

**Date:** 20240717

**File:** 572-02-40581

**Citation:** 2024 FPSLREB 93

*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 subsection 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. Application before the Board

[1] This is an application by the Treasury Board of Canada (“the employer”) to exclude position 23138 from a bargaining unit represented by the Public Service Alliance of Canada (PSAC). The position has the title of Business Officer, Law Directorate, in the Quebec Regional Office (QRO) of the Department of Justice (DoJ). The Business Officer (classified at the AS-04 group and level) is responsible for the Notarial Affairs Directorate at the QRO. The QRO is divided into four directorates. Each directorate has an AS-04 business officer responsible for providing a broad range of administrative services for the directorate. The other three business officers have identical job descriptions and perform the same duties for their directorates as this Business Officer. The other three business officers are already excluded.

[2] I have decided to grant the employer’s application because the Business Officer position is identical to the other three positions already excluded. While the similarity between a position and another one already excluded is not determinative in an exclusion application, the identical duties of the four positions is a strong factor in favour of treating them the same way. Since the other three are excluded, this one will be as well.

[3] My more detailed reasons follow.

### II. Procedural History

[4] 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 total decisions bear the citations of 2024 FPSLREB 90 through 95.

[5] For context, the Federal Public Sector Labour Relations and Employment Board (“the Board”) is authorized to decide any matter without an oral hearing; see *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 for one or two days at most. However, there were a large number of exclusion applications that were filed

before 2023. The Board therefore identified 53 older files that may be suitable to be determined in writing.

[6] Both employers and bargaining agents have a shared interest in expeditious decisions in exclusion cases. Scheduling 53 days of hearing would delay the disposition of many of these exclusion cases, and also delay the hearing 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.

[7] The Board therefore 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 and 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 time period for the employer's initial submissions to permit the parties an opportunity to discuss these exclusion applications. After those discussions, the Board only needed to decide 21 files involving 2 employers and 2 bargaining agents. Two groups of these 21 files were consolidated because they all raised the same issue: a group of 14 (in 2024 FPSLRB 91) and a group of 3 (in 2024 FPSLRB 90).

[8] 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 FPSLRB 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.

[9] Finally, I want to thank all of the parties (the two employers and two bargaining agents) for the quality of their submissions. It was clear that 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. Basis of the application

[10] The employer applies to exclude the Business Officer position under s. 59(1)(g) of the Act. That provision reads 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*

...

*(g) the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer ....*

*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 :*

[...]

*g) poste dont le titulaire, bien que ses attributions ne soient pas mentionnées au présent paragraphe, ne doit pas faire partie d'une unité de négociation pour des raisons de conflits d'intérêts ou en raison de ses fonctions auprès de l'employeur;*

[11] I set out the controlling principles concerning s. 59(1)(g) of the Act in the decision *Treasury Board of Canada v. Public Service Alliance of Canada*, 2024 FPSLRB 92. That case explained that there are three elements to consider under s. 59(1)(g) of the Act:

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

[12] I rely upon that approach and the principles set out in that case when deciding this one. In particular, I emphasize what I said at paragraph 36 of that case that s. 59(1)(g) confers on the Board broad discretion to exclude a position.

---

#### IV. Duties and nature of the position proposed for exclusion

[13] As I mentioned in the outline of this decision, the Business Officer position works in the QRO of the DoJ. The QRO is divided into four directorates: three litigation directorates and the Notarial Affairs Directorate, which is composed of lawyers who perform advisory work. The Notarial Affairs Directorate is divided into two offices, one in Ottawa, Ontario, and one in Montreal, Quebec. The Business Officer position works in the Ottawa office and provides some assistance to the Civil Litigation (Ottawa) directorate within the QRO that is not relevant to this application. The position reports to the regional director and general notary (LC-02) of the Notarial Affairs Directorate in the QRO.

[14] The employer's will-say statement describes a broad range of duties performed by the Business Officer. Most relevant to this application, the Business Officer manages a team of administrative support staff in the Notarial Affairs Directorate and has the authority to make decisions about hiring, staffing, discipline, and other human resources issues. In addition to that supervisory work over administrative staff, the Business Officer also oversees all staffing actions within the Directorate and discusses or makes recommendations to the Regional Director and General Notary about these matters.

[15] PSAC argues that the employer did not include the written delegation of authority to the Business Officer to do any of those things; however, it did not otherwise dispute that the Business Officer performs those tasks or file any evidence to suggest otherwise. PSAC cited two cases (*Canada (Treasury Board) v. Association of Public Service Financial Administrators*, [1998] C.P.S.S.R.B. No. 106 (QL) ("*Keegan and Jessen*") at paras. 28 and 66, and *Canadian Energy Regulator v. Professional Institute of the Public Service of Canada*, 2020 FPSLRB 120 at para. 25) in which the employer did file an instrument of delegation; however, in neither case did the Board suggest that the employer was required to, and in *Keegan and Jessen*, the Board stated at paragraphs 48 and 49 that it should not give any weight to the delegation of authority. The Board concluded that it should examine what the occupant actually did and that the delegated authority is not evidence of the performance of any particular duty or power.

[16] PSAC also characterizes the Business Officer's duties as supervisory in nature, not managerial, and therefore, they do not justify excluding the position from the bargaining unit.

**V. The position should be excluded in the interests of consistency and equal treatment**

[17] Most importantly, the business officers for the other three QRO directorates are excluded from the bargaining unit. The employer applied for their exclusion in 2014, and PSAC did not object. Therefore, on October 14, 2014, the Board ordered those three positions excluded from the bargaining unit.

[18] I also note that the Board heard a similar case involving these parties in *Treasury Board v. Public Service Alliance of Canada*, 2020 FPSLRB 41 ("*Legal Support Coordinators*"). That case involved the British Columbia regional litigation office (BCRO) of the DoJ. Like the QRO, the BCRO was divided into four sections. The sections were larger than the QRO directorates. That case was about two AS-03 positions, each responsible for supervising between 15 and 20 legal assistants assigned to the lawyers in that section. The two positions reported to an AS-04 office manager. The Board decided to exclude those two positions because their incumbents provided their points of view to management and participated in management discussions leading to decisions impacting the legal assistants whom they supervised.

[19] PSAC does not deny that the Business Officer position in this case performs duties identical to the three other business officers excluded in 2014. PSAC also does not try to distinguish this case from the *Legal Support Coordinators* decision. Instead, PSAC argues that I should not consider those other cases at all.

[20] PSAC cites two Board decisions that state that each case should be decided on its own circumstances, namely, *Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 46 at para. 31, and *Legal Support Coordinators*, at para. 42. In *Legal Support Coordinators*, for example, the Board stated that "... the fact that in two other offices of the DOJ's litigation sector in B.C., there are similar positions with similar duties and responsibilities that have been declared managerial or confidential, is not in itself a deciding factor."

[21] PSAC also cites *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1975] C.P.S.S.R.B. No. 6 (QL) ("*Fraser*"), in which the Board stated, "... the fact of the

earlier exclusion of persons with the same job title as Miss Fraser **can have no bearing** on our determination with regard to her” [emphasis added]. PSAC has taken that passage out of context. The Board’s entire reasoning on that point is as follows:

...

*11 We would mention that, according to the Report of the Examiner, other Personnel Unit Clerks were excluded from the bargaining unit as being “managerial or confidential employees”, on the agreement of the parties, at the time of the original certification of the Clerical and Regulatory Group. We have no knowledge as to the nature of the duties and responsibilities being performed by the Personnel Unit Clerks concerned at that time, nor do we know the basis of the parties’ agreement. Accordingly, the fact of the earlier exclusion of persons with the same job title as Miss Fraser can have no bearing on our determination with regard to her. Our decision as to the employment status of Miss Fraser must be based on the evidence contained in the Report of the Examiner as to her particular duties and responsibilities at this time.*

...

[22] In *Fraser*, the Board stated that it would not rely upon the exclusion of other employees when their exclusions were made in haste at the very outset of collective bargaining for the federal public administration, when it was part of a broader agreement on exclusions designed to expedite collective bargaining, and when the Board had no information about the duties of those positions when they were excluded.

[23] In this case, by contrast, PSAC does not submit or even hint that it consented to the exclusion of the other business officers in haste or through inadvertence; nor does it submit or even hint that their exclusion was part of a broader agreement over a larger group of employees proposed for exclusion. Most importantly, unlike the Board in *Fraser*, I have information about the duties of the other three business officers because I have their job descriptions and the employer’s uncontested evidence is that they have identical duties to this Business Officer being proposed for exclusion. I also have the benefit of the Board’s decision in *Legal Support Coordinators*, which confirms that a similar position should be excluded.

[24] I appreciate that the Board should examine every application for exclusion on a case-by-case basis. I also want to be clear that PSAC is not estopped from responding

to the employer's application simply because it consented to the exclusion of three identical positions in 2014.

[25] However, consistency matters too. As the Ontario Labour Relations Board put it in another context, "... like-cases ought to have like-results unless a matter is distinguishable from those decided before it" (from *Labourers' International Union of North America, Local 183 v. 736902 Ontario Limited o/a HPN Engineering*, 2021 CanLII 70124 at para. 30). I can think of little that is worse for labour relations than having four employees performing the identical job but three of them being treated one way and the fourth being treated another.

[26] Had PSAC attempted to distinguish these cases factually, I would have considered carefully whether the differences warranted a different result. Had PSAC argued that the legal framework for s. 59(1)(g) has changed substantially since 2014, I would also have considered that carefully. Had PSAC applied under s. 77(1) of the *Act* to revoke the 2014 exclusion order, I might have taken that into account too. PSAC did none of those things.

[27] Therefore, I have decided to exercise my discretion to exclude the Business Officer position from the bargaining unit because its duties and responsibilities are identical to the duties and responsibilities of three positions that the Board has already excluded. I have been given no reason to doubt the basis of those three previous exclusions: there are no factual differences, there has been no significant legal evolution since 2014, there is no allegation that PSAC's consent to those three exclusion orders was given in haste or in error, and the positions are similar to those that the Board ordered excluded in *Legal Support Coordinators*.

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

*(The Order appears on the next page)*

**VI. Order**

[29] The application is allowed.

[30] Position number 23138, with the title of Business Officer, Law Directorate, is declared a managerial or confidential position under s. 59(1)(g) of the *Act*, effective June 18, 2019 (which is the date of the employer's application).

July 17, 2024.

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