CITATION: PUBLIC SERVICE ALLIANCE OF CANADA *v.* CANADIAN FEDERAL PILOTS ASSN., 2009 FCA 223, [2010] 3 F.C.R. 219 — A-375-08, A-383-08

2009 FCA 223

A-375-08

Public Service Alliance of Canada (*Applicant*)

v.

Canadian Federal Pilots Association and **Attorney General of Canada** (*Respondents*)

A-383-08

Attorney General of Canada (*Applicant*)

v.

Canadian Federal Pilots Association and **Public Service Alliance of Canada** (*Respondents*)

INDEXED AS: PUBLIC SERVICE ALLIANCE OF CANADA v. CANADIAN FEDERAL PILOTS ASSN. (F.C.A.)

Federal Court of Appeal, Evans, Pelletier and Layden-Stevenson JJ.A.—Ottawa, March 24 and July 2, 2009.

Public Service — Jurisdiction — Judicial review of Public Service Labour Relations Board decision allocating, on application under Public Service Labour Relations Act (PSLRA), s. 58, three positions in federal public service to bargaining unit comprising Aircraft Operations (AO) occupational group — Definition of AO group, bargaining unit expressly excluding positions not requiring pilot's licence, experience as pilot — References to flying aircraft removed from job descriptions re-allocated to AO group herein — Whether Board exceeding jurisdiction by re-allocating positions to AO group notwithstanding exclusion — Per Evans J.A. (Layden-Stevenson J.A. concurring): Board having legal authority to interpret, apply PSLRA, s. 58 given Parliament's express conferral of power thereon — Board's decision, interpretation of PSLRA, s. 58 entitled to curial deference, reviewable for unreasonableness — Applicants having to establish that Board's interpretation of s. 58 unreasonable because not reading into it direction in PSLRA, ss. 57(3), 70(2) that bargaining units must be co-extensive with occupational groups established by employer — Board concluding exclusion could not be determinative and thus override its statutory responsibility "to oversee and ultimately decide the proper composition of bargaining units" — Board also not persuaded that where primary duties of positions at issue falling within AO group, should automatically give priority to the specific exclusion in the AO group definition — Board's disposition of application not unreasonable — Applications dismissed — Per Pelletier J.A. (dissenting): Board's task under PSLRA, s. 58 to apply bargaining unit definitions to facts of given position, group — Board not allowed to reconsider appropriateness of bargaining unit definitions — In present case, Board erring in treating task under s. 58 as though having to define appropriate bargaining unit under s. 57 —

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Board erring when failing to distinguish between formal, functional criteria — Because experience as pilot, possession of valid pilot's licence not mandatory elements of positions at issue, positions explicitly excluded from AO bargaining unit — Unreasonable for Board to conclude positions could be included in group from which specifically excluded.

Administrative Law — Judicial Review — Standard of Review — Judicial review of Public Service Labour Relations Board decision allocating, on application under Public Service Labour Relations Act, s. 58, three positions in federal public service to bargaining unit comprising Aircraft Operations occupational group — Jurisdictional error only ground of review available herein — Interpretation of enabling legislation normally reviewable on standard of unreasonableness — While Supreme Court of Canada retaining category of "questions of jurisdiction or vires" reviewable on standard of correctness, no justification for characterizing as "jurisdictional issue" interpretations of provisions not raising question of law of central importance to legal system, outside administrative decision maker's area of expertise — In order to establish in present case that Board exceeding jurisdiction by misinterpreting provision in enabling statute, applicant having to establish Board's interpretation unreasonable.

This was an application for judicial review of a decision of the Public Service Labour Relations Board allocating, on an application under section 58 of the *Public Service Labour Relations Act* (PSLRA) by the Canadian Federal Pilots Association (CFPA), three positions in the federal public service to the bargaining unit comprising the Aircraft Operations (AO) occupational group. The applicants alleged that the Board exceeded its jurisdiction because the definition of the AO group and its bargaining unit expressly excludes positions that do not require a pilot's licence and experience as a pilot.

The dispute originated with the employer's revision of the job descriptions of three positions within Transport Canada, which removed references to flying an aircraft. They had previously been part of the AO group. These positions were re-allocated to different occupational groups. The CFPA applied to have the three positions allocated back to the AO group's bargaining unit. The Board concluded that the best fit was with the AO group. The applicants argued that the Board had committed a jurisdictional error in failing to regard the elimination of piloting qualifications from the descriptions of the re-classified positions as automatically excluding them from the AO group because of the specific exclusion from that group, and therefore from its bargaining unit, of positions for which piloting qualifications are not mandatory. The applicants also alleged that the Board erred by amending the bargaining units rather than simply deciding in which of the existing units the three positions were included.

The main issue was whether the Board exceeded its jurisdiction by allocating the positions to the AO bargaining units. Also, an analysis of the standard of review applicable to decisions of adjudicative administrative tribunals was conducted.

Held (Pelletier J.A. dissenting), the applications should be dismissed.

Per Evans J.A. (Layden-Stevenson J.A. concurring): Jurisdictional error under paragraph 18.1(4)(*a*) of the *Federal Courts Act* was the only ground of review available to the applicants on the facts of this case given the preclusive clause in section 51 of the PSLRA. A tribunal will have acted beyond its jurisdiction if it decides incorrectly a legal question for which correctness is the applicable standard of review. A tribunal may also exceed its jurisdiction if its decision on a question of law is unreasonable. Like other administrative tribunals, the Board is not authorized by Parliament to make a decision that is based on an unreasonable interpretation of any provision of its enabling legislation. Such decisions are not protected by even the strongest preclusive clause.

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Recent decisions of the Supreme Court of Canada, including *Dunsmuir v. New Brunswick*, state that the interpretation tribunals make of their enabling legislation is normally reviewable on a standard of unreasonableness. However, the Court in *Dunsmuir* retained a category of "questions of jurisdiction or *vires*" reviewable on a standard of correctness. While correctness is the appropriate standard of review for the interpretation of a statutory provision which demarcates the authority of competing different administrative regimes, there is no justification in contemporary approaches to the roles of specialist tribunals and generalist courts in administrative law for characterizing as a "jurisdictional issue" (reviewable on a standard of correctness) the interpretations of other provisions in a tribunal's enabling statute that do not raise a question of law that is of central importance to the legal system and outside the area of expertise of the administrative decision maker. To the extent that *Dunsmuir* retained the concept of a jurisdictional question to identify the provisions of an enabling statute which the administrative decision maker must decide correctly, it has done so in a very limited way. It would appear that a standard of review analysis is required when an adjudicative administrative tribunal has exceeded its jurisdiction because it has misinterpreted a provision of its enabling statute. Therefore, in order to establish that the Board exceeded its jurisdiction by misinterpreting a provision in its enabling statute, an applicant must demonstrate that the Board's interpretation was unreasonable.

The Board had the legal authority to interpret and apply section 58 given Parliament's express conferral of power thereon to interpret that section in order to dispose of a section 58 application, and its decision was entitled to curial deference. The question that the Board had to decide in the course of determining the section 58 application was one of the interpretation of its home statute and, as such, presumptively reviewable for unreasonableness.

The text of section 58 contains no explicit direction about the basis on which the Board must determine whether an employee is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining. In contrast, when the Board is initially establishing appropriate bargaining units under section 57 or is subsequently reviewing their appropriateness under section 70, it must ensure that bargaining units "are co-extensive with the occupational groups established by the employer", unless that "would not permit satisfactory representation of the employees to be included in a particular bargaining unit". In order for the applicants to succeed, they had to establish that the Board's interpretation of section 58 was unreasonable because it did not read into it the direction contained in subsections 57(3) and 70(2).

The Board's reasons provided the degree of "justification, transparency and intelligibility" to render its decision reasonable. First, it clearly addressed the principle relied on by the applicants that a position should not be included in a bargaining unit for an occupational group from which it is excluded by the definition of the group, and concluded that in the absence of an explicit statutory direction, the exclusion could not be determinative and thus override its statutory responsibility "to oversee and ultimately decide the proper composition of bargaining units." Second, the Board was not persuaded that, if the primary duties of the three positions fell within the AO group, it should automatically give priority to the specific exclusion in the AO group definition. It was not unreasonable for the Board to have considered the group definitions as a whole, i.e. their inclusive and their exclusive elements, since it was not possible to allocate the positions to a group without running foul of some aspect of the definitions. Third, in the circumstances, the Board resorted to its established methodology for resolving these kinds of disputes, i.e. assign the position to the bargaining unit comprising the occupational group, the principal duties of which are most similar to those of the disputed position. Finally, the Board indicated that it was not overlooking the labour relations implications of its decision. For these reasons, the Board's disposition of the application was not unreasonable.

Per Pelletier J.A. (dissenting): It is the Board's function to define the appropriate bargaining units in light of the employer's occupational groups and the requirements of collective bargaining. Once those bargaining units have been defined, the task of the Board under section 58 of the PSLRA is to apply those definitions to the facts of a given position or group. Nothing in section 58 would permit the Board to embark on a fresh consideration of the appropriateness of the bargaining unit definition.

In this case the Board erred in treating the task before it under section 58 of the PSLRA as though it were

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called upon to define an appropriate bargaining unit under section 57. While it is true that one of the Board's statutory obligations is to decide the proper composition of the bargaining units, it has a further duty. It must resolve questions of inclusion or exclusion from the bargaining units it has defined. The flaw in the Board's reasoning was that it failed to distinguish between formal and functional criteria. The analysis as to whether a position or group is included in a bargaining unit definition must begin with a determination of the presence or absence of the specified formal criteria. In this case, the question was whether experience as a pilot and possession of a valid pilot's licence were a mandatory element of the position or group description. If they were not, the position or group had to be excluded from the Aircraft Operations bargaining unit. Because those criteria were not mandatory in this case, the positions were explicitly excluded from the Aircraft Operations bargaining unit. It was unreasonable to conclude that they could be brought back into that bargaining unit by reference to functional criteria which operate independently of the formal exclusion.

STATUTES AND REGULATIONS CITED

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1(4)(*a*) (as enacted by S.C. 1990, c. 8, s. 5), (*c*) (as enacted, *idem*), 28 (as am. by S.C. 1990, c. 8, s. 8; 2002, c. 8, s. 35).

Municipal Government Act, R.S.A. 2000, c. M-26.

Public Service Labour Relations Act, S.C. 2003, c. 22, **s. 2**, ss. 43, 51 (as am. by S.C. 2003, c. 22 s. 274), 57, 58, 70.

CASES CITED

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1, 82 Admin. L.R. (4th) 1.

CONSIDERED:

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, (1998), 160 D.L.R. (4th) 163, 11 Admin. L.R. (3d) 1, amended reasons [1998] 1 S.C.R. 1222, (1998), 11 Admin. L.R. (3d) 130; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, (1979), 25 N.B.R. (2d) 237, 97 D.L.R. (3d) 417; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, 279 D.L.R. (4th) 1, 59 Admin. L.R. (4th) 1; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, 346 A.R. 4, 26 Alta L.R. (4th) 1.

REFERRED TO:

Aircraft Operations Group Association v. Treasury Board, 2001 PSSRB 2; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, 293 D.L.R. (4th) 578, 70 Admin. L.R. (4th) 157; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, 217 N.S.R. (2d) 301, 231 D.L.R. (4th) 385.

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APPLICATIONS for judicial review of the Public Service Labour Relations Board's decision (2008 PSLRB 42), on an application under section 58 of the *Public Service Labour Relations Act*, allocating three positions in the federal public service to the bargaining unit comprising the Aircraft Operations occupational group. Applications dismissed, Pelletier J.A. dissenting.

APPEARANCES

Andrew J. Raven for applicant (Docket A-375-08).

Neil McGraw for applicant (Docket A-383-08).

Phillip G. Hunt for respondent Canadian Federal Pilots' Association (Dockets A-375-08, A-383-08).

Neil McGraw for respondent Attorney General of Canada (Docket A-375-08).

Andrew J. Raven for respondent Public Service Alliance of Canada (Docket A-383-08).

SOLICITORS OF RECORD

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l., Ottawa, for applicant (Docket A-375-08).

Deputy Attorney General of Canada for applicant (Docket A-383-08).

Shields & Hunt, Ottawa, for respondent Canadian Federal Pilots Association (Dockets A-375-08, A-383-08).

Deputy Attorney General of Canada for respondent Attorney General of Canada (Docket A-375-08).

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l., Ottawa, for respondent Public Service Alliance of Canada (Docket A-383-08).

The following are the reasons for judgment rendered in English by

EVANS J.A.:

A. INTRODUCTION

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[1] The Public Service Alliance of Canada (PSAC) and the Attorney General of Canada have made applications for judicial review under section 28 [as am. by S.C. 1990, c. 8, s. 8; 2002, c. 8, s. 35] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [s. 1 (as am. *idem*, s. 14)], to set aside a decision of the Public Service Labour Relations Board [*Canadian Federal Pilots Association v. Treasury Board*] (2008 PSLRB 42). They say that the Board exceeded its jurisdiction when, on an application by the Canadian Federal Pilots Association (CFPA), the respondent to the applications for judicial review, it allocated three positions in the federal public service to the bargaining unit comprising the Aircraft Operations (AO) occupational group.

[2] The applicants submit that the Board's decision should be set aside under paragraph 18.1(4)(*a*) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Courts Act*, on the ground that the Board exceeded its jurisdiction because the definition of the AO group and its bargaining unit expressly excludes positions that do not require a pilot's licence and experience as a pilot (piloting qualifications). The possession of piloting qualifications, they say, is not mandatory for the incumbents of the three positions in dispute.

[3] The applicants argue that the Board's power under section 58 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, **s. 2** (PSLRA) to determine whether an employee is included in a bargaining unit approved by the Board does not authorize it to allocate an employee to a bargaining unit comprising an occupational group from which he or she is specifically excluded. They submit that it is a fundamental principle of the labour relations scheme governing the federal public service that, save in exceptional circumstances, bargaining units should be co-extensive with occupational groups created by the employer.

[4] I do not agree. In my view, the Board did not exceed its jurisdiction when it allocated the positions in question in this case to the AO group's bargaining unit, whose members' duties were similar to those of the incumbents of the disputed positions. The Board did not base its decision on an incorrect interpretation of a provision in the PSLRA which is reviewable on a standard of correctness, nor on an unreasonable interpretation of the relevant provision. Accordingly, I would dismiss the applications for judicial review.

[5] The applications for judicial review were heard together since they concern the same Board decision and raise identical issues. These reasons deal with both applications and a copy will be inserted in both Court files (A-375-08 and A-383-08).

B. FACTUAL BACKGROUND

[6] The dispute originated with the employer's revision of the job descriptions of three positions which removed references to flying an aircraft. The positions in question are within Transport Canada. They are: Manager, Civil Aviation Contingency Operations (position 1); Superintendent, Enforcement Investigations (position 2); and Superintendent, Aerodrome Safety (position 3).

[7] Before the job descriptions were re-written and their classifications altered, the three positions had been included in the AO occupational group because 10% of their duties had included flying aircraft. While these descriptions did not expressly specify that piloting qualifications were mandatory for incumbents of the positions, this was necessarily inferred from the fact that the duties

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included flying. The amended work descriptions, which removed flying duties, were also silent on the need for piloting qualifications.

[8] Following the amendment of the work descriptions for the positions in question, the employer allocated position 1 from the bargaining unit for the AO group to that representing the Program and Administrative Services (PA) occupational group. Positions 2 and 3 were allocated from the AO group to the Technical Services (TC) occupational group's bargaining unit. CFPA is the certified bargaining agent for the AO group's bargaining unit, and PSAC is the certified bargaining agent for the PA and TC groups' bargaining units.

[9] The basis of the reallocation was that the reclassified positions no longer required the incumbents to have piloting qualifications and, as such, were specifically excluded from the definition of the AO group's bargaining unit.

[10] The definition of the AO group and its bargaining unit (see *Aircraft Operations Group Association v. Treasury Board*, 2001 PSSRB 2, paragraph 4) contained two exclusions. First, positions were excluded if their primary purposes were included in the definition of another occupational group. Second, and of particular importance for present purposes [at paragraph 10 of 2008 PSLRB 42]:

> Also excluded are positions in which experience as an aircraft pilot and a valid pilot's licence are not mandatory.

The word "Also" suggests that positions for which piloting qualifications are not mandatory are excluded from the AO group, even though their primary purposes are not included in another group.

[11] Some years after the reclassifications and the allocation of the positions to the PA and TC groups' bargaining units, CFPA applied to the Board under section 58 [of the PSLRA] to request that the three positions be allocated back to the AO group's bargaining unit, on the ground that the duties attached to the positions were a better fit with those of the AO group than with those of the PA and TC groups. CFPA had not challenged the accuracy of the work descriptions of these positions.

C. DECISION OF THE BOARD

[12] The Board, comprising a single member, noted that, while CFPA had made its section 58 application in May 2006, position 1 had been reclassified in March 2003, and position 2 had been reclassified early in 2001. However, no issue was raised over these delays. The Board also stated that, as the applicant under section 58, CFPA had the burden of establishing that the primary duties and purposes of the positions were found within the AO group. The parties did not challenge this either.

[13] The Board acknowledged that the employer had the right to classify positions, that the classifications of the three positions were current and accurate, and that they could not be questioned in a section 58 application.

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[14] The Board saw its task (at paragraph 9) on this section 58 application as being to "determine the best fit in order to place these positions into their proper bargaining units, and not necessarily a perfect fit." In comparing the work descriptions for the positions with the duties included in the AO group on the one hand, and with those of the PA and TC groups on the other, the Board stated that it had to pay particular attention to the primary duties attached to the positions in dispute and those to which they were being compared.

[15] In response to the objection that CFPA's application should be dismissed on the basis of the exclusion from the AO occupational group's bargaining unit of positions for which piloting qualifications were not mandatory, the Board stated (at paragraph 11):

> Surely that is too simplistic an approach. One that would preclude the [Board] from fulfilling one of its statutory obligations, which is to oversee and ultimately to decide the proper composition of bargaining units.

[16] While holding that a specific exclusion from an occupational group did not automatically exclude a position from the bargaining unit comprising that group, the Board stated that the exclusion was one of the factors to be taken into account in assessing the overall "best fit" for collective bargaining purposes. The Board concluded that, although not perfect, the best fit was with the AO group and, accordingly, reallocated the positions to that group and granted CFPA's section 58 application.

[17] The applicants seek judicial review of this decision and request that it be set aside. They argue that the Board committed a jurisdictional error in failing to regard the elimination of piloting qualifications from the descriptions of the reclassified positions as automatically excluding them from the AO group because of the specific exclusion from that group, and hence from its bargaining unit, of positions for which piloting qualifications are not mandatory.

D. LEGISLATIVE FRAMEWORK

[18] The following provisions of the PSLRA are relevant to these applications for judicial review. Section 51 [as am. by S.C. 2003, c. 22, s. 274] contains a strong preclusive clause which, as applied to the facts of this case, limits the grounds of judicial review to jurisdictional error:

> **51.** (1) Subject to this Part, every order or decision of the Board is final and may not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.
>
> . . .
>
> (3) Except as permitted by subsection (1), no order, decision or proceeding of the Board made or carried on under or purporting to be made or carried on under this Part may, on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction,
>
> (*a*) be questioned, reviewed, prohibited or restrained; or
>
> (*b*) be made the subject of any proceedings in or any process of any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise.

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[19] The ground of judicial review provided in the *Federal Courts Act* relevant to this application is as follows:

18.1 (1) . . .

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

[20] The Board's decision was rendered in response to an application by CFPA under section 58 of the PSLRA. However, section 57, which deals with the certification of bargaining units, is also relevant, as is section 70, which deals with post-certification reviews of the appropriateness of the bargaining units previously approved by the Board. Sections 57 and 70 are relevant because the applicants argue that the Board erred by amending the bargaining units, rather than simply deciding in which of the existing units the three positions were included.

57. (1) When an application for certification is made under section 54, the Board must determine the group of employees that constitutes a unit appropriate for collective bargaining.

(2) In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board must have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.

(3) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.

(4) For the purposes of this Part, a unit of employees may be determined by the Board to constitute a unit appropriate for collective bargaining whether or not its composition is identical with the group of employees in respect of which the application for certification was made.

58. On application by the employer or the employee organization affected, the Board must determine every question that arises as to whether any employee or class of employees is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining, or is included in any other unit. [Emphasis added.]

[21] Finally, the following provisions govern the review of certified bargaining units:

43. (1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.

. . .

70. (1) If the Board reviews the structure of one or more bargaining units, it must, in determining whether a group of employees constitutes a unit appropriate for collective bargaining, have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the

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employer.

(2) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.

E. ISSUES AND ANALYSIS

Issue 1: Were piloting qualifications still mandatory after the changes to the work descriptions of the three positions?

[22] At the oral hearing, counsel for CFPA argued that the reclassification of the three positions did not in fact eliminate the requirements that the incumbents possess a pilot's licence and have recent flying experience. He pointed out that neither the previous, nor the current, work descriptions explicitly mentioned piloting qualifications. However, a requirement that incumbents must possess them had been inferred from the fact that some items of their previous work description involved flying an aircraft.

[23] Counsel argued that it was wrong to infer from the elimination of these duties that piloting qualifications were no longer required for the reclassified positions. This was, he said, because a number of the specific duties that were still included were similar to those contained in the list of the activities of the AO group, for the performance of which "recent experience in piloting an aircraft is required". He submitted that this latter requirement was equally applicable to the same activities listed in the new work description, and that therefore piloting qualifications implicitly continued to be required by the new job descriptions.

[24] I do not agree. The Board did not find that the new descriptions of the three positions impliedly required that the incumbents possess a pilot's licence and recent flying experience. Indeed, two of the incumbents were not so qualified to fly an aircraft. The Board went no further than saying [at paragraph 31] that the possession of piloting qualifications for position 2 would "enhance the performance of the duties or, to quote [a witness] 'it would help'."

[25] Indeed, the central thrust of the Board's reasons is that, even though the reclassified positions were excluded from the AO group as a result of the elimination of duties for which piloting qualifications were "mandatory", they could still be allocated to the AO bargaining unit because the principal duties of the positions in dispute were similar to those of the AO occupational group.

[26] Like the Board, I shall proceed on the basis that the effect of the changes to the work descriptions for the three positions removed the requirement that their incumbents possess piloting qualifications and that, accordingly, the definition of the AO group excluded them from it.

Issue 2: Did the Board exceed its jurisdiction by allocating the positions to the AO bargaining unit?

[27] The applicants argue that the Board exceeded its jurisdiction when, on a section 58 application, it allocated an employee to a bargaining unit comprising an occupational group from which the position held by the employee was specifically excluded. They say that this amounts to a

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change to the certified bargaining units, something which the Board only has the legal authority to do in accordance with section 70.

[28] They submit that whether section 58 enables the Board to, in effect, amend the definition of a bargaining unit is a jurisdictional question and therefore must be decided correctly: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*), at paragraphs 30, 31 and 59.

[29] In the alternative, they say, the Board's interpretation of section 58 as enabling them to include positions in a bargaining unit from which the definition specifically excluded them was unreasonable, because it violated a basic principle of collective bargaining in the federal public service, namely that bargaining units must be co-extensive with occupational groups.

[30] Jurisdictional error (*Federal Courts Act*, paragraph 18.1(4)(*a*)) is the only ground of review available to the applicants on the facts of this case. The preclusive clause in section 51 ousts the Court's power to review the decisions of federal tribunals for "mere" error of law under paragraph 18.1(4)(*c*) [as enacted by S.C. 1990, c. 8, s. 5]. In the absence of any indication to the contrary, the references in paragraph 18.1(4)(*a*) to the wrongful assumption or declining of jurisdiction should be understood to connote the concept of jurisdictional error in the common law of judicial review of administrative action: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, especially at paragraph 19 (*Khosa*).

[31] Paragraph 18.1(4)(*a*) does not prescribe a standard of review for determining whether a federal tribunal has exceeded its jurisdiction. As Justice Binnie said in *Khosa* (at paragraph 42) of paragraph 18.1(4)(*a*):

> No standard of review is specified. *Dunsmuir* says that jurisdictional issues command a correctness standard (majority, at para. 59).

However, it is important to emphasize that a tribunal may exceed its jurisdiction in one of two ways.

[32] First, a tribunal will have "acted beyond its jurisdiction" if it had decided incorrectly a legal question for which correctness is the applicable standard of review. Such questions have been labelled "jurisdictional questions" or, to adopt the terminology of Justice Binnie referred to above, "jurisdictional issues". They may include provisions of a tribunal's enabling statute.

[33] Second, even if the question decided by a tribunal is not "jurisdictional" in this sense, but is a "mere" question of law, the Court may nonetheless intervene on an application for judicial review if the tribunal's decision is unreasonable.

[34] Thus, the Board will have "acted beyond its jurisdiction" if the Court concludes that the Board had to be correct in deciding whether the discretion conferred by section 58 authorized it to include a position in a bargaining unit when the definition of the unit specifically excluded it, and the Court disagrees with the Board's conclusion.

[35] Even if its interpretation of section 58 is not subject to review for correctness, the Board will nonetheless have "acted beyond its jurisdiction" if its interpretation is unreasonable. Like other

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administrative tribunals, the Board is not authorized by Parliament to make a decision that is based on an unreasonable interpretation of its enabling legislation. Fidelity to the rule of law requires that individuals be afforded this minimum protection from the arbitrary exercise of public power by administrative decision makers, whether or not they are protected by a preclusive clause: *Khosa*, at paragraph 42.

(i) Correctness review and "jurisdictional questions"

[36] Recent decisions of the Supreme Court of Canada have clarified many aspects of the standard of review applicable to the decisions of adjudicative administrative tribunals, like the Board. Of particular importance in the context of the present case is the Court's enunciation of a presumption that tribunals' interpretation of their enabling legislation is normally reviewable on a standard of unreasonableness: *Dunsmuir*, at paragraphs 54–55; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195, at paragraph 21; *Khosa*, at paragraph 25.

[37] However, the Court's retention in *Dunsmuir* (at paragraph 59) of a category of "question[s] of jurisdiction or *vires*" reviewable on a standard of correctness is apt to cause confusion if such questions are to be identified independently of a standard of review analysis.

[38] It would be difficult, in my view, to reconcile the Court's well-established pragmatic and functional approach to the standard of review (as now streamlined and renamed by *Dunsmuir*) with the abstract approach inherent in the concept of a jurisdictional question. In particular, if a standard of review analysis indicates that a tribunal's interpretation of a particular provision in its enabling statute is reviewable for unreasonableness, on what basis could it be characterized as a "jurisdictional issue" and thus reviewable for correctness?

[39] I well appreciate why correctness is the appropriate standard of review for the interpretation of a statutory provision which demarcates the authority of competing different administrative regimes: *Dunsmuir*, at paragraph 61. However, I can see no justification in contemporary approaches to the roles of specialist tribunals and generalist courts in administrative law for characterizing as a "jurisdictional issue", and thus reviewable on a standard of correctness, the interpretation of other provisions in a tribunal's enabling statute that do not raise a "question of law that is of 'central importance to the legal system . . . and outside the . . . specialized area of expertise' of the administrative decision maker" (*Dunsmuir*, at paragraph 55).

[40] In my view, the analytical emptiness of the concept of a "jurisdictional issue" was deftly exposed by Justice Bastarache in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paragraph 28 when he said:

> . . . "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

Indeed, the Court in *Dunsmuir* seems to have been thinking along the same lines when Justices Bastarache and LeBel, writing for the majority, said (at paragraph 29):

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Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter.

[41] To the extent that the Court in *Dunsmuir* has retained the concept of a jurisdictional question to identify the provisions of an enabling statute which the administrative decision maker must decide correctly, it has done so in a very limited way. I say this for the following three reasons.

[42] First, it is clear from the reasons in *Dunsmuir* (at paragraph 59) that the Supreme Court did not intend to turn back the clock to the days before 1979 when virtually any question of law decided by a tribunal could be, and routinely was, characterized as a jurisdictional issue, and thus subject to *de novo* judicial review, notwithstanding the presence of a strong preclusive clause. Thus, the Court repeated with approval (at paragraph 35) the warning of Justice Dickson (as he then was) that "courts 'should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so'": *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at page 233.

[43] In a similar vein, Justice Abella had noted in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 88, that invoking "preliminary, jurisdictional questions" as a basis for subjecting a tribunal's interpretation of its enabling legislation to review for correctness:

> . . . has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise.

[44] Second, the Court indicated the limited range of issues that it had in mind when it stated (at paragraph 59) that jurisdictional questions are to be limited to "<u>true</u> question[s] of jurisdiction or *vires*" (my emphasis):

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.

[45] Despite the vagueness of the phrases "the authority to make the inquiry" and "the authority to decide a particular matter", and the similar phrases used in the pre-*New Brunswick Liquor* jurisprudence, I am satisfied that the Court in *Dunsmuir* did not intend to return the law to that era. This is apparent, not only from the passages quoted earlier where the Court expressly disavowed such an intention, but also from the manner in which the Court disposed of the question before it.

[46] The issue in contention in *Dunsmuir* was whether a labour adjudicator had exceeded his jurisdiction by going behind the terms of the letter terminating Mr. Dunsmuir's employment and considering whether he was in fact being dismissed for disciplinary reasons. On the basis of the four-factor standard of review analysis (at paragraphs 66–71), the Court concluded that the standard of review was unreasonableness. It went on to find that the adjudicator's interpretation of the relevant provisions of the enabling statute was unreasonable and that, despite the privative clause, he had thereby exceeded his jurisdiction.

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[47] Significantly, in my view, the Court did *not* say that, since the adjudicator had no authority to inquire into the "real reason" for the employee's dismissal, he had exceeded his jurisdiction because he had no authority to make that inquiry or to decide that question. Indeed, having found that the standard of review analysis indicated that unreasonableness was the applicable standard of review, the Court did not canvass the possibility that the interpretation of the statutory provision in question might raise a "jurisdictional issue". Similarly, there is no consideration in the Court's important post-*Dunsmuir* standard of review decisions, *Proprio Direct* and *Khosa*, of the possibility that the interpretation of the statutory provisions in question in those cases involved a "jurisdictional issue".

[48] Third, the only example given by the Court in *Dunsmuir* of "true question of jurisdiction or *vires*" is its decision in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. The issue in that case was whether a resolution by the City of Calgary was within the legal authority delegated to it by the *Municipal Government Act* [R.S.A. 2000, c. M-26]. Writing for the Court, Justice Bastarache said (at paragraph 5):

> Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised.

[49] In my view, this suggests that a standard of review analysis *is* required when an adjudicative administrative tribunal is said to have exceeded its jurisdiction because it has misinterpreted a provision of its enabling statute. This is because Justice Bastarache only excluded the need for "[a] pragmatic and functional approach" (now, a standard of review analysis) on "a review for *vires*" when a municipality's delegated legislation is being challenged, but not when the exercise of its "adjudicative or policy-making function" is in issue.

[50] To conclude, in order to establish that the Board has exceeded its jurisdiction by misinterpreting a provision in its enabling statute, which neither raises a question of law of central importance to the legal system nor demarcates its authority *vis-à-vis* another tribunal, an applicant must demonstrate that the Board's interpretation was unreasonable.

[51] The only qualification that I would add is that the tribunal must have the legal authority to interpret and apply the disputed provision of its enabling legislation. However, administrative tribunals performing adjudicative functions, such as the Board, normally have explicit or implied authority to decide all questions of law, including the interpretation of its enabling statute, necessary for disposing of the matter before it: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504, at paragraphs 40–41.

[52] In my view, it is too late in the development of administrative law in Canada for an applicant to invoke the ghost of jurisdiction past to inveigle the Court into reviewing for correctness a tribunal's interpretation of a provision in its enabling statute, without subjecting it to a standard of review analysis. It would, in my view, make no sense to apply a correctness standard when the tribunal has the authority to interpret and apply the provision to the facts, and a standard of review analysis indicates that the legislature intended the tribunal's interpretation to be reviewed only for

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unreasonableness.

(ii) Is correctness the appropriate standard of review of the Board's interpretation of section 58?

[53] On the basis of the above analysis, the first question is whether the Board had the legal authority to interpret and apply section 58 to the facts before it. In my view, Parliament's direction to the Board to "determine every question that arises" from an application to decide whether an employee is included in a bargaining unit approved by the Board is an express conferral of power on the Board to interpret section 58 in order to dispose of a section 58 application.

[54] Having concluded that the Board has the legal authority to interpret section 58, I must now consider the standard of review applicable to its interpretation. Since counsel did not direct us to any previous judicial authority determining this question, I must apply the standard of review analysis. In my view, the four elements of the standard of review analysis identified in *Dunsmuir* (at paragraph 64) all indicate that the Board's decision is entitled to curial deference.

[55] First, section 51 of the PSLRA contains a strong preclusive clause. Second, like other labour relations legislation, the purpose of the PSLRA is to facilitate the resolution of labour disputes expeditiously, inexpensively and with relatively little formality: *Dunsmuir*, at paragraphs 62, 68–69. Third, the question in dispute is the interpretation of a provision of the PSLRA, the Board's "home" statute and does not involve a question "'of central importance to the legal system . . . and outside the . . . specialized area of expertise'" of the Board (*Dunsmuir*, at paragraph 55). Fourth, the Board is an independent tribunal with a specialized jurisdiction in labour relations within the federal public service. The question of law at issue calls for an understanding of the nature and significance of occupational classifications, and their relationship to bargaining units within the statutory scheme administered by the Board. It is thus within the Board's labour relations expertise.

[56] Hence, since the Board has the legal authority to interpret section 58 in the course of deciding a section 58 application (the "inquiry" or "matter" before the Board), and a standard of review analysis indicates that curial deference is due to the Board's interpretation of it, the Court cannot review it for correctness as a question concerning "the scope of . . . the jurisdiction conferred" on the Board by statute [*Dunsmuir*, paragraph 29].

[57] Whether the Board is absolutely bound by a specific exclusion from an occupational classification when making decisions under section 58 is no more a "jurisdictional issue" than the question in dispute in *Dunsmuir*, namely, whether the adjudicator could inquire into an employer's reason for an employee's dismissal with notice or pay in lieu (at paragraphs 66–71). Like the question in *Dunsmuir*, the question that the Board had to decide in the course of determining this section 58 application was simply one of the interpretation of its home statute and, as such, presumptively reviewable for unreasonableness.

(iii) Unreasonableness review

[58] A tribunal may also exceed its jurisdiction by basing the decision under review on an unreasonable interpretation of *any* provision of its enabling legislation. Such decisions are not protected by even the strongest preclusive clause. The rule of law imposes on the courts

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responsibility for ensuring that individual rights are protected from tribunal decisions that lack any rational support in the law.

[59] The applicants say that the Board's decision in the present case to allocate the three positions to the AO group was unreasonable because it amended the definition of the certified bargaining unit when no application had been made for a review under section 70. Further, they argue, the Board departed from a basic principle of labour relations in the federal public service, namely, that bargaining units must nearly always be co-extensive with the employer's occupational classifications.

(a) content of the standard

[60] *Dunsmuir* collapsed the former standards of patent unreasonableness and unreasonableness *simpliciter* into a single standard of unreasonableness: paragraphs 44–45. Nonetheless, this does not signal a more intrusive role for the judicial review of questions decided by a tribunal on which it is entitled to deference: *Dunsmuir*, at paragraph 48. Moreover, while unreasonableness is a single standard, it "takes its colour from the context" in which it is being applied: *Khosa*, at paragraph 59.

[61] The "context" in our case includes: the presence of the strong preclusive clause in section 51; the absence of any statutory directions to the Board in section 58 as to the basis for determining whether an employee is included in a particular bargaining unit; and the Board's expertise in federal public service labour relations and the relevance of that expertise to the matter to be decided in the application.

[62] In my opinion, these factors indicate that the Board's decision is entitled to a "high degree of deference" (*Khosa*, at paragraph 46) from the Court when determining whether it falls "within the range of acceptable and rational solutions" open to the Board on the facts and the law (*Dunsmuir*, at paragraph 47). If it does, the Board has not exceeded its jurisdiction and its decision cannot be set aside under paragraph 18.1(4)(*a*) of the *Federal Courts Act*.

[63] In deciding whether the decision under review satisfies the reasonableness standard, the Court must focus primarily on the Board's reasons, but must also consider the outcome. As the Court said in *Dunsmuir* (at paragraph 47):

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

(b) application of the standard

[64] The text of section 58 contains no explicit direction about the basis on which the Board "must determine every question that arises as to whether an employee . . . is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining".

[65] In contrast, when the Board is initially establishing appropriate bargaining units under section 57, or is subsequently reviewing their appropriateness under section 70, it must ensure that

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bargaining units “are co-extensive with the occupational groups . . . established by the employer”, unless that “would not permit satisfactory representation of the employees to be included in a particular bargaining unit”: subsections 57(3) and 70(2).

[66] In order for the applicants in this case to succeed, they must establish that the Board’s interpretation of section 58 was unreasonable because it did not read into it the above direction contained in subsections 57(3) and 70(2). I appreciate that there may be “tensions between a ‘reclassification’ and a ‘bargaining unit review’”: Christopher Rootham, *Labour and Employment Law in the Federal Public Service* (Toronto: Irwin Law, 2007), at page 171 (Rootham). Nonetheless, a decision made under section 58 is primarily focussed on whether an employee or class of employees is included in a bargaining unit, not on a comprehensive review of the appropriateness for collective bargaining purposes of an established unit. Hence, it would not seem unreasonable for the Board to decline to read into section 58 the statutory directions that the Board must follow when establishing or reviewing bargaining units under sections 57 and 70. It is always open to PSAC or the employer, or both, to apply to the Board under section 43 for a section 70 bargaining unit review.

[67] I turn now to the reasons of the Board to see if they provide that degree of “justification, transparency and intelligibility” to render its decision reasonable. I would emphasize the following four points.

[68] First, the Board clearly addressed the principle relied on by the applicants, namely that a position should not be included in a bargaining unit for an occupational group from which it is excluded by the definition of the group. In the absence of an explicit statutory direction, the Board concluded that [at paragraph 11], while it would take the specific exclusion into account, it could not be determinative and thus override its statutory responsibility “to oversee and ultimately decide the proper composition of bargaining units.”

[69] Second, the Board noted that the definitions of the groups excluded positions, the primary duties of which were included in another occupational group. The Board was not persuaded that, if the primary duties of the three positions fell within the AO group, it should automatically give priority to the specific exclusion in the AO group definition and allocate the positions to the PA and TC bargaining units, even though the definitions of those groups excluded positions, the primary duties of which were included in another occupational group. In my opinion, it was not unreasonable for the Board to have considered the group definitions as a whole, that is, their inclusive and their exclusive elements. As the Board found, it was not possible to allocate the positions to a group without running foul of some aspect of the definitions.

[70] Third, in these circumstances, the Board resorted to its established methodology for resolving these kinds of dispute: assign the position to the bargaining unit comprising the occupational group, the principal duties of which are most similar to those of the disputed position. The applicants do not challenge the Board’s conclusion that the AO group’s principal duties were a “better fit” with those of the disputed positions than those of the PA or TC groups. Rather, they say that the Board exceeded its jurisdiction by considering this question.

[71] Fourth, in noting (at paragraph 42) the absence of evidence that the inclusion of the positions in the AO group would “not provide satisfactory representation for the incumbents” or that “the

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positions do not enjoy a community of interest", the Board indicated that it was not overlooking the labour relations implications of its decision.

[72] I appreciate that combining different occupational groups in a single bargaining unit may pose problems for both the bargaining agent and the employer. However, this concern does not seem to have been the main reason for the adoption of the principle that bargaining units in the federal public service should normally be co-extensive with occupational groups. When collective bargaining was introduced into the federal public service, it was considered unfair that (Rootham, at page 157):

> . . . different public service employees, employed in the same occupational group and working side by side (but in different bargaining units) might earn different rates of pay.

Such discrepancies could cause serious morale problems in the work force (Rootham, at page 171) and complicate negotiations.

[73] In any event, as noted above, the parties in the present case can always return to the Board for a bargaining unit review if serious problems arise from including the three positions in the AO group's bargaining unit.

[74] In my view, neither the reasoning of the Board, nor the decision itself, demonstrates that the Board's disposition of CFPA's section 58 application was unreasonable. In concluding that the Court ought not to interfere in this case, I have kept in mind the following observations of Justice Binnie in *Khosa* (at paragraph 59):

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

F. CONCLUSIONS

[75] For these reasons, I would dismiss the applications for judicial review with costs.

LAYDEN-STEVENSON J.A.: I agree.

* * *

The following are the reasons for judgment rendered in English by

[76] PELLETIER J.A. (dissenting reasons): I have read in draft my colleague's reasons. For the following reasons, I am unable to agree with his conclusion that the Board's decision is reasonable. I would therefore allow the application for judicial review.

[77] I agree with my colleague's description of the facts of the case and so, for the sake of brevity, I will not repeat them here.

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[78] The application before the Board in this case was made under section 58 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, **s. 2** (the Act), reproduced below for ease of reference:

> **58.** On application by the employer or the employee organization affected, the Board must determine every question that arises as to whether any employee or class of employees is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining, or is included in any other unit.

[79] This section presumes the existence of defined bargaining units. The question before the Board on an application brought under section 58 is simply one of applying the existing bargaining unit definitions. This is apparent from the terms of section 58 itself, which requires the Board to decide whether "any employee or class of employees *is included in a bargaining unit determined by the Board* to constitute a unit appropriate for collective bargaining" (emphasis added).

[80] In defining the bargaining units, a task conferred upon it by section 57 of the Act, the Board must take into account various factors, including the employer's occupational groups. I reproduce section 57 below for the sake of convenience:

> **57.** (1) When an application for certification is made under section 54, the Board must determine the group of employees that constitutes a unit appropriate for collective bargaining.
>
> (2) In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board must have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.
>
> (3) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.
>
> (4) For the purposes of this Part, a unit of employees may be determined by the Board to constitute a unit appropriate for collective bargaining whether or not its composition is identical with the group of employees in respect of which the application for certification was made.

[81] By virtue of its mandate pursuant to section 57, the Board must determine whether a group "constitutes a unit appropriate for collective bargaining". In deciding whether a group is an appropriate unit, the Board must have regard to the employer's classification scheme, including the occupational groups or subgroups, and must establish bargaining units which are co-extensive with them, unless doing so would not permit satisfactory representation of employees for bargaining purposes.

[82] In order to fulfill its mandate, the Board is entitled to define a bargaining unit in terms other than those contained in the application: see subsection 57(4). In other words, the Board is not limited to giving a "yes/no" response to the application before it, but may craft a bargaining unit according to its view of the appropriate bargaining relationships. All of this to say that the weighing of competing interests, the employer's classification system as against the most appropriate groupings for collective bargaining, takes place at the point at which the bargaining units are defined. Once they are defined, they can only be restructured by means of an application under section 70 of the

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Act.

[83] In this case, the bargaining unit definition includes two exclusions. The first is "[p]ositions excluded from the Aircraft Operations Group are those whose primary purpose is included in the definition of any other group." This exclusion appears in every other occupational group description and therefore, I assume, in every other bargaining unit definition. It is the basis of the "best fit" approach which the Board purported to apply in this case. In a classification environment in which descriptions are necessarily general and perhaps ambiguous, this exclusion is intended to create mutually exclusive categories. It is, in effect, a tie-breaker rule for use in those cases where a position or a group might fit within more than one occupational group.

[84] The second exclusion is "[a]lso excluded are positions in which experience as an aircraft pilot and a valid pilot's licence are not mandatory." This exclusion was presumably designed to create or recognize either an occupational qualification or a community of interest. The Board had the discretion to delete this requirement, which appears in the occupational group description, from the bargaining unit definition if it thought that doing so would remove an impediment to satisfactory representation. It did not do so.

[85] The use of exclusions in the definition of occupational groups or subgroups is a frequent occurrence. By way of example only, the Technical Services Group definition includes the following exclusions:

Positions excluded from the Technical Services Group are those whose primary purpose is included in the definition of any other group or those in which one or more of the following activities is of primary importance:

1. the planning, conduct or evaluation of control, mapping or charting surveys, and the planning or conduct or legal surveys of real property;

2. the planning, design, construction or maintenance of physical or chemical processes, systems, structures or equipment; and the development or application of engineering standards or procedures;

3. the performance of manual tasks such as cleaning laboratory equipment, assisting in morgue and autopsy tasks, and the care and feeding of laboratory animals;

4. the performance of administrative activities such as program, human resources or financial management and planning that do not require the application of principles outlined in the inclusions; and the administrative management of buildings, grounds and associated facilities;

5. the conduct of experimental, investigative or research and development work in the field of electronics;

6. the leadership of activities related to maintenance and repair functions not requiring knowledge identified in the inclusions;

7. the operation of duplicating or reproduction machines, motion picture projection machines and accessories and process cameras in support of an offset printing or duplicating process;

8. the planning, development, installation and maintenance of information technology and processing systems to manage, administer or support government programs and activities; and

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9. the application of electronics technology to the design, construction, installation, inspection, maintenance and repair of electronic and associated equipment, systems and facilities and the development and enforcement of regulations and standards governing the use of such equipment.

Also excluded are positions in which experience as an aircraft pilot and a valid pilot's licence are mandatory.

[86] It is clear from this lengthy list, that exclusions are as significant as inclusions in the definition of occupational groups. It is also clear that many of the exclusions are couched in general language, which may require the Board, when applying the bargaining unit definitions under section 58, to interpret the terms of the exclusion in order to arrive at a proper bargaining unit designation. But, as this case illustrates, there are also exclusions that are unambiguous. Furthermore, such exclusions may have mirror image exclusions in other occupational groups, such as the exclusion from the Technical Services Group definition of positions in which experience as an aircraft pilot and a valid pilot's licence are mandatory.

[87] To recapitulate, it is the Board's function to define the appropriate bargaining units in light of the employer's occupational groups and the requirements of collective bargaining. Once those bargaining units have been defined, the task of the Board under section 58 is to apply those definitions to the facts of a given position or a given group. Nothing in section 58 would permit the Board to embark on a fresh consideration of the appropriateness of the bargaining unit definition. That task can only be undertaken, upon application, under section 70 of the Act.

[88] In this case, the Board member fundamentally misconstrued his statutory duty when, in the course of rejecting the argument that the exclusion with respect to a valid pilot's licence was conclusive of the application before him, he said, at paragraph 11 of his reasons:

> Surely that is too simplistic an approach. One that would preclude the Public Service Labour Relations Board ("the Board") from fulfilling one of its statutory obligations, which is to oversee and ultimately to decide the proper composition of bargaining units.

[89] It is true that one of the Board's statutory obligations is to decide the proper composition of the bargaining units. That duty is articulated in sections 57 and 70 of the Act. The Board has a further duty, and it is spelled out in section 58 of the Act. It must resolve questions of inclusion or exclusion from the bargaining units it has defined. In other words, it must apply the bargaining unit descriptions it has formulated under section 57 to a new position or group, or to an old position or group whose characteristics have changed. That task must necessarily take as a given the terms of the bargaining unit definitions formulated under section 57, since nothing under section 58 gives the Board any mandate to redefine the bargaining unit definitions. In this case, the Board member erred in treating the task before him under section 58 of the Act as though he were called upon to define an appropriate bargaining unit under section 57.

[90] The flaw in the Board's reasoning is that it failed to distinguish between formal and functional criteria. For the most part, occupational group definitions are based on functional criteria (i.e. the duties and responsibilities of members of the group). It is, however, possible to include or exclude members from such a group by requiring certain formal criteria (e.g. the possession a valid pilot's licence). There is no necessary correlation between functional and formal characteristics.

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[91] The “primary purpose” exclusion calls for a comparison between the functional characteristics of a position or group and those of a bargaining unit. Where there is a high degree of congruency between the two, an exclusion based on formal criteria will never be determinative because it does not speak to the question of purpose or function. The result will invariably be that the exclusion based on formal criteria will be subordinated to the comparison of functional elements.

[92] In order for an exclusion based on formal characteristics to have any effect, it must be considered independently of any functional comparison. The analysis as to whether a position or group is included in a bargaining unit definition must begin with a determination of the presence or absence of the specified formal criteria. In this case, the question is whether experience as a pilot and possession of a valid pilot’s licence are a mandatory element of the position or group description. If they are not, the position or group is excluded from the Aircraft Operations bargaining unit. In this case, those criteria were not mandatory and, by the terms of the bargaining unit definition, the positions were excluded from the Aircraft Operations bargaining unit. It is unreasonable to conclude that they could be brought back into that bargaining unit by reference to functional criteria which operate independently of the formal exclusion. Put another way, it is outside the range of reasonable outcomes to conclude that a position can be included in a bargaining unit from which it is specifically excluded.

[93] Consequently, I am of the view that it was unreasonable for the Board to include in the Aircraft Operations bargaining unit positions which were explicitly excluded from that bargaining unit. One cannot be included in a group from which one is specifically excluded. As a result, I would allow the application for judicial review, set aside the Board member’s decision, and remit the matter to the Board for a fresh determination on a basis consistent with these reasons.

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