Federal Court of Appeal | Cour d'appel fédérale

Date: 20230412

Docket: A-205-21

Citation: 2023 FCA 75

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

NATIONAL POLICE FEDERATION

Respondent

Heard at Ottawa, Ontario, on December 15, 2022.

Judgment delivered at Ottawa, Ontario, on April 12, 2023.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] The Attorney General of Canada (the AGC) applies for judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (the Board) (2021 FPSLREB 77 (the Decision)), which allowed the complaint filed by the respondent, the National Police

Federation (NPF), pursuant to section 190 of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the Act).

[2] In its complaint (the Freeze Complaint), the NPF alleged that the employer, the Treasury Board, through the Royal Canadian Mounted Police (the RCMP or the Employer), violated section 56 of the Act by converting—or "civilianizing"—during the "freeze period" set out in that provision, five positions traditionally occupied by regular members of the RCMP into positions to be held by public service employees represented by a different bargaining agent (the positions at issue or the converted positions). These five positions are taken out of approximately 50 positions of instructors/facilitators to the Cadet Training Program for new recruits delivered at the RCMP Depot Division located in Regina, Saskatchewan.

[3] Before the Board, the RCMP unsuccessfully argued that section 56 could not operate to paralyse the management rights listed in section 7 of the Act, unless those rights have been deliberately negotiated away, something that had not been done in the instant case. Those rights include the assignment of duties to public service employees and the classification of the positions associated with these duties.

[4] These two provisions, which are at the heart of the present matter, read as follows:

Right of employer preserved	**Maintien du droit de l'employeur**
7 Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the	**7** La présente loi n'a pas pour effet de porter atteinte au droit ou à l'autorité du Conseil du Trésor ou d'un organisme distinct quant à l'organisation de tout secteur de

federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.	l'administration publique fédérale à l'égard duquel il représente Sa Majesté du chef du Canada à titre d'employeur, à l'attribution des fonctions aux postes et aux personnes employées dans un tel secteur et à la classification de ces postes et personnes.
[…]	[…]
Continuation of terms and conditions	**Maintien des conditions d'emploi**
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.

[5] In the alternative, the RCMP contended that even if section 56 applied to this case, it was still at liberty to continue to exercise its management rights as it did before the freeze, provided it did so in a manner consistent with normal management policy, as the RCMP alleged was done

here. The Board concluded otherwise. In the Board's view, the civilianization of the positions at issue was inconsistent with the RCMP's past management practice, meaning that the RCMP could not rely on a "business-as-before" defence.

[6] This application for judicial review asks this Court to set aside the Board's decision and remit the matter back to the Board for redetermination on the ground that the Board committed untenable errors in its consideration of the legal context that constrained the exercise of its decision-making authority by misinterpreting section 7 and by applying the "business-as-before" exception too narrowly.

II. Context

[7] The NPF is the bargaining agent representing all non-commissioned regular members of the RCMP and reservists. As this Court stated in *Canada (Attorney General) v. National Police Federation*, 2022 FCA 80 (*NPF 2022*), up until the changes made to the Act in 2017, regular members and reservists of the RCMP were not permitted to unionize or engage in collective bargaining. That had been the case since collective bargaining was first introduced in the federal public service in the late 1960s. This limitation was lifted after having been found to impermissibly encroach on the freedom of association guaranteed by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (*NPF 2022* at para. 15).

[8] The NPF's application for certification to become the bargaining agent for this group of employees was made on April 18, 2017. The application was granted on July 12, 2019. On July 15, 2019, the NPF served on the Employer a notice to bargain pursuant to section 105 of the Act.

[9] A few weeks prior to certification, on May 23, 2019, the RCMP announced that the positions at issue, which were vacant at the time, were converted into AS-04 group and level positions and were to be filled by public service employees. The converted positions, together with the other instructor/facilitator positions at the RCMP Depot Division, help deliver the Applied Police Sciences course (the APS course), which is the academic core of the Cadet Training Program.

[10] It is not disputed that until the time the RCMP made its announcement, the employees delivering the APS course (the APS Instructors) had always been regular members of the RCMP. It is also not disputed that the duties associated with the position of APS Instructor required experience as a police officer.

[11] The Freeze Complaint was filed on August 19, 2019. It alleged that the civilianization of the positions at issue, at the time it occurred, amounted to a unilateral change to the terms and conditions of employment of the employees of the (then) proposed bargaining unit, contrary to section 56 of the Act.

III. The Board's decision

[12] The Board laid out as follows the analytical framework applicable to freeze complaints under the Act, whether it be in the context of a certification application or a notice to bargain:

> [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 […]:
>
> > 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 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….
>
> (Decision at paras. 55-56)

[13] The Board noted that there was no dispute between the parties that this was the applicable two-stage test in the instant case and recalled that this analytical framework recognizes that the Act's freeze provisions do not operate "as a *deep freeze*" preventing the employers "from making any changes to the workplace", provided these changes are part of an established pattern (Decision at para. 57).

[14] Part four of the first stage of the test was determined by the Board, at the request of the parties, in a preliminary ruling dated November 19, 2020 (*National Police Federation v. Treasury Board (Royal Canadian Mounted Police)*, 2020 FPSLREB 102). In that ruling (the Part-4 Test Ruling), the Board concluded that the Act did not prevent the parties from voluntarily agreeing to a provision in the collective agreement that would require certain cadet instructional duties to be performed only by regular members of the RCMP (Decision at para. 58). The Part-4 Test Ruling was not challenged.

[15] As a result of this preliminary ruling, the Board focussed on the other branches of the test and, more particularly, on what it considered to be the two key issues in dispute: the term and condition of employment under analysis, and the business-as-before defence analysis (Decision at para. 64).

A. *The term and condition issue*

[16] On the first issue—the term and condition of employment under analysis—the Board looked first at the case law before engaging in the interpretation of section 7 of the Act.

[17] After a lengthy review of its own case law, the case law of labour boards of other Canadian jurisdictions, and the Federal Courts' jurisprudence, the Board rejected the Employer's contention that freeze complaints had only been upheld in situations in which an employer had voluntarily agreed to give up its management rights under section 7 of the Act. It held that this contention was not "sustainable in light of the jurisprudence as a whole", noting that it has "consistently found that management rights can be circumscribed by the freeze provisions in the Act" (Decision at para. 109).

[18] That said, the Board acknowledged that none of the case law it had examined to that point "touches on matters that fall quite so directly into the management rights listed in [section] 7 of the Act as [the present] matter does", but found that two cases from the New Brunswick Labour Board (*C.U.P.E. v. New Brunswick (Treasury Board)*, 1984 CarswellNB 449 and *C.U.P.E. Local 1190 v. New Brunswick (Board of Management)*, 2004 CarswellNB 632 (the *NB Labour Board Cases*)) did (Decision at paras. 113-114). More particularly, the Board found these two cases to be helpful for two reasons: first, because they both addressed a provision in New Brunswick's *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 that is modeled after section 7 of the Act; and second because they both held that even classification changes made by the employer were subject to that act's freeze provision (Decision at para. 119).

[19] The Board concluded its review of the case law as follows:

> a) For the purposes of a freeze complaint, a term and condition of employment can be determined to exist based on, for example, employer guidelines and past practice; it can also take the form of a unilateral exercise of management authority;
>
> b) There is, however, no support in the case law for the proposition that absent a collective agreement, management rights are a frozen term and condition of employment such that the exercise of those rights cannot result in a change to a term and condition of employment for the purposes of determining whether a freeze violation exists;
>
> c) Rather, the case law recognizes that, while an employer has the discretion to make changes to terms and conditions of employment continued in force by the freeze provision, the exercise of that discretion must be part of an established pattern.
>
> (Decision at para. 121)

[20] The Board then turned to the interpretation of section 7 of the Act, the second key issue it had identified for the purposes of determining whether there had been a violation of section 56. Acknowledging that it could not ignore the "plain and clear language of [section] 7", the Board recalled that the meaning of that provision "depend[ed] not only on text but also on context and purpose, including the context and purpose of [section] 56" (Decision at paras. 145 and 148).

[21] The Board found that a purposive interpretation of both sections led to the conclusion that these provisions "[did] not conflict and [could] be read and [could] function together in the scheme of the [Act]". The Board considered that this interpretation was supported by the Supreme Court of Canada decision, *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323 (*Wal-Mart*) (Decision at para. 148).

[22] While, according to the Board, the wording of section 56 of the Act did not go as far as "removing or even completely freezing the employer's rights under [section] 7", it was nevertheless designed to "[circumscribe] the employer's discretion to proceed with alterations to certain terms and conditions of employment, for a certain period of time (as indicated in paragraphs 56(a) and (b))", while providing "for certain exceptions thereto ('…except under a collective agreement or with the consent of the Board…')" (Decision at para. 152).

[23] For the Board, this approach was more consistent "with the objectives of the statutory freeze" which, by circumscribing the employer's management powers, are "to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith", and, ultimately, "to foster the exercise of the right of association" (Decision at para. 155, quoting from *Wal-Mart* at paras. 34 and 36).

[24] Accepting the Employer's position, the Board said, would "deprive [section] 56 of much of its purpose" and, quoting again from *Wal-Mart* at para. 49, "permit the employer to keep using its managerial powers as if nothing had changed" and allow it, ultimately, "to do that which the law is actually meant to prohibit" (Decision at para. 157). The applicability of both

sections 7 and 56, it insisted, “recognizes that, once it is notified of the application for certification, the employer is dealing with a new scheme of labour relations and it must take this new system into account in the exercise of its management powers (see Wal-Mart at para. 51)” (Decision at para. 157).

[25] The Board concluded that neither the jurisprudence nor its interpretation of section 7 led it to find that the term and condition that was frozen at the time the NPF applied for certification “was exclusively the [Employer’s] unrestricted right to assign duties or classify positions” (Decision at para. 163). That term and condition was rather, as argued by the NPF, the assignment of APS Instructors duties to regular members, as evidenced by the RCMP’s past practice.

[26] Having determined that a condition of employment (that only regular members served as APS Instructors) existed on the day the NPF’s certification application was filed, that this term and condition had been changed by the Employer during the freeze period set out in section 56 without seeking the approval of the Board for doing so, and taking into account the Part-4 Test Ruling, the Board concluded that the Freeze Complaint met the four elements of the first stage of the analytical framework (Decision at paras. 166-167).

B. *The business-as-before issue*

[27] The Board then moved to the second stage of the analysis, asking itself whether the change made by the RCMP to that existing condition of employment was consistent with the RCMP's business-as-before management practices (Decision at para. 168).

[28] In deciding this issue, the Board considered the RCMP's past management practices as a whole, not only with respect to the positions of APS Instructors, as urged by the NPF (Decision at para. 174). After considering the evidence on the RCMP's staffing patterns and different civilianization processes that had occurred over the years in detail, the Board concluded that, although it was clear that the RCMP had shifted toward greater use of public service employees in recent years, the civilianization at issue was not in accordance with the RCMP's past practices (Decision at para. 215).

[29] The Board noted that although the converted positions did not in and of themselves require "a badge and gun"—one of the criteria used by the RCMP in previous civilianization processes for assessing whether certain duties could be performed by a civilian—there was a common understanding between the parties that only current or former police officers could "provide the instruction, run the APS scenarios, and monitor and evaluate the progress of recruits through the program" (Decision at para. 224). The Board was satisfied as well that "past practice of civilianization in the RCMP was concentrated in areas such as human resources, strategic planning, media relations, intelligence analysis, informatics, and related executive positions",

whereas the positions at issue were unique because "only current or former police officers can provide the instruction" (Decision at para. 229).

[30] Furthermore, the Board found there was "undisputed evidence" that during its most significant period of civilianization, the RCMP had made a clear decision not to civilianize APS Instructors positions. There was evidence as well that the civilianization at issue was prompted by the desire "to try something new" (Decision at para. 232).

[31] The Board underscored that in reaching these conclusions, it was not suggesting that the RCMP was barred from civilianizing duties during a freeze period. Rather, its findings were largely influenced by the fact that "[t]he APS [Instructor] role is a fairly unique circumstance with very specific past management decisions and practices" (Decision at para. 234).

IV. Issue and standard of review

[32] The only issue to be determined in this case is whether this Court should interfere with the Board's decision that the civilianization of the positions at issue in May 2019 amounted to a violation of section 56 of the Act, and that this violation could not be saved by the business-as-before defence.

[33] The parties agree that the applicable standard of review is the presumptive standard of reasonableness, which applies to all aspects of administrative decisions subject to it, including aspects calling into question the decision maker's interpretation of its home statute (*Canada*

(Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 25 (*Vavilov*)).

[34] On reasonableness review, the focus of the inquiry "must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para. 83). Ultimately, the reviewing court must be satisfied that the administrative decision is "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para. 85).

[35] When the issue concerns more specifically the decision maker's interpretation of its home statute, reasonableness review means that although the decision maker's interpretation must be consistent with the text, context, and purpose of the provision at issue, as required by the well established principles of statutory interpretation, the reviewing court must refrain from undertaking a *de novo* analysis, asking itself what the correct interpretation would have been and deciding the issue itself (*Vavilov* at paras. 75, 83, 116 and 120; *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156 at para. 20 (*Mason*)). Its role is rather to exercise "judicial restraint". In so doing, it must be mindful of "the distinct role of administrative decision-makers", focus on the "administrator's reasons 'with respectful attention'" and seek to "understand the reasoning process" (*Mason* at para. 20, quoting from *Vavilov* at paras. 75 and 84).

[36] More specific to the matter at hand, in *NPF 2022*, which involved a dispute between these same parties also regarding the scope of section 56 of the Act, this Court provided this important reminder respecting the significance deference owed to the Board's interpretation of statutory freezes:

> [84] At the outset, it is worthwhile remembering that decisions like the one in the case at bar are relatively unconstrained due to their subject-matter, the statutory remit of the Board, and its specialization in discharging that remit. Thus, as a practical matter, the decisions of the Board on matters such as this receive significant deference. Interpretation of the statutory freeze lies at the centre of the setting the balance of power in labour-management relations – a matter that the legislators have left explicitly to expert labour relations boards to settle and over which they have accumulated much know-how by dealing with so many cases in this area.
>
> [85] For well over half a century, courts in this country have consistently held that decisions of this nature cannot be lightly interfered with. That has been the approach to such decisions from the 1970's in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382, 1973 CanLII 191 (SCC) and *C.U.P.E v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 to the present day.
>
> [86] The privative clause in subsection 34(1) of the *Federal Public Sector Labour Relations and Employment Board Act,* S.C. 2013, c. 40, s. 365 is a strong indication of the requirement for such deference, as this Court has held in *Canada (Attorney General) v. Public Service Alliance of Canada*, 2019 FCA 41, 432 D.L.R. (4th) 170 at para. 34 and *Canada (Attorney General) v. Best Buy Canada Ltd*., 2021 FCA 161 at paras. 122-123.

[37] With these principles in mind, I see no basis to interfere with the Board's conclusions, whether it be on the interplay between sections 7 and 56 of the Act that led the Board to conclude to a violation of section 56, or on the business-as-before defence advanced by the RCMP, for the reasons that follow.

V. Analysis

A. *The section 56 violation conclusion*

[38] The AGC argues that this conclusion is unreasonable because the Board failed to adopt a textual, purposive and contextual approach when interpreting section 7 while overemphasizing the purpose of section 56 and the speculative impact of preserving limited management rights on the Act's framework. It contends that the Board did not grapple enough with the clear and unequivocal words used in section 7. The Board's failure to assign any meaning to those words demonstrates, says the AGC, that it was not alive to essential elements of statutory interpretation.

[39] The AGC reiterates that section 7 specifically carves out the employer's management rights to assign duties and classify positions from the operation of statutory freeze provisions. This, it claims, distinguishes the present matter from *Wal-Mart*.

[40] Finally, the AGC submits that the *NB Labour Board Cases* do not support the Board's interpretation of section 7. This is so, in its view, because these two decisions affirmed that what is prohibited during a freeze period is not the exercise of the employer's right to classify positions, but solely the assignment of employees. The AGC recalls that there was no such assignment in the present matter as the positions at issue were vacant at the time of their civilianization.

[41] I disagree with these assertions. More would be required, in my view, to set aside on reasonableness review, the Board's conclusion regarding the violation of section 56. In fact, the AGC does exactly what he asserts the Board did, which is to focus on one provision to the detriment of the other. As noted, the AGC essentially claims that the Board did not grapple enough with the clear and unequivocal wording of section 7. However, this, in my view, is not a fair characterization of the Board's reasoning on the violation issue.

[42] Reasonableness review, when the administrative decision-maker provided written reasons for its decision, begins by a review, with respectful attention, of the reasons as those are "the means by which the decision maker communicates the rationale for its decision" (*Vavilov* at para. 84; *NPF 2022* at para. 53).

[43] Here, the Board's 248-paragraphs decision, which I summarized in broad terms at paragraphs 12 to 31 of these reasons, is detailed, thorough, and does not exhibit the fatal flaws that the AGC claims it does. On the contrary, it exhibits, in my view, a more balanced and sensitive approach to statutory interpretation and to the case law constraining the Board's decision-making authority than the one advocated by the AGC. In other words, it is internally coherent and falls well within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[44] This balanced approach is reflected in the Board's reasons in a number of ways.

[45] As already noted, the Board acknowledged that it could not ignore the plain and clear language of section 7 (Decision at para. 145). However, it determined that the interpretation of that provision depended "not only on text but also on context and purpose, including the context and purpose of [section] 56" (Decision at para. 148). The Board then concluded, based on that approach, that both sections did not conflict and "[could] be read and [could] function together in the scheme of the Act", adding that *Wal-Mart* was "instructive" in that regard (*ibid*).

[46] I see no reviewable error in the Board's approach to the interpretation of section 7. It is defensible, in my view, in respect of the modern principle of statutory interpretation and does find support in the seminal case of *Wal-Mart*.

[47] It is well settled that, although the relative effect of ordinary meaning, context and purpose in the interpretation of a statute may vary from one case to another, one must seek, "in all cases", to read the provisions of a piece of legislation "as a harmonious whole" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10, quoted in the Decision at para. 130). This is consistent with the presumption of legislative coherence, whereby legislation passed by the same order of government is presumed not to contain contradictions or inconsistencies (Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 323). Hence, "an interpretation which results in conflict should be eschewed unless it is unavoidable" (*Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591 at para. 47). As a corollary, the presumption will stand if the conflict can be avoided by interpretation (*Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 at paras. 89 and 92).

[48] Here, the AGC claims, in essence, that conflict between sections 7 and 56 is unavoidable unless the employer, on its own volition, bargains away the prerogatives listed under section 7. If the employer does not do so, then that conflict is to be resolved by having section 7 prevail over section 56.

[49] The Board rejected this restricted view of the interplay between the two provisions. First, it emphasized that it has "case after case" dismissed the view that the existence of a collective agreement provision between the parties was "the determining factor in a freeze complaint" and has, as a result, "taken jurisdiction over, and has rendered relief in, many complaints with no 'voluntary negotiated' provision about the term and condition at issue" (Decision at para. 147).

[50] As an example, the Board cited this Court's decision in *Library of Parliament v. Canadian Association of Professional Employees*, 2013 FCA 237 (*Library of Parliament*), where the Board upheld a freeze complaint under section 39 of the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) in relation to the employer's implementation of a workforce adjustment policy during a notice to bargain freeze period. In particular, the Board in that case determined that to be captured by that freeze provision, a term and condition of employment did not need to be embodied in a collective agreement as long as it was capable of being so embodied.

[51] There, the employer was claiming that the policy at issue was not capable of being embodied in a collective agreement and could not, as a result, be captured by section 39 of the *Parliamentary Employment and Staff Relations Act* because, among other things, this would

encroach on its management rights preserved by subsection 5(3) of that act (*Library of Parliament* at para. 23), a provision that mirrors section 7 of the Act. The Court dismissed that contention, holding that subsection 5(3) was no obstacle to the application of the freeze provision because the impugned policy was capable of being embodied in a collective agreement (*Library of Parliament* at paras. 32 and 34).

[52] Here, the Board found that the Act did not prevent the parties from voluntary agreeing to a provision in the collective agreement that would require certain cadet instructional duties to be performed by regular members of the RCMP (Decision at para. 58). As noted previously, this ruling is not in dispute before us. To the extent that *Library of Parliament* stands for the proposition that a provision of the nature of section 7 is no obstacle to a freeze complaint if the term and condition at issue is capable of being embodied in a collective agreement, as I believe it does, it was therefore open to the Board to dismiss the Employer's contention that section 7 will always prevail over section 56, unless the management rights listed under section 7 have been voluntarily negotiated away in a collective agreement.

[53] More importantly, perhaps, when considering the interplay between sections 7 and 56, the Board, relying in great measure on *Wal-Mart*, saw no conflict in the application of both provisions (Decision at para. 155). It held, in essence, that both provisions could co-exist and function together outside the limited scope suggested by the Employer. In doing so, it is clear that the Board, interpreting both provisions, strived to strike a balance that would not deprive section 56 of any meaning, while at the same time preserving the employer's management rights under section 7 to the fullest extent possible when the two provisions collide.

[54] Such an approach, in my view, was reasonably open to the Board when one looks at *Wal-Mart*, which, as stated by this Court in *NPF 2022*, applies, as opposed to alters, decades of labour law jurisprudence (*NPF 2022* at para. 95). In fact, I would say that this was the only avenue available to the Board.

[55] It is important, I believe, to underscore the fact that *Wal-Mart* fundamentally dealt with tensions of the same nature as the ones we have in the present matter, that is tensions between a freeze provision—in that case, section 59 of Québec's *Labour Code*, C.Q.L.R. c. C-27—and what the Supreme Court described as the employer's "unilateral decision-making power" over the employees' conditions of employment (*Wal-Mart* at para. 35) or the employer's "power and prerogative to unilaterally dictate or change conditions of employment, in law and in fact" (*Wal-Mart* at para. 50, quoting from André C. Côté, "Le gel statutaire des conditions de travail" (1986) 17 R.G.C. 151 at 161 [my emphasis]).

[56] As noted by the Board (Decision at paras. 54 and 155-157), the Supreme Court, after having emphasized that the purpose of the freeze provision at issue was not merely to ensure that the balance that existed between the parties at the time the petition for certification was filed was maintained, but more fundamentally "to foster the exercise of the right of association" (*Wal-Mart* at paras. 34-36), resolved these tensions as follows:

> [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. 41 of 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. Once the petition for

> certification is filed, the employer is dealing with [TRANSLATION] "the possible implementation of a new scheme of labour relations in the business, a system that is now institutionalized", and it must take this new system into account in exercising its management power.
>
> (*Wal-Mart* at para. 51)

[57] As part of the broader labour law context, it is worth reminding that freeze provisions are not specific to the Act or to Québec's labour legislation. They exist in all other jurisdictions in Canada (*Wal-Mart* at para. 60; *NPF 2022* at para. 1) and play a fundamental role in "setting the balance of power in labour-management relations" (*NPF 2022* at para. 84).

[58] That does not mean that the search for that balance will inexorably tip the scale in favour of freeze provisions. On the contrary, the Board was well aware that Canadian labour boards have long interpreted statutory freeze provisions like section 56 of the Act as requiring "a dynamic as opposed to a static freeze", meaning that such provisions "permit[—]and sometimes require[—]an employer to continue to operate in accordance with its prior pattern of operations" (*NPF 2022* at para. 2). To use the words of the Board, freeze provisions "do not operate as a 'deep freeze' that prevent employers from making any changes to the workplace" (Decision at para. 57).

[59] Freeze provisions, therefore, as the Board made clear, do not discard, remove or completely freeze the employer's management rights; they circumscribe it "for a certain period of time" with, in the case of section 56 of the Act, "certain exceptions" (Decision at para. 152; see also Decision at paras. 155 and 166; *Wal-Mart* at para. 35). As this Court noted in *NPF 2022*, the notion of a "static freeze" was rejected "in recognition of employers' needs to continue to run

their businesses during freeze periods, which sometimes may be lengthy", and was replaced by the "business as usual test" (*NPF 2022* at para. 59).

[60] This means that if changes to the terms and conditions of employment made by an employer are captured by a freeze provision, it remains open to the employer to justify these changes under the business as usual—or business-as-before—defence or exception. Again, as we have seen, this resonated with the Board, which, after having concluded that the civilianization of the positions at issue engaged section 56 of the Act, went on to determine whether that change to the terms and conditions of the group of employees represented by the NPF was justified under that defence.

[61] In the end, what the AGC proposes is an interpretation that would wholly insulate section 7 from the overall operation of the Act, subject only to the employer giving away the rights listed therein at its sole will and discretion. The Board reasonably rejected this approach as it is insensitive to the canon of construction requiring, consistent with the presumption of legislative coherence, that the provisions of an Act be read "in all cases", "as a harmonious whole", and is contrary to the teachings of *Wal-Mart*.

[62] This Court has already warned against an "absolutist interpretation of section 7" and, as a corollary, against a "narrowly technical construction that would defeat [the] purpose" of freeze provisions (*P.S.A.C. v Canada (Treasury Board)*, 1987 CarswellNat 1118 at paras. 13, quoting from *R v. C.A.T.C.A.*, 1981 CarswellNat 148 at para. 24, and 17 (*P.S.A.C.*)). Section 7, reminded the Court, "is not the embodiment of divine theory of executive power nor even a more limited

proclamation of governmental sovereignty"; it is "simply […] a management rights clause" (*P.S.A.C.* at para. 18, referring to *P.S.A.C. v. Canada (Treasury Board)*, [1986] F.C.J. No. 819).

[63] The fact that section 7 carves out specific management rights does not alter this finding, contrary to the AGC's contention. *Wal-Mart* remains, in my view, a relevant—and unavoidable—constraint regardless of whether some management rights have been carved out or not by legislation, as does section 7. The AGC's submission on that point offers no principled basis for distinguishing *Wal-Mart* and this Court's case law guarding against an absolutist interpretation of section 7.

[64] Ultimately, this Court, to paraphrase *NPF 2022* at paragraph 89, is being invited by the AGC to engage in something akin to a correctness review by substituting its own interpretation to that of the Board in order to measure the reasonableness of the Board's decision. As stated previously in these reasons, this is something *Vavilov* instructs reviewing courts not to do.

[65] Lastly, the AGC claims that the Board's reliance on the *NB Labour Board Cases*, as case law involving matters falling directly into the management rights listed in section 7 of the Act and supporting its interpretation of section 7, was misguided. It was so, according to the AGC, because what was held to be protected from the employer's exercise of its management rights by the freeze provision at issue in these cases was the assignment of employees into newly classified positions, not the classification of these positions itself.

[66] Assuming this proposition to be correct, I find that it is not determinative of the outcome of this case because the Board, as we have seen, also based its rejection of the RCMP's contention that section 7 constitutes a bar to the application of section 56, unless the employer bargains away the management rights listed therein, on a review of the text, context and purpose of both sections 7 and 56.

[67] Furthermore, the Board's conclusions regarding its review of the case law were based on the "preponderance of the case law" (Decision at para. 121), meaning all the case law reviewed, not solely the *NB Labour Board Cases*. Besides, when one looks at the structure of the Board's decision, the Board was satisfied before addressing the *NB Labour Board Cases* that there was sufficient basis for it to proceed to the second stage of the analytical framework, the business-as-before stage. In other words, it was satisfied that the first stage of that framework—the section 56 violation stage—had been met by the NPF (Decision at paras. 112-113). When one looks at the Board's reasons, nothing suggests that the *NB Labour Board Cases* were central to the Board's findings.

[68] In conclusion, I find that the AGC has failed to establish that the Board's conclusions on the section 56 violation issue were unreasonable. On the contrary, the Board offered a reasonable and balanced view of the interplay between sections 7 and 56 of the Act that is respectful of the principles of statutory interpretation and aligned with the teachings of the Supreme Court in *Wal-Mart*. I see no basis to interfere with the Board's decision on that point.

B. *The business-as-before defence*

[69] Freeze cases are inherently factual in nature *(NPF 2022* at para. 96). Here, the business-as-before defence advanced by the RCMP required the Board to determine whether the impugned change to the terms and conditions of employment was a reasonable one that the RCMP was permitted to make in light of all the relevant surrounding circumstances. This was a factually suffused determination. It is well settled that such determinations are owed considerable deference on the part of reviewing courts (*Vavilov* at paras. 125-126; *NPF 2022* at para. 96; *Canadian Helicopters Limited v. Office and Professional Employees International Union*, 2020 FCA 37 at paras. 25 and 29-33 (*Canadian Helicopters*)).

[70] As noted, the Board recognized that the RCMP had shifted toward greater use of public service employees in recent years. However, it held that the civilianization at issue was not in accordance with its past practices when all the relevant surrounding circumstances are considered (Decision at para. 215). Therefore, it dismissed the Employer's business-as-before defence.

[71] The AGC contends that the Board applied the business-as-before test too narrowly by limiting its scope to the civilianization of the particular positions at issue. He submits that the Board's analysis should have been based on the criteria for civilianization that the RCMP had established for itself, prior to the freeze, for all regular members represented by the same bargaining agent, a practice, he says, that "occurred hundreds of times over years throughout the RCMP" (AGC's Memorandum of Fact and Law at para. 33).

[72] Again, I disagree with these submissions.

[73] Contrary to the RCMP's assertion, the Board did not limit its consideration of the business-as-before defence to the past practice regarding the position of APS Instructor. The Board's approach was quite the contrary, having taken the view that it was "appropriate to consider the RCMP experience as a whole" (Decision at para. 174). It did so by undertaking a detailed review of the evidence regarding the various initiatives, beginning in 2012, that resulted in the civilianization of hundreds of regular member jobs. It did the same regarding the staffing patterns across the RCMP.

[74] The Board found that although positions held by regular members had been civilianized in the past, the APS Instructor position was materially different from those other positions because the APS Instructor position required police experience whereas the civilianized positions were concentrated in administrative roles (Decision at para. 229). It noted as well that the civilianization of the APS Instructor position had once been considered but was rejected (Decision at para. 182). It further noted that when the idea was resuscitated in 2019, this was to "try something new" (Decision at para. 232). This led the Board to conclude that the APS Instructor's role "[was] a fairly unique circumstance with very specific management decisions and practices" (Decision at para. 234). In other words, the civilianization of the positions at issue was, in the Board's view, an unprecedented decision, which, as a result, was inconsistent with the RCMP's business-as-before or past practices.

[75] I am satisfied that there is evidence on record supporting those findings. Absent exceptional circumstances, it is trite that this Court should not interfere with the Board's factual findings (*Vavilov* at para. 125; *Canadian Helicopters* at para. 25). The AGC has failed to establish that any such circumstances exist in the present matter that would justify this Court to interfere with the Board's conclusions regarding the RCMP's business-as-before defence.

[76] The Board's decisions on freeze complaints cannot be interfered with lightly (*NPF 2022* at para. 85). Here, the AGC has not met this demanding burden, be it in respect of the section 56 violation issue or the business-as-before issue. Generally, I am satisfied that the Board's decision regarding these two issues is "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the [Board]" (*Vavilov* at para. 85).

[77] For all these reasons, I would dismiss the AGC's judicial review application, with costs to the NPF.

"René LeBlanc"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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