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Overview

1. The arbitration board in this case sought to do indirectly what it acknowledged it could not do directly. During the hearing, the board was requested by the employer to extend the statutory 90-day period for implementation of its award. The board properly ruled that it had no jurisdiction to do so. However, the board then provided longer than 90 days to implement certain parts of its award by purporting to postpone the date on which those provisions would come into force. The board had no statutory authority to do so and it was not open to the board to seek to extend the statutory implementation period in this manner.

PART I - FACTS

2. The Association of Justice Counsel (“AJC”) was certified as the bargaining agent for the LA (Law) 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.

Application Record. p. 6

3. Treasury Board represents the Crown as employer of the members of the bargaining unit.

4. The AJC and Treasury Board entered into negotiations but were unable to conclude a first collective agreement and a request for arbitration pursuant to the Public Service Labour Relations Act (“*PSLRA*”) was filed in September, 2008.

Application Record, p. 5

5. On February 12, 2009, the Public Service Labour Relations Board established an arbitration board and issued a ruling on its terms of reference.

Application Record, p. 5

6. Following a hearing in June, 2009, the arbitration board issued an arbitral award dated October 23, 2009.

7. The arbitral award included provisions for lawyers at the LA-1 and LA-2A levels to receive overtime compensation for some hours worked in excess of 37.5 hours per week averaged over a 4-week period. The award also provided that lawyers at the LA-2B and LA-3 levels are entitled to receive discretionary leave with pay when required to work excessive hours.

Application Record, pp. 16-17

8. The arbitral award also provided compensation for lawyers at the LA-1 and LA-2A levels when they are required to travel on government business. The award included detailed provisions that defined the specific circumstances in which travelling time is compensable.

Application Record, pp. 18-19

9. The award did not provide compensation for travelling time to lawyers at the LA-2B and LA-3 levels.

Application Record, p. 19

10. The arbitration board ruled that, in the absence of agreement by the parties to the award, there is a mandatory 90-day period from the date of the award in which the provisions of the award must be implemented. The arbitration board held that only the Public Service Labour Relations Board has jurisdiction to authorize a longer period for implementation.

Application Record, p. 24

11. Nevertheless, the arbitration board provided in paragraph 21 of the award that the provisions on overtime and travelling time compensation would not take effect until 120 days after the date of the award, thereby effectively postponing the implementation of these provisions for longer than 90 days.

Application Record, p. 19

PART II - ISSUES

12. Did the arbitration board exceed its jurisdiction by ordering that the Overtime and Travelling Time provisions of the award would not become effective until 120 days from the date of the award, thereby giving the Employer 120 days from the date of the award to implement these provisions?

PART III - LAW AND SUBMISSIONS

Standard of Review

13. The standard of review is correctness. The issue in this case is a question of law that concerns the jurisdiction of the arbitration board.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

Proper Interpretive Approach

14. When the words of a statutory provision are precise and unequivocal, 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

15. Sections 154 through 157 of the *PSLRA* are precisely worded, carefully constructed statutory provisions that govern the temporal operation of arbitral awards and circumscribe an arbitration board's powers to tinker with the time for implementing of the provisions of an award. Consequently, the clear words used in these sections should play a dominant role in interpreting whether the board exceeded its powers with respect to the implementation of the award.

The Relevant Sections of the *PSLRA*

16. Section 157 of the *PSLRA* provides 90 days for implementation of the provisions of an arbitral award unless the parties have agreed to a longer period or the Public

Service Labour Relations Board has ordered a longer period. Neither exception is applicable here.

157. Subject to the appropriation by or under the authority of Parliament of any money that may be required by the employer, the parties must implement the provisions of the arbitral award within 90 days after the day on which the award becomes binding on them or within any longer period that the parties may agree to or that the Board, on application by either party, may set.

157. Sous réserve de l'affectation, par le Parlement ou sous son autorité, des crédits dont l'employeur peut avoir besoin à cette fin, les parties commencent à appliquer les conditions d'emploi sur lesquelles statue la décision arbitrale dans les quatre-vingt-dix jours suivant la date à compter de laquelle la décision arbitrale lie les parties ou dans le délai plus long dont celles-ci peuvent convenir ou que la Commission peut, sur demande de l'une d'elles, accorder.

17. The arbitration board was correct in determining that section 157 established a mandatory 90-day implementation period:

The board reads this provision as establishing a mandatory 90-day implementation period, which can only be altered by agreement of the parties or by order of the Public Service Labour Relations Board. In our view, this board does not have the authority to change the 90-day period.

Application Record, p. 24

18. The 90-day period set out in section 157 begins to run on the date the award “becomes binding on [the parties]”.

19. Section 154 states that an arbitral award becomes binding on the parties “as of the day on which it is made”. This provision is clear and explicit: the award is binding on the date it was made, not the date it becomes effective.

154. Subject to and for the purposes of this Part, as of the day on which it is made, the arbitral award binds the employer and the bargaining agent that are parties to it and the employees in the bargaining unit in respect of which the bargaining agent has been certified. To the extent that it deals with matters referred to in section 12 of the Financial Administration Act, the arbitral award is also binding, on and after that day, on every deputy head responsible for any portion of the federal public administration that employs employees in the bargaining unit.

154. Dans le cadre de la présente partie, la décision arbitrale lie l'employeur et l'agent négociateur qui y sont parties, ainsi que les fonctionnaires de l'unité de négociation à l'égard de laquelle l'agent négociateur a été accrédité, à compter de la date à laquelle elle a été rendue. Elle lie aussi, à compter de cette date, tout administrateur général responsable d'un secteur de l'administration publique fédérale dont font partie des fonctionnaires de l'unité de négociation, dans la mesure où elle porte sur des questions prévues à l'article 12 de la Loi sur la gestion des finances publiques.

20. Section 154 of the *PSLRA* is a departure from section 71(1) of the former *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, which gave the arbitration board the discretion to postpone the date on which an award would become binding.¹

¹ Section 71(1) of the former *PSSRA* stated:

An arbitral award is, subject to and for the purposes of this Act, binding on the employer and the bargaining agent that is a party thereto and on the employees in the bargaining unit in respect of which the bargaining agent has been certified, effective on and after the day on which the award is rendered or such later day as the arbitration board that rendered the award may determine.

21. The arbitral award in this case was made on October 23, 2009. Consequently, the mandatory implementation period was the 90-day period from October 23, 2009.
22. Subsections 155(1) and 155(2) of the *PSLRA* deal with an arbitration board's power to determine when the provisions of an arbitral award come into force.
23. Subsection 155(1) provides that the entire arbitral award will become effective on the day it is made unless the arbitration board determines an earlier or later date for the entire award to come into force. Subsection 155(1) does not give the board the power to pick different dates on which selective parts of an award will come into force.

155. (1) The arbitral award has effect as of the day on which it is made or, subject to subsection (2), any earlier or later day that the arbitration board may determine.

155. (1) La décision arbitrale entre en vigueur le jour où elle est rendue ou, sous réserve du paragraphe (2), à toute autre date que le conseil d'arbitrage peut fixer.

24. Subsection 155(2) permits an arbitration board to give retroactive effect to part of an award, but does not authorize a board to delay the date on which part of an award will come into force.

155. (2) The arbitral award or any of its parts may be given retroactive effect, but not earlier than the day notice to bargain collectively was given.

155. (2) Tout ou partie de la décision arbitrale peut avoir un effet rétroactif jusqu'à la date à laquelle l'avis de négociateur collectivement a été donné.

Meaning of “Implement”

25. To implement a provision of an arbitral award or collective agreement is to perform the obligation required by the provision. In *P.S.A.C. and Canada (Treasury Board)*, [1969] C.P.S.S.R.B. No. 7, the Public Service Staff Relations Board considered the meaning of the term “implement” in the *Public Service Staff Relations Act*, the legislative predecessor to the *PSLRA*:

...To implement, as the Shorter Oxford English Dictionary says, is to complete, to perform, to fulfil. In the law of contract, where the time at which performance is to be made is not specified exactly in the contract, the rule is as set out in Williston On Contracts, section 38:

...partly in order to carry out supposed actual intention of the parties and partly, doubtless, in order to prevent an offer or agreement from being ineffectual because too indefinite, courts will, where the contract contemplates a single act or exchange of acts, unless the circumstances show a contrary intention, interpret a promise which does not in terms state the time of performance as intending performance in a reasonable time.

“Implementation”, for the purposes of the Public Service Staff Relations Act, is the equivalent of Williston’s word “performance”. Under the Act, the time at which performance or implementation – is to be made is fixed by the provisions of section 56(1). Implementation, where no period for implementation is specified in an agreement, is to take place:

- (i) within a period of ninety days from the date of its execution, or*

(ii) *within such longer period as may, on application by either party to the agreement, appear reasonable to the Board.*

P.S.A.C. and Canada (Treasury Board), [1969] C.P.S.S.R.B. No. 7 at para. 9

26. The implementation period provided for in section 157, therefore, is the period during which the Employer and the bargaining agent must commence performing the obligations set out in an arbitral award. Once the award is implemented, the parties are, of course, required to carry out their obligations as they become due during the term of the award.

Statutory Context and Purpose

27. Sections 154, 155 and 157 are to be read in the entire context of the *PSLRA*, including Division 9, which sets out the legislative scheme governing interest arbitration for the federal public service.
28. Arbitration is intended to provide parties with an efficient mechanism to resolve disputes if an impasse is reached in collective bargaining. Often, much time will have elapsed by the time that parties finally reach the hearing stage of an interest arbitration proceeding. Here, over three years had passed since notice to bargain was served.

29. Section 149 of the *PSLRA* was enacted for the express purpose of preventing excessive delay. It imposes upon the arbitration board the responsibility to resolve all disputed matters referred to it “as soon as possible”.
30. Section 157 further ensures, with greater specificity, that the obligations set out in an award must be implemented, i.e., commence to be performed, within 90 days of the making of the arbitral award, save and except on consent of the parties, or by order of the PSLRB.
31. Sections 149(1) and 157 reflect Parliament’s intention that there is to be a finite period of time in which the Employer must commence to carry out and perform the obligations in the award. Absent the consent of the parties or an order of the PSLRB, the period of time is fixed at 90 days from the date of the award and the arbitration board under the terms of the *PSLRA* has no discretion to extend this period.
32. Sections 155(1) and 157 are to be interpreted harmoniously. If subsection 155(1) were construed as permitting an arbitration board to delay the coming into force of the award by more than 90 days from the date of the award, this would render meaningless the mandatory obligation in section 157 that performance of the provisions of the award is to commence within 90 days from the date of the award. In order to give harmonious effect to both sections, subsection 155(1) should be

interpreted as authorizing the board to delay the coming into force of an award no longer than the 90-day implementation period provided for in section 157.

33. While interest arbitration boards established under the *PSLRA* have broad discretion to make an award that is fair as between the parties, they do not have unfettered latitude to simply do as they see fit. Parliament was explicit in carefully defining the scope of an arbitration board's powers. It would be inconsistent with this approach to interpret section 155 of the *PSLRA* as giving the board unlimited power to postpone the coming into force of part of an award, when such an interpretation could result in an implementation period that exceeds the mandatory 90-day implementation period provided for in section 157, a result that is contrary to Parliament's clearly expressed intention.

Conclusion

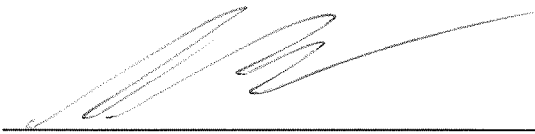
34. The arbitration board in this case sought to circumvent the 90-day period established by section 157 for implementation of overtime and travelling time compensation by purporting to postpone for 120 days the date on which those parts of the award came into force. As the board itself acknowledged, it had no jurisdiction to provide for an implementation period of more than 90 days. It would be inconsistent with the clear wording and purpose of the legislation to hold that

the board could nevertheless use subsection 155(1) as an indirect method of extending the implementation period stipulated in section 157.

PART IV - ORDER SOUGHT

35. The AJC asks that paragraph 21 of the award be set aside, and that the Court declare that the overtime and travelling time provisions of the award are to be implemented within 90 days from October 23, 2009.

All of which is respectfully submitted.


for Dougald E. Brown
Counsel for the Applicant

PART V - AUTHORITIES

1. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190
2. *Canada Trustco Mortgage Co. v. Canada*, [2005] S.C.J. No 56
3. *P.S.A.C. and Canada (Treasury Board)*, [1969] C.P.S.S.R.B. No. 7