Date: 20200429

File: 561-02-901

Citation: 2020 FPSLREB 44

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

NATIONAL POLICE FEDERATION

Complainant

and

TREASURY BOARD

Respondent

Indexed as
National Police Federation v. Treasury Board

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Christopher Rootham, counsel

For the Respondent: Richard Fader, counsel

Heard at Ottawa, Ontario,
December 18, 2018.

I. Complaint before the Board

[1] The National Police Federation (NPF) made this complaint under s. 190(1)(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). It states that the Treasury Board ("the employer") violated s. 56, a statutory freeze provision in the *Act*, which at that time was named the *Public Service Labour Relations Act*. For ease of reference in this decision, "the *Act*" refers to that legislation under both names.

[2] On April 18, 2017, the NPF applied for certification as the bargaining agent of a bargaining unit composed of all Royal Canadian Mounted Police (RCMP) regular members and reservists. At that time, s. 56 of the *Act* (referred to as simply "s. 56" from here on) provided as follows:

> ***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 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 *(a) the application has been withdrawn by the employee organization or dismissed by the Board; or*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.*

[3] Although s. 56 was amended on June 19, 2017, the amendment does not affect the matter before me in any substantial way.

[4] In the complaint filed on February 15, 2018, the NPF challenges the employer's changes to its promotions policy, implemented on November 20, 2017. The changes require RCMP corporals and sergeants to successfully complete certain training programs to apply for promotions to the ranks of sergeant and staff sergeant, respectively.

[5] On July 12, 2019, the Federal Public Sector Labour Relations and Employment Board ("the Board") certified the NPF as the bargaining agent for a bargaining unit composed of "[a]ll the employees who are RCMP members (excluding officers and civilian members) and all the employees who are reservists"; see *National Police Federation v. Treasury Board*, 2019 FPSLREB 74.

[6] The NPF states that the changes to the promotions policy met the criteria for a breach of s. 56 and were not business as usual or within the employees' reasonable expectations. Therefore, they violated the statutory prohibition against making changes during a freeze period.

[7] The employer acknowledges that it made these changes unilaterally during the freeze period and that it did not provide the employees with any notice of the impending changes. However, it states that the wheels had been put in motion to make the changes many months before and that it would have done the same thing had there been no certification application pending. It argues that this meets the business-as-usual test described in *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45 ("*Wal-Mart*" or "the *Wal-Mart* decision").

[8] The employer argues that there has been a "hybridization" of the business-as-usual and employees'-reasonable-expectations tests in the Board's recent jurisprudence such that an employer will not have a business-as-usual defence if the employees could not have reasonably expected a change. It argues that this is at odds with the historical development of the two tests and with the *Wal-Mart* decision. It insists that the two tests operate independently as defences available to an employer and that an objective assessment of employees' expectations does not disentitle an employer to a business-as-usual defence.

[9] I find that the promotions policy contained terms or conditions of employment that existed on the day on which the certification application was filed, that they were changed during the freeze period without the Board's consent, and that the changes could be included in a collective agreement.

[10] I further find that in making these changes the employer was not managing its business as usual. The changes were not consistent with past management practices, with what a reasonable employer would have done in the same situation, or within the employees' reasonable expectations. As well, the employer could have sought the Board's consent to make these changes or simply waited until they could be dealt with at the bargaining table, post-certification. For all these reasons, I find that the employer breached the freeze prohibition set out in s. 56.

II. **Background**

[11] The changes to the promotions policy were made on November 20, 2017, when the employer amended Chapter 4 of its *Career Management Manual* (CMM) to include the following new provisions:

> *10.1.10 member who is promoted to Sgt. after 2018-03-31 must successfully complete the Management Development Program (MDP) before applying for promotion to S/Sgt.*
>
> *10.1.11 member who is promoted to Cpl. after 2019-03-31 must successfully complete the Supervisor Development Program (SDP) before applying for promotion to Sgt.*

[12] The Management Development Program (MDP) and the Supervisor Development Program (SDP) are described as "competency based developmental programs" and are designed to last 12 months. They have three phases: pre-class online learning, in-class instruction, and application in the workforce. The in-class instruction is 5 to 9 days and must be attended in person. Previously, it was not mandatory for employees to complete these training programs before applying for promotions to these ranks.

A. **What was the decision to change the promotions policy, and when was it made?**

[13] The employer submitted that although the changes were implemented during the freeze period, they had been decided much earlier, at a June 27, 2016, meeting of the Senior Executive Committee (SEC), which is the senior management group that includes the RCMP's commissioner. According to the employer, this decision, made about 10 months before the freeze period started, set the wheels in motion to bring about the changes.

[14] No witness who sits on the SEC testified, but the employer entered a document into evidence that appears to be a record of decisions made at that meeting. It does not clearly record a decision to make successful completion of the SDP and MDP programs mandatory to apply for promotion to the ranks of sergeant and staff sergeant. It states as follows:

> *The Committee agreed that effective April 1st, 2017 all newly promoted Corporals, Sergeants and newly commissioned officers are to complete the Supervisor Development, Manager Development and Executive Officer Development programs respectively.*

[15] Elizabeth MacDonald, Policy and Program Analyst, National Staffing Program, gave evidence. She acknowledged that the record does not reflect a decision to make

completing the courses mandatory to apply for promotions but said that it was "understood" that that was the intent. She could not explain how it came to be understood in this way or why the record did not so specify.

B. **Request for management feedback**

[16] In any event, after the alleged decision was made, an email was sent to each RCMP division requesting feedback from supervisory employees, primarily superintendents, on the new draft policy. A previously proposed draft policy was also attached to the email. It was not explained why the employer consulted its supervisors on a policy change that it states had already been firmly decided or why the other proposed policy was also attached to the request for feedback.

[17] Most of the supervisors' responses to the request for feedback raised the same concerns that employees would later bring to the NPF once they became aware of the changes. Issues of courses filling up and inequitable access for employees working in small or remote divisions were raised repeatedly. Inequitable access for employees in certain jobs was also raised. Those working in forensics, for instance, do not typically supervise and therefore are given low priority to attend the courses.

[18] The feedback received was recorded in a document entered in evidence entitled, "Consultation with Divisional CDR offices Re: SDP/MDP in the NCO Promotion Process, July/August 2016". This is a representative sampling of the responses received; each entry is from a different RCMP division:

> *No concern with the policy itself so long as divisions have training capacity to offer SDP to all promotable* [corporals]*, and MDP to all promotable* [sergeants]*. If members who want promotion cannot access training then they will have a supportable grievance….*
>
> *…*
>
> *… This may be hard for smaller Detachments to release members to attend course. Not an issue for bigger ones but would disadvantage smaller ones. Could take months to get on a course….*
>
> *…*
>
> *… Ensuring the timing and availability of SDP/MDP courses in the Divisions so that a worthy candidate is not excluded from the process due to the training not being available in a timely manner is crucial….*
>
> *…*

> *… Getting members in and out of* [Nunavut] *is not a simple matter. Most of our* [corporals] *are stationed in 2 or 3 member posts … it is expensive to send members out of* [Nunavut]. *Most locations entail two days of travel from post to destination… sending members to the SDP/MDP will be difficult and that is if nothing goes awry: no flight cancellations, fog, blizzards etc….While we support the principle of developing leadership in the* [non-commissioned-officer] *ranks,* [Nunavut] *will be challenged to release* [non-commissioned officers] *to the SDP and MDP should it become mandatory training for the promotional process….*
>
> *…*
>
> *The only issue I see with this policy is the availability for members to actually get loaded onto the course… you could have a* [Forensic Identification Section corporal] *that has been a* [corporal] *for 5 years and it will be next to impossible to get them loaded and not bumped prior to the training… This will put some members at a significant disadvantage for future promotional opportunities if they are required to have the training in order to apply for a promotion yet they can't get onto a SDP or MDP course which would be no fault of their own. If they are going to go forward with this they must give everyone equal opportunity to get the training which will mean putting on a lot more courses.*
>
> *…*
>
> *These courses have historically been quite hard to get. If they are going to be mandatory for promotion then they will have to be offered to everyone in a timely manner. Also … they don't seem to consider that* [Forensic Identification Section] *members need this course, which may cause problems filling positions when these policies take effect and having a greater impact on* [Forensic Identification Section] *than other positions in the Force.*
>
> *…*
>
> *Historically members were not always offered the SDP or MDP because* [Learning & Development] *didn't have the capacity to deliver the training where and when it was needed. What has changed? Also if members were not supervising they were not allowed to take the course so, has that changed? Will the SDP be offered to every constable in Canada? Will detachments willingly permit their members to take this course with the vacancy rate the way it is now?*

C. **If the decision was made on June 27, 2016, was it firm?**

[19] A long process of what Ms. MacDonald referred to as the "back and forth" ensued as the policy changes were drafted and re-drafted. In some cases, related substantive issues continued to be discussed and debated. For example, in October 2016, the issue of who would approve exceptions when an employee did not meet the requirements was discussed and decided.

[20] The changes were eventually approved (as the document states) on March 24, 2017. They were signed off by Christine Vaillant, Manager, National Staffing Program; Nadim Lakhani, Acting Director, National Staffing Program; and Assistant Commissioner Stephen White, Assistant Chief Human Resources Officer and Director General, Workforce Programs and Services. However, subsequently, more changes were made, and on May 18, 2017, the same people approved a revised version; this was during the freeze period.

[21] The employer suggests that this approval should not be confused with the ambiguously worded, inaccurately recorded June 27, 2016, SEC approval, which occurred 10 months before the freeze period. It states that the signed document of May 18, 2017, was just an approval of the policy's specific wording. The evidence does not bear this out.

[22] On June 22, 2017, Ms. MacDonald contacted Jamie Taplin, Director, National Performance Programs, to see if the policy changes were still going ahead. She was advised that the effective dates were to change. Now, the policy would apply to sergeants first and to corporals a year later, rather than the other way around. This was another substantive change, and quite a significant one — certainly for the sergeants.

[23] In cross-examination, Ms. MacDonald confirmed that the policy could still be changed at that point. Clearly, it still was being changed, two months into the freeze period.

[24] On June 23, 2017, Ms. MacDonald was told that the new Director General of National Performance Programs wanted to carry out a final check of the policy. Then she was told that the new Director General wanted to make some changes. Then she was told and, in turn, conveyed to others "that plans for the SDP/MDP in the promotion process may be changed or delayed" and that "we're on hold".

[25] In cross-examination, Ms. MacDonald confirmed that it appeared that the decision as to whether to implement the changes was still open at that point, although she said that she never heard that they would not be implemented. Certainly, she must have become somewhat concerned that the changes might not go ahead. In emails of June 22 and August 17, 2017, she tried to ascertain the status and suggested that if

the promotion policy changes were not to go ahead, they be removed from the draft so that the other changes could proceed.

[26] Ultimately, however, the changes were finally approved on October 23, 2017, following which the new version of chapter 4 of the CMM was published on the employer's "Infoweb" site on November 20, 2017.

[27] It is not clear that a firm decision of any kind was made on June 27, 2016. The evidence suggests that October 23, 2017, is the first time it could credibly be said that the employer reached a firm decision on the substantive content of these policy changes or even on whether it would proceed to make them. That was six months into the freeze period.

D. **Delayed announcement to employees after publication**

[28] On November 11, 2016 (a full year before the policy changes were finalized and published), Ms. MacDonald wrote the following to Louise Roy, National Program Manager, National Performance Programs: "Can you tell me if [Learning & Development] is planning a national communication on the upcoming SDP/MDP changes?" Ms. Roy responded by stating, among other things, "According to [Daniel Fitzpatrick, Director of National Performance Programs] the communication might be ready for January."

[29] On December 8, 2016, Ms. MacDonald followed up with Ms. Roy, as follows:

> *…The draft SDP/MDP section of CMM 4 was sent to Directives for their information and we're planning to include it with other CMM 4 changes for publishing in the next few months, no later than April 1. This is why I was asking about the communication piece.* ***It's important to get the information out before it appears in policy so it doesn't come as a surprise to members.*** *I'm planning to add a question to our FAQs and ask the National Promotions Unit to include a message on the Promo site with a link to the communique.*
>
> [Emphasis added]

[30] On January 30, 2017, Ms. MacDonald followed up again, asking Stéphane Rainville, National Program Manager, National Performance Programs, for an update on the communication plan. He responded as follows: "We do have a comms [*sic*] plan. I was waiting to finalize all of this before pulling the trigger." On September 14, 2017,

Jamie Taplin asked to be kept in the loop about the publishing date, so that the communications piece could be timed with the publishing of the policy changes.

[31] A year later, on January 8, 2018, Mr. Rainville sent the approved message to the Communications branch for distribution. However, the date on which it was actually sent out to advise employees of the changes was not adduced in evidence. Ms. MacDonald could state only that it went out sometime in February 2018. She also confirmed that nothing had gone out before it, not even a quick email, to alert employees to the changes. When she was asked why the employees were notified only several months after the changes were published on Infoweb, Ms. MacDonald responded that the changes went into effect only as of April 2018; therefore, no one was affected before then.

[32] I was struck by the contrast between this response and Ms. MacDonald's December 8, 2016, email to Ms. Roy. Her earlier words bear repeating: "This is why I was asking about the communication piece. It's important to get the information out before it appears in policy so it doesn't come as a surprise to members." Her apparent indifference in her testimony that a delayed announcement could have negatively impacted employees was surprising in light of her concern expressed earlier, in December 2016.

E. **The reaction of the employees and the NPF to the changes**

[33] When the employees were finally made aware of the changes, the NPF began to receive comments from them, primarily focusing on concerns that they might be denied access to these programs, in a number of circumstances. This, of course, could present serious problems for the career trajectories of those employees, given that completing the courses was now mandatory for promotion up the ranks.

[34] In his testimony, Brian Sauvé, NPF Co-Chair, made it clear that the NPF completely supports the employer in its efforts to ensure that supervisory employees are well trained. The NPF's concerns are strictly focused on how to effectively and equitably implement such a change by addressing the barriers that affect access to the training programs.

[35] Employees were concerned that access could be denied or significantly delayed by a lack of support from their supervisors to attend, because of operational

requirements or for any reason. They were concerned about the courses filling up and lacking sufficient space. Employees from smaller, remote detachments knew that the need for more travel time and the lack of personnel to cover their absences would make it harder for them to attend the courses.

[36] Mr. Rainville testified that in his view, the courses are sufficiently available for all employees, and I do not doubt that he does his best to ensure that. However, his assessment of the situation, as a course provider, was undermined by the extent to which the employees' concerns mirrored the feedback from superintendents. While none of the superintendents testified, the employer adduced into evidence the consultation document, dated July/August 2016, which recorded their written comments. Given the striking similarity between those comments and the employees' concerns, I accept that both provide a true reflection of the situation on the ground.

[37] Clearly, making these courses mandatory for promotion, without first addressing the barriers to accessing them, could render promotion up the ranks dependent on factors such as the size, location, and operational requirements of a candidate's detachment, rather than on his or her merit.

[38] Having canvassed these issues though, it is important to note that the statutory freeze is a strict liability provision. It applies regardless of the employer's reasons for instituting the changes, the employees' concerns with the implementation of the changes, or the objective merits of the changes.

III. **The issue**

[39] The main issue to be determined can be simply stated. Can the unilateral changes made to the RCMP's promotion policy during the certification freeze period be considered business-as-usual, on the basis of internal management discussions only, with no notice to the employees?

IV. **Reasons**

[40] Statutory freeze provisions serve a vital function. Many decisions of this and other labour boards refer to the purpose of the prohibitions and the crucial role they play in our labour relations schemes.

[41] The *Act* sets out two statutory freeze periods. The s. 56 freeze applies to the period after a certification application is filed. The s. 107 freeze applies to the period

after a notice to bargain collectively is served and has been in place since the beginning of collective bargaining in the federal public sector in 1967. The s. 56 freeze was added later, in the 2005 legislative overhaul that created the *Act*.

[42] This is the first time the Board has considered an alleged breach of the s. 56 freeze provision.

[43] The purpose of the post-notice-to-bargain-collectively freeze (s. 107) is to provide the parties with a stable platform for bargaining. It is to do the following (see *Federal Government Dockyard Chargehands Association v. Treasury Board (Department of National Defence)*, 2016 PSLREB 26 at para. 47, citing *Canadian Union of Public Employees v. Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679 at para. 8):

> … maintain the status quo of the employment relationship so that the union is given an opportunity to enter negotiations and bargain for a collective agreement from a fixed point of departure and in an atmosphere of industrial relations security that is undisturbed by alterations in conditions of employment….

[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.

[46] I also note another difference. The s. 56 freeze provides the employer with an option not available under s. 107 in that it can seek the Board's consent to make changes during the freeze period.

A. **Elements of the statutory freeze under s. 56**

[47] An employee organization challenging an alleged breach of s. 56 must show that a term or condition of employment existed on the day on which the certification application was filed, that it was changed during the freeze period without the Board's consent, and that it could be included in a collective agreement.

[48] There is no dispute that the term or condition of employment (eligibility to apply for a promotion to the ranks of sergeant and staff sergeant, with no requirement to complete the SDP or MDP courses) existed on April 18, 2017, the day on which the NPF applied for certification. There is no dispute that the employer changed it without the Board's consent and that it did so on November 20, 2017, which was during the freeze period. And there is no dispute that this employment condition could be included in a collective agreement.

[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.

B. **The employees'-reasonable-expectations approach**

1. **Historical development**

[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.

[55] This is not a recent development. The employees'-reasonable-expectations approach to determining whether a change was business as usual arose decades ago and from the very beginning was not applied as a separate test but rather as a complementary analytical approach.

[56] In *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters v. Canada Bread*

Company Limited, 2016 CanLII 25094 (ON LRB) ("*Canada Bread*"), the Ontario Labour Relations Board (OLRB) recounted this history at paragraph 224, quoting as follows paragraphs 30 to 34 of *Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers v. Simpsons Limited*, [1985] OLRB Rep. April 594 ("*Simpsons Limited*"), and noting that this case provided a "… useful exposition and application of the 'reasonable expectations' test":

> *30. The freeze provisions catch two categories of events. There are those changes which can be measured against a pattern (however difficult to define) and the specific history of that employer's operation is relevant to assess the impact of the freeze. There are also first time events and it is with respect to that category that the business as before formulation is not always helpful in measuring the scope of employees' privileges. Some first time events have been readily rejected by the* [OLRB]*. . . . On the other hand, the* [OLRB] *has upheld an employer's right to lay-off employees during the freeze (assuming there is no anti-union animus in the decision) [citations omitted]….*
>
> *31. Instead of concentrating on business as before, the* [OLRB] *considers it appropriate to assess the privileges of employees which are frozen under the statute and thereby, delimit the otherwise unrestricted rights of the employer, by focussing on the reasonable expectations of employees. The reasonable expectations approach, in the* [OLRB]*'s opinion, responds to both categories of events caught by the freeze, integrates the* [OLRB]*'s jurisprudence and provides the appropriate balance between employer's rights and employees' privileges in the context of the legislative provisions.*
>
> *32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, Corporation of the Town of Petrolia, supra; Scarborough Centenary Hospital, supra; Oshawa General Hospital, York-Finch Hospital, supra; St. Mary's Hospital, 1119791 OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); AES Data Limited [1979] OLRB Rep. May 368… Thus, in the* [OLRB]*'s view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the* [OLRB] *is expressly articulating the test.*
>
> *33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer.…*
>
> *34. The reasonable expectations approach also integrates those cases which affirm the right of the employer to implement programmes during the freeze where such programs have been*

> *adopted prior to the freeze and communicated (expressly or implicitly) to the employees prior to the onset of the freeze:* Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244….*

[57] This Board, then named the Public Service Labour Relations and Employment Board, addressed this in *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)* 2016 PSLREB 68, citing *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19, to the effect that the business-as-usual criteria would not be contradicted by the employees'-reasonable-expectations test. Employees would expect normal practices to be maintained during a freeze period. The Board commented as follows: "The business-as-before approach is not exclusive to the reasonable expectations approach. The employer's business as usual when determining work hours includes the parliamentary translators' expectations."

[58] The recent decision in *Office and Professional Employees International Union v. Canadian Helicopters Limited (Canadian Helicopters Offshore)*, 2018 CIRB 891, found that introducing a different work schedule and wage structure for new hires violated s. 24(4), the *Canada Labour Code*'s post-certification-application freeze provision. The Canada Industrial Relations Board (CIRB) followed the previous case law and clearly intermingled the two tests, as follows:

> …
>
> *[97] According to this "business as before" inquiry, the* [CIRB] *will consider whether the changes made were part of the employer's normal practices (see* Québec Aviation Limitée *(1985), 62 di 41 …). In this inquiry, the* [CIRB] *will look at the overall circumstances of the employer's operations … and consider whether the change is one that is a customary or established practice such that it constitutes in itself a term or condition of employment … In such circumstances, the employer will be permitted to alter terms and conditions of employment without union or* [CIRB] *consent.*
>
> *[98] In this inquiry, the* [CIRB] *will be influenced by the fact that an employer made attempts to advise, consult or inform the union of the process it was undertaking to implement a change … Where an employer's actions are planned or formulated, decided and communicated to employees, and effectively implemented prior to the filing of the application for certification, these actions will not be subject to the statutory freeze provisions, even if the actual start date follows the filing of the application ….*
>
> …

[59] The CIRB found no evidence of a customary practice of implementing different wage structures and work schedules for different employees or any indication that the employer had advised the employees. On judicial review, the Federal Court of Appeal upheld the CIRB's decision, which found that the freeze provision had been breached (see *Canadian Helicopters Limited v. Office and Professional Employees International Union*, 2020 FCA 37).

[60] Another recent Federal Court of Appeal decision, *Canadian Federal Pilots Association v. Attorney General of Canada*, 2020 FCA 52, took the same view in its discussion of these two interconnected approaches, as follows:

> …
>
> *[12] …It was not necessary for the Board … to have articulated the "reasonable employee expectation test", which likely would have led to a similar result on these facts, in any event. Indeed, as noted by the Board at paragraph 76 in* Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency), *2016 PSLREB 19 … the "'business as before test' … would not be contradicted by the 'reasonable expectations' test". Under either articulation, what is relevant is whether the impugned changes commenced before the onset of the freeze or were part of the way in which the employer previously operated or could reasonably be expected to operate.…*
>
> …

[61] Clearly, the employees'-reasonable-expectations test developed historically as an alternative but complementary approach to determining whether a change was business as usual or whether it violated a statutory freeze by asking the question, "What would a reasonable employee expect to constitute his or her terms and conditions of employment or benefits in the specific circumstances of his or her employer?" A review of the jurisprudence reveals no difference in how these analytical approaches have been applied from their very beginnings some 40 years ago to the present.

2. **The importance of purposive interpretation**

[62] Always of primary importance in the jurisprudence, and rightly so, has been ensuring that the purpose of freeze legislation is met, regardless of the particular analytical route taken. For example, in the recent decision in *Public Service Alliance of Canada v. Anishinabek Police Service*, 2018 CanLII 81987 (ON LRB) ("*Anishinabek*"), the

OLRB introduced as follows a review of the older jurisprudence by highlighting the primary importance given to a purposive application of these tests:

> …
>
> *37. Before considering the* [OLRB]*'s specific jurisprudence regarding termination during the freeze period, it is worthwhile to review, briefly, the* [OLRB]*'s general jurisprudence on what is currently section 86. Over a period of at least 40 years, the* [OLRB] *has focused on various evolving tests such as the "business as before" or "business as usual" test, or the "reasonable expectations of employees" test, or examining the relationship of the impugned conduct to the bargaining process. However, in describing and applying these tests, the* [OLRB] *has been sensitive and given primary importance to the purpose of the section.*
>
> …

[63] At paragraph 38 *Anishinabek* goes on to quote *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453 at paras. 38 and 39 of that case:

> …
>
> *38. … The purpose of the "statutory freeze" …* is to maintain the prior pattern of the employment relationship in its entirety *while the parties are negotiating for a collective agreement. This ensures that they will have a fixed basis from which to begin negotiations and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda…*
>
> *39. … difficulties with the literal meaning of the words of the section have led the* [OLRB] *to adopt a purposive "business as before" interpretation … which requires that* an employer continue to run its operation according to the pattern established before the circumstances giving rise to the freeze occurred: Spar Aerospace Products Limited, [1978] OLRB Rep. Sept. 859… {T}he importance of the employees' perspective to a purposive analysis of section 79 underlies the recent evolution of the "business as usual" approach into the "reasonable expectations of employees" test applied in Simpsons Limited, *[1985] OLRB Rep. April 594 ….*

3. **Does the *Wal-Mart* approach mean that the two tests are separate and distinct?**

[64] The employer states that in addition to their historical development, the two tests were confirmed to be separate and distinct by the approach taken by the Supreme Court of Canada in *Wal-Mart*. I see nothing of the sort in their historical development or in *Wal-Mart*.

[65] Firstly, the factual circumstances of any case will determine the focus and the analytical approach or approaches that will be applied. The fact situation in *Wal-Mart*

was this: one week after the union requested first-contract arbitration, and on the very day on which the arbitrator was appointed, Walmart announced that it would close its newly unionized, profitable store in Jonquière, Quebec, and that it would lay off its entire workforce of almost 200 employees. An extreme and unusual case, to say the least.

[66] The Supreme Court of Canada's main issue was to determine whether a termination of employment in the context of a business closure constituted a change to terms and conditions of employment to which the freeze prohibition (s. 59 of the Quebec *Labour Code* (CQLR, c. C-27) would apply, or whether the notion of a freeze violation simply did not apply given that an employer has the right to close its operation for any reason.

[67] Having concluded that the freeze provision did apply, the majority of the Supreme Court of Canada then followed the jurisprudence and considered whether the terminations were business as usual. To determine this, the Court looked at past management practices and considered whether a reasonable employer would have done the same thing in the same situation. Its task was to decide whether the Quebec Court of Appeal was correct in overturning the decision of the Quebec Superior Court, which had affirmed an arbitrator's decision that Walmart had breached the freeze provision.

[68] The Supreme Court of Canada found that the arbitrator had reasonably relied on evidence showing that Walmart's actions did not accord with past management practices. It also found that Walmart did not act as a reasonable employer in the same situation would have acted. This was based in part on evidence of employees' expectations stemming from information Walmart had shared detailing the store's strong financial performance and the potential receipt of bonuses. At paragraph 95, the Court stated as follows:

> *95 In discussing the "business as usual" rule and its application in this case, Arbitrator Ménard did not place an inappropriate burden of proof on the employer. In fact, it is clear from his review of the Union's evidence that the Union had shown that the store's situation did not suggest it would be closed. For example, Mr. Ménard stated early in his reasons that he was adopting the following [TRANSLATION] "additional evidence":*
>
> > *[TRANSLATION] [T]he Employer at no time told anyone that it intended to go out of business or that it was experiencing*

> *financial difficulties. On the contrary, it indicated that, from a perspective of five (5) years, the store was performing very well and that its objectives were being met. [para. 2]*
>
> *He then quoted a passage from the testimony of Gaétan Plourde in which Mr. Plourde revealed that the establishment's manager had indicated to him that bonuses would be paid for 2003 (para 2).*

[69] At paragraph 96, the Court concluded that it was reasonable for the arbitrator to find "…that a reasonable employer would not close an establishment that 'was performing very well' and whose 'objectives were being met' to such an extent that bonuses were being promised." On that basis, the Court restored the arbitrator's ruling.

[70] The concept of employees' expectations is an inherently logical aspect of a business-as-usual analysis. If employees have a reasonable expectation that something will happen, in the absence of evidence to the contrary, one can assume that they have that expectation because it happened before, because it usually happens, or because they were told it would happen. Their expectations are not made out of whole cloth but are based on their workplace experiences or on what they have been told. It is a simple matter of logic and probability.

[71] Nothing expressed in *Wal-Mart* suggests that labour boards should no longer apply that criterion. Walmart's employees had a reasonable expectation that the store would stay open and that their jobs would continue to exist because they had been told that the store was meeting its financial objectives and that bonuses would be paid (see *Wal-Mart*, at para. 95). They knew that reasonable employers do not suddenly close businesses that are making money. The concept of employees' expectations and the idea of what a reasonable employer in the same situation would have done are inextricably linked.

[72] That the Supreme Court of Canada's main focus was on past management practices, as informed by the reasonable-employer-in-the-same-situation criterion, in the context of the *Wal-Mart* fact situation, does not mean that reasonable employees' expectations have no relevance to the consideration of any business-as-usual defence or that these tests must somehow be kept separate and distinct.

[73] The employer's position before me ignores the fact that employees' reasonable expectations did in part inform the reasonable-employer-in-the-same-situation analysis (see *Wal-Mart*, at paras. 95 and 96). It also ignores the following passage from *Wal-*

Mart, which expressly considers the reasonable expectation of employees that their employer will terminate their employment only in accordance with the law:

> …
>
> *[42] The condition of continued employment is implicitly incorporated into the contract of employment and need not be expressly stipulated… Absent one of these justifications, the employer is bound by an obligation to continue employing the employee. This principle is all the more fundamental in our modern society, because the systemic importance of work means that the vast majority of employees are completely dependent on their jobs … In this context, it can be said that such employees have a reasonable expectation that their employer will not terminate their employment except to the extent and in the circumstances provided for by law.*
>
> …

[74] As well, it is just not a logical leap. Even in the absence of any analysis considering employees' reasonable expectations, I would not conclude that the Supreme Court of Canada intended to draw an artificial boundary between two serviceable but imperfect analytical approaches, which have undeniably proven more useful in most situations when applied together. Nothing about the decision suggests that. Interpreting *Wal-Mart* in that way would mean ignoring decades of labour board jurisprudence, the vast majority of which has used the two tests to complement each other. And it would mean doing so in the absence of any suggestion from the Supreme Court of Canada that that was its intent.

[75] It would also directly contradict the Court's strong statements about the critical role of freeze provisions and the importance of purposive interpretations of them. Consider these comments, which the Court made at paragraphs 34 to 37, 49, and 51:

> *[34] In my opinion, the purpose of s. 59 in circumscribing the employer's powers is not merely to strike a balance or maintain the* status quo*, but is more precisely to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith….*
>
> *[35] The "freeze" on conditions of employment codified by this statutory provision limits the use of the primary means otherwise available to an employer to influence its employees' choices: its power to manage during a critical period. … By circumscribing the employer's unilateral decision-making power in this way, the "freeze" limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of*

> *what will eventually become the labour relations framework for the business.*
>
> *[36] In this context, it is important to recognize that the true function of s. 59 is to foster the exercise of the right of association….*
>
> *[37] By codifying a mechanism designed to facilitate the exercise of the right of association, s. 59 thus creates more than a mere procedural guarantee. In a way, this section, by imposing a* duty *on the employer not to change how the business is managed at the time the union arrives, gives employees a substantive* right *to the maintenance of their conditions of employment during the statutory period. This being said, it is the employees, as the holders of that right, who must ensure that it is not violated.*
>
> …
>
> *[49]… I wish to stress that to accept the opposite argument — that the employer can change its management practices in all circumstances because it had the power to do so before the union's arrival — would be to deprive s. 59* [the statutory freeze] *of any effect. Thus, s. 59 was enacted for the specific purpose of preventing the employer from [TRANSLATION] "exercising its great freedom of action at the last minute by being particularly generous or adopting any other pressure tactic" (Morin et al., at p. 1122). To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit.*
>
> …
>
> *[51] An interpretation that would leave the employer with all the freedom it had before the petition for certification was filed would be contrary to s. 41of the* Interpretation Act, *CQLR, c. I-16, which favours a broad and purposive interpretation of the provision. It seems to me that such an interpretation would also overlook the fact that the employer ceases to have sole control over labour relations in its business after the union arrives on the scene.…*

[76] I also note that the employer does not argue that employees' expectations are completely irrelevant. It simply states that they are relevant only to an employees'-reasonable-expectations test and that they cannot be used as part of a business-as-usual analysis. As indicated earlier, I see no merit in that argument; it is difficult to even conceptualize a completely separate application of these approaches. However, even if I accepted that the employees' reasonable expectations could be applied only as a separate and distinct test, in my view, it would lead to the same conclusion.

[77] The employer argued that although the Board could still apply the employees'-reasonable-expectations test (albeit separately), it would not trump the business-as-

usual test. In making this argument, the employer implicitly suggests that business as usual should trump the employees' reasonable expectations. It is not at all clear what that proposition is based on, but in any event, in my view, this argument is also without merit. Neither of these complementary analytical approaches can be said to trump the other; that is simply not how they work.

4. **Applying the employees'-reasonable-expectations test**

[78] Many decisions of this Board and other labour boards have held that changes can be made during a freeze period without violating the freeze as long as they were within the employees' reasonable expectations. To be within the employees' reasonable expectations, a change must be part of an established pattern such that the employees would reasonably expect it, or there must have been a firm decision to make the change that was communicated to the employees before the onset of the freeze period (see *Canadian Union of Public Employees v. Scarborough Centenary Hospital Association*, 1978 OLRB Rep. July 679, *Canadian Union of Public Employees, Local 2664 v. Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244, *Carleton Roman Catholic Separate School Board Employees' Association v. Carleton Roman Catholic Separate School Board*, [1984] OLRB Feb. Rep. 205, *Professional Association of Foreign Service Officers v. Treasury Board*, 2003 PSSRB 4, *Federal Government Dockyard Chargehands Association* v. *Treasury Board* (*Department of National Defence*), 2016 PSLREB 26, *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services)* 2016 PSLREB 68, *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 107,*Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 6, *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16, *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11 and many others).

[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 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. This was demonstrated in the evidence. It clearly showed that further changes to the policy, which was already in a state of change, continued to be made for more than a year. Even the decision as to whether to implement the changes at all was subject to change, right up to the 11th hour.

[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.

C. Another analytical approach: are these the kinds of changes that could be bargained collectively?

[83] Neither the legislation nor the jurisprudence, including *Wal-Mart*, restricts the Board's inquiry to only the business-as-usual or the employees'-reasonable-expectations approach, or both. There are other ways of thinking about what kinds of changes should be considered as violating a freeze. Some alternative approaches have long been used in the jurisprudence, and others may well be created in future.

[84] In *Public Service Alliance of Canada v. BHP Billiton Diamonds Inc.*, 2006 CIRB 353, the CIRB found that the employer in that case had violated the post-notice-to-bargain-collectively freeze provision in the *Code* by unilaterally turning its defined-benefit pension plan into a defined-contribution plan without consulting the union or obtaining its consent. The CIRB held as follows at paragraphs 52 and 53:

> *[52] … the employer's change with respect to the pension plan was a substantial change that clearly modified employees' rights or benefits … without the employer having consulted the Association or PSAC, even after it was clear that the latter was the certified bargaining agent for the mine's unionized employees. …*
>
> *[53] … the* [CIRB] *accepts that PSAC's role as bargaining agent was understandably questioned by employees when they learned of the employer's unilateral change to the pension plan despite union representation of a substantial group of the employees at the mine. Since one of the objectives under the freeze provision is to eliminate the adverse affect [sic] to a union that any change to an expected benefit like a pension plan would have on the union's*

> *representation of the employees, the* [CIRB] *finds that under the circumstances, PSAC's role as bargaining agent was placed in an unfavourable position at the bargaining table to have to bargain for rights or benefits it previously had.*

[85] The same problem is evident in this case. Whether deliberately or not, the employer went ahead and made significant changes to the promotions policy while the certification application was pending. This put the NPF, once certified, in the position of having to engage the employer in collective bargaining, or other types of negotiation or discussion, to regain rights that the employees once had or even just to have their concerns about implementation taken into account. This cannot help but impact the standing of the NPF in the eyes of the employees.

[86] A similar analysis, focused on collective bargaining, was developed in the seminal OLRB decision in *Ontario Public Service Employees Union v. Royal Ottawa Health Care Group Institute of Mental Health Research*, 1999 CanLII 20151 (ON LRB) ("*Royal Ottawa*"). This approach was based on simply asking whether a change made during a freeze was "… the kind of thing about which the employer would normally be required to bargain …". The OLRB thought it more useful to focus on the relationship between the impugned change and the collective bargaining process, rather than on business as before or employees' reasonable expectations.

[87] *Royal Ottawa* dealt with a post-notice-to-bargain freeze. However, the approach can be applied to either type of freeze, in my view, as ultimately, a breach of either kind is likely to impact collective bargaining. The impact can be direct, by placing the union in a position of having to bargain back what the employees already had, or indirect, by simply eroding employee confidence in the union.

[88] The *Royal Ottawa* decision did not reject the business-as-usual and employees'-reasonable-expectations approaches. It simply added to the body of jurisprudence another pragmatic and useful way of thinking about the same issues. This decision illustrates that the two most commonly used tests, business as usual and employees' reasonable expectations, whether applied separately or intermingled, are neither legislated nor immutable. They can be used to the extent that they assist the analysis and can be complemented by other ways of thinking about what should and should not be frozen before a certification or collective bargaining.

[89] The recent *Anishinabek* decision highlights the *Royal Ottawa* discussion about the practical limitations of the business-as-usual and employees'-reasonable-expectations tests. It quotes and relies on the following from *Royal Ottawa*:

> …
>
> *85. It is also worth mentioning (at the risk of stating the obvious) that section 86(1) says nothing about "employee expectations" … nor does it use the phrase "business as usual". These are but the* [OLRB]*'s way of describing some of the interests that might have to be considered when construing elastic language (and, in practice, the* [OLRB]*'s way of relieving employers from the "deep freeze" which a superficial reading of the statute might otherwise impose – freezing employee "duties" for example). They are phrases that illuminate the exercise of interpretation and infuse it with policy content – recognizing the need to balance interests in a way that is congruent with the "rights" and "prerogatives" of the parties, and with the overall statutory scheme. They are an aid to interpretation, not a legal prescription of result – as the many cases amply illustrate.*
>
> *86. This is not to say that one should jettison these approaches, for each of them contains an element of truth – a lens through which one can examine the facts of a particular case. They help to frame the problem and provide a starting point for analysis ….*
>
> *87. But as any tour through the* [OLRB]*'s jurisprudence will reveal, in today's world neither of these approaches provides a litmus test for predicting the results in particular cases; and the phrase "business as usual" is downright misleading – especially in first agreement situations. It is necessary, therefore, to refine and supplement the* [OLRB]*'s interpretive arsenal – not to discard the established approaches, but rather to add an additional one.*
>
> *88. In my view, and in light of experiences, these traditional views have to be augmented by another perspective that is more in tune with the precise role that section 86(1) is to play in the regulatory framework, once bargaining has begun. The language of section 86 has to be read as the* [OLRB] *did in Ottawa Public Library, supra, with these statutory purposes clearly in mind: bolstering the bargaining process; reinforcing the status of the union as the employees' bargaining agent … and providing a firm (if temporary) starting point from which bargaining will take off.*
>
> *89. From that perspective it is necessary to pay particular attention to how the proposed change in employment conditions relates to bargaining.* ***Is it the kind of thing that would typically be the subject of collective bargaining? And would changes of this kind, if implemented unilaterally in these circumstances, unduly disrupt, vitiate, or distort that bargaining process (what the freeze is designed to avoid …)? Is it the kind of thing about which the employer would normally be required to bargain by virtue of section 17? Because if the answer to these questions is***

> ***"yes," it is the kind of thing that probably falls within the ambit of section 86(1) ….***
>
> …
>
> [Emphasis added]

[90] Would changes to the promotions policy requiring the completion of training courses to apply for promotions be the kind of thing that the employer would normally be required to bargain collectively? Granted, this is not the kind of thing that has traditionally been found in federal public sector collective agreements. However, the *Act* does not prohibit its inclusion in a collective agreement. Therefore, in my view, if a bargaining agent proposed it as a matter for collective bargaining, then the employer would certainly have to address it at the bargaining table.

[91] These changes were of significant importance to the employees and they would have expected the NPF, if certified as their bargaining agent, to be able to discuss them with the employer before they came into effect. Making unilateral changes, with no notice to the employees instead of waiting to discuss them with the NPF (if certified as the bargaining agent), negatively impacts the representational rights of the bargaining agent. And, as expressed in the *Royal Ottawa* decision, it can 'unduly disrupt, vitiate, or distort' collective bargaining. Accordingly, making those changes breaches the freeze prohibition.

D. **The employer's business-as-usual defence**

[92] The employer relies on the business-as-usual test as described and applied by the Supreme Court of Canada in the *Wal-Mart* decision as follows at paragraphs 55 to 57:

> *[55] … in conditions of employment within the meaning of section 59 of the* Code*, the arbitrator must be satisfied that it was made in accordance with the employer's* past *management practices. In the words of Judge Auclair, the arbitrator must be able to conclude that the employer's decision was made [TRANSLATION] "in accordance with criteria it established for itself before the arrival of the union in its workplace" ….*
>
> *[56] Second, the courts have held that the employer must continue to be able to adapt to the changing nature of the business environment in which it operates. For example, in some situations in which it is difficult or impossible to determine whether a particular management practice existed before the petition for certification was filed, the courts accept that a decision that is [TRANSLATION] "reasonable", based on "sound management" and*

> *consistent with what a "reasonable employer in the same position" would have done can be seen as falling within the employer's normal management practices ….*
>
> *[57] Thus, a change can be found to be consistent with the employer's "normal management policy" if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. In other words, a change [TRANSLATION] "that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which section 59 of the Labour Code applies":* Club coopératif de consommation d'Amos*, at p. 12.*

1. **Past management practices**

[93] The *Wal-Mart* decision noted that a freeze provision does not require a deep freeze but instead leaves an employer with its general management power. However, this power must be exercised "in a manner consistent with the rules that applied previously and with the employer's usual business practices from before the freeze" (at paragraph 47).

[94] Before the change, RCMP corporals and sergeants could apply for promotions to the ranks of sergeant and staff sergeant, respectively, without completing the SDP or MDP training programs. Clearly, making it mandatory to complete the courses successfully prior to applying for promotions is not consistent with the rules that applied previously.

[95] Nor was it consistent with the employer's usual business practices from before the freeze. The employer submits that the changes to the Career Management Manual, in particular the *Promotions* chapter, along with Ms. MacDonald's testimony, show that changes of this nature were made "constantly" before the freeze. As an example of these constant changes, the employer refers to making the maintenance of certain operational skills mandatory for promotion. Granted, this was a change of the same nature as the impugned ones. However, it was not an example of constant changes but rather was the only other change of this nature to which the employer could point.

[96] Nor did Ms. MacDonald testify that changes of this type were made constantly. Rather, she said that it took so long to make any changes that the practice was to try to "get a lot in" at the same time (referring to the many minor changes that rode the coat-tails of the promotions policy change). She said that changes could be made

several times a year but made it clear that she was not talking about substantive changes. It was evident from her testimony and from the documentary evidence that all the other changes made to chapter 4 of the CMM were matters of minor clarification. So minor, in fact, that when the employer asked her what the other changes were, she could not remember even one of them.

[97] I also note that the internal discussion about developing a communications message related only to announcing the promotions policy change. There was no intent at all to advise employees of any of the other small changes to the manual.

[98] Accordingly, the evidence does not persuade me that substantive changes of this nature were made constantly. One previous change does not reveal an established pattern of past management practice with respect to substantive policy changes.

[99] The evidence also suggests that communications in this case were not handled in accordance with past management practices. The emails of three different employees reveal that they all took for granted that having a communications message ready before publication was important, that doing so was the usual procedure, and that it would be done this time as well. Two of those employees testified but did not explain why the announcement of the changes was delayed for several months after the publication or who delayed it.

[100] On the evidence, I cannot conclude that these changes were made in accordance with past management practices.

2. **Were these the actions of a reasonable employer in the same situation?**

[101] In its final submission, the employer stated that it relied only on the first prong of the business-as-usual test described in *Wal-Mart* (past management practices) and not on the second (a reasonable employer in the same situation). However, the employer did argue that the wheels were in motion for months, in order to show that it would have acted the same way in the absence of a certification application. As I read *Wal-Mart*, the latter notion is just another way of analyzing whether the employer managed its business as usual:

> *[57] Thus, a change can be found to be consistent with the employer's "normal management policy" if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would*

> *have made in the same circumstances.* ***In other words****, a change [TRANSLATION] "that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which section 59 of the Labour Code applies":* Club coopératif de consommation d'Amos*, at p. 12.*
>
> [Emphasis added]

[102] Despite the employer's position that it does not rely on the reasonable-employer-in-the-same-situation criterion, I will briefly address this aspect.

[103] These were significant but clearly not urgent changes. The employer states that the June 27, 2016, SEC decision kick-started the changes that were later made during the freeze period. Even if I were to accept that allegation, the changes were not actually made until November 20, 2017, when they were published on Infoweb, and the employees were not told about them until sometime in February 2018. As well, there was evidence that these changes were put on hold for reasons unknown, and it was unclear for some period of time whether they would be implemented. Clearly, there was no urgency to make the changes, no necessity to press on and make them during the freeze period, once the certification application had been filed.

[104] In addition to the lack of urgency, it would have been reasonable to wait, given the feedback the employer had received from its superintendents. The employer knew that some serious issues had to be ironed out, and discussing them with the NPF, in the event that the Board certified it as the employees' bargaining agent, could have provided a collaborative and effective way to resolve these issues, before they became active problems in the workplace. The employer could have simply waited for the Board's decision on the certification application, and in my view a reasonable employer in the same situation would have done exactly that.

[105] The CIRB commented in *BHP Billiton Diamonds Inc.*, as follows:

> …
>
> *… That change occurred without the employer having consulted the Association or PSAC, even after it was clear that the latter was the certified bargaining agent for the mine's unionized employees. It is difficult to conclude that BHP did its best, under the circumstances, to act co-operatively and in consultation with the bargaining agent ….*
>
> …

[106] In this case, too, it is difficult to conclude that the employer did its best to act reasonably in the circumstances.

[107] Finally, the employer had another option available to it — seeking the Board's consent as set out in s. 56. In my view, when the legislation offers a clear alternative to making a unilateral change during a freeze period, a reasonable employer would take that approach. The CIRB pointed out as follows in *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus de Pessamit* 2016 CIRB 831 at para. 99:

> *[99] The employer acknowledges that it changed the terms and conditions of employment of its teachers in a period during which an application for certification was pending before the* [CIRB]*. It is important to note that it should have sought the* [CIRB]*'s consent as set out in the* Code*, which it did not do.*

[108] I note that the employer made use of this option in *Canadian Union of Public Employees v. Treasury Board (Royal Canadian Mounted Police)*, 2018 FPSLREB 3. The same approach could also reasonably have been taken in this matter.

3. **Would the employer have acted the same way had there been no certification application?**

[109] As mentioned earlier, as I read *Wal-Mart*, this notion is just another way of thinking about whether the employer managed its business as usual. The Supreme Court of Canada did not state that it was a new test or an additional question that must be asked in every case. To the contrary, by prefacing it with the phrase "[i]n other words" at paragraph 57, the Court clearly indicated that it was simply another possible way to frame the inquiry as to whether the employer acted in its usual manner.

[110] In my view, there are as many ways to approach determining whether an employer's actions are business as usual as there are fact situations. Asking if the employer would have done the same thing had there been no union was one way the arbitrator approached the *Wal-Mart* fact situation, and the Supreme Court of Canada determined that that approach was reasonable, in that context. In doing so, the Court did not suggest that it is the only way to make this determination or that an employer can meet the business-as-usual test simply by showing that it would have acted the same way in the absence of a certification application. If one were to interpret it that way, it would be tantamount to importing some suggestion of a requirement of anti-union animus to prove a freeze violation.

[111] Labour jurisprudence in every jurisdiction of the country has always explicitly rebuffed such a notion, as did the Supreme Court of Canada in *Wal-Mart*, when at paragraph 38, it made it crystal clear that that was not the intent, as follows:

> *[38] I wish to note first that, since s. 59 is not directly concerned with the punishment of anti-union conduct, the prohibition for which it provides will apply regardless of whether it is proven that the employer's decision was motivated by anti-union animus … (citations omitted) The essential question in applying s. 59 is whether the employer* unilaterally *changed its employees' conditions of employment* during the period of the prohibition.
>
> [Emphasis in the original]

[112] The employer also acknowledged this and did not suggest that any notion of anti-union animus might be required. Yet, were its argument accepted, it would logically lead to that. (As an aside, I note that both employer witnesses testified that they did not have the certification application on their radar when they worked on the changes. I give no weight to this testimony as neither one was in a position such that that would necessarily have been expected. I did not hear this from the RCMP's commissioner or from any member of senior management.)

[113] The Board's *Public Service Alliance of Canada v. Canada Revenue Agency*, 2019 FPSLREB 110 ("*Sudbury Tax Office*") decision dealt with a s. 107 freeze period during which the Canada Revenue Agency changed its hours-of-work policy. As in this case, the Board determined that the policy change was not consistent with past management practices, and therefore, it was not a business-as-usual change.

[114] However, in obiter, the Board also considered the second prong of the business-as-usual test as described in *Wal-Mart*. The Board concluded that the second prong would be brought into play only when the precondition expressed in paragraph 56 of the *Wal-Mart* decision applied; that is, when it was difficult or impossible to determine previous management practices. If it did come into play, then it would have to be shown that a reasonable employer in the same situation would have changed the terms and condition of employment. I agree with this analysis.

[115] In *Sudbury Tax Office*, the Board also considered whether, if the second prong were brought into play, the evidence would also have to show that the employer would not have acted the same way had no notice to bargain collectively been given. The Board concluded that such a requirement would end up "… subverting the force of a

statutory freeze." Following *Wal-Mart*'s purposive focus, the Board noted that the legislative purpose should be of paramount concern. It noted the finding of the Supreme Court of Canada that that purpose is to ensure that an employer "… ceases to have sole control over labour relations in its business after the union arrives on the scene…" (at paragraph 168, citing *Wal-Mart*, at para. 51).

[116] The evidence in *Sudbury Tax Office* led the Board to conclude that the implications of s. 107 were not in the forefront of the employer's mind when it changed the hours-of-work policy. Rather, it was reacting to a "Service Renewal" mandate received from head office, which it was obliged to implement. Thus, on that evidence, the CRA might well have acted the same way had there been no notice to bargain collectively. Did this mean that the employer's action was business as usual within the meaning of paragraph 57 of *Wal-Mart*, and therefore that its defence should succeed? Answering that question, the Board commented as follows:

> …
>
> *[169] My approach to applying s. 107 of the* Act *cannot leave the respondent with unfettered freedom of action; I must similarly give the statutory freeze real meaning and force. To be sure, s. 12 of the* Interpretation Act *(R.S.C. 1985, c. I-21) in the Board's jurisdiction imposes the same requirement that I give to s. 107 of the* Act*, which is, as per s. 12, "… such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."*
>
> *[170] …To suggest that Mr. Bouchard could continue to exercise his powers and significantly alter past management practice after notice to bargain was served as if nothing changed would be to do exactly what* Walmart *says should not happen: "**To permit the employer to keep using its managerial powers as if nothing had changed would, when all is said and done, be to allow the employer to do that which the law is actually meant to prohibit**" [emphasis added]. A finding that the respondent might have proceeded to change hours of work in the way it did had the complainant not served notice to bargain — a finding that may not even be required or appropriate given the precondition stated at paragraph 56 of* Walmart *— is, in my view, far from a compelling reason to fail to give s. 107 of the* Act *its required broad and liberal application.*
>
> *[171] If the collective bargaining regime that lies at the heart of the* Act *is to function effectively within the purposes stated by the* Act *in its preamble, it is essential that an employer respect the injunction against unilateral changes in terms and conditions of employment during the s. 107 statutory-freeze period. The grounds for a business as usual exception must be constructed*

> *conservatively, in my view, to not frustrate the compelling purpose of s. 107….*
>
> *[172] …The respondent changed a term and condition of employment that might have been included in the collective agreement after notice to bargain was served, without the consent of the bargaining agent. The change did not conform to past management practice. Based on the evidence, it cannot safely be concluded that a reasonable employer would have acted in the same fashion in the same or similar circumstances. While one might accept that Mr. Bouchard and his team would have implemented the same changes in the absence of the notice to bargain, to hold that therefore, the respondent was free to exercise its powers in the way that it did as if nothing happened, would risk rendering s. 107 of the* Act *meaningless.*
>
> …
>
> [Emphasis in the original]

[117] While *Sudbury Tax Office* dealt with a s. 107 freeze complaint, these comments are even more germane to a complaint under s. 56. That case noted that the Canada Revenue Agency's "world changed" when a notice to bargain collectively was filed. This was in the context of a long-established collective bargaining relationship. How much more so can it be said that the RCMP's world changed when the NPF filed its certification application? Concluding that the employer could essentially make any changes it wished simply because it might have made them in the absence of a certification application would make a mockery of s. 56 and render it meaningless.

E. ***Wal-Mart*'s impact on freeze-violation jurisprudence**

[118] Given the Supreme Court of Canada's comments in *Wal-Mart*, especially at paragraphs 34 to 37, 49, and 51, it is clear that that decision was not intended to change the vast body of statutory freeze jurisprudence that has been developed and refined over decades and across jurisdictions. When the Supreme Court of Canada decides to change decades of jurisprudence, it is typically quite clear about it. The Court canvasses the prior jurisprudence in depth, specifically signals that it is taking a different route, and explains why. None of that was done in *Wal-Mart*. To the contrary, the *Wal-Mart* decision specifically cited and accepted the existing jurisprudence represented by the leading decision in *Spar Aerospace Products Ltd.*, [1979] 1 CLRBR 61, as well as a number of CIRB and Quebec arbitration decisions.

[119] Accordingly, in my view, the Court had no intention to change and did not change the jurisprudence in any substantial way, whether to remove any consideration

of employees' reasonable expectations from a business-as-usual analysis, or to suggest that an employer could establish a business-as-usual defence simply by showing that it would have acted the same way had there been no application for certification.

[120] Nor have subsequent decisions of arbitrators, labour boards, or courts suggested that the *Wal-Mart* decision should be understood to have made a sea change in the way freeze violations should be approached.

[121] A significant number of post-*Wal-Mart* decisions have applied the traditional approaches, just as they have been applied for decades. Some did not refer to *Wal-Mart*; others specifically cited and followed it, seeing no apparent contradiction with the previously developed jurisprudence. (See, for example, *Office and Professional Employees International Union v. Canadian Helicopters Limited (Canadian Helicopters Offshore)*, upheld on judicial review in *Canadian Helicopters Limited*; *Canadian Federal Pilots Association v. Department of Transport,* 2018 FPSLREB 91, upheld on judicial review in *Canadian Federal Pilots Association*, 2020 FCA 52; *Anishinabek*; *Teamsters Local Union No. 31 v. 669779 Ontario Ltd. O/A CSA Transportation*, 2018 CIRB 894; *Public Service Alliance of Canada v. Canada Revenue Agency*, 2017 FPSLREB 16; *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 11; *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 6, *Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN v. Treasury Board,* 2016 PSLREB 47; *Public Service Alliance of Canada* v. Treasury Board, 2016 PSLREB 107; *Canada Bread*; *Canadian Association of Professional Employees v. Treasury Board (Department of Public Works and Government Services*, 2016 PSLREB 68; *Federal Government Dockyard Chargehands Association v. Treasury Board*, 2016 PSLREB 26; *Public Service Alliance of Canada v Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19; *Alberta Union of Public Employees v. Shephard's Care Foundation*, 2016 Alta LRBR 33; *New Brunswick Board of Management v. CUPE, Local 1840*, 2014 N.B.L.E.B.D. 27 (QL)) and others.

[122] Other recent cases, like *Sudbury Tax Office*, have dealt specifically with arguments based on the *Wal-Mart* decision similar to those raised in this case.

[123] The arbitrator's decision in *Corporation de l'École Polytechnique de Montréal v. Association syndicale des salarié-e-s étudiant-e-s de la Polytechnique (ASSEP/Alliance de la Fonction publique du Canada (AFPC)*, 2015 CanLII 13848 (QC SAT)("*École Polytechnique*"), dealt with a change made to a pension plan during a statutory freeze under s. 59 of the Quebec Labour Code, the same provision at issue in *Wal-Mart*. Membership in the pension plan would no longer be available to all employees, and some were given the option of opting out and receiving a 5% salary increase instead. The wheels had been set in motion for this change two years before the certification application, but the change was implemented during the freeze period, with no notice to the employee organization that had applied for certification.

[124] The arbitrator addressed the employer's argument that a complete lack of notice to its employees was irrelevant to its ability to make out a business-as-usual defence. He found that *Wal-Mart* does not detract from case law that holds that a term and condition of employment – or, in the case before him, a change to a term and condition of employment – exists before the freeze period only when it is known to employees. The arbitrator held that the newly implemented change to a term and condition of employment that remains unknown to employees could not exist, as none could seek its enforcement.

[125] In *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus Pessamit*, 2016 CIRB 831, the union relied on *Wal-Mart* to support its complaint that the employer had breached s. 24(4) of the *Code* by changing teachers' terms and conditions of employment while a certification application was pending. The CIRB stated as follows:

> …
>
> *[90] The* [CIRB] *also notes that the* [Supreme Court of Canada] *specified the requirements of section 59 of Quebec's* Labour Code *… a provision similar to section 24(4) of the* Code*, in* Wal-Mart*. The* [Supreme Court of Canada] *indicated that the purpose of freezing the terms and conditions of employment was to facilitate certification and encourage good faith bargaining between the parties….*
>
> *[91] Other than the variations in the wording of section 59 of the Quebec* Labour Code *and section 24(4) of the* Code*, which establish some differences,* ***the*** [CIRB] ***is of the view that the*** [Supreme Court of Canada]***'s decision does not substantially change the case law applicable in this case.***

> *[92] The objective of section 24(4) of the* Code *is to prevent disruptions in employee-employer relations should the application for certification be denied. Consequently, it is important to maintain the situation in the state it was prior to the filing of the application, unless the* [CIRB] *approves the changes to the terms and conditions of employment or these changes are consistent with a collective agreement….*
>
> …
>
> [Emphasis added]

[126] The union in that case applied for reconsideration, arguing that the CIRB had erred by disregarding the Supreme Court of Canada's statements in *Wal-Mart* that were said to have introduced a shift in the legal paradigm that should apply to freeze provisions. The decision was confirmed on reconsideration in *Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN v. Conseil des Innus de Pessamit*, 2017 CIRB 861. The CIRB stated as follows:

> …
>
> *[26] Contrary to what the union submits in its application for reconsideration,* ***it is not wrong to state that the*** [Supreme Court of Canada]***'s decision in* Wal-Mart, supra*, does not substantially change the*** [CIRB]***'s jurisprudence in its analysis and application of the freeze provision of the terms and condition of employment****. Although* Wal-Mart, supra*, reaffirmed the purpose and function of the freeze provision by indicating that it was not only seeking to maintain the status quo,* ***it did not change the analysis the*** [CIRB] ***conducts when it is seized of a complaint related to the maintenance of the terms and conditions of employment during a freeze period****.…*
>
> *[27] … the original panel followed the* [Supreme Court of Canada]*'s teachings. In fact, in striking a balance between the parties by maintaining the terms and conditions of employment during the prohibited period, the freeze provision aims to promote good faith bargaining in order to give true meaning to the right of association and the right to collective bargaining. The* [CIRB] *is of the view that, in addition to correctly stating the purpose of the freeze provision, the original panel correctly identified the issues to be determined in the context of the three complaints before it ….*
>
> …
>
> *[29] For these reason, the* [CIRB] *finds that the original panel correctly set out the criteria applicable to a complaint under section 24(4) and did not make any error of law or policy in its interpretation of* Wal-Mart, supra*.*
>
> [Emphasis added]

[127] Finally, in *Canada Bread*, the OLRB heard the same kind of argument to the effect that "… the Supreme Court of Canada in *Wal-Mart* established a singular test applicable without regard for the tests developed through the [OLRB's] jurisprudence …" (see paragraph 215). The OLRB determined that there was nothing on which to ground a finding that the employer in that case would not have done the same thing had there been no certification application. However, the OLRB also made comments that closely align with the arbitrator's comments in *École Polytechnique* and with those of the CIRB in both of the *Conseil des Innus de Pessamit* decisions.

[128] The OLRB succinctly stated its view as follows:

> …
>
> *204. In responding to Canada Bread's reliance on the analysis of the* Wal-Mart *decision, counsel for the applicant made the trenchant observation that the ruling by the Supreme Court of Canada did not "do away with three decades of Board jurisprudence" as the "business as before" and "reasonable expectations" test continued to apply.*
>
> *205. I am in full agreement ….*
>
> …

V. **Conclusion**

[129] There was no dispute that the terms or conditions of employment at issue existed on the day on which the certification application was filed, that they were changed during the freeze period without the Board's consent, and that they could be included in a collective agreement.

[130] The evidence did not show that the changes were consistent with past management practices or that they would have been made by a reasonable employer in the same situation. They were not business as usual and were not within the employees' reasonable expectations. As well, these were the kind of changes that the employees would expect the NPR, if certified, to be able to discuss with the employer, or to deal with at the bargaining table. Making them unilaterally as the employer did, would necessarily impact the NPR's representational status and collective bargaining.

[131] It is not clear that a firm decision was made that set the wheels in motion to make these changes before the freeze period. However, even were I to accept that such a decision was made, having strictly internal discussions with management and drafting policy changes, with no notice to employees, does not make the changes

business as usual. The employer's wheels-in-motion narrative lacks a crucial aspect of such an argument, which is that the employees must be aware of the coming changes.

[132] For all of these reasons, I find that the employer breached s. 56, the freeze provision, by changing its promotion policy during the freeze period and make the following order:

(The Order appears on the next page)

VI. **Order**

[133] The Board declares that the changes made to the employer's promotions policy during the freeze period violated s. 56 of the *Act*.

[134] The Board orders the employer to do the following:

(a) allow RCMP corporals and sergeants to apply for promotions to the ranks of sergeant and staff sergeant, respectively, without completing the Supervisor Development Program or Management Development Program;
(b) identify the employees who were screened out of promotions to the ranks of sergeant and staff sergeant, respectively, because they had not completed the SDP or MDP and reassess any such employee for that promotion, regardless of his or her completion of the SDP or MDP;
(c) complete the identification and reassessment ordered in this decision and report the results to the NPF within 120 days of the date of this order; and
(d) pay any employee identified as a result of that identification and reassessment who is entitled to a promotion all lost wages and benefits that the employee would have received had he or she been promoted but for the violation of s. 56.

April 29, 2020.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board