

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

- and -

ASSOCIATION OF JUSTICE COUNSEL

Respondent

APPLICATION UNDER S. 18.1 OF THE *FEDERAL COURTS ACT*

RESPONDENT'S RECORD
VOLUME 6
MEMORANDUM OF FACT & LAW

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OVERVIEW

At the request of Treasury Board, an interest arbitration board was established to settle the terms of a first collective agreement with the Association of Justice Counsel. There were a large number of unresolved issues for the arbitration board to determine. In its award, the board decided some matters in favour of the Association and some in favour of the Employer. The reasonableness of an interest arbitration award can only be assessed by looking at the entire award as an overall package. In this application, Treasury Board selectively seeks to challenge as “unreasonable” one part of the award in which the Board granted a modified form of overtime for some employees. It is not open to a party to interest arbitration to selectively pick out one element of an award as unreasonable, while conveniently ignoring the many issues that were decided in its favour.

Treasury Board also seeks to set aside as contrary to the *Expenditure Restraint Act* portions of the arbitral award in which the board adopted some or all of the Association’s proposals dealing with overtime, travelling time, meal expenses and court clothing. Although Treasury Board raised other jurisdictional objections at the arbitration hearing, the issues which it seeks to raise in this application were not raised before the board.

In any event, there is no conflict between the terms of the arbitral award and the *ERA*. The performance pay plans that were required to be included in the arbitral award do not by necessary inference compensate lawyers for working excessive hours. Lawyers who were covered by performance pay plans were compensated for working excessive hours through a separate regime of paid Management Leave.

Reimbursement for out-of-pocket expenses for meals and court clothing is not “additional remuneration” as defined in the *ERA* and the arbitration board was not precluded from awarding reimbursement for such expenses.

PART I - FACTS

1. The Respondent, the Association of Justice Counsel (“AJC”), was certified as the bargaining agent for the LA (Law Group) bargaining unit in 2006, following passage of the *Public Service Labour Relations Act*, 2003, c. 22, s. 2, which, for the first time, permitted lawyers employed by the Department of Justice to bargain collectively.

Arbitral Award, para 3, Application Record, p. 9

2. There are approximately 2,500 employees in the bargaining unit. Lawyers within the bargaining unit are classified at the following levels: LA-01; LA-2A; LA-2B; LA-3A; and LA-3B.

Respondent’s Record, Vol. 1, p. 20

3. Some of the lawyers in the bargaining unit – those employed in departments other than the Department of Justice – were previously represented in collective bargaining by the Professional Institute of the Public Service of Canada (“PIPSC”) and were previously covered by collective agreements negotiated by PIPSC.

Arbitral Award, para 3, Application Record, p. 8

4. Treasury Board filed a request for arbitration pursuant to the *PSLRA* in September, 2008.

Arbitral Award, para 1, Application Record, p. 8

5. On February 12, 2009, the Public Service Labour Relations Board established an arbitration board.

Arbitral Award, para 1, Application Record, p. 8

Expenditure Restraint Act

6. After the dispute had been referred to arbitration, the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, (“*ERA*”) was passed. It came into force on March 12, 2009.

7. Section 34(1) of the *ERA* established a number of rules applicable to an arbitral award for employees in the LA group. These rules placed restrictions on rates of pay and increases in pay from the start of the 2006-07 fiscal year to the end of the 2010-11 fiscal year. This was done by stipulating the exact rates of pay that were to apply for 2006-07 and then stipulating maximum annual increases to those rates.

Expenditure Restraint Act, S.C. 2009, c 2, s. 393, section 34(1)

8. Section 34(1) of the *ERA* also provided that an arbitral award must provide that the performance pay plans that were in place on May 9, 2006, for employees in the LA group would apply without alteration to all employees in the bargaining unit. On May 9, 2006, there was a performance pay plan for lawyers at the LA-01, LA-2A and LA-2B levels and another performance pay plan for lawyers at the LA-3A and LA-3B levels.

Expenditure Restraint Act, S.C. 2009, c. 2, s. 393, section 34(1)(a)(iii)

Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels, Respondent’s Record, Vol. 2, p. 235

Directives for the Performance Management Program (PMP) for the Executive Group, Respondent’s Record, Vol. 2, p. 241

9. The *ERA* also provided in sections 34(1)(a)(iv) and (v) that “additional remuneration” could be provided in an arbitral award, provided that on May 9, 2006, the additional remuneration had applied to some employees in the LA Group.

Expenditure Restraint Act, S.C. 2009, c. 2, s. 393, sections 34(1)(a)(iv) and (v)

10. “Additional remuneration” is defined in the *ERA* as “any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments”.

Expenditure Restraint Act, S.C. 2009, c.2, s. 393, section 2

11. Prior to the arbitration hearing, the AJC and Treasury Board presented their positions and supporting material to the arbitration board through written briefs. Supplementary briefs on specific issues were filed following a pre-hearing mediation session.

Affidavit of Marco Mendicino, paras 3 – 11, Respondent’s Record, Vol. 1, pp. 1-3

Submissions of the AJC and Supporting Document Brief, Exhibits B and C to the Affidavit of Marco Mendicino, Respondent’s Record, Vol. 1, tab B and Vol. 2, tab C

Submission of Treasury Board, Exhibit D to the Affidavit of Marco Mendicino, Respondent’s Record, Vol. 4, tab D

Supplementary Hearing Brief and Supplementary Exhibit Brief of AJC, Exhibits F and G to the Affidavit of Marco Mendicino, Respondent’s Record, Vol. 5, tab F and Vol. 5, tab G

12. At the arbitration hearing, counsel for Treasury Board made submissions dealing with the jurisdiction of the arbitration board to entertain the AJC’s proposal for pay increases for lawyers outside Toronto.

Affidavit of Marco Mendicino, para 14, Respondent’s Record, Vol.1, p. 4

Arbitral Award, paras 32-39, Application Record, pp. 26-27

13. At the arbitration hearing, Treasury Board did not raise any issue or make any submission that the AJC’s proposals dealing with overtime, travelling time compensation, reimbursement of

meal expenses, or reimbursement for court clothing were outside the jurisdiction of the arbitration board.

Affidavit of Marco Mendicino, para 14, Respondent's Record, Vol. 1, p. 4

14. The arbitral award was issued on October 23, 2009. Among the many matters dealt with in the award were provisions concerning hours of work and overtime; travelling time compensation, reimbursement of meal expenses; and reimbursement for court clothing.

Arbitral Award, paras 16-18 (overtime); para 19 (travelling time); paras 26-27 (reimbursement of meal expenses); para 31 (court clothing), Application Record, tab 2A

Hours of Work and Overtime

15. The evidence before the arbitration board dealing with hours of work and overtime was that lawyers who were part of the former PIPSC bargaining unit were entitled to overtime under the terms of their collective agreement. Previously unrepresented lawyers employed by the Department of Justice had been entitled, in the employer's discretion, to Management Leave with Pay, which was granted when a lawyer had worked excessive hours.

PIPSC LA Collective Agreement, articles 13.05 – 13.08 (overtime), Respondent's Record, Vol. 1, p. 129

Management Leave, *Terms and Conditions of Employment for the Law Group, Department of Justice, LA-01 and LA-2A*, clause 9, Respondent's Record, Vol. 3, pp. 633-34

Management Leave, *Consolidated Terms and Conditions of Employment Regulations for the Law Group Department of Justice (LA-2B, LA-3A to LA-3C)*, clause 9, Respondent's Record, Vol. 3, pp. 693-94

Supplementary Hearing Brief of the AJC, Respondent's Record, Vol. 5, p. 1264

16. At the arbitration hearing, Treasury Board proposed that, to compensate lawyers for working excessive hours, the board should award "Time Management Leave with Pay". The proposal was very similar to the Management Leave that had been in place for lawyers employed at the

Department of Justice. Treasury Board's proposal for Time Management Leave with Pay would permit management, in its discretion, to allow an employee up to 5 days off with pay each year in exceptional circumstances, such as where the employee had worked excessive hours over a prolonged period.

Arbitral Award, para 16, Application Record, p. 19

17. The AJC's proposal at the arbitration was very similar to the hours of work and overtime provisions for medical doctors and dentists in the public service that are contained in the Health Services Collective Agreement to which Treasury Board is a party. The AJC proposed that lawyers' hours of work be averaged over 4 weeks and that a lawyer should be entitled to overtime compensation when he or she has been required to work more than 37.5 hours per week averaged over a 4-week period.

Supplementary Hearing Brief of the AJC, Respondent's Record, Vol. 5, p. 1266 and Vol. 5, pp. 1318-19

18. The arbitral award contained provisions dealing with hours of work and overtime for lawyers at the LA-01 and LA-2A levels and a separate set of provisions dealing with hours of work and overtime for lawyers at the LA-2B, LA-3A and LA-3B levels. For both groups, hours of work are to average 37.5 hours per week over a 4-week period. For lawyers at the LA-01 and LA-2A levels, the arbitration board awarded a modified form of the AJC's proposal. The award provided:

(5) Where a lawyer has been required to work in excess of an average of 37.5 hours per week over a 4-week period, the lawyer shall be compensated at the rate of 1 ½ times the lawyer's hourly rate of pay for each hour worked in excess of the normal hours of work for each 4-week period.

(6) In the calculation of hours worked for the purposes of clause (5) hereof, a lawyer shall be deemed to have worked 7.5 hours on any day when the actual hours worked were more than 7.5 but less than 8.5. All other calculations for overtime shall be based on each completed period of 30 minutes.

(7) Upon application by the lawyer and at the discretion of the Employer, compensation earned under this Article will be taken in the form of compensatory leave calculated at the premium rate set out in this Article, provided that compensatory leave earned in a fiscal year and outstanding on September 30th of the next following fiscal year shall be paid at the lawyer's daily rate of pay on September 30th.

(8) When a payment is made to liquidate compensatory leave outstanding at the end of a fiscal year, the Employer will endeavour to make such payment within 6 weeks of the first pay period after September 30th of the following fiscal year.

(9) Nothing in this Article is intended to prevent lawyers from having access to the Employer's existing policies respecting alternate work arrangements, including compressed work week, job sharing, telework, self-funded leave and pre-retirement transition leave.

(10) Lawyers will submit such attendance and timekeeping reports as may be required by the Employer for the purposes of this Article.

(underlining in original to indicate parts of the award that differed from AJC's proposal)

Arbitral Award, para 17, Application Record, p. 19

19. For lawyers at the LA-2B, LA-3A, and LA-3B levels, the arbitration board awarded provisions that were as proposed by Treasury Board:

(5) Lawyers are eligible for exceptional leave with pay, as the delegated manager considers appropriate, for a period of up to five (5) days in one fiscal year. Examples of such leave are situations where lawyers are required to work excessive hours.

(6) *Under exceptional circumstances, the deputy head can approve exceptional leave with pay for a period exceeding the five (5) days referred to above.*

(7) *Leave granted as exceptional leave with pay can be carried over into the next fiscal year, and is to be used within six (6) months of being granted.*

(8) *Lawyers will submit such attendance and timekeeping reports as may be required by the Employer for the purposes of this Article.*

(underlining in original to indicate parts of the award that differed from AJC's proposal)

Arbitral Award, para 18, Application Record, p. 20

Travelling Time Compensation

20. The evidence before the arbitration board concerning travelling time compensation was that lawyers who were covered under the former PIPSC LA Collective Agreement received compensation for time spent in travel that was outside normal hours of work.

Submissions of the AJC, Exhibit B to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 1, pp. 134-35

21. The AJC asked the board to award the same travelling time provisions that were included in the PIPSC LA Collective Agreement, adapted to be consistent with the AJC's proposal on overtime.

Submissions of the AJC, Exhibit B to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 1, pp. 134-35

Supplementary Hearing Brief of the AJC, Exhibit F to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 5, p. 1267

22. Treasury Board did not make any proposal dealing with travelling time compensation.

23. The arbitral award included provisions dealing with travelling time compensation for lawyers at the LA-01 and LA-2A levels only. The terms of the award were modified from the AJC proposal to be consistent with the board's approach on overtime:

19. As regards Travelling Time, the board awards the following, based on the Association's proposal. However, these provisions will only apply to lawyers at levels LA-1 and LA-2A.

12.10 (a) When a lawyer is required to travel outside his headquarters area on government business, the time of departure and the means of such travel shall be determined by the Employer and the lawyer will be compensated for travel time in accordance with clauses 12.11 and 12.12. Travelling time shall include time necessarily spent at each stop-over en route, provided such stop-over does not include an overnight stay.

(b) Pursuant to sub-clause (a), when a lawyer is travelling by public transportation and, owing to an unforeseeable or unavoidable delay, is subject to an unscheduled overnight stay with overnight accommodation, travelling time shall include time necessarily spent at the stop-over en route as well as the necessary time to reach the overnight accommodation.

12.11 For the purpose of clause 12.10 and 12.12, the travelling time for which a lawyer shall be compensated is as follows:

(a) for travel by public transportation, the time between the scheduled time of departure and the time of arrival at a destination, including the normal travel time to the point of departure, as determined by the Employer;

(b) for travel by private means of transportation, the normal time as determined by the Employer, to proceed from the lawyer's place of residence or work place, as applicable, direct to the destination and, upon return, direct back to the lawyer's residence or work place;

(c) in the event that an alternate time of departure and/or means of travel is requested by the lawyer, the Employer may authorize such alternate arrangements in which case compensation for travelling time shall not exceed that which would have been payable under the Employer's original determination.

12.12 *If a lawyer is required to travel as set forth in clauses 12.10 and 12.11:*

(a) On a normal working day on which he/she travels but does not work, a lawyer shall receive his/her regular pay for the day;

(b) on a normal working day on which a lawyer travels and works, he/she shall be paid;

(i) regular pay for the day for a combined period of travel and work not exceeding seven decimal five (7.5) hours, and

(ii) compensation at the rate of time and one-half for additional travel time in excess of a seven decimal five (7.5) hour period of work and travel, with maximum compensation for such additional travel time not to exceed twelve (12) hours pay at the straight-time rate in any day;

(c) on a day of rest or on a designated paid holiday, a lawyer shall be compensated at the rate of time and one-half for hours travelled to a maximum of twelve (12) hours pay at the straight-time rate;

(d) In the calculation of hours worked and/or travelled for the purposes of clause (b) and (c) above, a lawyer shall be deemed to have worked and/or travelled 7.5 hours on any day when the actual hours worked and/or travelled were more than 7.5 but less than 8.5. All other calculations for travelling time shall be based on each completed period of 30 minutes.

12.13 *A lawyer shall not be compensated for travelling time to courses, training sessions, conferences and seminars to which the lawyer is sent for the purpose of career development, unless required to attend by the Employer.*

12.14 Upon application by a lawyer and at the discretion of the Employer, compensation for travel time will be taken in the form of compensatory leave, which will be calculated at the applicable premium rate laid down in this Article. Compensatory leave earned in a fiscal year and outstanding on September 30th of the next following fiscal year shall be paid at the lawyer's daily rate of pay on September 30th.

12.15 Where the Employer makes cash payment for travel time, the Employer will endeavour to make such payment within six (6) weeks from September 30th.

20. *For lawyers at levels LA-2B and LA-3, there will be no compensation for travelling time.*

(underlining in original to indicate parts of the award that differed from AJC's proposal)

Arbitral Award, paras 19-20, Application Record, p. 20-22

Reimbursement of Meal Expenses

24. The evidence before the arbitration board was that the terms and conditions of employment for lawyers employed at the Department of Justice provided for LA's at all levels to be reimbursed for meal expenses when a lawyer was required to work beyond normal hours and extending beyond the normal meal period.

Meal Allowance, Terms and Conditions of Employment for the Law Group, Department of Justice, LA-01 and LA-2A, clause 30, Respondent's Record, Vol. 3, p. 672

Meal Allowance, Consolidated Terms and Conditions of Employment Regulations for the Law Group Department of Justice (LA-2B, LA-3A to LA-3C), clause 28, Respondent's Record. Vol. 3, p. 710

25. The AJC proposed that the arbitral award include a similarly-worded provision and that the amount of reimbursement be capped in accordance with the amounts allowed for meal reimbursement under the Travel Directive. The Treasury Board did not make any proposal for reimbursement of meal expenses.

Submissions of the AJC, Exhibit B to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 1, p. 156

Supplementary Hearing Brief of the AJC, Exhibit F to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 5, p. 1272

26. The arbitral award provided for reimbursement of meal expenses:

Reimbursement of Meal Expenses

26. *The Association has proposed that employees required to work late or on a day of rest or on a paid holiday should continue to be entitled to reimbursement of actual expenses for meals. The employer has opposed this.*

27. *The board awards the following provision, based on the Association's proposal:*

A lawyer who is required by the Employer to work beyond normal hours extending beyond the normal meal period or who works at least 3 hours on a day of rest or on a paid holiday will be reimbursed for out-of-pocket expenses for one or more meals, depending on the number of meal periods occurring in the period of time so worked, up to the amounts set out in Appendix C to the Travel Directive.

Arbitral Award, paras 26-27, Application Record, pp. 24-25

Reimbursement for Court Clothing

27. The evidence before the arbitration board was that there was an existing "Directive on Clothing for Lawyers (Litigators) Appearing in Court" that provided for reimbursement for court clothing.

Submissions of the AJC, paras 281-82, Exhibit B to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 1, p. 152

28. Treasury Board did not propose any reimbursement for court clothing.

29. The arbitration board awarded the following provision dealing with court clothing:

Court clothing

The board essentially accepts the Association's proposal on this subject, and awards the following:

Where court clothing is required on a regular basis in order for a lawyer to carry out his or her duties, the lawyer will be entitled to be reimbursed for the cost of obtaining one complete set of court clothing, in an amount not to exceed \$1,200, provided the Employer has not paid the lawyer for these items within the preceding five (5) years. Replacement items will be reimbursed where existing items are no longer serviceable. Lawyers will be responsible for the replacement of lost clothing. In addition, lawyers are entitled to be reimbursed, up to \$100, for the cost of one new shirt each year. Where individual circumstances justify, and with the approval of the Employer, a lawyer will also be entitled to be reimbursed for the cost of additional court clothing which he or she reasonably requires, including shirts.

(underlining in original to indicate parts of the award that differed from AJC's proposal)

Arbitral Award, para 31, Application Record, p. 25.

PART II - ISSUES

30. The issues on this application are:

- (i) What is the appropriate standard of review?
- (ii) Do the performance pay plans that are required to be included in the arbitral award serve the same purpose as paid overtime for work beyond normal hours of work?
- (iii) Are the hours of work and overtime provisions awarded by the arbitration board “additional remuneration” within the scope of section 34(1)(a)(iv) of the *ERA*?
- (iv) Are the travelling time compensation provisions awarded by the arbitration board “additional remuneration” within the scope of section 34(1)(a)(iv) of the *ERA*?
- (v) Are the reimbursement for meal expenses provisions awarded by the arbitration board “additional remuneration” within the scope of section 34(1)(a)(iv) of the *ERA*?
- (vi) Are the provisions of the arbitral award dealing with court clothing “additional remuneration” within the scope of section 34(1)(a)(iv) of the *ERA*?
- (vii) Are the provisions of the arbitral award dealing with hours of work and overtime unreasonable?

PART III - SUBMISSIONS

(a) **What is the Appropriate Standard of Review?**

31. The proper standard of review on all of the issues raised by this application is reasonableness. The issues to be determined do not involve true questions of jurisdiction or *vires*; rather, the issues involve mixed fact and law. Determining whether a specific benefit awarded by the arbitration board constitutes “additional remuneration” within the scope of section 34(1)(a)(iv) involves both factual and legal elements: Was it something that applied to a member of the Law Group as of May 9, 2006? Does it exceed the highest amount or rate that applied to a particular position level at that date? How should the statutory definition of “additional remuneration” be construed? In light of its factual character, is something an “allowance, bonus, differential or premium” or a payment similar to those things within the meaning of section 34(1)(a)(iv)? In *Dunsmuir*, the Supreme Court of Canada pointed out that “questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness”.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para 51, Application Record, tab B1

32. In *Dunsmuir*, the Court held that the correctness standard should be reserved to cases where there is a true question of jurisdiction – that is, where a tribunal must determine whether it has the authority to decide a particular matter. The Court stated that reviewing courts should take a “robust view of jurisdiction” and that true questions of jurisdiction will be narrow. The Court cautioned that “reviewing judges must not brand as jurisdictional issues that are doubtfully so”.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para 59, Application Record, tab B1

33. More recently, in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 the Supreme Court reiterated that caution should be exercised in labelling a question as jurisdictional:

The inference to be drawn from paras 54 and 59 of Dunsmuir is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority. (at para 34)

Nolan v. Kerry (Canada) Inc., 2009 SCC 39, Respondent's Authorities, tab B1

34. Consideration of the factors identified in *Dunsmuir* also point to reasonableness as the appropriate standard in this case.

Privative Clause

35. The proceedings of an arbitration board are protected by a specific privative clause in section 142(2) of the *PSLRA*:

142. (1) The Chairperson must, without delay, notify the parties of the establishment of the arbitration board and of the name or names of its member or members, as the case may be.

(2) The notification constitutes conclusive proof that the arbitration board has been established in accordance with this Part and, after it is given, no order may be made or process entered into, and no proceedings may be taken in any court, to question the establishment of the board or to review, prohibit or restrain any of its proceedings.

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2, section 142, Appendix "A", tab A1

Expertise

36. Interest arbitration is a discrete and highly specialized administrative regime. Members of arbitration boards are specifically selected for their expertise in labour relations. In *National Automobile, Aerospace, Transportation and General Workers' Union of Canada, Local 5454 (CAW-Canada) v. Canada (Treasury Board)*, 2006 FC 989, the Court stated:

Finally, the nature of the work of interest arbitration boards, namely, the resolution of outstanding matters on which parties are unable to reach agreement during the course of collective bargaining regarding the terms and conditions of employment is a highly technical and specialized area of work requiring expertise in labour relations. The Board is required to take into account statutory factors, as well as other relevant factors as they relate to findings of fact in the labour relations context.

In contrast, the Court does not have this highly technical and specialized expertise in labour relations.

National Automobile, Aerospace, Transportation and General Workers' Union of Canada, Local 5454 (CAW-Canada) v. Canada (Treasury Board), 2006 FC 989, paras 15, 16, Respondent's Authorities, tab B2

Nature of the Question

37. Although the Applicant now seeks to characterize the issues before the arbitration board as jurisdictional, it did not raise them before the board (although it did raise other jurisdictional objections at the hearing). The matters the board was required to decide involved factual and legal issues that were intertwined. To the extent that discrete questions of law, such as the interpretation of section 34(1)(a)(iv) of the *ERA* can be extracted, they do not involve questions of law that are outside the specialized area of expertise of the board. Such questions of law are properly reviewed on a standard of reasonableness. In *Dunsmuir*, the Supreme Court held that

only questions of law that are “of central importance to the legal system ...and outside the ... specialized area of expertise of the administrative decision-maker” will attract a correctness standard.

Dunsmuir v. New Brunswick, 2008 SCC 9 at para 55, Application Record, tab B1

38. In *Dunsmuir*, the Court noted that “[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely related to its function, with which it will have particular familiarity” (at para 54). The provisions of the *ERA* that are at issue in this case are directly concerned with the board’s function. Interpretation of the provisions of the *ERA* concerning the LA arbitral award does not involve questions of law that are of central importance to the legal system.
39. The third issue raised by the Applicant (“Was the Overtime Award otherwise unreasonable?” – para 10C of the Applicant’s Memorandum) concerns application of the factors in section 148 of the *PSLRA* and involves a high degree of discretion, policy and judgment. In *National Automobile, Aerospace, Transportation and General Workers’ Union of Canada, Local 5454 (CAW-Canada) v Canada (Treasury Board)*, 2006 FC 989, the Court held that such questions are reviewable on a standard of reasonableness.

National Automobile, Aerospace, Transportation and General Workers’ Union of Canada, Local 5454 (CAW-Canada) supra, at para 20, Respondent’s Authorities, tab B2

(b) Do the performance pay plans that are required to be included in the arbitral award serve the same purpose as paid overtime for work beyond normal hours of work?

40. The arbitration board was required to provide in its award for the inclusion of the performance pay plans that had been in effect on May 9, 2006:

34(1)(a)(iii) [the arbitral award] must provide, for all employees in the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date, but those plans may not have retroactive effect.

Expenditure Restraint Act, S.C. 2009, c 2, s. 393, section 34(1)(a)(iii), Appendix "A", tab A2

41. Two performance pay plans were in place for lawyers employed by the Department of Justice – one plan for lawyers at the LA-01, LA-2A and LA-2B levels and another for lawyers at the LA-3A, LA-3B and LA-3C levels.

Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels, Respondent's Record, Vol. 2, p. 235

Directives for the Performance Management Program (PMP) for the Executive Group, Respondent's Record, Vol. 2, p. 241

42. The pay ranges for lawyers employed at the Department of Justice had only a minimum and maximum amount. There were no fixed annual "pay increments" or steps on the pay scale, as there were for most other occupational groups. Instead of a fixed annual pay increment, lawyers received increases in base salary based on assessment of their performance. (The pay rates imposed by the *ERA* are structured in the same fashion). Under the performance pay plan for LA-01 to LA-2B, a lawyer assessed as "Fully Satisfactory" was eligible for a salary increase of up to 5%, as "Superior", up to 7% and as Outstanding, up to 10%.

43. Once a lawyer reached the maximum rate of pay for his or her level (the “job rate”), the lawyer would no longer receive salary increases, but was eligible to receive a lump sum payment based on assessed performance: up to 5% for Fully Satisfactory; up to 7% for Superior; and up to 10% for Outstanding.

5.1 A performance award (bonus) may be granted to an employee whose performance has been assessed as fully satisfactory, superior or outstanding, and whose salary is already at the job rate or has just reached the job rate by the application of an in-range increase ...

...

The maximum permissible amount for the awards should not be automatically granted. Consideration must be given to factors such as the salary relationship with immediate supervisors or subordinates and, the number of consecutive years of above fully satisfactory performance.

Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels, Respondent’s Record, Vol. 2, p. 238

44. The performance pay plan for lawyers at levels 3A to 3C operated in a similar manner. These employees were required to have a Performance Agreement that identified “Ongoing Commitments” and “Key Commitments”. An in-range salary increase up to 5% per year was dependent on the employee achieving his or her “Ongoing Commitments”. A lump sum payment of up to 10% of salary was dependent on the employee achieving the “Key Commitments” identified in the employee’s Performance Agreement.

Directives for the Performance Management Program (PMP) for the Executive Group, Respondent’s Record, Vol. 2, p. 243

45. The performance pay plans contain no reference to hours of work or compensation for work in excess of normal hours. They contain no specific criteria for evaluating differing levels of performance and do not refer to any specific factors that are to be taken into account. The purpose of the plans was to tie an employee's salary to the overall performance and quality of the employee's work. The Directives for the Management Program, which applied to LA-3A – LA-3B's describe their purpose as follows:

Guidelines for in-range salary movement and at-risk lump sum payments are designed to give freedom of action and the managerial discretion to recognize and reward differing degrees of performance.

Directives for the Performance Management Program (PMP) for the Executive Group, Respondent's Record, Vol. 2, p. 242

46. The purpose of the Performance Pay Administration Policy for Non-Management Senior Excluded Levels – the plan for LA-01 to LA-2B – stated in a similar vein that the objective of the plan was:

To ensure the accurate and consistent administration of performance pay for certain non-Management Category senior excluded employees, including incentives to recognize and reward individuals in relation to their peers and subordinates

Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels, Respondent's Record, Vol. 2, p. 235

47. The performance pay plans were not the vehicles used for compensating employees for working in excess of normal working hours. Compensation for working excess hours was provided through Management Leave with Pay. Entitlement to Management Leave with Pay was

provided for in the terms and conditions of employment for lawyers employed at the Department of Justice:

Management Leave

(a) An employee who is required by management to:

- *work excessive hours;*
- *work or travel on a day of rest or on a holiday;*

may be granted such leave with pay as the Deputy Minister considers appropriate.

(a) The amount of management leave granted is at the discretion of the approving authority:

- *up to 5 days may be authorized by Senior, General, Senior General Counsel or member of the Executive Group*
- *5 to 10 days must be authorized by appropriate supervising Associate Deputy Minister, Assistant Deputy Attorney General, or Assistant Deputy Minister*
- *10 days or more must be authorized by the Deputy Minister.*

Management Leave, Terms and Conditions of Employment for the Law Group, Department of Justice, LA-01 and LA-2A, clause 9, Respondent's Record, Vol. 3, pp. 633-34

Management Leave, Consolidated Terms and Conditions of Employment Regulations for the Law Group Department of Justice (LA-2B, LA-3A to LA-3C), clause 9, Respondent's Record. Vol. 3, pp. 693-94

48. If, as the Applicant suggests, compensation for working excessive hours was provided under the performance pay plans, Management Leave with Pay would have been unnecessary and redundant.

49. In the arbitration, while fully aware that the *ERA* mandated the continuation of performance pay, Treasury Board proposed that the board should include in its award a provision for Management Leave with Pay as a means of compensating employees for working excess hours. The Treasury Board should not now be heard to suggest that its own proposal was outside the board's jurisdiction and it is noteworthy that the Applicant does not complain about the inclusion of Management Leave with Pay in the arbitral award as a means of compensating lawyers at the LA-2B level and above for working excessive hours. It is submitted that the Applicant's real complaint is simply that it is dissatisfied that the board awarded overtime to lawyers at the LA-01 and LA-2A levels, instead of Management Leave with pay, as proposed by Treasury Board.

(c) Are the hours of work and overtime provisions awarded by the arbitration board "additional remuneration" within the scope of section 34(1)(a)(iv) of the *ERA*?

50. The arbitration board was entitled to award "any additional remuneration" subject to the conditions set out in section 34(1)(a)(iv):

(iv) [the arbitral award] may provide for any additional remuneration – other than a performance bonus – that applied to any position level in the Law Group on May 9, 2006, but the amount or rate of that additional remuneration for a particular position level may not be greater than the highest amount or rate that applied to employees of that position level on that date

Expenditure Restraint Act, S.C. 2009, c. 2, s. 393, section 34(1)(a)(iv), Appendix "A", tab A2

51. At the relevant time, lawyers covered by the PIPSC Collective Agreement were entitled to overtime at the rate of time-and-a-half for all work beyond the normal weekly hours of work. This included lawyers at the LA-01 and LA-2A levels.

Submissions of the AJC, paras 231, 23, Exhibit B to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 1, pp. 21, 129

52. The overtime provisions of the arbitral award, which apply only to lawyers at the LA-01 and LA-2A levels, do not provide for payment of overtime at a rate higher than was in place on May 9, 2006. The overtime provisions as awarded by the board are less generous than the provisions in the PIPSC Collective Agreement.
- (d) **Are the travelling time compensation provisions awarded by the arbitration board “additional remuneration” within the scope of section 34(1)(a)(iv) of the ERA?**
53. The performance pay plans contain no reference to travelling time compensation. They were not the vehicles used to compensate employees who were required to travel during periods outside normal work hours.
54. The vehicle that was used to compensate lawyers for travel outside normal hours was paid Management Leave, which could be granted where a lawyer was required to “work or travel on a day of rest or on a holiday”.
55. The provisions of the arbitral award dealing with travelling time compensation for lawyers at the LA-01 and LA-2A levels, do not provide a greater benefit than the travelling time provisions that were included in the PIPSC LA Collective Agreement.

Submissions of the AJC, paras 235, 236, Exhibit B to the Affidavit of Marco Mendicino, Respondent's Record, Vol. 1, pp. 134-35

(e) **Are the reimbursement for meal expenses provisions awarded by the arbitration board “additional remuneration” within the scope of section 34(1)(a)(iv) of the ERA**

56. Reimbursement of out-of-pocket expenses incurred for the purpose of obtaining a meal when a lawyer is required to work late or on a holiday is not “additional remuneration” as defined in section 2 of the ERA:

“additional remuneration” means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.

“rémunération additionnelle” Allocation, boni, prime ou autre paiement semblable à l’un ou l’autre de ceux-ci versés aux employés.

Expenditure Restraint Act, S.C. 2009, c 2, s. 393, section 2

57. Reimbursement for out-of-pocket expenses is not income or compensation for service and is fundamentally different in character from an allowance, bonus, differential or premium. The employee has incurred an expense to permit him or her to carry out work on behalf of the employer and reimbursement does not represent any improvement in his or her economic position. All of the types of payment referred to in the definition of “additional remuneration” constitute forms of income. Reimbursement of expenses is not income to the employee.

58. Even if the provisions of the award dealing with reimbursement for meal expenses were “additional remuneration”, they are not contrary to section 34(1)(a)(iv) of the ERA. The terms and conditions of employment for lawyers employed at the Department of Justice at all levels provided for reimbursement of meal expenses at the rate provided under the Treasury Board Travel Directive. The provisions for reimbursement of meal expenses awarded by the arbitration

board are the same as those that applied on the relevant date. The fact that reimbursement is an enforceable right under the arbitral award and no longer within the discretion of management does not, as the Applicant suggests, violate section 34(1)(a)(iv) of the *ERA*. Prior to the arbitral award there was no collective agreement between the parties. The arbitral award would inevitably establish, as enforceable rights, matters that had previously been in the employer's discretion.

(f) Are the provisions of the arbitral award dealing with court clothing “additional remuneration” within the scope of section 34(1)(a)(iv) of the *ERA*?

59. Reimbursement for expenses incurred by a lawyer to purchase court clothing to enable the lawyer to appear in Court on behalf the Crown is not “additional remuneration” as defined in section 2 of the *ERA*. As a result, section 34(1)(a)(iv) has no application. The powers of the arbitration board under the *PSLRA* were not suspended by the *ERA*. The arbitration board's powers were impacted by the *ERA* only to the extent of the specific rules and limitations set out in the *ERA*. When the rules and limits imposed by the *ERA* do not apply to a matter, the arbitration board's powers to make an arbitral award were unaffected.
60. As set out above, reimbursement for out-of-pocket expenditures differs fundamentally in character from an allowance, bonus, differential or premium. Reimbursement is not remuneration or income.
61. These terms are commonly used in labour relations and have well-established meanings:

Allowance. A limited predetermined sum of money paid to enable the recipient to provide for certain kinds of expenses; its amount is

determined in advance and, once paid, it is at the complete disposition of the recipient who is not required to account for it. The Queen v. Pascoe, [1975] C.T.C. 58, 75 D.T.C. 5427 (Fed. C.A.)

Dictionary of Canadian Law, 3rd Ed., 2004, p. 52, Respondent's Authorities, tab B3

*A **bonus** may be a mere gift or gratuity as a gesture of goodwill, and not enforceable, or it may be something which an employee is entitled to on the happening of a condition precedent and is enforceable when the condition is fulfilled. But in both cases it is something in addition to or in excess of that which is ordinarily received.*

Great Western Garment Co. Ltd. v. Minister of National Revenue, [1947] Ex. C.R. 458 at paras 48-49, Exchequer Court of Canada, Respondent's Authorities, tab B4

***Bonus.** A consideration or premium paid in addition to what is strictly due. A gratuity to which the recipient has no right to make a demand. A premium or extra or irregular remuneration in consideration of offices performed or to encourage their performance. A premium paid to a grantor or vendor. An advance royalty.*

Black's Law Dictionary, 5th Ed., 1983, p. 95, Respondent's Authorities, tab B5

The term "differential" has a well established meaning in the context of employee compensation. The Dictionary of Personnel Management and Labour Relations ed. by Jay Shafritz (1985), the Facts on File, 2nd edition, defines that term as follows:

increases in wage rates because of shift work or other conditions generally considered to be undesirable.

The Dictionary of Personnel and Industrial Relations ed. by E.R. Becker (1958) Philosophical Library contains the following definition:

differentials. Differences in wage rates because of hours of work, certain undesirable days, or other working conditions. Differentials may include evening and night differentials, Christmas Eve and New Year's differentials,

time differential tricks or shifts, and in-charge differentials.

Federal Government Dockyard Chargehands Association and Treasury Board, 1992 C.P.P.S.R.B. No. 56, p. 11, Respondent's Authorities, tab B6

Premium. 1. *The single or periodical payment to be made for insurance and includes dues and assessments.* 2. *Any goods, services, rebate or other benefit offered or given at the time of the sale of goods or the lease of services, which may be granted or obtained immediately or in a deferred manner, from the merchant, manufacturer or advertiser, either gratuitously or on conditions explicitly or implicitly presented as advantageous.* 3. *Where used in relation to a commodity futures option, means the consideration for which the option is acquired.* 4. *The excess value of the consideration received from the issue or resale of securities over the par or stated value of the securities.*

Dictionary of Canadian Law, 3rd Ed., 2004, p. 975, Respondent's Authorities, tab B3

62. When the words of a statutory provision are precise and there is no ambiguity, the ordinary meaning of the words plays a dominant role in the interpretive process:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

Canada Trustco Mortgage Co. v. Canada, [2005] S.C.J. No 56 at para 10, Respondent's Authorities, tab B7

(g) Are the provisions of the arbitral award dealing with hours of work and overtime unreasonable?

63. The task of an interest arbitration board is to create, rather than interpret, rights. It is quintessentially a function that involves the exercise of wisdom, judgment, and broad discretion. There is a broad range of reasonable outcomes in any interest arbitration, particularly in a multi-issue arbitration. In this case, there were proposals on a large number of issues before the board. A reviewing court should adopt a highly deferential approach, particularly when one party selectively challenges the outcome on only certain issues. The Applicant in its Memorandum relies heavily on the dissent of its nominee on the board, Mr. Munn. While Mr. Munn would no doubt have arrived at a different outcome, that does not render the decision unreasonable.

64. The established practice in interest arbitration is to give sparse reasons or none at all. The paucity of the board's reasons on any issue cannot, therefore, be taken as a sign that the board did not carry out its functions properly or take into account all relevant factors.

Ross Memorial Hospital v. Canadian Union of Public Employees Local 1909, [2007] O.J. 3673 at para 4 (Div. Ct.), Respondent's Authorities, tab B8

Canadian National Railway Co. v. Western Canadian Coal Corp. 2007 FC 371 at para 53, Respondent's Authorities, tab B9

65. The arbitration board was required to take into account the factors set out in section 148 of the *PSLRA*, together with any other factors that it considered relevant. The board expressly stated that it had done so:

In arriving at its award, the board examined the evidence and submissions of the parties in light of the factors listed in section 148 of the Public Service Labour Relations Act.

Arbitral Award, para 3, Application Record, p. 9

66. The Applicant's argument is premised on the speculative argument that overtime for the two most junior levels of the LA group will result in "a significant increase in potential compensation" (Applicant's Memorandum, para 62). Although Treasury Board would presumably have at its disposal data from which meaningful projections could be made, including the actual overtime paid to lawyers under the PIPSC Collective Agreement in the past, no such data was provided to the arbitration board or to the Court.

67. The evidence before the arbitration board was that government lawyers under the former PIPSC Collective Agreement had conventional provisions for overtime. There was no evidence that this has entailed undue cost to the employer, that it was unworkable, or that it caused disruption in the workplace.

68. The board also had evidence that medical doctors and dentists employed by the government are entitled to overtime under an averaging system.

Supplementary Hearing Brief of the AJC, Respondent's Record, Vol. 5, p. 1266

69. The Applicant suggests that awarding even a limited form of overtime to junior members of the bargaining unit is unreasonable because government lawyers in provincial jurisdictions do not have overtime. However, it is misleading to select a single item from the total compensation package. The evidence was that compensation for provincial government lawyers in several provinces exceeds the compensation for federal lawyers.

Supplementary Hearing Brief of the AJC, Respondent's Record, Vol. 5, pp. 1250-51 and 1279

70. The arbitration board also had evidence of recruitment and retention problems in the LA group. The Public Prosecution Service of Canada has publicly stated that it suffers from a personnel

shortage due to its inability to compete with compensation paid to lawyers and prosecutors in other jurisdictions.

Submissions of the AJC, Respondent's Record, Vol. 1, pp. 40-42

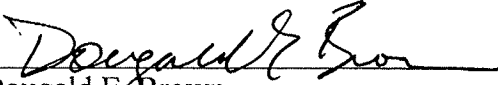
Supplementary Hearing Brief of the AJC, Respondent's Record, Vol. 5, pp. 252-54

71. The arbitration board's award dealing with overtime was, in fact, a compromise. For the most junior members of the bargaining unit, the board awarded a watered-down form of overtime in which employees are deemed not to have worked in excess of the normal 7.5 daily hours of work until they work 8.5 hours. For lawyers at the level of LA-2B and above, the arbitration board adopted the Treasury Board's proposal for Management Leave. Although it is likely that both sides were disappointed with the result, that does not render it unreasonable.

PART IV - ORDER SOUGHT

72. The Respondent asks that this application be dismissed with costs.

All of which is respectfully submitted, this 7th day of May, 2010


Dougald E. Brown
Counsel for the Respondent

PART V - AUTHORITIES

1. *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39
2. *National Automobile, Aerospace, Transportation and General Workers' Union of Canada, Local 5454 (CAW-Canada) v. Canada (Treasury Board)*, 2006 FC 989
3. Dictionary of Canadian Law, 3rd Ed., 2004, pp. 52 and 975
4. *Great Western Garment Co. Ltd. v. Minister of National Revenue*, [1947] Ex. C.R. 458
Exchequer Court of Canada
5. Black's Law Dictionary, 5th Ed., 1983, p. 95
6. *Federal Government Dockyard Chargehands Association and Treasury Board*, 1992
C.P.P.S.R.B. No. 56
7. *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No 56
8. *Ross Memorial Hospital v. Canadian Union of Public Employees Local 1909*, [2007] O.J. 3673
(Div. Ct.)
9. *Canadian National Railway Co. v. Western Canadian Coal Corp.* 2007 FC 371

Appendix “A” – Statutes Cited

1. *Public Service Labour Relations Act*, S.C. 2003, c. 22. s. 2, section 142
2. *Expenditure Restraint Act*, S.C. 2009, c 2, s. 393, section 2, section 34(1)

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2, section 142

142. (1) The Chairperson must, without delay, notify the parties of the establishment of the arbitration board and of the name or names of its member or members, as the case may be.

(2) The notification constitutes conclusive proof that the arbitration board has been established in accordance with this Part and, after it is given, no order may be made or process entered into, and no proceedings may be taken in any court, to question the establishment of the board or to review, prohibit or restrain any of its proceedings.

142. (1) Le président avise sans délai les parties de l'établissement du conseil d'arbitrage et leur communique le nom du ou des membres.

(2) L'avis du président constitue une preuve concluante de la conformité de l'établissement du conseil d'arbitrage avec la présente partie. Une fois l'avis donné, aucune ordonnance ne peut être rendue ni aucun recours porté devant un tribunal tant pour contester l'établissement du conseil d'arbitrage que pour en examiner, empêcher ou restreindre l'activité.

Expenditure Restraint Act, S.C. 2009, c 2, s. 393, sections 2 and 34(1)

2. The following definitions apply in this Act.

“additional remuneration” means any allowance, bonus, differential or premium or any payment to employees that is similar to any of those payments.

34. (1) The following rules apply in respect of any collective agreement or arbitral award that governs employees in the Law Group whose employer is Her Majesty as represented by the Treasury Board, and in respect of any period that begins during the restraint period:

(a) in the case of a collective agreement entered into — or an arbitral award made — after the day on which this Act comes into force,

(i) it may not have retroactive effect in respect of a day that is earlier than May 10, 2006,

(ii) any increase to rates of pay that it provides for in respect of any period that begins during the 2006–2007 fiscal year must be based on the rates of pay set out in Schedule 2,

(iii) it must provide, for all employees in the Law Group, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group and, in relation to any particular position level, those plans must be at the same amounts or rates that were in effect for that position level on that date, but those plans may not have retroactive effect,

(iv) it may provide for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, but the amount or rate of that additional remuneration for a particular position level may not be greater than the highest amount or rate that applied to employees of that position level on that date, and

(v) it may not provide for additional remuneration if that additional remuneration applied to no employee in the Law Group on May 9, 2006; and

(b) in the case of a collective agreement entered into — or an arbitral award made — on or before the day on which this Act comes into force,

(i) if any of its provisions has retroactive effect in respect of a day that is earlier than May 10, 2006, that retroactive effect is deemed never to have had effect, the provision is deemed to have had retroactive effect as of May 10, 2006 and the first day of every other period that is related to that provision is deemed to be moved forward by the number of days that is equal to the number of days between the first day the provision was expressed to have retroactive effect and May 10, 2006,

(ii) if the increase provided to rates of pay for any period that begins during the 2006–2007 fiscal year is based on rates of pay that are greater than those set out in Schedule 2, those greater rates of pay are of no effect or are deemed never to have had effect, as the case may be, and the increase is deemed to be based on the rates of pay set out in Schedule 2,

(iii) if subparagraph (ii) applies, its provision that provides for the rates of pay for any other period that begins on or before March 31, 2011 is of no effect or is deemed never to have had effect, as

the case may be, and the rates of pay in that provision are deemed to be the rates of pay that applied immediately before the beginning of that period as a result of this Act,

(iv) if it provides for performance pay plans and those plans are not the same as those that were in effect on May 9, 2006 for any employees in the Law Group or the amounts or rates provided for in those plans in relation to any particular position level are not the same as those of the performance pay plans that were in effect on that date — or the plans were expressed to be retroactive — the provisions that provide for those plans are of no effect or are deemed never to have had effect, as the case may be, and are deemed to be provisions that provide, for all employees in the Law Group, as of the day that the agreement was entered into or the award was made, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group at the same amounts or rates, in relation to any particular position level, that were in effect on that date,

(v) if it does not provide for performance pay plans, it is deemed to provide, for all employees in the Law Group, as of the day that the agreement was entered into or the award was made, for the same performance pay plans that were in effect on May 9, 2006 for any employees in the Law Group at the same amounts or rates, in relation to any particular position level, that were in effect on that date,

(vi) if it provides for any additional remuneration — other than a performance bonus — that applied to any position level in the Law Group on May 9, 2006, and the amount or rate of that additional remuneration for a particular position level is greater than the highest amount or rate that applied to any employees of that position level on that date, the provision that provides for that payment is deemed to be of no effect or is deemed never to have had effect, as the case may be, and is deemed to provide for the highest amount or rate, as the case may be, that applied in respect of any of those employees on that date, and

(vii) if it provides for any additional remuneration, and that additional remuneration applied to no employee in the Law Group on May 9, 2006, the provision that provides for that payment is of no effect or is deemed never to have had effect, as the case may be.

Loi sur le contrôle des dépenses, L.C. 2009, c. 2, art. 393, s. 2 et 34(1)

2. Les définitions qui suivent s'appliquent à la présente loi.

« rémunération additionnelle » Allocation, boni, prime ou autre paiement semblable à l'un ou l'autre de ceux-ci versés aux employés.

34. (1) Les règles ci-après s'appliquent à l'égard de toute convention collective ou décision arbitrale régissant les employés du groupe du droit dont l'employeur est Sa Majesté, représentée par le Conseil du Trésor, et de toute période commençant au cours de la période de contrôle :

a) dans le cas d'une convention conclue — ou d'une décision rendue — après la date d'entrée en vigueur de la présente loi :

(i) elle ne peut avoir un effet rétroactif au-delà du 10 mai 2006,

(ii) toute augmentation des taux de salaire qu'elle prévoit à l'égard de toute période commençant au cours de l'exercice 2006-2007 doit être fondée sur les taux de salaire figurant à l'annexe 2,

(iii) elle doit prévoir pour tous les employés du groupe les mêmes régimes de rémunération au rendement — et les mêmes montants ou taux pour un niveau de poste donné — que ceux en vigueur le 9 mai 2006 pour des employés de ce groupe, mais ces régimes ne peuvent avoir d'effet rétroactif,

(iv) elle peut prévoir toute rémunération additionnelle — autre qu'une prime de rendement — s'appliquant à tout niveau de poste de ce groupe le 9 mai 2006, mais le montant ou le taux de celle-ci ne peut, pour un niveau donné, être supérieur au plus élevé des montants ou taux de la rémunération additionnelle applicable à tout employé occupant un poste de ce niveau à cette date,

(v) elle ne peut prévoir de rémunération additionnelle dont aucun employé de ce groupe ne bénéficiait le 9 mai 2006;

b) dans le cas d'une convention conclue — ou d'une décision rendue — à la date d'entrée en vigueur de la présente loi ou avant cette date :

(i) si telle de ses dispositions a un effet rétroactif au-delà du 10 mai 2006, cette rétroactivité est réputée n'avoir jamais eu d'effet, la disposition est réputée avoir un effet rétroactif au 10 mai 2006 et le premier jour de toutes les autres périodes prévues dans celle-ci est reporté d'un nombre de jours égal au nombre de jours écoulés entre la date originale de sa prise d'effet et le 10 mai 2006,

(ii) si les augmentations prévues à la convention ou à la décision pour toute période commençant au cours de l'exercice 2006-2007 sont fondées sur des taux de salaire supérieurs à ceux figurant à l'annexe 2, ces taux de salaire supérieurs sont inopérants ou réputés n'être jamais entrés en vigueur et les augmentations sont réputées être fondées sur les taux de salaire figurant à cette annexe,

(iii) si le sous-alinéa (ii) s'applique, les dispositions prévoyant les taux de salaire pour toute autre période commençant le 31 mars 2011 ou avant cette date sont inopérantes ou réputées n'être jamais entrées en vigueur et les taux de salaire qui y sont prévus sont réputés être les taux de salaire en vigueur avant cette période en application de la présente loi,

(iv) si elle prévoit un régime de rémunération au rendement différent — ou si les montants ou les taux pour un niveau de poste donné sont différents — de tout régime en vigueur le 9 mai 2006 pour des employés de ce groupe, ou si elle prévoit que le régime a un effet rétroactif, les dispositions qui le prévoient sont inopérantes ou réputées n'être jamais entrées en vigueur et sont réputées prévoir, à compter de la date de la convention ou de la décision, les mêmes régimes de rémunération au rendement — et les mêmes montants ou taux pour un niveau de poste donné — que ceux en vigueur le 9 mai 2006 pour des employés de ce groupe,

(v) si elle ne prévoit pas de régime de rémunération au rendement, elle est réputée prévoir, à compter de la date de la convention ou de la décision, pour tous les employés du groupe, les mêmes régimes de rémunération au rendement — et les mêmes montants ou taux pour un niveau de poste donné — que ceux en vigueur le 9 mai 2006 pour des employés de ce groupe,

(vi) si elle prévoit une rémunération additionnelle — autre qu'une prime de rendement — applicable aux employés de ce groupe le 9 mai 2006 et que le montant ou le taux de celle-ci est, à l'égard des employés d'un niveau de poste donné, supérieur au plus élevé des montants ou taux applicables aux employés de ce niveau à cette date, les dispositions qui la prévoient sont inopérantes ou réputées n'être jamais entrées en vigueur et sont réputées prévoir une rémunération additionnelle dont le montant ou le taux est équivalent au plus élevé des montants ou taux applicables à ces employés à cette date,

(vii) si elle prévoit une rémunération additionnelle dont aucun employé de ce groupe ne bénéficiait le 9 mai 2006, les dispositions qui la prévoient sont inopérantes ou réputées n'être jamais entrées en vigueur.