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



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

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Bargaining Agent

and

TREASURY BOARD AND CANADA REVENUE AGENCY

Employers

Indexed as

Public Service Alliance of Canada v. Treasury Board and Canada Revenue Agency

In the matter of policy grievances referred to adjudication

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

For the Bargaining Agent: Morgan Rowe, counsel

For the Treasury Board: Isabelle Tremblay

For the Canada Revenue Agency: Nicholas Gualtieri

Decided on the basis of written submissions,
filed December 6, 2024 and January 17, February 24, March 28, July 4 and 11,
August 15, September 5, and October 17, 2025.

REASONS FOR DECISION

I. Overview

[1] On July 1, 2023, the plan administrator for the Public Service Health Care Plan (PSHCP) changed from Sun Life Financial to Canada Life. While the transition was supposed to be seamless, the Public Service Alliance of Canada (PSAC) says that it was not. Therefore, on or about February 15, 2024, PSAC presented a policy grievance against the Treasury Board, and on or about February 22, 2024, it presented another policy grievance, against the Canada Revenue Agency (CRA). The two employers raised several preliminary objections against these grievances. This decision is about those preliminary objections.

[2] Both employers object to the policy grievances because they are untimely. I disagree. Instead, I agree with PSAC that they are continuing grievances, and therefore, they were filed in a timely manner.

[3] Both employers object to the policy grievances because they state that the ability to file a policy grievance about the administration of health benefits has been replaced by the special appeals process set out in the National Joint Council's (NJC) *Public Service Health Care Plan Directive* ("the PSHCP Directive"). Again, I disagree. A careful review of that directive along with the *NJC By-Laws* shows that the appeals process applies only to individual claims involving the denial of benefits and that it does not apply to the more general concerns about the administration of the PSHCP that are the basis of these policy grievances.

[4] Both employers object to the policy grievances because PSAC is raising new arguments that it did not raise during the grievance process contrary to the so-called *Burchill* principle (under *Burchill v. Attorney General of Canada*, 1980 CanLII 4207 (FCA)), that the policy grievances do not raise tenable human rights claims, and that the issues raised by PSAC are not appropriate for a policy grievance. I have decided that it is premature to rule on those objections.

[5] Finally, the CRA objects to the policy grievance filed against it on a ground unique to it. While the PSHCP Directive is incorporated by reference into collective agreements between PSAC and the Treasury Board, it is not incorporated into the collective agreement between PSAC and the CRA. Additionally, the CRA has no role in

the administration of the PSHCP. Therefore, I have concluded that there is no arguable case that CRA breached the management-rights clause or joint-consultation clause of its collective agreement. However, the no-discrimination clause goes further and prohibits discrimination “with respect to an employee”. There is an arguable case that the alleged discriminatory conduct in the administration of the PSHCP has a sufficient connection with the employment relationship to fall under that provision.

[6] My detailed reasons follow.

II. Essential character of the policy grievances

[7] Before turning to the specific objections raised by the Treasury Board and the CRA, I will begin by outlining the nature or character of these policy grievances.

[8] The PSHCP is the health care plan for employees across the federal public administration. The benefits provided and the contributions that need to be paid toward it are set out in the PSHCP Directive. As I will describe in greater detail later, the benefits are paid by the Treasury Board out of money voted for that purpose in annual Appropriation Acts. However, the PSHCP is administered by an insurance company called the “plan administrator”. This means that claims for health benefits are filed with an insurance company, which assesses them and then makes sure that money is paid for valid claims.

[9] As I mentioned in the overview, the plan administrator had been Sun Life Financial for decades. On July 1, 2023, the plan administrator was changed to Canada Life.

[10] PSAC alleges what it calls “systemic dysfunction” in the administration of the PSHCP (i.e., the processing of benefit claims). It says that this systemic dysfunction has occurred since the transition to Canada Life. In its submissions opposing the preliminary objections, it states:

...

... Importantly, the issues in these grievances do not pertain to the transition to Canada Life in itself or to the decisions rendered by Canada Life on the merits of individual claims for benefits. Rather, the grievances challenge the myriad ways in which the Plan has simply failed to function or fulfill its objective of providing “benefits efficiently and effectively” which are “equivalent, as far as possible, to those services available to individuals residing in

Canada and covered under a provincial/territorial health insurance plan” since Canada Life assumed responsibility for its administration.

...

[11] In its final-level grievance presentation to the Treasury Board, PSAC also alleged that these problems included “[a]rbitrary and erroneous denials of claims.” As I will discuss later, denials of claims are dealt with through a separate appeals process. However, PSAC alleges that the problems with the administration of the PSHCP involve things other than whether a claim is ultimately allowed. It identifies problems such as interruptions in benefits because members need to manually re-enroll, inability to reach or delays reaching Canada Life’s agents, delays processing claims, and the inappropriate or invasive questioning of claimants.

[12] The employers argue that the essential character of these grievances is the plan administrator change from Sun Life Financial to Canada Life on July 1, 2023. However, PSAC says that that change is not what its grievances are about. PSAC does not state that the employers violated the collective agreements by changing the plan administrator. To paraphrase PSAC’s case (and to strip its case of all its nuances), PSAC argues that the collective agreements require the employers to properly administer a health care plan. PSAC says that the root cause of the problems is the way that the change in plan administrator was handled (including the terms of the contract between the Treasury Board and Canada Life), but that the proper administration of the plan is ultimately the employer’s responsibility, regardless of the identity of the plan administrator. In a way, it does not matter why these problems are occurring; the fact that they are occurring breaches the collective agreements.

[13] I conclude by pointing out that none of PSAC’s allegations have been proven at this stage. In its submissions, PSAC suggested that I should adopt the “arguable case” approach to these objections. The arguable case approach requires the Board to treat the grievor’s alleged facts as true so long as they have an air of reality and are more than mere speculation, following which it decides whether the grievance raises an arguable case (see, for example, *Kemp v. Public Service Alliance of Canada*, 2024 FPSLRB 87 at para. 54). PSAC states that when assessing preliminary objections like these ones, the Board accepts the allegations made by PSAC as true and capable of proof; as the Board put it in *Hughes v. Department of Human Resources and Skills Development*, 2012 PSLRB 2 at para. 105, “... if I have any doubt about what the facts, *Federal Public Sector Labour Relations and Employment Board Act and Federal Public Sector Labour Relations Act*

assumed to be true, reveal, then I must err on the side of finding that there is an arguable case ...”. In its submissions, PSAC relied on news reports (which are hearsay) and evidence given to a Parliamentary committee (which is also hearsay and may be privileged). PSAC has not been asked to prove its allegations yet.

[14] However, in *Association of Justice Counsel v. Canada (Attorney General)*, 2013 FC 806 at para. 50 the Federal Court applied a differently worded test requiring the Board to ask itself “... whether the subject matter [of the grievance is] in respect of the interpretation or application of a provision of the collective agreement or an arbitral award.”

[15] Considering the employer’s objections, I do not believe there is a meaningful difference between those two approaches in this case. I will be using the phrase “arguable case” later in this decision as a convenient shorthand and not because of any difference between those two approaches or because I have chosen one over the other.

III. The six objections by the two employers

[16] The Treasury Board and the CRA both make five objections to the Board hearing these policy grievances:

- 1) that the grievances are untimely, because they were filed more than 25 working days from the date Canada Life became the plan administrator;
- 2) that the grievances fall outside the jurisdiction of the Board because they are about matters that are within the special appeals process set out in the PSHCP, which ousts the grievance process;
- 3) that PSAC is raising new arguments, contrary to the so-called *Burchill* principle;
- 4) that these are not suitable policy grievances because they are about individual issues and do not concern the bargaining unit generally; and
- 5) that PSAC has not shown that there is adverse treatment in a way prohibited by the no-discrimination clause.

[17] In addition, the CRA raises a sixth objection based on the fact that its collective agreement does not incorporate the PSHCP by reference or mention group benefits in any way.

[18] I will deal with these six objections in that order.

A. Objection #1: the grievances are continuing grievances

[19] The employers argue that the grievances are untimely. Part of their argument rests on their position that the essential character of both grievances is about the change in the plan administrator. As I stated earlier, the change in the plan administrator may be the cause of the problems that form the essential character of the grievances, but PSAC is not grieving the fact of the change.

[20] The rest of the employers' argument is that PSAC knew about these problems long before it filed these grievances. The relevant collective agreements stipulate that policy grievances against either employer must be filed within 25 working days of PSAC being informed of, or having knowledge of, the act, omission, or other matter being grieved. These 2 grievances were dated February 15 and 22, 2024 respectively; the Treasury Board says it received its grievance on February 16, and the CRA says it received its grievance on February 28. However, PSAC knew about these problems well before the 25-working-day period before it filed these 2 grievances, as shown by posts that PSAC made on its website on July 7 and 12 and August 29, 2023, complaining about these issues.

[21] PSAC argues that these are continuing grievances, and I agree.

[22] A continuing grievance is one involving "... repetitive successive alleged breaches of the collective agreement ..." (see *Canada (Attorney General) v. Duval*, 2019 FCA 290 at para. 30). Two classic examples of a continuing grievance are claims that an employee is being paid at the wrong wage rate (because a new breach occurs each pay day) and a grievance alleging a failure to accommodate (because the alleged failure reoccurs every day). A continuing grievance is not one where there has been the recurrence of damage because of a breach (see *Oladeinde v. Canada Revenue Agency*, 2025 FPSLRB 21 at paras. 58 to 62). For example, placing an employee on leave without pay has recurring consequences each day they are unpaid, but it is not a continuing grievance because those consequences are the result of a discrete decision.

[23] To repeat what I said earlier, the essential nature of these grievances is not about the change in plan administrator. PSAC alleges that the employers have an obligation to ensure that the PSHCP is properly administered. Whenever the administration of the PSHCP falls below a certain standard, PSAC says that violates the collective agreement. PSAC says that the administration of the PSHCP fell below that

standard on or shortly after the change in plan administrator but that it continued to fall below that standard through February 2024. This, according to PSAC, makes this a continuing grievance. I agree.

[24] This case is similar to that of *Hamilton Health Sciences v. Ontario Nurses' Association*, 2007 CanLII 7388 (ON LA). In *Hamilton Health Sciences*, the employer (a group of hospitals) used to administer its sick leave benefits plan. In the spring of 2005, it decided to outsource the application and assessment functions of its short-term disability sick leave benefit plan. The hospitals completed that outsourcing between April and June 2005. The new plan administrator required employees to use a new form to apply for sick leave benefits that the union alleged was privacy-invasive, and the union stated that it was intruding on the privacy of employees in other ways (such as repeated and unnecessary telephone calls). The union filed a policy grievance on July 27, 2005, which the employer argued was late. The arbitrator disagreed that it was late.

[25] More importantly for our purposes, the arbitrator also concluded that it was a continuing grievance, stating:

...

35. A continuing grievance is one which relates to a continuing course of conduct consisting of a series of identifiable actions and consequences, each of which could support a separate grievance. An ongoing failure to pay the proper wage rate can form the basis of an individual or group continuing grievance. Any practice relating to terms and conditions of employment under a collective agreement that requires individual albeit repetitive or ongoing application can form the basis of a policy continuing grievance. In contrast, a single act which possesses substantial finality, whether or not it has continuing consequences, cannot form the basis of a continuing grievance. The application of discipline, or the award of a position under the job posting provisions of a collective agreement are single final acts with continuing consequences which do not form the basis for a continuing grievance. The continuing effect of a decision or practice is not the issue. The repeated but severable application of a decision or practice is.

*36. It may be that an individual grievance challenging the propriety of an APS or the Cowan form concerns a single act on a specific occasion and as such is not a continuing grievance (although I make no determination in that respect). **But that is quite different from these policy grievances which clearly do not concern a single act or occasion. They concern an ongoing policy and practice which the Hospital is applying on a***

continuing basis. Every occasion on which a bargaining unit employee is required to complete a medical information form is a form of “fresh step” which, as the individual grievances filed demonstrate, can give rise to a new individual grievance that alleges the same breaches alleged in a more general way in this case (see, for example, Re Port Colborne General Hospital and O.N.A., (1986) 23 L.A.C. (3d) 323 (Burkett)). The overall or general issue between the parties concerns the continuing use as well as the implementation of the APS and Cowan forms. Further, the grievances raise serious legal issues which have a continuing impact on the bargaining unit and on the labour relations between the parties, and which clearly require arbitral intervention, and if these grievances are not determined on the merits that intervention will occur seriatim in a much less comprehensive (and potentially conflicting) way in the individual grievances that have been filed and are being held in abeyance pending the disposition of these grievances. The issue is not going away. Finally, Union seeks only prospective declaratory and injunctive relief.

...

[Emphasis added]

[26] Unlike in *Hamilton Health Sciences*, PSAC is seeking more than declaratory relief, and I have no evidence of individual grievances about this issue. However, the more important part of the decision is the first part of paragraph 36. Like in *Hamilton Health Sciences*, these grievances are about an ongoing practice being applied on a continuing basis. Each occasion when the administration of the PSHCP falls below the required standard can give rise to a new grievance.

[27] For these reasons, I agree with PSAC that these are continuing grievances. The grievances are not against the change in plan administrator on July 1, 2023. They are against the employers' failure to ensure the proper administration of the PSHCP, and PSAC alleges that this failure occurred up to and beyond February 2024. This makes these continuing grievances and, therefore, timely.

[28] The employers argue, in the alternative, that if these are continuing grievances, the relevant period of evidence and possible remedies would need to be limited to the 25-day period preceding their presentation. The relevant legal principle that the employers cite is that in the case of a continuing grievance, the 25-day the time limit in the grievance process serves to limit the period in respect of which damages may be awarded (see *Duval*, at para. 31).

[29] PSAC has not yet provided evidence to support its damages claim, nor has it provided details of the amounts it seeks or to whom it wants damages paid. It is premature for me to weigh in on whether or how the remedial limit that I just described applies to this case.

B. Objection #2: The policy grievances are not ousted by the special dispute-resolution process in the PSHCP Directive

[30] The PSHCP Directive is a so-called NJC directive. The NJC is a council composed of representatives of employers and bargaining agents. It is responsible for codeveloping NJC directives by producing a joint recommendation to the appropriate executive body of the federal government to implement the NJC directives. There are currently 11 NJC directives, including the PSHCP Directive.

[31] Bargaining agents and the Treasury Board often agree to incorporate different NJC directives into their respective collective agreements. As I will discuss later, PSAC and the CRA have not incorporated NJC directives into their collective agreement.

[32] There is a different grievance system available when an employee wants to grieve an alleged breach of an NJC directive. Instead of the normal departmental grievance system, the grievance is resolved using the grievance process provided in section 15 of the *NJC By-Laws*. The final level of the grievance process is the Executive Committee of the NJC. When an NJC directive is incorporated into a collective agreement, a grievor represented by a bargaining agent may also refer that grievance to adjudication.

[33] However, this different grievance system does not apply to some cases about the PSHCP. Section 15.3 of the *NJC By-Laws* reads as follows:

15.3 Appeals Process under the PSHCP

15.3.1 This grievance procedure does not apply to claims or coverage under the Public Service Health Care Plan (PSHCP). A separate and distinct appeal procedure is provided under the PSHCP. Any decision taken by the Board of Directors, within the meaning of the PSHCP, in respect of an appeal regarding claims or coverage shall be final and binding.

[34] This special appeals process is set out in the PSHCP Directive as follows:

...

Claims Appeal Procedure

The grievance procedure set out in section 15 of the NJC By-laws does not apply to this Plan Directive or the PSHCP or any policy relating thereto. A separate and distinct appeal procedure is provided under the PSHCP. Any decision taken by the PSHCP Administration Authority, within the meaning of the PSHCP, in respect of an appeal regarding claims or coverage shall be final and binding. The PSHCP appeal process is outlined in section 5.2.

...

5.2 Appeals

5.2.1 Where a member does not agree with a decision of the Plan Administrator and wishes a review of their case, a submission may be made to the PSHCP Administration Authority for review by its Appeals Committee. The Appeals Committee has the discretion to reach a decision that embodies due consideration for individual circumstances and Plan provisions. Members should endeavour to exhaust all avenues of review with the Plan Administrator before submitting an appeal to the PSHCP Administration Authority. The Appeals Committee reserves the right to refuse to reconsider their decision on an appeal. The appeal process is the final review level under the PSHCP.

5.2.2 An appeal of a decision of the Plan Administrator must be submitted to the PSHCP Administration Authority within one year from the mailing of the Plan Administrator's Explanation of Benefits statement or the date of the pharmacy receipt from a benefit card transaction.

...

[35] The employers argue that these provisions mean that the grievance process does not apply to anything in relation to the PSHCP; therefore, PSAC cannot file a policy grievance in relation to the PSHCP.

[36] I disagree because of the wording of those two provisions. The *NJC By-Laws* state, “**This** grievance procedure does not apply to claims or coverage under the Public Service Health Care Plan ...” [emphasis added]. The grievance procedure that it is referring to is the NJC grievance process, not the right to file a policy grievance under s. 220 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*). All the *NJC By-Laws* mean is that the NJC grievance process does not apply to issues about claims made under the PSHCP. However, PSAC is not trying to use the NJC grievance process; it is trying to use the policy grievance process set out in its collective agreements with the employers and then refer these policy grievances to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s.

221 of the *FPSLRA*. This is also confirmed in the unnumbered article in the PSHCP that I just cited, which states, “**The grievance procedure set out in section 15 of the NJC By-laws** does not apply to this Plan Directive or the PSHCP or any policy relating thereto” [emphasis added].

[37] To emphasize a different phrase, the *NJC By-Laws* state that “This grievance procedure does not apply to **claims or coverage** under the Public Service Health Care Plan ...” [emphasis added]. These policy grievances are certainly not about the coverage under the PSHCP; PSAC makes no complaint in these grievances about which health benefits are covered and which are not. These policy grievances are not about any individual claim made under the PSHCP, aside from the one reference I quoted earlier to PSAC complaining about the arbitrary and erroneous denials of claims. As I said earlier, the essential nature of the policy grievances is about the administration of the plan, not whether any particular claim was disallowed.

[38] On a plain reading of the *NJC By-Laws*, it ousts the NJC grievance process only when the issue is a claim or coverage under the PSHCP. PSAC’s policy grievances are not under the NJC grievance process and not about a claim or coverage.

[39] This narrow interpretation of the *NJC By-Laws* is consistent with the wording of section 5.2 of the PSHCP. As set out earlier, the appeals process is triggered “[w]here a member does not agree with a decision of the Plan Administrator and wishes a review of their case ...”. These policy grievances are not about a decision of the plan administrator and are not asking for a review of any particular case.

[40] This interpretation is also consistent with the collective agreement between PSAC and the Treasury Board. Using the agreement for the Program and Administrative Services Group as an example, it states:

...

18.01 *In cases of alleged misinterpretation or misapplication arising out of agreements concluded by the National Joint Council of the Public Service on items which may be included in a collective agreement and which the parties to this agreement have endorsed, the grievance procedure*

[...]

18.01 *En cas de fausse interprétation ou application injustifiée présumées découlant des ententes conclues par le Conseil national mixte de la fonction publique sur les clauses qui peuvent figurer dans une convention collective et que les parties à cette dernière ont*

will be in accordance with section 15 of the NJC by-laws.

ratifiées, la procédure de règlement des griefs sera appliquée conformément à la partie 15 des règlements du CNM.

...

[...]

[41] These policy grievances are not about a misinterpretation or misapplication arising out of the PSHCP Directive. They are about the administration of the PSHCP.

[42] Finally, PSAC points out that the Board's jurisdiction to hear these grievances is consistent with the Quebec Court of Appeal's decision in *Pontbriand v. Administration du régime de soins de santé de la fonction publique fédérale*, 2011 QCCA 157. In that case, a unionized employee made a claim for the cost of a medical evacuation. When the claim and subsequent appeal were denied, he filed a civil claim in Quebec Superior Court. The defendant moved to strike the claim on the basis that it needed to be grieved. The Quebec Court of Appeal concluded that it did not. In essence, the Quebec Court of Appeal concluded that the appeals process under section 5.2 of the PSHCP was a complaint procedure for the purposes of s. 208(5) of the *FPSLRA* and therefore prevented him from filing a grievance about the denial of benefits.

[43] More importantly for our purposes, the Quebec Court of Appeal qualified its reasons as follows at paragraph 23: "While the abolition of the PSCHP [*sic*] or unilateral amendments to the benefits provided therein by the federal government could possibly give rise to a collective grievance or a policy grievance ...". PSAC's policy grievances are not about the abolition of the PSHCP or the unilateral amendments to the benefits it provides. However, this passage still supports PSAC's position that not everything relating to the PSHCP is subject to the appeals procedure.

[44] For these reasons, I have concluded that the appeals process in the PSHCP does not bar these policy grievances.

C. Objections #3, 4, and 5: It is too early to rule on the *Burchill* objection, whether there is a sufficient link to a prohibited ground of discrimination, and whether these are proper policy grievances

[45] One of PSAC's arguments is that the maladministration of the PSHCP violates the no-discrimination clause in the collective agreements. The employers have three objections to PSAC's argument. I have decided that these objections should be decided by the Board after hearing these policy grievances on their merits.

[46] First, PSAC raises issues about the way that transgender employees are being treated by the plan administrator. The employers state that PSAC never raised these issues in the grievance process, and therefore, it cannot do so now, in accordance with *Burchill*.

[47] While I have a copy of the grievances and PSAC's written arguments at the final level, I do not have any evidence about PSAC's oral argument and what it raised verbally in the grievance process. PSAC certainly raised human rights issues of some kind. Finally, it is too early to tell how prominent a role transgender issues will play in PSAC's arguments in these policy grievances, namely, whether it is an entirely new ground of the grievances or just an argument elaborating on pre-existing grounds. Therefore, I have decided that it is too early to rule on whether PSAC's arguments go beyond those permitted under *Burchill*.

[48] Second, both employers argue that PSAC has not demonstrated a link or nexus between a protected ground and any adverse impact suffered by an employee. That argument is premature. PSAC has not led any evidence yet, and it does not have to lead evidence at this preliminary stage. Therefore, I have decided that it is too early to rule on whether PSAC has made out its allegations of breaches of the no-discrimination clauses of the collective agreements.

[49] Third, the employers argue that the maladministration of the PSHCP is not the proper subject of a policy grievance because it is really about the individual experiences of individual employees. Section 220 of the *FPSLRA* requires that a policy grievance relate to a bargaining agent or "the bargaining unit generally." It is too early to know whether the allegations are few enough that they are truly individual in nature or whether they are widespread enough to relate to the bargaining unit generally. Therefore, I have decided that this issue should be reserved for the Board after it has heard the evidence in these policy grievances.

D. Objection #6: Whether PSAC has a valid policy grievance against the CRA

[50] There is no dispute that a policy grievance must be in respect of the interpretation or application of a collective agreement. The CRA raises a separate objection to the policy grievance presented against it — that it falls outside the scope of its collective agreement with PSAC. Unlike the collective agreements between PSAC and the Treasury Board, the collective agreement between PSAC and the CRA does not

incorporate the PSHCP Directive. Therefore, the CRA argues that there can be no policy grievance presented about the PSHCP.

[51] The CRA's initial submissions were not quite as clear about this point as they could have been. However, in its reply submissions, it made this argument more explicitly. Therefore, I asked PSAC to file a sur-reply to address this issue, to ensure that PSAC had an opportunity to respond to it and to ensure that I properly understood both parties' positions.

[52] I agree with the CRA in part.

[53] Part of PSAC's policy grievance alleges a breach of clause 6.01 (managerial responsibilities) of the collective agreement. I acknowledge that the Board recently concluded that this so-called management rights clause does not create any rights that flow to a bargaining agent and does not bind the employer in how it manages its workplace (see *Public Service Alliance of Canada v. Treasury Board*, 2025 FPSLREB 161 at para. 76). As will become clear later in these reasons, I have approached this case in a different way by assuming that the management rights clause can create substantive obligations. My reasons should not be seen as either endorsing or rejecting that recent Board decision; the parties argued this case differently, and so my decision is different.

[54] To explain my reasons, it is necessary to understand two elements of the legal context behind this case. First, I will set out the legal foundation of the PSHCP and its application to the CRA. Second, I will set out the general legal framework behind the circumstances when insurance benefit issues are capable of adjudication under a collective agreement. Then I will assess PSAC's three reasons for stating that this grievance is in respect of the CRA collective agreement, in light of those two broader legal contexts.

1. Legal framework behind the PSHCP

[55] For most terms and conditions of employment, each employer has the power to establish those terms (either through collective bargaining or unilaterally, depending on whether their employees are unionized). For example, s. 51 of the *Canada Revenue Agency Act* (S.C. 1999, c. 17; "the *CRA Act*") provides the CRA with the power to establish terms and conditions of employment, such as pay (s. 51(1)(d)) and allowances

(s. 51(1)(h)). In the core public administration, the Treasury Board retains those powers (see the *Financial Administration Act* (R.S.C. 1985, c. F-11), s. 11.1(1)).

[56] Group insurance and benefits in the federal public administration are dealt with differently from other terms and conditions of employment, and they have special statutory provisions dealing with them. The relevant provisions are as follows:

[From the *CRA Act*:]

...

[...]

Group insurance and benefit programs

Programmes d'assurances collectives et autres avantages

52 (1) The Agency may establish or enter into a contract to acquire group insurance or benefit programs for its employees and may set any terms and conditions in respect of those programs, including those relating to premiums, contributions, benefits, management and control and expenditures to be made from those contributions and premiums, and may audit and make contributions and pay premiums in respect of those programs.

52 (1) L'Agence peut établir des programmes d'assurances collectives ou d'autres avantages pour ses employés, fixer les conditions qui leur sont applicables, notamment en ce qui concerne les primes et cotisations à verser, les prestations et les dépenses à effectuer sur celles-ci ainsi que la gestion, le contrôle et la vérification des programmes, conclure des contrats à cette fin et verser les primes et cotisations.

Financial Administration Act does not apply

Non-application de la Loi sur la gestion des finances publiques

(2) The Financial Administration Act does not apply to any contributions made or premiums paid by the Agency or the members in respect of any program established under subsection (1) or any benefits received by the members of such a program.

(2) La Loi sur la gestion des finances publiques ne s'applique pas aux primes ou cotisations versées par l'Agence ou perçues auprès des cotisants aux programmes visés au paragraphe (1) ni aux prestations qui sont versées à ceux-ci.

...

[...]

[From the *Financial Administration Act*:]

...

[...]

Group insurance and benefit programs

7.1 (1) The Treasury Board may establish or modify any group insurance or other benefit programs for employees of the federal public administration and any other persons or classes of persons it may designate to be members of those programs, may take any measure necessary for that purpose, including contracting for services, may set any terms and conditions in respect of those programs, including those relating to premiums, contributions, benefits, management, control and expenditures and may audit and make payments in respect of those programs, including payments relating to premiums, contributions, benefits and other expenditures.

Remainder of Act does not apply

(2) This Act, other than this section, does not apply to any contributions or other payments made or premiums paid by the Treasury Board or the members in respect of any program established or modified pursuant to subsection (1) or any benefits received by the members of such a program.

Incorporation by letters patent

7.2 (1) On the recommendation of the National Joint Council of the Public Service, the President of the Treasury Board may issue letters patent of incorporation that take effect on the date stated in them for a corporation without share capital

Programmes d'assurances collectives et autres avantages

7.1 (1) Le Conseil du Trésor peut établir ou modifier des programmes d'assurances collectives ou des programmes accordant d'autres avantages pour les employés de l'administration publique fédérale et les autres personnes qu'il désigne comme cotisants, individuellement ou au titre de leur appartenance à telle catégorie de personnes, prendre toute mesure nécessaire à cette fin, notamment conclure des contrats pour la prestation de services, fixer les conditions et modalités qui sont applicables aux programmes, notamment en ce qui concerne les primes et cotisations à verser, les prestations et les dépenses à effectuer ainsi que la gestion, le contrôle et la vérification des programmes, et faire des paiements, notamment à l'égard des primes, cotisations, prestations et autres dépenses y afférentes.

Non-application des autres dispositions de la présente loi

(2) Les dispositions de la présente loi, à l'exception du présent article, ne s'appliquent pas aux primes, cotisations ou autres paiements versés par le Conseil du Trésor ou perçus auprès des cotisants aux programmes visés au paragraphe (1), ni aux prestations qui sont versées à ceux-ci.

Lettres patentes

7.2 (1) Sur recommandation du Conseil national mixte de la fonction publique, le président du Conseil du Trésor peut délivrer des lettres patentes prenant effet à la date qui y est mentionnée et constituant une personne morale sans capital-

that is charged with the administration of any group insurance or benefit program described in subsection 7.1(1).

...

Board of directors

7.3 *The corporation's board of directors consists of*

(a) *one director appointed by the President of the Treasury Board, on the recommendation of the National Joint Council of the Public Service, who is the chairperson;*

(b) *one director appointed by the President of the Treasury Board, on the recommendation of the National Joint Council of the Public Service, who, in the opinion of the President, represents the pensioners;*

(c) *four directors appointed by the President of the Treasury Board; and*

(d) *four directors appointed by that portion of the National Joint Council of the Public Service that represents the employees.*

...

actions pour veiller à l'administration de tout programme visé au paragraphe 7.1(1).

[...]

Conseil d'administration

7.3 *Le conseil d'administration de la personne morale est composé :*

a) *du président, nommé par le président du Conseil du Trésor sur recommandation du Conseil national mixte de la fonction publique;*

b) *d'un administrateur nommé par le président du Conseil du Trésor sur recommandation du Conseil national mixte de la fonction publique, qui, de l'avis du président du Conseil du Trésor, représente les bénéficiaires;*

c) *de quatre administrateurs nommés par le président du Conseil du Trésor;*

d) *de quatre administrateurs nommés par les représentants des salariés au sein du Conseil national mixte de la fonction publique.*

[...]

[57] Before the coming into force of what is now the CRA Act, employees working in what was then called Revenue Canada were employed by the Treasury Board. They were in bargaining units represented by several bargaining agents, including PSAC. When what is now called the CRA was created as a separate agency, PSAC was certified as the bargaining agent for one of the two bargaining units at the CRA (see *Canada Customs and Revenue Agency v. Association of Public Service Financial Administrators*, 2001 PSSRB 127). This meant that PSAC and the CRA had to negotiate a new collective agreement.

[58] When they did, they agreed not to incorporate any NJC directives into their collective agreement. They negotiated a memorandum of understanding in 2002 about Federal Public Sector Labour Relations and Employment Board Act and Federal Public Sector Labour Relations Act

the CRA's internal policies that replaced the NJC directives and listed those policies. The PSHCP is not listed. That memorandum of understanding starts with the following: "The purpose of this Memorandum of Understanding is to confirm an agreement reached by the Employer and the Alliance concerning the CCRA policies replacing the former NJC Directives."

[59] Subsection 52(1) of the *CRA Act* gives the CRA the power to create a group benefits plan for its employees. The parties agree that the CRA has not exercised that power. Instead, employees in the CRA are part of the PSHCP. The PSHCP is a group benefits plan created by the Treasury Board using the powers granted under s. 7.1(1) of the *Financial Administration Act*. That provision permits the Treasury Board to create a group benefits plan for all employees of the federal public administration — not just employees for whom the Treasury Board is the employer (i.e., not just the core public administration).

[60] The CRA is a "participating employer" under the PSHCP because it is listed in Schedule I of the PSHCP Directive. This brings the CRA's employees under the ambit of the PSHCP, as they are "employees" eligible for coverage under the PSHCP by virtue of the definition of "employee" in the PSHCP Directive, which includes any employee of a participating employer.

[61] There are three things I note in particular about the legal framework of the PSHCP.

[62] First, the Treasury Board has the unilateral power to amend Schedule I, meaning that the Treasury Board decides which employers are, and are not, participating employers (see paragraph (c) of the definition of "employee", and the definition of "participating employer"). As the Federal Court of Appeal put it, "... the *Financial Administration Act* provides the Treasury Board with the authority to modify the Plan", from *Bemister v. Canada (Attorney General)*, 2019 FCA 190 at para. 7.

[63] Second, participating employers play no role in the administration of the PSHCP.

[64] The PSHCP is overseen by the Federal PSHCP Administration Authority ("the Administration Authority"). This is the corporation without share capital established under the power granted to the Treasury Board in s. 7.2(1) of the *Financial Administration Act*. The Treasury Board appoints 6 of its 10 directors; 4 of those 6 are

appointed unilaterally by the Treasury Board, and 2 on the recommendation of the NJC. The remaining 4 directors are appointed by the portion of the NJC that represents employees (see s. 7.3 of the *Financial Administration Act*).

[65] The letters patent incorporating the Administration Authority explain its purpose, as follows (from “Letters Patent Issued to the Federal Public Health Care Plan Administration Authority”, *Canada Gazette*, Part I, Vol. 141, No. 27, July 7, 2007):

...	[...]
<p>3.1 Objects of the Authority. <i>Pursuant to subsection 7.2(1) and paragraph 7.2(2)(b) of the Act, the Authority is charged with the administration of the PSHCP. Its object is to ensure that benefits and services to Plan members and their covered dependents, as defined in the PSHCP documentation, are delivered in a manner that ensures the effective and efficient administration of the PSHCP.</i></p>	<p>3.1 Mission. <i>Aux termes du paragraphe 7.2(1) et de l'alinéa 7.2(2)b) de la Loi, l'Administration a pour mission d'administrer le RSSFP de façon efficace et efficiente pour faire en sorte que les souscripteurs au RSSFP et les personnes à charge assurées, telles qu'elles sont définies dans la documentation du RSSFP, reçoivent les prestations et les services auxquels ils ont droit.</i></p>
...	[...]

[66] Specifically, the Letters Patent say that the Administration Authority may provide instructions to the plan administrator (currently, Canada Life) about the administration of the PSHCP and tasks it “... to ensure that service standards set out in the Administrative Services Contract are achieved and to take action where necessary to ensure that service to Plan members is provided in accordance with the service agreements ...”.

[67] The Administration Authority is accountable to the Partners Committee. The Partners Committee is established by the Treasury Board and is composed of three groups of representatives: representatives “of the employer” (and “employer” is a defined term, meaning the Treasury Board), representatives of employees pulled from the employee side of the NJC, and a person representing pensioners appointed by the NJC. The Partners Committee makes recommendations to the Treasury Board about the PSHCP.

[68] While the Treasury Board may decide to appoint someone from a participating employer as one of its representatives on the Partners Committee, participating employers play no role in the development, amendment, or administration of the PSHCP.

[69] Third, participating employers are not responsible for paying benefits. Subsection 3.1.1 of the PSHCP Directive provides that the PSHCP is supported through contributions from the Treasury Board, participating employers, and plan members. The PSHCP spells out the contributions that participating employers must pay (currently, \$179.39 per employee each month).

[70] However, participating employers do not pay benefits to employees. The PSHCP Directive provides that “[t]he Plan is operated on a self-insured basis, which essentially means that the Plan assumes full liability for the payment of all costs related to the operation of the Plan, including the payment of claims.” This provision is a bit misleading or circular. The PSHCP is not a legal entity. “The Plan” cannot assume liability for anything. The purpose of this provision of the PSHCP is to make it clear that the plan administrator is not responsible for the costs of claims. The plan administrator issues the payments to members of the PSHCP, but it is not legally responsible to pay for the benefits out of its own pockets. The Treasury Board of Canada Secretariat makes the actual benefit payments, as authorized by the relevant Appropriation Act for that year (see, for the 2024-2025 fiscal year as an example, *Appropriation Act No. 2, 2024-25* (S.C. 2024, c. 18), Schedule 1, Vote 20).

[71] PSAC refers to the PSHCP as an administrative services only (ASO) plan. An ASO plan is one in which an insurance company administers health benefits, but the employer pays the cost of the benefits out of its own pocket. Calling the PSHCP an ASO plan is only partially correct. It is correct to refer to the PSHCP as an ASO plan insofar as the plan administrator is not financially liable to pay the benefits of the plan. However, that does not mean that each participating employer is responsible to pay the cost of the benefits under the PSHCP. Participating employers transfer contributions to the Treasury Board Secretariat, which is responsible for paying benefits. This means that it is an ASO plan for the Treasury Board but not for participating employers.

2. Legal framework for when insurance benefit issues arise under a collective agreement

[72] Arbitrators have often had to decide whether grievances about insurance benefit plans fall under their jurisdiction or, alternatively, must be dealt with by courts or another forum. Arbitrators have traditionally divided disputes over health or insurance benefits into four categories, called the *Brown and Beatty* categories (named after the original authors of Brown and Beatty, *Canadian Labour Arbitration*, 5th ed.). The four *Brown and Beatty* categories are:

- 1) The plan or policy is not mentioned in the collective agreement.
- 2) The collective agreement specifically provides for certain benefits.
- 3) The collective agreement provides that the employer will pay premiums.
- 4) The specific plan or policies are incorporated by reference into the collective agreement.

[73] The general rule is that disputes over benefits involving categories 1 and 3 are not arbitrable; disputes involving categories 2 and 4 are arbitrable. There are some exceptions to this general rule, and sometimes cases are a hybrid of two or more categories.

[74] PSAC cited *GP Northwoods LP v. Unifor, Local 99-P*, 2021 CanLII 26559 (ON LA), in support of its argument, which is a relatively recent decision that summarizes this principle as follows at pages 9 to 17:

...

This is yet another case, among many hundreds over the years, in which an arbitrator is invited to parse, sometimes in excruciating detail, collective agreement disability benefits language in an effort to determine whether employee benefits claims may be pursued against the employer under the agreement that gave rise to the benefits - the collective agreement - or whether they must be pursued in court against the employer and/or a third party insurer or administrator.

Few areas of labour arbitration are as arcane.

On the one hand, there are the four Brown and Beatty categories, which address the uses that can be made at arbitration of so-called "ancillary documents", including plans of insurance, which have long provided the lens through which such claims are viewed...

...

[Arbitrator Goodfellow goes on to point out some criticisms of what he refers to as the Brown and Beatty typology, then continues:]

...

... Despite, at one time, there being a number of prominent arbitral voices questioning, or more, the continued validity of the Brown and Beatty categories in the light of Weber and Pilon, [3] courts have pronounced the typology valid (see London Life Insurance Company v. I.W.A. Canada, Local 2693, (2000) 190 D.L.R. (4th) 428 (Ont. C.A.) and arbitrators have followed (see Telus Communications Inc., supra.).

Longevity, in other words, has produced legitimacy. The typology now provides the backdrop against which parties are taken to have organized and adjusted their affairs. Change is now a matter for collective bargaining (see e.g. the language of the central agreement between the Ontario Nurses' Association and the Participating Hospitals in this Province) not litigation.

...

The dividing line between categories two and three was historically understood this way: the second category involved the agreement providing for the payment of benefits, with no mention of insurance, while the third involved the agreement providing for insurance with no mention of the payment of benefits. The "hybrid" category recognizes an agreement that does both, with the result being arbitrability.

...

[75] Arbitrator Goodfellow also quoted from Mitchnick and Etherington, *Labour Arbitration in Canada*, at page 56, as follows:

...

The "four categories" are, however, only a guideline, and it is not always easy to fit the dispute into one of them. In the leading case of Coca-Cola Bottling Ltd. v U.F.C.W. (Boud) (1994), 44 L.A.C. (4th) 151 (Swan), the arbitrator emphasized that, while the categories may be of assistance, the fundamental task is to determine what the parties actually intended. Was it within their contemplation that the employer would bear primary liability for the payment of benefits, whether or not it chose to reduce its risk by taking out a policy of insurance, or did they intend that the employer could fully meet its obligation by purchasing a specified type of plan, which would be administered by an outside carrier?

...

[76] Finally, Arbitrator Goodfellow concluded that disputes over benefits when the employer has an ASO plan are arbitrable, stating:

...

Much more importantly, however, as the typology has come to be understood and applied in the benefits context, what matters to the possible application of category three is not just the presence of a Plan but the presence of a Plan of Insurance. There is no such plan here. The WI benefit is “self-insured”. The Company is responsible for paying the claims. It does not pay premiums to a third party to “commute its risk”. The Company bears the full risk. Sun Life simply administers the Plan on the Company’s behalf.

This is made crystal clear by Sun Life’s letters to employees, which, to repeat, state:

It is important for you to note that Georgia-Pacific Canada’s short-term disability benefits payments are self-insured. This means that Georgia-Pacific Canada has the sole legal and financial responsibility for this benefit and funds the claims. Sun Life provides administrative services only (ASO) such as claims processing and case management services.

Don’t come looking to us, in other words, says Sun Life, if your claim is denied. Any claim is against the Company. It is the Company that is solely legally and financially responsible for your benefits.

The absence of a true plan of insurance supports arbitrability: see Bell Canada v. C.E.P., Local 27, supra, and Scotsburn Dairy Group and National Automobile Workers (CAW), (dated January 5, 2008) unreported (Christie) discussed therein. It does so by negating the two main arguments against jurisdiction described above. The employer is not paying premiums to a third party to pay claims, it is paying the claims itself. And there is no concern that the entity administering the plan — Sun Life — cannot be made party to the proceedings or subject to an arbitral order. It need not be; there is no reason for it. Sun Life is simply acting as the Company’s agent, fulfilling the Company’s collective agreement obligations.

...

[77] It is with these two legal contexts in mind that I turn to PSAC’s arguments for whether this dispute is capable of being adjudicated because it is in respect of the interpretation or application of the collective agreement.

3. PSAC’s three grounds of the policy grievance against the CRA

[78] PSAC makes three main arguments for why its policy grievance against the CRA is in respect of the collective agreement, despite the collective agreement not referring to the PSHCP or health benefits in any way.

a. Argument #1: the 2002 memorandum of understanding is not relevant to this case

[79] First, PSAC addresses the 2002 memorandum of understanding and argues that it does not constitute an agreement to "... carve policies out of the Collective Agreement or, particularly, the application of the Management Rights clause." This is in response to the CRA's submission that the 2002 memorandum of understanding means that this policy grievance falls outside the scope of the collective agreement.

[80] With respect, the interpretation of the 2002 memorandum of understanding is not relevant to this issue because the PSHCP is excluded from its ambit. The 2002 memorandum of understanding was a red herring when the CRA made arguments about it, and I will not address it any further.

b. Argument #2: the CRA has not exercised any management authority

[81] Second, PSAC argues that the CRA has "acted in the sphere of benefits" and "... exercised its management authority to instead [of adopting its own plan] adopt the PSHCP and is an active, formal participant in that Plan." I disagree.

[82] The only decision that the CRA made was not to exercise its power to create a benefit plan exclusively for its own employees. After that, every single decision was made by the Treasury Board, from the decision to include the CRA as a participating employer, to the selection of the majority of the directors on the Adminstrating Authority, to the decision to change the plan administrator to Canada Life. Contrary to PSAC's submissions, the CRA did not adopt the PSHCP. The Treasury Board decided that CRA employees would be covered by the PSHCP.

[83] PSAC makes this related argument:

...
... the scheme of the Plan makes clear that CRA remains ultimately responsible for the provision of benefits to its employees under the Plan, as it funds the Plan for its employees and has simply delegated Plan administration to Treasury Board and Treasury Board's designated administrative service provider, Canada Life...
...

[84] Again, I disagree. The CRA is not responsible for providing health benefits to its employees; the Treasury Board is responsible. The Treasury Board designs the plan,

decides who is covered by it, and pays for all the benefits under the plan. The only thing that the CRA needs to do is transfer money out of its operating budget to the Treasury Board Secretariat's operating budget to offset some of the cost of the PSHCP.

[85] To put this into the *Brown and Beatty* typology, this is entirely category 1: the collective agreement is silent about the benefit plan. It is not category 2, as PSAC is, in practice, submitting.

[86] PSAC cites three cases in its submissions that are relevant to this point, but they are all distinguishable because they involve some action by the employer, unlike in this case, where CRA did not do anything.

[87] First, PSAC cites *Dalhousie University v. Dalhousie Faculty Association* (2012), 220 LAC (4th) 317. In 1996, the Nova Scotia government amalgamated the Technical University of Nova Scotia (TUNS) with Dalhousie University. Before that time, employees of TUNS were part of the province's *Public Service Superannuation Act*, (S.N.S. 1996, c. 24). In 1997, employees were given the option to stay in the Nova Scotia Public Service Superannuation Plan or move to the Dalhousie University Staff Pension Plan. Most of them decided to remain with the provincial plan. In 2000, the province added a Supplementary Employee Retirement Plan (SERP) to the provincial plan. The province also gave employers the ability to opt out of the SERP. Dalhousie University opted out of the SERP in 2007 (the earliest date it was permitted to). The union grieved, arguing that this decision was an unreasonable exercise of management rights. The arbitrator allowed the grievance in part. In response to the employer's argument that the grievance was not arbitrable because the employer was not responsible for the terms of the pension plan, the arbitrator stated:

...

14 ... I accept the University's submission that any changes to that plan over which it had no control could not be subject to the obligation set out in article 36.01 to exercise its management rights "fairly and reasonably, in good faith and without discrimination, and in a manner consistent with the provisions of this Collective Agreement". However, in this case the legislation creating the SERP gave to the University the right to decide whether to opt out of that supplemental pension plan, and the exercise of this right did affect a matter falling within the purview of the collective agreement — the entitlement of certain bargaining unit members to retire under the Public Service Superannuation Plan. It follows that the University's decision to opt out of the SERP must be made in a

manner consistent with the terms of article 36.01 of the collective agreement, since the University was exercising a managerial right that had an impact upon rights established by the collective agreement.

15. If there is a breach of this article, however, in my view it must relate to the University's decision itself rather than to any defect in due process made either before or after that decision was reached....

...

[88] In other words, the management-rights clause applied only to the exercise of management rights by the employer. In that case, the employer did not change the terms of the pension plan, and no policy grievance could have been filed against that change; however, it exercised a decision given to it by the legislated pension plan, and its decision was subject to the management-rights clause.

[89] I follow the same reasoning in this case. The management-rights clause in this collective agreement does not apply because the CRA played no role in the decisions being grieved.

[90] Second, PSAC relies on *GP Northwoods LP*. In that case, which I quoted from at length earlier, the arbitrator concluded that the collective agreement was a hybrid of categories 2 and 3, using the *Brown and Beatty* typology, because it involved a true ASO plan. As I have already set out, the PSHCP is an ASO plan for the Treasury Board, but it is not so for the CRA.

[91] Finally, PSAC relies on *Wassef v. Sun Life Assurance Company of Canada*, 2016 CanLII 58939 (ON SCSM). That case was a decision of the Ontario Small Claims Court. The plaintiff was described as a federal public servant, and the Court did not state whether he was employed by the Treasury Board or a separate employer. In essence, his claim was that he was entitled to medical expenses incurred over four years in the amount of \$10 000. He initially commenced an action against Sun Life but then added the Treasury Board as a defendant. The Court substituted the Attorney General of Canada as the proper defendant, instead of the Treasury Board. The Attorney General of Canada argued that the claim should have been brought against the Administration Authority. The deputy judge hearing that case disagreed, stating (in the passage relied on by PSAC):

...

[37] *In my view the addition of Federal Public Service Health Care Plan Administrator and Authority is unnecessary. Based on my analysis, the contractual relationship is between the plaintiff and the Government of Canada. In my view while the Government of Canada may determine how it will deliver its statutory obligations it cannot escape its liability, if such exists, by delegating its responsibilities to a third party....*

...

[92] The deputy judge's conclusion that "... the contractual relationship is between the plaintiff and the Government of Canada" is the key to his decision. That conclusion does not apply in this case.

[93] As a matter of constitutional law, there is only one "employer", and that is His Majesty the King in Right of Canada, commonly referred to as "the Crown". However, the Crown does not exercise his functions as employer personally. Instead, he delegates the exercise of those functions. The *Financial Administration Act* sets out to whom the Crown has delegated those functions, namely, the Treasury Board for those employed in the organizations listed in Schedules I and IV, and separate agencies, like the CRA, for those listed in Schedule V; see *Gingras v. Canada (C.A.)*, [1994] 2 F.C. 734 (C.A.) at pages 753 and 754.

[94] Therefore, in some sense, an individual public servant has a contractual relationship with the Crown. However, a bargaining agent's relationship with the Crown is set out in statute, not common law. Its collective agreement is with an "employer", in accordance with the definition of the term "collective agreement" in s. 2(1) of the *FPSLRA*. The *FPSLRA* also defines the term employer to mean His Majesty in Right of Canada as represented by either the Treasury Board, for departments or portions named in Schedules I and IV of the *Financial Administration Act*, or a separate agency listed in Schedule V (in this case, the CRA).

[95] The deputy judge in *Wassef* went on to state that "... the Government of Canada ... cannot escape its liability, if such exists, by delegating its [statutory] responsibilities to a third party." Again, that is true, but the proposition goes only so far when it comes to a collective bargaining agreement. The CRA has no statutory requirement to provide health benefits to its employees. Further, this is a policy grievance, so it must be about its responsibility under its collective agreement with PSAC. The proposition in *Wassef* is not relevant to this case.

[96] For these reasons, I have concluded that the CRA has not exercised any power or authority with respect to health benefits.

[97] This means that there can be no breach of the management-rights clause or the joint-consultation clause in the collective agreement. Any alleged breach of the management-rights clause is predicated on the employer having exercised some management right. The CRA did not.

[98] Similarly, the joint-consultation clause states that its purpose is "... providing joint consultation on matters of common interest." Since the CRA has no role in the provision of group benefits to its employees, this cannot be a subject matter of "common" interest between PSAC and the CRA, which means that the grievance on its face cannot relate to the joint-consultation clause. I acknowledge PSAC's argument that the CRA did not "... put forward any objection to the alleged breach" of this article. I disagree. Read in context, the CRA's submissions are about all three bases of this grievance (i.e. management rights, joint consultation, and no-discrimination).

c. Argument #3: there is an arguable case of a breach of the no-discrimination clause

[99] Finally, PSAC argues that "Long-standing arbitral decisions have clearly and repeatedly confirmed that a benefits plan established entirely by virtue of a management rights exercise is still subject to collective agreement requirements that it not be discriminatory."

[100] As I stated earlier, the PSHCP was not established by virtue of the CRA's exercise of management rights. The cases that PSAC cites are all about some action taken by the employer about a subject that was not set out in the collective agreement. In particular, PSAC cites three cases about benefits for employees in a same-sex relationship from the 1990s, namely, *Chrysler Canada Ltd. v. C.A.W.* (1996), 57 L.A.C. (4th) 81 ("*Chrysler*"); *Canadian Broadcasting Corporation v. Canadian Media Guild, Local 213* (1995), 45 L.A.C. (4th) 353 ("*CBC*"); and *C.T.E.A. v. Bell Canada* (1994), 43 L.A.C. (4th) 172. *Chrysler* was about a company pension plan that was outside the collective agreement; *CBC* was about health care, dental care, and life insurance benefits provided by the employer; and *Bell Canada* was about a company policy excluding same-sex partners from all its benefit plans (including the pension plan and health plans).

[101] In all three cases, the arbitrators concluded that the no-discrimination clauses in the collective agreements gave them the jurisdiction to rule on the exclusion of same-sex couples from benefit plans, despite the fact that the terms of the benefit plans were not set out in the collective agreement. Arbitrator MacDowell's decision in *Bell Canada* is probably the bluntest of the three, stating as follows:

...

29 On its face, Article 2 is a free-standing and mutual undertaking, by the union and the employer, not to "threaten, intimidate or unlawfully discriminate" against employees on the stipulated grounds. The clause does not elaborate on the context within, or the means by which, such threats or discrimination might occur. It is a simple prohibition against certain conduct by either party; and there is no reason on the wording of Article 2, to confine these mutual undertakings to the administration of the collective agreement, or to the particular subjects covered by the agreement. What the parties have done in Article 2.02, is make freedom from unlawful discrimination a negotiated, and general, term of employment. They have mutually agreed that neither of them will unlawfully discriminate.

30 Article 2.02 does not begin with a qualifying preface such as "when administering this collective agreement", or "when exercising rights under this collective agreement" -which could easily have been added had the bargaining parties wanted to limit their obligations. (And note that the latter phrase does appear, for another purpose, later on in the clause.) Nor, in my view, would such implication be consistent with the purpose and thrust of the language, which is to prohibit discrimination whatever form it may take and by whatever means it is effected by either party. For example: could the company exclude black workers from employee lunchroom facilities yet escape scrutiny under Article 2.02, because lunchroom facilities are not specifically addressed in the collective agreement? I do not think so; moreover, the inclusion of the Association in Article 2.02 reinforces this broad thrust. The union's institutional and representational activities are not confined to the particular terms that are negotiated from time to time, but extend to the negotiation process itself and the various ways that an employee might interact with his/her bargaining agent. The union undertakes that that interaction will not be tainted by discrimination on any of the prohibited grounds. It is a general undertaking that is not confined to particular items mentioned in the agreement.

...

59 Management is not obliged to exercise its rights in any particular way, or at all. But if it does do so, its actions must be consistent with the agreement, which includes an undertaking to deal with employees in a manner that does not involve unlawful discrimination. Thus, the company may have no obligation to

provide any particular schedule of employment advantages, work opportunities, privileges or perquisites for its employees. That remains a matter of managerial initiative and prerogative. But if it does provide such things for employees, it must do so in a lawful non-discriminatory manner. To take a less controversial example than the one raised on this grievance: management need not provide free parking for its employees, but if it does decide to do so, it cannot provide parking for white employees only, without contravening Article 2.02. Likewise, if it provides a benefit to employees, it cannot unlawfully discriminate in the provision of that benefit. I do not think it matters that the benefit in question is not found in the collective agreement. It is unlawful discrimination that is prohibited - not its means or manifestation.

...

[102] In those three cases, the employer provided a benefit to its employees. That benefit was not set out in the collective agreement. Nevertheless, the employer could not unlawfully discriminate in the way it provided that benefit.

[103] This case is different. The CRA is not providing health benefits to its employees, either directly or indirectly.

[104] Despite this, I have concluded that PSAC has shown an arguable case about a breach of the no-discrimination clause of the collective agreement.

[105] That clause reads as follows:

...

19.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, marital status, genetic characteristics, disability, membership or activity in the Alliance or a conviction for which a pardon has been granted.

[...]

19.01 Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, son identité ou expression de genre, sa situation familiale, son état matrimonial, ses caractéristiques génétiques, son incapacité, son adhésion à l'Alliance ou son activité dans celle-ci ou une condamnation

*pour laquelle l'employé-e a été
gracié.*

...

[...]

[Emphasis added]

[106] The phrase “discrimination ... with respect to an employee” is very broad. To my knowledge, the Board has not had to rule on the scope of such a provision in a case like this.

[107] However, s. 7(b) of the *Canadian Human Rights Act* (R.S.C., 1985, c H-6) makes it a discriminatory practice to differentiate adversely “... in the course of employment ... in relation to an employee ...”, and s. 14(1)(c) states that it is a discriminatory practice to harass someone “in matters related to employment”. This does not require that a respondent to a human rights complaint be the complainant’s employer or that the actions take place at the workplace; instead, there need only be a “sufficient connection with the employment context” (from *Nielsen v. Nee Tahi Buhn Indian Band*, 2019 CHRT 50 at para. 119).

[108] The Supreme Court of Canada has also said that the term “regarding employment” requires only that the discrimination at issue be “... **related to** the employment context in some way” [emphasis added] (see *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 at para. 37) and that the terms “in respect of employment” and in the “course of employment” are interchangeable (see *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at page 1293). In light of these cases, it is at least arguable that the phrase “discrimination ... with respect to an employee” in the no-discrimination clauses is close enough to the wording of those human rights statutes for the Board to apply the “sufficient connection” test.

[109] The CRA did not choose Canada Life as the plan administrator, and the CRA is not responsible for the PSHCP. However, despite that, there is an arguable case that discrimination with respect to the administration of the PSHCP has a sufficient connection with employment to be captured within the meaning of the no-discrimination clause of the collective agreement. At the very least, this is a question that requires evidence to decide.

[110] To give one analogy, when an employee in a store is harassed by a customer, an employer is not held responsible for the customer's remarks but is held responsible for how it responds to the customer's discriminatory conduct; see, for example, *Mohammed v. Mariposa Stores Ltd.*, 1990 CanLII 12519 (BC HRT) at para. 30. I acknowledge that this is not a particularly close analogy. However, it helps explain, to some extent, why PSAC has raised an arguable case. There is no arguable case that the CRA is responsible for the alleged maladministration of the PSHCP. However, there is still an arguable case that it is responsible for what it did after learning about the (allegedly) discriminatory maladministration because any discrimination in the provision of health benefits, if proven, may have a sufficient connection to the employment context to trigger the no-discrimination clause.

IV. Conclusion

[111] In conclusion:

- 1) The two policy grievances are continuing grievances and were not filed outside the 25-day limitation period.
- 2) The essential character of both policy grievances does not fall within the specialized appeals process to deal with a denial of a claim under the PSHCP.
- 3) It is premature to decide whether the policy grievances violate the *Burchill* principle, demonstrate a sufficient link to a prohibited ground of discrimination, or relate to the bargaining unit generally.
- 4) The policy grievance against the CRA does not raise an arguable case of a breach of clauses 6.01 (managerial responsibilities) or 21 (joint consultation) of the CRA collective agreement.
- 5) The policy grievance against the CRA raises an arguable case of a breach of clause 19.01 (no discrimination) of the CRA collective agreement.

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

(The Order appears on the next page)

V. Order

[113] The preliminary motion by the Treasury Board to dismiss the policy grievance against it is denied.

[114] The preliminary motion by the CRA to dismiss the policy grievance against it is allowed in part and I dismiss the grievance about clauses 6.01 (managerial responsibilities) or 21 (joint consultation) of the CRA collective agreement. The preliminary motion against the grievance as it concerns 19.01 (no discrimination) is denied, and that part of the grievance will continue.

[115] These two policy grievances will be scheduled in due course.

December 17, 2025.

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