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

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

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

TREASURY BOARD

Respondent

Indexed as
Public Service Alliance of Canada v. Treasury Board

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

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Aaron Lemkow, legal officer

For the Respondent: Pierre Marc Champagne and Stephanie White, counsel

Heard via videoconference,
January 9 to 12, 2023,
and via written submissions,
February 8, 2023.

I. Complaint before the Board

[1] This is a complaint made against the Treasury Board ("the employer") with respect to negotiations over the renewal of the Public Service Dental Care Plan ("the Dental Plan").

[2] The complaint was made on June 30, 2022, by the Public Service Alliance of Canada (PSAC) under s. 190 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). In the complaint, the PSAC alleged that the employer violated s. 106 of the *Act*, which requires the parties to bargain in good faith and make every reasonable effort to enter into a collective agreement.

[3] The complaint was made to the Federal Public Sector Labour Relations and Employment Board ("the Board"). In this decision, references to "the Board" will generally also include its predecessors, the Public Service Staff Relations Board (PSSRB), the Public Service Labour Relations Board, and the Public Service Labour Relations and Employment Board.

[4] The Dental Plan is a unique feature of the collective bargaining relationship between the parties. The plan is incorporated by reference into the collective agreements between the PSAC and the employer for five bargaining units.

[5] In addition, the Dental Plan negotiated by the parties is also extended to more than 20 separate employers with which the PSAC has collective agreements under the *Act*, as well as a few bargaining units certified under the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*").

[6] Further adding to the uniqueness and complexity of negotiations for the Dental Plan is the fact that PSAC members and their dependants comprise just one of five different components in the plan. Non-PSAC employees of the federal public service and their dependants are covered by the National Joint Council (NJC) component to the plan. A third component covers reservists of the Canadian Armed Forces. A fourth component covers dependants of the Canadian Armed Forces, and the fifth covers dependants and civilian members of the Royal Canadian Mounted Police. The PSAC component of the plan is the largest of the five.

[7] Under the Dental Plan, each component has its own Board of Management charged with administering the plan and resolving disputes about it. The PSAC, through its Board of Management, is responsible only for administering and

renegotiating the provisions of the plan with respect to its members and their dependants.

[8] However, plan changes put into place after negotiations between the PSAC and the Treasury Board have historically been extended to the other components. Thus, although there are five components to the Dental Plan, the rules with respect to eligibility, benefits, and costs apply equally to all five components.

[9] The Dental Plan is administered by a third party, currently Canada Life, on an "administrative services" basis. This is different from an insured plan in which the third party bears some of the risk; the administrator's role is to apply the rules and reimburse employees under the plan, for which it is paid administrative fees.

[10] Given the institutional structure of the plan, in this decision, I will refer to the Dental Plan generically in reference to the provisions of the plan as a whole and in reference to the negotiation of changes to it that take place between the PSAC and the Treasury Board. In the rare instances when I refer to negotiations with other components, or to matters involving the engagement of other components of the plan, those other components will be specifically mentioned.

[11] This structure of the Dental Plan is also unique in comparison to certain other terms and conditions of employment that apply commonly across the public service. For example, many employers and bargaining agents have agreed to incorporate various directives of the NJC into their collective agreements (e.g., the *Travel Directive* and the *Relocation Directive*). The process for administering and renegotiating those directives is established through the bylaws of the NJC. Somewhat similarly, the Public Service Health Care Plan (PSHCP) is also covered by an NJC directive, although the PSHCP has its own specific structures for governance and plan design. Nevertheless, as with other NJC directives, the PSAC participates alongside other bargaining agents in any discussions with the employer about the PSHCP.

[12] I point all this out at the outset for two reasons. First, the uniqueness of the structure governing the negotiation of the Dental Plan is important background information for the adjudication of this complaint. Second, although the parties have some differences in approach and interest with respect to how best to manage the plan and negotiate changes to it, they have expressed a shared interest in maintaining a single public-service-wide plan, for reasons of efficiency in negotiations, administrative efficiency, enhanced benefits, and fairness. As will be detailed later in this decision, I

find it appropriate that the Board keep this shared interest in mind, particularly when it comes to the application of the principles with respect to harmonious labour-management relations as articulated in the preamble to the *Act*.

[13] In January 2022, the PSAC informed the Treasury Board that it wished to commence negotiations for a renewal of the Dental Plan. Following an exchange of correspondence between the parties, detailed later in this decision, in May 2022, the employer informed the PSAC that it wanted to delay negotiations for the Dental Plan until discussions about the renewal of the PSHCP were completed and until a proposed "benchmarking" study of dental plans it was conducting with the NJC component of the plan could be completed. Therefore, it declined to set dates for an exchange of proposals for changes to the plan. This complaint followed that communication.

[14] It is also important to note that this complaint was made within a larger collective bargaining context involving both parties. When this complaint was made, all five of the collective agreements between the parties had expired, and the PSAC had served notices to bargain for each. The five units, their collective agreement expiry dates, and the dates on which notice to bargain was served by the PSAC are as follows:

- Program and Administrative Services (PA), expiry date June 20, 2021, notice to bargain given February 22, 2021;
- Technical Services (TC), expiry date June 21, 2021, notice to bargain given February 22, 2021;
- Education and Library Science (EB), expiry date June 30, 2021, notice to bargain given February 26, 2021;
- Operational Services (SV), expiry date August 4, 2021, notice to bargain given April 6, 2021; and
- Border Services (FB), expiry date June 20, 2022, notice to bargain given February 21, 2022.

[15] As of the dates of the hearing, and as of the date of this decision, the parties had yet to conclude a collective agreement for any of these five units.

[16] The employer argued that the negotiation of the Dental Plan does not take place under the provisions of ss. 105 and 106 of the *Act*, and therefore, the Board is without jurisdiction to decide a complaint made under s. 190. As such, it requested that the complaint be dismissed. Alternatively, it argued that the Board should find that the employer has not bargained in bad faith, and it should dismiss the complaint on that basis.

[17] The PSAC argued that the provisions of s. 106 have been triggered by the notices to bargain served for the five bargaining units between the parties and that the duty to bargain in good faith extends to the negotiation of changes to the Dental Plan. As such, the Board has jurisdiction to decide this complaint. It also argued that the Board's jurisdiction can be taken from a broad and purposive interpretation of the *Act*. Finally, it argued that the employer has not bargained the Dental Plan in good faith by setting preconditions for negotiations and by refusing to set dates to commence discussions.

[18] For the reasons that follow, I deny the employer's objection to the Board's jurisdiction. I find that despite its unique nature, the Dental Plan was established through the collective bargaining process between the parties and that it has been maintained as part of the collective agreements between them. I find that s. 106 of the *Act* applies to the negotiation of the Dental Plan. Furthermore, I conclude that the employer has violated that section by refusing to establish dates to commence negotiations of the plan.

[19] On February 3, 2023, Pierre Marc Champagne, co-counsel for the employer in this matter, was appointed as a full-time member of the Board, effective March 13, 2023. There has been no discussion between this panel of the Board and him about this matter. I also note that the employer's written submissions of February 8, 2023, made after Mr. Champagne's appointment was announced, were submitted by his co-counsel, Stephanie White.

II. Summary of the evidence

[20] The parties relied extensively on a joint book of documents numbering 32 tabs. They submitted an agreed statement facts that is relied on throughout this decision. The employer submitted a book of documents numbering 9 tabs, which were entered on consent. The PSAC's book of documents comprised 5 documents and was entered during testimony.

[21] The PSAC called Seth Sazant as witness. Mr. Sazant is employed by the PSAC as a negotiator. He is the PSAC's lead negotiator for the renewal of the Dental Plan, as well as the lead negotiator for the TC bargaining team. He was also the chief spokesperson on behalf of bargaining agents in the renewal of the PSHCP. Mr. Sazant also negotiates for PSAC members in a wide range of bargaining units under federal, provincial, and territorial legislation.

[22] The employer called these three witnesses:

- David Prest is the executive director of benefits, policies, and programs at the Treasury Board Secretariat. In that capacity since September 2019, Mr. Prest oversees the administration and negotiation of the Dental Plan, the PSHCP, and the federal government's disability insurance plans.
- William Leffler was the senior director of benefits operations from the spring of 2017 to August of 2022 and then was the senior director of benefits and retendering until his retirement just before the hearing. He was the lead negotiator for the employer when Dental Plan negotiations began in 2016 and as such was Mr. Sazant's counterpart in the beginning stages of those negotiations.
- Allison Shatford is the senior negotiator in the Compensation and Collective Bargaining section at the Treasury Board Secretariat. She is the chief negotiator for the employer at two PSAC tables during the current round of collective agreement negotiations.

[23] Although they did not appear as witnesses, two other Treasury Board Secretariat employees were referenced frequently in the testimony and the documentary evidence before me. The two employees and their work relationships to the witnesses who did appear are as follows:

- Ashique Biswas is the senior director of benefits, policies, and negotiations for the employer; he replaced Mr. Leffler as the senior negotiator in both Dental Plan and PSHCP negotiations beginning in the spring of 2017 and reports to Mr. Prest. He was Mr. Sazant's counterpart throughout the period leading up to the making of this complaint.
- Marie-Chantal Girard is the assistant deputy minister responsible for pension and benefits, to whom Mr. Prest reports.

[24] Most of the essential facts are not in dispute and are summarized as follows under three headings: the background to the Dental Plan and its inclusion in the collective agreements between the parties, the 2016 to 2018 negotiations for the renewal of the Dental Plan, and the events that led to the making of this complaint. This evidence is summarized in chronological order, generally without reference to which witness provided it, except when the facts are in dispute. Following those three sections, I summarize additional evidence from each witness's testimony.

A. Dental Plan background

[25] The Dental Plan first appeared in the former Master Agreement between the parties, which expired on June 30, 1988. The Master Agreement contained common collective agreement provisions for what were (then) almost 40 different bargaining units represented by the PSAC. Certain other terms and conditions, notably pay, were set out in group-specific agreements.

[26] The Dental Plan was added to the collective agreement following a “binding conciliation” award for the Master Agreement issued on October 28, 1986. The binding conciliation panel consisted of Martin Teplitsky as the chairperson and as sides persons representing the parties, John Fryer and Bruce Light.

[27] Included in the panel’s decision (“the Teplitsky award”) was article 44, which read as follows: “The attached Dental Care Plan and the terms and conditions referred to therein shall apply to the parties.”

[28] Attached to the Teplitsky award were the initial rules for the Dental Plan, comprising five pages of provisions. These set out the rules for participating in the plan, the level of dental benefits, the provisions for co-insurance, the fee schedules at which benefits would be paid, and the contribution and cost-sharing rates between employees and the employer. The rules also established a “Board of Management” composed of three members nominated by the PSAC, three by the employer, and a non-voting chairperson. Among the powers of the Board of Management were the duties of resolving member complaints about the plan and the role of considering changes to rates, levels of contribution, and level of benefits.

[29] Finally, the Dental Plan rules attached to the Teplitsky award also established an Appeal Board consisting of three members to determine any matter upon which the Board of Management could not agree. Specifically, this was to include the level of contributions after July 1, 1988, and the level of benefits to be provided under the plan. For the first three years of the plan’s operation, the Appeal Board was to consist of the three members of the binding conciliation panel (Messrs. Teplitsky, Light, and Fryer); after that, the Appeal Board would be structured in a similar fashion: one member nominated by the employer, one nominated by the PSAC, and a neutral chairperson either agreed upon by the other two members or, failing an agreement, to be appointed by the chairperson of the (then) PSSRB.

[30] In the late 1990s, the parties ceased to negotiate a Master Agreement covering all PSAC bargaining units. The Master Agreement was replaced with separate collective agreements for five bargaining units (four of which were multi-classification units similar to the PA, SV, TC, and EB units as currently constructed). The collective agreements reached between the parties for these units continued to incorporate the Dental Plan by reference. For example, the collective agreement for the PA bargaining unit, signed December 29, 1998, with an expiry date of June 20, 1999, contained the following article:

> ***8.01** The Dental Care plan as contained in the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, with an expiry date of June 30, 1988, and subsequently amended on March 10, 1988, December 12, 1991, November 26, 1993, April 2, 1996, January 15, 1997 and March 11, 1998 shall be deemed to form part of this Agreement.*
>
> ***8.01** Sont réputées faire partie de la présente convention les modalités du Régime de soins dentaires telles qu'énoncées dans la convention cadre signée entre le Conseil du Trésor et l'Alliance de la Fonction publique du Canada, qui est venue à expiration le 30 juin 1988, et telles que modifiées par la suite le 10 mars 1988, le 12 décembre 1991, le 26 novembre 1993, le 2 avril 1996, le 15 janvier 1997 et le 11 mars 1998.*

[31] By counting the dates listed in the article, by the time that PA collective agreement was signed in 1998, the provisions of the Dental Plan had been amended six times.

[32] This structure for the Dental Plan article — with an exact listing of each date of subsequent amendment to the plan — was renewed in the two subsequent rounds of negotiations between the parties (expiry dates in 2000 and 2003) for each of the relevant PSAC bargaining units in existence at the time.

[33] Starting with the collective agreements between the parties that expired in 2007, the wording of the article was changed to eliminate the reference to each specific date of amendment to the Dental Plan. For example, in the PA collective agreement signed on March 14, 2005, with an expiry date of June 20, 2007, clause 8.01 was amended to read as follows:

> ***8.01** The Dental Care plan as contained in the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, with an expiry date of June 30, 1988, **and as subsequently amended from time to time**, shall be deemed to form part of this Agreement.*
>
> ***8.01** Sont réputées faire partie de la présente convention les modalités du Régime de soins dentaires telles qu'énoncées dans la convention cadre signée entre le Conseil du Trésor et l'Alliance de la Fonction publique du Canada, qui est venue à expiration le 30 juin 1988, **et telles que modifiées de temps à autre**.*

[Emphasis added]

[34] This identical provision was included in the collective agreements that expired in 2007 for the SV, TC, FB, and EB groups, with the exception that in the EB collective agreement, the clause is numbered 40.01.

[35] Since 2007, the parties have renewed these articles without change in each subsequent collective agreement reached with respect to each of the PA, SV, TC, EB, and FB bargaining units. This remains the wording of the articles in the currently expired collective agreements for all five units.

B. Negotiations for the renewal of the Dental Plan, 2016 to 2018

[36] Although the Dental Plan underwent many revisions after its inception in 1986, after 2008, it was not revised for more than eight years, until the PSAC requested negotiations that started in 2016 and ended in 2018.

[37] The PSAC requested those negotiations via a letter dated May 2, 2016, to the assistant deputy minister for pension and benefits at the Treasury Board. The letter named Mr. Sazant as the chief negotiator for the PSAC's negotiating team and said that it wished to begin negotiations in September of 2016.

[38] Negotiations did not start in the fall of 2016, and no dates for bargaining were set. On January 11, 2017, legal counsel at the PSAC sent Mr. Leffler what the parties referred to as a "demand letter" about the negotiation process. The letter stated that in the absence of a response before January 19, 2017, the PSAC would make a bad-faith bargaining complaint against the employer "… for its refusal to bargain and disclose the necessary information required for bargaining."

[39] The employer replied on January 19, 2017, proposing preliminary dates in February of 2017 and an exchange of proposals by April 2017. The costing data requested by the PSAC was attached to that letter.

[40] Mr. Leffler testified that when the PSAC Board of Management met in February 2017, it held "exploratory" discussions about the renewal of the Dental Plan. In attendance at that meeting was the administrator of the plan (Great-West Life at the time; now called Canada Life). The administrator was there to answer questions and provide information about potential changes to the plan that could have introduced savings without reducing benefits.

[41] Mr. Leffler initially testified that on April 12, 2017, the PSAC presented its proposals for changes to the Dental Plan and that the employer planned to present its proposals when they met in May 2017. However, after being brought to an email summary of the meeting that he had prepared for Mr. Biswas, he confirmed that both parties presented their proposals on April 12, 2017.

[42] The parties held some further meetings to negotiate changes to the Dental Plan, but on July 18, 2017, Mr. Sazant wrote to Mr. Leffler, stating that the PSAC did not believe that the parties could reach a mutual agreement on the Dental Plan and that it would strike the Appeal Board provided for in the Teplitsky award.

[43] Mr. Sazant testified that the reason the PSAC moved to convene the Appeal Board was that employer's mandate in the negotiations was one of "cost-neutrality", in which improvements in one part of the Dental Plan had to be offset by savings elsewhere in the plan. Mr. Leffler confirmed this mandate in his testimony.

[44] In August 2017, the parties began discussions on how to proceed with the Appeal Board. It was at about this time that Mr. Biswas replaced Mr. Leffler as the lead negotiator for the employer.

[45] Given that this was the first time the parties had convened an Appeal Board since the issuance of the Teplitsky award, the parties took several months to negotiate how it would operate. Eventually, on May 4, 2018, the parties signed a memorandum of agreement ("the Appeal Board MOA") with respect to the establishment and operation of the Appeal Board. The structure of the Appeal Board described in the MOA mirrored that established via the Teplitsky award: one member nominated by the employer, one member nominated by the PSAC, and an independent chairperson agreed to by the employer and employee representatives.

[46] The Appeal Board's mandate was to render a decision on changes to the Dental Plan, provided that they had been the subject of negotiation between the parties. The agreement set out the factors that the Appeal Board was to take into account when making its decision. I note that some of the factors in the MOA are similar in wording to the factors that arbitration boards established to resolve collective bargaining disputes must take into account under s. 148 of the *Act*.

[47] The Appeal Board MOA also contained this provision: "15. The Appeal Board must determine the term of the Appeal Board decision and set it out in the decision."

[48] After the Appeal Board MOA was signed, an Appeal Board was struck consisting of Morton Mitchnick, the chairperson, Patti Bordeleau (nominee of the employer), and Joe Herbert (nominee of the PSAC). The Appeal Board held hearings and panel discussions on June 19 and August 21, 2018. Each party presented extensive briefs to it in support of their proposed changes.

[49] The Appeal Board issued its report on October 1, 2018. It did not adopt cost neutrality as a guiding principle, although it did award some of the cost-saving measures proposed by the employer. It also awarded several of the proposals proposed by the PSAC. The details of what it awarded are not of consequence to this decision, except with respect to the term of the Dental Plan that was part of its mandate. Its award on that issue read as follows: "All changes to the Plan awarded by the Board shall be effective January 1st, 2019, unless otherwise stipulated in this Award. This Award shall cover the period January 1st, 2019 to December 31st, 2021."

[50] Following the award, changes to the Dental Plan were incorporated into a document called "Rules of the Dental Care Plan for the Public Service of Canada" (dated December 20, 2018; "the Dental Plan Rules").

[51] As explained earlier, the rules for the Dental Plan in the Teplitsky award had been a 5-page document. As a result of successive amendments and additions, by December 2018, the Dental Plan Rules had become a 36-page document. They apply to all 5 components of the Dental Plan, although they do list the different Boards of Management that exist to manage the different components of the plan.

[52] I note that the Dental Plan Rules do not themselves describe a term or contain an expiry date. However, the document lists certain changes to take effect on January 1st of 2019, 2020, and 2021.

C. Events leading up to the making of this complaint

[53] On January 6, 2022, Mr. Sazant wrote to Mr. Biswas and requested that the employer provide the PSAC with demographic and costing information related to potential benefit increases that the PSAC was considering, in preparation for "… our upcoming round of negotiations for the PSAC Dental Care Plan …".

[54] On January 10, 2022, a letter from PSAC President Chris Aylward was sent to Ms. Girard, indicating that the PSAC "… hereby serves Notice to negotiate the terms of the Public Service Dental Care Plan." The letter stated that "[t]he updated plan according to the arbitration award stipulated that the plan could not be renegotiated until after December 31, 2021." The letter said that Mr. Sazant would be the chairperson of the PSAC negotiating team.

[55] The parties exchanged several emails about the data request between January 7 and March 8, 2022. On February 10, Mr. Sazant said it had been over a month since the

data request had been made and that no information had been received. Mr. Biswas replied the same day, promising data by February 21. The demographic and claims information were provided to the PSAC on February 22. Following some further exchanges, the costing data for potential proposals was provided to the PSAC on March 8, 2022.

[56] On April 14, 2022, Mr. Sazant emailed Mr. Biswas to arrange dates for the exchange of proposals for the Dental Plan. He said that the PSAC was looking to find dates before the end of May and that it was ready to table its initial proposals. He also requested a meeting with the employer and Canada Life to address questions about the costing data. Mr. Biswas replied a few days later, asking for some time to respond.

[57] On May 2, Mr. Sazant reiterated the request for dates and warned that the PSAC would be "examining our further options" if dates were not forthcoming.

[58] On May 13, 2022, Mr. Biswas responded, explaining that the employer did not yet have a mandate to negotiate the Dental Plan. He stated that the employer was committed to concluding negotiations on the PSHCP first. However, he expressed an interest in hearing the PSAC's proposals. He also said that he wanted to gauge the PSAC's interest in undertaking "a joint benchmarking study to understand plan comparability to the current market." He stated that the NJC Dental Plan Board of Management had requested such a study "… so that negotiations will be informed by the same evidence, data and science."

[59] The NJC's request had been made in a letter to the president of the Treasury Board, which was sent March 16, 2022, on behalf of the bargaining agents included in the NJC component of the plan. In that letter, the NJC bargaining agents had requested the employer to issue a mandate to enter into discussions about the Dental Plan, specifically to allow a benchmarking study of comparable dental plans, and to consider several specific areas of improvement. The letter also asked the Treasury Board to recognize that the NJC Dental Plan is independent of the PSAC plan, which could lead to a different but comparable plan design.

[60] On May 20, 2022, Mr. Sazant replied to Mr. Biswas' email of May 13. He expressed frustration that more than four months had passed since the PSAC served notice that it wished to begin negotiations. He said that the PSAC would not make its proposals unless the employer also agreed to make its proposals and that he had "… never engaged in the style of bargaining you propose." He said that it was

inappropriate for the employer to wait almost five months after the expiry of the Dental Plan to propose a joint benchmarking study, which would unduly delay the start of bargaining. He asked Mr. Biswas to propose bargaining dates no later than June 3 or the PSAC would begin the necessary actions to constitute the Appeal Board.

[61] Following some internal discussions with Mr. Prest, Mr. Biswas sent a reply to Mr. Sazant dated May 27, 2022, which read as follows:

> *Thank you for your response outlining PSAC's views on collective bargaining and seeking information on next steps for the negotiations on the Public Service Dental Care Plan (PSDCP). The Employer remains committed to continuing good faith bargaining and to the modernization of the public service benefits plans.*
>
> *From the Employer's perspective, PSDCP renewal discussions have commenced with our engagement with you on PSAC-specific PSDCP data and analysis. The Employer also started engagement with other Bargaining Agents represented by the Dental Board of Management (BOM) under the National Joint Council.*
>
> *As noted in my May 13, 2022, email, the Employer will be in a position to establish formal negotiation dates following the conclusion of the renewal of the Public Service Health Care Plan, and once in receipt of a PSDCP negotiations mandate from the President of Treasury Board. PSDCP renewal must be based on data and science, which is a fundamental consideration for the President.*
>
> *For this reason, a benchmarking study will be jointly undertaken by the Employer and the National Joint Council-led Bargaining Agents to identify areas for modernization. We would like to again extend our invitation to PSAC to participate in this study.*

[62] As noted earlier, this complaint was made on June 30, 2022.

[63] As of the date of the hearing, the parties had yet to set dates to exchange proposals for the Dental Plan.

D. Additional points arising from the testimony of Mr. Sazant

[64] I will now turn to some additional points arising from the testimonies of the witnesses that do not easily fit into the chronology of events, starting with Mr. Sazant.

[65] Mr. Sazant testified about the uniqueness of the bargaining process with the Treasury Board. With many employers, the PSAC is able to negotiate all terms and conditions of employment for its members at a single table. That's not the case with the Treasury Board. For the PA, SV, TC, and EB groups, the parties have created a "common-issues table" to negotiate certain collective agreement provisions that will be

common to all four units. Other terms and conditions are in the NJC directives, which are negotiated through the NJC. Other terms and conditions, such as the public service pension plan, are established through legislation and are not negotiated. The Dental Plan is also negotiated at a separate table.

[66] As of the hearing, Mr. Sazant had been on the PSAC Dental Plan Board of Management for seven years. He said that in that venue, he has heard the employer state several times that it would like the PSAC to join with the other components in a single board of management and that it would like the plan provisions to be consistent across all components.

[67] Mr. Sazant testified that more than 150 000 PSAC members are covered by the Dental Plan, including Treasury Board employees and those of many other federal public sector employers. Balancing members' interests across all these units can be challenging, but the PSAC has not been interested in negotiating different plans for each bargaining unit, he testified. The PSAC also has not wanted to negotiate the Dental Plan in conjunction with other bargaining agents, like it does with the PSHCP. He said that it would result in a loss of autonomy for the PSAC.

[68] Mr. Sazant testified that the PSAC spent about six months preparing for the 2022 Dental Plan negotiations. In October and November of 2021, it invited its members' input on changes to the Dental Plan via its website. He said that the call for input generated more than 10 000 submissions. The PSAC had to sort through and assess them when developing its bargaining priorities. He said that the input informed the request for data he made to Mr. Biswas in January 2022.

[69] In cross-examination, Mr. Sazant was asked why the PSAC's web posting stated that the Dental Plan is negotiated "separately from collective bargaining." He testified that this was the PSAC's colloquial way of explaining that the Dental Plan is bargained at a separate table, not at the main contract tables.

[70] Mr. Sazant was also asked in cross-examination why, if the PSAC was working to prepare for Dental Plan negotiations for six months in advance of January 2022, he did not provide any notice in advance to the employer. He said that the decision of the Appeal Board in 2018 meant that the parties were not to begin new negotiations before December 31, 2021, and that the expiry date of the plan was known well in advance. He testified that he did not think that it was up to the PSAC to remind the employer of these deadlines.

[71] On Mr. Biswas' proposal that the parties meet so that the PSAC could present its proposals in advance of the employer's, Mr. Sazant testified that he viewed this as unorthodox and unfair. Almost all the Dental Plan negotiations involve monetary issues, he said. In his experience as a negotiator, the parties always exchange their initial proposals at the same session. He said that this ensures a level playing field in bargaining.

[72] On Mr. Biswas' proposal to delay Dental Plan negotiations until the completion of bargaining for the PSHCP, Mr. Sazant testified that he did not understand why both processes could not run concurrently. He was the lead spokesperson for the NJC bargaining agents in the PSHCP negotiations, and it was not a problem for him or the PSAC to do both at the same time. He testified that although the employer and bargaining agent did conclude those negotiations in August 2022, at the time Mr. Biswas expressed this position (on May 13 and 27, 2022), there was no indication when the PSHCP negotiations would conclude.

[73] On the employer's request to delay negotiations until the completion of a benchmarking study, Mr. Sazant stated that in his experience, such studies could take 9 to 12 months, which would lead to a significant delay in the negotiations. He said that the PSAC might have agreed to such a study had it been proposed a year earlier but that it would not agree to delaying negotiations by that length of time in May of 2022. He testified that the benchmarking study done for the PSHCP was not a joint study but was "owned" by the PSHCP Administration Authority, although the bargaining agents did provide input into its design.

[74] Mr. Sazant testified that he did not agree with the concept that the Dental Plan could be negotiated based on "science". The parties enter negotiations based on different interests. Even when the parties have access to a benchmarking study, they may not agree on the plan design, he said. He further testified that the PSAC and Treasury Board are sophisticated parties that are able to do their own research about other plans. He referenced the briefs provided in 2018 to the Appeal Board as evidence of the parties' ability to do their own research.

[75] I will note at this point that the employer objected to the introduction of these briefs as evidence on the basis that they were not relevant to the issues before the Board. Given that these briefs were a key part of recent Dental Plan negotiations, I agreed to accept them as exhibits, subject to arguments about what conclusions I should draw about them, if any.

[76] As for the establishment of the Appeal Board in the 2018 Dental Plan negotiations, Mr. Sazant testified that this was the first time since the creation of the plan that the Appeal Board process in the Teplitsky award had been struck. He testified that it took some time to agree on its role and authority since that is not set out in statute.

[77] Nevertheless, the process set out in the Appeal Board MOA means that the Appeal Board works like a traditional arbitration board. In Mr. Sazant's experience, an arbitration board would expect the parties to have bargained before being convened and to have narrowed the issues in advance of presenting their briefs.

[78] Asked why the PSAC did not just trigger the Appeal Board process in June of 2022, when the employer would not agree to commence negotiations, Mr. Sazant testified that if the PSAC went straight to arbitration, the panel would ask why it was being asked to issue a decision when no negotiations had taken place. He testified that in his view, the Appeal Board would be prejudiced against the party that invoked the panel under such circumstances.

[79] Finally, Mr. Sazant confirmed in his testimony that he is not aware of any discussion about the renewal of the Dental Plan in the current round of collective agreement negotiations with the Treasury Board for the PA, SV, TC, EB, or FB groups. He said that the parties have agreed to negotiate the Dental Plan at one table, rather than doing so in 30 different places.

E. Additional points arising from the testimony of Mr. Prest

[80] Mr. Prest testified that he oversees a number of different staff units at the Treasury Board Secretariat that are responsible for benefits administration, policy development, overseeing the work of benefits administrators such as Sun Life and Canada Life, and the establishment of contracts with those administrators.

[81] He testified that 2022 was the first time he became involved in Dental Plan negotiations. He had not been aware that the PSAC had threatened to make an unfair-labour-practice complaint about Dental Plan negotiations in 2017. He was not involved in the 2018 Appeal Board process other than the communication of plan changes to the membership of the plan following the issuance of the Appeal Board's decision.

[82] Mr. Prest worked closely with Mr. Biswas and Ms. Girard in responding to the PSAC's January 2022 requests for data and to begin negotiations.

[83] On the fulfillment of the data request, Mr. Prest testified that significant work was required on the part of Canada Life to extract data for only the PSAC component of the Dental Plan. He said that he had anticipated that it would take six to eight weeks to fulfil the request and confirmed that the results were sent to the PSAC in two batches, one on February 22, 2022, and the second on March 8, 2022.

[84] He testified that he was surprised when Ms. Girard received the letter of January 10, 2022, asking to begin negotiations, as the employer had only just received the data request. He was also surprised because the parties were in the midst of an intense period of negotiations on the PSHCP, with Mr. Sazant acting as spokesperson for the bargaining agents.

[85] On the subject of why the employer did not anticipate the notice to negotiate, Mr. Prest testified that unlike a collective agreement, the Dental Plan does not expire. His view of the Appeal Board's award was that the parties were not to begin renegotiating until after December 31, 2021. He did not understand that as an expiry date but as a cooling-off period. The plan itself would continue to exist after that date. At any point after that, a party could ask to begin negotiations. Therefore, the Dental Plan is different from collective bargaining, he said. In cross-examination, he acknowledged that he had little direct experience in collective bargaining.

[86] Mr. Prest testified that shortly after the PSAC's data request was fulfilled, in mid-March 2022, the employer also received the request to begin Dental Plan discussions with the NJC component of the plan. He testified that he supported the NJC's proposal for a benchmarking study and that the federal government has mandated that decision making be based on "data and science". A benchmarking study had been conducted to prepare for the PSHCP negotiations, and he said that it was instrumental in securing a mandate to negotiate health care improvements. He acknowledged that the PSHCP study had taken three years to complete. He said that the health care plan is more complex and that it had not been updated for some time, and he did not anticipate a Dental Plan study to take as long. He also testified that without a benchmarking study to collect data on other dental plans, he anticipated difficulty obtaining a mandate to negotiate improvements with the PSAC.

[87] Another factor behind wanting a benchmarking study was the federal government's Budget 2022 announcement (made in April 2022) that it would launch a national dental care program, Mr. Prest testified. He said that the Dental Plan is a secondary provider and that it would have to be adjusted if the provinces are to

provide certain benefits under the new national program, particularly for dependants under the age of 12. He also said that a benchmarking study was required because the industry had undergone significant change, given the COVID-19 pandemic.

[88] On the issue of why PSHCP negotiations were such a large factor affecting its approach to negotiating the Dental Plan, Mr. Prest testified that the employer had carried out a retendering process for the administrator of that plan, resulting in a pending change from Sun Life to Canada Life. To be ready to implement this significant change by July 1, 2023, the parties had to finalize changes to the design of the PSHCP. He said that the parties used a collaborative approach to negotiations and that he believed that the bargaining agents, including the PSAC, prioritized the completion of the discussions. The employer had only a few experts to rely on, and there was “limited bandwidth” to be involved in a completely separate conversation (about the Dental Plan) at the same time. While admitting that he was not at the PSHCP technical committee, where negotiations took place, he testified that he was kept fully apprised of those discussions and that he was regularly in attendance at the PSHCP Partners Committee.

[89] Mr. Prest testified that all these factors were considered when the employer told the PSAC in May 2022 that it did not want to set dates to commence negotiations on the Dental Plan. He said that the employer considered setting dates for the fall of 2022 but that it opted to communicate to the PSAC its goal of finishing the PSHCP negotiations first and of completing a joint benchmarking study with the bargaining agents in the NJC component of the plan. The employer once again invited the PSAC to participate in that study. He said that he knew that there was a risk that the PSAC would trigger the dispute resolution process in the plan; that is, the Appeal Board. What happened instead is that the PSAC made this complaint, he said.

[90] In cross-examination, Mr. Prest was asked if he would agree to negotiate individual dental plans for PSAC bargaining units. He testified that it would not be his call to make but that he would not recommend a result that involves table-specific plans. It makes sense, he said, to have one plan for all of an employers’ employees.

F. Additional points arising from the testimony of Mr. Leffler

[91] Mr. Leffler testified primarily about his involvement in Dental Plan negotiations in 2016 to 2018, most of which is reflected in the chronological summary of facts set out earlier in this decision.

[92] He said that the employer had been surprised when the PSAC sent its letter in May of 2016 stating that it wished to begin negotiations in the fall of 2016. He testified that typically, bargaining agents would raise their interest in negotiating changes at the different Boards of Management. He was also surprised about the wording of that letter, which stated that the PSAC "… hereby serves Notice to negotiate the terms of the Public Service Dental Care Plan." He said that that language is something that the employer normally sees at the "wage table".

[93] Mr. Leffler testified about the contents of notes he made about the meeting on April 12, 2017, at which the parties exchanged proposals. In those notes, he wrote that the employer had stated its desire to negotiate in good faith, which "reduced some tension existing at [the] outset" of the meeting. He also testified in cross-examination that the commitment to negotiate in good faith was stated to him in a mandate letter from the Treasury Board's president.

[94] Mr. Leffler's notes of that meeting also stated that the employer made it clear that a key priority for it was to maintain a single plan design. The summary stated that the PSAC agreed that the employer could share its demands with the boards of management for the other components of the Dental Plan. The summary also stated that the PSAC said that it would never agree to a single dental board of management.

G. Additional points arising from the testimony of Ms. Shatford

[95] Ms. Shatford testified that during the current round of collective agreement negotiations, she is the lead negotiator for the employer at the PA bargaining table and for the common-issues table established by the parties to address certain issues for the PA, SV, EB, and TC groups. She was also a negotiator for the employer for the PA group in the previous round of bargaining between the parties, which resulted in the current collective agreements.

[96] As part of the division at the Treasury Board Secretariat responsible for collective agreement negotiations, she understands that the Dental Plan is part of the total compensation package. She said that the benefits plans are handled by another division. Similarly, the NJC directives form part of total compensation but are also not negotiated by her division.

[97] Ms. Shatford testified that no proposals with respect to the Dental Plan had been made by the PSAC at either the PA or the common-issues table in either this round of bargaining or during proposals exchanged in 2018. She also testified that no

discussions with respect to the Dental Plan took place at the PA or common-issues tables. She said that she was not aware of any discussions about the Dental Plan at any of the tables during the current round of negotiations.

[98] Asked what would happen if the employer were ready to conclude a tentative agreement and the Dental Plan had not been dealt with, Ms. Shatford testified that there would be no impact. Asked in cross-examination if she would agree to negotiate a dental plan only for the PA group, Ms. Shatford testified that the Dental Plan is negotiated by another group.

III. Legislative provisions

[99] Before introducing the parties' arguments and my reasons for decision, I will introduce the key legislative provisions at issue.

[100] This is a complaint made under s. 190 of the *Act*, which states that the Board "… must examine and inquire into any complaint made …" for, among other reasons, a complaint listed at s. 190(1)(b) that "… the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith) …".

[101] The duty to bargain in good faith at s. 106 of the *Act* flows directly from the provisions in s. 105 on the serving of a notice to bargain. Together, the two provisions read as follows:

Negotiation of Collective Agreements	***Négociation des conventions collectives***
Notice to bargain collectively	***Avis de négocier collectivement***
105 (1) *After the Board has certified an employee organization as the bargaining agent for a bargaining unit and the process for the resolution of a dispute applicable to that bargaining unit has been recorded by the Board, the bargaining agent or the employer may, by notice in writing, require the other to commence bargaining collectively with a view to entering into, renewing or revising a collective agreement.*	***105 (1)*** *Une fois l'accréditation obtenue par l'organisation syndicale et le mode de règlement des différends enregistré par la Commission, l'agent négociateur ou l'employeur peut, par avis écrit, requérir l'autre partie d'entamer des négociations collectives en vue de la conclusion, du renouvellement ou de la révision d'une convention collective.*
When notice may be given	***Date de l'avis***

(2) *The notice to bargain collectively may be given*

(2) *L'avis de négocier collectivement peut être donné :*

(a) *at any time, if no collective agreement or arbitral award is in force and no request for arbitration has been made by either of the parties in accordance with this Part; or*

a) *n'importe quand, si aucune convention collective ni aucune décision arbitrale n'est en vigueur et si aucune des parties n'a présenté de demande d'arbitrage au titre de la présente partie;*

(b) *if a collective agreement or arbitral award is in force, within the four months before it ceases to be in force.*

b) *dans les quatre derniers mois d'application de la convention ou de la décision qui est alors en vigueur.*

Copy of notice to Board

Copie à la Commission

(3) *A party that has given a notice to bargain collectively to another party must send a copy of the notice to the Board.*

(3) *Copie de l'avis est adressée à la Commission par la partie qui a donné l'avis.*

Effect of Notice

Effet de l'avis

Duty to bargain in good faith

Obligation de négocier de bonne foi

106 *After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*

106 *Une fois l'avis de négociation collective donné, l'agent négociateur et l'employeur doivent sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai éventuellement convenu par les parties :*

(a) *meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*

a) *se rencontrer et entamer des négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom;*

(b) *make every reasonable effort to enter into a collective agreement.*

b) *faire tout effort raisonnable pour conclure une convention collective.*

[102] Given the references in s. 105 to the negotiation of a collective agreement, the definition set out at s. 2(1) of the *Act* as follows is relevant to this complaint:

collective agreement *means an agreement in writing, entered into under Part 1 between the employer* and a barga*ining agent, containing provisions respecting terms and*

convention collective *Convention écrite conclue en application de la partie 1 entre l'employeur et un agent négociateur donné et renfermant des dispositions relatives*

conditions of employment and related matters. (convention collective)	*aux conditions d'emploi et à des questions connexes.* (collective agreement)

[103] It is also important to note that ss. 105 and 106 are contained within Part 1 of the *Act*, which concerns labour relations generally. That part of the *Act* sets out the framework for collective bargaining in the federal public service, starting with the establishment of bargaining units, the certification of bargaining agents, the choice of process for dispute resolution, and the collective bargaining process. Provisions for essential services, arbitration, conciliation, and strike votes are also set out in this part.

IV. Issues before the Board

[104] There are two issues before the Board.

[105] The first issue concerns the employer's objection that the Board does not have jurisdiction to hear this complaint.

[106] If I determine that the Board does have jurisdiction to hear this complaint, the second issue is whether the employer has violated s. 106 of the *Act* by bargaining in bad faith or by not making every reasonable effort to conclude a collective agreement.

A. Issue 1: The Board's jurisdiction to hear this complaint

1. Arguments of the employer

[107] I will start with the employer's arguments because it made the jurisdictional objection.

[108] The employer argued that the Board's jurisdiction to hear this complaint is limited by what is set out at s. 190 of the *Act*. Specifically, s. 190(1)(b) mandates the Board to determine a complaint that a party has failed to adhere to the duties set out at s. 106. Based on the wording of s. 106, the duty to bargain in good faith takes effect when a notice to bargain a collective agreement has been given, as set out in s. 105. If no notice to bargain a collective agreement was given, then s. 106 is not engaged, the employer argued, and no complaint may be made under s. 190(1)(b).

[109] When the PSAC wrote to the employer on January 10, 2022, stating that it wished to commence negotiations for the Dental Plan, it did not serve a notice to bargain that met the requirements of s. 105, the employer argued. The Dental Plan is not a collective agreement between the parties. It is a separate agreement negotiated

by the parties outside the collective bargaining process of the *Act*. Although the Dental Plan is incorporated by reference into the PSAC collective agreements, the parties have agreed to a separate process governing the negotiation of the plan and the resolution of disputes about it.

[110] To support its arguments, the employer referenced a number of facts about the letter of January 10, 2022. First, it used the words “notice to negotiate”, not “notice to bargain”. When the PSAC wishes to negotiate a collective agreement, it sends a letter that uses the words “notice to bargain” and makes specific reference to s. 105 of the *Act*, the name of the bargaining unit, and the bargaining certificate. Its letter to negotiate the Dental Plan did none of these things, and could not have, because the Dental Plan is not a collective agreement, the employer said.

[111] Secondly, the letter to negotiate was not sent within the four months before the expiry of a collective agreement, which is required by s. 105(2)(b). It was sent well **after** the expiry dates of the PA, SV, TC, and EB collective agreements in 2021 and **before** the four-month period commenced in advance of the FB collective agreement in June 2022.

[112] Third, the letter was not copied to the Board, which is a requirement under s. 105(3). The *Act* does not set this out as an option; it is a requirement, the employer argued.

[113] As the notice to negotiate the Dental Plan does not meet the requirements of s. 105, the employer argued, s. 106 does not apply. The requirement to bargain in good faith and make every reasonable effort to commence negotiations begins “[a]fter the notice to bargain collectively is given …”. The Board is without jurisdiction to hear a complaint under s. 190 if s. 106 does not apply, the employer argued.

[114] The bargaining history for the Dental Plan demonstrates that it is not negotiated on the same cycle as the parties’ collective agreements, the employer argued. The collective agreements incorporate the Dental Plan into them, but the plan that is incorporated is not one with a fixed date but one that is “modified from time to time”. On June 14, 2017, the parties signed collective agreements expiring in 2018 for the PA, SV, TC, and EB groups while they were still in the middle of the Dental Plan negotiations that took place between 2016 to 2018. The Dental Plan negotiations took place on a separate timeline, ending with the Appeal Board’s award on October 1, 2018.

[115] The notices to bargain served by the PSAC for its five bargaining units also did not trigger the duty to bargain the Dental Plan in good faith because they were not served in accordance with the cycle for Dental Plan negotiations, the employer argued. The PA, SV, TC, and EB notices were sent well before December 31, 2021, and the notice to bargain for the FB group was sent several weeks after the notice to negotiate the plan was sent. Those notices do not mention the plan, and Mr. Sazant is named as the chairperson of bargaining in only one of those notices (for the TC group).

[116] Over 30 years ago, the parties made an informed decision to negotiate the Dental Plan outside the collective bargaining process, for reasons of efficiency and improved benefits, the employer argued. This distinct process is reflected in how the PSAC explains the process on its website, which states that the plan is negotiated "separately from collective bargaining". The plan itself sets out the rules by which it is managed and how disputes are resolved. The plan is discussed at the Board of Management, which historically is where discussions about plan changes start. The PSAC changed the process in 2016 by issuing a formal notice to negotiate that surprised the employer, and after only six months of discussions, the PSAC declared an impasse and convened the Appeal Board. But this system does not fall under the *Act*, the employer argued. It is not collective bargaining per ss. 105 and 106, and therefore, the Board should not decide a complaint made under s. 190(1)(b).

[117] The Appeal Board process was established as an alternative dispute resolution process to resolve any disputes about the Dental Plan, the employer argued. It was first established as part of the Master Agreement. The parties' agreement to use the Appeal Board to resolve disputes is recognized in the email Mr. Sazant sent to Mr. Biswas on May 20, 2022. In that email, he wrote not only that the Appeal Board had been agreed to by the parties but also that it was the **only** option for resolving a dispute about when to commence negotiations. Given the parties' agreement to use that process, the Board is precluded from assuming jurisdiction over the matter, the employer argued.

[118] Determining the Board's jurisdiction is a simple exercise involving the application of the clear provisions of ss. 105 and 106, the employer argued. The PSAC argued that the Board should derive its jurisdiction from here and there, and it picked a bit of this and a bit of that from the jurisprudence and legislation to create a recipe for the Board's jurisdiction. It is simple: s. 106 does not apply to this matter because the parties have created an alternative to the collective bargaining process to negotiate

the Dental Plan and resolve disputes about it. Where there is clear language in the statute, a complicated interpretative exercise is not needed.

[119] If the PSAC now wishes to resile itself from the historical and contractual process agreed to by the parties, it is not up to the Board to make that determination, the employer submitted. The proper recourse for the PSAC is to renegotiate the Dental Plan at the collective bargaining table, with the acceptance and understanding that it will need to live with the inefficiencies and costs that will entail for its membership.

[120] The Board should draw from the preamble of the *Act* the principle that "the public interest is paramount" and recognize that the employer's objective is to maintain the Dental Plan as a single group insurance plan across the public service. Thirty years ago, the parties made an informed decision to negotiate this plan outside the collective bargaining process, and the Board should not open the door to imposing the strict requirements of the *Act* where they were not intended to apply, the employer argued.

[121] In terms of jurisprudence supporting the requirement for a clear link between the notice to bargain and the duty to bargain in good faith, the employer cited *Canadian Union of Public Employees, Local 70, v. City of Lethbridge*, [2001] Alta. LRBR 116 at para. 52 ("*Lethbridge*"), and *General Teamsters, Local Union No. 362, v. Burnco Rock Products Ltd.*, [2002] Alta. LRBR 271 at para. 14 ("*Burnco Rocks*").

[122] For the principle that parties may enter into a variety of contractual arrangements that are not collective agreements and that do not engage the intervention of a labour board, the employer cited *International Association of Fire Fighters, Local 255 v. Calgary (City)*, 1997 CanLII 16893 (AB LRB) ("*IAFF*"), in which the Alberta Labour Relations Board ("the Alberta Board") stated that "[i]n the normal course, it is not anticipated that the Board will have a role in interpreting and applying those various contracts."

[123] For the principle that agreements negotiated during the term of a collective agreement would not encompass the duty to bargain in good faith, the employer cited the decision of the Ontario Grievance Settlement Board (GSB) in *Ontario Public Service Employees Union v. Ontario (Management Board Secretariat)*, 2000 CanLII 20550 (ON GSB) ("*OPSEU*").

2. Arguments of the PSAC

[124] When it made the complaint, the PSAC took the position that the Board should interpret the *Act* in a broad and purposive manner, give effect to the *Act*'s preamble, and take jurisdiction over bargaining disputes "that do not neatly slot" into the structure of the *Act*.

[125] Before me, it conceded that the Dental Plan is not a collective agreement as the term is used in s. 105 of the *Act* but that the duty to bargain it in good faith flows from the fact that the PSAC properly served notice to bargain for its PA, SV, TC, EB, and FB bargaining units with the Treasury Board and that it made this complaint while in the process of collective bargaining for those units. As such, there is a duty on the employer to bargain in good faith that extends to the Dental Plan, and on this basis, the Board has jurisdiction over the complaint, it argued.

[126] As for why the PSAC served a separate notice to negotiate the Dental Plan on January 10, 2022, it said that the facts before the Board demonstrate that the Dental Plan is incorporated into the collective agreements between the parties, that the plan contains provisions for an Appeal Board to resolve disputes about the plan, and that in 2018, the Appeal Board established a term for the Dental Plan ending on December 31, 2021. The PSAC's notice to commence negotiations respected that term.

[127] The PSAC said that the issue of the Board's jurisdiction over a complaint involving the negotiation of the Dental Plan is not directly addressed by a previous decision of the Board. Therefore, it made a series of further arguments as to why the Board should take jurisdiction over this complaint.

[128] First, the PSAC said that the Board should look to the preamble of the *Act* in determining its jurisdiction. The *Interpretation Act* (R.S.C., 1985, c. I-21), at s. 12, states that every enactment "… shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", and at s. 13, it states that "[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object." That Board has recognized that is bound to observe the provisions of the preamble in determining its decisions; see *Public Service Alliance of Canada v. Treasury Board*, 2016 PSLREB 61 at para. 89 ("*PSAC/Separate Employers Transfers*").

[129] In this case, the Board should look particularly to those points in the preamble of the *Act* that emphasize the protection of the public interest, the importance of

effective labour-management relations, and the "… fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment …". These principles should help the Board take jurisdiction, the PSAC argued.

[130] Further to this point, the PSAC argued that the Supreme Court of Canada (SCC) has emphasized the importance of reading a statute in its entire context when interpreting it; see *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 24 ("*Rizzo Shoes*"). At paragraph 27, the SCC goes on to recognize another principle of statutory interpretation that the legislature does not intend to produce absurd consequences. It would be absurd, the PSAC argued, to draw a line between the main collective bargaining tables, including the common-issues table, and the table at which the Dental Plan is negotiated. The Dental Plan is the ultimate common issue, it said.

[131] Secondly, the PSAC argued that contracts are to be interpreted in their factual matrix; see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. The factual matrix in this complaint includes the overall reality of Treasury Board bargaining, which is not simple or straightforward but complex and happening at many different tables. The Board should keep this reality in mind when determining its jurisdiction. It should also keep in mind that this structure for bargaining the Dental Plan serves both parties' interests.

[132] Third, the PSAC argued that the SCC has clearly upheld the constitutional right to collective bargaining; see *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Sciences*"). Furthermore, in a decision about the duty to bargain in good faith under the *Code*, the SCC has ruled that "[t]he duty of the parties to bargain in good faith and make every reasonable effort to reach an agreement is an important precondition to achieving the larger purposes of the Code"; see *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC) at para. 64 ("*Royal Oak Mines*"). There is no substantive difference between s. 106 of the *Act* and the equivalent s. 99(2) of the *Code*, and so with these two decisions, the SCC states that workers have a constitutional right to collective bargaining and that the duty to bargain in good faith is an important precondition to achieving that purpose, the PSAC said. For those reasons, s. 106 should be interpreted liberally, even though the Board need not give it a liberal interpretation to take jurisdiction.

[133] Fourth, the PSAC argued that all government action is reviewable, and if the Board does not have jurisdiction to hear this complaint, then the PSAC would be left to

take the matter to the Federal Court. Parliament has created administrative tribunals like the Board to decide matters in their respective areas of expertise; see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 24 and 29. This does not mean that the Board has jurisdiction to decide anything related to labour relations, but the principles in *Vavilov* should be kept in mind when interpreting the scope of the powers the Board is given.

[134] By way of example, the PSAC cited the decision of the Federal Court to decline jurisdiction in a dispute about whether certain employees were entitled to retroactive pay following the settlement of some reclassification grievances; see *Public Service Alliance of Canada v. Canada (Attorney General)*, 2020 FC 481 ("*PSAC/Reclassification Remedy*"). Even though the dispute was rooted in the resolution of a large number of classification grievances, which are not adjudicable under the *Act*, the Federal Court determined that a liberal interpretation should be given to the *Act* and other labour relations statutes so "… that [all] employment-related disputes should be first addressed pursuant to those regimes" (paragraph 57). The Court sided with the respondent in that matter (also the Treasury Board) and determined that the PSAC ought to exhaust the grievance process under the *Act* rather than seek a review by the Court. In doing so, it drew on principles in *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2001 FCT 568 at para. 61, *Public Service Alliance of Canada v. Canada (Treasury Board)*, 2002 FCA 239 at para. 3, and *Vaughan v. Canada*, 2005 SCC 11.

[135] Fifth, the Board should undertake a textual and contextual analysis of the *Act* when looking at this complaint and its jurisdiction. The definition of a collective agreement is broad enough to encompass the Dental Plan, the PSAC argued. The plan may be an ancillary document, but it is part of the collective agreement and is an agreement in writing that contains terms and conditions of employment.

[136] Section 12 gives the Board broad jurisdiction to obtain the objects of the *Act*, the PSAC argued. Section 67 explains the effect of certification, which is to give bargaining agents the "exclusive authority to bargain collectively". Section 162, which is about the establishment of Public Interest Commissions (PICs), requires the parties to have bargaining "sufficiently and seriously", which is what the PSAC wants to do before deciding whether it should convene an Appeal Board. Section 182 allows the parties to make use of an alternate dispute resolution process, which is what the

Appeal Board is. The Board's jurisdiction to hear a complaint about the application of s. 106 should be determined in light of this overall contextual analysis.

[137] Keeping in mind the overall purpose and structure of the *Act*, the Board has interpreted its jurisdiction broadly, even when the *Act* lacked express provisions giving it jurisdiction, the PSAC argued. In *Amos v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 74 at paras. 62, 63, 97, 98, and 112, the Board took jurisdiction to determine whether a party had breached a settlement agreement, despite the lack of an express provision in the *Act* (upheld in 2011 FCA 38 at paras. 44, 67, and 69).

[138] In another case, the PSAC said that the Board took jurisdiction to determine matters that could be included in an essential services agreement, even though the parties had already renewed their collective agreement; see *Public Service Alliance of Canada v. Treasury Board (Border Services, Program and Administrative Services and Operational Groups)*, 2009 PSLRB 37 at para. 24. The Board also took jurisdiction and ordered a production request related to an essential services agreement, despite the strong wording of s. 120 of the *Act* that gives the employer exclusive authority to determine the level of essential services; see *Public Service Alliance of Canada v. Treasury Board (Program and Administrative Services Group)*, 2010 PSLRB 88 at para. 135 ("*PSAC/Service Canada ESA*").

[139] The PSAC also cited *Professional Association of Foreign Service Officers v. Treasury Board*, 2013 PSLRB 110 ("*PAFSO*"), in which the Board drew on the preamble of the *Act* and its overall structure to determine that the alternate dispute resolution provision at s. 182 of the *Act* forms a part of the overall collective bargaining process. As such, s. 182 also attracts the obligations in s. 106 to bargain in good faith, which led the Board to taking jurisdiction over a complaint made by the bargaining agent in that decision.

[140] Sixth, labour boards in Canada have demonstrated an interest in encouraging flexible bargaining structures; see *United Food & Commercial Workers International Union, Local 1288P v. Pepsi Bottling Group (Canada) Co.*, 2007 CanLII 71258 (NB LEB) at para. 15, and *Utility Workers of Canada v. Public Utilities Commission of the Borough of Scarborough*, 1982 CanLII 888 (ON LRB) at para. 14. The way in which the Dental Plan is negotiated is a flexible form of bargaining, but it is nevertheless a part of the collective bargaining process, the PSAC argued.

[141] Seventh, the PSAC argued that employees are allowed to grieve ancillary agreements that are incorporated into collective agreements; see *Kramer v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2010 PSLRB 116. It would not make sense to allow grievances under the Dental Plan while excluding it from the duty to bargain in good faith, the PSAC argued.

[142] Eighth, labour boards in other jurisdictions have applied the duty to bargain in good faith to ancillary agreements and reopener clauses, the PSAC argued, and the Board should follow their lead; see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Hotels Inc.*, 2008 CanLII 61402 (SK LRB) at paras. 124 and 134-135 ("*Prairie Hotels*"), which concerned a return-to-work agreement, and *United Nurses of Alberta v. Alberta Health Services*, 2019 CanLII 120251 (AB LRB) at paras. 19 and 24 ("*United Nurses of Alberta*"), which concerned a wage reopener. Both the Saskatchewan Labour Relations Board and the Alberta Board determined that the duty to bargain in good faith applied to those situations, the PSAC argued.

[143] Ninth, the PSAC pointed out that the courts have determined that labour boards can be given jurisdiction over complaints, despite the lack of an express provision. The Supreme Court of Yukon dismissed a duty-of-fair-representation complaint brought before it by a member of the Yukon Employees' Union (a component of the PSAC) because it found that despite the lack of an express provision in the Yukon *Public Service Labour Relations Act* (RSY 2002, c 185) imposing the duty of fair representation, the Yukon labour board had "implicit" jurisdiction to rule on the complaint; see *Kornelsen v. Yukon Employees' Union*, 2020 YKSC 1.

[144] In making that decision, the Supreme Court of Yukon drew on a decision of the Federal Court of Appeal in *Canadian Air Traffic Control Association v. The Queen in right of Canada as represented by the Treasury Board*, 1985 CanLII 5595 (FCA; "*CATCA*"), which found that the PSSRB should assume jurisdiction over duty-of-fair-representation complaints even though the governing Act at the time contained no express provision to do so (which the current *Act* has, s. 187).

[145] Finally, the PSAC emphasized that the facts about the case reinforce its assertion that the negotiation of the Dental Plan is part of the collective bargaining process. The plan was first added to the collective agreement through a binding conciliation process that ended with the Teplitsky award. Mr. Teplitsky hailed the achievement of the Master Agreement as a significant collective bargaining accomplishment. The award contained the first Dental Plan terms and conditions,

which established the Board of Management and created the structure for the Appeal Board. The Dental Plan as amended has been incorporated into successive collective agreements between the parties.

[146] In 2016 to 2018, the provisions of the plan contained in the collective agreements between the parties were used to negotiate changes and to invoke the use of the Appeal Board, which is a form of interest arbitration by another name. The Appeal Board's award resulted in changes to the plan that are now incorporated into the collective agreements between the parties. The Appeal Board established a term, and the PSAC now wants to begin negotiations. These facts are not altered because the PSAC describes the Dental Plan negotiation process as "separate from regular collective bargaining" on its website. It used that phrase to explain to its members why input into bargaining the Dental Plan was being asked for at a separate time from the main negotiation tables, which resulted in more than 10 000 submissions from PSAC members, it argued.

[147] Given all that the Board should take jurisdiction to determine this complaint, the PSAC argued. The PSAC does not want to be in a situation in which its only mechanism to engage the Board's jurisdiction is to start negotiating the Dental Plan at each individual table. Nor does it think it is appropriate that in the absence of Board jurisdiction, it should have to seek recourse before the Federal Court, where it might encounter another jurisdictional objection from the employer; see *PSAC/ Reclassification Remedy*, at para. 53.

3. Reasons

[148] I agree with the PSAC that the negotiation of the Dental Plan does not fit neatly into the structure of the *Act*.

[149] In and of itself, it is clear to me that the Dental Plan is not "a collective agreement" as defined in the *Act*. Division 5 of the *Act* provides for the certification of bargaining agents for bargaining units that are established by the Board, which must have regard to the occupational groups established by the employer (see s. 57). Division 6 gives the bargaining agent the right to choose, for each bargaining unit, whether it wishes to resolve collective bargaining disputes by arbitration or conciliation (see ss. 103 and 104). Division 7 provides the framework for collective bargaining and collective agreements, and s. 105 opens as follows:

105 (1) *After the Board has certified an employee organization as the bargaining agent* ***for a bargaining unit and the process for the resolution of a dispute applicable to that bargaining unit has been recorded by the Board****, the bargaining agent or the employer may, by notice in writing, require the other to commence bargaining collectively with a view to entering into, renewing or revising a collective agreement.*	***105 (1) Une fois l'accréditation obtenue par l'organisation syndicale et le mode de règlement des différends enregistré par la Commission****, l'agent négociateur ou l'employeur peut, par avis écrit, requérir l'autre partie d'entamer des négociations collectives en vue de la conclusion, du renouvellement ou de la révision d'une convention collective.*
…	[…]

[Emphasis added]

[150] The wording of s. 105 make it clear: collective agreements are directly linked to a particular bargaining unit, and the notice to bargain may be served once the bargaining agent has made a choice of dispute resolution process for that unit.

[151] The Dental Plan between the parties is clearly not a collective agreement for a particular bargaining unit. The plan applies not only to these five bargaining units between these parties (PA, SV, TC, EB, and FB) but also to a large number of other PSAC bargaining units under the *Act*, for example the PSAC units at the Canada Revenue Agency, Parks Canada, and the Canadian Food Inspection Agency, to name a few. It also applies to PSAC members in some bargaining units certified under the *Code*, such as the Canadian Museums of Human Rights, Nature, and History, to name a few.

[152] Because the Dental Plan is not a collective agreement under the *Act*, it would not be possible for the PSAC to serve a "notice to bargain" under the auspices of s. 105. In fact, the PSAC did not assert that Mr. Aylward's letter to Ms. Girard of January 10, 2022, was a notice to bargain under s. 105. And as the employer argued, the PSAC called this letter a "notice to negotiate", did not file the letter in the four months before the expiry of a collective agreement, and did not copy the letter to the Board.

[153] The issue is whether the duty to bargain in good faith in s. 106 of the *Act* nevertheless applies to the negotiation of the Dental Plan and whether the Board has jurisdiction to hear a complaint under s. 190 that the employer violated s. 106, despite the fact that the letter that Mr. Aylward sent was not a notice to bargain.

[154] I agree with the employer that on its face, s. 106 is triggered only once a notice to bargain had been served. It reads as follows:

***106 After the notice to bargain collectively is given**, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,*	***106 Une fois l'avis de négociation collective donné**, l'agent négociateur et l'employeur doivent sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai éventuellement convenu par les parties :*
***(a)** meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and*	***a)** se rencontrer et entamer des négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom;*
***(b)** make every reasonable effort to enter into a collective agreement.*	***b)** faire tout effort raisonnable pour conclure une convention collective.*

[Emphasis added]

[155] Also on its face, s. 190(1)(b) states clearly that the Board must inquire into any complaint made to it that "… the employer or a bargaining agent has failed to comply with section 106 (duty to bargain in good faith) …". This complaint was made under that section. There is no explicit provision in s. 190 that allows the Board to decide a complaint about the duty to bargain in good faith in situations in which s. 106 is not engaged.

[156] The employer's objection to the Board's jurisdiction was based on this strict interpretation of the wording of ss. 105, 106, and 190. However, the employer's objection was also rooted in the idea that the parties negotiate the Dental Plan outside the collective bargaining process. At paragraph 11 of its initial response to the complaint, filed on August 26, 2022, it stated as follows:

> *11. The Employer has not contravened section 106 of the* [Act] *because these provisions related to collective bargaining under the* [Act] *do not apply to the dental care plan negotiations. Although collective agreements between the PSAC and the Treasury Board contain language on the dental care plan, **it is not negotiated through the collective bargaining process.***
>
> …
>
> [Emphasis added]

[157] This remained the employer's central line of argument in the hearing before me. It focused its arguments on the fact that the Dental Plan is negotiated separately, that the PSAC has agreed to this structure of the plan through the text of the plan, and that this fact is reflected in its website posting for members that describes the plan as being negotiated "separately from collective bargaining". As such, it offered only a general critique of the PSAC's much broader arguments. It did not respond specifically to the PSAC's arguments on the application of the preamble of the *Act*, the principles of statutory interpretation, the concept of implied or derived jurisprudence or to most of the jurisprudence cited by the PSAC.

[158] My main difficulty with the employer's argument is that while the parties have clearly agreed upon and refined a unique process for negotiating the Dental Plan, the history of the plan and its incorporation into the collective agreement demonstrates that it is **entirely rooted in the collective bargaining process** between the parties.

[159] The Dental Plan was first established as a result of negotiations in 1985 to 1986 for the Master Agreement between the parties. When the parties could not conclude negotiations for the Master Agreement on their own, they agreed to appoint a "binding conciliation" board, resulting in the panel chaired by Mr. Teplitsky.

[160] In the Teplitsky award, he described the effort to achieve a Master Agreement as a "two-tier" system of bargaining. He called the task of converting 39 collective agreements into one Master Agreement a "gargantuan" task. He described how he and the parties' nominees worked together to assist the parties in completing their negotiations. He said that the agreement was "… the product of their negotiating efforts and the efforts of their nominees." He concluded his report by congratulating the parties and their nominees, stating that "[t]hey have proven once again that in the sphere of human relations, nothing is impossible."

[161] Because of those negotiations and the issuance of the Teplitsky award, the Master Agreement between the parties included a Dental Plan article directly in the collective agreement. The wording of that article incorporated the text of the plan into the collective agreement. The first version of the Dental Plan Rules were attached to that award.

[162] When the parties resumed bargaining following the 1991 to 1996 suspension of bargaining rights, the first collective agreements signed by the parties (in 1998) contained an article about the Dental Plan that referenced the plan contained in the

Master Agreement. The article also listed six dates on which that plan had been amended. This model for the article was continued with the collective agreements signed in 2000 and 2004. This meant that each time the parties concluded a collective agreement, they needed to negotiate the Dental Plan article at the table and agree that the plan had been amended on those dates.

[163] In negotiations for the collective agreements between the parties that expired in 2007, the parties amended the Dental Plan article to read as follows (using as an example the PA collective agreement that expired on June 20, 2007):

***** ARTICLE 8***	*****ARTICLE 8***
DENTAL CARE PLAN	***RÉGIME DE SOINS DENTAIRES***
8.01 *The Dental Care plan as contained in the Master Agreement between the Treasury Board and the Public Service Alliance of Canada, with an expiry date of June 30, 1988,* ***and as subsequently amended from time to time****, shall be deemed to form part of this Agreement.*	***8.01*** *Sont réputées faire partie de la présente convention, les modalités du Régime de soins dentaires telles qu'énoncées dans la convention cadre signée entre le Conseil du Trésor et l'Alliance de la Fonction publique du Canada, qui est venue à expiration le 30 juin 1988,* ***et telles que modifiées de temps à autre.***

[Emphasis added]

[164] The double asterisks before the article indicate a change in language from the previous collective agreement. This change was to remove the increasingly long list of dates on which the plan was amended and to replace it with the highlighted words. This meant that any amendment to the Dental Plan made after the signing of the collective agreement would from them on be unambiguously deemed to form part of the collective agreement. Other than that, in my assessment, the change in format was nothing more than a housekeeping change that allowed the parties to renew the article without change in subsequent rounds of bargaining.

[165] Despite the fact that both Mr. Sazant and Ms. Shatford testified that the parties have not made proposals about the Dental Plan article or discussed the Dental Plan at the collective bargaining tables in either the current or previous rounds of collective bargaining, the parties still must renew this article each time they sign a collective agreement. The article remains in the current collective agreements between the

parties. Therefore, until the parties agree otherwise, the Dental Plan continues to be "deemed to form part of" the collective agreements between them.

[166] None of this narrative is intended to deny that the parties have put into place a very unique form for the negotiation of the Dental Plan. They have negotiated into the plan a Board of Management to oversee the administration of the plan and to negotiate changes to it, they have altered the provisions of the plan a minimum of 8 times, and only once in a 30-plus-year history have they had to make use of the Appeal Board process in the plan.

[167] The testimonies of the witnesses and the arguments before me indicate that the parties place a very high value on the Dental Plan as currently structured. Neither Mr. Sazant nor Mr. Prest thought that it would be beneficial to start negotiating different dental plans for different bargaining units. Both witnesses in their testimonies, and both parties in their arguments, recognized that a single plan across all components of the plan produces efficiencies and cost savings that benefit employers and members alike. Despite some clear differences around the question of whether the plan should continue to have separate boards of management for the PSAC and the NJC bargaining agents, the parties have for more than 30 years negotiated the plan together, maintained it as single common Dental Plan across all components, and continued to provide it across some 30 separate employers.

[168] This unique structure is similar in some ways to the directives of the NJC, but it is also different from them. The similarities are that the plan contains a distinct process for hearing members' complaints and its renegotiation does not follow the same cycle as do the collective agreements. However, the process of negotiating NJC directives and the resolution of disputes about them fall under the NJC's by-laws, which exist independently and outside the collective bargaining process. Unlike the NJC directives, the framework for the negotiation of the Dental Plan exists entirely within the Dental Plan Rules, which are deemed to form part of the collective agreements between the parties.

[169] Borrowing a term from the SCC's decision in *Sattva Capital Corp.*, this history is the "factual matrix" within which I consider the relationship between the Dental Plan and collective bargaining.

[170] In short, the Dental Plan began because the parties negotiated for it through the process of collective bargaining, and through that process, they have deemed it part of

their collective agreements. They have renewed this agreement through the process of collective bargaining many times over. I can conclude only that the Dental Plan does **not** exist outside the collective bargaining process.

[171] Having concluded that, the question nevertheless remains: Does the duty to bargain in good faith in s. 106 extend to the negotiation of the Dental Plan, and does the Board have jurisdiction to hear a complaint that the employer has failed to adhere to that duty under s. 190? And if so, how?

[172] I will emphasize at this point that the employer stated clearly its desire to bargain the Dental Plan in good faith and that it maintained that it has done so in this case. However, it took the position that the *Act* does not mandate doing so as a duty and that it does not give the Board the jurisdiction to decide a complaint that it failed that duty. Mr. Leffler testified that the mandate to negotiate the Dental Plan in good faith came to him in the form of a mandate letter from the Treasury Board's president. Mr. Prest testified that to negotiate in good faith, he had to be able to make decisions based on data and science, which principle is also reflected in ministerial mandate letters.

[173] Given that the existence and maintenance of the Dental Plan is rooted in the collective bargaining process, I do not think that the employer can derive its mandate to negotiate it in good faith solely from ministerial mandate letters.

[174] For the reasons that follow, I believe that the duty to bargain in good faith extends to the Dental Plan and that the Board does have jurisdiction to decide this complaint.

[175] This is particularly the case given the facts before me that the PSAC had properly served notices to bargain for each of the PA, SV, TC, and EB groups when it sent its notice to negotiate the Dental Plan and that by the time this complaint was made, it had also served notice to bargain for the FB group. There is no dispute between the parties that those notices to bargain were served under s. 105 and that they triggered the duty to bargain those collective agreements in good faith at s. 106 and allow making a complaint under s 190(1)(b). Given that the Dental Plan is deemed to form part of the collective agreement, negotiating it during the process of collective bargaining means that those negotiations must also engage the duty to bargain in good faith, despite the fact that the PSAC sent a separate notice to negotiate the Dental Plan and the fact the parties have not mentioned the Dental Plan at the main table.

[176] I recognize that there may be some ambiguity about whether the provision in s. 106 stating that the parties must be prepared to begin negotiations within 20 days would apply, given these facts. Through the Appeal Board's award, the parties were not to start Dental Plan negotiations until after December 31, 2021. Clearly, there was no intention that the notices to bargain for the PA, TC, EB, and SV units served in February and April of 2021 would trigger a 20-day deadline to being negotiations for the Dental Plan. However, given that the PSAC did not argue that a 20-day deadline was triggered by the notice to negotiate the Dental Plan, I am not sure that I need to resolve this ambiguity.

[177] Having reached the conclusion that the duty to bargain in good faith applies in this fact situation, does this mean that the duty would **not** apply at a time when all the collective agreements between the parties were in force? Or hypothetically speaking, would the duty to bargain the Dental Plan in good faith under s. 106 end if the parties signed the collective agreements they are currently in the process of negotiating?

[178] In my view, the answer to both of these questions is in the negative, for many of the reasons argued by the PSAC. In the paragraphs that follows, I will not address every one of those arguments but will focus on those arguments and jurisprudence that I find most compelling.

[179] First, for the principle that the Board should look to the preamble of the *Act* to help interpret it in a broad and purposeful way, the PSAC cited ss. 12 and 13 of the *Interpretation Act* and the Board's 2016 decision in *PSAC/Separate Employers Transfers*, which at paragraph 89 stated this:

> ***89*** *As a panel of the new Board, I draw my jurisdiction from, among other authorities, the* PSLRA*. Although the parties did not argue it, I am nonetheless bound to observe the provisions of that statute, including the preamble, which promotes collaborative efforts, communication, and sustained dialogue as well as the fair, credible, and efficient resolution of matters that arise with respect to the terms and conditions of employment. In addition, it recognizes that the bargaining agents "represent the interests of employees". I have kept those overarching concepts in mind during my consideration of this policy grievance.*

[180] The preamble to the *Act* reads as follows:

Recognizing that	*Attendu :*

the public service labour-management regime must operate in a context where protection of the public interest is paramount;	*que le régime de relations patronales-syndicales de la fonction publique doit s'appliquer dans un environnement où la protection de l'intérêt public revêt une importance primordiale;*
effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;	*que des relations patronales-syndicales fructueuses sont à la base d'une saine gestion des ressources humaines, et que la collaboration, grâce à des communications et à un dialogue soutenu, accroît les capacités de la fonction publique de bien servir et de bien protéger l'intérêt public;*
collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment;	*que la négociation collective assure l'expression de divers points de vue dans l'établissement des conditions d'emploi;*
the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;	*que le gouvernement du Canada s'engage à résoudre de façon juste, crédible et efficace les problèmes liés aux conditions d'emploi;*
the Government of Canada recognizes that public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;	*que le gouvernement du Canada reconnaît que les agents négociateurs de la fonction publique représentent les intérêts des fonctionnaires lors des négociations collectives, et qu'ils ont un rôle à jouer dans la résolution des problèmes en milieu de travail et des conflits de droits;*
commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service;	*que l'engagement de l'employeur et des agents négociateurs à l'égard du respect mutuel et de l'établissement de relations harmonieuses est un élément indispensable pour ériger une fonction publique performante et productive,*
NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows ….	*Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :*

[181] In *Amos*, the Board determined that it should take jurisdiction over the question of whether a negotiated grievance settlement was final and binding, and following

from that, to render a decision on an allegation that a party is in non-compliance with the settlement. In doing so, it drew extensively on the preamble of *Act*, stating as follows at paragraph 63:

> *63 Given the objects stated in the preamble of the new* Act*, I view it as my task in this case to give the relevant provisions of the new* Act *such "… fair, large and liberal construction and interpretation …" as is consistent with promoting "… collaborative efforts between the parties …" while supporting the "… fair, credible and efficient resolution of matters …" and encouraging "… mutual respect and harmonious labour-management relations … "*

[182] As discussed earlier, despite this complaint and some differences in approach to the management of the plan, both parties to this complaint view the construct of the Dental Plan as a very effective form of labour-management relations. The parties have used a collaborative approach to develop it. They have sustained a dialogue about it for more than 30 years. The plan provides for an important term and condition of employment that balances the interest of employees (to have the benefits) with the public interest (to have an efficient and cost-effective plan).

[183] In other words, one could conclude that the process for negotiating the Dental Plan and the result of the plan itself fulfill many of the elements in the preamble to the *Act*.

[184] I will also draw from the SCC's 1998 decision in *Rizzo Shoes*, which stated that statutory interpretation should not produce an absurd result. The PSAC argued that it would be an absurd result to make a distinction between the Board's jurisdiction over bargaining at the main contract tables and the common-issues table, and the bargaining for the Dental Plan. Quoting from the preamble again, if the Board is the appropriate venue for the "… fair, credible and efficient resolution of matters arising …" from collective bargaining disputes at the main tables, it ought to also be the appropriate place to resolve disputes about the negotiation of the Dental Plan, given its roots in the collective bargaining process.

[185] Second, I also find myself in agreement with the PSAC's argument about the combined effect of the SCC's 2007 *Health Sciences* and 1996 *Royal Oak Mines* decisions, which is jurisprudence that is cited often in many of the Board's cases on the duty to bargain in good faith. *Health Sciences* upholds the right to bargain collectively as a constitutionally protected right. *Royal Oak Mines* states that the duty to bargain in good faith is an important precondition to the collective bargaining

relationship. Despite the fact that the fact situation in *Royal Oak Mines* involved a particularly egregious violation of an employer's duty to bargain in good faith, it stands for the proposition that the duty is an inherent part of the statutes that govern labour relations in this country. It is not a duty that simply emerges from ministerial mandate letters.

[186] Third, I will draw on the Board's decision in *PAFSO*, which I find is one of the strongest authorities for the conclusion I am reaching. In *PAFSO*, the bargaining agent had opted for conciliation, had been in collective bargaining, and had begun strike action. It proposed to place certain issues, namely wages, in front of an independent third party for binding arbitration, as provided for in s. 182 of the *Act*. The respondent (the Treasury Board) agreed but wanted to place certain preconditions on the process, in particular one stating that the arbitration board could not use pay comparisons to certain other classifications in rendering its compensation award. The bargaining agent made a complaint under s. 190 and argued that the employer's precondition violated the duty to bargain in good faith. Analogous to this complaint, in *PAFSO*, the respondent argued that s. 182 is a completely voluntary process independent of all other sections of the *Act* dealing with collective bargaining. It said that s. 106 did not apply to s. 182 and that the Board should decline jurisdiction to decide the complaint.

[187] For reference, s. 182 reads in part as follows:

Alternate dispute resolution process	***Mode substitutif de règlement***
182 (1) *Despite any other provision of this Part, the employer and the bargaining agent for a bargaining unit may, at any time in the negotiation of a collective agreement, agree to refer any term or condition of employment of employees in the bargaining unit that may be included in a collective agreement to any eligible person for final and binding determination by whatever process the employer and the bargaining agent agree to.*	***182 (1)*** *Malgré les autres dispositions de la présente partie, l'employeur et l'agent négociateur représentant une unité de négociation peuvent, à toute étape des négociations collectives, convenir de renvoyer à toute personne admissible, pour décision définitive et sans appel conformément au mode de règlement convenu entre eux, toute question concernant les conditions d'emploi des fonctionnaires de l'unité pouvant figurer dans une convention collective.*
Alternate process applicable only to terms referred to it	***Maintien du mode normal de règlement***

(2) *If a term or condition is referred to a person for final and binding determination, the process for resolution of a dispute concerning any other term or condition continues to be conciliation.*

(2) *Le mode de règlement des différends applicable à toute condition d'emploi non renvoyée à la personne en question pour décision définitive et sans appel demeure la conciliation.*

Agreement not unilaterally changeable

Effet du choix

(3) *Unless both parties agree, the referral of a term or condition to a person for final and binding determination remains in force until the determination is made.*

(3) *Sauf accord des parties, le choix fait au titre du paragraphe (1) est irrévocable jusqu'au règlement du différend.*

…

[…]

(4) *The form of the final and binding determination must, wherever possible, permit the determination to be*

(4) *La décision visée au paragraphe (1) est rédigée, dans la mesure du possible, de façon à :*

(a) *read and interpreted with, or annexed to and published with, a collective agreement dealing with other terms and conditions of employment of the employees in the bargaining unit in respect of which the determination applies; and*

a) *pouvoir être lue et interprétée par rapport à toute convention collective statuant sur d'autres conditions d'emploi des fonctionnaires de l'unité de négociation à laquelle elle s'applique, ou être jointe à une telle convention et publiée en même temps;*

(b) *incorporated into and implemented by any instrument that may be required to be made by the employer or the relevant bargaining agent in respect of the determination.*

b) *permettre son incorporation dans les documents que l'employeur ou l'agent négociateur compétent peuvent être tenus d'établir à son égard, ainsi que sa mise en oeuvre au moyen de ceux-ci.*

Binding effect

Obligation des parties

(5) *The determination is binding on the employer, the bargaining agent and the employees in the bargaining unit and is deemed to be incorporated into any collective agreement binding on the employees in the bargaining unit in respect of which the determination applies or, if there is no such agreement, is deemed to be such an agreement.*

(5) *La décision visée au paragraphe (1) lie l'employeur, l'agent négociateur et les fonctionnaires de l'unité concernée et est réputée faire partie de la convention collective régissant ces derniers. À défaut d'une telle convention, la décision est réputée en tenir lieu.*

… […]

[188] On the issue of whether s. 182 existed independently of the collective bargaining process, in *PAFSO*, the Board ruled in favour of the bargaining agent, as follows at paragraph 44, drawing in part on the principles in the preamble of the *Act*:

> *44 Despite the respondent's argument and regardless of the fact that the process under section 182 of the* Act *is identified by a header identifying it as* Alternative Dispute Resolution*, I find that it is not independent of the negotiation process. For example, section 182 dealing with final and binding determination and section 183 dealing with a minister's direction to hold a vote on the employer's last offer received by the bargaining agent are both included under separate headings. Each provides an alternative to the traditional collective bargaining impasses. Section 182 is one of the many tools available to the parties to resolve issues or conflicts which arise along the continuum between notice to bargain collectively and signing of a new collective agreement. In the current situation, it is a tool available to the parties to break the impasse in which they find themselves, given the ongoing strike and their current inability to conclude negotiations. This interpretation is consistent with the principles outlined in the preamble of the* Act*.*

[189] Flowing from that, the Board found that the duty to bargain in good faith in s. 106 was engaged as soon the employer agreed to use s. 182, stating the following at paragraph 52:

> *52 Given that section 182 can be accessed by the parties at any point during the negotiation process, and that its intent is to assist the parties to conclude a collective agreement and resolve any outstanding issues between the parties that prevent the conclusion of the collective agreement, clearly the obligations attach and continue until such time as an agreement has been reached. The respondent was not obligated to agree to participate in final and binding determination under section 182, but once it entered into negotiation of the conditions under which the determination would occur, it was under the obligation to bargain these conditions in good faith and to make every reasonable effort to conclude a collective agreement as per section 106. Section 182, its use and the negotiation of the conditions for its use are all part of the negotiation process.*

[190] The Board then proceeded to conduct an analysis of whether the employer had violated s. 106 and found that it had, for reasons I will return to later in the merits portion of the decision.

[191] Like in *PAFSO*, when the parties negotiate the Dental Plan, they are engaging in negotiations that are rooted in the collective bargaining process. They have also agreed to use a form of alternate dispute resolution process to resolve disputes arising in that process: the Appeal Board process. Both the PSAC and the employer made reference to the Appeal Board as a form of alternate dispute resolution. Although s. 182 did not exist when the Master Agreement was signed, the binding conciliation process that resulted in the Teplitsky award was clearly a form of alternate dispute resolution. Furthermore, while the Appeal Board MOA signed by the parties on May 4, 2018, does not make specific reference to s. 182, like that section, it creates a forum for the binding determination of disputes that are deemed to be incorporated into the collective agreement.

[192] Furthermore, the Appeal Board MOA specifically recognizes that the parties may approach the Board for assistance. In it, the parties agreed as follows: "Either party may request that the Federal Public Sector Labour Relations and Employment Board (FPSLREB), Dispute Resolution Services assist the parties in the administration of this MOA."

[193] And if the parties cannot agree on a neutral chairperson for the Appeal Board, the Appeal Board MOA states as follows:

> …
>
> *4. If the vacancy referred to above is the Chairperson, the Board members of the respective parties shall agree on a new Chairperson as quickly as possible. If the parties cannot agree on a new Chairperson, either party may apply to the Chairperson of the Federal Public Sector Labour Relations and Employment Board to appoint a Chairperson.*
>
> …

[194] Mr. Sazant testified that the parties had to negotiate the Appeal Board MOA because there was nothing set out in statute to provide for its specific mandate or format. But the MOA contains elements drawn from both s. 182 and certain elements applicable to arbitration boards, such as the factors affecting the making of the award (s. 148 of the *Act*, point 7 in the MOA) and the restrictions on the content of the award (s. 150 of the *Act*, points 10 and 11 in the MOA).

[195] Through the Appeal Board process, the parties have mutually agreed to a form of alternative dispute resolution and have agreed to use the services of the Board to assist them in resolving disputes that may arise in the conduct of that process. The

Appeal Board MOA does not specifically mention s. 182 of the *Act*, but that does not change my conclusion that this process falls within that ambit, and their agreement to draw on the services of the Board helps underline that conclusion. Although *PAFSO* was rendered in relation to the use of s. 182 before a collective agreement was signed, and the Appeal Board process could be used during or outside a period of collective bargaining, the Appeal Board exists as a process to resolve a collective bargaining dispute that can result in changes that are deemed to form part of the collective agreement. Following *PAFSO*, I find it reasonable to conclude that the duty to bargain in good faith follows, as does the Board's jurisdiction to decide a complaint made in relation to it.

[196] Fourth, in its 2010 *PSAC/Service Canada ESA* decision, the Board followed a similar path to the one I am taking in this case to take jurisdiction over an essential services dispute, despite the wording of s. 120 of the *Act*, which gives the employer the exclusive right to determine the level at which an essential service is to be provided to the public. In that decision, the Board found that it had jurisdiction to review whether the employer's exclusive right had been exercised in good faith. Therefore, it determined that a PSAC request for a document production order was arguably relevant to a matter that could come before it.

[197] In conducting its analysis in *PSAC/Service Canada ESA*, the Board adopted a line of analysis with several similarities to the one that the PSAC has asked me to adopt in this case. It drew extensively on the preamble of the *Act* to find its jurisdiction. At paragraph 112, it referenced the SCC's decision in *Rizzo Shoes* to conclude that the *Act* should be given liberal interpretation, and at paragraph 164, it referenced the SCC's decision in *Vaughan* to conclude that the *Act* establishes a comprehensive regime for the resolution of labour relations disputes in the federal public service. More significantly, the Board dealt extensively with an argument only briefly mentioned by the PSAC, drawing jurisdiction from what then s. 36 of the previous *Act*, now s. 12 of the *Act*, which reads as follows:

12 *The Board administers this Act and it may exercise the powers and perform the duties and functions that are conferred or imposed on it by this Act, or* ***as are incidental to the attainment of the objects of this Act,*** *including the making of orders requiring compliance with this Act, with regulations made under it* ***or with decisions made in respect of a matter coming before the Board.***	***12*** *La Commission met en oeuvre la présente loi et exerce les attributions que celle-ci lui confère ou* ***qu'implique la réalisation de ses objets****, notamment en rendant des ordonnances qui en exigent l'observation, celle des règlements pris sous son régime* ***ou des décisions qu'elle rend sur les questions dont elle est saisie.***

[Emphasis added]

[198] The Board's conclusion about this section is stated thoroughly at paragraph 166, as follows:

> *166 Do the Board's supervisory powers under section 36 of the* Act *take it the further step of intervening if, for example, the disclosure of information about the exercise by an employer of its discretion under section 120 causes an affected party to allege that the employer's decision was tainted by a violation of an important principle of administrative law? Despite the strong arguments made by the respondent to the contrary, I have come in the final analysis to agree with the applicant's position. However exceptional the circumstances may be that could justify the Board's intervention, I do not believe on balance that it is consistent with the objects of the* Act*, taken together, for the Board to sit on the sidelines if a dispute about a key principle of administrative law with respect to a determination under section 120 occurs in the midst of an ESA negotiation process.* ***The alternative course would be to leave the resolution of such a dispute to the courts, with the inevitable delays that would attend an application for judicial determination of the matter.*** *If it were the case that the courts, rather than the Board, possessed the specialized expertise necessary to understand the dynamics of a strike situation and the extent to which a "level of service" determination interplays with the other elements of an ESA, I might take a different view. As it is, I judge that there are strong policy reasons consistent with the objects of the* Act *that it makes better sense in the first instance for the Board to consider a dispute over the exercise of discretion under section 120, subject to subsequent judicial review of its decision as necessary.* ***Furthermore, as a question of law, I believe that the Board may use section 36 as necessary to resolve that dispute because doing so is rationally linked to, and thus incidental to, the objects of the*** **Act** ***to resolve disputes efficiently and to maintain effective labour-management relations.***
>
> [Emphasis added]

[199] As the PSAC argued, the Board's decision in *PSAC/Service Canada ESA* was upheld in 2011 FCA 257 at paras. 40 to 41.

[200] If the Board can use what is now s. 12 of the *Act* to take jurisdiction over a matter that the *Act* has given exclusive authority over to the employer, then I think that it is reasonable for me to also draw on s. 12 for the purpose of accepting jurisdiction over a complaint rooted in the collective bargaining process between the parties, over which the Board has clear jurisdiction.

[201] I do not find it necessary to go further and analyze each of the PSAC's other arguments or cited case law in detail, where the employer did not make specific arguments. Suffice it to say that the principles that the PSAC drew from *Vavilov*, *Vaughan*, *PSAC/Reclassification Remedy*, *Kornelsen*, and *CATCA* all reinforce the conclusion I have made.

[202] I will note that the employer argued that there are significant differences between the *Act* and the legislative regimes under which *Prairie Hotels* and *United Nurses of Alberta* were issued. I will not analyze those arguments in detail as I have not relied on those cases in my reasons for my decision on jurisdiction.

[203] I note that the cases cited by the employer (*Lethbridge*, *Burnco Rocks*, *IAFF*, and *OPSEU*) were also under other jurisdictions. *Lethbridge* and *Burnco Rocks* stand for the proposition that there has to be a link between a notice to bargain and the duty to bargain in good faith, which point has already been fully canvassed earlier in this decision.

[204] It is true that in *IAFF*, the Alberta Board said that "[i]n the normal course, it is not anticipated that the Board will have a role in interpreting and applying … various contracts" that are outside a collective agreement. However, as the PSAC argued, the Alberta Board was very cautious about making its conclusion. It also stated that it did not believe "… that it accords with the public policy as expressed in the provisions of the *Code* to conclude that it is possible for a bargaining agent to place terms and conditions of employment beyond the reach of the bargaining table irrevocably." That is not what the PSAC has done in this case, as it continues to negotiate a Dental Plan that is deemed to form part of the collective agreements.

[205] As for *OPSEU*, the GSB did state that the parties likely did not envision that its process for operating a classification grievance committee would engage the duty to

bargain in good faith and that it would be unusual for such a duty to apply to a process that takes place during the term of a collective agreement. However, *OPSEU* can be distinguished as a grievance, not a complaint, and on the basis that it dealt with a classification grievance committee that was not analogous to the status enjoyed by the Dental Plan, which is deemed to form part of the collective agreements between the parties.

[206] In any case, the GSB granted the grievance in that matter and directed the employer there to cease and desist from setting preconditions. At best, I find that *OPSEU* stands for the proposition that the PSAC could have filed a policy grievance against the employer's refusal to come to the table rather than making this complaint, but since the employer did not argue that that is what the PSAC ought to have done, I will not explore that issue further.

[207] In conclusion, I find that the Dental Plan is an important mechanism by which the parties engage in collective bargaining over a particular set of terms and conditions of employment. Negotiations for it are rooted in the collective bargaining process that the parties have engaged in under the *Act*. Given the facts of this case, the duty to bargain in good faith contained in s. 106 of the *Act* is in effect. Furthermore, drawing on the preamble to the *Act*, the decisions of the SCC in *Health Sciences* and *Royal Oak Mines*, and the Board's decisions in *PAFSO* and *PSAC/Service Canada ESA*, I find that it is appropriate and consistent with the *Act* for the Board to determine this complaint. I have been able to distinguish this complaint from the cases cited by the employer. I turn now to the merits of the complaint.

B. Issue 2: Has the employer violated s. 106 of the *Act*?

[208] One week after the hearing of this complaint ended, the Board released its decision on a bargaining-in-bad-faith complaint made by the employer; see *Treasury Board v. Canadian Merchant Service Guild*, 2023 FPSLREB 7 ("*CMSG*"). In that complaint, the employer alleged that the bargaining agent ("the Guild") had violated s. 106 of the *Act* by not bargaining in good faith, in respect of its conduct in negotiations, by delaying or cutting short several negotiation sessions, and by prematurely requesting arbitration of the collective agreement. In dismissing the complaint, the Board surveyed the jurisprudence, applied it to the facts of the case, and was not convinced that the Guild "… had no real intention of concluding a collective agreement or hoped to destroy its collective bargaining relationship with the Treasury Board" (paragraph 83).

[209] Given the subject and timing of the Board's decision in *CMSG*, I invited the parties to provide me with any submissions they wished to make on its application to this complaint. Both parties did so, on February 8, 2023.

[210] The summary of arguments and the reasons that follow draw on the parties' arguments at the hearing and their written submissions on *CMSG*.

1. Arguments of the PSAC

[211] The PSAC argued that s. 106 contains two distinct elements: the duty to bargain in good faith, which is measured on a subjective standard, and the duty to make every reasonable effort to conclude a collective agreement, which is measured on an objective standard; see *Royal Oak Mines*, at para. 42.

[212] The setting of preconditions on bargaining is incompatible with the obligation to make every reasonable effort to conclude a collective agreement, the PSAC argued; see *Public Service Alliance of Canada v. Canada (Treasury Board)*, 1991 CarswellNat 1574 (CPSSRB) at para. 19 ("*PSAC 1991*").

[213] The employer placed three preconditions on Dental Plan negotiations: it wanted to conclude negotiations on the PSHCP before commencing negotiations on the Dental Plan, it had to request a mandate before beginning negotiations, and it wanted to complete a benchmarking study before seeking that mandate. These were preconditions that the PSAC could not accept when this complaint was made because the PSAC believed that they would result in a significant delay in commencing and concluding negotiations. The fact that negotiations had still not begun as of the hearing only confirms this belief.

[214] In *PAFSO*, the Board found that the employer had violated the duty to bargain in good faith by imposing a precondition on the mandate for an interest arbitration board; see paras. 54 to 56 and 58 to 61. Given the preconditions imposed in this case, the Board should make a similar finding, the PSAC argued.

[215] The parties must be ready to bargain, even if that means the allocation of more resources, the PSAC argued; see *Professional Institute of the Public Service of Canada v. Canadian Food Inspection Agency*, 2008 PSLRB 78 at paras. 65 and 69 to 71 ("*PIPSC/CFIA 2008*").

[216] The employer should not have been caught by surprise when the PSAC sought to commence negotiations via its letter of January 10, 2022. It was following the same process it had used in 2016, when it served a notice to negotiate and made a data request. In January 2017, when the employer had not agreed to the establishment of the dates, the PSAC threatened to make a bad-faith-bargaining complaint. Shortly after that, the employer gave Mr. Leffler a mandate to bargain in good faith.

[217] When the parties reached an impasse in the bargaining process, they jointly requested that the Appeal Board establish a term for the Dental Plan. The Appeal Board established a term for the Dental Plan from January 1, 2019, to December 31, 2021. The existence of that term should not have been a surprise to the employer. It was no surprise to the NJC component of the plan, which also requested to begin negotiations just two months after the PSAC did.

[218] This case is not about two parties talking past each other, the PSAC argued. By ignoring the existence of the term, the employer is being wilfully blind to its obligations or is suffering from institutional amnesia. It is not up to the PSAC to remind the employer of the Dental Plan term or explain to Mr. Prest the procedures of collective bargaining. The two parties to this complaint are sophisticated, and the Dental Plan forms part of their collective agreements and bargaining relationship. The employer should understand the law and should have anticipated setting a mandate to commence negotiations.

[219] Requiring that a benchmarking study be conducted before seeking a mandate to negotiate is not a reasonable precondition, the PSAC argued. While the employer may wish to have a benchmarking study, it was not reasonable for it to wait until after the term of the Dental Plan expired and after the PSAC requested to commence negotiations before initiating its request for the PSAC to participate. It was also not reasonable for the employer to insist on completing such a study before starting bargaining. The PSHCP study took three years, and it was not a joint study. The PSAC is not opposed on principle to participating in a benchmarking study but could not agree to a proposal made in May 2022 that was likely to delay bargaining by more than a year, it argued.

[220] Bargaining in good faith requires employers to recognize and respect the legal status of bargaining agents as exclusive representatives of the bargaining units for which they are certified, the PSAC argued. That requirement needs to be satisfied before proceeding to an analysis of whether the parties are bargaining in good faith.

The employer's long-standing and stubborn desire to treat the PSAC and NJC as a single component is incompatible with this obligation, the PSAC argued. The PSAC has strongly communicated its intention to remain a separate component.

[221] The NJC component also said that it wanted to be treated distinctly, and it did not request a joint benchmarking study involving the PSAC. Despite this, the employer invited the PSAC to participate in the benchmarking study and has continued to insist that the study it is doing with the involvement of the NJC component be completed before bargaining with the PSAC begins. The employer has effectively told the PSAC to sit on the sidelines for more than a year, pending the completion of the study it is doing with the NJC component.

[222] In any case, a benchmarking study is not required to bargain the Dental Plan, the PSAC argued. The parties have agreed to bargain the plan and to strike the Appeal Board if they cannot reach agreement. As an interest arbitration process, each party has to justify its position to the Appeal Board. If one party cannot do a good job with that, then the other party will likely prevail. In 2018, both parties undertook sectoral and economic research and cited problems with the plan. The parties' abilities to do this research was reflected in the sophistication of the briefs they presented to the Appeal Board. Some proposals were based on data; some were based just on need. In those negotiations, the employer had a mandate of cost neutrality. That mandate was based on interests, not science, the PSAC said. Even if the parties have access to a benchmarking study, they may make different arguments based on their interests.

[223] Assuming but not accepting that the employer was taken by surprise in January 2022, it has taken much too long to catch up, the PSAC argued. The PSAC prepared for bargaining by seeking members' input months before the term of the Dental Plan ended. Mr. Sazant had to sift through 10 000 suggestions from members before making the data request of January 6, 2022. The employer did not have to do this work. The PSAC was still ready to commence negotiations by March 2022 and asked for bargaining dates in May 2022. Mr. Sazant was able to do this while also chairing the PSHCP negotiations on behalf of the bargaining agents and conducting other negotiations for the PSAC. While appreciating that there is a different culture at the Treasury Board, the employer is ultimately responsible for preparing for bargaining, and when this complaint was made, it was not ready.

[224] When assessing a bargaining-in-bad-faith complaint, the Board should look to the totality of the bargaining process, including before and after the complaint was

made, the PSAC argued; see *PIPSC/CFIA 2008*, at para. 56, and *CMSG*, at para. 64. Not only was the employer not ready to start bargaining in May of 2022, but also, as of the hearing in January 2023, it was still not ready. More than a year passed, and it still was not prepared. This is not bargaining in good faith or making every reasonable effort to conclude an agreement, the PSAC argued.

[225] As for *CMSG*, the PSAC argued that it includes useful summaries of the principles of the duty to bargain but that some of the case law cited in it predates the SCC's decision in *Royal Oak Mines*. Among the cases quoted by the Board at paragraph 65 was *Hodges v. Dominion Glass Co. Ltd.*, [1964] 2 O.R. 239, which called the distinction between good-faith bargaining and reasonable efforts "… so tenuous and elusive as to lose any legal significance." The PSAC said that that case is no longer good law in light of *Royal Oak Mines*, which emphasized that the duty to bargain in good faith should be measured on a subjective standard, while the duty to make every reasonable effort to conclude a collective agreement should be measured on an objective standard. This is important, the PSAC argued, because the employer's main witness (Mr. Prest) said that he had little to no knowledge, experience, or understanding of collective bargaining or interest arbitration. It is not a legal defence to say "I did not know any better", when s. 106 has a distinct objective requirement and given that the parties to the complaint are sophisticated institutions with a long history of bargaining with each other, the PSAC submitted.

[226] Finally, the PSAC argued that the case law cited in *CMSG*, at para. 65, focuses on concluding a collective agreement and that one might be tempted to focus on those bargaining issues that lead to ratifying and signing a collective agreement. Leaving aside the fact that the bargaining of the PA, SV, TC, EB, and FB collective agreements has yet to be concluded, this temptation would be misplaced, it argued.

[227] Each of these collective agreements includes language that deems that the Dental Plan, as amended from time to time, forms part of the collective agreement. The plan was last amended by the award of the Appeal Board that included a term of January 1, 2019, to December 31, 2021. The expiration of that term rendered the pertinent articles of the collective agreements unconcluded. Much like the trigger of a wage-reopener clause, the expiration of the Dental Plan reactivated the duty to bargain in good faith that began with the notices served for the PA, SV, TC, EB, and FB groups and that continues, despite the existence of an interest arbitration provision; see

United Nurses of Alberta, at paras. 17, 19, and 24, and *PAFSO*, at paras. 54 to 56 and 58 to 61.

2. Arguments of the employer

[228] The employer agreed with the PSAC on the application of *Royal Oak Mines*, which requires both a subjective assessment of the parties' willingness to enter into negotiations in good faith and an objective assessment of whether the parties are making reasonable efforts to conclude an agreement. It said that a party will be found in breach of s. 106 if it does not comply with both of these components.

[229] However, the employer argued that the duty to bargain in good faith does not impose an obligation to **reach** an agreement; it imposes a duty on each party to **intend** to reach an agreement. See *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102 at para. 84 ("*PIPSC/CS Negotiations 2009*").

[230] The duty to bargain in good faith does not preclude "hard" bargaining, which is "… the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms", the employer argued; see *Health Sciences*, at paras. 103 and 104. Hard bargaining is not the same as "surface" bargaining, in which one party pretends to bargain but has no real intention to sign a collective agreement; see *PIPSC/CS Negotiations 2009*, at para. 85.

[231] The failure to bargain in good faith should not be lightly found and should be clearly supported on the record before the Board, the employer argued; see *Health Sciences*, at para. 107.

[232] In this case, the employer argued that the record before the Board demonstrates that it has bargained in good faith by doing the following:

- acting in accordance with the separate dispute resolution process agreed to by the parties;
- providing the PSAC with the extensive costing data it requested within weeks of the request;
- inviting the PSAC to share its proposals for the renewal of the Dental Plan, even though the employer was not ready to make its proposals;
- inviting the PSAC to participate in the joint benchmarking study with the NJC; and
- explaining that it did not have the resources to simultaneously negotiate two major benefits plans: the PSHCP and the Dental Plan.

[233] The employer argued that its desire to complete a benchmarking study is reasonable in light of the COVID-19 pandemic and its impact on dental care practices, the current record levels of inflation, and the introduction of a national dental care plan by the federal government. These factors have fundamentally altered the economic landscape within which the Dental Plan operates, it said. The employer's need for independent market data is not unreasonable, given that it must keep the public interest in mind, consider the broader economic factors, and assess the cost implications of changes across all five components of the Dental Plan.

[234] The employer's invitation for the PSAC to participate in the benchmarking study was made in good faith and should not have been a surprise to the PSAC since the parties had just done such a study for the PSHCP, the employer argued. While the PSAC may disagree with the need for the study, it does not mean that the employer's position is unreasonable or that the resulting delay meets the threshold of bargaining in bad faith. To the contrary, bad faith has been found in circumstances in which an employer has failed to provide a coherent economic or business justification for its bargaining decisions; see *Canadian Union of Public Employees (Airline Division), Local 4027 v. Iberia Airlines of Spain*, (1990) 13 CRRBR (2d) 224 at para. 125.

[235] By contrast, the employer argued, it is the PSAC that has acted in bad faith by doing the following:

- unilaterally departing from a long-standing past practice of informal open dialogue at the Board of Management before commencing negotiations to amend the Dental Plan;
- insisting that the employer obtain a mandate from the president of the Treasury Board in the absence of material cost comparables;
- disregarding the employer's legitimate concerns about the changes to the economic landscape by refusing to acknowledge the need for a benchmark analysis; and
- insisting that the employer divert scarce human resources to starting Dental Plan negotiations when PSHCP negotiations had to be completed urgently.

[236] The employer argued that this complaint is nothing more than the PSAC attempting to circumvent an agreed-upon dispute resolution process (the Appeal Board) in the hope of securing a strategic advantage in the context of its broader, ongoing collective bargaining negotiations with the employer.

[237] In assessing these arguments, the employer said that the Board should look at the whole of the bargaining process; see *CMSG*, at paras. 64 to 68. The Board should also consider the parties' history and relationship; see *CMSG*, at paras. 71 and 72. In

this case, the employer has demonstrated that the parties agreed to a separate negotiation process for the Dental Plan, outside the collective bargaining process. The language in the collective agreement reflects this, incorporating the plan by reference as "amended from time to time".

[238] The employer was surprised when it received the letters from the PSAC in January of 2022. The parties had used the Appeal Board process in the Dental Plan for the first time in 2018. It did not perceive December 31, 2021, as an "end date" to the plan. If the PSAC was working on it 6 months before the expiry date, it would have been reasonable for it to notify the employer of that. The employer relied on the 30-year history and practice of negotiations to inform its approach to the negotiation of changes to the plan. It was reasonable for the employer to govern itself in accordance with this history. Furthermore, given the parties' long-standing history, it is reasonable for the employer to expect the PSAC to rely on the existence of the independent dispute resolution mechanism of the Appeal Board rather than making a complaint before the Board.

[239] The employer also argued that a parties' limited resources and competing priorities were recognized by the Board in *CMSG*; see paras. 82 and 83. In this case, the employer demonstrated that it faced a strict timeline for the completion of the PSHCP negotiations in advance of the July 2023 change in administrator. The announcement of a national dental care program also diverted the attention of Mr. Prest and his team. The employer argued that it explained this reality to the PSAC and that it has reiterated its commitment to entering into an agreement on the Dental Plan as soon as reasonably practical.

3. Reasons

[240] It is hard to find, in the case law cited by the parties, a concise distillation of the principles governing the requirements to bargain in good faith and to make every reasonable effort to enter into a collective agreement. The principles summarized in *CMSG*, at paras. 65 to 68, comprise nearly five pages. The summary in George Adams, *Canadian Labour Law*, 2nd edition, at section 10.25 (titled "rational discussion and reasonable efforts") comprises seven pages, not including footnotes.

[241] A succinct and useful starting place can be found in *CMSG*, at para. 66, where it quotes as follows from the guidelines established in *Public Service Alliance of Canada*

v. Canada (Treasury Board), PSSRB File No. 148-02-16 (19770630), [1977] C.P.S.S.R.B. No. 16 (QL) at para. 11:

> …
>
> *a) The employer has the duty to recognize the union as the bargaining agent for its employees.*
>
> *b) Both the employer and the bargaining agent have the duty to share the intent of entering into a collective agreement, even though the objectives of the parties as to the content of the collective agreement might be different.*
>
> *c) The employer has the obligation to provide sufficient information in order to ensure "rational informed discussion". The reason underlying this obligation has been stated as follows:*
>
> > *As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well defined.*
>
> *d) The negotiation process should be looked upon as a whole.*

[242] I agree that the recognition piece is key, and when an employer's actions are found to have the objective of undermining the recognition of a union or bargaining agent, a violation of the duty to bargain in good faith has been found; see *Royal Oak Mines*. The intent to enter into a collective agreement is also key. When the Board has found that an alleged violation of the duty did **not** amount to an intent to avoid entering into a collective agreement, complaints under s. 106 have been dismissed; see *CMSG*, at para. 83, and *PIPSC/CS Negotiations 2008*, at paras. 84 and 92.

[243] Rational dialogue and discussion are also key elements of the duty to bargain in good faith. For a summary of the importance of this principle, I will draw from *CMSG*, at para. 65, which quotes from a succession of cases that trace back to *United Steelworkers of America on behalf of Local 13704 v. Canadian Industries Limited*, [1976] OLRB Rep. May 199 at para. 19 ("*United Steelworkers*"), in which the Ontario Labour Relations Board (OLRB) found as follows:

> *19. The requirement of rational discussion imposes upon the parties a duty to communicate with each other, recognizing that proper collective bargaining depends upon effective communication. Although a failure to communicate might not appear to be the same kind of wrong as an unwillingness to recognize the other party, it does, in fact, have a very serious effect on the collective bargaining process as a whole. The breakdown of established bargaining relationships, because of an unwillingness to engage in full discussion with the other party, is likely to lead to more frequent resort to economic sanctions, and to greater dissatisfaction with the collective bargaining process. The*

> *obligation to bargain in good faith recognizes the importance of collective bargaining as a structure within which a full dialogue can be conducted between a trade union and the employer.*

[244] It has also been found that preconditions imposed by one party or the other amount to bargaining in bad faith because they shut down dialogue. In *PSAC 1991*, the employer insisted that the bargaining agent accept a wage-restraint position being introduced via legislation before it would agree to return to the bargaining table. The Board found that this was a violation of the duty to bargain in good faith (at paragraph 19). When an employer has refused to provide the payroll data necessary to a rational discussion of bargaining proposals, the Board has also found a violation of the duty to bargain in good faith; see *PIPSC/CFIA 2008*, at para. 68.

[245] In *PAFSO*, the employer said that it would not agree to establish a binding arbitration panel unless the bargaining agent agreed not to argue wage comparability with other classifications in front of the panel. The Board found this precondition to have crossed the line from being “hard” bargaining into “surface” bargaining, demonstrating an intention to not enter into a collective agreement (paragraph 63).

[246] Finally, both parties agreed on the application of the principles articulated as follows by the SCC in *Royal Oak Mines*, at para. 42:

> *42. … Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*

[247] In this complaint, the PSAC’s allegations that the employer violated s. 106 can be summarized as containing the following elements:

- the employer refused to set dates for the commencement of negotiations;
- the employer delayed providing data related to the negotiation of the Dental Plan;

- the employer's insistence that negotiations for the PSHCP be completed before starting negotiations on the Dental Plan was an unreasonable precondition to collective bargaining;
- the employer's insistence that it complete a benchmarking study with the NJC component of the Dental Plan before seeking a mandate or commencing bargaining was also an unreasonable precondition on bargaining;
- it was unreasonable for the employer to propose that the PSAC table its proposals for the Dental Plan when the employer was not ready to make its own; and
- somewhat related to these allegations, the PSAC also argued that it was unreasonable for the employer to not recognize and respect the existence of a term for the Dental Plan, given the clear statement of a term in the October 2018 award of the Appeal Board.

[248] I will dispense quickly with the allegation made by the PSAC with respect to the completion of negotiations for the PSHCP. I find that the employer's rationale for prioritizing those negotiations in May of 2022 was clear and reasonable. A decision had been made to change the administrator for the PSHCP by July of 2023, and the parties to the plan had to finalize changes to the plan design, to get ready for that change.

[249] Despite that Mr. Sazant felt able to simultaneously complete PSHCP negotiations and commence Dental Plan negotiations, I accept Mr. Prest's testimony that the pressures on the employer team were such that his team had "limited bandwidth" to devote time to both processes simultaneously. I find this both subjectively and objectively reasonable.

[250] Furthermore, this precondition to bargaining ceased to be in play after August of 2022, when the parties announced that they reached an agreement about changes to the PSHCP. After that, those negotiations were no longer a barrier to getting to the table.

[251] I find that the employer also acted in good faith by providing the PSAC with data related to the negotiation of the Dental Plan relatively quickly. The PSAC made its request on January 6, 2022. Mr. Prest testified that the extraction of PSAC-only data and PSAC-only costing required considerable work by Canada Life. On February 22, 2022, the employer provided the demographic data requested. On March 8, 2022, the employer provided the costing information. Mr. Sazant might have felt the need to remind Mr. Biswas a few times about the PSAC's expectations of data, but the employer took just eight weeks to meet the PSAC's data request in full. In my assessment, the employer respected the principle that the exchange of data is an important component to bargaining in good faith; see *PIPSC/CFIA 2008*, at para. 68.

[252] I will also dismiss the allegation that the employer acted in bad faith when it invited the PSAC to table its proposals to amend the Dental Plan, even though the employer did not have a mandate to table any proposals of its own. This would be an unconventional way to proceed in negotiations, but I see no bad faith in the invitation. Mr. Sazant explained to Mr. Biswas why the PSAC would not agree to bargain in this fashion; once that was done, Mr. Biswas did not pursue the matter further.

[253] With respect to the benchmarking study, the parties provided opposing arguments as to why one would be useful or necessary to bargaining. I do not think that it is for the Board to resolve those arguments. The employer desired a study to provide reputable comparable data on dental plans in a rapidly changing environment, given the impact of the pandemic on the industry, the current rate of inflation, and the possible impact of the new national dental care program. It invited the PSAC to participate, in good faith. The PSAC was also not opposed on principle to the idea of a study, although it did not think one was required for the parties to bargain or to appear in front of an eventual Appeal Board. However, it argued that reaching an agreement about the Dental Plan is a matter of interests and that data and science cannot determine the outcome. In short, I do not find the employer's desire for a benchmarking study in bad faith, but neither do I agree with its assertion that the PSAC acted in bad faith by not agreeing to participate in the study.

[254] The real issue is whether the employer's insistence that it complete the benchmarking study before seeking a mandate to commence bargaining on the Dental Plan demonstrated bad faith.

[255] The PSAC took the position that if the employer wanted a benchmarking study to inform the negotiations, it should have launched one well before the expiry of the Dental Plan. The employer should not have been surprised when the PSAC served notice to negotiate the Dental Plan; the plan's expiry date was well known to the parties in advance of December 31, 2021. Had the employer approached the PSAC in advance of the expiry date, the PSAC might have agreed to participate, Mr. Sazant testified. It could not agree to in May 2022, when doing so would mean a delay of more than a year in starting negotiations.

[256] The PSAC argued that Mr. Prest might not have been familiar with the collective bargaining process, but his subjective experience should not determine this complaint. The Treasury Board as an institution is very familiar with the collective bargaining

process and should not have been caught by surprise when the PSAC wanted to begin negotiations.

[257] The employer's argument in response was that unlike a collective agreement, the Dental Plan does not expire. It argued that over a 30-year history, the parties always engaged in informal discussions about changes to the plan at the Board of Management and that it was the PSAC that acted unreasonably by departing from that practice by instead serving formal notice to negotiate in both 2016 and then again in 2022.

[258] Other than the testimony of Mr. Leffler, I was provided with very little evidence of the parties' 30-year history of bargaining the Dental Plan. Of the witnesses before me, Mr. Sazant had the longest tenure on the Board of Management: 7 years. I was provided with no evidence about how often that board meets and what issues are dealt with in its meetings. I have no reason to doubt that for most of that board's 30-year history, changes to the plan were brought up informally before being formalized, but it is not clear to me how that normally worked in practice.

[259] The evidence about the recent history of Dental Plan negotiations was much more detailed. In 2016, after no changes had been made to the plan since 2008, the PSAC served a notice to negotiate on May 2, 2016. Some eight months later, on January 11, 2017, PSAC legal counsel sent a "demand letter" to Mr. Leffler, threatening to make a bargaining-in-bad-faith complaint if the Treasury Board would not provide data and set dates. On January 19, 2017, the employer provided the data requested and proposed informal discussions at the Board of Management in February and an exchange of formal proposals in April of 2017. The parties then began to bargain, and on July 18, 2017, the PSAC moved to invoke the Appeal Board process. At about this time, Mr. Biswas replaced Mr. Leffler as the employer's lead negotiator, and the parties spent several months negotiating an agreement as to how the Appeal Board would operate. The Appeal Board MOA was signed by Mr. Sazant and Mr. Biswas on May 4, 2018.

[260] The Appeal Board MOA clearly stated the parties' expectations about a term for the Dental Plan. Point 15 read, "The Appeal Board must determine the term of the Appeal Board decision and set it out in the decision."

[261] Included in the Appeal Board's award of October 1, 2018, were the following relevant provisions: "All changes to the Plan awarded by the Board shall be effective

January 1st, 2019, unless otherwise stipulated in this Award. This Award shall cover the period January 1st, 2019 to December 31st, 2021."

[262] I have noted that the Dental Plan Rules, dated December 20, 2018, do not include a term or an expiry date. The only reference in the rules that relates to the period of the award is found at section 6.(5)(c), which sets out the maximum reimbursement amounts that came into effect on January 1 of 2019, 2020, and 2021.

[263] The employer argued that since the PSAC spent six months preparing for negotiations, Mr. Sazant should have provided it with advance notice of its intentions with respect to the timeline for bargaining. I agree that that might have been ideal; the conflict underlying this complaint might well have been avoided had the parties discussed the negotiation process and its timing either directly or at the Board of Management in advance of January 2022. But I agree with the PSAC that it was not obligated to provide such notice.

[264] On balance, I conclude that the Treasury Board should not have been surprised that the PSAC might want to renegotiate the Dental Plan as soon as possible after December 31, 2021. They had jointly asked the Appeal Board to establish a term. The Appeal Board included a term in its award. Witnesses from both parties testified that they understood the Appeal Board's award to mean that they would not reopen negotiations until after December 31, 2021. The PSAC sent its data request on January 6, 2022, and its notice to negotiate on January 10, 2022.

[265] If the employer had any justification for being initially surprised about the content of the letter of January 10, 2022, it ought to have been gone by May 2022. In an internal email sent to Mr. Prest on May 24, 2022, discussing the proposed content of a reply to the PSAC's request for dates, Mr. Biswas stated as a consideration that "[t]he 2018 dental plan arbitration award took effect on January 01, 2019 and ended on December 31, 2021 …" and that the "[c]urrent provisions continue to remain in place until the outcome of new negotiations is approved." Also listed as a possible consideration was that if dates were not established by the beginning of June, the PSAC might make an unfair-labour-practice complaint, launch the dispute resolution process (the Appeal Board), or both.

[266] Three days later, on May 27, 2022, Mr. Biswas sent the email to Mr. Sazant that triggered this complaint, informing the PSAC that the employer did not yet have a mandate to commence negotiations, that such a mandate needed to be based on data

and science, and that they employer would consequently undertake a benchmarking study jointly with the NJC bargaining agents.

[267] Given these facts, it is hard to understand why Mr. Prest would testify that in his view, the Dental Plan is different from a collective agreement. When a collective agreement expires, it continues in force. So does the Dental Plan. If the parties cannot agree on the terms of a new collective agreement, a dispute resolution process is initiated (whether by conciliation-strike, or arbitration). It is the same for the Dental Plan: it is the Appeal Board. I am not sure that this amounts to the employer being wilfully blind, as argued by the PSAC, but from Mr. Biswas's email of May 27, 2022, it was clear that the employer was aware of the possible consequences of refusing to set dates to commence negotiations.

[268] The PSAC went further with its arguments, stating that the employer's plan to delay negotiations until it could undertake a benchmarking study with the NJC bargaining agents amounted to it not recognizing the PSAC as a legitimate bargaining agent with the exclusive authority to bargain on behalf of the employees in its bargaining units. It said that the employer's "longstanding and stubborn" desire to treat the PSAC and NJC bargaining agents as a single component under the Dental Plan is incompatible with its s. 106 of the *Act* obligations. It said that the employer's behaviour amounted to an ultimatum: agree on comparators with the employer and NJC component, or wait on the sidelines for well over a year before sitting down to negotiate the renewal of the Dental Plan.

[269] As noted earlier, it is well established that the duty to bargain in good faith is underpinned by an employer's recognition of the legal authority of bargaining agents to negotiate on behalf of their members. However, I do not agree that the employer's **desire** to have the PSAC and NJC components joined in a single Board of Management equals a lack of recognition for the PSAC.

[270] This is a complex environment for the employer. It said the maintenance of a single plan across all components has significant advantages in terms of cost efficiencies and improved benefits. The PSAC's evidence and arguments in front of me both recognized and supported this goal. However, unlike the PSHCP or the NJC directives, the employer must negotiate separately with the PSAC and the NJC bargaining agents. The parties told me that in the 30-year history of the plan, changes negotiated with the PSAC have been extended to the other components of the plan. This has placed the PSAC in the position of "setting the pattern".

[271] In their own March 2022 request to open negotiations, the NJC bargaining agents indicated that they would like a greater role, independent of the PSAC, in setting the terms of the Dental Plan. Whether or not the employer owes the other bargaining agents the same duty to bargain in good faith under the *Act* that I have concluded in this case that it owes the PSAC, it at least has obligations to those bargaining agents under the Dental Plan and the NJC Board of Management.

[272] In short, while I understand the PSAC's interest in maintaining its independence when it comes to the negotiation of the Dental Plan, I also understand why the employer's interests lie in having a single component. These divergent **interests** are not in bad faith. I do not find that the employer's position of wanting to complete the benchmarking study it had agreed to do with the NJC bargaining agents amounts to it **imposing** its interests on the PSAC. I do not find that it intended to sideline the PSAC; in fact, Mr. Biswas invited the PSAC to participate in the study not once, but twice.

[273] In summary, I find that the employer failed to fully recognize the implications of the term established for the Dental Plan in 2018, which contributed to it not being ready to commence negotiations for its renewal when asked to by the PSAC in January of 2022. However, by the end of May, it was still not ready to commence negotiations; it told the PSAC that it had to complete the PSHCP negotiations first and complete a benchmarking study with the NJC bargaining agents. Therefore, it refused to seek a mandate to commence negotiations and refused to establish dates to begin negotiations with the PSAC. Even after PSHCP negotiations were out of the way, it maintained that position and defended it at the hearing of this complaint.

[274] As discussed earlier, the principles underlining the duty to bargain in good faith rest solidly upon the requirement for dialogue, communication, and rational discussion. As the OLRB stated in *United Steelworkers*, "The obligation to bargain in good faith recognizes the importance of collective bargaining as a structure within which a full dialogue can be conducted between a trade union and the employer." Without dialogue, bargaining breaks down, and the potential for economic sanctions and the deterioration of the bargaining process goes up.

[275] Whether measured subjectively or objectively, dialogue cannot begin if one party refuses to even set dates to begin discussions. While I have found the employer's desire to conduct a benchmarking study reasonable, imposing it as a precondition to commencing negotiations and delaying the start of bargaining by upwards of a year, is

not reasonable. That party is not bargaining in good faith and as such must be found in violation of s. 106.

[276] The employer is correct that the PSAC could have opted to initiate the Appeal Board process rather than making this complaint. However, the Appeal Board MOA, at point 11, clearly sets out an expectation that the Appeal Board would only make orders on proposals that had been the subject of negotiation between the parties. In the absence of an exchange of positions, even if the employer's mandate was to only renew the Dental Plan without changes, I cannot see how the Appeal Board could make an award. It depends on a dialogue having taken place in the process of negotiations.

[277] I must note that there is no evidence that the employer's unwillingness to set dates for Dental Plan negotiations is having any impact on the parties' ability to conclude a collective agreement for the PA, SV, TC, EB, or FB bargaining units. Both Mr. Sazant and Ms. Shatford testified that no proposals on the Dental Plan have been made at the bargaining table for those units; nor have the parties discussed the Dental Plan at those tables. Ms. Shatford testified that if the parties were prepared to conclude a collective agreement for the PA group, there would be no impact if the Dental Plan had not been dealt with. Nothing in Mr. Sazant's testimony contradicted this view. The PSAC made it clear throughout its submissions that the parties negotiate the Dental Plan at a separate table and on a separate timeline.

[278] However, given my findings on the Board's jurisdiction earlier in this decision, the fact that the parties may conclude those collective agreements before a Dental Plan agreement is reached does not absolve them of the obligation to bargain the plan in good faith and to make every reasonable effort to conclude those negotiations.

V. Concluding remarks

[279] In this decision, I have recognized that the Dental Plan forms a unique but important part of the collective bargaining relationship between the PSAC and the employer. The Dental Plan was added to the collective agreements between the parties through the collective bargaining progress. Over a history of 30 years, the parties have renewed their agreement that the Dental Plan is deemed to form part of their collective agreements. They have thus far found a means of reaching agreement on updates to the plan.

[280] I have noted that the unique nature of the Dental Plan embodies several principles articulated in the preamble of the *Act*. The parties have used a collaborative

approach to develop it. They have sustained a dialogue about it for more than 30 years. The plan provides for an important term and condition of employment that balances the interest of employees (to have the benefits) with the public interest (to have an efficient and cost-effective plan).

[281] I have used these facts, the preamble to the *Act*, my analysis of the *Act*, and my analysis of the jurisprudence to determine that the Board has jurisdiction to decide this complaint.

[282] In my view, therefore, it is also appropriate for the Board to draw from the preamble to the *Act* and recognize that in the interests of harmonious labour-management relations and the efficient resolution of matters, the parties have expressed a shared interest in maintaining the Dental Plan as a public-service-wide benefits regime rather than devolving to a situation in which the parties might end up conducting Dental Plan negotiations at specific tables.

[283] The employer had asked that the Board pay attention to the preamble of the *Act* and that it dismiss this complaint on that basis. It argued as follows:

> *…*
>
> *The preamble of the* [Act] *provides that the public service labour-management regime must operate in a context where* ***protection of the public interest is paramount****. The Employer's objective in maintaining a dental care plan for its employees is to promote recruitment and retention of top talent in the public service, thereby enhancing the quality of service it provides to Canadians. Although the Employer negotiates the* [Dental Plan] *with the PSAC separately from the other bargaining agents, the plan is, in essence, a single group insurance plan in substance across the public service. The PSAC dental plan is one part of a complex benefits regime that relies on the principle of universality to provide the greatest benefit to the membership in the most efficient manner possible.*
>
> *Over thirty years ago, the parties made an informed decision to negotiate the* [Dental Plan] *outside of the collective bargaining process, recognizing the benefits and efficiencies they would collectively gain from such a scheme. They have governed themselves in accordance with this understanding throughout the life of the* [Dental Plan]*. In the interests of preserving good labour relations, the Board must respect the choices made by the parties. It is not statutorily empowered to hear this complaint on the facts of this case, and any decision to the contrary could open the door to imposing the strict requirements of the* [Act] *in circumstances where they were never intended to apply. It could fundamentally alter the nature and extent of all discussions that occur between the parties outside of collective bargaining.*

…

[Emphasis in the original]

[284] While I agree with the employer (and the PSAC) that there is much value in the Dental Plan as a universal benefits plan, I cannot agree that the plan exists outside the collective bargaining process. As I have concluded, the Dental Plan between the parties exists **because** they negotiated it through the collective bargaining process. It continues to exist, deemed part of their collective agreements, because the parties continue to renew the collective agreement articles that state that as a fact. The fact that the parties have in good faith opted to negotiate changes to the plan at a separate table, outside the regular collective bargaining process, and to resolve disagreements about it through an alternate dispute resolution process, does not change those facts. At any time, the parties might have opted to bring proposals about dental benefits to the regular bargaining table. This could well have resulted in an end to the universality of the plan.

[285] The Board taking jurisdiction over this complaint does not in my view **increase** the likelihood of this result, it **decreases** it. If s. 106 did not apply to the Dental Plan, the parties would have to bring proposals to the regular bargaining table to seek the protections that s. 106 offers them.

[286] The requirement for the parties to bargain in good faith is not a "strict requirement" designed to restrict the ability of the parties to find creative solutions but to enhance their efforts. As Mr. Teplitsky stated in his 1986 award on the Master Agreement, with dialogue and negotiations, "… in the sphere of human relations, nothing is impossible."

[287] I have found that the employer violated s. 106 of the *Act* by not agreeing to commence negotiations for the renewal of the Dental Plan because it insisted on starting and completing a benchmarking study first. Because the parties have not been able to commence negotiations, they have not been able to engage in the rational dialogue they need to complete the renewal of the plan.

[288] Given these facts, in my view, the appropriate remedy is a declaration of the violation. It is up to the parties to then commence negotiations and begin that dialogue.

[289] This is not a message that is new to the parties. In three recent reports from the PICs for the SV, TC, and EB groups, the PICs have unanimously commented on the importance of dialogue to negotiations and on how without dialogue, the collective bargaining relationship between the parties suffers; see *Public Service Alliance of Canada v. Treasury Board*, Board file no. 590-02-44770 (EB Group) at para. 19, *Public Service Alliance of Canada v. Treasury Board*, Board file no. 590-02-44771 (SV Group), dated January 26, 2023, at paras. 22 and 23, and *Public Service Alliance of Canada v. Treasury Board*, Board file no. 590-02-44769 (TC Group), dated January 13, 2023, at para. 14.

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

(The Order appears on the next page)

VI. Order

[291] The employer's preliminary objection that the Board lacks jurisdiction to determine this complaint is denied.

[292] The complaint is allowed in part. I declare that the employer has failed to comply with s. 106 of the *Act* by refusing to commence bargaining of the Dental Plan in good faith.

March 29, 2023.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board