**Date:** 20240717

**File:** 572-02-39254

**Citation: 2024 FPSLREB 94**

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

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

BETWEEN

**TREASURY BOARD OF CANADA**

Applicant

and

**PUBLIC SERVICE ALLIANCE OF CANADA**

Respondent

Indexed as
*Treasury Board of Canada v. Public Service Alliance of Canada*

In the matter of an application, under section 71(1) of the *Federal Public Sector Labour Relations Act*, for a declaration that a position is a managerial or confidential position

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

**For the Applicant:** Larissa Volinets Schieven, counsel

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

Decided on the basis of written submissions, filed March 22 and April 12 and 18, 2024.

**REASONS FOR DECISION**

## I. Overview

[1] The Treasury Board of Canada ("the employer") has applied to exclude the position of Principal Analyst, Management Services, at the Department of Justice, position number 23098, from the Program and Administrative Services bargaining unit represented by the Public Service Alliance of Canada (PSAC). The employer applied to exclude the position because it is confidential to a position classified in the Law Management (LC) occupational group ("the LC position").

[2] I have denied the application because a position classified in the LC occupational group is not classified as being in the executive group. To exclude this position, the position to which it is confidential must be in the executive group. Since the LC position is not in that group, I must deny the application.

## II. Procedural background

[3] This decision is being released alongside five other decisions involving applications by an employer to exclude a position or group of positions identified in s. 59(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The six decisions bear the citations 2024 FPSLREB 90 through 95.

[4] For context, the Federal Public Sector Labour Relations and Employment Board ("the Board") is authorized to decide any matter without an oral hearing; see the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), at s. 22, and *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68. When the Board schedules an oral hearing for an exclusion case, it typically lasts one or two days at most. However, a large number of exclusion applications were filed before 2023. Therefore, the Board identified 53 older files that may be suitable to be determined in writing.

[5] Both employers and bargaining agents have a shared interest in expeditious decisions in exclusion cases. Scheduling 53 days of hearing would delay the dispositions of many of these exclusion cases, as well as the hearings of other cases that the Board has not yet scheduled. Exclusion cases are also well-suited for hearing in writing because, most of the time, the evidence about the duties performed by the

position at issue is not in dispute and can be provided by the employer through a combination of documents (including a job description) and will-say evidence.

[6] Therefore, the Board wrote to 3 employers and 2 bargaining agents involved in these 53 files. One pair of employer and bargaining agent identified a 2023 application that was similar to other existing applications, so the Board issued directions about 54 files, some of which involved multiple employees. The directions provided the employer and bargaining agent in each case with a timetable to file written submissions. The parties in each case were also given the opportunity to request an oral hearing; none did so. In many cases, the Board extended the period for the employer's initial submissions to permit the parties an opportunity to discuss these exclusion applications. After those discussions, the Board had to decide only 21 files involving 2 employers and 2 bargaining agents. Two groups made out of these 21 files were consolidated because they all raised the same issue: a group of 14 (in 2024 FPSLREB 91) and a group of 3 (in 2024 FPSLREB 90).

[7] I was assigned to decide each of these files. After reviewing them, I concluded that they were capable of being decided in writing. In one case (2024 FPSLREB 95) I had a follow-up question about the effective dates of certain documents, but otherwise, I was able to decide the case on the basis of the documents filed, the employer's will-says, and the written submissions of both parties.

[8] Finally, I want to thank all the parties (the two employers and two bargaining agents) for the quality of their submissions. It was clear that the employers and bargaining agents worked hard to resolve the majority of these cases on their own and that the cases remaining either raised important points of principle (like this one) or were borderline cases based on their facts. These were not easy cases; the parties' submissions made them easier. I thank them for it.

## III. Meaning of "executive group" in s. 59(1)(h) of the *Act*

[9] The employer applies to exclude this position under s. 59(1)(h) of the *Act*. That paragraph requires the occupant of the position being excluded to be confidential to the occupant of another position described in ss. 59(1)(b), (c), (d), or (f). The employer says that this position is confidential to a LC position and that a LC position is included in s. 59(1)(b). Paragraphs 59(1)(b) and (h) of the *Act* read as follows:

| | |
|---|---|
| ***59 (1)*** *After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that* | ***59 (1)*** *Après notification d'une demande d'accréditation faite en conformité avec la présente partie ou la section 1 de la partie 2.1, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :* |
| … | […] |
| ***(b)*** *the position is classified by the employer as being in the executive group, by whatever name called;* | ***b)*** *poste classé par l'employeur dans le groupe de la direction, quelle qu'en soit la dénomination;* |
| … | […] |
| ***(h)*** *the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).* | ***h)*** *poste de confiance occupé, en matière de relations de travail, auprès des titulaires des postes visés aux alinéas b), c), d) et f).* |

[10] The employer states that a position in the LC occupational group is "… in the executive group, by whatever name called …". The employer states that the phrase "by whatever name called" in s. 59(1)(b) of the *Act* means that the position at issue must be in a group composed of executives, defined broadly. The employer relies on the Treasury Board's *Policy on the Management of Executives* to support its position. PSAC states that the phrase "by whatever name called" modifies the term "the position" so that the position need not have the job title of executive, but it still must be in the executive occupational group.

[11] I do not agree with either party. I have concluded that the phrase "by whatever name called" modifies the phrase "executive group", meaning that the employer may decide to rename the current executive occupational group without taking that group outside the scope of s. 59(1)(b) of the *Act*. However, the phrase does not mean that other occupational groups or subgroups with duties that are primarily managerial fall within its scope.

[12] The issue is one of statutory construction, which concerns the trinity of the text, context, and purpose of legislation (see *Bernard v. Canada (Professional Institute of the Public Service)*, 2019 FCA 236 at para. 7). I will turn to those three elements in turn.

**A. Text**

[13] The text of s. 59(1)(b) precludes the interpretation submitted by PSAC. PSAC is correct insofar as the phrase "by whatever name called" shows that the subsection is dealing with nomenclature; see *Canada v. Corsano (C.A.)*, 1999 CanLII 9297 (FCA) at paras. 48 and 49. However, as a matter of grammatical construction, the phrase modifies the phrase "executive group" and not the word "position".

[14] This is the meaning of the same phrase adopted by the Federal Court of Appeal in *Corsano*. In that case, the Court of Appeal had to interpret s. 2(1)(f) of the *Companies Act* (R.S.N.S. 1989, c. 81), which defined the term "director" as follows: "'director' **includes** any person **occupying the position of director by whatever name called**" [emphasis in the original]. The phrase "by whatever name called" modified the term "position of director", so that a person with the title of governor or manager would still be a director under that *Act*. However, the phrase "by whatever name called" did not modify the phrase "any person". The legislature did not concern itself with whether the director was named Frank or Francine, but it wanted to ensure that the rules about directors applied no matter what title the corporation used for its directors. The Court of Appeal went on to conclude that the definition did not include *de facto* directors who did not meet the technical qualifications to be a director under that *Act*, which is similar to the result I reach in this decision.

[15] As in *Corsano*, in this case, the phrase "by whatever name called" modifies "the executive group" and not "the position". Parliament did not concern itself with the name of the position but instead with the name of the occupational group. This is evident as a matter of grammatical construction and is consistent with the statutory context discussed later in this decision.

[16] The text of the *Act* also does not support the employer's position. Paragraph 59(1)(b) refers to **the** executive group, not **an** executive group. The text contemplates only a single executive group, and not the many executive groups that the employer argues exist.

[17] I acknowledge that s. 33(2) of the *Interpretation Act* (R.S.C., 1985, c. I-21) states that words in the singular include the plural. However, that interpretative rule is not absolute and "… should only be resorted to where it is necessary to give effect to the apparent legislative intent of the Act being considered" (see *Gunn v. Canada (Commissioner of Corrections)*, [1981] 2 FC 99 at 111, citing *R. v. Noble*, [1978] 1 SCR 632 at 639; see also, more recently, *Canada (Privacy Commissioner) v. Facebook, Inc.*, 2023 FC 533 at paras. 55 and 56). The context behind s. 59(1)(b) shows that it is intended only to refer to a single executive group, and therefore, I will not resort to s. 33(2) of the *Interpretation Act*.

**B. Context**

[18] In this case, the legislative context is the most important means by which to interpret s. 59(1)(b) of the *Act*.

**1. Legislative evolution**

[19] First, s. 59(1)(b) should be read in light of its legislative evolution, which is an important part of its context and an important aid to its interpretation; see *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 43.

[20] When Parliament first enacted the *Public Service Staff Relations Act* (S.C. 1966-67, c. 72; *PSSRA*), the *PSSRA* excluded persons and not positions. It excluded from its ambit persons employed in a managerial or confidential capacity, which it went on to define in a way structurally similar to the current s. 59(1) of the *Act* in that it listed categories of managerial or confidential employees. However, those categories were worded differently than they are today.

[21] The equivalent to s. 59(1)(b) of the *Act* was subparagraph (u)(iii) of the definition of "person employed in a managerial or confidential capacity" in the *PSSRA*. That provision addressed executives by excluding a person "… who has executive duties and responsibilities in relation to the development and administration of government programs …". In other words, the original version of the *PSSRA* used a functional approach to excluding executive positions.

[22] Before 1992, the Board's predecessor developed a rich body of jurisprudence on the meaning of "executive duties" and "development and administration", so that

persons fell within that provision only when their duties were of a senior level and had a significant degree of decision-making authority over the development and administration of policies and programs that involved the use of financial, material, or personnel resources; see *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, PSSRB File No. 172-02-262 (19780720) at para. 23, *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, PSSRB File No. 174-02-304 (19800128), and *Professional Institute of the Public Service of Canada v. Canada (Treasury Board) (Commerce Group - Scientific and Professional Category)*, [1980] C.P.S.S.R.B. No. 3 (QL) at paras. 28 to 31. The former Board's decisions all used the functional approach required by the *PSSRA* to decide who was, or was not, an executive.

[23] In 1992, Parliament enacted the *Public Service Reform Act* (S.C. 1992, c. 54), which amended the exclusion regime in the *PSSRA* so that positions became excluded, instead of persons. That statute also amended the definition of "managerial and confidential position" to replace the old wording about executives with wording identical to the current s. 59(1)(b) of the *Act*. The phrase "… executive duties and responsibilities in relation to the development and administration of government programs …" was replaced by "being in the executive group". When the current *Act* came into force in 2005, Parliament amended other parts of s. 59(1) — but not s. 59(1)(b).

[24] This legislative evolution refutes the employer's submission about the meaning of s. 59(1)(b) of the *Act*, which is that it should be interpreted functionally, so that any occupational group that performs executive functions is captured within its meaning. However, that is precisely what Parliament changed in 1992: it changed what is now s. 59(1)(b) from a functional approach to a category-based approach.

**2. The architecture and use of occupational groups**

[25] Second, s. 59(1)(b) must be read in light of the broader context of the classification architecture in the core public administration.

[26] When collective bargaining was first introduced, bargaining units were determined solely on the basis of occupational groups. The *PSSRA* originally created 5 occupational categories and then required the Public Service Commission to specify and define the occupational groups within each occupational category by March 28,

1967 — i.e., in time for employee organizations to start applying to be certified as bargaining agents for bargaining units of each occupational group (see *PSSRA*, at s. 26). The Public Service Commission created 72 occupational groups, which meant the certification of up to 72 bargaining units (although some occupational groups never unionized).

[27] The existence of a large number of bargaining units contributed to difficulties in collective bargaining. Therefore, in the *Public Service Reform Act*, Parliament required the Treasury Board to specify new occupational groups within six years of certain provisions coming into force (see *Public Service Reform Act*, at s. 101) and then publish the new groups in the *Canada Gazette*. That statute also gave the Treasury Board the power to amend the definition of an occupational group and post the new definition in the *Canada Gazette* (see s. 102). The purpose behind that provision was to reduce the number of occupational groups, which would in turn reduce the number of bargaining units, thus making collective bargaining more efficient.

[28] The Treasury Board redefined two occupational groups in 1999 that are relevant to this decision: the Executive Group (EX) and the Law Group (LA). Both groups existed before 1999. In 2014, it amended the Law Group definition by splitting it into two occupational groups: Law Management (LC) and Law Practitioner (LP). The LC group is "… primarily involved in the application of a comprehensive knowledge of the law and its practice in the management of legal functions …", while the LP group is primarily involved in "the performance of legal functions."

[29] I do not propose to delve into the minutiae of the definitions of occupational groups and the differences between the EX and LC groups. My point is that there are minutiae to delve into. Each occupational group is a hermetically sealed compartment. A position may not exist in two occupational groups at the same time. A position may contain duties that fall within more than one occupational group (see *Federal Government Dockyard Trades and Labour Council (East) v. Treasury Board (Department of National Defence)*, 2014 PSLRB 51 at para. 66), but it is still classified within a single occupational group.

[30] Parliament knew this when it enacted what is now s. 59(1)(b). The importance and nature of occupational groups was front of mind for Parliament in the *Public Service Reform Act*. Parliament specifically had in mind that there was an occupational

group called the Executive Group and that it would be redefined within six years. Had Parliament intended s. 59(1)(b) to refer to other occupational groups that the Treasury Board could create (either as part of the 1999 exercise or later), it would have said so explicitly.

### 3. Express language in another statute

[31] A third point is related to the second point: Parliament has permitted more than one executive occupational group in another statute but expressly confined that definition to that statute.

[32] The *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) permits the Public Service Commission to make regulations about the appointments of persons to and within the "executive group" (see s. 22(2)). Subsection 2(3) also states, "A reference **in this Act** to … the executive group shall be construed as a reference to an occupational group or subgroup designated by the employer and consisting of management personnel" [emphasis added]. Parliament defined the term "executive group" in a functional way in the *PSEA*. It is noteworthy that the current *PSEA* was amended at the same time as the *Act* and that Parliament chose to define the term "executive group" functionally in the *PSEA* but that it did not do so in the *Act*. Additionally, Parliament was careful to adopt a functional interpretation of "executive group" only "**in this Act**" [emphasis added] (being the *PSEA*); this language refutes the presumption of consistent expression between the *Act* and the *PSEA* and clarifies that the definition of "executive group" in the *PSEA* applies only to the *PSEA*, not the *Act*.

### 4. The use of the *Policy on the Management of Executives*

[33] Finally, the employer relies on the *Policy on the Management of Executives*. I do not endorse relying on a policy drafted by the employer to as a tool to interpret a statute regulating the employer because this could easily lead to abuse if the employer drafted self-serving policies as interpretative aids to legislation.

[34] However, even if I were to rely on the *Policy on the Management of Executives*, it does not assist the employer.

[35] The *Policy on the Management of Executives* defines three separate terms: "executive", "Executive Group" and "executive position". Those definitions are as follows:

…

***Executive (cadre supérieur)***

*An employee appointed or deployed to an excluded and unrepresented position in one of the following groups and levels:*

*i. Executive (EX) Group, levels 01 to 05;*

*ii. Defence Scientific Service (DS) Group, levels 7A, 7B, and 8;*

*iii. Medical Officer (MD-MOF) Group, levels 04 and 05;*

*iv. Medical Specialist (MD-MSP) Group, level 3; or*

*v. Law Management (LC) Group, levels 01 to 04.*

***Executive Group, EX group (groupe de la direction, groupe EX)***

*The occupational group as defined in the Canada Gazette, Part 1, March 27, 1999.*

***Executive position (poste du cadre supérieur)***

*An excluded and unrepresented position in one of the following groups and levels:*

*i. Executive (EX) Group, levels 01 to 05;*

*ii. Defence Scientific Service (DS) Group, levels 7A, 7B, and 8;*

*iii. Medical Officer (MD-MOF) Group, levels 04 and 05;*

*iv. Medical Specialist (MD-MSP) Group, level 3; or*

*v. Law Management (LC) Group, levels 01 to 04.*

…

[36] According to the *Policy on the Management of Executives*, an employee in the LC group is an "executive" and a position in the LC group is an "executive position" — but an LC position is not in the "Executive Group". The *Act* uses the term "executive group", not "executive position". Therefore, the employer's proposed interpretation of the *Act* is inconsistent with the very policy it relies on as an interpretative aid because the policy states that LCs are not in the Executive Group.

[37] For these four reasons, a contextual reading of s. 59(1)(b) of the *Act* shows that it is intended to include only the executive group, not similar groups composed of other managers.

**C. Purpose**

[38] Finally, I considered the purpose of s. 59(1)(b) and the *Act* more generally and did not find that purposive review helpful. There is, on the one hand, the long-standing recognition of the importance of collective bargaining rights and that "… they are not

to be lightly cast aside"; see *Treasury Board v. Public Service Alliance of Canada*, 2024 FPSLREB 10 at para. 84. A narrow reading of s. 59(1)(b) would be consistent with the purpose of the *Act* to further free collective bargaining. On the other hand, the purpose of managerial exclusions is not to interfere with the associational rights of employees but to promote freedom of association by preventing "… employee-employer role conflicts, conflicts of interest and even the domination of unions by the employer …"; see *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para. 169 (by the minority, but the majority expressed a similar view at paragraph 51).

[39] Since the legislative context in this case is so strong, I do not need to reconcile those two competing purposes or resort to a purposive interpretation of s. 59(1)(b). It is sufficient to note that my interpretation of s. 59(1)(b) is not inconsistent with these purposes; it is obviously consistent with the purpose of furthering the greatest possible access to collective bargaining, and it is not inconsistent with the purpose of preventing conflicts of interest because there are other paragraphs within s. 59(1) that an employer could rely upon to address that purpose.

[40] I had some concern over the implications of my decision on the employer's ability to assign executive responsibilities to lawyers and to trust that those lawyers would be excluded — which was the reason behind creating the LC group in the first place. I am comforted by the knowledge that most if not all positions in the LC group would be excluded under other paragraphs (such as s. 59(1)(e) of the *Act*, which excludes employees with substantial management duties). My decision does not impact whether LCs can unionize; my decision is about positions in other, unionized occupational groups.

[41] In conclusion, the LC occupational group is not "the executive group" for the purposes of s. 59(1)(b) of the *Act*. This is consistent with the text (in particular, the use of the word "the" instead of "an") and, more importantly, the context behind that provision. This means that a position confidential to an LC position cannot be excluded under s. 59(1)(h) of the *Act*. Since that was the only basis of the employer's application, I must deny it.

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

*(The Order appears on the next page)*

## IV. Order

[43] The application is denied.

July 17, 2024.

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