective agreement. Some of the CFIA's argument on this point is about the pith and substance of these grievances (i.e., whether it is about classification or standing to file a grievance), an issue I have addressed earlier. However, the CFIA also submits that there is no provision of the collective agreement implicated in these policy grievances.

[108] PIPSC argues that these policy grievances implicate three clauses of the collective agreement: clauses A4.01 (management rights), A5.01 (rights of employees), and E1.01 (statement of duties).

[109] I have concluded that a violation of s. 208 of the *Act* also violates clauses A4.01 and A5.01 of the collective agreement. Those clauses reads as follows:

ARTICLE A4	***Article A4***
MANAGEMENT RIGHTS	***Droits de la direction***
A4.01 *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*	***A4.01*** *L'Institut reconnaît que l'Employeur retient les fonctions, les droits, les pouvoirs et l'autorité que ce dernier n'a pas, d'une façon précise, diminués, délégués ou modifiés par la présente convention.*
ARTICLE A5	***Article A5***
RIGHTS OF EMPLOYEES	***Droits des employés***
A5.01 *Nothing in this Agreement shall be construed as an abridgement or restriction of an employee's constitutional rights or of any right expressly conferred in an Act of the Parliament of Canada.*	***A5.01*** *Rien dans la présente convention ne peut être interprété comme une diminution ou une restriction des droits constitutionnels ou de tout autre droit d'un employé qui sont accordés explicitement par une loi du Parlement du Canada.*

[110] Clauses A4.01 and A5.01, read together, mean that the CFIA does not have the authority to do anything that restricts or abridges an employee's right conferred in s. 208 of the *Act*.

[111] I have reached this conclusion because clause A4.01 confers on the CFIA only the functions, rights, powers and authority that have not been restricted or abridged by the collective agreement. The CFIA does not have, and never had, the right, power or authority to violate s. 208 of the *Act*. Clause A5.01 makes it clear that nothing in the collective agreement (including clause A4.01) shall be construed as permitting the CFIA to restrict or abridge an employee's statutory right, which includes the right to file a classification grievance under s. 208 of the *Act*. Therefore, clause A4.01 cannot be interpreted in a way that permits the CFIA to violate s. 208 of the *Act*.

[112] I draw further support for this conclusion from the principle that a collective agreement incorporates rights contained in employment-related statutes and that employees aggrieved by the violation of those rights may grieve that violation under the collective agreement. As the Supreme Court of Canada stated in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 ("*Parry Sound*") at paragraphs 23 and 28:

> *23 … Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the* Human Rights Code *and other employment-related statutes.*
>
> …
>
> *28 As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.*

[113] While I appreciate that the Board has concluded that *Parry Sound* does not grant it the jurisdiction to hear a grievance when such a grievance falls outside s. 209 of the *Act* (such as when a non-unionized employee grieves a breach of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), as in *Chamberlain*), the principle in *Parry Sound* about employment-related statutes being incorporated into a collective agreement is just as sound in this jurisdiction as in every other. I have also noted *Lukits v. Treasury Board (Department of National Defence)*, 2017 PSLREB 6, in which the Board accepted that it

had the jurisdiction to decide a grievance that touched upon the *Access to Information Act* (R.S.C., 1985, c. A-1; *AIA*). While the Board accepted jurisdiction in that case for other reasons, it expressly stated that "… I do not have to address the arguments of whether the *AIA* is an employment-related statute" — acknowledging, at least implicitly, that if it were an employment-related statute, it would be incorporated into the collective agreement and therefore the proper subject of a grievance alleging a breach of the collective agreement under s. 209(1)(a) of the *Act*.

[114] In this case, I am not relying exclusively on the principle in *Parry Sound*. I have concluded that based on a textual interpretation, clauses A4.01 and A5.01 cannot be interpreted in a way that the employer may breach s. 208 of the *Act*, and any grievance alleging such a breach falls within the ambit of the collective agreement. However, this textual interpretation is also consistent with the broader legal context that employment-related statutes (of which the *Act* must surely be one) are incorporated into collective agreements and may be the subjects of grievances under them.

[115] The CFIA argues that clause A4.01 is comparable to a preambulatory clause and therefore does not give PIPSC any substantive rights. The CFIA relied upon *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55 at para. 32, for the proposition that the purpose clause of a collective agreement (in this case, clauses A1.01 and A1.02) "and clauses comparable to it" do not grant substantive rights to employees.

[116] I reject the CFIA's argument for two reasons. First, the CFIA has cited no authority for the proposition that a management-rights clause is comparable to a preamble or a purpose clause in a collective agreement. A management-rights clause clearly had substantive impacts in *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55. This management-rights clause is not contained in the preamble of the collective agreement but, instead, much later in the text. It is not "comparable to" a preamble or purpose clause.

[117] Second, even if the CFIA was right about management-rights clauses, this case is not only about clause A4.01 but also clause A5.01 and the *Act*.

[118] PIPSC argues that denying standing to former incumbents of the impugned positions was an unreasonable exercise of management rights. In response, the CFIA proposed the novel argument that its management rights do not need to be exercised

reasonably, despite the wealth of case law to the contrary (including *Association of Justice Counsel*, at para. 20, and *Canada (Attorney General) v. Lloyd*, 2022 FCA 127 at para. 50), because this particular management-rights clause does not explicitly state that the employer must act reasonably. I do not need to address that argument because my conclusion would be the same regardless of whether the CFIA was right on this point. The breach did not occur because the CFIA acted unreasonably but because it violated s. 208 of the *Act*. I will leave it to another case to decide whether the CFIA has reserved the right to act unreasonably.

[119] In light of my conclusion about the interpretation of clauses A4.01 and A5.01, I do not need to address whether these grievances fall under clause E1.01.

D. Clause D6.04 of the collective agreement does not change the conclusion that a violation of the *Act* also violates the collective agreement

[120] Finally, the CFIA relies upon clause D6.04 to argue that decisions about standing to file classification grievances fall outside the collective agreement. That clause reads as follows:

Individual Grievances	***Grief individuel***
D6.04 *Subject to and as provided in section 208 of the* Federal Public Sector Labour Relations Act *an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause D6.07 ….*	***D6.04*** *Sous réserve de l'article 208 de la* Loi sur les relations de travail dans le secteur public fédéral *et conformément aux dispositions dudit article, l'employé qui estime avoir été traité de façon injuste ou qui se considère lésé par une action quelconque ou l'inaction de l'employeur au sujet de questions autres que celles qui découlent du processus de classification, a le droit de présenter un grief de la façon prescrite au paragraphe D6.07* […]
…	[…]

[121] The CFIA argues that in clause D6.04, the parties "… specifically excluded matters which relate to classification from the Collective Agreement's grievance process." As I described earlier, the essential character of these grievances is about standing, not classification. Clause D6.04 does not explicitly or implicitly oust everything that "relate[s] to" classification from the grievance process. This is evident

from *Coupal* and *Paré*. Those cases were about breaches of clause E1.01 of the collective agreement, which requires the employer to provide a current and classified work description. Clearly, not everything that "relate[s] to" classification falls outside the collective agreement or the grievance process that it contains.

[122] In response to the CFIA's argument, PIPSC submits that clause D6.04 states explicitly that it is subject to s. 208 of the *Act*, and therefore, clause D6.04 cannot remove a right conferred by statute. The effect of clause D6.04 is that the employer can establish a classification grievance process that is different from that for other grievances, but it cannot contract out of the *Act* by doing so.

[123] I agree with that interpretation of the collective agreement.

[124] Additionally, clause D6.04 states only that employees with grievances captured within its scope may file a grievance "… in the manner prescribed in clause D6.07." On a purely textual basis, this means that the parties have agreed that the classification grievance process is not the one established under clause D6.07; it does not mean that the parties have contracted out of the right of an employee to file a classification grievance — even assuming that the parties could contract out of the terms of the *Act*.

E. Conclusion on the merits of the policy grievances

[125] I have concluded that the CFIA's policy depriving former incumbents of the right to file a classification grievance in respect of the classification of their former position violates clauses A4.01 and A5.01 of the collective agreement. Former incumbents have the right under s. 208 of the *Act* to file a grievance about the classification of their former position because such a classification is a term or condition of their employment. Denying them such a right violates clauses A4.01 and A5.01 of the collective agreement because, read together, those two clauses prohibit the CFIA from violating the terms of the *Act*. Finally, the parties did not contract out of this right in clause D6.04 of the collective agreement.

V. Remedy for policy grievances

[126] By the time I heard these grievances, PIPSC narrowed its request to these three remedies:

1) a declaration that the CFIA's decision to deny former incumbents the right to file classification grievances violates the collective agreement;

2) that the CFIA be ordered to issue the notification of classification decisions to all current and former incumbents of the positions immediately, including those who held the positions at any time from May 1, 2001, onwards; and
3) that the CFIA be ordered to process the classification grievances of former incumbents of the positions, including those who have retired and those who have moved on from the positions held at the time the grievances were filed, in the same fashion as for current incumbents.

[127] The CFIA submits that s. 232 of the *Act* limits me to issuing a declaration.

[128] Until it filed its final reply submissions, PIPSC argues that I should order the CFIA to pay retroactive compensation or back pay to successful grievors. PIPSC dropped that request in its final reply submissions. Most of the CFIA's written submissions about remedy were in response to that remedy.

[129] During oral argument, I asked the CFIA to make submissions about the three requested remedies remaining at issue in these grievances. The CFIA stated only that it was surprised by the third remedy sought because it goes without saying that it should apply the same norms for current or former incumbents (which begs the question of why it did not allow them to grieve in the first place).

[130] The CFIA did not submit that the remaining remedies fall outside the Board's jurisdiction under s. 232 of the *Act*. Subsection 232(3) the *Act* permits the Board to require the employer to **administer** the collective agreement in a specified manner. The two orders sought by PIPSC concern the administration of the collective agreement and therefore fall within the jurisdiction of the Board.

[131] On the second remedy sought, the CFIA states that it advised all the employees who grieved their work description (whether former or current incumbents) of the classification decision. When I asked PIPSC about this during oral argument, it stated that it has no evidence that this was done and that the previous notifications are worthless if former incumbents were not entitled to file a grievance. However, PIPSC provided evidence of a number of former incumbents who did try to file classification grievances — so clearly the CFIA gave notice to some former incumbents, and that notice was not worthless.

[132] I also expressed some concern to PIPSC during oral argument about its third requested remedy and whether it was asking me to delve too deeply into the mechanics of the classification grievance process — something I have no jurisdiction

to do in light of the employer's broad discretion to establish procedures for the disposition of classification grievances (see *Boyer*, at para. 98).

[133] Nevertheless, I have decided to grant all three remedies sought by PIPSC in this case, for three reasons.

[134] First, I was struck by the CFIA's lack of opposition to the remaining remedies sought by PIPSC. As I just said, the CFIA's opposition to the remedies sought were oriented around ensuring that I did not award any compensation-related remedies to prospective grievors. Since PIPSC dropped that demand, I am left without submissions to contest the remaining remedies — despite the fact that I invited CFIA to make those submissions during oral argument.

[135] Second, on the second remedy, I am left with no evidence one way or the other about how many former incumbents were informed about the classification decision: it was either some or all. I have chosen to err on the side of caution; there is less harm to the employer in having to send a letter to former incumbents than there is harm to a former incumbent failing to file a classification grievance because they are unaware that the CFIA made a decision they may wish to grieve.

[136] Third, in *Burke*, the Board heard another standing case about classification grievances. In that case, the employer refused to hear a classification grievance filed by two employees who were acting in their positions. The Board concluded that the failure to hear a classification grievance about acting positions violated what was then s. 8(1) of the *Public Service Staff Relations Act* because it amounted to interference with those employees' representation by their bargaining agent. I note that this is not my conclusion in this case. PIPSC does not argue the case in that way, and by referring to this case, I do not endorse that conclusion. However, the Board concluded at paragraph 35 that the employer cannot "… deny the complainants the right to have their grievances **processed in the same manner** as any other classification grievance" [emphasis added] and ordered the employer to hear those classification grievances using the same process it used to hear a classification grievance filed by an indeterminate employee in the same position. While that case is not binding on me because it was about a different issue and did not involve a policy grievance (and I want to repeat, my decision should not be seen as endorsing the conclusion that

classification grievances trigger statutory representation rights), the fact that it ordered the third remedy PIPSC seeks helps persuade me to do the same in this case.

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

(The Order appears on the next page)

VI. Order

[138] The application for an extension of time to file the grievances in Board file nos. 569-32-47713, 47714, and 47715 is granted.

[139] The policy grievances are granted. I declare that the employer contravened clauses A4.01 and A5.01. I declare that former incumbents have the standing to file a classification grievance about the classification of their former position.

[140] The CFIA must send the notice of classification decision dated May 19, 2022, for the position of Supervisory Veterinarian to all former incumbents of that position between May 1, 2001, and May 19, 2022, within 90 days from the date of this decision.

[141] The CFIA must send the notice of classification decision dated February 18, 2022, for the position of Veterinarian Program Officer to all former incumbents of that position between May 1, 2001, and February 18, 2022, within 90 days from the date of this decision.

[142] The CFIA must send the notice of classification decision dated June 16, 2022, for the position of Veterinarian Program Specialist to all former incumbents of that position between May 1, 2001, and June 16, 2022, within 90 days from the date of this decision.

[143] The CFIA is ordered to process the classification grievances of former incumbents of those positions, including those who have retired and those who have moved on from the positions held at the time the grievances were filed, in the same fashion as for current incumbents.

[144] I remain seized of these policy grievances for a period of 100 days from the date of this decision.

May 23, 2024.

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