Date: 20240423

File: 561-34-47778

Citation: 2024 FPSLREB 57

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

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

CANADA REVENUE AGENCY

Respondent

Indexed as
Public Service Alliance of Canada v. Canada Revenue Agency

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

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

For the Complainant: Andrew Astritis and Simcha Walfish, counsel

For the Respondent: Larissa Volinets Schieven and Richard Fader, counsel

Decided on the basis of written submissions, filed December 21, 2023, and January 29 and February 9, 2024.

REASONS FOR DECISION

I. Overview

[1] The Public Service Alliance of Canada (PSAC) has filed a complaint alleging that the Canada Revenue Agency (CRA) breached its duty to bargain in good faith by not disclosing the fact that it was planning to terminate the employment of a number of term employees working in CRA call centres. PSAC and the CRA entered into a collective agreement a little over six weeks after PSAC says it learned about the pending terminations. The CRA says that entering into the collective agreement means two things: it cured any breach of the duty to bargain in good faith or is otherwise a complete answer to the complaint, and it made the complaint moot. It objects to the complaint on those two grounds and asks that the complaint be dismissed.

[2] I have dismissed both objections.

[3] On the first objection, the duty to bargain in good faith includes a duty of unsolicited disclosure of information, to permit some opportunity for the parties to have a rational and informed negotiation in light of that information. PSAC alleges that it did not have an opportunity to negotiate in light of that information because it had already reached a tentative agreement with the CRA and had recommended the ratification of that agreement to its members before it learned the information. PSAC alleges that its ratification process made it impossible to negotiate after recommending ratification to its members, despite having over six weeks to do so. Whether PSAC had some opportunity to negotiate after learning the information is a question of fact that I cannot resolve at this early stage of the complaint. Therefore, I have dismissed this first objection as PSAC has made an arguable case that entering into the collective agreement did not cure any breach of the duty of unsolicited disclosure.

[4] On the second objection, I have reoriented the issue to determine whether the complaint serves a labour relations purpose. The Federal Public Sector Labour Relations and Employment Board (“the Board”, which in this decision also refers to any of its predecessors) can remedy a breach of the duty to bargain in good faith by putting the parties in the position they would have been in but for the breach. This complaint is about a $2500 lump-sum payment made to employees in the bargaining unit on the date the collective agreement was signed. PSAC may be able to demonstrate

that, but for the late disclosure, it would have negotiated different terms of eligibility for that payment. Again, this is a question of fact that I cannot resolve at this early stage of the complaint. However, this means that there may be a concrete remedy available to PSAC in this complaint. This in turn means that the complaint may serve a labour relations purpose. Therefore, I have dismissed the second objection as well.

[5] I explain my reasons for these conclusions in detail.

II. Factual context to the complaint

[6] PSAC filed this complaint against the CRA. PSAC represents over 35 000 employees in the Program Delivery and Administrative Services bargaining unit at the CRA; see *Public Interest Commission - Public Service Alliance of Canada v. Canada Revenue Agency*, 2023 CanLII 9685 (PSLREB) at para. 1.

[7] PSAC served notice to bargain with the CRA on October 15, 2021. The parties reached an impasse in bargaining in 2022 and met before a Public Interest Commission, which issued its report on February 7, 2023. On April 19, 2023, PSAC declared a strike against the CRA. The parties reached a tentative agreement on May 3, 2023, ending the strike.

[8] There are two terms of that tentative agreement relevant to this complaint. First, PSAC agreed that its bargaining team would recommend that PSAC members vote to ratify the tentative agreement. Second, the CRA agreed to pay a one-time lump-sum payment of $2500 "… to incumbents of positions within the PDAS group on the date of signing of the collective agreement."

[9] This complaint is about the impact of that second term on employees in the Contact Centre Services Directorate, which, in essence, is a call centre. Staffing levels in the call centre had generally increased between 2018 and 2023. Many of those workers in the CRA's call centre worked on term contracts. Starting on May 2, 2023, the CRA ended a number of term contracts with call centre employees. While the complaint made by PSAC initially identified the date it became aware of the cessation of term contracts as May 2, 2023, it explains that this was a typographical error and that it alleges that it became aware of the cessation of these term contracts on May 12, 2023.

[10] The CRA disputes that PSAC only became aware of this information on May 12, 2023, or, alternatively, states that PSAC should have been aware of it before that date.

As I will explain later, at this stage I am taking the facts alleged in the complaint as true and capable of being proven; therefore, I am assessing the CRA's preliminary objection as if PSAC only found out about this information on May 12, 2023. PSAC and the CRA also dispute the number of employees affected by this issue, with PSAC estimating that 1700 employees are affected, and the CRA stating that "several hundred" employees are affected. Again, I do not need to resolve that factual dispute at this stage, as the precise number of affected employees is not relevant to the two preliminary objections.

[11] PSAC's members ultimately voted to ratify the tentative agreement on June 16, 2023, and the parties signed their new collective agreement on June 27, 2023. PSAC filed this complaint on July 7, 2023. PSAC seeks a declaration that the CRA has violated s. 106 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"), that the CRA pay $2500 to every employee whose contract was terminated between May 3 and June 27, 2023, and that the CRA reinstate "… all employees whose contracts were unlawfully terminated …".

III. Process followed to date in this complaint

[12] PSAC filed this complaint on July 7, 2023, complaining that the CRA violated ss. 106 and 186 of the *Act*. The CRA responded on August 16, 2023. Both the complaint and the response included detailed information about the facts of this complaint and identified where the parties' facts diverged. However, the CRA's response identified the two preliminary objections to PSAC's complaint under s. 106 that I have identified earlier.

[13] On October 20, 2023, I informed the parties that I intended to resolve those two initial objections to the complaint under s. 106 in advance of an oral hearing as the material facts underlying those objections were not in dispute. I initially proposed that the parties file written submissions about the CRA's two objections, followed by an oral hearing into those objections. The CRA requested that I decide the preliminary objections in writing instead, and PSAC did not oppose that request. Therefore, I did not schedule an oral hearing into these two issues, and instead, I relied solely upon the parties' detailed written submissions.

[14] The Board may 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). I have exercised that authority in light of the parties' agreement that I should decide these two preliminary issues using their written submissions.

[15] Both parties included detailed factual information in their written submissions. The parties dispute the extent to which PSAC knew or ought to have known about the pending dismissals, the number of dismissals, and other details of the complaint. It is not necessary for me to resolve those factual disputes to determine the two preliminary issues raised in this decision, and I have declined to resolve those factual issues.

[16] PSAC argued that I should apply the "arguable case" standard to the CRA's preliminary objections. The arguable-case standard requires the Board to accept the allegations in the complaint as being true and capable of proof and then to decide whether the complaint raises an arguable case. PSAC argues further that if there is any doubt as to whether an arguable case has been made out, the Board must err on the side of finding that there is an arguable case and preserve the opportunity to have the case heard.

[17] The cases cited by PSAC in support of that proposition (namely, *Charbonneau v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 1 at para. 25; *Fry v. Parks Canada Agency*, 2021 FPSLREB 88 at para. 34; and *Wepruk v. Treasury Board (Department of Health)*, 2016 PSLREB 55 at para. 65) all discuss the standard of "any doubt" about whether an arguable case has been made out on a factual basis. The Board stated this most explicitly in *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2 at para. 105, as follows:

> ***105*** *I agree with* Quadrini [*Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37] *that, when conducting the required assessment, I must be cognizant that, if I have* ***any doubt about what the facts, assumed to be true, reveal, then I must err on the side of finding that there is an arguable case*** *for the required link that the respondent contravened* [the *Act*]*, and I must preserve the complainant's opportunity to have his complaints heard in a proceeding ….*
>
> [Emphasis added]

[18] Or, as the Board put it in *Corneau v. Association of Justice Counsel*, 2023 FPSLREB 16 at para. 29, "If the facts are in dispute, or the Board has doubt about the

facts, then the Board must rely only on those facts pled by the complainant in assessing whether an arguable case has been made out."

[19] Therefore, I agree with PSAC to the extent that it submits that any legitimate doubt about the facts of a case that would impact the result mean that the case must proceed to a hearing to resolve those factual disputes.

[20] Finally, this decision is only about the preliminary objections to the complaint alleging a breach of s. 106 of the *Act*. The CRA has not raised any preliminary objections to the Board hearing the complaint based on s. 186(2) of the *Act*, and the Board will hear that aspect of this complaint in due course.

IV. Issues

[21] The CRA's preliminary objections raise two issues:

1) Does the fact that PSAC ratified and signed the collective agreement after it learned about the cessation of employment for call centre employees cure any breach of the duty to bargain in good faith?
2) Did entering into the collective agreement render the bad-faith bargaining complaint moot?

V. Reasons

A. Issue #1: Whether PSAC learning about information no later than May 12, 2023, which PSAC alleges should have been disclosed cures any breach of the duty to bargain in good faith

[22] I have divided the reasons addressing this issue into five parts. First, I will provide an overview of the duty of unsolicited disclosure during collective bargaining. Second, I will examine whether any labour board decisions answer this issue. There are no labour board decisions that are dispositive. Therefore, third, I will move on to assessing the first principles behind the duty of unsolicited disclosure — namely, this duty exists to permit parties to engage in the rational and informed negotiation of a collective agreement. Fourth, I will address two other principles about the duty to bargain in good faith: that it continues until the parties finalize the collective agreement, and that the disclosure of information must be timely. Finally, I will explain why I have concluded that PSAC has provided an arguable case that entering into the collective agreement after learning the new information did not cure the alleged breach of the duty of unsolicited disclosure because PSAC may be able to prove that the late

disclosure deprived it of some opportunity to negotiate changes to the tentative agreement.

1. Overview of the duty of unsolicited disclosure during collective bargaining

[23] Both parties acknowledge that the duty to bargain in good faith includes an obligation that the employer disclose certain information to a bargaining agent. This includes an obligation to disclose certain information even when the bargaining agent has not asked for such disclosure. The case law refers to this as the "duty of unsolicited disclosure"; see, for example, *Canadian Federal Pilots Association v. Treasury Board (Department of Transport)*, 2014 PSLRB 64 at para. 105; and *Unifor Canada Local 594 v. Consumers' Co-operative Refineries Limited*, 2022 CanLII 95885 (SK LRB) at paras. 126 and following.

[24] The parties made submissions about the outer contours of the duty of unsolicited disclosure, such as whether the undisclosed information affects a large enough number of employees and has enough of an impact on the bargaining unit as a whole (discussed in particular in *Nanaimo Daily News (Postmedia Network Inc) v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2013 CanLII 12927 (BC LRB) at para. 22), whether the information is about a final decision or just an unfinalized plan (discussed in particular in *Consumers' Co-operative Refineries Limited*, at paras. 134 to 137), whether the information provided to the union was clear enough to meet the duty (discussed in particular in *University of Manitoba Faculty Association v. University of Manitoba*, 2018 CanLII 5426 (MB LB) at para. 132), and whether the issue should be analyzed by considering whether the failure to disclose is tantamount to a misrepresentation (discussed in *International Association of Fire Fighters, IAFF Local 4794 v. Rocky View County*, 2013 CanLII 67124 (AB LRB) at paras. 57 and 58). Those issues require an assessment of the facts of this case in a level of detail that is not appropriate at this stage, and therefore, I will not address those aspects of the duty of unsolicited disclosure any further.

[25] It is sufficient to note at this stage that both parties acknowledge the existence of a duty of unsolicited disclosure, but they dispute factually whether the CRA met that obligation. For the purposes of this decision, I have assumed that the CRA did not meet that obligation.

2. No labour board decision directly answers this issue

[26] PSAC does not dispute that it received the necessary disclosure or learned the information by other means no later than May 12, 2023. There is no dispute that by that date, the parties had already entered into a tentative agreement. There is also no dispute that PSAC did not ratify the agreement until June 16, 2023, and that the parties did not finalize and sign the collective agreement until June 27, 2023. Therefore, the issue for the Board is whether disclosure given after the parties have reached a tentative agreement, but before they have ratified and finalized that agreement, satisfies the duty of unsolicited disclosure. To put this another way, does disclosure made after the tentative agreement but exactly five weeks before ratification "cure" any defect in the disclosure?

[27] The parties were not able to provide me with any decisions from the Board or other labour boards that answer this question directly.

[28] The CRA cited two decisions in which a union filed a bad-faith bargaining complaint about the duty of unsolicited disclosure but labour boards dismissed the complaint because the union had already entered into a collective agreement. However, in each of those cases, the union discovered the information (either by employer disclosure or otherwise) late in the collective bargaining process but still before reaching a tentative agreement:

- In *Ontario Public Service Employees Union v. Art Gallery of Ontario*, 2011 CanLII 25215 (ON LRB), the union was apprised of the information on March 15, 2010, but reached a collective agreement with the assistance of a conciliation officer in mid-April 2010.
- In *Ontario Nurses' Association v. Grey Owen Sound Joint Homes for the Aged (Grey Owen Lodge)*, 1983 CanLII 809 (ON LRB), the union's negotiating committee was informed of the information no later than June 8, 1982, completed an agreement in principle on September 29, 1982, ratified that agreement on October 6, 1982, and then signed the collective agreement on November 3, 1982.

[29] Neither decision is directly on point.

[30] The CRA did cite one decision that is more similar to the facts in this case, *Campbell River (District) v. Canadian Union of Public Employees, Local 623*, 2002 CanLII 53413 (BC LRB) ("*Campbell River*"). In that case, the parties began bargaining for a renewal collective agreement in November 2000 and with the assistance of a mediator reached a tentative agreement on January 31, 2001. The union ratified the agreement

on February 12, 2001. After the agreement was ratified but before it was signed, the employer laid off 5 employees and gave notices of potential layoff to 92 more employees. The union filed a bad-faith bargaining complaint in March 2001. On May 31, 2001, the union signed the collective agreement anyway but on the express understanding that signing the agreement was without prejudice to its right to pursue the bad-faith bargaining complaint. The British Columbia Labour Relations Board (BCLRB) dismissed the complaint. While the BCLRB treated the argument as one of mootness (an issue I will return to later), it also discussed the issue that I have described when it stated the following:

> …
>
> *41 The purpose of any remedy is to put a party in the position it would have been had a breach not occurred. The Union says that it has lost the opportunity "to pressure the Employer appropriately to achieve an acceptable outcome". The Union asserts broadly that had it known of the Employer's plans, its priorities in bargaining would have been significantly different. It claims that by denying the Union the information, it removed the Union's opportunity to address the issue in negotiations.*
>
> *42 Any right that the Union may have lost is only an opportunity to bargain. A lost opportunity does not necessarily confer a right to the remedy the Union seeks. There is no absolute guarantee that the Union would have obtained a prohibition against layoffs had the possibility of elimination of jobs been disclosed, and had there been bargaining on that subject.*
>
> *43 It is true that the Union could have imposed pressure on the Employer in an attempt to achieve an acceptable accommodation. However, there is no guarantee that the pressure it would have imposed would have achieved the result it desired. Had the Union pressed its demands to prevent the Employer from acting to lay off employees, the Employer could take its own tough, but legitimate, stance in opposition. As any outcome is speculative, it is not possible to recreate what would have happened at the bargaining table had the particular breach not occurred.*
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> …
>
> *49 Discussions held after the Sections 11 and 54 complaints were filed allowed the Union **some opportunity** to speak to the Employer about alternatives to those layoffs. The Union, therefore, had some opportunity to address the issue when it reached the agreement with the Employer in April. I appreciate the Union's argument that those discussions did not amount to a complete reopening of the collective agreement. The Union says it sought to reopen the collective agreement in March, but the Employer refused. The Employer appears to deny that assertion. For the purposes of determining the mootness objection, it does not matter*

> *which claim is true. Whether the Union's claim or the Employer's denial is true, the parties subsequently negotiated an agreement to resolve some of the matters in dispute and signed the collective agreement on a without prejudice basis. In its Section 11 complaint, the Union does not ask the Board to open up the collective agreement. Nor does it ask the Board for a declaration that the collective agreement is not in existence because of any misrepresentation.*
>
> …
>
> [Emphasis added]

[31] *Campbell River* is the closest that any decision comes to the facts of this case, but even it is slightly different in that the union and employer continued to negotiate the issue after ratifying the collective agreement, and the disclosure came after ratification but before signature. Unlike in *Campbell River*, there is no indication at this stage that PSAC asked to renegotiate the collective agreement or whether the CRA was or would have been prepared to. Further, the BCLRB addressed only the second issue raised in this case (whether the complaint is moot) and did not directly address whether disclosure between a tentative agreement and the ratification of that agreement cures any breach of the duty of unsolicited disclosure before reaching a tentative agreement.

[32] In short, *Campbell River* is helpful but not determinative on this issue.

[33] PSAC cited *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102 ("*PIPSC 2009*"), in support of its case, which, like *Campbell River*, addressed whether a bad-faith bargaining complaint was moot because the parties entered into a collective agreement after the complaint was made. The Board decided to hear the case despite the collective agreement, stating that:

> …
>
> *24 Collective bargaining is a dynamic process, and settlements happen for all sorts of reasons. Generally, settlements should be encouraged because they do bring some stability to labour relations. A blanket refusal by the Board to hear disputes that arise in collective bargaining because of an intervening settlement could have the unintended consequence of a party declining to reach an agreement until the Board comes to a final determination on the dispute. That is not in the interest of good labour relations.*
>
> …

[34] As with *Campbell River*, the sentiment expressed in that paragraph of *PIPSC 2009* is helpful but not determinative on this issue.

[35] Since there are no previous decisions directly on this point, I will return to first principles to answer this question.

3. First principles: the purpose behind the duty of unsolicited disclosure is to ensure that both parties have the opportunity to engage in rational, informed negotiation

[36] The duty of unsolicited disclosure is a byproduct of the duty to bargain in good faith codified in s. 106 of the *Act*. That section requires the bargaining agent and employer to "bargain collectively in good faith" and "… make every reasonable effort to enter into a collective agreement."

[37] The principle that an employer is required to disclose information to a bargaining agent as part of its duty to bargain in good faith dates from the very beginning of the *Wagner Act* model of collective bargaining. In 1936, shortly after the passage of the *Wagner Act* in the United States, the National Labor Relations Board (NLRB) issued its decision in *Pioneer Pearl Button Co.*, 1 N.L.R.B. 837 (1936). In that case, during the one time that the employer's representative with authority to negotiate with the union actually met with the union during a strike, the representative stated simply that the employer's financial condition was poor, and therefore, there would be no revision to the wage scale he imposed before the strike. One union negotiating-committee member asked the employer to show the union its books, and the employer refused. The NLRB found that the employer did not bargain in good faith in part because it "… refused either to prove his statement [that its financial position was poor], or to permit independent verification" (at paragraph 13).

[38] That decision was the genesis of a duty to provide information that was a corollary of the duty to bargain in good faith. The United States Supreme Court confirmed such a duty in *Labor Board v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956), in which a majority of that Court agreed with the NLRB that an employer must provide information about its financial standing if during the course of bargaining it told the union that it could not meet the union's requested wage increases for financial reasons. The Court stated this at pages 152 and 153:

…

> *Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be far-fetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.…*
>
> *…*

[39] An employer's obligation to provide information to the bargaining agent was developed in Canada in a series of decisions in the 1970s and early 1980s. In *Noranda Metal Industries Ltd. v. CAIMAW* (1974), [1975] 1 Can. L.R.B.R. 145, the BCLRB (in a panel chaired by Paul Weiler) decided that a duty to provide information was a part of the duty to bargain in good faith, stating:

> *…*
>
> *56 … It is a long-established principle of American labour law that a party commits an unfair labour practice if it withholds information relevant to collective bargaining without reasonable grounds … That principle does fit comfortably within the language of Section 6* [s. 106 of the *Act*]. *One would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making "every reasonable effort to conclude a collective agreement". The policy behind the American rule has been summed up in this comment: "Negotiation nourished by full and informal discussion stands a better chance of bringing forth the fruit of collective bargaining agreement than negotiation based on ignorance and deception".…*

[40] The Ontario Labour Relations Board (OLRB) came to the same conclusion in a series of decisions in the 1970s and early 1980s. The first of those decisions (*United Electrical, Radio and Machine Workers of America v. DeVilbiss (Canada) Ltd.*, [1976] OLRB Rep. March 49) described the duty to bargain in good faith as designed to "… foster rational, informed discussion thereby minimizing the potential for 'unnecessary' industrial conflict." The OLRB concluded that this in turn requires a party to supply the other side with information necessary to its decision-making capability, and the failure to provide this information violates the duty to bargain in good faith. The OLRB expanded upon its reasoning in *United Electrical, Radio & Machine Workers of America v. Westinghouse Canada Limited*, 1980 CanLII 893 (ON LRB), stating as follows:

…

> *38. The union charges that the company's failure to advise it during the course of bargaining of its plan to decentralize its Switchgear and Control operation is a breach of the duty to bargain in good faith as imposed upon it under section 14 of the Act. Given the intention to conclude a collective agreement the Board has defined the duty imposed under section 14 as one which protects the integrity of the decision-making process which is intrinsic to collective bargaining.…*
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> …
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> *39. … Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.*
>
> …

[41] These decisions are rooted in the principle that bargaining in good faith requires rational and informed discussion, which in turn requires that the parties provide information to each other necessary to engage in that informed discussion. Labour boards continue to apply that logic today. The OLRB has explained this recently in *Elementary Teachers' Federation of Ontario v. The Crown in Right of Ontario as represented by the Ministry of Education*, 2022 CanLII 35068 (ON LRB):

…

> *85. The Board has held that the duty to bargain in good faith requires employers to (a) respond honestly when asked in bargaining if they are contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit; and (b) reveal to the union on the employer's own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is*

> *effectively put in the dark and cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents ….*
>
> *…*

[42] In conclusion, the purpose behind the duty of unsolicited disclosure is to ensure that both parties have an opportunity to engage in rational, informed negotiation.

4. Two other relevant considerations of the duty to bargain in good faith

[43] There are two other aspects of the duty to bargain in good faith that I have considered in making my decision: (1) the duty to bargain continues to the point that the parties finalize the collective agreement, and (2) the disclosure of information must be timely.

[44] First, the duty to bargain in good faith continues after the parties have reached an agreement in principle through to the point that they sign and enter into a collective agreement. As the Canada Industrial Relations Board (CIRB) put it in *N.A.B.E.T. v. CKLW Radio Broadcasting Ltd.* (1977), 23 di 51 at para. 82:

> *82 … The duty to bargain in good faith and make every reasonable effort is a continuous duty from when notice to bargain is given until a final resolution of an agreement. It survives the intervention of a work stoppage, although the character of the duty may change. It also survives a complaint of failure to bargain in good faith. Of course, the existence of the complaint may make it very difficult for the parties to meet face to face on their own.*

[45] The parties have cited a number of decisions (specifically, *Treasury Board v. Public Service Alliance of Canada*, [1988] C.P.S.S.R.B. No. 141 (QL); *Canada (Treasury Board) v. Professional Association of Foreign Service Officers*, 2000 CanLII 21077 (PSSRB); and *Swissport Canada Inc. v. International Association of Machinists and Aerospace Workers*, 2019 CIRB 918) in which the Board and other labour boards have considered whether a refusal to recommend that a union's members vote to ratify a collective agreement constitutes bad-faith bargaining. This means that the duty to bargain in good faith subsists beyond reaching the tentative agreement and instead extends to the point that the collective agreement has been entered into.

[46] I have also paid particular attention to *Rocky View County*, which the CRA cited for a different purpose. In that case, the Alberta Labour Relations Board (ALRB) found

a breach of the duty of unsolicited disclosure because the employer did not disclose a *de facto* decision about pending layoffs after the parties had already presented their case at interest arbitration and the arbitration board was holding the case under reserve. The decision in that case was made after the parties had presented their case at arbitration and was not properly disclosed until the day after the arbitration board released its decision. The ALRB still expected the parties to comply with the duty to bargain in good faith (which would require them to meet and bargain in good faith in light of the *de facto* decision), despite the fact that the dispute was under reserve by the arbitration panel.

[47] The implication is that it is never too late to negotiate in good faith.

[48] Second, disclosure must take place in a timely way; see *Economic Development Edmonton v. UFCW, Local 401* (2002), 88 C.L.R.B.R. (2d) 210 (ALRB); and *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78 at paras. 65 and 68.

5. Application of the principles behind the duty to bargain in good faith

[49] When I discussed *Campbell River* earlier in this decision, I emphasized the following passage at paragraph 49 of that decision: “Discussions held after the Sections 11 and 54 complaints were filed allowed the Union **some opportunity** to speak to the Employer about alternatives to those layoffs” [emphasis added]. I am returning to that concept now.

[50] In light of the absence of any determinative line of case law from this or other labour boards, I have concluded that there is no fixed rule that providing the required information before the parties entered into a collective agreement cures the untimely disclosure of that information in the first place. The key point is whether there has been some opportunity for the parties to engage in a rational, informed discussion in light of the information disclosed.

[51] I have drawn this conclusion not only from *Campbell River* but also from the principles I have outlined earlier in this decision. There must be **some opportunity** for the parties to negotiate in light of the disclosed information because the purpose behind such disclosure is to have a rational, informed discussion about the information disclosed. There must be **some opportunity** to negotiate in light of the

disclosed information, no matter when the information is disclosed, because the duty to bargain continues up to the point that the collective agreement is formally entered into. There must be **some opportunity** to negotiate in light of the disclosed information because the information must be disclosed in a timely fashion to permit such negotiation. The opportunity to negotiate does not have to be perfect, but it has to be real.

[52] In this case, the timeline (according to PSAC, which is the timeline I adopt only for the purposes of this decision, following the arguable-case approach) was as follows:

- April 19: Strike begins.
- May 3: PSAC and the CRA reach the tentative agreement.
- May 5: PSAC sends ratification package to its members, which includes a statement that its bargaining team recommends accepting the tentative agreement.
- May 12: PSAC learns the information. (I note that PSAC alleges that it still does not have "full production" about exactly how many employees did not receive the $2500 lump-sum payment, but it does not dispute that knew by this date about the reduction of term employees by the end of June 2023.)
- June 16: PSAC members vote to ratify the collective agreement.
- June 27: The parties sign the collective agreement.

[53] In light of the principles I have set out above, the question is this: is there an arguable case that the period between May 12 and June 27, 2023, did not provide PSAC with "some opportunity" to collectively bargain, in light of the new information?

[54] PSAC says that it did not.

[55] PSAC refers to this as a "brief window" to negotiate (at paragraph 2 of its submissions). I reject that characterization entirely. PSAC and the CRA moved from an impasse to a collective agreement resolving (according to PSAC's ratification kit, which it provided to me in its submissions) 22 major issues and 8 "minor amendments" within a 2-week strike. Even if I exclude the period after PSAC's members ratified the collective agreement, PSAC and the CRA still had 5 weeks (from May 12 to June 16) to address this one issue.

[56] PSAC also argues that it could not have negotiated further because its bargaining team had already recommended that its members accept the tentative

agreement and that it had ended the strike. PSAC states that it would have had to bring the ratification process "to a grinding halt" and "potentially resume the strike", which would have placed "the entire agreement into jeopardy." PSAC argues that doing so would substantially undermine its role as bargaining agent. The CRA disagrees, submitting that "[a]ssuming it is true that PSAC first became aware of plans to downsize staffing capacity on May 12, 2023, PSAC was still not deprived of any opportunity to respond to the true state of affairs … before it signed the collective agreement."

[57] PSAC also argues that its claims that it could not have taken action before signing the collective agreement are factual claims that I must assume to be true at this stage, in light of the threshold at this "arguable case" stage of this case.

[58] Applying the arguable-case framework, I am willing to assume that returning to the bargaining table would have halted the ratification process. I am also willing to assume that PSAC might have resumed its strike as a result.

[59] In terms of placing the entire agreement into jeopardy, I have my doubts. When a tentative agreement is ultimately not ratified by the membership, neither party is permitted to start "bargaining afresh"; instead, "… bargaining that follows a rejection of a memorandum of settlement is in the nature of a problem-solving exercise designed to 'tweak' the terms of settlement in a manner that preserves the essential bargain while at the same time facilitating a reconsideration by the principals" (see *Thames Emergency Medical Services Inc. v. O.P.S.E.U.*, 2004 CanLII 94732 (ON LA)). However, I am prepared to assume at this early stage that PSAC is right that returning to the bargaining table risked the viability of the entire agreement.

[60] In other words, I am prepared to assume at this stage that all PSAC's claims are true — ratification would have ground to a halt, it might have had to go back on strike, and the entire agreement with the CRA was at risk.

[61] Do those claims mean that PSAC was deprived of "some opportunity" to negotiate in light of the new information that it says it learned on May 12, 2023?

[62] At the risk of repeating a phrase I used earlier, I have my doubts. However, there may be some factual nuance that could meet PSAC's burden to prove that it did not have an opportunity to negotiate after receiving the new information available to it.

PSAC says that it could not have paused its ratification vote on May 12, 2023, and returned to the negotiating table. PSAC has not explained why yet, but at this "arguable case" stage, it has done enough by making that assertion, which is at least conceivable or capable of being proven.

[63] Finally, PSAC argues that taking action after learning the new information would have risked the CRA making a bad-faith bargaining complaint against it because it would have had to break its agreement to recommend that PSAC members ratify the tentative agreement. The CRA responds by pointing out that there are cases in which breaking an agreement to recommend ratification was not bad-faith bargaining. However, PSAC notes that the CRA does not unequivocally state that it would not have made such a complaint. Both parties acknowledge that these cases are generally fact-dependent.

[64] Despite the parties' submissions, the dilemma faced by PSAC was not only whether its bargaining team should change its recommendation that its members vote to ratify the agreement. The dilemma faced by PSAC was also whether it should barrel ahead with ratification or pause ratification and return to the negotiating table. Only after returning to the negotiating table would PSAC have been faced with the dilemma about whether to recommend that its members ratify the agreement if it was unable to negotiate any changes flowing from the information it learned after it reached a tentative agreement. As I stated earlier, it is conceivable that PSAC could not have returned to the negotiating table for some reason.

[65] For these reasons, I have concluded that there is an arguable case that entering into the collective agreement after learning the new information did not automatically "cure" the alleged breach of the duty of unsolicited disclosure. PSAC has stated that it could not have negotiated further after sending a ratification package to its members. To rephrase that submission using the term in *Campbell River*, PSAC has pled an arguable case that it was deprived of some opportunity to negotiate after receiving certain information because it had already recommended ratification to its members.

B. Issue #2: whether entering into the collective agreement renders the bad-faith bargaining complaint moot

[66] The CRA argues that since the parties have entered into a collective agreement, the complaint is moot. The CRA cited 17 cases in which the Board and other labour

boards have dismissed bad-faith bargaining complaints as being moot after the parties entered into a collective agreement. The CRA also argues that there is no practical remedy available, as at best PSAC is entitled to a declaration, which would serve no practical purpose. PSAC denies that the complaint is moot, arguing that refusing to hear the complaint would be unfair because it is the employer that breached its duties, the complaint under s. 186 of the *Act* will have to be heard anyway, the CRA's breach has a continuing effect, and there is a practical remedy available.

[67] I will address this issue in three parts: (1) the test for mootness in this context, (2) what remedies are available in this complaint, and (3) whether the complaint can serve a labour relations purpose, in light of the available remedies.

1. The test for mootness in this context

[68] The case law from labour boards across Canada discloses two ways to articulate the CRA's argument in this case.

[69] The first way is to consider whether the complaint has become moot as a result of the parties having entered into a collective agreement. This approach follows the approach to mootness by courts as laid out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353. First, courts determine whether there is a "live controversy" between the parties, in the sense of there being a tangible and concrete dispute. Second, if there is no longer a live controversy, the court may exercise its discretion to hear the case anyway depending on whether there is an adversarial context, whether there is a practical utility to hearing the case, and whether the court would be exceeding its proper role by making law in the abstract. This was the approach followed in *Campbell River* and most of the other cases cited by the CRA.

[70] The second way is to consider whether there is a labour relations purpose behind hearing the complaint after a collective agreement has been entered into. As the Board put it in *PIPSC 2009*, at para. 18: "… a more nuanced approach to the doctrine of mootness is required when dealing with labour relations matters, where there is usually an ongoing relationship." The CIRB tends to apply this second approach, stating as follows in *Teamsters Local Union No. 419 v. Swissport Canada Handling Inc.*, 2017 CIRB 863 at para. 47:

> *[47] … the conclusion of a collective agreement does not automatically render a bad faith bargaining complaint moot. The*

> *Board also focused on the relation between the remedy being sought and its importance to the bargaining relationship as a whole, including the administration of the collective agreement.…*

[71] I note as well that the two approaches typically converge in the final result and are similar to one another. To the extent that they diverge, however, I prefer the second approach, for two reasons.

[72] First, the *Borowski* test for mootness was developed for civil courts. It must be "… applied with care in the context of proceedings before administrative tribunals"; see *Teamsters Canada Rail Conference v. Canadian National Railway Company*, 2011 CIRB 572 at para. 15. The concern of courts about moot cases is a threefold balance between a court's inherent competence to resolve legal disputes, judicial economy, and the judiciary's role in law-making functions. By contrast, an administrative tribunal's competency to resolve a dispute derives explicitly from statute; it must be concerned with administrative economy instead of judicial economy (which, admittedly, are very similar things); and an administrative tribunal's law-making role is different from the role of the judiciary. On that last point, administrative tribunals are not solely adjudicative bodies; they are also regulatory bodies. The Board's role is not solely to adjudicate disputes between two parties; it is also, according to the preamble to the *Act*, to promote "effective labour-management relations".

[73] Second, the test for mootness applied by a court often becomes subsumed in the related question of whether the court should hear a case when the relief sought is a declaration. The "live controversy" test for mootness considers whether the relief sought will have any future effect on the parties (see *Professional Institute of the Public Service of Canada v. Canada (Canadian Food Inspection Agency)*, 2012 FCA 19 at para. 16). The test for whether to grant a declaration is whether a court "… has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought …" (from *Ewert v. Canada*, 2018 SCC 30 at para. 81). In light of the overlap between the two tests, it is not surprising that "… a request for declaratory relief cannot by itself avoid mootness" (from *Peckford v. Canada (Attorney General)*, 2023 FCA 219 at para. 22) — in other words, the fact that a court could issue a declaration is not enough by itself to generate a live controversy.

[74] The problem is that there are many types of cases heard by the Board in which declaratory relief is the most common form of relief granted. This includes policy grievances (see ss. 232(a) and (b) of the *Act*), staffing complaints (see the discussion in *Doucette v. Attorney General of Canada*, 2023 PESC 51 at paras. 49 to 67), unlawful strike cases (see ss. 198(1) and (2) of the *Act*), and bad-faith bargaining complaints. While the Board can grant remedies other than a declaration in those cases, a significant body of the Board's caseload involves granting or denying applications for a declaration. Too close attention to whether the Board should hear cases in which the only relief sought is a declaration would deprive the Board of much of its work, contrary to the *Act*, which specifies in a number of places that the Board may grant declarations.

[75] Therefore, I have decided to follow the second line of authorities and characterize the issue as whether hearing the complaint would serve a labour relations purpose.

[76] I appreciate that there is very little practical difference between the two approaches and that in most cases the result of the case would be the same after applying either approach. The conceptual difference is as follows. While the *Borowski* approach divides its approach into two stages (whether there is a live controversy, and then whether there is a practical reason to hear a case without a live controversy), the second approach telescopes those two stages into a single inquiry: whether deciding the case serves a practical labour relations purpose. A labour relations purpose is almost always served when there is a concrete dispute and remedy available (i.e., there is a live controversy in the *Borowski* test). A labour relations purpose may also be served when the only relief is a declaration, depending on whether the declaration itself will serve some labour relations purpose. These labour relations purposes have included the ongoing administration of a collective agreement (as in *Swissport Canada Handling Inc.*, and *Society of Professional Engineers and Associates v. Atomic Energy of Canada Limited*, 2001 CIRB 110) and resolving similar complaints involving the same or related parties (as in *PIPSC 2009*). These are not the only labour relations purposes that can be served, and the Board will have to address the existence of a labour relations purpose on a case-by-case basis.

C. The remedies available in this complaint

[77] The CRA has cited 17 decisions of the Board and other labour boards that dismissed a bad faith bargaining complaint because it was moot (or served no labour relations purpose). Those cases concluded that there was either no live controversy between the parties or no practical remedy (other than a declaration) available to the complaining bargaining agent because the parties had entered into a collective agreement. I have already cited and discussed several of the most important of those decisions, including *Campbell River*, *Rocky View County*, and *Swissport Canada Handling Inc.*

[78] In response, PSAC has cited *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 SCR 369, about the broad powers of a labour board to remedy bad-faith bargaining, and *Consumers' Co-operative Refineries Limited* for an example of a labour board granting concrete remedies (in that case, ordering the cessation of layoffs of a certain job classification) as a result of a failure of the employer to meet its duty of unsolicited disclosure.

[79] However, both parties agree that the Board has the power to remedy a breach of the duty to bargain in good faith by granting a remedy that puts the parties back in the position they would have been in but for the breach. PSAC cites *Rocky View County*, in which the ALRB stated at paragraph 59 that the task of a labour board is to "undo, to the extent possible, the damages caused by the breach"; the CRA also submits that "[a]ny remedy for a breach of section 106 must be directed at the lost opportunity to bargain."

[80] In addition to a declaration, PSAC seeks an order that the CRA pay general damages in the amount of $2500 to all employees whose contracts were terminated between May 3, 2023, and the signing of the collective agreement. It is at least arguable that the lost opportunity to bargain could be remedied in that way. PSAC may arguably be able to prove that but for the CRA's failure to disclose the pending terminations of employment in its call centres, it would have negotiated (and the CRA would have agreed to negotiate) a collective agreement that paid a $2500 lump-sum payment to everyone employed as of some date other than the signing of the collective agreement. PSAC would have to lead evidence to substantiate such a claim, and the CRA may have evidence to rebut it. If that is PSAC's theory of this case, it may also have to explain whether any employees hired between May 3, 2023, and June 27, 2023, would have to

pay back their $2500 lump-sum payment. The Board may also have to decide whether the CRA would have extracted any concessions from PSAC in exchange for that change, whether those concessions would have impacted any payments already made by the CRA, and, if so, who must repay those payments to the CRA (whether PSAC or the employees it represents). I can only speculate about the answer to these and other factual issues at this time, so I cannot address them further.

[81] My point is that it appears as if PSAC is asking the Board to construct a different collective bargaining result based on the assumption the information was provided to PSAC earlier. As I explained earlier, PSAC states that taking action after learning the information would have placed the entire agreement in jeopardy; if it is right, this means the Board has to consider whether changing the rules for the $2500 payment would have changed the entire agreement. Even if the Board can or should do that (which is by no means guaranteed, but only arguable at this stage), the construction may have more consequences than simply paying $2500 to affected former employees. Those consequences will depend on the evidence presented at a hearing. However, at this early stage, I cannot say that the only remedy available to PSAC is a declaration. It is arguable that the Board may award a concrete remedy from this complaint.

[82] Finally, PSAC also seeks a remedy reinstating the employees whose contracts were terminated. It is not clear to me whether PSAC seeks that remedy for the alleged breach of ss. 106 or 186(2) of the *Act*. In light of my conclusion about the $2500 in damages, I do not need to address that remedy at this stage, and I will say no more about it.

D. Conclusion on whether to dismiss the complaint for lack of labour relations purpose

[83] I have concluded that there is a labour relations purpose to this complaint because the Board could order a concrete remedy flowing from the alleged breach of the duty of unsolicited disclosure. Such a remedy is not so remote a possibility that there is no labour relations purpose behind this complaint.

[84] I want to thank both parties for their detailed submissions about these two preliminary issues. While my decision does not resolve the complaint, I hope that it will nevertheless clarify the issues in dispute between the parties and provide some focus during the hearing of this matter.

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

(The Order appears on the next page)

VI. Order

[86] The CRA's preliminary objections to the complaint based on s. 106 of the *Act* are dismissed.

[87] This complaint will be scheduled for a hearing in the normal course.

April 23, 2024.

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