**Date:** 20230327

**File:** 561-02-838

**Citation: 2023 FPSLREB 30**

*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

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 104**

Complainant

and

**TREASURY BOARD**
**(Royal Canadian Mounted Police)**

Respondent

Indexed as
*Canadian Union of Public Employees, Local 104 v. Treasury Board (Royal Canadian Mounted Police)*

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

**Before:** James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Ella Henry, counsel

**For the Respondent:** Elizabeth Matheson, counsel

Heard via videoconference,
May 16 to 20 and June 7 to 9, 2022.

## I. Introduction, and background to the complaint

[1] Canada's national police force, the Royal Canadian Mounted Police (RCMP), has three categories of employees. One category consists of police officers, referred to in the RCMP as regular members. These are the uniformed, plainclothes, or undercover police officers involved in day-to-day policing operations. The RCMP also employs public servants, primarily in administrative roles. In the 1970s, the Treasury Board (TB or "the respondent") created civilian member positions within the RCMP to support the regular members' operational fieldwork. This case involves the latter two categories.

[2] Civilian members of the RCMP have played many different roles, all related to law-enforcement activity. Some roles include telecommunications operator, the intercept (wiretap) monitor, and the forensic laboratory worker (including carrying out fingerprint and DNA record keeping and analysis). Included as well is the laboratory firearms analysis role, in support of investigations involving firearms-related complaints and investigations, and the role involving a specialty in explosive devices (the bomb squads). Some of the RCMP's information technology technicians and computer support personnel have been civilian members. RCMP aircraft pilots have been civilian members. Obviously, some civilian member positions are more closely aligned than others with the day-to-day fieldwork of the regular members.

[3] In the *Canadian Union of Public Employees v. Treasury Board (Royal Canadian Mounted Police)*, 2018 FPSLREB 17, decision, which was amended by the decision in *Treasury Board v. Canadian Union of Public Employees*, 2019 FPSLREB 96, the Canadian Union of Public Employees was certified as the bargaining agent for the bargaining unit composed of all employees in the Intercept Monitoring and Telecommunications Operations subgroups of the Law Enforcement Support Group and in the Police Operations Support Group defined in Part 1 of the Canada Gazette of March 9, 2019.

[4] In *Canadian Union of Public Employees v. Treasury Board*, 2022 FPSLREB 50, the Federal Public Sector Labour Relations and Employment Board ("the Board") declared the Canadian Union of Public Employees, Local 104 (CUPE or "the complainant"), the successor to the Canadian Union of Public Employees as the bargaining agent for the bargaining unit.

[5] On May 5, 2017, the complainant made a complaint against the TB about both the violation of a statutory freeze and an unfair labour practice.

[6] CUPE represents RCMP employees in the following highly specialized subgroups:

- LES-TO: the designation "TO" stands for telecommunications operators (pre- and post-2014), who are and have always been civilian members);

- PO-TCO: telecommunications operators (post-2014), who are public servants and who perform the same work as those in the LES-TO subgroup;

- LES-IM: intercept monitors (pre- and post-2014), who are and have always been civilian members; and

- PO-IMA: intercept monitors (post-2014), who are public servants and who perform the same work as those in the LES-IM subgroup.

[7] For the subgroups LES-TO and LES-IM, the prefix "LES" stands for "law enforcement support" and pertains to the nature of the work those employees do and have always done. These employees have been sworn in as civilian members.

[8] TOs, as the name "telecoms operators" suggests, perform a variety of law-enforcement-related tasks, including complaint-taking functions (which includes handling 911 calls), triaging complaints and emergency situations, performing outreach to other government or non-government agencies (depending upon the nature of the situation at hand), dispatching and assigning operational police resources to incidents and emergencies, and making records checks (including vehicle registrations, driver's licences, criminal records, and other databases of a provincial, national, or international nature). These functions are directly related to the immediate day-to-day needs and functions of the regular members (uniformed, plainclothes, and undercover).

[9] The designation "IM" stands for intercept monitors. As the name suggests, their functions pertain to monitoring and transcribing ongoing wiretap operations (in French or English or in whatever language is required). When necessary, IMs also relay information and intelligence, in real time, to regular members engaged in surveillance and undercover operations and in searches and arrests (takedowns). The IMs support all levels of police operations: uniformed, plainclothes, and undercover.

[10] In 2014, as part of an ongoing "Category of Employees" (COE) project, the TB created two new subgroups, PO-TCO and PO-IMA, to identically match the day-to-day work engaged in by the existing LES-TO and LES-IM subgroups. The prefix "PO" is meant to convey that these two new subgroups directly support police operations. It is of fundamental importance to this case that individuals hired into these two new subgroups are public servants. They are not sworn in and are not civilian members.

[11] One of the COE's objectives is to eliminate the civilian member positions. The TB created the PO subgroups in 2014 in anticipation of a so-called "deeming" provision. Simply stated, as of the date on which deeming occurs, the employees sworn in as civilian members will be deemed public servants, appointed under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). Although fixed deeming dates have been set in the past, they have come and gone, and deeming has yet to occur. The LES subgroups are still composed of civilian members.

[12] When the parallel public-servant positions were created in 2014, the civilian members in the LES-TO and LES-IM subgroups expressed some uneasiness. They were worried that the terms and conditions of their employment would be affected. In particular, they were worried about their pay and benefits. In response, on April 29, 2014, RCMP senior management assured them as follows: "To be clear, the current civilian members working in the LES-TO and LES-IM groups are not impacted at this time." Subsequent messages confirmed that nothing would be affected until deeming occurred.

[13] When the LES subgroups were created alongside other civilian member positions in the 1970s, the TB gave special consideration to the close day-to-day working relationships that the specific LES subgroups had with regular members. To reflect this, LES civilian members' pay was benchmarked to regular members' pay. After some initial trials using linear regression methods to estimate average rates of pay, in 1989, the TB formally fixed the maximum rate of pay for LES-TO civilian members at 79% of the pay earned by a senior constable (a regular member). A few years later, in 1992, the TB formally fixed the rate of pay for the LES-IM civilian members to that same benchmark, namely, 79% of the salary earned by a senior constable.

[14] Thus, from 1989 onward for LES-TOs (and from 1992 onward for LES-IMs), whenever the TB announced pay raises for regular members, the civilian members in these two specialized subgroups could count on an identical raise in their rate of pay. Whatever the new rate of pay became for a senior constable, they would receive 79% of that amount. No other civilian member subgroup has ever had its pay benchmarked to the pay of a regular member in this fashion.

[15] Regular members receive what is known as "service pay" commensurate with their length of service. The TB reflected the close working relationship of these two specialized LES subgroups with regular members by also paying them service pay. In

this way as well, the LES-TO and LES-IM subgroups are unique among all the civilian member subgroups.

[16] Before 2017, the last pay raise for regular members was announced in 2014. As was customarily the case, the LES civilian members received the same rate of increase as did the regular members in that their pay was benchmarked to 79% of the pay of a senior constable.

[17] After several years with no pay raises being announced, there was anticipation of such an announcement in spring 2017.

[18] Meanwhile, in December of 2016 and in January and March of 2017, CUPE filed applications for certification to bargain collectively for the LES and the PO subgroups. Before that, on January 4, 2016, RCMP Commissioner Bob Paulson ("the Commissioner") announced that no pay raise was anticipated in the 2015-2016 fiscal year, adding, "… however, any decision would be retroactive to January 1, 2015."

[19] When the pay raise was announced on April 5, 2017, the LES subgroups were surprised to see that they had been specifically excluded from the Commissioner's announcement. One of the civilian member TOs raised the issue with RCMP senior management, questioning why the customary 79% benchmark had not been applied.

[20] Deputy Commissioner Dan Dubeau, the RCMP's chief human resources officer (CHRO), replied to this TO directly, stating that the TB had approved a raise but only for regular members and that the TB did not approve any pay raise for the TOs because they were then the subject of a CUPE certification application to represent them in future collective bargaining processes. Therefore, their terms and conditions of employment were "frozen".

[21] On April 21, 2017, the CHRO issued a bulletin entitled, "Pay Package Update - Civilian Members". Under the heading "Telecommunications Operators (LES-TO) and Intercept Monitors (LES-IM) sub-groups" was the following:

> *Until 2014, the LES-TO and LES-IM subgroups had their rates of pay established in relation to the rates of pay for regular members because there was no equivalent occupational group in the core public administration.*
>
> *Since 2014, and in anticipation of deeming, these sub-groups have been pay-matched to the Law Enforcement Support (PO) group in the core public administration.…*

…

[22] CUPE made a complaint about an unfair labour practice that was contrary to ss. 190(1)(a) and (g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), as it was then named. On May 5, 2017. CUPE alleged the following:

> …
>
> *It is a violation of section 56 to alter the terms and conditions of employment after being notified of an application for certification. Included among the terms and conditions of employment are the reasonable expectations of the employees and [sic] protected from unilateral action by the employer. The purpose of section 56 is to maintain the status quo with respect to the terms and conditions of employment for the employees that a trade union seeks to represent.*
>
> …

[23] CUPE also alleged the following: "The Treasury Board explicitly altered the terms and conditions of employment of workers that had recently sought union recognition. This amounts to a deliberate and clear violation of sections 186(1)(a and b), 186(2)(a)(i), 186(2)(c), and 189(1)(a and b)."

[24] The respondent denied the allegations, maintaining that the statutory freeze prevented any change to terms and conditions of employment. The respondent stated:

> …
>
> *Until 2014, the telecommunications operator (LES-TO) and intercept monitor (LES-IM) sub-groups in the Law Enforcement Support (LES) group had their rates of pay established in relation to the rates of pay for regular members because there was no equivalent occupational group in the core public administration. Since 2014, these sub-groups have been pay-matched to the Police Operations Support (PO) group in the core public administration, in anticipation of civilian members being deemed to be appointed under the* Public Service Employment Act *on April 26, 2018. The PO group includes the PO-TCO and PO-IMA sub-groups; their work is identical to the work performed by civilian members in the LES-IM and LES-TO sub-groups.*
>
> …

[25] The *PSLRA* was in force when the complaint was made. On June 19, 2017, an *Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c.9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations*

*and Employment Board Act* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* (*FPSLRA*).

[26] The substance of both the freeze-provision complaint and the unfair-labour-practice complaint remains the same as before the legislative modifications were made.

[27] These matters were heard by way of a videoconference platform on May 16 to 20 and June 7 to 9, 2022.

[28] For the reasons that will follow, the complaint, about an unfair labour practice and the violation of a statutory freeze, is allowed.

[29] With respect to the statutory freeze violation, the term or condition of employment at issue was the benchmarking of the LES-TO and LES-IM salaries to 79% of a senior constable's pay. This term or condition has to do with salary and incremental pay increases, which are most certainly capable of being included in a collective agreement. This term or condition existed on the day on which the certification application was filed, and the respondent changed the term or condition of employment unilaterally during the freeze period.

[30] With respect to the unfair labour practice, the respondent discriminated against the LES-TO and LES-IM subgroups with respect to the term or condition of employment mentioned in the last paragraph by withholding the pay raise that they were due because they participated in the process of forming an employee organization.

## II. Testimony of the witnesses, and the documentary evidence

[31] Dennis Duggan, testifying on behalf of the respondent, described his lengthy career with the TB beginning in 1980 in strategic management and policy analysis. Although retired, he continues to perform contract work for the TB on aspects of collective bargaining.

[32] Mr. Duggan described how the regular members' pay rates were set before 2016, when collective bargaining became a reality. The RCMP would make a TB submission, which would be reviewed and then discussed. A recommendation would then be made to the TB's president, who would then issue the TB's decision.

[33] The TB's decision remained in effect until it decided that it should be changed, reversed, or limited in some way, and again, this process was done by way of a TB submission. Thus, for employees not involved in collective bargaining, their pay was determined by way of a TB submission.

[34] Mr. Duggan described the three categories of RCMP employees as follows:

> 1) Members appointed to a rank under the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10; "the *RCMP Act*"). They are the regular members, and for compensation purposes, the relevant ranks are from constable to superintendent, along with special constables.
>
> 2) Civilian members appointed to a level under the *RCMP Act*. They perform work such as telecommunications, intercept monitoring, and forensic sciences.
>
> 3) Public service employees appointed under the *PSEA* who provide corporate and administrative services to the RCMP.

[35] When the TB announces pay increases for the RCMP, they are announced as applying to regular members at the superintendent rank and below as well as special constables. The process for determining regular members' rates of pay not appointed to a rank is different. The civilian members' rates of pay are benchmarked to the rates of pay of their comparator groups in the rest of the core public administration. Most comparator groups are covered by collective agreements, so the majority of civilian members receive pay increases once the collective agreements for the benchmarked groups in the core public administration are signed. Once that happens, the RCMP is advised of the new rates of pay for civilian members and is authorized to implement them. This process, testified Mr. Duggan, has been in place for many years.

[36] Mr. Duggan described the origin and evolution of the LES-TO and LES-IM subgroups by referring to TB documents. In the 1970s, when civilian member positions were created, after extensive study and consultation, the TB acknowledged that the work performed by these two subgroups was very closely aligned with the day-to-day work of regular members. It was also noted that there was no comparator group in the core public administration, so the model that applied to the rest of the RCMP's civilian members could not apply to these two subgroups. Thus, their rates of pay were linked, in some fashion, to regular members' pay.

[37] Initially, a multifaceted linear regression model was used to provide an average rate of pay and was used as a benchmark to set pay-rate increases for these specialized civilian members. The linear regression model was found to be a

complicated and unsatisfactory method for a variety of reasons, and the TB eventually decided, in 1989 for the LES-TO subgroup, and later, in 1992, for the LES-IM subgroup, to abandon the linear regression model. To simplify matters, the TB formally benchmarked the maximum pay of the LES-TO and LES-IM subgroups to 79% of the pay of a senior constable in the RCMP. TB bulletins were issued to that effect.

[38] Thus, testified Mr. Duggan, when the regular members' pay increases were announced, the LES-TO and LES-IM subgroups would receive pay increases that matched, according to the 79% benchmark, the pay-rate increase for a senior constable.

[39] The complainant's witnesses testified to how these rate increases occurred. Yvonne McChesney was sworn in as a civilian member when she was hired in February 1998 and is still one, in the LES-TO subgroup. Kathleen Hippern, a TO, was initially hired as a temporary civilian employee (TCE) but later was sworn in as a civilian member. She remains a civilian member in the LES-TO subgroup. Elena Farid was also hired as a TCE, in 1992, and like Ms. Hippern was later sworn in as a civilian member, and she still is one, in the LES-IM subgroup.

[40] Ms. Hippern, Ms. Farid, and Ms. McChesney all testified to the increases in their rates of pay as civilian members being linked to a senior constable's pay. As civilian members in the LES-IM and LES-TO subgroups, they would receive the same rate of pay increase as regular members did, so the maximum salary of these subgroups would remain at 79% of a senior constable's salary. When pay increases for regular members were announced, civilian members in the LES subgroups knew that their pay would increase by exactly the same rate. None of these witnesses were explicitly made aware of this pay-rate increase mechanism when they became civilian members, but they all knew how it worked. They would receive their pay raises when the TB announced pay raises for regular members.

[41] Several of the witnesses referred to the report issued in 2007 about the RCMP and called the "Brown Report" after its author, which spoke (among many other things) of abusive practices in the hiring of TCEs, who were hired on an "as-and-when-required" basis but were effectively being used as full-time employees. TCEs worked side-by-side with civilian members but received none of the attendant benefits of a full-time employee. Ms. Hippern and Ms. Farid both testified to this as an abusive practice in their experience, and they testified that they were not alone in feeling that way. Both Ms. Hippern and Ms. Farid testified to being very proud and very pleased to

eventually be sworn in as civilian members and agreed that it was important to stop the abusive practices in hiring TCEs.

[42] Ms. Hippern, Ms. Farid, and Ms. McChesney all testified to their understanding that the PO-TCO and PO-IMA subgroups were created primarily as a mechanism to stop the abuse in TCE hiring practices.

[43] The witnesses also testified to learning that the PO-TCO and PO-IMA subgroups' creation was part of the larger COE project, one of the goals of which was to eventually eliminate civilian member positions. Ms. McChesney, Ms. Farid, and Ms. Hippern all expressed profound misgivings about the plan to eliminate civilian member positions. They each testified to their view that it is a disservice to civilian members.

[44] Ms. Hippern testified to making inquiries about the potential impact of the PO-TCO and PO-IMA subgroups' creation. She referred to an RCMP-wide broadcast from the CHRO dated April 29, 2014, which reads as follows:

> ***New Public Service Occupational Group for Telecommunications Operators and Intercept Monitors***
>
> *I would like to update you on an important development in the process of implementing the* Enhancing Royal Canadian Mounted Police Accountability Act (Accountability Act), an Act to amend the RCMP Act.
>
> *A new public service occupational group has been approved by Treasury Board called the Police Operations Support (PO) Group.*
>
> *Up until now, there had been no existing public service occupational group to classify the work of RCMP personnel in the Law Enforcement Support (LES) occupational group, with its two sub-groups: Intercept Monitors (LES-IM) and Telecommunication [sic] Operators (LES-TO), because this work is only performed for the RCMP.*
>
> *The new PO group includes two sub-groups: the Intercept Monitoring and Analysis Sub-Group (PO-IMA), and the Telecommunications Operations sub-Group (PO-TCO). The creation of the new occupational group and sub-groups will enable the RCMP to hire term and casual public service employees for this essential police support work. This is important because, as has been previously communicated, the* Accountability Act *contains a provision to remove the RCMP's authority to hire and employ Temporary Civilian Employees (TCEs).…*
>
> *The Terms and Conditions for this Occupational Group have not yet been approved by the President of TB, but to ensure the RCMP can continue to deliver service in these two areas, the Legislative Reform Initiative Team (LRIT) has confirmed with Treasury Board Secretariat that preparatory work can continue in anticipation of*

> *final approval. As soon as the RCMP receives TB approval, final preparations will commence. More information about the new group, including questions and answers will be posted on the COE site soon.*
>
> *To be clear, the current civilian members working in the LES-TO and LES-IM groups are not impacted at this time.*
>
> *I know that there have been many rumours about the date on which Treasury Board Ministers will deem civilian members to be public service employees. A lot of preparatory work is underway, but a date has still not been determined. Please be assured that we will advise you should more information become available.*
>
> *…*

[45] Deputy Commissioner Dubeau issued another RCMP-wide broadcast soon after this date entitled, "Follow-up Message from CHRO regarding Treasury Board (TB) approval of Terms and conditions (T&Cs) for Police Operations Support (PO) Group", which read, in part, as follows:

> *Further to my 2014-04-29 message regarding Treasury Board (TB) approval of the new Police Operations Support (PO) Group, I am pleased to announce that TB has now approved the Terms and Conditions (T&Cs) of employment for the new PO occupational group.*
>
> *This approval means that the RCMP may proceed to hire temporary (term and casual) public service employees (PSEs) using the new Intercept Monitoring and Analysis Sub-Group (PO-IMA) and the Telecommunications Operations Sub-Group (PO-TCO) for this essential police support work.*
>
> *The importance of this has been previously communicated as the …* (Accountability Act) *contains a provision to remove the RCMP's authority to hire and employ Temporary Civilian Employees (TCEs).…*
>
> *Current Civilian Members (CMs) working in the existing Law Enforcement Support (LES) occupational group composed of Intercept Monitors (LES-IM) and Telecommunication [sic] Operators (LES-TO) are not impacted at this time.*
>
> *The* Accountability Act *includes a mechanism whereby TB, at a date that has yet to be determined, can deem CMs to become PSEs. The new PO occupational group and its two sub-groups (i.e., PO-IMA and PO-TCO) do not apply to current CMs until deeming occurs. Upon deeming, all roles in the Operational Communications Centre (OCC) and functions of Intercept Monitoring (IM) (including training, policy, and supervisory functions) would be included in the new PO occupational group.*
>
> *It is also important to note that CMs receive benefits that TCEs do not, such as service pay, retirement move, paid funeral, etc. The benefits have not been addressed in the T&Cs at this time, but will be as part of the deeming process.*

> *We have posted more information about the group on the COE web site, including questions and answers (Q&As), and we encourage you to continue to visit that site for the latest information.…*
>
> …

[46] Ms. Hippern, Ms. Farid, and Ms. McChesney all testified to feeling reassured by the CHRO's two messages, which stated that the terms and conditions of their employment as civilian members would not be affected until the deeming date. Ms. Hippern referred to the Q&A (question and answer) site that the CHRO's messages referred to and found nothing to indicate that the existing terms and conditions of employment for civilian members had changed or would change until deeming. She referred to several examples from the Q&As:

> …
>
> [Q:] *Why was the PO occupational group needed now if a deeming date isn't known yet?*
>
> [A:] *The* Accountability Act *specifies that the RCMP will no longer have the authority to hire and employ TCEs, therefore all employees hired for temporary needs must now be employed under the* [PSEA]*. The PO occupational group was created because there had been no existing public service occupational group to classify the work of the Intercept Monitors (LES-IM) and Telecommunications Operators (LES-TO), because this work is only performed in the RCMP.*
>
> [Q:] *How will the new PO occupational group apply to Civilian Members?*
>
> [A:] *The* Enhancing RCMP Accountability Act *includes a mechanism whereby Treasury Board, at a date that has yet to be determined, can deem CMs to become PSEs. The new PO occupational group and its two sub-groups (i.e., PO-IMA and PO-TCO) would not apply to current Civilian Members until deeming occurred [sic] ….*
>
> [Q:] *What happens to the existing LES-IM and LES-TO classification standards?*
>
> [A:] *It is the intent that the existing LES-IM and LES-TO classification standards will continue to be used to classify Civilian Member positions until deeming takes place.*
>
> [Q:] *How will the new PO classification standard be used in the interim, i.e. until deeming?*
>
> [A:] *For now, the new PO classification standard will be used to create public service positions in the PO group to be staffed on a temporary basis only because the RCMP will no longer utilize TCEs. Any new, full time positions will still be staffed pursuant to the Civilian Member staffing process.*
>
> …

[47] The questions and answers on the COE website further reassured Ms. Hippern that nothing would change for civilian members until deeming took place.

[48] Lourena Williams testified for the respondent about her role, beginning in 2018, as the director of the COE project. She testified to two recommendations in the Brown Report that pertained specifically to TCEs and that explained the need to eliminate that particular category of employee. She became very familiar with the terms and conditions of employment in the different civilian member groups and in their core public administration comparator groups.

[49] Ms. Williams testified to the unique nature of "deeming" provisions for civilian members. Nothing like this had ever been done before in the public service, so there was no precedent for what the RCMP was about to engage in. The LES-TO and LES-IM subgroups were unique among the civilian member subgroups because there were no core public administration comparator groups, and therefore, there was no way to hire new public servants into those very specific roles. She testified to the IM subgroup as being a primary user of TCEs, hence the immediate need for an equivalent group so that new employees (public servants) could be hired.

[50] Ms. Williams and Mr. Duggan referred to the TB's submissions on the creation of the two new subgroups, as well as this letter to the RCMP's CHRO, Deputy Commissioner Dan Dubeau, from Manon Brassard, the assistant deputy minister at the TB, dated May 16, 2014:

…

> *Deputy Commissioner Dubeau:*
>
> *I am pleased to advise that the Ministers of the Treasury Board have approved a new* Public Service Employment Act (PSEA) *Police Operations Support (PO) Group, along with its related Classification Standard, Qualification Standard, and pay line, for exclusive application by the RCMP. Within its two sub-groups of Telecommunications Operations (PO-TCO) and Intercept Monitoring and Analysis (PO-IMA), the new PO Group has been specifically designed to accommodate RCMP work that is currently being done by RCMP Civilian Member Intercept Monitors (IM) and Telecommunication Operators (TO) in the* RCMP Act *Law Enforcement Support (LES) Group.*
>
> *The PO Group became effective May 15, 2014, the date on which the President of the Treasury Board approved its terms and conditions of employment. In particular, the PO Group's terms and conditions of employment have been directly linked to those of the Technical Services (TC) Group, by way of consequential*

> *amendments to the* Directive on Terms and Conditions of Employment *and the* Directive on Terms and Conditions of Employment for Certain Excluded / Unrepresented Employees. *Concurrently, these Directives were also amended with PO Group specific language in order to accommodate RCMP operational flexibilities with regard to hours of work and assignment of shifts.*
>
> *Effective May 15, 2014, the RCMP is at liberty to hire casual, term, and indeterminate employees to perform work that falls within the PO Group. In the short-term, creation of the PO Group facilitates the RCMP's transition from Temporary Civilian Employees (TCEs), expected later this year. In the longer-term, the existence of the PO Group provides for a comprehensive classification solution to the "deeming" of Civilian Members from under the* RCMP Act *to* PSEA *groups, anticipated at some future date.*
>
> …
>
> [*Sic* throughout]

[51] Ms. Williams testified to her efforts as the COE project's director to answer inquiries on the implications of deeming. She testified to the importance of reassuring the civilian members that nothing in their day-to-day lives would change until deeming occurred. She said that this was important in terms of both employee morale and organizational stability.

[52] In the meantime, following a Supreme Court of Canada decision affirming the right of RCMP employees to bargain collectively, CUPE began to seek certification for groups of employees. On December 9, 2016, it filed an application for certification for the following proposed bargaining unit: "all Civilian Members of the Royal Canadian Mounted Police within the Law Enforcement Support - Telecom Operators (LES-TO) occupational sub-group" (Board file no. 542-02-8).

[53] On January 19, 2017, CUPE filed an application for certification for the following proposed bargaining unit: "all employees of the Treasury Board of Canada within the Police Operations Support - Telecommunications Operations occupational subgroup ("PO-TCO")" (Board file no. 542-02-9).

[54] On March 28, 2017, CUPE filed an application for certification for the following proposed bargaining unit (Board file no. 542-02-11):

> *a) All Civilian Members of the Royal Canadian Mounted Police within the Law Enforcement Support - Intercept Monitors ("LES-IM") occupational subgroup; and*

> *b) All employees of the Treasury Board of Canada within the Police Operations - Intercept Monitoring and Analysis ("PO-IMA") occupational subgroup.*

[55] All the witnesses testified to the absence of a pay raise from 2014 onward. Entered into evidence was a "Commissioner's Broadcast" dated January 4, 2016:

> …
>
> *Update on the RCMP pay raise submission*
>
> *In an effort to keep you informed, I am providing you with an update on the RCMP pay raise for 2015, which I had submitted to Treasury Board Secretariat earlier last year. The election of a new government and the subsequent transition process has caused delays in the approval of the new pay package.*
>
> *Nonetheless, the process is still ongoing and work is continuing. Unfortunately, the Treasury Board Secretariat does not anticipate a resolution on this matter this fiscal year (March 31, 2016), however, any decision would be retroactive to January 1, 2015.*
>
> *We have been waiting on this outcome for quite some time and I appreciate your continued patience throughout this process. I will provide further updates as information becomes available.*
>
> …

[56] Ms. Hippern testified to her assumption, shared by her civilian member colleagues, that this pay raise would be no different from any other past one, in that the regular members' rate increase would apply to civilian members in the LES group by means of the 79% benchmark. She testified that "there was no reason to believe otherwise".

[57] Ms. Hippern, Ms. Farid, and Ms. McChesney all testified to their shock when they read the Commissioner's April 5, 2017, announcement:

> …
>
> *I am advised that the Treasury Board has approved a pay package for regular members of the RCMP for 2015 and 2016. In this package regular members will receive a 1.25% increase dated January 1, 2015 and 1.25% dated January 1, 2016 with an additional market adjustment allowance of 2.3% dated April 1, 2016. These increases total 4.8%.…*
>
> …

[58] Ms. Hippern testified to it being the first time she had ever seen a specific mention of a pay increase for "regular members". She sent a message to the CHRO the following morning, April 6, 2017, which reads, in part:

> *Good morning Sir,*
>
> *I read the Commissioners broadcast on the pay raise from last night. Does he not realize that the LES group is pay matched to the RM's? Does anyone realize it? Does anyone realize we are MEMBERS. Sworn members at that. Does anyone care? Clearly not. That broadcast was a further diss of us. We are yesterdays news.…*
>
> …
>
> [*Sic* throughout]

[59] Deputy Commissioner Dubeau replied:

> *Good morning Kathleen - thank you for your frank message and I understand your frustration. However, I must clarify why the broadcast yesterday only addresses our regular member pay. As per the broadcast, yesterday the Commr and I were to advised that the employer, Treasury Board, had approved a raise for our Regular Member group only. TB did not approve any raise for our TOs given this group is currently as subject of a certification application by CUPE to represent this group in future collective bargaining processes. As such, Terms and Conditions of this group are 'frozen' as per Section 56 of the PSLRA that states:*
>
> ***56** After being notified of an application for certification made in accordance with this Part, the employer may not, except under a collective agreement or with the consent of the Board, alter the terms and conditions of employment that are applicable to the employees in the proposed bargaining unit and that may be included in a collective agreement unit* [until]
>
> *(a) the application has been withdrawn by the employee organization or dismissed by the Board; or*
>
> *(b) 30 days have elapsed after the day on which the Board certifies the employee organization as the bargaining agent for the unit*
>
> *As such, we must be guided by the provisions of the PSLRA and respect the certification process as it unfold.*
>
> *Once again, thank you for reaching out to me and I hope my explanation elucidates the legislative requirements imposed on our organization during certification.*
>
> *Dan*
>
> [*Sic* throughout]

[60] Ms. Hippern responded approximately 17 minutes later with, "Thank-you [*sic*] Sir. We have always been tied to regular member pay. Anything that is of normal course of business applies and is not tied to this freeze. This is our pay raise as well."

[61] Deputy Commissioner Dubeau and Ms. Hippern exchanged additional similar messages on April 6 and 7, 2017.

[62] On April 13, 2017, the Commissioner issued the following RCMP-wide broadcast that read, in part:

> …
>
> *Further to my broadcasts regarding the regular member pay package, I would like to provide you with some additional information and clarification. The pay package the government announced applies to regular members (up to and including the rank of superintendent) and special constables.*
>
> …
>
> *I will provide information concerning civilian member pay raises in a separate message. I would like to thank you in advance for your patience in this matter.*
>
> …

[63] Ms. Hippern, Ms. Farid, and Ms. McChesney each testified to their feelings, which they said their colleagues echoed, which was that the denial of their pay raise was a form of reprisal because they had taken steps to seek representation, for collective bargaining purposes. Ms. Hippern said, frankly, and with great emotion, "The feeling was that we had screwed ourselves out of our pay raise by signing a union card."

[64] The CHRO issued no further communication on the matter until April 21, 2017:

> ***Pay Package Update – Civilian Members***
>
> *Since the regular member pay package was announced on April 5, 2017, we have received many questions from civilian members about adjustments to their rates of pay. I would like to provide some clarity, particularly for telecom operators, intercept monitors and pilots.*
>
> ***Adjustments to the rates of pay of civilian members***
>
> *The majority of civilian members are pay-matched to comparator groups in the rest of the core public administration who are covered by collective agreements. They will receive pay increases once the collective agreements for these benchmarked groups are signed.*
>
> …
>
> ***Telecommunications Operators (LES-TO) and Intercept Monitors (LES-IM) sub-groups***
>
> *Until 2014, the LES-TO and LES-IM subgroups had their rates of pay established in relation to the rates of pay for regular members because there was no equivalent occupational group in the core public administration.*
>
> *Since 2014, and in anticipation of deeming, these sub-groups have been pay-matched to the Law Enforcement Support (PO) group in*

> *the core public administration. The PO group is not currently represented by a bargaining agent.*
>
> *The Canadian Union of Public Employees (CUPE) has filed applications for certification to represent civilian members who occupy positions in these sub-groups which has resulted in a statutory freeze. Pursuant to* ***section 56 of the*** **Public Service Labour Relations Act** ***(PSLRA),*** *most of the terms and conditions cannot be amended following applications for certification.*
>
> *The rationale for the "freeze" on terms and conditions of employment is to provide the proposed bargaining agent with the opportunity to represent the interests of its future members in collective bargaining once certified.*
>
> …
>
> [Emphasis in the original]

[65] Deputy Commissioner Dubeau, the CHRO, did not testify at the hearing.

[66] Ms. Williams testified to receiving many information requests about the circumstances surrounding the pay-raise announcement on April 5, 2017. She was cross-examined on whether there was any indication before April 21, 2017, of the rates of pay for the LES subgroups (TO and IM) being pay-matched to the PO groups created in 2014. She testified to some of the items of correspondence received in the COE mailbox and the responses to those inquiries. In particular, she referred to this exchange of correspondence between Andree Lupien, Ms. Williams's immediate predecessor as the COE project's director; Alex Benoit, a civilian member in the LES-TO subgroup; and Assistant Commissioner Stephen White, Assistant Chief Human Resources Officer:

- On June 18, 2016, Mr. Benoit asked Ms. Lupien, "HI [*sic*] Andree re the COE THING- as a CM-- 25 years-- I m [*sic*] getting mixed messages on a few topics-- hoping you can clarify".

- On June 27, 2016, Ms. Lupien responded with this:

  > *Bonjour Alex,*
  >
  > *Sorry for the delay in responding.*
  >
  > *You have a number of questions which we will try to answer, but are not in a position at this time to respond to your questions on terms and conditions of employment of civilian members upon deeming.*
  >
  > …
  >
  > *The LES category is not currently pay-matched to an occupational group in the public service.…*
  >
  > …

> • On August 9, 2016, Mr. Benoit responded with questions about why civilian member pilots should be categorized as special constables and not civilian member TOs.
>
> • On August 16, 2016, Assistant Commissioner Stephen White wrote to Mr. Benoit, summarizing the review of the duties and responsibilities of the LES-TO subgroup in the context of the creation of the PO-TCO subgroup. He concluded with this sentence: "As a result, all civilian member positions in the RCMP, including LES-TO, have been mapped to occupational groups in the public service."

[67] Mr. Duggan testified to his understanding of the TB's prerogative to establish and change rates of pay. He testified to the circumstances surrounding the creation of the civilian member category of employee in the RCMP and to the desire to pay-match civilian members' rates of pay to public service comparator groups. This was done for all but two subgroups, LES-TO and LES-IM, because of the lack of a comparator group at the time. Deeming would not be possible without a comparator group, so one was created.

[68] Mr. Duggan testified that when the comparator group was created in May of 2014, the rates of pay for LES-TO and LES-IM subgroups were immediately pay-matched to the PO-TCO and PO-IMA groups.

[69] Mr. Duggan was asked how he was able to reconcile the statement in the CHRO's broadcast on April 29, 2014, "[t]o be clear, the current civilian members working in the LES-TO and LES-IM groups are not impacted at this time" with what was arguably a very tangible impact, namely, the pay-matching of the LES-TO and LES-IM to the PO-TCO and PO-IMA subgroups as of May 16, 2014. Mr. Duggan answered that at that point, they were not impacted. He testified to the COE project's clear intent to eliminate civilian member positions by including them in the PO group upon deeming.

[70] Mr. Duggan repeated that according to the pattern established in 1972, pay-matching only required classification into an identical group in the core public administration. He referred to this relevant TB submission:

> *4) The Treasury Board … directs that Public Service rates of pay as revised from time to time shall apply to those Civilian Members and Special Constable positions which have been classified in accordance with Public Service Classification Standards, effective April 1, 1972.*

[71] Mr. Duggan testified that this is precisely what happened on May 16, 2014, when LES-TO and LES-IM positions were classified in accordance with the public service classification standards pertaining to PO-TCO and PO-IMA positions.

## III. Summary of the arguments

### A. The complainant's submissions

[72] Section 56 of the *FPSLRA* reads as follows:

| | |
|---|---|
| ***56*** *After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer is not authorized, except under a collective agreement or with the consent of the Board, to alter the terms and conditions of employment that are applicable to the employees in the proposed bargaining unit and that may be included in a collective agreement until* | ***56*** *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 ne peut modifier les conditions d'emploi applicables aux fonctionnaires de l'unité de négociation proposée et pouvant figurer dans une convention collective, sauf si les modifications se font conformément à une convention collective ou sont approuvées par la Commission. Cette interdiction s'applique, selon le cas :* |
| ***(a)*** *the application has been withdrawn by the employee organization or dismissed by the Board; or* | ***a)*** *jusqu'au retrait de la demande par l'organisation syndicale ou au rejet de celle-ci par la Commission;* |
| ***(b)*** *30 days have elapsed after the day on which the Board certifies the employee organization as the bargaining agent for the unit.* | ***b)*** *jusqu'à l'expiration du délai de trente jours suivant la date d'accréditation de l'organisation syndicale.* |

[73] The purpose of the statutory freeze, argued the complainant, is set out in a number of cases and is summarized as follows in *National Police Federation v. Treasury Board (Royal Canadian Mounted Police*, 2021 FPSLREB 77 at para. 54:

> *[54] While the two types of freezes have a similar impact, their purposes have been recognized as somewhat different. The purpose of the bargaining freeze has been recognized as providing a stable point from which negotiations can take place (see* Whistler Parking*, at para. 35). The certification freeze has been recognized by the Supreme Court of Canada (SCC) as being designed to*

> *"facilitate certification" (see* United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 …).*

[74] Similarly, *National Police Federation v. Treasury Board*, 2020 FPSLREB 44 ("*NPF No. 1*") at paras. 44 and 45, states this:

> *[44] The post-application-for-certification freeze is also meant to keep a fixed point of departure in place for collective bargaining, but first and foremost, its purpose is to foster the exercise of the right of association, to facilitate the certification itself. It limits employer influence and eases the concerns of employees who actively exercise their rights by limiting the employer's power to manage during a critical period (see* Wal-Mart*, at paras. 34 to 36).*
>
> *[45] Both freezes are found in the labour relations legislation of every provincial jurisdiction as well as federally in the* Act *and in the* Canada Labour Code *(R.S.C., 1985, c. L-2; "the* Code*"). Labour board jurisprudence in all jurisdictions has largely applied the same analytical approaches to both types of freezes, and both parties suggested that the Board should do the same. I propose to do so, while bearing in mind that although both types of freezes are of crucial importance to our labour relations scheme, the s. 56 freeze serves the somewhat heightened purpose, in my view, of facilitating certification itself, which is the very basis of the collective bargaining relationship.*

[75] The test for establishing a violation of s. 56, argued the complainant, is found as follows in *National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, at paras. 55 and 56:

> *[55] The analysis of both types of complaints starts with a first stage, in which the decision maker assesses whether the complaint meets the following four-part test (see, for example,* Sudbury Tax Centre*, at para. 137, and* Wal-Mart*, at para. 39):*
>
> *1) that a condition of employment existed on the day the certification application was filed (or following notice to bargain, in the case of a bargaining freeze);*
>
> *2) that the employer changed the condition of employment without the consent or approval of the Board (or the bargaining agent, in the case of a bargaining freeze);*
>
> *3) that the change was made during the freeze period; and*
>
> *4) that the condition of employment is capable of being included in a collective agreement.*
>
> *[56] Complaints that meet all four of those elements are then subject to a second stage of analysis, most often termed a "business-as-before" analysis. That assessment is set out succinctly in an often-cited decision of the Ontario Labour Relations Board (OLRB),* Spar Professional and Allied Technical Employees

> Association v. Spar Aerospace Products Limited, *1978 CanLII 2255 (ON LRB) at para. 23, as follows:*
>
> > *23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union….*

[76] The complainant argued that although it is called a "freeze", it is not necessarily static, citing *NPF No. 1*, at paras. 49 to 54, as follows:

> *[49] However, it has long been accepted in the jurisprudence of this and other labour boards that even if these elements are proven, a statutory freeze does not require the employer to maintain a completely static work environment. Therefore, some changes may be made without violating the prohibition, if they are business as usual for the employer or if they are within the employees' reasonable expectations, or both.*
>
> *[50] The employer argues that the two tests are distinct and that employees' expectations cannot be considered in a business-as-usual analysis. It adds that intermingling them not only runs counter to the way they developed historically but also was confirmed as wrong by the Supreme Court of Canada's approach in the* Wal-Mart *decision.*
>
> *[51] I have to disagree with the employer on both counts. Jurisprudence that applies these two analytical approaches in a complementary and interconnected way is entirely in line with how they developed historically. Furthermore, I see nothing in* Wal-Mart *that changes that or that even suggests that an assessment of employees' expectations should not form part of a business-as-usual analysis.*
>
> …
>
> *[52] The business-as-usual test began as a way to deal more flexibly with the literal wording of freeze provisions. These provisions could be interpreted to mean that no changes are allowed — that they require a "static" or "deep" freeze. A few decisions have held exactly that. However, in most cases, labour boards have been unwilling to interpret freeze provisions that way. The jurisprudence has recognized that employers still need to run their operations, especially given the sometimes lengthy period from application to certification and from the notice to bargain collectively to a finalized collective agreement.*
>
> *[53] The business-as-usual approach is intended to ensure that employers do not make unexpected changes that could impact certification or collective bargaining but at the same time that they are not caught in a deep-freeze situation. However, analyzing*

> *when a change breaches a freeze provision is not an exact science, and the business-as-usual test has not proved helpful in every situation. For example, it could at times be difficult to apply that test in a post-certification application context. The application itself creates a very significant change that must have some impact on what can be considered business as usual. It has been recognized that business as usual does not mean that an employer can continue to make unilateral decisions as it did in its previous, union-free environment simply because that is what it did before.*
>
> *[54] When a business-as-usual analysis did not fit the situation or was difficult to apply, labour boards began to ask the question, "What were the employees' reasonable expectations?" If the employees could reasonably have expected the change (because there was a previous pattern of such changes or because they were notified that it was coming), it increased the likelihood that it would be found to be a business-as-usual change that did not violate the freeze.*

[77] The complainant argued that an important aspect of the test is that a decision has to have been both made and communicated to employees before the freeze period, referring once more to *NPF No. 1* at paras. 79 to 82:

> *[79] In many such cases, it is typical for employees to have some but not all the information about pending changes. The key is determining what they knew when the statutory freeze period began (see* Public Service Alliance of Canada, *2016 PSLREB 107 at para. 50). If they knew enough to reasonably expect that a term or condition of employment would change, then, in some cases, employers have been permitted to implement such changes.*
>
> *[80] In this case, the employees knew nothing.*
>
> *[81] The employer states that what is important is that the wheels were in motion before the freeze. In my view, the idea of "wheels in motion" necessarily and logically incorporates employees' reasonable expectations. In the absence of any notice to the employees, no decision is solid and can be changed at any time without accountability, rendering the whole concept and purpose of a freeze provision meaningless.…*
>
> *[82] To have any credence, the concept of "wheels in motion" has to mean work being done to implement a firm decision that employees know about. Wheels turning silently on an exclusively inside track mean nothing.*

[78] The complainant then addressed the specific context of a regular, planned, or expected wage increase, arguing that these changes are not prohibited by operation of the freeze. On the contrary, it argued, important changes such as wage increases are actually protected. It referred to the following cases to support this aspect of its argument:

- *Ontario Nurses' Association v. George St. L. McCall Chronic Care Wing of the Queensway General Hospital*, 1991 CanLII 6062 (ON LRB);

- *Ontario Public Service Employees Union v. Lifelabs LP*, 2019 CanLII 113709;

- *Ontario Public Service Employees Union v. Lifelabs LP*, 2022 CanLII 12320 (ON LRB);

- *International Union of Operating Engineers, Local 955 v. Teamco Construction Services Ltd.*, 1998 CarswellAlta 1405;

- *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Winners Merchants International L.P.*, 2005 CanLII 63021 (SK LRB); and

- *Canadian Union of Public Employees, Local 3010 v. Children's Aid Society of Cape Breton*, 2009 CanLII 57119 (NS LRB).

[79] The complainant argued against Mr. Duggan's interpretation of the future or hypothetical effect of the 1972 document on civilian members' pay. Civilian members other than those in the LES-TO and LES-IM subgroups are classified in accordance with a public service classification standard. The LES-TO and LES-IM subgroups have never been so classified, and doing so would require that the TB articulate it specifically, not just create a standard into which it would theoretically be possible to classify these employees.

[80] The 1972 TB decision to which Mr. Duggan referred is properly read, argued the complainant, as applying only to those positions classified in accordance with the public service standards **at that time**. The TB specifically turned its mind to what are now known as the LES subgroups, and clearly indicated (in 1989 for the LES-TO subgroup and in 1992 for the LES-IM subgroup) that their pay was to be benchmarked to 79% of a senior constable's salary. The TB issued bulletins to that effect. The complainant argued that any change to that pay-rate mechanism cannot simply be assumed or inferred; it must be clearly articulated and announced.

[81] The complainant argued that there is not a single document that specifies that the LES-IM and LES-TO subgroups are classified in accordance with the classification standards created for the PO subgroups on May 15, 2014. Rather, it is the other way around: the PO group's creation on May 15, 2014, deliberately linked its pay rates to those being earned by the LES-TO and LES-IM subgroups.

[82] The complainant argued that Ms. Hippern, Ms. Farid, and Ms. McChesney provided clear and convincing testimony about the expectations of civilian members in the two LES subgroups. When pay increases were announced for regular members,

their pay increased at the same rate. It does not matter that some civilian members knew more about the origins and the mechanism of the 79% link than others did. The important point, argued the complainant, was stated succinctly as follows by Ms. Hippern: "I just knew it; I always knew it."

[83] When Ms. Hippern asked direct questions about the impact of the PO subgroups' creation in May of 2014, RCMP management told her repeatedly that nothing would change until deeming occurred. Deeming has never occurred.

[84] Deputy Commission Dubeau received a letter dated May 16, 2014, from the TB, advising of the creation of the PO subgroups. The letter makes no mention of pay-matching the LES subgroups to the new PO subgroups. No mention was made of pay-matching when the raises were announced on April 5, 2017. No mention was made of pay-matching in the updates on civilian member pay on April 7 and 13, 2017. The only time it was mentioned was when Deputy Commissioner Dubeau issued an update on civilian member pay on April 21, 2017.

[85] The complainant argued it would certainly appear that the decision to pay-match the LES subgroups to the PO subgroups was made only between April 5 and 21, 2017. It would also appear that the pay raise was withheld from civilian members in the LES groups strictly due to CUPE's certification application. Deputy Commissioner Dubeau could have answered these important questions, argued the complainant, but he did not testify. The complainant argued that an adverse inference should be drawn from his failure to testify about these crucial aspects of the case.

[86] The respondent's interpretation of the implications of a statutory freeze, argued the complainant, are simply wrong. There is ample precedent for an employer to provide pay raises during a statutory freeze because they are an important component of an employee's reasonable expectations. Therefore, this complaint of an unfair labour practice must be upheld, and the pay raises announced on April 5, 2017, must be implemented.

**B. The respondent's submissions**

[87] The respondent acknowledged that the term or condition of employment at issue in this case is the benchmarking of the pay of LES-IM and LES-TO civilian members to 79% of a senior constable's pay. The respondent argued that to discharge its burden, the complainant had to show that that term or condition of employment

existed on the days on which the certification applications were filed, namely, December 9, 2016, and January 19 and March 28, 2017.

[88] The respondent argued that it was not a term or condition of employment at the onset of the freeze, for two reasons. First, the salary increase announced for regular members on April 5, 2017, was not confirmed before the onset of the freeze and was not yet a term of employment for anyone.

[89] With respect to the 79%, argued the respondent, the TB used benchmarking as a tool. This did not amount to a guarantee of future pay increases commensurate with regular member pay increases. The respondent characterized Mr. Duggan's testimony as convincing and authoritative on the pay-matching issue. The LES-IM and LES-TO subgroups were pay-matched to the PO group as of the date on which that comparator group was created in the core public administration; that is, on May 15, 2014. It arose by operation of the TB's 1972 document, pay-matching civilian member subgroups to comparator groups in the core public administration. As soon as the PO comparator group was created, the LES subgroups' pay was matched and was to be determined as per the appropriate collective agreement.

[90] As Mr. Duggan testified, the TB makes pay-increase decisions for any given year and is able to change its mind. That is consistent, argued the respondent, with *Meredith v. Canada (Attorney General)*, 2015 SCC 2 at para. 26, which reads as follows:

> *[26] For the affected RCMP members, the* ERA [*Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393] *resulted in a rollback of scheduled wage increases from the previous Pay Council recommendations accepted by the Treasury Board, from between 2% and 3.5% to 1.5% in each of 2008, 2009 and 2010. The original increase would also have doubled service pay and increased the Field Trainer Allowance. Both of these were also eliminated by the* ERA*, subject to subsequent negotiations pursuant to s.62 of that* Act*.*

[91] The respondent pointed out that when the TB formally linked the pay of LES-TO civilian members to 79% of a senior constable's pay in 1989, and when it did the same for LES-IM civilian members in 1992, it exercised its discretion to change rates of pay. As Mr. Duggan said, the TB was "changing its mind"; if there is no legislation or collective agreement restraining its actions, the TB can make such changes. Therefore, the decisions made in 1989 with respect to LES-TO civilian members and in 1992 to LES-IM civilian members must not be considered binding.

[92] The respondent referred to *Public Service Alliance of Canada v. Treasury Board*, 2020 FPSLREB 106 at paras. 11 and 12, which read as follows:

> *[11] Some 4000 RCMP civilian members are affected by the Categories of Employees project. They have been structured into a number of RCMP occupational groups and sub-groups. In preparation for the deeming date, the employer engaged in a process of "matching" the RCMP sub-groups to existing public service occupational groups, as possible. A match to a represented occupational group was communicated to the affected bargaining agent.*
>
> *[12] For the RCMP occupational sub-groups covered by these applications, the parties agree that their duties match the definition of an existing public service occupational group and classifications. The parties also note that the Categories of Employees project involved "pay-matching" the salaries of RCMP civilian members to their equivalent public service classifications.*

[93] That decision is consistent with the testimonies of both Mr. Duggan and Ms. Williams, argued the respondent, in terms of the stated objective of making sure employees who carried out the same work were paid the same amount.

[94] Although the respondent's position was that the term or condition of employment (the 79% link to regular-member pay) did not exist as of the freeze, it added that should the Federal Public Sector Labour Relations and Employment Board ("the Board") find otherwise, additional analysis is required. To that end, it referred to *National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2020 FPSLREB 71 ("*Whistler Parking*") at paras. 92 to 94, as follows, to set out the analytical framework:

> *[92] At the first stage, one must examine whether an employer made an unapproved change to the terms and conditions of employment during a freeze period, provided that the changed term and condition is capable of being included in a collective agreement.*
>
> *[93] At the second stage, one must consider whether that change was consistent with the employer's business-as-usual practices. Often at this stage, considering whether the changes were (or were not) part of the employee's reasonable expectations is required.*
>
> *[94] A third stage is required in those situations in which it is difficult or impossible to apply the business-as-usual or reasonable-expectations tests. In that case, one should apply the reasonable-employer test articulated in* Wal-Mart.

[95] Were the Board to find that in the first stage, there was a change, the analysis would shift to the business-as-usual practices. The respondent argued that not much supports LES-TO and LES-IM salary increases as a business-as-usual practice.

[96] The 79% internal relativity factor came into effect in 1989 and 1992, but shortly after that, in the mid-1990s, a pay freeze came into effect for all public servants. It was repeated roughly a decade later with the *Expenditure Restraint Act* (S.C. 2009, c. 2, s. 393). Thus, internal relativity was not the only factor influencing LES pay increases. Therefore, it should not be taken as an indisputable practice. The past practices concerning the LES salary increases were too haphazard to amount to a pattern.

[97] The respondent also called into question whether the expectation was reasonable. Expectations must be informed by the process by which terms and conditions are determined, not just by past effects. A salary increase is not a term of employment until the TB renders a decision granting the increase. In this case, no one was told of an increase until April 5, 2017.

[98] The third stage of the *Whistler Parking* analysis centres on what a reasonable employer would have done in the circumstances. The respondent stated once again that including the LES civilian members in the pay-raise package while a freeze period was in effect would have violated s. 56 of the *FPSLRA*, which would not have been a reasonable course of action.

[99] With respect to complaints of unfair labour practices, the respondent referred to *Gray v. Canada Revenue Agency*, 2013 PSLRB 11 at paras. 78 and 79, which read as follows:

> *[78] The burden of proof in an unfair labour practice complaint under subsection 186(2) of the* Act *is set out in subsection 191(3) as follows:*
>
> > **191**. (3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.
>
> *[79] The Board's case law is that a complainant must make an arguable case for a violation of subsection 186(2) of the* Act *before the reverse onus is engaged; see* Quadrini, Manella *and* Hager et al. *As the Board stated in paragraph 32 of* Quadrini*: "… [T]he threshold is the following: taking all of the facts alleged in the*

> *complaint as true, is there an arguable case that the respondents have contravened subparagraphs 186(2)*(a)*(iii) or (iv) of the new* Act*?"*

[100] The respondent further cited *Gray*, at para. 82, which reads as follows:

> *[82] Concerning the allegation that the CRA violated subparagraph 186(2)*(a)*(iv) of the* Act*, to establish that a violation of that provision occurred, a complainant must prove that any of the measures set out in paragraph 186(2)*(a)* were taken because the complainant "… has exercised any right under this Part or Part 2 …" (see subparagraph 186(2)*(a)*(iv)). In other words, a complainant must show that, as a result of having exercised a right under Part 1 or 2 of the* Act*, he or she was subjected to a reprisal measure set out in paragraph 186(2)*(a)*.*

[101] The respondent argued that nothing in the evidence indicated any intimidation, threats, or discrimination. The simple fact of this case, it argued, is that the freeze was cited as the reason the LES civilian members did not receive the same raise as did the regular members. There was no evidence adduced connecting the exercise of the right to any form of reprisal.

[102] There was no form of reprisal, argued the respondent. There is only a simple disagreement about the implications of the freeze period. The RCMP simply tried to follow the laws protecting the integrity of the certification process.

[103] The respondent argued that Ms. Williams gave a credible and reasonable explanation about the timing of the release of pay-matching information. The focus of the COE project, as it pertained to the LES civilian members, was to explain how deeming would affect them. Since, in the short term, no pay raise of any kind was on the horizon, there was no need to explain pay-matching, since it did not affect their daily work. Ms. Williams also explained that civilian members were posing a lot of questions and that it was not always possible to issue answers right away. This, argued the respondent, is a reasonable explanation for the delay between April 6 and 21, 2017.

[104] The evidence was clear, argued the respondent, that as soon as the relevant collective agreement was signed, letters were sent asking for the pay raise to be implemented. This was consistent with the RCMP's legal position all along, which was that the freeze period had to be respected.

[105] The respondent submitted that no person made any comment at any time about any aspect of the unionization process. The April 21, 2017, explanation to civilian members about pay-matching cannot in any way be construed as a form of intimidation, coercion, or undue influence.

[106] The respondent cited *Canadian Federal Pilots Association v. Department of Transport*, 2018 FPSLREB 91, on the issue of intimidation. That case reads as follows at paragraphs 659 and 660:

> *[659] Section 186(5) of the* Act *provides that an employer does not commit an unfair labour practice only by reason of expressing its point of view, so long as it does not use coercion, intimidation, threats, promises, or undue influence.*
>
> *[660] In* Canada Council of Teamsters v. FedEx Ground Package System, Ltd.*, 2011 CIRB 614 at para. 81, the Canada Industrial Relations Board (CIRB) dealt with the virtually identical provision in the* Canada Labour Code*. From the case law, that board derived the following non-exhaustive principles:*
>
> - An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.
> - In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?
> - The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.
>
> …

[107] As the Board noted at paragraph 618 of *Lala v. United Food and Commercial Workers Canada, Local 401*, 2017 FPSLREB 42, the context in which a statement is made is relevant to an analysis of whether s. 186(1) of the *FPSLRA* was violated. In this case, the context is simple, argued the respondent. The RCMP was responding in a straightforward fashion to questions from civilian members about the pay raise.

[108] In summary, argued the respondent, this complaint under s. 190 of the *FPSLRA* should be dismissed because the practice of benchmarking LES civilian member pay to 79% of a senior constable's salary ended when those members were pay-matched to the

PO group upon its creation on May 15, 2014. With respect to the characterization of the pay-matching announcement as an unfair labour practice, the respondent submitted that it simply did not occur as alleged. The explanations that Mr. Duggan and Ms. Williams provided about the timing of the announcement were entirely reasonable.

[109] The respondent concluded its submissions with two observations on remedy, should the Board find in the complainant's favour. First, no interest should be payable on any amounts awarded because under s. 226(2)(c) of the *FPSLRA*, the Board may award interest only on a grievance involving a termination, demotion, suspension, or financial penalty. On that point, *Dansou v. Canada Revenue Agency*, 2020 FPSLREB 100 at para. 36, reads as follows:

> *[36] This debt is time barred. If the February 2007 paycheque was incorrect, the recovery should have taken place in February 2013 at the latest. A recovery in April 2013 was too late. Consequently, the grievor should be reimbursed the $64.07. However, I have no jurisdiction to award interest on that amount because s. 226(2)(c) of the* Act *expressly provides the circumstances in which the Board may award interest as part of adjudicating a grievance: "… termination, demotion, suspension or financial penalty …". The issue in this case is not covered.*

[110] Similarly, *Roy v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 49 at para. 88, reads as follows:

> *[88] The Board has the authority to grant interest under s. 226(2)(c) of the* Act *in the case of a grievance "… involving termination, demotion, suspension or financial penalty …". Since Parliament defined the authority to grant interest, it follows by simple interpretation that the Board does not have the authority to grant interest in other circumstances, such as those in this case.*

[111] The respondent's second submission on remedy had to do with including the PO subgroups should the LES subgroups be successful in arguing for the salary increases announced in April of 2017. There is no basis for the presumption that the announced increase should flow to them. Since the PO group's creation in 2014, it has had a relevant collective agreement to which PO salaries are linked. The PO group has no history linking its salary to that of regular members; therefore, there is no past-practice argument upon which to rely.

## IV. Decision and reasons

[112] The parties correctly set out the analytical framework for an alleged violation of a statutory freeze and an allegation of an unfair labour practice. I will deal with each in turn.

### A. Statutory freeze violation

[113] I agree with the analytical framework articulated as follows at paragraphs 92 to 94 of *Whistler Parking*:

> *[92] At the first stage, one must examine whether an employer made an unapproved change to the terms and conditions of employment during a freeze period, provided that the changed term and condition is capable of being included in a collective agreement.*
>
> *[93] At the second stage, one must consider whether that change was consistent with the employer's business-as-usual practices. Often at this stage, considering whether the changes were (or were not) part of the employee's reasonable expectations is required.*
>
> *[94] A third stage is required in those situations in which it is difficult or impossible to apply the business-as-usual or reasonable-expectations tests. In that case, one should apply the reasonable-employer test articulated in* Wal-Mart.

[114] The term or condition of employment must be capable of being included in a collective agreement. The term or condition of employment at issue in this case is the benchmarking of the salary of LES-TO and LES-IM civilian members to 79% of the pay of a senior constable. Salary, and the calculation of increments to salary, are without a doubt terms or conditions of employment capable of being included in a collective agreement. This point was not in dispute.

[115] With respect to the onset of the freeze period, the parties agree that:

- On December 9, 2016, CUPE filed an application for certification for the following proposed bargaining unit:
  - All civilian members of the RCMP within the LES-TO occupational subgroup (Board file no. 542-02-8).

- On January 19, 2017, CUPE filed an application for certification for the following proposed bargaining unit:
  - All employees of the Treasury Board of Canada within the PO-TCO occupational subgroup (Board file no. 542-02-09).

- On March 28, 2017, CUPE filed an application for certification for the following proposed bargaining unit:

> - All civilian members of the RCMP within the LES-IM occupational subgroup; and
> - all employees of the Treasury Board of Canada within the PO-IMA occupational subgroup (Board file no. 542-02-11).

[116] These dates are important because they set very clear parameters for when the freeze began. As per s. 56(b) of the *FPSLRA*, the freeze period ends 30 days after an employee organization is certified. When the complaint was made on May 5, 2017, the certification application had not yet been decided; thus, the freeze period was in effect as of the announcement of the regular members' pay raises in April of 2017.

[117] I find that the respondent muddied the waters somewhat by arguing (I paraphrase) that "the raises announced in April of 2017 were not confirmed at the onset of the freeze and therefore were not yet a term of employment for anyone." That statement missed the mark because the April 2017 raises are not the term or condition of employment at issue. It is the benchmarking of LES-IM and LES-TO civilian member salaries. The crux of the matter before me is whether the creation of the PO groups on May 15, 2014, changed that term or condition.

[118] The heart and soul of this aspect of the respondent's case lies in Mr. Duggan's testimony with respect to his interpretation of certain TB documents, namely, the following:

- documents dating to 1972 as they pertain to categories of civilian members and their salaries;
- documents dating to 1989 as they pertain to the salaries of LES-TO civilian members;
- documents dating to 1992 as they pertain to the salaries of LES-IM civilian members;
- documents dating to 2014 as they pertain to the creation of the PO-TCO and PO-IMA subgroups and the implications for current LES-TO and LES-IM civilian members; and
- documents pertaining to the announcement of salary increases for members of the RCMP in April of 2017.

[119] It is common ground between the parties that the other categories of the RCMP's civilian members have a comparator group in the core public administration. The term "comparator group" simply means that the work they do is, for all intents and purposes, the same as the work being done by public servants in a specific comparator group in the core public administration.

[120] This is an important agreement because this is how the salaries of these other categories of civilian members are calculated. When a collective agreement is finalized for the core public administration comparator group, the TB authorizes a pay increase for the civilian members to which that particular comparator group is specifically related.

[121] It was determined as far back as 1972 that there were two subgroups of RCMP civilian members for whom there was no comparator group in the core public administration. Although they were not always called by these names, the two groups eventually came to be known as the LES-TO and LES-IM subgroups.

[122] Since the work performed by these two subgroups was more closely aligned to the work performed by regular members of the RCMP than it was with any group in the core public administration, their rates of pay had to be calculated differently.

[123] It is common ground between the parties that a linear regression analysis of the salaries of several different groups was initially the mathematical mechanism used to arrive at a rate of pay for these two groups. It is also common ground that the linear regression method contained inherent complications that were resolved by formal declarations, in 1989 for LES-TO civilian members and in 1992 for LES-IM civilian members, to simply benchmark their salaries at 79% of the salary of an RCMP senior constable.

[124] In 1989 and 1992, the TB announced and published those important decisions, and the bulletins were entered into evidence at the hearing.

[125] It is also common ground between the parties that from these dates onward, up to and including the pay raise in 2014, whenever the TB announced a pay raise for regular members of the RCMP, it was announced for "… RCMP members in the rank of Superintendent and below, as well as Special Constables."

[126] The LES civilian members knew that their pay would increase by the same rate, by virtue of the 79% calculation. The respondent submitted that the years of fiscal restraint in which pay raises of 0% were commonplace across the entire public service amounted to a "haphazard" environment, and did not amount to a pattern. I do not agree, because 79% of 0 is 0. Like everyone else in the public service affected by the *Expenditure Restraint Act*, the LES-IM and LES-TO civilian members did not receive a

pay raise during those years. This had nothing to do with how their pay raise was calculated.

[127] Mr. Duggan testified that according to the pattern established in 1972, pay-matching only requires classification into an identical group in the core public administration. Paragraph 4 of the TB's submission dated August 22, 1972, reads, in part, as follows:

> *4) The Treasury Board … directs that Public Service rates of pay as revised from time to time shall apply to those Civilian Members and Special Constable positions which have been classified in accordance with Public Service Classification Standards, effective April 1, 1972.*

[128] Mr. Duggan offered his opinion that this is precisely what happened on May 16, 2014, when LES-TO and LES-IM positions were classified in accordance with the public service classification standards pertaining to PO-TCO and PO-IMA positions. Thus, according to Mr. Duggan, the term or condition of employment for LES-TO and LES-IM civilian members has never changed.

[129] With the greatest of respect for Mr. Duggan, who is extremely knowledgeable in such matters and was a very important witness, he was not qualified as an expert in these proceedings. His opinion is just that, an opinion, and one that I have some difficulty with.

[130] There is no question that the classification exercise took place, but I disagree that the pay-matching of the LES-TO and LES-IM subgroups to the new PO-TCO and PO-IMA positions automatically resulted. In fact, if anything, the reverse is true. The (new) PO groups' pay was deliberately matched to the (existing) LES groups' pay, not the other way around.

[131] I find it very significant that every document entered into evidence on the subject of pay-matching explicitly mentioned the "deeming" exercise. Every time any witness was asked about the trigger for pay-matching the LES groups to the PO groups, the witness would mention deeming, which was to occur "at a date in the future". The evidence is conclusive that the deeming date is the date upon which pay-matching will occur, but deeming has yet to occur.

[132] The complainant's argument, with which I agree, is that if the TB's May 15, 2014, decision represented such an important departure from its 1989 and 1992

announcements of the benchmarking of LES-TO and IM pay to 79% of the pay of a senior constable, then it should have made such an announcement. If the TB has ever made such an announcement, it was not introduced into evidence.

[133] Entered into evidence was this letter to the RCMP's CHRO, Deputy Commissioner Dan Dubeau, from Manon Brassard, Assistant Deputy Minister at the TB, dated May 16, 2014:

> …
>
> *Deputy Commissioner Dubeau:*
>
> *I am pleased to advise that the Ministers of the Treasury Board have approved a new* Public Service Employment Act (PSEA) *Police Operations Support (PO) Group, along with its related Classification Standard, Qualification Standard, and pay line, for exclusive application by the RCMP. Within its two sub-groups of Telecommunications Operations (PO-TCO) and Intercept Monitoring and Analysis (PO-IMA), the new PO Group has been specifically designed to accommodate RCMP work that is currently being done by RCMP Civilian Member Intercept Monitors (IM) and Telecommunication Operators (TO) in the* RCMP Act *Law Enforcement Support (LES) Group.*
>
> *The PO Group became effective May 15, 2014, the date on which the President of the Treasury Board approved its terms and conditions of employment. In particular, the PO Group's terms and conditions of employment have been directly linked to those of the Technical Services (TC) Group, by way of consequential amendments to the* Directive on Terms and Conditions of Employment *and the* Directive on Terms and Conditions of Employment for Certain Excluded / Unrepresented Employees. *Concurrently, these Directives were also amended with PO Group specific language in order to accommodate RCMP operational flexibilities with regard to hours of work and assignment of shifts.*
>
> *Effective May 15, 2014, the RCMP is at liberty to hire casual, term, and indeterminate employees to perform work that falls within the PO Group. In the short-term, creation of the PO Group facilitates the RCMP's transition from Temporary Civilian Employees (TCEs), expected later this year. In the longer-term, the existence of the PO Group provides for a comprehensive classification solution to the "deeming" of Civilian Members from under the* RCMP Act *to* PSEA *groups, anticipated at some future date.*
>
> …
>
> [*Sic* throughout]

[134] The key sentence is the last one, which speaks of the "longer-term" [*sic*] implications for LES-TO and LES-IM civilian members. The creation of the PO-TCO and PO-IMA subgroups, to paraphrase Mr. Duggan, "gives the LES-TO and LES-IM civilian

members a place to land, once deeming occurs." I conclude that the purpose of the creation of the PO-TCO and PO-IMA subgroups was to permit and to facilitate the deeming process, not to change the way rates of pay were calculated for LES-TO and LES-IM civilian members. Yes, of course, the creation of the PO-TCO and PO-IMA subgroups will eventually have that effect, but only once deeming occurs.

[135] This conclusion was reinforced at many different turns. The LES-TO and LES-IM civilian members, who found themselves justifiably concerned about the terms and conditions of their employment when the May 16, 2014, announcement was published, immediately began to ask very specific questions about the implications of creating the PO subgroups.

[136] The CHRO had already written, on April 29, 2014:

> ***New Public Service Occupational Group for Telecommunications Operators and Intercept Monitors***
>
> *I would like to update you on an important development in the process of implementing the* Enhancing Royal Canadian Mounted Police Accountability Act (Accountability Act), an Act to amend the RCMP Act.
>
> *A new public service occupational group has been approved by Treasury Board called the Police Operations Support (PO) Group.*
>
> *Up until now, there had been no existing public service occupational group to classify the work of RCMP personnel in the Law Enforcement Support (LES) occupational group, with its two sub-groups: Intercept Monitors (LES-IM) and Telecommunication [sic] Operators (LES-TO), because this work is only performed for the RCMP.*
>
> *The new PO group includes two sub-groups: the Intercept Monitoring and Analysis Sub-Group (PO-IMA), and the Telecommunications Operations sub-Group (PO-TCO). The creation of the new occupational group and sub-groups will enable the RCMP to hire term and casual public service employees for this essential police support work. This is important because, as has been previously communicated, the* Accountability Act *contains a provision to remove the RCMP's authority to hire and employ Temporary Civilian Employees (TCEs).…*
>
> *The Terms and Conditions for this Occupational Group have not yet been approved by the President of TB, but to ensure the RCMP can continue to deliver service in these two areas, the Legislative Reform Initiative Team (LRIT) has confirmed with Treasury Board Secretariat that preparatory work can continue in anticipation of final approval. As soon as the RCMP receives TB approval, final preparations will commence. More information about the new group, including questions and answers will be posted on the COE site soon.*

> *To be clear, the current civilian members working in the LES-TO and LES-IM groups are not impacted at this time.*
>
> …

[137] If the manner in which pay increases for the LES-TO and LES-IM civilian members was about to be fundamentally and permanently changed in a couple of weeks, this would have been a very good time to signal it. To the contrary, the CHRO reassures everyone that "… the current civilian members working in the LES-TO and LES-IM groups are not impacted at this time."

[138] Soon afterward, in response to more concerns, the CHRO published a "Follow-up Message from CHRO regarding Treasury Board (TB) approval of Terms and conditions (T&Cs) for Police Operations Support (PO) Group", as follows:

> *Further to my 2014-04-29 message regarding Treasury Board (TB) approval of the new Police Operations Support (PO) Group, I am pleased to announce that TB has now approved the Terms and Conditions (T&Cs) of employment for the new PO occupational group.*
>
> *This approval means that the RCMP may proceed to hire temporary (term and casual) public service employees (PSEs) using the new Intercept Monitoring and Analysis Sub-Group (PO-IMA) and the Telecommunications Operations Sub-Group (PO-TCO) for this essential police support work.*
>
> *The importance of this has been previously communicated as the …* (Accountability Act) *contains a provision to remove the RCMP's authority to hire and employ Temporary Civilian Employees (TCEs).…*
>
> *Current Civilian Members (CMs) working in the existing Law Enforcement Support (LES) occupational group composed of Intercept Monitors (LES-IM) and Telecommunication [sic] Operators (LES-TO) are not impacted at this time.*
>
> *The* Accountability Act *includes a mechanism whereby TB, at a date that has yet to be determined, can deem CMs to become PSEs. The new PO occupational group and its two sub-groups (i.e., PO-IMA and PO-TCO) do not apply to current CMs until deeming occurs. Upon deeming, all roles in the Operational Communications Centre (OCC) and functions of Intercept Monitoring (IM) (including training, policy, and supervisory functions) would be included in the new PO occupational group.*
>
> *It is also important to note that CMs receive benefits that TCEs do not, such as service pay, retirement move, paid funeral, etc. The benefits have not been addressed in the T&Cs at this time, but will be as part of the deeming process.*

> *We have posted more information about the group on the COE web site, including questions and answers (Q&As), and we encourage you to continue to visit that site for the latest information.…*

[139] Again, another opportunity was squandered to deliver the very important news that LES-TO and LES-IM pay increases would no longer be tied to regular members' pay increases. Nor was any mention made on the Q&A site of pay-matching their salaries to the new PO subgroups. Obviously, based on the testimonies of Mr. Duggan and Ms. Williams and on the content of the CHRO's memos and emails, the PO subgroups' creation will most certainly have important consequences, but only once deeming takes place.

[140] Two dates have already been set for deeming. The first was April 26, 2018 (*Canada Gazette*, Part 1, Vol. 151, No. 6, page 672). The second was May 21, 2020 (*Canada Gazette*, Part 1, Vol. 152, No. 14, page 1134). Both dates have come and gone. Deeming has yet to occur.

[141] In 2014, after several years with no pay raises being announced, there was anticipation of such an announcement in the spring of 2017. On January 4, 2016, the Commissioner announced that no pay raise was anticipated in the 2015-2016 fiscal year, "… however, any decision would be retroactive to January 1, 2015."

[142] No mention was made in any of these bulletins or announcements of pay-matching for the LES-TO and LES-IM groups.

[143] Meanwhile, the COE project continued to generate concerns and questions for LES-IM and LES-TO civilian members, questions continued to be asked, and answers continued to be given about the terms and conditions of their employment.

[144] Not everyone in RCMP management was on the same page when providing these answers. Ms. Williams felt that Ms. Lupien was mistaken when she wrote:

> *Bonjour Alex,*
>
> *Sorry for the delay in responding.*
>
> *You have a number of questions which we will try to answer, but are not in a position at this time to respond to your questions on terms and conditions of employment of civilian members upon deeming.*
>
> *…*
>
> *The LES category is not currently pay-matched to an occupational group in the public service.…*

…

[145] I find that Ms. Lupien's statement was correct because she used the word "currently" in her response. The LES category, as of June 27, 2016, was not currently pay-matched to an occupational group in the public service because, according to every TB document entered into evidence, it will not be pay-matched until deeming occurs.

[146] On August 16, 2016, Assistant Commissioner Stephen White, Assistant Human Resources Officer, wrote to Mr. Benoit, summarizing the review of the duties and responsibilities of the LES-TO subgroup in the context of the creation of the PO-TCO subgroup. He concluded with the sentence, "As a result, all civilian member positions in the RCMP, including LES-TO, have been mapped to occupational groups in the public service."

[147] What Assistant Commissioner White wrote was correct — the LES positions had been mapped to public service occupational groups. What he did not state was that pay-matching had necessarily resulted from that mapping process. He could not have mentioned it because the TB was silent on this specific issue, because pay-matching would take place only upon deeming. Assistant Commissioner White could not elaborate because he did not testify at the hearing.

[148] I find that the complainant successfully discharged the burden of proof in its allegation of a violation of a statutory freeze. I make the following findings of fact on the basis of the witnesses' testimonies and the documentary evidence entered at the hearing:

> 1) A condition of employment existed on the day the certification application was filed for the LES-TO and LES-IM subgroups, which is salary and how it is to be calculated. To be precise, it is the benchmarking of LES-TO and LES-IM civilian members' pay to 79% of the pay of a senior constable.
>
> 2) The respondent changed that condition of employment by not giving the April 5, 2017, pay raise to the LES-TO and LES-IM subgroups, which was done unilaterally, without the Board's consent.
>
> 3) The change was made during the freeze period. As per s. 56(b) of the *FPSLRA*, the freeze period ends 30 days after an employee organization is certified. When the complaint was made, on May 5, 2017, the certification application had not yet been decided. Thus, the freeze period was in effect as of the announcement of the pay raises on April 5, 2017.
>
> 4) The condition of employment (salary and how salary is calculated) is capable of being included in a collective agreement.

[149] As per *NPF No. 1* at para. 78, "[t]o be within the employees' reasonable expectations, a change must be part of an established pattern such that the employees would reasonably expect it …". Since LES civilian members received (since 1989 for the LES-TO and 1992 for the LES-IM subgroup) 79% of a senior constable's salary, it can be safely said that on April 5, 2017, this was a reasonable expectation.

[150] The third stage of the *Whistler Parking* analysis centres on what a reasonable employer would have done in the circumstances. The respondent submitted that including the LES civilian members in the pay-raise package while a freeze period was in effect would have violated s. 56 of the *FPSLRA*, which would not have been a reasonable course of action.

[151] I find that the "reasonable-employer" analysis is not necessary in this case. It is required only if it is difficult or impossible to determine previous management practices. In this case, the practice was crystal clear. When pay raises for RCMP members were announced by the TB, the pay of LES-TO and LES-IM civilian members was benchmarked to 79% of the pay of a senior constable. This has never changed, and it will not change until deeming occurs.

[152] The respondent, by making the "reasonable employer" argument, claims that the pay raise could not have been granted because doing so would have violated the statutory freeze, which would not have been a reasonable course of action.

[153] I disagree. Regular, planned, or expected wage increases can occur in the context of a statutory freeze. I accept the related cases that the complainant submitted. But I wish to specifically reference *Ontario Nurses' Association*, in which the Ontario Labour Relations Board found that the employer breached the freeze provision by not paying the nurses a wage increase, which was contrary to a pattern that had emerged before certification. That is exactly what happened in this case. Paragraph 13 states this:

> *13 Although the "freeze" label has stuck, it is a bit of a misnomer. Sections 13 and 79 of the HLDAA and the LRA respectively do not necessarily contemplate a static situation. As the Board's jurisprudence demonstrates, it is the pattern that existed prior to the onset of the freeze and the reasonable expectations of employees which are preserved, not merely the terms and conditions of employment in effect at the point in time that the freeze provisions come into effect. As such, section 13 of the HLDAA and section 79 of the LRA are strict liability provisions in the sense that an employer's actions need not be necessarily improperly motivated for it to be in breach of them (see* Beaver Electronics Ltd. *[1974] OLRB Rep. Mar. 120,* The Wellesley

> Hospital *[1976] OLRB Rep. July 364,* Kodak Canada Ltd. *[1977] OLRB Rep. Aug* 517*).*

[154] That principle is reinforced as follows at paragraph 15:

> *15 Many of the cases in the Board's freeze jurisprudence involve the payment, or, more often, the non-payment of wage increases. The Board has consistently found that a failure to pay a wage increase in accordance with a past practice … constitutes a breach of section 13 of the HLDAA or section 79 of the LRA ….*

[155] Important changes such as wage increases must be protected, even during a statutory freeze.

[156] The complainant asked me to draw a negative inference from Deputy Commissioner Dubeau's failure to testify. It bears mentioning that the complainant could have requested a summons for the CHRO but did not. Although I agree that the CHRO's testimony would probably have shed some light on certain aspects of this case, I find that I do not need to draw a negative inference from his failure to testify to find that the respondent violated the freeze provision.

**B. Unfair labour practice**

[157] Section 185 of the *FPSLRA* defines "unfair labour practice" as follows:

| | |
|---|---|
| ***185*** *In this Division,* ***unfair labour practice*** *means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).* | ***185*** *Dans la présente section,* ***pratiques déloyales*** *s'entend de tout ce qui est interdit par les paragraphes 186(1) et (2), les articles 187 et 188 et le paragraphe 189(1).* |

[Emphasis in the original]

[158] The complainant's allegation of an unfair labour practice is simple and does not involve allegations of coercion, threats, intimidation, promises, or undue influence. It does allege discrimination in that the 2017 pay raise was withheld for the stated reason of its certification applications. Section 186(2) of the *FPSLRA* states this:

| | |
|---|---|
| ***186 (2)*** *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential* | ***186 (2)*** *Il est interdit à l'employeur, à la personne qui agit pour le compte de celui-ci ainsi qu'au titulaire d'un poste de direction ou de confiance, à l'*officier*, au sens du* |

| | |
|---|---|
| *position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall:* | *paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada *ou à la personne qui occupe un poste détenu par un tel officier, qu'ils agissent ou non pour le compte de l'employeur :* |
| ***(a)*** *Refuse to employ or to continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person* | ***a)*** *de refuser d'employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, de la licencier par mesure d'économie ou d'efficacité à la Gendarmerie royale du Canada ou de faire à son égard des distinctions illicites en matière d'emploi, de salaire ou d'autres conditions d'emploi, de l'intimider, de la menacer ou de prendre d'autres mesures disciplinaires à son égard pour l'un ou l'autre des motifs suivants :* |
| ***(i)*** *is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization ….* | ***(i)*** *elle adhère à une organisation syndicale ou en est un dirigeant ou représentant — ou se propose de le faire ou de le devenir, ou incite une autre personne à le faire ou à le devenir —, ou contribue à la formation, la promotion ou l'administration d'une telle organisation,* |
| … | […] |

[159] The respondent submitted the *Gray* decision on the issue of an unfair labour practice, which states this at paragraph 78:

> *[78] The burden of proof in an unfair labour practice complaint under subsection 186(2) of the* Act *is set out in subsection 191(3) as follows:*
>
> > ***191.*** *(3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

> *[79] The Board's case law is that a complainant must make an arguable case for a violation of subsection 186(2) of the* Act *before the reverse onus is engaged; see* Quadrini, Manella *and* Hager et al. *As the Board stated in paragraph 32 of* Quadrini*: "… [T]he threshold is the following: taking all of the facts alleged in the complaint as true, is there an arguable case that the respondents have contravened subparagraphs 186(2)*(a)*(iii) or (iv) of the new* Act*?"*

[160] The respondent further cited *Gray*, at para. 82, as follows:

> *[82] Concerning the allegation that the CRA violated subparagraph 186(2)*(a)*(iv) of the* Act*, to establish that a violation of that provision occurred, a complainant must prove that any of the measures set out in paragraph 186(2)*(a)* were taken because the complainant "… has exercised any right under this Part or Part 2 …" (see subparagraph 186(2)*(a)*(iv)). In other words, a complainant must show that, as a result of having exercised a right under Part 1 or 2 of the* Act*, he or she was subjected to a reprisal measure set out in paragraph 186(2)*(a)*.*

[161] As per the analysis in *Gray*, if the facts alleged in the complaint are taken to be true, is there an arguable case? The complainant alleges that the RCMP committed an act of discrimination with respect to pay when it withheld a pay raise to which the complainant was entitled because of the complainant's participation in the formation of an employee organization. The complainant asserted that the withholding of the pay raise was a reprisal. I find that this is a black-and-white assertion that if taken as true creates an arguable case for the complainant.

[162] When, on the evening of April 5, 2017, Ms. Hippern learned that the LES civilian members had been excluded from the pay raise, she wrote to the CHRO the first thing the next morning, asking why. Deputy Commissioner Dubeau's reply of April 6, 2017, is all that is needed to find that an unfair labour practice occurred. He replied:

> *Good morning Kathleen - thank you for your frank message and I understand your frustration. However, I must clarify why the broadcast yesterday only addresses our regular member pay. As per the broadcast, yesterday the Commr and I were to advised that the employer, Treasury Board, had approved a raise for our Regular Member group only. TB did not approve any raise for our TOs given this group is currently as subject of a certification application by CUPE to represent this group in future collective bargaining processes. As such, Terms and Conditions of this group are 'frozen' as per Section 56 of the PSLRA that states:*
>
> ***56** After being notified of an application for certification made in accordance with this Part, the employer may not, except under a collective agreement or with the consent of the Board, alter the*

> *terms and conditions of employment that are applicable to the employees in the proposed bargaining unit and that may be included in a collective agreement unit* [until]
>
> *(a) the application has been withdrawn by the employee organization or dismissed by the Board; or*
>
> *(b) 30 days have elapsed after the day on which the Board certifies the employee organization as the bargaining agent for the unit*
>
> *As such, we must be guided by the provisions of the PSLRA and respect the certification process as it unfold.*
>
> *Once again, thank you for reaching out to me and I hope my explanation elucidates the legislative requirements imposed on our organization during certification.*
>
> *Dan*
>
> [*Sic* throughout]

[163] The CHRO's explanation clearly discriminated against the complainant for the sole reason of its participation in the formation of an employee organization. I find that the complaint, as articulated, gave rise to a clearly arguable case to which the respondent had to reply and discharge its burden under the reverse-onus provision.

[164] Had the CHRO testified, he might have been able to explain himself, but he did not, and I find no other way to interpret his message: the pay raise was being withheld because of CUPE's certification application. I cannot, as the respondent urged, attribute this to unfortunate timing. This was retribution against the civilian members because they were participating in the formation of an employee organization.

[165] Therefore, the respondent did not discharge its burden of proving that an unfair labour practice did not occur. I find that it committed an unfair labour practice when it withheld the pay raise announced on April 5, 2017, from the LES subgroups.

[166] The effect of the CHRO's explanation had a profoundly negative impact on the LES civilian members. As Ms. Hippern so bluntly testified, "The feeling was that we had screwed ourselves out of our pay raise by signing a union card." The impact is important when determining the appropriate remedy.

**C. Remedy**

[167] The complainant asks for a declaration that the respondent violated the statutory freeze and committed an unfair labour practice. The complainant also asks the Board to order the payment of the pay raise announced on April 5, 2017, to the employees of the bargaining unit.

[168] S. 192(1) of the *FPSLRA* states that if the Board determines that a complaint is well founded, it may make any order that it considers necessary in the circumstances. The Board finds that both remedies requested by the complainant are necessary.

[169] This decision stands as a declaration that the respondent violated the statutory freeze and committed an unfair labour practice.

[170] The Board also orders the payment of the pay raise announced on April 5, 2017, to all employees of the bargaining unit. The LES subgroups should have received the pay raise announced on April 5, 2017, because the rates of pay of the LES subgroups remained benchmarked to 79% of the pay of a senior constable. Similarly, the rates of pay for the PO group have been pay-matched to the pay of the LES groups since 2014. This complaint arose in the context of an application for certification by CUPE to represent both groups, and it now represents a bargaining unit composed of those groups. As such, the PO groups should also benefit from the pay raise announced on April 5, 2017.

[171] There is some indication that portions of the raise, namely, the 1.25% effective January 1, 2015, and 1.25% effective January 1, 2016, have already been effected (see *Canadian Union of Public Employees v. Treasury Board (Royal Canadian Mounted Police),* 2018 FPSLREB 3). To the extent that this has already taken place, the remedy is to be adjusted accordingly.

[172] Otherwise, the complainant was clear that the 2.3% market adjustment for RCMP members in the rank of Superintendent and below and Special Constables effective April 1, 2016, has not been paid to the employees in the bargaining unit.

[173] In *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2013 PSLRB 139 at para. 33, the former Board found that it could not award interest under s. 192(1) of the *PSLRA*. I have no reason to make a contrary finding.

[174] I will leave it to the parties to calculate the amounts payable pursuant to the above directions. If the parties are unable to agree on the quantum of the remedy, the Board will remain seized to decide that issue. The remedy must be paid in full by the respondent within 90 days of the receipt of this decision, or, within that same time, the parties shall notify the Board in writing that the assistance of the Board is required to resolve the issue.

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

*(The Order appears on the next page)*

## V. Order

[176] The respondent has committed an unfair labour practice and has failed to comply with s. 56 of the *FPSLRA* (duty to observe terms and conditions).

[177] The pay raises and market adjustments that the TB announced on April 5, 2017, shall be paid to the employees of the bargaining unit.

[178] The amount of this remedy is to be reduced by any amount that might already have been paid.

[179] These remedies are to be paid within 90 days of the receipt of this decision.

[180] The Board retains jurisdiction over the calculation of the amounts payable pursuant to the above orders. If the parties are unable to agree on the quantum of the remedy, the parties shall, within 90 days of the receipt of this decision, notify the Board in writing that the assistance of the Board is required to resolve the issue.

March 27, 2023

**James R. Knopp,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**